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Eugenia Caracciolo di Torella

**A “Family Principle” in EC
Employment Law:
Lessons from the Scandinavian Model**

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**PhD
University of Durham
Department of Law
1999/2000**



14 NOV 2000

*Ai miei genitori, Emanuela e Giuseppe,
che nonostante non siano mai stati pagati per allevarmi,
mi hanno insegnato che ogni cosa
ha un valore prima ancora che un prezzo
e a Will che sar  un padre perfetto.*

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A tutti grazie

Eugenia Caracciolo di Torella

LIST OF ABBREVIATIONS

AS	Acta Sociologica
AJCL	American Journal of Comparative Law
BLR	Business Law Review
CDE	Cahiers de Droit Européen
CLJ	The Cambridge Law Journal
CMLRev.	Common Market Law Review
ColLRev.	Columbia Law Review
d/D	Il Diritto delle Donne - Trimestrale di Informazione Giuridica
DPL	Diritto e Pratica del Lavoro
EHRLR	European Human Rights Law Review
EIRR	European Industrial Relations Review
ELJ	European Law Journal
ELRev.	European Law Review
EPL	European Public Law
EOR	Equal Opportunity Review
FI	Foro Italiano
FLS	Feminist Legal Studies
GDLRI	Giornale di Diritto del Lavoro e di Relazioni Industriali
GO	Government and Opposition
GWO	Gender, Work & Organisation
HRLJ	Human Rights Law Journal
HLRev	Harvard Law Review
HWLJ	Harvard Women's Law Journal
IL	The International Lawyer
ILO	International Labour Organisation Report
ILJ	Industrial Law Journal
ILR	International Labour Review
IntJCompLLIR	The International Journal of Comparative Labour Law and Industrial Relations
IRS	Industrial Relations Review and Reports
IRLR	Industrial Relations Law Reports
ISSRev	International and Social Security Review
IJSL	International Journal of the Sociology of Law
IJLPF	International Journal of Law, Policy and Family
YEL	Yearbook European Law
YJLF	Yale Journal of Law and Feminism
YLJ	Yale Law Journal
JSP	Journal of Social Policy

JSWFL	The Journal of Social Welfare and Family Law
JESP	Journal of European Social Policy
JGS	Journal of Gender Studies
JLS	Journal of Law and Society
JCMS	Journal of Common Market Studies
JV	Jussens venner
LD	Lavoro e Diritto
LIEU	Legal Issues of the Maastricht Treaty
LQR	The Law Quarterly Review
LR	Lov og Rett
LS	Legal Studies
LT	Legal Theory
MLR	The Modern Law Review
MichLRev.	Michigan Law Review
MLRev.	Market Law Review
MR	Mennesker og Rettigheter
MJ	Maastricht Journal of European and Comparative Law
NILQ	Northern Ireland Legal Quarterly
NK	Nytt om kvinneforskning
NLJ	New Law Journal
NLJ	Nordic Labour Journal
NJIL	Nordic Journal of International Law
NORA	Nordic Journal of Women's Studies
NOU	Norges offentlige utredninger
OLJ	Osgoode Law Journal
Ox JLS	Oxford Journal of Legal Studies
Ot. prp.	Odelstingproposisjon
PP	Policy and Politics
PRQ	Political Research Quarterly
RDE	Rivista di Diritto Europeo
RIDL	Rivista Italiana di Diritto del Lavoro
RGL	Rivista Giuridica del Lavoro
RTDE	Revue Trimestrelle de Droit Européen
RNJT	Retfærd nordisk juridisk tidsskrift
SEHRev	Scandinavian Economic History Review
SLS	Social and Legal Studies
SPS	Scandinavian Political Studies
SSL	Scandinavian Studies in Law
ST	Statsvetenskaplig tidsskrift
St. meld.	Stortingsmelding
TR	Tidsskrift for rettvitenskap
UchigLRev	University of Chicago Law Review
UillLRev	University of Illinois Law Review
WES	Work Employment and Society

WSIF
WVLRev.
WWLJ

Women's Studies International Forum
West Virginia Law Review
Wisconsin Women's Law Journal

LIST OF CASES

ECJ/CFI Cases and ECJ Opinions

Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963]

ECR I

Case 75/63, *Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor*

Case 6/64, *Costa v. ENEL*, [1964] ECR 585

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Case 12/81, *Garland v British Rail Engineering*, [1982] ECR 359

Case 53/81, *Levin v. Staatssecretaris van Justitie*, [1982] ECR 1035

Case 163/82, *Commission v. Italy*, [1983] ECR 3273

Case 143/83, *Commission v. Denmark*, [1985] ECR 427

Case 267/83, *Diatta v. Land Berlin*, [1985] ECR 567

Case 184/83, *Hofmann v. Barmer Ersatzkasse*, [1984] ECR 3047

Case 152/84, *Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching) (No. I)*, [1986] ECR 723

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Case C-102/88, *Ruzius-Wilbrink v. Bestuur van de Bedijvereniging voor Overheidsdiensten*, [1989] ECR 4311

Case C-171/88, *Rinner Kühn v. FWW Spezial-Gebaudereinigung GmbH*, [1989] ECR 2743

Case C-177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus*, [1990] ECR I-3941

Case C-179/88, *Hertz*, [1990] ECR I-3979

Case C-262/88, *Barber*, [1990] ECR I-1889

Case C-322/88, *Grimaldi*, [1989] ECR 4407

Case C-33/89, *Kowalska v. Freie und Hansestadt Hamburg*, [1990] ECR I-2591

Case C-184/89, *Nimz v. Freie und Hansestadt Hamburg*, [1991] ECR I-297

Case C-300/89, *Commission v. Council (Titaniumdioxide)*, [1991] ECR I-2867

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Council Directive 97/80 EC OJ (1998) L 14/6 (Burden of Proof Directive)
Council Directive 97/81 EC OJ (1998) L 14/9 (Part Time Workers Directive)
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NOU 1983:38 *ILO-Konvensjoner som Norge ikke har ratifisert*

NOU 1992:20 *Det gode arbeidsmiljø er lønnsomt for alle*

NOU 1993:12 *Tid for barna*

NOU 1992:17 *Rammeplan for barnehagen*

NOU 1995:19 *Et apparat for likestilling*

NOU 1995: 27 *Pappa kom hjem*

Ot prp and St prp

Ot prp nr 3 (1975-76) - om lov om arbeidsmiljø-og sikkerhetsområdet m.v.

Ot prp nr 107 (1992-93) - om lov om endringer i lov 17.6.1996 n° 12 om folketrygd, Lov 4 februar 1977 nr 4 om arbeidsvern og arbeidsmiljø m.v. og i visse andre lover (tidskonto)

Ot prp nr 50 (1993-94) - Om lov endring i lov 4.2.1977 nr 4

Ot. prp. nr 78 (1993-94) - Om lov om endringer i lover på arbeidsmiljø-og sikkerhetsområdet som følge av EØS-avtalen og en tilleggsavtale til EØS-avtalen

Ot prp nr 78 (1997-98) - Om lov om køtantstøtte til småbarnsforeldre

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Lovbekendtgørelse nr 184 af 22.3.1995 om arbejdsmiljø (Working Environment Act)

Lovbekendtgørelse nr 875 af 17.10.1994 om ligebehandling af mænd og kvinder med hensyn til beskæftigelse og barseorlov m.v. (Equal Treatment Act)

Lovbekendtgørelse nr 549 af 23.6.1994 om dagpenge ved sygdom eller fødsel (Birth Benefits Act)

Lovbekendtgørelse nr 238 af 20.4.1988 om ligestilling mellom mænd og kvinder (Equal Status Act)

Swedish Legislation

Lag om allmen försäkring 1962: 381(National Insurance Act)

Arbetsmiljölög 1977: 1160 (Working Environment Act)

Jämställdhetslag 1991: 433 (Equal Status Act)

Föräldraledighetslag 1995:27 (Parental Leave Act)

INTRODUCTION

1 Topic and aims of the research

“Traditional assumptions about the separation of work life and personal life are no longer viable, but we have not yet created a coherent set of new values and beliefs to take their place.”¹

For a long period society has been based on the idea that life is divided into two spheres: the domestic and public spheres. Issues relating to employment have been regulated in the public sphere, while matters concerning the family and its organisation, such as the care of young children or elderly² and disabled³ members of the family, have been confined to the domestic sphere. The public sphere belonged to men whilst the domestic sphere belonged to women. For several reasons these assumptions are rapidly changing. One of the reasons is that women, either because of choice or need, are increasingly present in the employment market: this creates a clash between the two spheres and challenges the *status quo* of the present situation. To deny that the two spheres are connected and have a mutual influence on each other has many negative consequences: first of all it creates a problem of (sex) equality and in the long term a problem of justice.⁴ This becomes particularly evident when considering the structure of the employment market where, despite the efforts of the legislator, equality has not

¹ **R. M. Kanter**, *When Giants Learn to Dance: Mastering the Challenge of Strategy, Management in Careers in the 1990s*, Routledge.

² *Inter alia*, **J. Phillips**, “Paid Work and Care of Older People: a UK Perspective” in *Women, Work and the Family in Europe*, E. Drew, R. Emerek, E. Mahon (eds.), 1998, Routledge, 66.

³ E.g. the case of Ms Drake who had to stop working in order to care for her disabled mother; Case C-150/85, *Drake v. Chief Adjudication Officer*, [1986] ECR 1995. See also **H. Cullen**, “The Subsidiary Woman” (1994) 16 JSWFL 4 and **I. Moebius**, **E. Szyszczak**, “Of Raising Pigs and Children” (1998) 18 YEL 126.

⁴ *Inter alia*, **S. Moller Okin**, *Justice, Gender and the Family*, 1989, Harper Collins.

been achieved because the two spheres are often still kept separate and the fact that family issues have an impact on working life seems to be either ignored or considered as a burden.⁵ This research has chosen to focus on one aspect of family responsibilities, namely on the care of young children. The reason for focusing on only one aspect is that, although these responsibilities have in common the *effect* of limiting women's opportunities in the employment market, they entail different situations which need to be tackled with different approaches. For example, while one of the solutions commonly proposed to the issue of caring for young children is a determinate period of leave which can range from few weeks to few years (*id est* parental leave), this cannot be the case for an elderly member of the family who may need caring for more than few months or years.

The position of working parents can be remedied by implementing two kinds of action: improving existing (public) child-care structures and enacting measures aimed at restructuring the employment market in order to take into consideration the needs of working parents. In this context child care structures are of relative interest. This research does not deny their importance: fostering a re-distribution of child care structures facilitates mothers' entry into employment. However, the benefits of establishing such a redistribution are neither controversial nor are they capable of reshaping the structure of society and, more specifically, of the employment market. Furthermore, to improve child care structures does not achieve the aim of involving fathers in the care of new born and young children. This research maintains that child care structures should be regarded as complementary to, not as alternatives for, measures aimed at restructuring the employment market in order to take into consideration the needs of parents.

The need for such restructuring of the employment market is mainly the sum of several interests. Firstly, the welfare of the mother and child. Secondly, the need to secure the participation of mothers in paid work. In fact the *status quo* affects their

⁵ E.g. "Motherhood still Clashes with Macho in Business Culture", The Financial Times, 21 July 1998.

employment opportunities and, if they are already employed, weakens their connection to the labour market. It also has consequences on their general welfare as mothers with young children often cannot be employed or work part-time and therefore earn less and are entitled to fewer benefits.⁶ This is not to say that all women should work⁷ but they all should have opportunity to choose and, accordingly, provisions protecting their choice must exist.⁸ Thirdly, fathers do not have the opportunity to be involved in family life and the development of their children.⁹ Fourthly, children either end up spending most of their time in a day care structure or are *de facto* raised by only one parent and therefore they grow up in a “gendered” model family.¹⁰ Finally, the lack of appropriate provisions in this area can have a detrimental effect on business.¹¹ Employers find that the productivity of their best employees is threatened by the fact that they “worry day in, day out, about their children’s care”.¹² Alternatively they (mostly mothers) leave their jobs in order to meet their family commitments or they feel unable to apply for jobs involving long hours.¹³

⁶ *Inter alia*, **T. Hervey, J. Shaw**, “Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law” (1998) 8 JESP 44; see also EC Commission, “Childcare in the European Commission 1985-1990”, in *Women of Europe - Supplements*, n° 31, 1990, at 2.

⁷ E.g. “Nice Work, if you Can Get it”, *The Observer*, 4 July 1999.

⁸ On this point see **E. Vigerust**, *Arbeid, barn og likestilling - Rettslig tilpasning av arbeidsmarkedet*, 1998, Tano Aschehoug, at 37.

⁹ **H. Kaul**, “Who Cares? Gender Inequality and Care Leave in the Nordic Countries” (1991) 34 AS, 115, **D. Sommer**, “Fatherhood and Caring: Who Cares?”, in *The Equality Dilemma*, S. Carlsen, J. Larsen (eds.), 1993, The Danish Equal Status Council, 155.

¹⁰ **H. Kaul**, “Who Cares? Gender Inequality and Care Leave in the Nordic Countries” (1991) 34 AS, 115, **S. Moller Okin**, *Justice, Gender and the Family*, 1989, Harper Collins.

¹¹ “Childcare Gap is Bad for Business, Parents and Children”, *IRS Employment Review*, March 1997, 628.

¹² “The Childcare Gap”, Briefing Paper 1, Daycare Trust, 1997.

¹³ “Female Attraction”, *The Financial Times*, 3 June 1997.

In order to restructure the employment market, this research suggests the introduction of a "family principle"¹⁴ in employment law. Such a principle would include, *inter alia*, provisions aimed at protecting pregnant employees and working mothers in the workplace, a meaningful system of pregnancy, maternity, paternity and parental leave and finally the implementation of family friendly working arrangements. This research prefers to use the term "family principle" rather than that of "reconciling work and family life" normally used by the Commission of the EC. This is because, whilst the family principle implies a restructuring of the employment market and precise commitments from the employer and the State, the expression "reconciling work and family life" tends to shift the responsibility to employees and to the private arrangements which they use in order to fulfil both their family and work commitments. Again, as with childcare provisions, the provisions aimed at reconciling work and family life do not really challenge the present *status quo* of the employment market. It can be argued that, to a certain extent, provisions aimed at reconciling work and family life have already existed for some time. However, the provisions involved in the family principle suggested by this research differ from the more traditional provisions so far enacted. In fact, they rely on a new interpretation of the concept of care for young children which goes beyond the protection of the special bond between mother and child and the traditional division of roles in the family: they are based on a gender-neutral caring concept, *id est* the idea that caring for young children should be equally shared between the parents.

The provisions aimed at establishing a family principle can be analysed from different points of view, such as those of employers and/or employees (*id est* in the context of the employment market), family policies or the interests of the child. Although all these perspectives are important, this research has chosen to base its analysis on the point of view of the employment market, with particular emphasis on their potential impact on employees. However, as these points of view are all closely

¹⁴ The expression is borrowed from J. Kristiansen, "Familielivbeskyttelse i arbejdsretten", in *Kvindelig arbejdsret*, H. Petersen (ed.), 1995, Gad Jura, 41.

interconnected, they sometimes inevitably overlap and so occasional reference is also made to other perspectives.

It is arguable that the EC provisions in this field have so far proved to be unsatisfactory. This is so for two reasons. Firstly, only recently has this problem been addressed. Secondly, so far the efforts of the EC have focused for the main part on the protection of pregnancy (and to a certain extent maternity) whilst related situations such as paternity and parenthood have been largely ignored.¹⁵ The most obvious pitfall of such a situation is that it perpetuates stereotypes with detrimental consequences - especially for women. Furthermore, the rules on pregnancy and maternity have not been entirely satisfactory as they have been characterised by a pragmatic approach. An example of the struggle surrounding this pragmatic approach is the obscure border line drawn between pregnancy and maternity with only the former receiving protection.¹⁶

In contrast, in the Scandinavian countries the opportunity of establishing a family principle has already been the subject of debate for several years and steps to implement it have already been taken. One reason for this is that the Scandinavian countries have a longer tradition in both the development of employment rights¹⁷ and the welfare state system.¹⁸

This research analyses and compares the relevant provisions in the Scandinavian countries and in the European Community. In the light of this analysis, it suggests

¹⁵ Both the Equal Treatment Directive and the Pregnancy and Maternity Directive, in fact, mention only "pregnancy" and "maternity". So far the only exception is the Parental Leave Directive which, although theoretically very important, from a practical point of view can hardly be seen as an instrument promoting change. For a more detail discussion see *infra* Chapter V.

¹⁶ E.g. in Case C-179/88, *Hertz*, [1990] ECR I-3979, the Court drew an obscure and much criticised border line between pregnancy and pregnancy related illness after the maternity leave. The issues has been re-visited in subsequent case law which have not substantially altered this position.

¹⁷ *Inter alia*, S. Evju, "European Labour Law from a Norwegian Perspective", in *Developing the Social Dimension in an Enlarged Union*, A. Neal, S. Foyn (eds.) IUSEF n° 16, 1993, Centre for European Law, University of Oslo, 125, N. Bruun *et al.*, *The Nordic Labour Relations Model*, 1992, Dartmouth.

¹⁸ E.g. G. Esping-Andersen, *Three Worlds of State Capitalism*, 1990, Cambridge Polity Press; contra A. Leira, *Welfare States and Working Mothers*, 1992 Cambridge University Press, Chapter 3. For a more detailed discussion on this point see *infra* Chapter II.

amendments to the relevant EC provisions, particularly the Pregnancy and Maternity Directive¹⁹ and the Directive on Parental Leave and Leave for Family Reasons,²⁰ so as to develop a “gender-neutral caring concept” and a “family principle” in the structure of the EC employment market. This research acknowledges that there are several difficulties in using the Scandinavian system as a model for proposing amendments to the EC legislation in this area. One of the main problems is due to the fact that the EC Member States have different standards in both employment and social policies not only from the Scandinavian countries, but also between themselves. Furthermore, they also differ in their welfare state structures which often implies that they have access to different resources. This is the reason why the scale of the amendments proposed in Part III is not such as to provoke major changes in the EC Treaty. The main message that should arrive from the Scandinavian experience is that the law can and should play role in changing social stereotypes.

In this respect this research is (to a certain extent) based on the “best practice assumption”,²¹ namely, it attempts to “bridge a knowledge gap”²² by looking at successful examples of policy measures.²³

2 *Structure of the research*

In order to explore these assumptions, the research is divided in three parts.

¹⁹ Council Directive 92/85 EEC OJ (1992) L 348/1.

²⁰ Council Directive 96/34 EEC OJ (1996) L 145/4-9.

²¹ *Best Practice Examples: What can Europeans Learn from Each Other?*, as discussed in E. Szyszczak, “The Evolving European Employment Strategy”, in *Social Law and Policy in an Evolving European Law*, J. Shaw (ed.), Hart 2000 (forthcoming).

²² *Best Practice Examples: What can Europeans Learn from Each Other?*, as discussed in E. Szyszczak, “The Evolving European Employment Strategy”, in *Social Law and Policy in an Evolving European Law*, J. Shaw (ed.), Hart 2000 (forthcoming).

²³ For a more detailed discussion on the limits of comparative law, see *infra* section 3.

The first part analyses the principles behind the legal framework in which the provisions aimed at combining work and family responsibility have been placed (*Part I: The Theoretical Framework*). This part is divided into two chapters. These scrutinise how the concepts of pregnancy, maternity, paternity and parenthood have been incorporated into legislative models, namely as part of the sex equality and equal treatment legislation (*Chapter I: The Family Principle Between Sex Equality Legislation and Employment Rights*) and in the context of welfare state provisions (*Chapter II: The Welfare State and the Family Principle*).

The second part focuses on how these situations are tackled by legal systems (*Part II: The Existing Legal Provisions for Reconciling Work and Family Life*). The first chapter analyses the most important international documents focusing on these issues, in particular the relevant conventions of the International Labour Organisation (*Chapter III: International Employment Law*). The second chapter provides for an overview of the relevant legislation in the Member States of the European Community (*Chapter IV: An Overview of the Situation in the EC Members*). The purpose of this chapter is to assess whether a common pattern in the legislation of these States exists. The third chapter focuses on the position under EC law (*Chapter V: The European Community Position*) and the fourth chapter analyses the relevant provisions in the Scandinavian countries (*Chapter VI : The Scandinavian Position*).

Finally, in the light of the theoretical analysis carried out in the first part and the comparative research undertaken in the second part, the third part suggests which amendments should be introduced into the relevant EC legislation in order to develop a family principle in EC employment law (*Part III: Proposals for Amendments to EC Legislation*). This part is divided into three chapters. The first chapter explain the importance of establishing a family principle within the EC (*Chapter VII: A "Family Principle" in EC Employment Law*). The following chapter focuses on the proposed amendments to the relevant EC legislation (*Chapter VIII: Amendments to the Existing EC Legislation*) and the final chapter considers the opportunity to introduce forms of working arrangements taking into consideration the needs of employed parents (*Chapter IX: Family Friendly Working Arrangements*).

3 *Methodology and sources used in the research*

This research is carried out using mainly two methods of analysis: that of women's law and that of comparative law.

The women's law approach is used because, since the situations under analysis historically have affected mainly women, they have been of particular interest for women's law. Women's law originates from the feminist movement. Although it has existed for the last two centuries, only in 1960s did this movement led to development of academic disciplines, such as women's law in the USA, which studied the position of women in the society. An overview of feminism must take into account the fact that a single category of feminism does not exist; instead it is possible to identify several feminist strands.²⁴ These strands nonetheless have a common focus, namely the subordination of women to men and share the same goals of equality, justice and freedom.²⁵ On the other hand they differ as they focus on different reasons for women's subordination such as the structure of the society, the allocation of resources, the real possibility for equal opportunities or a combination of these elements.

As Stang Dahl points out, the law does not attach particular legal significance to the fact of "being a woman".²⁶ However, the reality of things is that men and women lead different kinds of life with different expectations, needs and opportunities and therefore legal rules necessarily affect them in different ways. The *raison d'être* of women's law is to analyse the impact that the law has on women and how it responds to their reality. It follows that women's law is not a unique and separate discipline but it is rather a method of analysis²⁷ which can be applied to any area of law. The main

²⁴ For a detailed analysis of the various feminist strands, see *inter alia*, P. Smith, "On Law and Legal Theory", in *Feminist Jurisprudence*, P. Smith (ed.), 1993, Oxford University Press, 483.

²⁵ P. Smith, "On Law and Legal Theory", in *Feminist Jurisprudence*, P. Smith (ed.), 1993, Oxford University Press, 483.

²⁶ T. Stang Dahl, *Women's Law*, 1987, Norwegian University Press.

²⁷ T. Stang Dahl, "Fra kvinners rett til kvinneverett" (1987) 37 RNJT 67.

contribution of women's law lies in the fact that that it provides for a new, critical method of interpretation of legal provisions.²⁸ An example is that of money law which, other than being the conventional discipline, is analysed as the distribution of money in society with an emphasis on the sources from where women get cash.²⁹ When using women's law, however, it must be taken into account that a single category of women does not exist: women's individual positions differ depending on several elements such as their social and cultural background or financial situation.³⁰ This means that the same issue (*in casu* childcare) often has a different impact on different groups. This research acknowledges this limit of women's law and seeks to establish a set of basic principles. In addition to these, however, specific situations still need to be individually considered. For the purposes of this research, the women's law approach is used in particular in the first part, as a tool to criticise the sex equality principle and its usage as a legal framework in the area under analysis. However, the contribution of women's law does not end with the analysis and critique the concept of sex equality. By proposing amendments to the existing legislation in order to the existing legislation in order to improve the position of employed parents, it evaluates the impact of legislation on women and improves their position

The second part of this research is based upon a comparative law approach. As a universal definition of comparative law does not exist, this research has chosen to adopt as a starting point the definition given by Bogdan who sees comparative law as: "the [comparison] of different legal systems with the purpose of ascertaining their similarities and differences" and its aim as

"working with the similarities and differences that have been ascertained, for instance explaining their origin, evaluation of the solutions utilized in

²⁸ T. Eckoff, "Can We Learn Anything From Women's Law", in *Methodology of Women's Law*, Studies in Women's Law n° 27 Institutt for offentlig retts skrifterserie n° 7/1988, 38.

²⁹ T. Stang Dahl, *Women's Law*, 1987, Norwegian University Press.

³⁰ *Inter alia*, C. Smart, "The Woman of Legal Discourse" (1992) ISLS 29. See also S. Walby *Gender Transformation*, Routledge 1997.

the different legal system, grouping of legal systems into families of law, or searching for the common core of the legal system.”³¹

In other words, comparative law analyses specific aspects of different legal orders. The comparison can be either bilateral (between two legal systems) or multilateral (between more than two legal systems); it can focus on the similarities or on the differences of the legal systems involved. Or again it can focus on the legislation, or on the case law.

The benefits of comparative law can be practical, for example the need to advise a client of the law of another country in order to deal with a specific legal problem. Furthermore, it is also generally acknowledged that comparative law studies can bring a major contribution to legal education and research. Comparative law, in fact, can explain the genesis of a specific piece of legislation, can help grouping different legal orders into the same family and in explaining why and how they have evolved similarly or differently. Using comparative law also helps the appreciation of how a specific problem has been solved in a legal system with a view to seeking the best solution to legal problems. Finally, comparative law improves the comparatist’s understanding of his/her own legal system.³²

Legal scholars, in particular Kahn-Freund, have, however, pointed out that there is a difference between using comparative law as a “tool for research” and as a “tool for reform”, and in particular the use of the “legal transplant”.³³ This operation might involve difficulties which can have the effect of rendering the comparison ineffective or misleading. In his article Kahn-Freund quotes the reasoning of Montesquieu who was one of the first to emphasise the difficulties inherent in comparative law. In Montesquieu’s view, only in exceptional cases could the legislation of one country be utilised in another country: this is because of “environmental factors” such as geography (e.g. climate and size of a country), economic (e.g., wealth of the people in a country,

³¹ **Bogdan M.**, *Comparative Law*, 1994, Kluwer Noutstedts Juridik Tano, at 18.

³² *Inter alia*, **H. Collins**, “Methods and Aims of Comparative Contract Law” (1991) 11 *Ox JLS* 396.

³³ **O. Kahn-Freund**, “On Uses and Misuses of Comparative Law” (1974) 37 *MLRev.* 1.

main activities engaged in the country), as well as social and cultural (e.g., religion).³⁴ To these elements Kahn-Freund adds political factors: "how far does [a] rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which [it does] not share?". On the contrary, Watson argues that these differences are not always that significant.³⁵ He uses as an example a piece of legislation valid in England and Wales which applies in very different environments such as London and a remote district in Wales. He argues that sometimes a statute, because is not closely tied with any particular kind of environment, can be "transplanted" more easily.

The legal comparator must be aware of the arguments briefly summarised above and in particular he/she must always be aware that when comparing and assessing the difference between legal rules in different systems there is "the need to judge the meaning of law primarily by reference not to its formal drafting but to the entire social and cultural context that determines its meaning and effect in application".³⁶

In this research the comparative approach is used to analyse the structure of the relevant Scandinavian and EC legislation and to scrutinise how these legal orders facilitate the introduction of the family principle in employment law in the respective legal orders. Broadly speaking this is a very specific area of employment law where the benefits of comparative law have been acknowledged.³⁷ Without suggesting a "legal transplant", this research scrutinises the positive and negative elements of the systems

³⁴ "Les lois politiques et civiles de chaque nation (...) doivent être tellement propres au peuple pour laquelle elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir à une autre", Montesquieu, *Esprit des Lois*, as discussed in O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLRev. 1.

³⁵ A. Watson, "Legal Transplant and Law Reform" (1976) 92 LQR 79.

³⁶ Lord Weddeburn, "The New Politics of Labour Law: Immunities or Positive Rights" in *Employment Rights in Britain and Europe*, 1991, London, 98.

³⁷ *Inter alia*, H. C. Gutteridge, *Comparative Law*, 1949, Cambridge University Press, see also the discussion in O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLRev. 1, at 20 *et seq.*

involved with a view to seeking positive insights and, hopefully, to suggesting an alternative approach.

In analysing these concepts, this research relies on data provided by relevant bodies, such as the International Labour Organisation and Directorate General V of the European Commission. The information relating to Norway and the other Scandinavian countries has been collected by the author during various periods spent at the Centre for European Law at University of Oslo.

4 Some starting points: concepts and subjects involved in the family principle

“Men, women and children are frustrated - all demanding more time, more closeness and more care. It is left entirely to the individual to achieve a worthwhile existence amidst the daily race against time between a busy job, a crowded supermarket and a child tired after a long day in a day-care institution. A lifestyle like this creates a longing for something lost, something that cannot yet be found. But is it up to the woman to satisfy this longing? Do we not all have a co-responsibility - at the workplace and at home?”³⁸

At this stage it is useful to provide the reader with some preliminary information on the situations addressed by this research. First of all there are family life and paid employment. Within these two areas the relevant subjects are expectant and working mothers, fathers and more generally parents. These are complex legal concepts which require regulation by different legal frameworks. For example, whilst maternity and paternity share common features and therefore could be analysed within the same framework, pregnancy is a unique situation requiring a different approach. What these situations have in common is the fact that, for a long time, they have not received satisfactory legal regulation. The next sections give some background information on these concepts.

³⁸ “Dømmen om en kvinde”, Politiken, 9 February 1993 (author’s translation).

4.1 *Employment and family life*

This research is concerned with the relationship, or rather the absence of a relationship, between family life and work. But what is the meaning of these two concepts?

On the one hand, there is employment whose crucial role has always been recognised at both national and international level. It is important because society is based on employment which contributes to the maintenance of the overall economy. Employment is also important for individuals because it gives them a source of sustenance; by means of employment individuals achieve social security and financial independence which allows them to make choices. Furthermore, the role of employment in modern society is wider than this as it provides “purposeful activity and personal fulfilment, dignity, social contacts, recognition and a basis for organising daily or weekly time”.³⁹ This concept is limited, however: it focuses only on paid employment and it ignores the role of unpaid employment, this being work, often performed in addition to paid employment, such as housework and caring responsibilities.⁴⁰

On the other hand there is the family whose social importance has always been recognised by society.⁴¹ The family is the first place where an individual is formed, is the basic unit of society. Since the industrial revolution it was structured according to the model of the breadwinner/husband providing for the economic welfare and a dependant/wife providing for the care of the house. During recent decades this structure has distinctly changed. The “two breadwinners” family and single parent families are become increasingly common. For a long time the family has been considered as a bundle of private relationships amongst individuals and this attitude was incorporated

³⁹ Green Paper, *European Social Policy - Options for the Union*, 17 November 1993, at 19.

⁴⁰ See further, E. Vigerust, *Arbeid, barn og likestilling - Rettslig tilpasning av arbeidsmarkedet*, 1998, Tano Aschehoug, in particular Chapter 1.

⁴¹ E.g. Article 1 of the Italian Constitution states that “Italy is a democratic republic founded on employment” (author’s translation).

into legal systems. Despite the fact that the social importance of the family has always been recognised, only recently have certain specific aspects such as marriage and divorce, have been regulated. The European Community position on family policies has not been very different. Rather, because of the scope of application of EC law it has always been more limited.⁴²

It follows that the importance of both family life and paid employment is acknowledged and legislative provisions in both areas have been enacted. It appears clearly however, that the two areas are ranked differently with the commitment towards employment regarded as more important. Furthermore, in almost all the legal systems analysed the concept of employment does not entail that of unpaid work.

4.2 *Pregnancy*

Pregnancy indicates a biological condition arising before confinement which is unique to women. For a long time the law has regulated pregnancy - if at all! - in terms of protection. Legislation was enacted merely to protect the health of pregnant (and even fertile!) women⁴³ and their special relationship with their children. Although improvements have been achieved by this legislation, which has at least set some standards, it has some limitations and, consequently, expectant mothers have suffered, and still suffer, disadvantages in the workplace.

These limits are due to several reasons. First of all, for a long time it has not really been clear for legislators, and consequently for employers, "how to deal with" pregnant women and therefore how far protective treatment had to be extended. As Burrows has observed, until recently the problem was in the following terms "[h]ow should the law view [a pregnant] woman? Is she an object to be treasured and protected? Is she comparable to another person, such as a sick man? Is she more than a

⁴² See *infra* Chapter VII, section 28.

⁴³ E.g. V. Andrade, "The Toxic Workplace: Title VII Protection for the Potentially Pregnant Person" (1981) 4 HWLJ 71; S. Norton, "Jobs, Gender and Foetal Protection Policies: From *Muller v. Oregon* to *Johnson Controls*" (1996) 3 GWO 1.

person - a person *plus* a part of another person, a person and half, a quarter, a third?"⁴⁴ Unfortunately this observation was not far from reality. For example, as recently as twenty years ago in an English case it was held that "when she is pregnant a woman is no longer a woman".⁴⁵ However, once it was acknowledged that a pregnant woman is not an obscure entity, only half of the problem was apparent. Another issue has been (and still is) that the protective legislation on pregnancy has been enacted mainly within the framework of sex equality in most countries. As a consequence pregnancy has been "trapped" in the equal treatment *versus* special treatment debate.⁴⁶ The most evident drawback of regulating pregnancy in the context of sex equality is that equality involves a comparison and finding adequate comparison in this case has proved to be difficult; the EC legislation in this area (especially in the early cases) provide for a very good illustration of this dilemma.

This research argues that sex equality legislation alone cannot provide an adequate framework for regulating pregnancy. In fact, with pregnancy being a situation unique to women, it should be regulated within a specific legal framework which *prima facie* appears to be more easily found in an *ad hoc* set of rules such as those which can be found in the employment rights approach. To say that this offers a better alternative is too simplistic, however. Here, the main drawback is that in practice this approach focuses mainly on health and safety. It thus risks "reducing" pregnancy almost to an illness and it can lead to a gross misunderstanding: pregnancy is a very healthy normal state rather than an illness.

⁴⁴ N. Burrows, "Maternity Rights in Europe - An Embryonic Legal Regime" (1991) 11 YEL 285.

⁴⁵ *Turley v. Allders Department Stores*, [1980] IRLR 4.

⁴⁶ *Inter alia*, L. Finley, "Transcending Equality Theory: A way Out of the Maternity and the Workplace Debate" (1986) CollRev. 1118; F. Olsen, "From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895" (1986) 84 MichLRev. 1518; W. Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate", (1985) 13 NYURevL&SocChange 325; S. Bailey, "Equal Treatment/Special Treatment: the Dilemma of the Dismissed Pregnant Employee" (1995) JSWL 87; A. Morris, S. Nott, "The Legal Response to Pregnancy" (1992) LS 54.

4.3 *Maternity, paternity and parenthood*

Maternity arises after pregnancy and concerns the relation between one of the parents, namely the mother, and the child. As Leira points out, maternity is not a single clear-cut concept: "it is a multidimensional concept [which] refers to biological process and cultural symbols, to the individual experience of being a woman parenting and to the social construction of woman as mother".⁴⁷ This complexity is reflected in the legal approach, which covers maternity within a wide range of situations, ranging from specific provisions in the workplace to the absence from the workplace before and after confinement and the care for young children. These situations are not dealt with in "one piece legislation" but they are addressed as components of several areas of the law, in particular sex equality and employment law.

Historically the main characteristics of maternity have been childcare, rearing and nurturing. This idea of maternity is based on the concept of the "isolated nuclear family" characterised by the strict division of tasks between the two parents: the father provides for the economic welfare (*id est* the breadwinner) and the mother is the home maker (*id est* the dependant).⁴⁸ It might be assumed that with the entry of women into the employment market, this approach would have changed. Instead this has complicated the matter even more. The mother now has two tasks: a paid one, namely to work outside the family, and an unpaid one, that is to care for the children. The two tasks are often seen as being in conflict. Paid employment is seen as an obstacle to the duties of a good mother and maternity is conceived as an impediment to women's equality in the workplace.

⁴⁷ A. Leira, *Welfare States and Working Mothers*, 1992, Cambridge University Press.

⁴⁸ *Inter alia*, T. Parsons, "The American Family: Its Relations to Personality and to Social Structure" in T. Parson, R. Bales (eds.) *Family, Socialization and Interaction Process*, 1995, Glencoe, Illinois: The Free Press as quoted in A. Leira, *Welfare States and Working Mothers*, 1992 Cambridge University Press, at 13.

Furthermore, it is also assumed that maternity has features which paternity cannot have. For a long period this attitude has been endorsed and reinforced by the relevant legislation. The majority of European legal systems, in fact, do not have specific provisions aiming at facilitating the caring role of fathers. Furthermore, on this point, the ECJ stated that the aim of EC law is not to deal with the organisation of the family⁴⁹ and that it aims to protect women “within family life”.⁵⁰ In 1890 Maine wrote that one of the most important development of the law was that women were no longer subordinated to their kin but to their husbands.⁵¹ Arguably now women are subordinated to their role as parents.

This research aims to challenge the stereotype of maternity as a very close and exclusive relationship between mother and child giving the mother the sole social responsibility of care for young children. The mother should be seen as both earner and a carer and the two tasks should be considered as equally important and she should be able, if wishing or forced to do so, to pursue both. Furthermore, the responsibility for young children should not be considered as an exclusive task of the mother.

As with maternity, paternity also deals with the relation between one of the parents, this time the father, and the child. Apart from specific biological features such as giving birth and breastfeeding, maternity and paternity are very similar situations and therefore should be regulated in a similar way. However, for various reasons paternity has proved to be more difficult to regulate and, as mentioned above, few legal systems seem to contemplate provisions for both maternity *and* paternity leave. In legal terms, in fact, the concept of paternity is still not regarded as the equivalent of maternity. An example of such an attitude can be found in the *Commission v. Italy* case,⁵² where the

⁴⁹ Case 184/83, *Hoffman*, [1984] ECR 3047.

⁵⁰ Case C-243/95, *Hill and Stapleton*, [1998] ECR I-3779.

⁵¹ **Sir H. Maine**, *Ancient Law*, London as discussed in **H. Petersen**, “Law and Order in Family Life and Working Life”, in *The Equality Dilemma*, S. Carlsen, J. Larsen (eds.), 1993, The Danish Equal Status Council, 41.

⁵² Case 163/82, *Commission v. Italy*, [1983] ECR 3275; see **N. Burrows, J. Mair**, *European Social Law*, 1996, Wiley, at 153 *et seq.*

European Court of Justice held that national legislation giving a right to leave to the adoptive mother but not to the adoptive father was acceptable because of the “special bond” between mother and child. The different legislation and on maternity and paternity reflects the assumption that life is divided into the domestic/public sphere.

It is submitted that in order to achieve real equality in this area, when it comes to the care of young children, the father should be entitled to the same rights and subject to the same duties as the mother. In this way, both parents will have a better connection with the employment market and at the same time they both will be involved in the care of their children. This idea is by no means new. In 1987 the US Supreme Court (Judge Marshall) in *California Federal Savings and Loan Association v. Guerra*,⁵³ held that there was no reason why a male employee could not be provided with the same rights as a female employee. Since then, some timid steps in this direction have been taken and indeed some legal orders in Europe provide, or at least have attempted to provide some provisions in this area. The relevant EC legislation, however, is at the early stages of development.

Finally, considering paternity and maternity together leads us to another situation: parenthood. This differs from the two situations considered above separately to the extent that it goes further than the relationship between mother/father and child being also concerned with the organisation of the family. While the first two are addressed individually and specifically either to the mother or the father, the third is addressed to both parents and accordingly the relevant rights can be used by both parents. This concept plays a crucial role in the provisions aimed at establishing a family principle. This research uses the definition provided by Moxnes as a starting point.⁵⁴ He argues that the social activity of parenthood is parenting, which is formed by three elements: legal parenting, economic parenting and practical parenting. These elements have been

⁵³ [479 US 272 (1987)].

⁵⁴ **K. Moxnes**, *Kjernerprengning i familien?*, Universitetsforlaget, Oslo 1990

further analysed by Kaul.⁵⁵ He argues that legal parenting is provided by the legislation regulating the period of leave and the economic benefits for parents in order to care for new born and young children. Economic parenting is the obligation which parents have to provide for the welfare of their children. Finally, practical parenting refers to the daily care of young children. When parents equally share these three aspects, this is called equal parenting. The main advantage of equal parenting is that it challenges the domestic/public dichotomy and therefore promotes a new way to organise family responsibilities. The disadvantage of parenting is that, if it is not specifically regulated so as to differentiate between the provisions relating to the mother and those relating to the father, it tends to be meaningless. An example of this can be found in some legislation on parental leave. Due to several reasons such as financial or mental attitude, parental leave tends to be used mainly by mothers and therefore parental leave becomes another name for maternity leave.

⁵⁵ H. Kaul, "Who Cares? Gender Inequality and Care Leave in the Nordic Countries" (1991) 34 AS 115.

Part I: The Theoretical Framework

CHAPTER I: THE FAMILY PRINCIPLE BETWEEN SEX EQUALITY

LEGISLATION AND EMPLOYMENT RIGHTS

5 *Introduction*

Although the subjects addressed by the family principle briefly discussed in the introduction - namely expectant and working mothers, fathers and parents - have always existed, some provisions aimed at regulating their position in the employment market only recently have been introduced. Furthermore, they have been regulated individually and not as parts of a comprehensive concept. As mentioned above, the first situations to be addressed were pregnancy and, to a certain extent, maternity. Moreover, in the majority of the legal systems under analysis they have been regulated in a piecemeal fashion: sometimes as a part of social welfare policy, sometimes as an health and safety issue. Until recently in fact, the relevant legislation focused on the physical protection of pregnant employees and working mothers. Thus, arguably, legislation in this area starts as a part of social welfare policies and employment rights with very few Member States having a precise idea of the importance of sex equality legislation.

The need to address pregnancy and maternity emerged when a considerable number of women entered the employment market. This happened in particular during the Second World War when the labour potential of the female work force became clear⁵⁶ and although with regional variations, it increased further during the 1960s.⁵⁷ Furthermore, the degree of participation of women in the employment market has also changed: until a few years ago it was more common for women to work part time, whereas more women are now involved in full time work. From a women's law point

⁵⁶ **G. Bock, P.Thane**, *Maternity and Gender Policies: Women and the Rise of the European Welfare State, 1880s - 1950s*, 1990, Routledge; see also **J. Gravensgård**, *Psykisk arbeidsmiljø -en veiledning*, 1997, Tiden Norsk Forlag, at 93 *et seq.*

⁵⁷ **L. Hantrais**, *Social Policy in the European Union*, 1995, London, at 112.

of view it can be argued that the legal regulation of these situations has not developed in line with other women's rights. In fact, while rights aimed at improving women's position in general (such as the right to work) have existed for a long time,⁵⁸ pregnancy and maternity at work have been regulated only recently. The situation is even more complex for paternity and parenthood: a few provisions aimed at regulating these concepts have been introduced only recently and they still do not have a clear legal *status* in many legal systems. An explanation for this legislative *vacuum* could be that paternity and parenthood go beyond mere health and safety issues and they could not have been tackled only by protective legislation in the work place. These situations do not involve employment rights, at least to the same extent as they are conceived for women, but they are at the heart of what this research has termed the gender-neutral caring concept.⁵⁹ Arguably, the fact that only the first two situations were regulated is a consequence of the fact that legislation is based on the domestic/public dichotomy with the "caring concept" belonging to the domestic sphere and therefore receiving little or inadequate regulation.

As the situations relating to the family principle have been regulated within the context of employment rights, welfare policies and eventually sex equality legislation, the starting point of this research is to critically analyse these approaches. The result of the discussion carried out in this section will be used to assess EC substantive law.⁶⁰ This research chooses to start by focusing on sex equality legislation because, although it is the most recent, it is in this context that the issues under analysis have mainly been developed. Sex equality has been a very powerful tool in publicising the "women's issue" and enhancing women's position in society. Initially it has played a crucial role in discouraging discrimination against employed women with young families and has moved on to try to change the structure of the employment market, for example through positive discrimination. In other words, sex equality has moved from addressing

⁵⁸ *Inter alia*, O. Hufton, *The Prospect Before Her*, 1995, Harper Collins.

⁵⁹ See *supra* Introduction.

⁶⁰ See *infra* Chapter V.

women' position to addressing parents' needs. Unfortunately, however, it has not always proved sufficient to improve all possible situations and limits still exist.⁶¹ The employment rights, being a gender neutral approach might *prima facie* offer a better alternative. It focuses not only less on gender roles, but also does not require evidence of discrimination in order to be entitled to certain specific rights, which are part of the employment contract. Yet, this research shows that as it has been applied so far, this approach also has gaps. It is anticipated that the main limit is that it is too narrow, so that it cannot be developed to include all possible situations.

This chapter analyses the advantages as well as the limits of the two approaches and their influence on the legislation relating to pregnancy, maternity, paternity and parenthood while welfare policies and the welfare state approach are discussed in the next chapter. In the light of the analysis undertaken, it seeks to assess to what extent they can provide the appropriate legal frameworks to tackle the problems of working parents. It is organised as follows. The first section explores the relation between the concepts of equality and sex equality and, in the light of that it turns to the analysis of sex equality legislation (6 *The principle of equality and sex equality*). After having discussed the features of the sex equality legislation and its relation with the concept of non discrimination, the second section scrutinises the employment rights approach and how this has contributed to the development of the concepts under analysis (7 *The employment rights approach*). The following scrutinises how these concepts have so far been applied to the issues under analysis (8 *Working parents in the workplace: the (historical) background*).

6 *The principle of equality and sex equality*

⁶¹ *Inter alia*, B. Hepple, "The Principle of Equal Treatment in Article 119 EC and the Possibilities for Reform", in *The Principle of Equal Treatment in EC Law*, A. Dashood, S. O'Leary (eds.) 1997, Sweet and Maxwell, 137; C. MacKinnon, "Sex Equality: on Difference and Dominance", 1989, Harvard University Press.

“In a case involving equal pay and maternity right, the European Court of Justice (“ECJ”) cites as precedent a case called *Schumaker*.⁶² As a trainee working on a maternity rights case, I was instructed by my supervisor to go and get a copy of this case. I looked at my supervisor and said, “but it’s about taxation of EU workers ...”. She looked at me irritatedly, “So what’s it got to do with maternity?” “Nothing”, I replied.”⁶³

The principle of equality is a cornerstone of democratic society and it is applied to a wide range of issues from taxation to maternity benefits.⁶⁴ Following this assumption, the concept of equality and sex equality are related: *prima facie* in fact, they both aim to achieve a similar result, namely equality between groups differentially situated and often they are based on the same doctrinal framework.⁶⁵ The two concepts, however, differ to the extent that a single model of equality is useful only as long as individuals share the same relevant characteristics.⁶⁶ Equality therefore becomes a concept difficult

⁶² Case C-27/93, *Schumaker v. Finanzamt Köln - Altstadt*, [1995] ECR I-250.

⁶³ G. More, “The Principle of Equal Treatment: From Market Unification to Fundamental Right?” in *The Evolution of EU Law*, P. Craig, de G. Búrca (eds.), 1999, Oxford University Press, 517.

⁶⁴ G. More, “The Principle of Equal Treatment: From Market Unification to Fundamental Right?” in *The Evolution of EU Law*, P. Craig, G. de Búrca (eds.) 1999 Oxford University Press, 517. Similarly, Moller Okin notes writes that “we as a society pride ourselves on our democratic value”, S. Moller Okin, *Justice, Gender and the Family*, 1989, Harper Collins. Furthermore Fredman notes that all major international documents, such as the Universal Declaration of Human Rights (1948) and the Convention on the Elimination of All Forms of Discrimination Against Women (1979), contain a non discrimination clause; S. Fredman, “Discrimination Law: Labour Market Regulation or Individual Rights?”, in *Legal Regulation of the Employment Relation*, H. Collins, P. Davies, R. Rideout (eds.), Kluwer, (forthcoming).

⁶⁵ E. g. in the US and in Canada the prohibitions against race and sex discrimination are in the same statute. Also the US Supreme Court, has used the same reasoning to assess justification in both areas, see *Griggs v. Duke Power Company* [1971] 401 US 424 (racial discrimination) and *Dothard v. Rawlinson* [1977] 433 US 321 (sex discrimination). *Contra* Allen argues that the European Court of Justice has interpreted differently the principle of equality in the context of sex equality and equality on ground of nationality. In the first case it has used a statistical approach, while in the latter a more intuitive one; R. Allen, “The Contribution of International and Transnational Regulation in the Search for Substantive Equality in the Workplace: Clarity or Confusion?” in *Legal Regulation of the Employment Relation*, H. Collins, P. Davies, R. Rideout (eds.), Kluwer, (forthcoming). On this point see also B. Hepple, “Equality and Discrimination” in *European Community Labour Law, Principles and Perspectives*, P. Davies, L. Lyon-Caen, S. Sciarra, S. Smitis (eds.), 1996, Oxford Clarendon Press, 237.

⁶⁶ H. Kay, “Equality and Difference: the Case of Pregnancy”, in *Feminist Jurisprudence*, 27 at 38.

to define when applied to specific situations such as race, disabilities or, as in the case under analysis, sex, where biological differences are involved: in these cases a more complex model needs to be developed. However, as the concept of sex equality remains the inspiring model, it is necessary to analyse it before moving on.

This research does not claim to set a new definition of equality, rather it seeks to evaluate some of the most important contributions given by commentators. The concept of equality is linked to that of justice,⁶⁷ according to Aristotle, who first analysed this idea, the two concepts were synonymous. His well known statement - "things that are alike must be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood"⁶⁸ - is still regarded as the pure expression of the principle of equality. The weakness of Aristotle's statement is that it does not specify which circumstances make individuals different and therefore it leaves open some crucial questions: what constitutes likeness? what constitutes difference? As these often depend upon culture and society, equality is not an easy issue to regulate by law. The task of the law is - or should be? - to ensure that these likeness and differences do not act as to discriminate but to ensure equality. In the context of sex equality, the issue of equality and differences was more recently addressed by MacKinnon.⁶⁹

The Aristotelian concept has been interpreted and developed in various ways. One of these interpretations is that of formal equality: individuals, men and women, are equal.⁷⁰ This interpretation which is linked to the concepts of sameness and uniformity, is however open to criticism. Formal equality creates an artificial concept of equality

⁶⁷ *Inter alia*, T. Tridimas, "The application of the Principle of Equality to Community Measures", in *The Principle of Equal Treatment in EC Law*, A. Dashood, S. O'Leary (eds.), 1997, Sweet and Maxwell, 214.

⁶⁸ Aristotle, *Ethica Nicomachea*, V. 3 1131a - 1131b (W. Ross trans, 1925). Aristotle, however, based his model of equality on structural injustice as he applied it only certain categories of individuals. In this context it is relevant that he used the term *anthropos* (human being) only referring to men. In his conception, in fact women did not possess the virtues necessary to participate in the active life of the *polis*; *La Politica* (C. Bari trans. Laterza, 1925).

⁶⁹ For a more detailed discussion of MacKinnon's analysis, see *infra* section 6.2.

⁷⁰ N. Abercrombe, S. Hill, B. Turner, *The Penguin Dictionary of Sociology*, 1994, at 147.

which assumes an initial equality and refuses to focus on inherent distinctions. In other words, it reflects the model introduced by the French revolution prohibiting both the poor and the rich from sleeping under the bridges. The formal equality model does not accept affirmative action - namely *prima facie* discriminating measures, which aiming to redress structural inequality - because again, these focus on distinctions: people are to be treated the same, only in so far as they are the same.⁷¹ In reality individuals often become unequal because of circumstances leading them to be advantaged or disadvantaged in terms of treatment and opportunities. Equality may thus need to be based on difference, such as gender, race and sex.

The alternative to the concept of formal equality is that of substantive equality. This differs from the former concept to the extent that it takes into consideration the specific conditions of individuals. In the substantive equality model, the law considers the starting differences and the different contexts in which individuals are placed. Affirmative action can be seen as a further development of substantive equality.

Before looking at the principle of sex equality and the relevant legislation, the next section scrutinises the ideologies underlying the models of formal and substantive equality. It is submitted that this is crucial in order to acquire the necessary understanding of the relevant legislation.

⁷¹ For a more detailed discussion on positive action see **H. Fenwick**, "From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law" (1998) 4 EPL 507. In footnote 1 she specifies that she uses the term affirmative action to indicate measures which give preference to women in employment sector where they are under-represented once and provided that they have the same experience and qualifications, or where male and female candidates are equally qualified.

6.1 Assumptions on sex equality: gender roles, the domestic/public dichotomy and their implications

Two assumptions, strongly interconnected, have influenced the development of the principle of sex equality and the relevant legislation: conceptions of gender roles and the assumptions that life is divided into two spheres.

6.1.1 Gender roles

Gender is a key-word when discussing sex equality. It is the social reflection of the biological sex of individuals: there are two sexes - male and female - and two genders - masculine and feminine. Accordingly, the term gender should simply indicate the biological differences between men and women. Things have developed differently, however, and it is not merely an academic discussion to assess whether gender has maintained its biological connotation or has become a socially constructed entity. MacKinnon, summarising the position of many commentators, notes that women and men are biologically different and therefore socially differentiated for some purposes.⁷² On these biological differences, society and law have erected some "arbitrary, irrational, confining and distorting distinctions".⁷³ Maternity and paternity are very good examples: society has attached connotations to them which go well beyond the biological situation.⁷⁴ Assumption such as that a good mother should not work and that

⁷² **C. MacKinnon**, *Towards a Feminist Theory of the State*, 1989, Harvard University Press. On this point see also Moller Okin who regards gender as the "deeply entrenched institutionalisation of sexual difference", **S. Moller Okin**, *Justice, Gender and the Family*, 1989, Harper Collins, at 6; furthermore, Burrows notes that gender is taken to mean more than the simple division of the human race: it indicates a social division which *predetermines expectation*, **N. Burrows**, "Employment and Gender", in *The Legal Relevance of Gender*, McLean Burrows (eds.), 1988, London; finally, the EU Commission describes it as "a social economic and cultural dimension which cuts across access all areas and sectors of development", Communication from the Commission to the Council and the European Parliament on Integrating Gender Issues in Development Co-operation, 18/9/95 COM 95/423.

⁷³ **C. MacKinnon**, *Towards a Feminist Theory of the State*, 1989, Harvard University Press, at 218.

⁷⁴ *Inter alia*, **S. Lewis**, "Motherhood and Employment: the Impact of Social and Organizational Values" in *Motherhood - Meanings, Practice and Ideologies* 1991 Sage, 195; **A. Leira**, *Welfare States and Working Mothers - the Scandinavian Experience*, 1992, Cambridge University Press, in

full-time employment of a mother is equivalent to “death of a parent, imprisonment of a parent, war [or] famine”⁷⁵ have unfortunately permeated the relevant legislation. In the same way the law has supported the idea that the role of the father within the family is confined to the breadwinner. In other words, gender indicates a fact, namely the biological difference between men and women, which has lost its original meaning to acquire the *status* that society has conferred to it and, eventually, legal systems have codified.

In this context, feminist legal scholars argue that the law is male, sexist and gendered.⁷⁶ The law is male in that it incorporates values and attitudes which are masculine; the law is sexist in that, when allocating resources and opportunities, the law perpetuates the disadvantages of women as a group.⁷⁷ Finally, the law is gendered as it is a “process of producing fixed gender identities rather than simply as the application of law to previously gendered subjects”.⁷⁸ This research maintains that, as the law has codified certain principles, it now has the responsibility to revise them.

particular Chapter 2; C. McGlynn, “The Court of Justice and Ideologies of Motherhood in Community Sex Equality Legislation”, (2000) 6 ELJ 29. On this point see also the debate on the Norwegian press, “Konas plass er hjemme”, in *Dagens Næringsliv*, 7 September 1996 and “Kvinnens plass” in *Dagens Næringsliv*, 9 September 1996.

⁷⁵ J. Bowbly, *Maternal Care and Mental Health*, Geneva: WHO, 1951. at 11, as discussed in C. McGlynn, “The Court of Justice and Ideologies of Motherhood in Community Sex Equality Legislation”, (2000) 6 ELJ 29; see also B. Tizard, “Employed Mothers and the Care of Young Children”, in *Motherhood, Meaning, Practicies and Ideologiyes*, A. Phoenix, A. Woollet, E. Lloyds (eds.) 1991, Sage, 178.

⁷⁶ *Inter alia*, C. Smart, “The Woman of Legal Discourse” (1992) 1 SLS 29.

⁷⁷ This is what is also known as the male norm.

⁷⁸ C. Smart, “The Woman of Legal Discourse” (1992) 1 SLS 29, at 34.

6.1.2 *The domestic/public dichotomy*

The implications of gender differentiation (and inequalities) have been further consolidated by the assumption that life is divided into two separate spheres: the domestic and the public spheres. The ideology behind this is well explained by Parson:

“the fundamental explanation of the allocation of the roles between the biological sexes lies in the fact that the bearing and early nursing of children establish a strong presumptive primacy of the relation of the mother to the small child and this in turn establishes a presumption that the man, who is exempted from these biological functions, should specialize in the alternative instrumental direction”.⁷⁹

Paid employment and business life are part of the public sphere which belongs to men while unpaid work, such as the care of the house and of young children, is part of the domestic sphere which belongs to women. Only the first one is considered as productive.⁸⁰ This dichotomy is more than ideology: it is entrenched in the vast majority of the legal systems and has several implications. Firstly, the areas falling within the private sphere sometime appear to be outside and above the scope of the law: the State does not intervene in these areas. In fact, despite the increasing number of domestic areas regulated by the State (such as, *inter alia*, divorce, child abuse, child custody and welfare provision), in the majority of the legal systems many areas of the private sphere are still not regulated. Although the State uses the argument of “privacy” as an excuse for non-interference,⁸¹ this has merely reinforced the dependence of women on men. On this point it has been argued that “the family as a stateless place is at best an oversimplified concept and at worst a blind alley in the debate, in politics and

⁷⁹ **T. Parson**, “The American Family: its Relations to Personality and to the Social Structure”, in *Family Socialization and Interaction Process* Parson, Bales (eds.), Glencoe Illinois: the Free Press, at 23 as discussed in **A. Leira**, *Welfare States and Working Mothers - the Scandinavian Experience*, 1992, Cambridge University Press, at 15; on this point see also **R. Collier**, “Feminising the Workplace? Law, the “Good Parent” and the “Problem of Men”, in *Feminist Perspectives on Employment Law*, A. Morrison, T. O’Donnel (eds.), 1999, Cavendish, 161.

⁸⁰ *Inter alia*, **F. Olsen**, “The Family and the Market: a Study on Ideology and Market Reform” (1993) 96 HLRev. 1497.

⁸¹ **N. Rose**, “Beyond the Public/Private Division: Law, Power and the Family” (1987) 14 JLS 61.

in real life".⁸² Secondly, as the two spheres are perceived as separate, the influence of the domestic sphere upon the public sphere is still largely denied. The activities taking place in the domestic sphere are considered almost as leisure activities which should have no relevance for employers.⁸³ Accordingly, caring for young children is still too often regarded as akin to fishing or gardening. Instead, as Finley notes: "the fact that women bear children and men do not has been the major impediment to women becoming fully integrated into the public of the workplace".⁸⁴ For example women often do not have the opportunity to reach prestigious positions in careers involving responsibility because they cannot work long hours or have to take leave, as they are responsible for young families.⁸⁵ The formal recognition of the relation between the domestic and public sphere is necessary to achieve real equality and to establish a family principle in employment law. Thirdly, the domestic/public dichotomy allows the perception of certain activities as natural rather than constructed, such as women being involved in caring jobs as these are the natural "extension" of activities belonging to the private sphere. This perception is one of the main reasons for gender segregation in employment.⁸⁶

Accordingly, many inequalities between men and women are the result of them being placed in one rather than the other sphere. The matter is further complicated by the fact that the border between the two spheres has changed over the years and it will inevitably change again. Prior to the industrial revolution, for example, the difference

⁸² **G. Berget**, Norwegian Minister of Children and Family Affairs, Hague, 26 June 1996, available on the net at <http://www.sidep.no/preskont/barneog.htm>. *Contra S. Moller Okin*, *Justice, Gender and the Family*, 1989, Harper Collins.

⁸³ The ECJ seems to have confirmed this interpretation in a recently decided case where it compared the situation where an employee resign because of childcare commitment to that of an employee who resign for "non important" reasons, Case C-249/97, *Gruber v. Silhouette*, decided on 14 September 1999.

⁸⁴ **L. Finley**, "Transcending Equality Theory: a Way Out of the Maternity and the Workplace Debate" (1986) 86 *ColLRev.* 1118, at 1119.

⁸⁵ **H. Cullen**, "The Subsidiary Woman" (1994) *JSWFL* 407.

⁸⁶ **J. Rubery, C. Fagan**, "Gender Segregation in Societal Context" (1995) 9 *WES* 213.

between the two spheres was mainly based on the reproductive capacity. At that time, both men and women, although with different tasks, were involved in the maintenance of the household and of the children. With the advent of the industrial revolution, the dichotomy between the public of domestic spheres became more evident with men mostly in charge of the financial maintenance of the household and women in charge of domestic and care work. In other words, the difference began to focus more on the paid and unpaid work.⁸⁷

Also in this case, it is submitted that the legislator should go beyond the mere codification of socially accepted behaviour to encourage the development of the society by proposing new models.

6.2 *Sex equality legislation*

Chapter V looks in detail at the development of sex equality legislation in EC law. This section aims to introduce this discussion by looking at the impact of the debate mentioned in the previous sections. It follows from it that the division between equality, both formal and substantive, applies also to sex equality legislation. Before looking at it, however, the relation between sex equality legislation and that of legislation on non discrimination on the grounds of sex should be clarified. Do they refer to the same concept? The principle of non-discrimination is narrower than the concept of equality: the former being individualised and comparative.⁸⁸ In other words, sex equality is the general principle which gives rise to the non-discrimination legislation. As a technical tool, however, non discrimination legislation is possibly more efficient. It is one thing to affirm that all individuals are created equal, but does this mean that the law can ignore obvious inequalities? By way of contrast, to forbid discrimination has a more concrete connotation. Originally the word to discriminate,

⁸⁷ M. Ferber, "Women in the American Economy", in *The Women's Movement in Canada and the United States*, C. Backhouse, D. Flaherty (eds.), 1992 McGill-Queen's University Press, 205. See also S. Moller Okin, S. Moller Okin, *Justice, Gender and the Family*, 1989, Harper Collins.

⁸⁸ E. Ellis, *EC Sex Equality Law*, 1998, Oxford, Chapter 5.

discernere, simply meant “to see” and eventually it developed to mean “separate by means of the senses”. Only recently has it acquired a negative meaning.⁸⁹ Although there is nothing wrong in treating two persons differently, provided that there are good reasons for it, discrimination now is mainly intended to mean making irrelevant distinctions and treating individuals differently accordingly. In this sense, to discriminate on the grounds of sex means to treat individuals differently because of their sex. For example, the UK Sex Discrimination Act states that “a person discriminates against (...) if on grounds of her sex he treats her less favourably than he treats or would treat a man”.⁹⁰ However, for the purposes of this research the two terms are used interchangeably.

When analysing the legislation on sex equality/non discrimination, four features must be considered: on the one hand formal and substantive equality and on the other hand direct and indirect discrimination.

The division into formal and substantive approaches to equality has been strongly influenced by the attitudes towards gender roles discussed above. This research uses as a starting point the framework proposed by MacKinnon. She identifies two possible approaches to consider gender within the context of legal provisions: the difference approach and the inequality approach. She further explains that

“the first approach envisions the sexes as socially as well as biologically different from one other, but calls impermissible or “arbitrary” those distinctions or classifications that are found preconceived and/or inaccurate. The second approach understands the sexes to be not simply socially differentiated but socially unequal. In this broader view, all practices which subordinates women are prohibited. The difference approach, in its sensitivity to disparity and similarity, can be a useful corrective to sexism: both women and men can be damaged by sexism, although usually it is women who are. The inequality approach, by

⁸⁹ T. Stang Dahl, *Women's Law*, 1988, Norwegian University Press, at 37 *et seq.*; see also Judge D. Edwards, DELI Lecture, November 1996, published in (1997) 6 *Inter Alia - Student Law Journal*, University of Durham, 13.

⁹⁰ S. 1(1) (a) Sex Discrimination Act 1975.

contrast sees women's situation as a structural problem of enforced inferiority that needs to be radically altered"⁹¹

The two approaches conceptualise sex equality legislation in two different ways. The difference approach, which is based on the formal equality approach, aims to develop a system of legal neutrality which is blind to sex differences. In legal terms this has led to the creation of gender neutral norms. Needless to say *prima facie* this approach has gone far in achieving sex equality.⁹² However, a closer analysis reveals that the results achieved are not always satisfactory. Firstly, it does not consider the overall context in which individuals are placed and the fact that inequalities between men and women often arise from socio-economic differences *id est* the structural inequalities which are inherent in the society. For example, it ignores the domestic and parental role which, in the majority of the cases, is undertaken by women and the consequences that this role has in the workplace. Secondly, formal sex equality assumes that individuals make free choices when often this is not the case: a woman often chooses neither to stay home nor to go into employment. Thirdly it uses the male norm as a standpoint. This is the construction of the law which does not consider that women and men might have different interests and needs, and it is based on interests which are predominantly male.⁹³ By assuming that women should be the same as men it fails to achieve equality - when it does not penalise them - for the many women who do not conform to the male norm: here the expression "equal to", in reality means "the same as".⁹⁴ A good example

⁹¹ C. MacKinnon, *The Sexual Harassment of Working Women*, 1979, Yale University Press, New Haven; see also *Towards a Feminist Theory of the State*, 1989, Harvard University Press.

⁹² An example amongst many can be that of the issue of voting. Nielsen and Halvorsen, however, in their analysis of the concept of sex equality in the Scandinavian countries, note that women in Norway were granted suffrage on the assumption that they were by nature conservative and therefore there was no risk of revolutionary consequences. In other words a right which *prima facie* enhanced sex equality was in reality granted because of economic implications. *The Nordic Labour Relations Model*, N. Bruun *et al.* (eds.) 1992, Dartmouth.

⁹³ S. Fredman, "European Discrimination Law: a Critique" (1992) 21 ILJ 119.

⁹⁴ *Inter alia*, L. Finley, "Transcending Equality Theory: a Way Out of the Maternity and the Workplace Debate" (1986) 86 ColLRv. 1118, at 1119.

is provided by the system of birth benefits which is calculated as sickness benefits. Finally, formal equality is based upon a series of comparisons which reinforce the male norm.⁹⁵

By way of contrast, the inequality approach, which is based on substantive equality, views the problems of women as structural and believes that it can be redressed only with the implementation of specific provisions.⁹⁶ As this approach considers the factual context in which individuals are placed and attempts to go beyond the male standpoint, many commentators argue that it can overcome the limitations of the formal model of sex equality. Furthermore, as it regards women as different from men, it might offer a better alternative. In practice, however, it has been used to consider women's difference from men merely as a derogation from the male norm. Finally, it has been argued that substantive equality also has the advantage of rejecting the comparison approach. An element of comparison still appears to exist and, furthermore, it is essential.⁹⁷ For example, the legislative provisions regulating the protection from dismissal on grounds of pregnancy until recently, have applied only during the period of maternity leave, which is the period in which a pregnant woman can be compared with an ill man. Although recent sex equality legislation might seem to move away from this narrow approach, it is arguable that this is impossible. In the pregnancy cases for example the comparator reappears in order to assess the effect of pregnancy rather than pregnancy itself.⁹⁸

⁹⁵ **B. Hepple**, "Equality and Discrimination" in *European Community Labour Law, Principles and Perspectives*, P. Davies, L. Lyon-Caen, S. Sciarra, S. Smitis (eds.), 1996, Oxford Clarendon Press, 237; see also **J. Bouchard**, "Le Concept d'Égalité des Sexes en Droit Européen Communautaire: un Perspective Féministe" (1993) 1 OLJ 625.

⁹⁶ Specific provisions could be, for example, positive actions.

⁹⁷ On this point see further **E. Ellis**, "The Definition of Sex Discrimination in European Sex Equality Law" (1994) 19 ELRev. 563, and more recently **R. Wintemunte**, "When is Pregnancy Discrimination Indirect Discrimination?" (1998) 27 ILJ 23.

⁹⁸ On this point see **F. Mancini, S. O'Leary**, "The New Frontiers of Sex Equality Law in the European Union" (1999) 24 ELRev. 331. See also the development from Case 179/88, *Hertz*, [1990] ECR I-3979 to Case C-32/93, *Webb*, [1994] ECR I-3567. The issue of comparison has been largely discussed in the sexual orientation cases, see in the see also the so called "equal

Thus, as Minow indicates, one of the main limits of both approaches is that they are based on a comparison.

“[f]ocusing on differences passes on the risk of recreating them. Especially when used by decision makers who award benefits and distribute burdens, as traits of difference can carry meanings uncontrolled and unwelcome by those to whom they are assigned. Yet denying those differences undermines the value they may have to those who cherish them as part of they own identity”.⁹⁹

Nordic feminist theories suggest leaving the equality and difference approach for an equity-based approach. Following the equity approach women are not treated as men, as they are a different entity with its own values and identities which cannot be compared.¹⁰⁰

Furthermore sex discrimination can be either direct or indirect. The first case is straightforward: two persons are treated differently because of their sex. In this case, if a breach of sex equality legislation has occurred, in the vast majority of the cases there is no possible justification unless expressly specified by the legislation. In order to be justified, a measure directly in breach of the principle of sex equality needs a specific provision. It follows that it is relatively easy to identify and outlaw direct sex discrimination. Most of the time, however, circumstances are more complex. It might happen that discrimination occurs in cases in which a condition that is apparently gender-neutral in reality affects only, or mostly, one sex, such as the legal provisions addressed to part-time workers. As these workers are mainly women, discrimination against part time workers often results in (indirect) discrimination against women. In other words, indirect discrimination occur when a provision, although, does not *prima facie* discriminate, has a discriminatory effect.¹⁰¹ The principle of indirect

misery” argument evaluated by **M. Bell**, “Shifting Conceptions of Sexual Discrimination at the Court of Justice: from *P v. S* to *Grant v. SWT*” (1999) ELJ 63.

⁹⁹ **M. Minow**, “Justice Engendered” (1987) 101 HLRev. 10.

¹⁰⁰ **Nordic Council of Minister**, 1995, *Gender Equality - the Nordic Model*, Copenhagen.

¹⁰¹ **T. Stang Dahl**, refers to direct and indirect discrimination as *de jure* and *de facto* discrimination in *Women's Law*, 1988, Norwegian University Press, Chapter 3.

discrimination was developed by the American Supreme Court as the “adverse impact theory” in order to combat distortions in the employment market.¹⁰² Accordingly it is potentially the ideal tool to challenge employment structures and practices perpetuating discrimination. The drawback is that, as it is not expressly based on sex, indirect discrimination might be difficult to prove and on certain occasions is justifiable.¹⁰³

7 *The employment rights approach*

The previous section questioned the effectiveness of tackling pregnancy and maternity solely on the base of the sex equality approach. A *prima facie* alternative might be the use of the employment rights approach. Employment rights are those rights which arise as part of the employment relationship, such as the right not to perform heavy tasks during the period of pregnancy, the right not to be dismissed on grounds of pregnancy or maternity or the right to take time off to care for new born and young children. The most important element of this approach is that, since it does not rely on equality, it is not based on an artificial comparison. Thus, it might follow that employment rights are more effective because in order to claim them, there is no need to prove sex discrimination. How far does the employment right approach really go in order to overcome the limitations of sex equality, however? The main drawback is that, although employment rights can in practice achieve sex equality, they do not necessarily have this aim. To a certain extent, in fact, employment rights might be regarded an application of the substantive equality principle in the sense that it gives substantive rights. However, the main difference between substantive equality and employment rights remains that the latter, although they might have the effect, do not have the specific aim of achieving sex equality. It follows that to rely only on the effect can be

¹⁰² *Griggs v. Duke Power* 401 US 424 (1971); see also S. Kenney, “Pregnancy Discrimination: Towards Substantive Equality?” (1995) X WWLJ 351.

¹⁰³ Case 96/80, *Jenkins v. Kingsgate*, [1980] ECR 911; Case C-170/84, *Bilka-Kaufhaus*, [1980] ECR 1607; Case C-127/92, *Enderby v. Frenchay Health Authority*, [1993] ECR I-5535.

dangerous as in certain cases these rights can actually have the opposite outcome. In fact employment rights are often implemented in a way which consolidates gender roles and eventually contributes to discrimination against women in the workplace. For example, to provide a relatively long period of paid maternity leave might have the practical result that an employer would be more likely to choose to employ a man rather than a woman (pregnant or even likely to become pregnant) because this choice would involve an extra burden. Furthermore, the absence of the specific sex equality aim makes very difficult, if not impossible, to develop a broad interpretation of employment rights which could theoretically expand their scope of application.

8 *Working parents in the workplace: the (historical) background*

This section aims to explain the reasoning underpinning the legal response given to the issues at stake. This analysis is important to understand better the development as well as the limits of substantive legislation discussed in the following chapters. As stated at the beginning of the chapter, the law started to regulate pregnancy and maternity relatively recently, namely when women's work became a widespread, and it has approached this issue in different ways since. While some health and safety provisions have been provided from the beginning, a sex equality approach has been used only recently. The legislative approach might be classified into three categories (stages): the denial of discrimination approach, the sex equality approach and the equity approach.¹⁰⁴ This research maintains that the main loophole of the legislative framework is that paternity and parenthood have not received adequate regulation.

¹⁰⁴ This classification is personal: some commentators refer to them as "restrictive comparative approach", "expansive comparative approach" and "substantive equality approach", S. Kenney, *op. cit.* see *supra* note 90, while others divide the approaches of the law in two categories, "comparative status" and "protective status", M. Rubenstein, "Understanding Pregnancy Discrimination: a Framework for Analysis" (1992) 42 EOR 22.

8.1 *The denial of discrimination*

In the first instance it was not clear whether pregnancy and maternity could be dealt with by means of sex equality legislation. The predominant legal reasoning was that since only women could become pregnant, there was no comparison and therefore no discrimination. For example, in a case before the English Employment Appeal Tribunal (EAT), it was stated that “when she is pregnant a woman is no longer a woman. She is a woman (...) with child and there is no masculine equivalent”.¹⁰⁵ Also the US Supreme Court for some time held that for both Title VII and the 14th Amendment of the Constitution, pregnancy discrimination was not sex discrimination as the group of non-pregnant persons consists of both women and men.¹⁰⁶

8.2 *The sex equality approach: equal rights v. special rights*

“Du har visst rett i det Hjalmar. La den bare aldri få se himmel og hav.”¹⁰⁷

Eventually the sex equality principle was applied to pregnancy and maternity. Although it represents an improvement from the non discrimination approach discussed above, it is not above criticism. There are two possible interpretations of the sex equality principle: equal rights and special rights.¹⁰⁸

According to the equal rights approach, equal situations are to be treated equally. This implies that when applying this principle, the first step is to identify relevant similarities and then to treat two similar individuals the same. When considering

¹⁰⁵ *Turley v. Alders Department Stores Ltd*, [1980] IRLR 4.

¹⁰⁶ *Geduldig v. Aiello*, 417 US 484 (1974). The same argument was used on other occasions such as *General Electric Company v. Gilbert*, 429 US 125 (1976) (US Supreme Court); *Attorney General of Canada v. Bliss*, 92 DLR (3d) 417 (1979).

¹⁰⁷ **H. Ibsen**, *Vildanden*, in *Nutisdrømmer 1877-99*, Gyldendal Norsk Forlag Oslo.

¹⁰⁸ Equal versus special rights debate is the American equivalent to formal versus substantive rights debate developed within the EC.

pregnancy, however, this presents problems as there is no similar comparable situation. This approach overcomes this obstacle by focusing on the effect of pregnancy on a worker, which is held to be the same as other disabling conditions. Pregnancy and maternity are seen as a "human experience" which, especially in the workplace, creates needs and problems similar to those arising from causes other than pregnancy, such as sickness. This principle was applied for example in *Hayes*¹⁰⁹ where the Employment Appeal Tribunal (EAT) held that "if in comparable circumstances [such as illness] a man would have been treated in the same way the dismissal was not on ground of sex and there is no discrimination". This was confirmed by the EAT a few years later in *Webb*¹¹⁰ where it stated that "to postulate a pregnant man is an absurdity but I can see no difficulty in comparing a pregnant woman with a man who has a medical condition which will require him to be absent for the same period of time and at the same time as does the pregnant woman": in the specific case, the Court suggested an illness such as an arthritic hip! Advocates of equal treatment submit that its *rationale* lies in the fact that women should be treated just like men and they cannot at the same time advocate the right to be treated differently in certain situations.¹¹¹ The justification for this approach is that as it is more objective and neutral, it poses less danger of judges and employers letting stereotypes about women guide their decisions. It believes that special treatment, instead of providing benefits, reinforces the idea that women are primarily child bearers and nurtures, and only secondarily workers. Accordingly, it opposes maternity benefits due to concerns that the protection of motherhood can slip into paternalism. It is arguable, however, that the equal rights approach inevitably leads

¹⁰⁹ *Hayes v. Malleable Working Men's Club and Institute* [1985] ICR 367.

¹¹⁰ *Webb v. AIR Emo Cargo (UK) Ltd*, [1992], 2 All ER 43.

¹¹¹ **W. Williams**, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate", (1985) NYURevLSocChange, 325, quoted in **L. Finley**, "Transcending Equality Theory: a Way Out of the Maternity and the Workplace Debate" (1986) 86 ColLRv. 1118.

to “the assimilation of women into the male structure”, *id est* it accepts the male norm of the workplace,¹¹² and it reduces maternity to sickness, when it does not deny it.¹¹³

In contrast the special treatment approach uses as its starting point the unique situation of pregnancy, namely the *essence* of pregnancy and maternity. Advocates of this side of the debate would treat pregnancy in the workplace as something “particular” which deserves its own specially tailored policies apart from sickness and disability arrangements.¹¹⁴ The argument to support the special rights approach is that the current employment system disadvantages pregnant women and mothers and therefore industrialised and democratic societies must have special provisions. It is also supported by an economic argument: childbirth is essential for the continuation of society and, therefore, it is absurd to expect an individual woman to bear the entire cost when society in general benefits. Finally, formal equality is fine for those mothers who can afford alternative solutions for looking after their baby while they work, but it does not suit many other women who do not have the same resources. Thus formal inequality is necessary to reach equal opportunity in the market place.

8.3 *The “equity” approach*

The approaches discussed above have been criticised for various reasons. This criticism is summarised Sohrab who argues that:

“The perceived necessity of making a choice between equal and special treatment is a false choice. In some areas equal rights are necessary, while in others it is gender-specific rights that are necessary, for instance in pregnancy. Neither approach is, nor should be the exclusive “answer”

¹¹² L. Finley, “Transcending Equality Theory: a Way Out of the Maternity and the Workplace Debate” (1986) 86 ColLRev. 1118.

¹¹³ To a certain extent see J. Conaghan, “The Invisibility of Women in Labour Law: Gender-Neutrality in Model Building” (1986) 14 IJSL 377.

¹¹⁴ Krieger, Cooney, “The Miller Wool Controversy: Equal Treatment, Positive Actions and the Meaning of Women’s Equality”, (1983) 13 Golden Gate U.L. Review, 513, quoted in L. Finley, “Transcending Equality Theory: a Way Out of the Maternity and the Workplace Debate” (1986) 86 ColLRev. 1118.

or strategy or claim, and arguing over substantive equality by opposing equal with special and vice-versa is at best redundant and at worst a costly distraction.”¹¹⁵

Further criticisms lay in the fact that both forms of equality are based on a comparison and the male norm. Gradually some legal systems have started acknowledging these limits. This has, however, been accomplished only with difficulty. In this context, the steps taken by the European Court of Justice are remarkable. The Court, in *Dekker*¹¹⁶ explicitly said that in the case of pregnancy the absence of a male candidate for the purpose of comparison is irrelevant. In *Webb*¹¹⁷ and more recently in *Boyle*, the Court reiterated the idea that pregnancy is a unique condition which cannot be compared with sickness.¹¹⁸ Due to the specific features of EC law the approach taken by the Court has been applied in the national legal systems of the Member States.¹¹⁹

¹¹⁵ J. Sohrab, “Avoiding the “Exquisite Trap”: A Critical look at the Equal Treatment/Special Treatment Debate” (1993) 1 FLS 14.

¹¹⁶ Case C-177/88, *Dekker*, [1990] ECR I-3941.

¹¹⁷ Case 32/93, *Webb*, [1994] ECR I-3567.

¹¹⁸ This is also the view of the Canadian Supreme Court, *Brooks v. Canada Safeway Ltd* (1989) SCR 1219.

¹¹⁹ L. Tanney, Case note on *Webb* before the English Court (1992) 29 CMLRev. 1021.

CHAPTER II: THE WELFARE STATE AND THE FAMILY PRINCIPLE

9 Introduction

After having analysed the approach of sex equality and employment rights towards the issues under analysis, it is now possible to assess what the State can do for them: in other words, how a family principle could be included in a legal system as a part of welfare provisions. There are two possible routes: the first is to establish a system of child care arrangements which allows parents to fulfil their work commitments. The second route is to give more weight to the notion of unpaid work (*in casu* the care for young children) so to encourage an equal share between parents. For reasons already explained in the introduction, this research focuses on the latter route. Admittedly, this idea is not alien to some European States: the Scandinavian countries, for example have to a great extent already undertaken these commitments¹²⁰ and other States are likely to follow the same route.¹²¹ In order to be effective a change in the approach of the state should be accompanied by a reformulating of family policies.¹²² Finally, once the benefit of the welfare state for the family principle has been established, the possibility to extend such a system at EC level is discussed.

This chapter is divided into four sections. The first section analyses the concept of the welfare state, the ideology underpinning it and the different models into which it has evolved (*10 The concept of the welfare state et seq.*). The reason for this analysis is to provide a base for the analysis of a potential EC welfare state. The second section

¹²⁰ For a more detailed discussion on the welfare state in the Scandinavian Countries see *infra* chapitre VI.

¹²¹ E.g. EC Commission, "Leave Arrangements for Workers with Children" DGV/773/94; EC Commission, "Childcare Networks in the European Community"; see also J. Plantega, J. Schippers, J. Siegers, "Towards an Equal Division of Paid and Unpaid Work: the Case of the Netherlands" (1999) 9 JESP 99.

¹²² S. Moller Okin, *Justice, Gender, and the Family*, 1989, Harper Collins.

scrutinises how the concept of gender is incorporated into these different models and its consequences (*10.2 The role of gender in the welfare state model*). In this context the concept of gender is particularly relevant because it is linked to unpaid work and therefore the care of young children. The third section focuses on the interaction between working parents and the welfare state (*10.3 Welfare state, working mothers and working parents*). Finally, in the light of the analysis carried out, the last section attempts to assess whether a welfare state at EC level can be established (*13 An EC welfare state?*). In this section several questions are considered including whether such a model is feasible and, if so, is it desirable?

10 The concept of the welfare state

It is difficult to provide a universal definition of a welfare state, as different countries apply different standards and this has resulted in the development of several models. As a working definition is necessary, a good starting point is to outline the common features. A first definition could be that proposed by Dominelli: "the welfare state comprises (...) those public and domestic relationships which take as their primary objectives the well-being of the people."¹²³ Ketscher takes a stronger position by saying that the "welfare concept requires the state to assume a social responsibility, not only in "traditional" social contingency contexts such as illness, unemployment and similar misfortunes, but as a subscriber to a welfare structure integral to the organisation of a modern society".¹²⁴ Arguably a development of this concept conceives as the main task of the welfare state the solution of the problem of poverty.¹²⁵ This idea can be expanded to include the principle of redistribution of wealth and, to use the words of Briggs:

¹²³ L. Dominelli, *Women across Continents: Feminist Comparative Social Policy*, 1991, Hemel Hempstead, Harvester Wheatsheaf, at 9.

¹²⁴ K. Ketscher, "The Danish Social System", in *Danish Law in a European Perspective*, F. Dahl, L. Melchior, J. Rehof, O. Tamm (eds.) 1996, Gad Jura, 293, at 293.

¹²⁵ A.-L. Seip, *Sosialhjelpstaten blir til norsk sosialpolitikk 1740-1920*, 1984, Gyldendal, at 11, as quoted in W. Aubert, *Continuity and Development in Law and Society*, 1989, Norwegian University Press, at 265.

“a welfare state is a state in which organised power is deliberately used in an effort to modify the play of the market forces in (...) three directions: first by guaranteeing individuals and families a minimum income, irrespective of the market value of their work or their property; second by narrowing (...) insecurity by enabling individuals and families to meet certain “social contingencies” (...) which lead otherwise to (...) crises, and third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services”.¹²⁶

It follows that in order to be successful the welfare state must rely on employment as a means of financing state subsidies. A narrower approach therefore relies strongly on the commitment to full employment as one of the most important elements of the welfare state:¹²⁷ to ensure employment is the best way to reduce poverty.¹²⁸

It is possible to conclude this overview of the welfare state by listing its most important characteristics for the establishment of a family principle:

- to ensure the well being of people;
- a commitment to employment;
- the elimination of the domestic/public dichotomy and consequently the promotion of the sharing of care duties between parents as a way to achieve justice.

10.1 The different models of the welfare state: the Esping-Andersen's model

For a long time the traditional tool for assessing the development of a welfare state system has been the quantification of public expenditure from statistical indices of the

¹²⁶ **A. Briggs**, “The Welfare State in Historical Perspective”, (1961) *Archives Européennes de Sociologie*, 221, as quoted in **W. Aubert**, *Continuity and Development in Law and Society*, 1989, Norwegian University Press, at 274.

¹²⁷ **R. Mishra**, *The Welfare State in Capitalist Society: Policies of Retrenchment and Maintenance in Europe, North America and Australia*, Hemel Hemstead, Harvester Wheatsheaf, as discussed in **A. Cochrane**, “Comparative Approaches and Social Policy”, in *Comparing Welfare States*, A. Cochrane, J. Clarke (eds.), 1997, Sage, 1.

¹²⁸ **A. Cochrane, J. Clarke** (eds.), *Comparing Welfare States - Britain in International Context*, 1993, Sage, at 3.

welfare state.¹²⁹ More recently alternative methods of classification have been introduced: these shift from using a technique such as the quantification of welfare policies, to a more qualitative analysis. Ware and Godin,¹³⁰ for example, classify welfare states into three models: a rights-based model in which benefits are determined by citizenship, an insurance based model where benefits are determined by contributions and a residual model where benefits are determined by needs and tested in a more or less "punitive" way.¹³¹ Furthermore, Esping-Andersen¹³² distinguishes between three different types of welfare state systems underpinned by different welfare regimes where the welfare state regime is a system of social security stratification that is the product of a particular distribution of power in society and the welfare state system is the result of such regimes, and therefore reflects patterns of class power.

In order to explore the concept of the welfare state, this research uses as a starting point the analysis proposed by Esping-Andersen. He focuses on the relation between the (welfare) state, the class system and the market. In other words, he underlines the link between work and welfare and, most importantly, he undertakes an analysis of power. In light of his analysis, he suggests three models of welfare state systems/regimes: comprehensive welfare state systems associated with social democratic welfare regimes, conservative welfare systems associated with corporatistic welfare regimes and residual welfare state systems which may be associated with countries with liberal welfare state regimes.

¹²⁹ See the discussion in **J. Kemeny**, "Theories of Power in the Three Worlds of Welfare Capitalism" (1995) 2 JESP 87.

¹³⁰ **A. Ware, R. Godin** (eds.), *Needs and Welfare*, 1990, Sage as quoted in **J. Lewis** (ed.), *Women and Social Policies in Europe - Work, Family and the State*, 1994, Edgar Elgar, at 13.

¹³¹ E.g. **K. Loybuourn**, *The Evolution of British Social Policy and the Welfare State*, Keele University Press, 1995 ("poor law" in England).

¹³² **G. Esping-Andersen**, *Three Worlds of State Capitalism*, 1990, Cambridge Polity Press. A similar analysis (bringing to almost identical conclusions) was undertaken by Titmuss in the 1960s, as quoted in **L. Hantrais**, *Harmonisation of Social Policies in the European Union*, 1995, Macmillian at, at 28.

The social democratic regimes (notably the Scandinavian countries) are characterised by the alliance of left wing workers' parties with small farmers dependent upon state subsidies to form an urban-rural coalition generating pressure for state commitment to a full employment welfare state providing a range of universalistic services which have incorporated both working class and middle class interests. This model emphasises equal opportunities and offers high levels of employment in return for high state spending, which in itself imposes a pattern of dual-earner households¹³³ as citizens struggle to meet the tax burden.¹³⁴ This model is open to criticism as its "workability" is contingent on the fact that the strongest groups of workers do not exercise their muscle. In such a context, social policy aims to guarantee high standards to all classes rather than to satisfy minimal needs. The emphasis is not on the market itself but the high rate of taxation assumes that every adult participate in the labour market. In this model, for women the state is the last resort employer.

The conservative regimes (Germany, Austria, Belgium and France) are those regimes where conservative forces in the government have developed a system of occupationally segregated social insurance welfare to ensure both middle and working class loyalty and the integration of the trade-union movement into the state. This model incorporates class inequalities and relies upon the capacity of a "high-productivity industrial economy to finance the burden of a growing population of pensioners and the non-active"¹³⁵ and its weak point is the growing cost of the non-active members of the society. Here social policy serves to preserve existing differences between genders; the State intervenes in the market but only in a very conservative way.

Finally, in the liberal welfare regimes (the best example is the United States with Great Britain rapidly moving in this direction), a basic class alliance was never achieved, with the result that the highly selective welfare state is directed at the poor

¹³³ E.g., St. Meld 35 (1994-95) (*Velferdsmeldingen*).

¹³⁴ "... all benefit; all are dependent; and will presumably feel obliged to pay", G. Esping-Andersen, *Three Worlds of State Capitalism*, 1990, Cambridge Polity Press.

¹³⁵ G. Esping-Andersen, *Three Worlds of State Capitalism*, 1990, Cambridge Polity Press, at 224.

and a dual system of private and occupational services caters for the needs of the middle class. This model of welfare upholds the markets needs.

This typology however is not rigorous and elements of more than one typology often appear within the same model.

10.2 The role of gender in the welfare state

The *Three Worlds Welfare of Capitalism* has been criticised for three reasons in particular. Firstly, the three-fold typology proposed is incomplete;¹³⁶ secondly, the creation of a single “Scandinavian model” is incorrect as it does not consider the differences among the Scandinavian countries¹³⁷ and thirdly it gives scarce attention to the gender dimension of the welfare state which is the point of greatest interest for this research.¹³⁸

In fact, Esping-Andersen focuses his analysis on the concept of the welfare state and the relation between state and economy or work and welfare, where by “work” he means “the contractual relationship (...), the salient characteristic of which is that one person, the employer, engages another person, the employee, for a period to give his service and

¹³⁶ The following are some examples. Liebfried has added the rudimentary welfare regimes of Southern Europe (the Mediterranean rim Countries) where there is no right to welfare or any history of full employment; Castles and Mitchell have added the fourth world of the Australasian working class labourism and Friedman has described Japan as an “anomalous form” Kemeny, however, deems this criticism non-fundamental but has questioned the lack of Eastern and Central Europe from the Esping-Andersen model; see S. Liebfried, “Towards a European Welfare State?”, in *New Perspective on the State in Europe*, J. Jones (ed.), 1993, Routledge, 130; J. Kemeny, “Theories of Power in the Three Worlds of Welfare Capitalism” (1995) 2 JESP.

¹³⁷ This critique focuses on gender in particular. A. Leira, “Mothers Markets and the State: a “Scandinavian Model”?”(1993) 22 JSPP 329; see also *infra* Chapter II.

¹³⁸ *Contra* Kemeny who asserts that that the lack of consideration for the gender issue can be explained by looking at the Author’s earlier comparative work focusing on the labour movement and corporatist theories; J. Kemeny, “Theories of Power in the Three Worlds of Welfare Capitalism” (1995) 2 JESP 87.

to work in a stated capacity in return for remuneration ...”¹³⁹ In other words he focuses only on paid work; accordingly welfare policies are concerned with the de commodification of paid employment. This construction ignores unpaid work, that is the work performed outside the labour market such as the care of young children and household. As unpaid work is carried out primarily by mothers, this division allows the perpetuation of gendered consequences. Moreover, mothers often perform these tasks in addition to their ordinary (paid) work and therefore their workload becomes double compared to that of men engaged in the same (paid) occupation.¹⁴⁰ The double workload is not the only problem: as it is not economically valued, unpaid work is not perceived as “real” work and thus mothers are “invisible”.¹⁴¹ This research, however, has already pointed out that paid and unpaid work are linked: participation in the employment market is supported by unpaid work.¹⁴² Thus to neglect the gender dimension of the welfare state means to ignore the relation between paid and unpaid employment and its consequences for women.

Attempts to justify the lack of consideration for unpaid work in *The Three Worlds Welfare Capitalism* are not lacking. Firstly, Esping-Andersen’s analysis is based on the fact that the concept of the modern welfare state was developed in the late nineteenth and early twentieth century following the lines of the public/domestic dichotomy which at that time was the norm.¹⁴³ Accordingly the models of the modern welfare state are

¹³⁹ **D. M. Walker**, *The Oxford Companion to Law*, Oxford, 1986, Clarendon Press, at 400, as quoted in **N. Burrows**, “Employment and Gender”, in *The Legal Relevance of Gender*, 1988, McLean, Burrows (eds.), 102, at 109.

¹⁴⁰ **T. Hervey, Shaw J.**, “Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law” (1998) 8 JESP 44.

¹⁴¹ **J. Lewis**, “Gender and the Development of the Welfare Regimes”, (1992) 2 JESP 157; Communication from the Commission to the Council and the European Parliament on Integrating Gender Issues in Development Cooperation, COM(95) 423.

¹⁴² **M. Langman, I. Osner**, “Gender and Welfare: Towards a Comparative Framework?”, in *European Development in Social Policy*, 1991, Room (ed.), Bristol University Press, as quoted in **Taylor-Gooby**, “Welfare Regimes and Welfare Citizenship” (1991) 1 JESP 93.

¹⁴³ In the “pure form” of this system married women do not participate in the labour market and are subordinated (dependant) to their husbands for the purposes of social security and are expected to

mainly based on the idea of the male breadwinner. Secondly, according to Hobson class mobilisation and class-political alliances could successfully promote social rights for everybody not only for women.¹⁴⁴ More drastically, Kemeny argues that gender critiques have little to say about theories of political and social power.¹⁴⁵

Furthermore, Esping-Andersen does not completely ignore the gender implications of the labour market: he acknowledges that “women (...) remain heavily over represented in the less desirable jobs”,¹⁴⁶ but he does not go any further. Moreover, his classification indirectly has a considerable impact on women and their position differs in each of the three models proposed.¹⁴⁷ Both the conservative and the liberal regimes are patriarchal. The first regime is based on a clear cut distinction between the public and the domestic sphere and consequently also between paid and unpaid work. In the liberal welfare model women are free to choose whether or not to enter the labour market. However, as the state does not support either of these options, women are disadvantaged. In contrast, the social democratic system is based on a “partnership” between women and the state. Thus, *prima facie*, it differs from the other two models as it consciously extends the idea of dual-earner households and equal opportunities. Although it has increased women’s participation in the employment market, in reality this has increased only in the public sector.¹⁴⁸ Accordingly women’s dependency on

undertake the work of caring at home without public support. This extreme position, however, does not exist in any state.

¹⁴⁴ **B. Hobson**, “Feminist Strategies and Gendered Discourses in Welfare States: Married Women’s Right to Work in the United States and Sweden”, in *Mother of a New World - Maternalistic Politics and the Origin of the Welfare State*, M. Koven, S. Michel (eds.) 1993, Routledge, 369.

¹⁴⁵ **J. Kemeny**, “Theories of Power in the Three Worlds of Welfare Capitalism” (1995) 2 JESP 87.

¹⁴⁶ **G. Esping-Andersen**, *Three Worlds of State Capitalism*, 1990, Cambridge Polity Press, at 224, at 215.

¹⁴⁷ **S. Duncan**, “Theorizing European Gender Systems” (1995) 5 JESP 263, at 266.

¹⁴⁸ **M. Nordli Hansen**, “The Scandinavian Welfare State Model: the Impact of the Public Sector on Segregation and Gender Equality” (1997) 11 WES 83.

men is merely shifted to the state without altering the relation between men and women.¹⁴⁹

Thus, as they are structured now, welfare state provisions contribute to gender imbalances because they fail to challenge the idea that women are primarily carers: in all the three models proposed by Esping-Andersen, women are, more or less heavily, denied access to comparable carer opportunities to those available for men.

10.3 Welfare state, working mothers and working parents

After having analysed the different features of the most common models of welfare state, including their potential importance as well as their limits, this section focuses on the consequences for working parents (mothers) of the “invisibility” of unpaid work. Before going any further, the first question to answer concerns the reason for the state to have any involvement in the organisation of the family. Two elements support the argument for State intervention: firstly, helping parents to have both a job and a family would help them to participate in the economy (and thus in the redistribution of wealth); secondly, the state is responsible of the overall welfare of its citizens.

The care of young children is “the work and responsibility in caring for children and meeting their full range of needs, and how that work and responsibility is organised and divided”.¹⁵⁰ It is a gross understatement to say that this work is unequally shared: too often, in fact, child care is regarded as an exclusive task for mothers. The care for young children plays a crucial role in the development of the family principle. However, its regulation can be a complicated issue as, arguably, it goes beyond “state policy”: it also implies a different concept and organisation of the family.

Welfare state policies have attempted to tackle the problem of the care of young children in different ways. The first of these is by evaluating unpaid work and

¹⁴⁹ *Inter alia*, P. Taylor Gooby, “Welfare Regimes and Welfare Citizenship” (1991) 1 JESP 93.

¹⁵⁰ EC Commission, “Childcare in the European Commission 1985-1990”, in *Women of Europe - Supplements*, n° 31, 1990, at 2.

encouraging policies directly addressed at the care of young children. These provisions have resulted in (partly) paid maternity leave and (often brief and unpaid) paternity leave. Although these are obvious benefits achieved by these provisions, the underling attitude often contributes to reinforcing the stereotype that only mothers can care for young children.¹⁵¹ Another form of policy is by introducing forms of child arrangements. Again, whilst these might *prima facie* offer a better alternative as they (theoretically) enable parents to reconcile family life and employment, they still present drawbacks.¹⁵² To start with, child care arrangements are not included in all welfare state models. In the liberal welfare state regime, for example, child care provisions are minimal. The conservative welfare regime, preserving a more traditional model of the family where the father is the bread winner and the mother the carer for the children, is more proactive in using child care to support full-time house wives. Only in the social democratic regime, where the task of caring for young children is regarded as a social responsibility and thus is carried out by the State, are child care provisions more widely available. However, if a welfare state that understands child care as a social responsibility and gives parents (mothers) more opportunities to participate in the labour market, it might be criticised for an “unwelcome intrusion” of the state in family life.¹⁵³ These provisions fail to challenge the idea of the special relation between mother and child.¹⁵⁴ Secondly, child care arrangements are not always free or subsidised. If this is so, there are two consequences: not all employees (mothers) can reconcile employment

¹⁵¹ **C. McGlynn**, “The Court of Justice and Ideologies of Motherhood in Community Sex Equality Legislation” (2000) 26 ELJ 29.

¹⁵² **S. Fredman**, “Discrimination Law: Labour Market Regulation or Individual Rights?”, in *Legal Regulation of the Employment Relation*, Collins, Davies, Rideout (eds.), Kluwer, (forthcoming). See also **E. Caracciolo di Torella**, “A Critical Assessment of the EC Legislation Aimed at Reconciling Work and Family Life: Lessons from the Scandinavian Model”, in *Legal Regulation of the Employment Relation*, H. Collins, P. Davies, R. Rideout (eds.), Kluwer, (forthcoming).

¹⁵³ *Inter alia*, **M. Everson**, “Women and Citizenship of the European Union”, in *Sex Equality Law in the European Union*, 1996, T. Hervey, D. O’Keeffe, (eds.), 203 at 213.

¹⁵⁴ **B. Siim**, “Welfare State, Gender Politics and Equality Policies: Women’s Citizenship in the Scandinavian Welfare States”, in *Equality Politics and Gender*, M. Meehan, S. Sevenhuijsen (eds.), 1991, Sage, 175.

and family commitments and, as often only parents in well paid jobs can afford some form of child care, children's access to quality services will depend on their parents' income.¹⁵⁵

The best step would be to encourage (if not to achieve!) an equal division of unpaid work between the parents and in particular the care for young children. This division should start in the domestic sphere (*id est* the family),¹⁵⁶ and should be complemented by welfare state policies, such as parental leave, to reconcile the domestic and the public sphere (*id est* the workplace).

Although the equal division of family responsibilities, and of childcare in particular, is still "the great revolution which has not happened",¹⁵⁷ during recent years a new trend seems to start taking place. Fathers seem to be increasingly willing to be involved in childcare and the law seems to have started to acknowledge this change of attitude and is more willing to legislate: parental leave provisions are one example of this new trend.¹⁵⁸

11 *An EC welfare state?*

In this context the most relevant feature of the welfare state is the well-being of its citizens. The previous sections have analysed how the welfare state model has been developed at national level and its impact on working parents. The next question is: does a welfare state system exist at EC level? Can, and should, the EC provide some form of assistance to working parents? Furthermore, does the concept of citizenship introduce new elements to the equation?

¹⁵⁵ "The Childcare Gap", Briefing Paper 1, Daycare Trust, 1997.

¹⁵⁶ S. Moller Okin, *Justice, Gender, and the Family*, 1989, Harper Collins.

¹⁵⁷ S. Williams, E. Holtzman, "Women in the Political World: Observation", (1987) 116 *Dedalus* 30, as quoted in S. Moller Okin, *Justice, Gender, and the Family*, 1989, Harper Collins, at 4.

¹⁵⁸ I. McDonald, "Reconciling Work and Home Life - Parental Leave" (1997) 19 *JSWFL* 87.

The answer to the first question is not clear cut. Generally speaking *some* EC soft law measures aiming at the promotion of a sort of welfare state exist. These are mainly directed at combating poverty and social exclusion and are, in any case, minimal. They might, however, have an impact on the development of Member State policies by both encouraging the convergence of their different standards and gathering information and drafting statistics which encourage the development of a "Community interest".¹⁵⁹ With that said, a welfare state in the sense discussed above still does not exist. The EC provides that national welfare provisions are granted on a non discriminatory basis to all EC nationals but "European measures" do not exist. Furthermore it is arguable that an EC welfare state is not even desirable. The welfare state is in fact the response that the state makes to specific problems that, although common (for example poverty), are caused by elements which are different in each Member State. The EC is not flexible enough to provide a single solution.

Turning to the second question, namely what the EC can do for working parents, although the EC is not strictly speaking concerned with them, some "related measures" are provided. In certain areas, in fact, benefits have been extended beyond the employment market to cover family members.¹⁶⁰ These benefits are, however, almost always disbursed only when an economic link exists. As this economic link is often provided by the (male) breadwinner, this approach in the short term does neither dissolve the paid/unpaid work dichotomy, nor does it encourage an equal share of caring work. In the long run it reinforces the subordination of women.

The Treaty of Maastricht in 1992 "hereby established" the Citizenship of the Union (Art. 8-8e EC, now 17-22 EC). At first, the idea of citizenship indicates the European Union is a constitutional state where all individuals enjoy basic rights, and provides it with a new legal base to expand these rights. In the early cases where the Court was asked to interpret this issue, however, it made clear that this was not the case.

¹⁵⁹ T. Hervey, *European Social Law and Policy*, European Law Series, 1998, Longman, at 172.

¹⁶⁰ E.g. social policy Council Regulation 1408/71 (OJ sp. ed. 1971) on the application of social security schemes to employed persons and their families moving within the Community.

It stated that the provision on citizenship “is not intended to extend the scope *ratione materiae* of the Treaty”.¹⁶¹ This appears to have changed and there is now reasons to believe that, theoretically, the European Citizenship could contribute to the establishment of a supranational political and social organisation. In a case recently decided, *Martinez-Sala*, the Court has recognised the potential importance of this concept.¹⁶² Here for the first time the provisions of non discrimination on grounds of nationality have been linked to the concept of citizenship, rather than to more economically orientated provisions on the free movement of workers.

This concept still has several limitations, however. Firstly, EU citizenship does not replace that of the Member States but is subsidiary to it and, therefore, the primary response remain with the Member States. Article 8 para 1 states that “citizenship of the Union shall complement and not replace national citizenship”. Secondly, there is a huge leap from the interpretation in *Martinez Sala* to the establishment of a family principle. Furthermore, what could European Citizenship do for working parents (mothers). It can be safely conclude that an EC welfare policy aimed at taking into consideration the problems of working parents is still very much *in nuce* and inadequate for dealing with the family principle.

The structures of welfare state analysed in this chapter provide evidence of the different reactions of the Member States towards the domestic/public dichotomy and to the relationship between family and employment. A satisfactory balance between these

¹⁶¹ Joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Ueker and Jacquet v. Land Nordrhein-Westfalen*; see also C-299/95 *Kremzow v. Austria*, [1997] ECR I-2629.

¹⁶² Case C-85/96, *Martinez Sala v. Freistaat Bayern*, [1998] ECR I-2691, further discussed by S. Fries, J. Shaw, “Citizenship of the Union: First Steps of the European Court of Justice” (1998) 4 EPL 533.

two areas, which is essential for the establishment of a family principle, can be achieved only by eliminating the domestic/public dichotomy. There is evidence that the legal systems of the Scandinavian countries has gone further than other legal systems in Europe in abolishing this dichotomy and this clearly appears from the relevant legislation enacted.

Part II: The Existing Legal Provisions for Reconciling Work and Family Life

CHAPTER III: INTERNATIONAL EMPLOYMENT LAW

12 Introduction

The improvement of the position of women in the employment market has been both a national and international priority for some time. Thus, having analysed the theoretical framework, this section turns to an analysis of the existing legal provisions aiming at establishing something similar to the family principle in the employment market.

As mentioned earlier, this research focuses on the legislation of the European Community. As this is influenced by the relevant legislation of the Member States as well as by the principles embodied in international conventions, a detailed analysis must consider all three areas in order to present the complete picture.¹⁶³ The main difference between the three areas is the fact that national and EC legislation create rights and obligations which individuals can enforce before their national courts¹⁶⁴ whereas international law creates rights and obligations only between the Contracting Parties. Moreover the national and EC systems provide for a system of remedies in case Member States do not implement legal provisions. This does not normally happen with international legislation.

Legal provisions aimed at establishing a family principle and a gender-neutral caring concept as proposed in the previous part, are not yet clearly stated in the international legislation, which tends to focus mainly on the protection of pregnancy and maternity in the workplace. Accordingly, the most important of these situations are considered in the context of conventions on labour standards, the most important being those enacted by the International Labour Organisations.

¹⁶³ R. Foglia, G. Santoro Passerelli, *Profili di Diritto Comunitario del Lavoro*, 1996, Giappichelli, 5 *et seq.*

¹⁶⁴ *Inter alia*, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR I.

This chapter focuses on the ILO and aims to assess whether its provisions comply with the family principle. For this purpose it is divided into two main sections. The first section briefly focuses on the historical background and structure of the ILO (*13 The International Labour Convention et seq.*). In the following sections the relevant conventions are analysed (*13.1 ILO Provisions aiming at establishing a "family principle"*). Finally, some conclusions are drawn.

13 The International Labour Organisation: some background information

The International Labour Organisation was established at the end of the First World War in 1919 by the Peace Conference, held in Paris (January) and Versailles (April) where the ILO Constitution was signed. This was drafted by a Labour Commission formed by representatives of Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the UK and the USA. Since 1946, the ILO has been a specialised agency of the United Nations.¹⁶⁵

The main aim of the ILO is to establish social justice by setting minimum standards in employment relations. Its main motivations are humanitarian, political and economic. Humanitarian because the ILO aims to improve the conditions of life of workers and their families; political because there was the fear that without an improvement workers would create social unrest; finally, economic because, given the increasing cost of production, any country adopting social reform would find itself economically disadvantaged towards other countries. These motivations are clearly stated in the Preamble, which states that "the failure of any nation to adopt humane conditions is an obstacle in the way of other nations which desire to improve the conditions in their own countries" and that "universal and lasting peace can be established only if it is based upon social justice".

The ILO enacts conventions and recommendations. Conventions are binding upon the Member States who ratify them; recommendations are often adopted together

¹⁶⁵ L. Betten, *International Labour Law*, 1993, Kluwer; see also the internet, <http://www.ilo.org/>.

with conventions and they fulfil two purposes: to explain further the content of a convention and to provide some guidance for those Member States which cannot yet ratify a convention.

In order to carry out its legislative task, the ILO is provided with an institutional structure which comprises the International Labour Conference (or General Conference), the Governing Body and the Secretariat respectively the legislative, the executive and the administrative body. One of the important features of the ILO is that the first two institutions are tripartite, namely they consist of representatives of Governments, employers and workers. Although this is not the place to discuss in detail the ILO legislative process a brief study of it will be useful in order to appreciate the interaction between the three bodies. The Governing Body decides to place an issue on the agenda. Following this decision the Secretariat prepares a preliminary report. At the same time the Secretariat prepare questionnaires which are sent to the Member States. States are recommended to consult employers and workers organisation. On the basis of the reply and comments the Secretariat prepares a report and suggests a draft conclusion. This is discussed twice by a Committee appointed by the Conference. After the second discussion the Committee presents its conclusions to the Conference. At this point, after some general remarks, the proposed text of the Convention is put to a vote. According to Article 19a, a Convention is adopted with a two-third majority of the votes.

Finally, before turning to the analysis of the relevant conventions enacted by the ILO, it is worth considering its status and the impact of its Conventions in the Member States. The ILO Conventions have the legal status of international Treaties and therefore they impose obligations only upon Member States. Furthermore, States are not under an obligation to ratify any ILO Convention. They are, however, under an obligation to bring the Convention before the national legislative authority. If a Member State decides to ratify an ILO Convention, according to Article 19(5) of the ILO Constitution it must "take such action as may be necessary to make it effective". In

case a Member State decides not to ratify the convention no further obligation lies on it apart from reporting regularly to the Governing Body the position of its law and practice in the relevant area.

13.1 ILO provisions aimed at establishing a “family principle”

There are several ILO Conventions and Recommendations focusing on the issues under analysis. The most relevant are the so-called “maternity conventions”.

Convention n° 3¹⁶⁶ was adopted in 1919 and deals with pregnancy and maternity in the workplace, maternity leave, protection from dismissals on grounds of pregnancy and maternity and maternity benefits. This Convention applies to any woman engaged in industrial or commercial undertakings but not in “undertakings in which only members of the same family are employed”. Women covered by the Convention “shall not be permitted” to work during the six weeks following confinement and “shall have the right” to leave work by presenting a medical certificate stating that confinement will probably take place within six weeks. Protection against dismissals is extended to the period of maternity leave or for a longer period of absence whether it arises out of pregnancy or confinement (in which case a medical certificate must be provided). It immediately appeared that in order to offer effective protection to pregnancy and maternity, it is crucial to find a balance between the protective legislation and its (potentially) detrimental consequences on employed or employable women. Article 2(c) states that during the period of leave a woman “shall be paid benefits sufficient for the full and healthy maintenance of herself and her child”. These benefits shall be paid either by a public fund or a competent authority in each Member State.

Convention n° 3 was amended in 1952 by Convention n° 103.¹⁶⁷ Although the revised text does not alter the substantive issues covered, it clarifies some important points. Firstly, it enlarges the range of employees covered by the Convention to any

¹⁶⁶ ILO Convention n° 3 concerning Maternity Protection in Employment and Occupation, 1919.

¹⁶⁷ ILO Convention n° 103 concerning Maternity Protection in Employment and Occupation, 1955.

“women employed in industrial undertakings and in non-industrial and agricultural occupations, including women wage earners working at home”. Secondly, it expressly states that the period of maternity leave shall be at least twelve weeks and shall include a period of compulsory leave after confinement which cannot be less than six weeks”. Thirdly, according to Article 6 it is unlawful to give notice of dismissal at such a time that the notice would expire during absence due to pregnancy and maternity. This provision was introduced with the intention of avoiding the possibility of dismissing a woman immediately before the period of leave. On this point, Recommendation n° 95 also adopted in 1952, suggests that protection against dismissals should start from the moment at which the employee notifies the employer of her pregnancy. Finally, Convention n° 103 further defines the concept of maternity benefits. According to Article 4 any employed woman should receive cash and medical benefits in order to provide for herself and her child. The benefits should be paid so as to include the *ante* confinement period, the confinement and post-natal care. The same Article also establishes a very important principle, namely that “in no case shall the employer be individually liable for the cost of such benefits due to women employed by him”.

Betten has pointed out that, although Convention n° 103 improves the situation, it still has some gaps.¹⁶⁸ It is difficult, for example, to appreciate how the Convention would work in practice in some specific cases, such as agriculture where women work in family fields most of the time without a proper contract or formal wages. As the Convention assumes that women are wage-earners and that their remuneration will continue during the period of leave, it is difficult to protect women engaged in such activities. Furthermore, these two Conventions present an inherent flaw: they focus on pregnancy and maternity rather than on the wider concept of parenthood and family life in the employment market.

¹⁶⁸ L. Betten., *International Labour Law*, 1993 Kluwer.

This gap was partly filled in 1981 by the adoption of Convention n° 156,¹⁶⁹ adopted together with Recommendation n° 165,¹⁷⁰ which deals expressly with workers with family responsibilities. Convention n° 156 is not “limited” to the (physical) protection of women employees but is addressed to “men and women workers with responsibilities in relation to their dependent children, where such responsibilities restrict their possibility of preparing for, entering, participating or advancing in economic activities”. More specifically Convention n° 156 provides for parental leave. It states that “either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave), without relinquishing employment and with rights resulting from employment being safeguarded. The most important feature of the Convention is that it is gender neutral. In fact, by replacing a previous recommendation which was addressed to women with family responsibilities,¹⁷¹ it aims to improve the position of employees, both men and women, in the workplace and achieve equality between those employees with family responsibilities and those without them; indirectly it also improves the situation of mothers.

A recent ILO report pointed out that, despite the fact that the situation has considerably improved, there are still loopholes.¹⁷² Employment protection is still not satisfactory in all the ILO Member States and the qualification period in order to be eligible for entitlements still constitutes a barrier in many States. Another important issue which has not received adequate attention is the risks to fertility which might

¹⁶⁹ ILO Convention n° 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981. See also ILO Report III, Workers with Family responsibilities, International Labour Conference, 80th Session, Part 4B, Geneva, 1993.

¹⁷⁰ ILO Recommendation n° 165 concerning Equal Opportunities and Equal treatment for Men and Women Workers: Workers with Family Responsibilities, 1981.

¹⁷¹ Recommendation n° 123, Workers with Family Responsibilities, 1965.

¹⁷² ILO 1998 Press Release, More than 120 Nations Provide Paid Maternity Leave, Gap in in Employment Treatment for Men and Women Still Exits, 16 February 1998, available on the internet <http://www.ilo.org/public/english/235press/pr/1998/7.htm>.

occur in the workplace. This idea has been further developed in the Scandinavian States and some steps in this direction have been taken in some EC Member States, but this principle has not been developed in EC legislation.

A proposal with a view to introduce a new Convention and Recommendation has recently been put forward.¹⁷³ These documents acknowledge the necessity to review the previous standards in order to recognise the different economic and social development of the Member States.

Finally, although it expressly refers neither to pregnancy nor maternity, Convention n° 111 is also relevant in this context, as it establish a general ban on discrimination in respect of employment and occupation. Article 5(2) states that “[a]ny Member may (...) determine that other special measures designed to meet the particular requirements of persons who for reasons such as sex, age, disablement, family responsibilities (...) are generally recognised as requiring special protection or assistance, shall not be deemed to be discrimination”.¹⁷⁴ This Conventions is part of the core labour standards covered by the 1998 ILO Declaration on fundamental principles and rights at work.

The importance of the principles established by the ILO Conventions and Recommendations cannot be underestimated. They provide evidence of the concerns surrounding these issues, in particular the protection of maternity at work, and, most

¹⁷³ Proposed Conclusion with a view to a Convention and a Recommendation on Maternity Protection, <http://www.ilo.org/public/english/com-mat.htm>.

¹⁷⁴ H. K. Nielsen, “The Concept of Discrimination in ILO Convention n° 111” (1994) 43 ICLQ 827, who quotes the General Survey by the Committee of Experts on Applications of Conventions and Recommendations, “Equality in Employment and Occupation”, ILC, 75th Session, 1988, Geneva, at para. 41.

importantly, they emphasise the idea that both parents should be involved in the care of their young children. Unfortunately, since they are measures of international law, they do not have the same impact on the Member States that national or EC measures have.

CHAPTER IV: AN OVERVIEW OF THE SITUATION IN THE EC MEMBER STATES

14 Introduction.

Although the majority of the legal systems under analysis focus on the protection of pregnancy and maternity at work, recently issues such as paternity and parental leave and, more generally, the reconciliation of work and family life, have been placed on the agenda of the majority of the Member States. A variety of measures have been adopted in this area. However, they still fall short of the practical achievement of the model proposed.

Before dealing with the relevant EC provisions, this chapter aims to provide the reader with a brief overview of the relevant legislation and the principles underling it, in some of the EC Member States namely Belgium, Luxembourg, The Netherlands, Germany, Austria, France, Italy, Spain, Portugal, Greece, UK, Ireland and Finland. Denmark and Sweden are analysed in the Chapter VI together with Norway as they belong to the Scandinavian model. It is important to examine the main features of the legislation of EC Member States for two reasons. First they explain why some common ground in this area has been reached (*in casu*, the Pregnancy and Maternity Directive and the Directive on Parental Leave). Secondly, they provide evidence of how far it might be possible to harmonise further this area.

All the legal systems of the EC Member States acknowledge the importance of enacting provisions recognising the double role of working parents, in particular mothers. Although they use different provisions, some common principles underlining the relevant legislation in each Member State exist. For example all EC Member States, although with different degrees, recognise the importance of ensuring that pregnancy and maternity *strictu sensu* are, at least physically, adequately protected. However, when it comes to maternity in a broader sense, paternity and parenthood, things are

different. In the majority of the EC Member States the allocation of responsibilities between parents is still often considered a private matter.

Rather than describing the situation in each State, this chapter points out the common features of the different legal orders. For this purpose, it is organised as follows. The first section focuses on issues involving security in the workplace (*15 The main features: a secure working environment*). The second section considers the leave and relevant financial benefits available for both parents (*15.1 Maternity, paternity, parental leave and related financial benefits*), and finally an overview of child care provisions is provided (*15.2 Child care provisions*).

15 The main features: a secure working environment

In all the EC Member States, the health of the expectant mother and of the unborn child is protected. Such a result is achieved in two ways: either by listing certain jobs considered dangerous for the health of the mother and the foetus and therefore, prohibited for pregnant women, or by providing "individual protection" which flows from the general employer's obligation to provide for the welfare of his employees. The combination of these approaches has several benefits. First, the list of the banned work provides only for a minimum standard and makes its observance easier. Secondly, the employee's duty to individual protection makes it possible to keep in step with the latest scientific and medical knowledge which are not promptly reflected in the legislation.

15.1 Maternity, paternity, parental leave and related financial benefits

All the Member States provide for statutory form of leave in connection with childbirth and the care of young children. There are three kinds of leave: maternity, paternity and parental leave. Leave can be either paid or unpaid.¹⁷⁵

¹⁷⁵ For a complete overview see "Leave Arrangements for Workers with Children", DGV/773/94.

The leave from work in connection with the birth is mainly reserved to the mother and, on average, before the entry into force of the Pregnancy and Maternity Directive, lasted between eight to fourteen weeks. In the majority of the EC Member States there is the possibility (often unpaid) to extend the leave. Furthermore if certain situations occur, specific provisions are provided. In Italy, for example, in case of disability or death of the mother, the leave can be transferred to the father.¹⁷⁶

Only two EC Member States, namely Spain and Belgium, entitle the father to statutory paternity leave. In other countries an attempt to mitigate the lack of statutory paternity leave is mitigated by can be seen in the collective agreements. These, however, not always cover all sectors of society.¹⁷⁷ In all the cases analysed, this leave is very short, normally two or three days in connection with confinement. The lack of provisions on paternity leave at national level explains why attempts to take steps in this directions at EC level have failed.¹⁷⁸ This attitude however is changing and the majority of the Member States, including the UK,¹⁷⁹ is evaluating the possibility of enacting some provisions. It is submitted, however, that a few days this paternity leave will not achieve meaningful results in the sense of a shift of social attitude. It neither challenges the actual structure of the employment market, nor changes the position of women. For the time being, only the Scandinavian countries provide for several weeks of paternity leave. Many EC States have tried to solve the problems of the lack of paternity leave by enacting provisions on parental leave.¹⁸⁰ This kind of leave entitles both parents to time

¹⁷⁶ C. M Bussolati, *Tutela della Maternità e Trattamento Economico*, Buffetti (ed.) 1997; G. Falcucci, *La Legislazione sul Lavoro Femminile*, 1998, Buffetti.

¹⁷⁷ "Mother Fathers and Employment 1985-1991, DGV/1731/1/90; Leave Arrangements for workers with Children DGV/773/94.

¹⁷⁸ E.g. D. Muffat Jandet, "Protection of Pregnancy and Maternity" (1991) 20 ILJ 76.

¹⁷⁹ See White Paper Fairness at Work 1998 (available on net <http://www.dti.gov.uk/IR/fairness>); The Employment Relations Act 1999; "Week's Paid Paternity Leave for all Fathers", The Times, 4 April 1998.

¹⁸⁰ At the time of writing, for example, a bill on paternity and parental leave is under discussed in the Italian Parliament; see the debate on the Italian press, "Semaforo Verde della Camera alle Norme

off in order to bring up young children. However, this is still a new legal regime in that only few legal systems provide it in a meaningful way. The main question linked to the parental leave is whether this really provides the fathers with the opportunity to share the care of the children or is a form of "extended maternity leave".

The available forms of leave, in particular maternity leave, are usually accompanied by some economic benefits. These benefits often take the form of welfare benefits and they offer replacement for the loss of wage, rather than the actual salary. This is open to criticism as they reinforce the idea that the parent taking care of the child (usually the mother) is "supported" while "not working" rather than being paid for the work which is actually performing, namely caring for a small child.¹⁸¹ Because of the rate of maternity benefits the financial situation of a woman on maternity leave is often worse than the situation of a woman with no children. Furthermore, in many Member States, in order to be eligible for benefits, the mother must fulfil certain conditions which are linked with her position in the employment market.

15.2 *Child care provisions*

Finally, all the EC Countries analysed provide child care arrangements. They are however organised in very different ways namely at state, regional or local level, individually or collectivised, publicly or privately. The purpose of the child care arrangements may vary from State to State. Child care structures are often enacted with purpose to facilitate the entrance of mothers in the employment market,¹⁸² as a part of an equal opportunity strategy, for the welfare of the child or for pedagogical reasons. It is

sui Congedi Parentali", *Il Sole 24 Ore*, 14 October 1999; "A Casa con il Bimbo anche il Papà e in Azienda arriva il Sabatico", *La Repubblica*, 14 October 1999.

¹⁸¹ Although focusing on the Danish system, for an excellent discussion on this point see **K. Ketscher**, "Fem prinsipper om lønarbejde og omsorgsarbejde", in *Liv arbejde og forvaltning*, 1995, K. Ketscher (ed.), Gad Jura, 291.

¹⁸² **H. Joshi, H. Davies**, "Childcare and Mothers' Lifetime Earnings: Some Contrasts", 1992, Centre for Economic Policy Research, Discussion Paper n° 600, 19; se also **J. J. Jensen**, "Public Childcare in an Equality Perspective", in *The Equality Dilemma*, S. Carlsen, J. Larsen (ed.), 1993, The Danish Equal Status Council, 53.

submitted, however, that child care arrangements are not capable to significantly alter the idea that only women are responsible for caring for young children and to introduce a family principle.

CHAPTER V: THE EUROPEAN COMMUNITY POSITION

16 Introduction

In the European Community a family principle in employment law does not yet exist. Originally, issues relating to family life and its relationship with the employment market were not contemplated by EC law. The only provision which could have been remotely relevant in this context, in so far as it establishes a ban on discrimination on the grounds of sex, was Article 119 EC (now 141 EC). This Article, however, contemplated sex discrimination only as far as pay was concerned.¹⁸³ It falls outside the context of this research to explore in detail the reasons for such a limitation. Suffice it to say that it should not come as a surprise in a market oriented Treaty, namely a Treaty whose first aim was to achieve a single market.¹⁸⁴ More importantly, the Treaty of Rome was market-making rather than market-correcting: it aimed at creating an integrated labour market and enabling it to function efficiently rather than correcting its outcomes in line with political standards of social justice.¹⁸⁵ It follows that in this context social goals were seen as merely side issues to achieving economic integration. In addition, the ECJ

¹⁸³ Article 119 EC provided for equal pay for equal work. This principle was further extended, by means of directives, to equality of treatment, equality in social security and equality in statutory schemes. For further details see **N. Burrows, J. Mair**, *European Social Law*, 1996, Wiley, at 13 *et seq.* Things, however, have changed as a consequence of the amendments introduced by the Treaty of Amsterdam, which widens the scope of application of the Article; on this point see **C. Barnard**, "The United Kingdom, the "Social Chapter" and the Amsterdam Treaty" (1997) 26 ILJ 275.

¹⁸⁴ **Ohlin**, "Social Aspects of European Economic Co-operation: Report by a Group of Expert" (1956) 102 *International Labour Review* 99, further discussed in **C. Barnard**, "The Economic Objectives of Article 119", in *Sex Equality Law in the European Union*, T. Hervey, D. O'Keeffe (eds.), 1996 Wiley, 321; more generally see **R. Nielsen, E. Szyszczak**, *The Social Dimension of the European Union*, 1997, Handelshøjskolens Forlag, Copenhagen and **C. Barnard**, "EC Social Policy" in *The Evolution of EU Law*, P. Craig and G. de Búrca (eds.), 1999, Oxford University Press, 479.

¹⁸⁵ **W. Streeck**, "Neo-Voluntarism: a New Social Policy Regime" (1995) 1 ELJ 31.

was initially reluctant to deal with questions concerning the organisation of the family or the division of responsibility between parents in the context of sex equality.¹⁸⁶

To a certain extent the situation has changed. Following the changes of the last decade, several provisions which have allowed a development of the area have been introduced. Using these as starting points, the EC has taken several steps to regulate this field. The EC political institutions, the Council, the Commission and the Parliament (the EC legislation), the ECJ (the EC litigation) as well as the amendments recently introduced by both the Treaty of Maastricht¹⁸⁷ and the Treaty of Amsterdam,¹⁸⁸ have contributed in the development of this area. The result is a growing *corpus juris* which is still, however, unbalanced. On the one hand, pregnancy and maternity have developed considerably, while on the other hand, paternity and parenthood still occupy a secondary place. Needless to say a coherent development of a family principle implies the consideration of all these situations. The only measure so far enacted especially with the purpose of reconciling work and family life, namely the Parental Leave Directive, appears to move away from this approach but is still unsatisfactory in many respects.

A complete analysis of the EC position in this area should also mention soft law provisions. The concept of soft law first appeared in international law, where it was used to indicate measures which, although not binding, were potentially capable of producing legal effects.¹⁸⁹ Within the EC legal order, soft-law provisions can either take the form provided by Article 249 EC (formerly Art. 189 EC), namely recommendations and opinions, or of acts such as codes of conduct, Commission communications and

¹⁸⁶ Case 184/83, *Hofmann v. Barmer Ersatzkasse*, [1984] ECR 3047.

¹⁸⁷ The Social Chapter annexed to the Treaty of Maastricht, see **R. Nielsen, E. Szyszczak**, *The Social Dimension of the European Union*, 1997, Handelshøjskolens Forlag, Copenhagen.

¹⁸⁸ See Article 13 EC, the new anti discrimination provision in the Treaty of Amsterdam as well as the new provisions on social policy (Arts. 136 to 145 EC).

¹⁸⁹ For a detailed discussion on the concept of soft law in international law see **K. C. Wellens, G. M. Borchard**, "Soft Law in European Community Law" (1989) 14 ELRev. 267.

Council resolutions. Although these provisions are not technically legally binding,¹⁹⁰ their role should not be underestimated. Soft law measures have several effects stem. First, they are capable to influence the conduct of those affected and they can be used as interpretative instruments when interpreting national provisions. This was made clear by the Court in *Grimaldi* where it held that:

“the national Courts are bound to take recommendations into consideration in order to decide a dispute submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions”.¹⁹¹

Secondly, they provide evidence that Member States are committed to certain issues although they lack the necessary consent (and possibly also the resources) to create individual rights.¹⁹² Thirdly, they indicate the attitude of the EC institutions in a specific field and they may also create an expectation that Member States will conform with them.¹⁹³ Furthermore, Kenner argues that they stimulate integration by both building upon existing legislation and providing a useful starting point for further discussion in a specific area.¹⁹⁴ Finally they differ from binding legislation as they do not have to incorporate compromises which can water down their content.¹⁹⁵ The benefits of soft

¹⁹⁰ Article 249 EC (formerly Art. 189 EC), for example, states that “recommendations and opinions shall have no binding force”.

¹⁹¹ Case 322/88, *Grimaldi*, [1989] ECR 4407; see also Case 90/76, *Van Ameyde v. UCI*, [1977] ECR 1091 and the Opinion of the Advocate General Warner in Case 113/75, *Fracassetti v. Amministrazione dello Stato*, [1976] ECR 983.

¹⁹² *Inter alia*, R. Nielsen, E. Szyszczak, *The Social Dimension of the European Union*, 1997, Handelshøjskolens Forlag, Copenhagen, at 204.

¹⁹³ R. Baxter, “International Law in “her infinite variety”” (1980) 29 ICLQ 566 and J. Klabbers “Informal Instruments before the European Court of Justice” (1994) 31 CMLRev. 997.

¹⁹⁴ J. Kenner, “EC Labour Law: the Softly Softly Approach” (1995) IntJCompLLIR 307.

¹⁹⁵ F. Beveridge, S. Nott, “A Hard Look at Soft Law”, in *Law Making in the European Union*, P. Craig, C. Harlow (eds.), 1998, Kluwer, 28. They argue that a soft law measure adopted without the “damaging compromises” which characterise certain binding measures can provide a better starting point for promoting social change. See also the discussion *infra* in section 18.

law provisions, however, must be weighed against their uncertain legal status and the difficulty in predicting their impact.

Soft law provisions have greatly contributed to the development of both EC social,¹⁹⁶ in particular equal treatment,¹⁹⁷ and employment law.¹⁹⁸ This research considers the impact of soft law measures in the area of the reconciliation of work and family life. Suffice it to say that, although measures tackling this issue were enacted only in the 1990s, the reconciliation of work and family life has been on the EC agenda for several years, a good example being the Action Programmes on the Promotion of Equal Opportunities for Women.¹⁹⁹ As early as 1974, the Social Action Plans called for the implementation of measures for the purpose of achieving equality between men and women in the workplace in particular with the aim “to ensure that the family responsibilities of all concerned may be reconciled with their job aspirations.”

This commitment has been reiterated on several occasions. The Action Programmes have not merely emphasised the importance of the principle, but have also triggered further measures. For example, following the suggestions made in the First Action Programme on the Promotion of Equal Opportunities for Women (1982-5), the Commission proposed a draft Directive on Parental Leave and Leave for Family

¹⁹⁶ A good example is the Community Charter of the Fundamental Social Rights. See further J. Kenner, “EC Labour Law: the Softly Softly Approach” (1995) *IntJCompLLIR* 307.

¹⁹⁷ *Inter alia*, E. Szyszczak, *EC Labour Law*, Longmann, at 99 *et seq.*

¹⁹⁸ *Inter alia*, EC Commission A European Strategy for Encouraging Local Development and Employment Initiatives COM (95)273; Council Resolution on the Prospects for European Union Social Policy: a Contribution to Economic and Social Convergence in the Union OJ 1994 C368/3. See further S. Sciarra, “The Employment Title in the Amsterdam Treaty: a Multilanguage Legal Discourse”, in *Legal Issues of the Amsterdam Treaty*, D. O’Keeffe, P. Twomey (eds.), 1999, Hart, 157; E. Szyszczak, “The Evolving European Employment Strategy”, in *Social Law and Policy in an Evolving European Law*, J. Shaw (ed.), 2000 Hart, Oxford (forthcoming)

¹⁹⁹ Four Action Programmes have already been adopted and one has been proposed by the Commission in November 1999: First Action Programme (1982-5), *Bulletin of the EC*, Supp. 1/82; Second Action Programme (1986-90), *Bulletin of the EC*, Supp. 3/86; Third Action Programme (1991-5), COM (90) 446 final; Fourth Action Programme (1996-00) COM (95) 381 final, respectively. A fifth Action Programme (2001-2005) is under adoption.

Reasons.²⁰⁰ Following the Second Action Programme (1986-90) the EC Childcare Network was established and again, as a result of the discussion put forward in the Third Action Programme (1990-5),

the Council adopted the Recommendation on Child Care.²⁰¹ Apart from the Action Programmes, there are also other soft law provisions which have promoted the importance of reconciliation of work and family life, such as the Green Paper on European Social Policy²⁰² and the Communication from the Commission on Family Policies, which are discussed further in this thesis.²⁰³

Although acknowledging the importance of soft law provisions in this area, this research focuses on the EC binding legislation and the case law of the Court in order to discuss the improvements these have achieved as well as the gaps which still exist. It is divided into five main sections. The first part scrutinises the concept of sex equality and employment policies within the EC and how these have addressed the issue of the reconciliation of work and family life (*17 Sex equality, employment rights and working parents within the EC*); the second and the third part analyses the EC legislation and EC litigation (*18 The EC legislation on maternity* and *19 The ECJ pregnancy and maternity saga*). The fourth part provides for an overview and a brief discussion of child-care provisions (*20 Measures concerning EC child-care arrangements*). The final part evaluates the EC position (*21 Evaluation of EC position*)

²⁰⁰ COM (83) 686. See also the discussion in this thesis, *infra* in section 18.4.

²⁰¹ Council Recommendation on Child Care, OJ (1992) L 123/16. See also the discussion *infra* in section 20.

²⁰² Green Paper, European Social Policy, Options for the Union (1993).

²⁰³ See *infra* Part III, in particular Chapter VII. See also P. Moss, "Reconciling Employment and Family Responsibility: A European Perspective", in *The Work and Family Challenge-Rethinking Employment*, S. Lewis, J. Lewis (eds.), 1996 Sage, 20.

17 *Sex equality, employment rights and working parents within the EC*

After having analysed the theory underpinning sex equality legislation and employment rights in Chapter I, this part applies the result of the discussion carried out to the EC context with a view to evaluating the most suitable framework to regulate the situations under analysis.

The concept of sex equality appears in both the EC legislation and the case law of the ECJ. However, since it has been mainly developed thanks to the activism and enthusiasm of the Court,²⁰⁴ a careful analysis of the case law is particularly important. Sex equality legislation has been described as one of the basic,²⁰⁵ fundamental²⁰⁶ principles of EC law as well as one of its greatest successes.²⁰⁷ Although it has been crucial for the area under analysis, gaps still exist, however. The following analysis is based on the structure outlined in Chapter I, namely direct discrimination, indirect discrimination and formal and substantive equality.

The Court has drawn a distinction between direct and indirect sex discrimination. The meaning of direct discrimination was analysed for the first time in the context of pay in *Defrenne (II)*, where the Court held that direct discrimination can “be identified solely with the aid of the criteria based on equal work and equal pay”.²⁰⁸ Direct discrimination cannot be justified unless specifically provided for by Treaty provisions and, in particular, it cannot be justified by economic reason. On the other hand, indirect

²⁰⁴ *Contra*, More who argues that ECJ has acted within the framework of the equality directives which therefore “predetermine” the meaning of equal treatment, **G. More**, “Equal Treatment of the Sexes in European Community Law: what does Equal Mean?” (1993) 1 FLS 45.

²⁰⁵ **C. Docksey**, “The Principle of Equality Between Women and Men as a Fundamental Right Under Community Law” (1991) 20 ILJ 33.

²⁰⁶ **A. Arnall**, *General Principles of EC Law and the Individual*, 1990, Leicester University Press. See also Case 43/75 *Defrenne II*, [1976] ECR 455 and Case C-13/94, *P. v. S and Cornwall County Council*, [1976] ECR I-2143.

²⁰⁷ *Inter alia*, **K. Munro**, “Preface” in **C. Bamford**, *Equal Treatment and the Law. A Guide to European Community Equality Law in Scotland*, 1995, European Commission Representation in Scotland, 1.

²⁰⁸ Case 43/75, *Defrenne v. Sabena (II)*, [1976] ECR 455, at para 461.

discrimination is a form of “disguised discrimination which can only be identified by reference to the more explicit implementing provisions of a Community or national character”.²⁰⁹ For example, indirect sex discrimination can occur where a practice which discriminates against part-time workers, although gender neutral, in practice affects a far greater proportion of women rather than men.²¹⁰ This is very important as far as working parents are concerned because, as AG Warner pointed out in his opinion in *Jenkins*, more women are likely to be employed on a part time basis because of family responsibilities.²¹¹ The Court has further developed the concept of indirect discrimination so as to also include national legislation that, albeit formulated in neutral terms, works to the disadvantage of far more women than men.²¹²

When dealing with issues relating to working parents (mothers), the ECJ has used both the concepts of direct and indirect sex discrimination. Clearly, discrimination on the grounds of pregnancy or maternity *stricto sensu*, is direct discrimination (for example, *Dekker*,²¹³ *Webb*²¹⁴ and *Rentoki*²¹⁵). Here it is obvious that there is discrimination because women are disadvantaged because of specific characteristic unique to them. Things have proved to be less straightforward in situations relating to caring responsibilities (*id est* situations relating to maternity, paternity and parenthood) where women are not discriminated against because of something which is unique to

²⁰⁹ Case 43/75, *Defrenne v. Sabena (II)*, [1976] ECR 455, at para 461.

²¹⁰ E.g. Case 170/84, *Bilka*, [1989] ECR 1607.

²¹¹ Opinion of the Advocate General Mr Warner, in Case 96/80, *Jenkins*, [1981] ECR 911. This was reiterated in Case C-243/95, *Hill and Stapleton*, [1998] ECR I-3739 at para 41, where the Court admitted that the vast majority of jobsharers “do so to combine family and work responsibilities [*inter alia*] caring for young children”.

²¹² Case C-279/93, *Schumaker*, [1995] ECR I-250, Case C-342/93, *Gillespie*, [1996] ECR I-475 and Case C-411/96, *Boyle*, [1998] ECR I-6401, Case C-1/95, *Gerster*, [1997] ECR I-5253; Case C-100/95, *Kording*, [1997] ECR I-5286.

²¹³ Case C-177/88, *Dekker*, [1990] ECR I-3941.

²¹⁴ Case 32/93, *Webb*, [1994] ECR I-3567.

²¹⁵ Case C-394/96, *Brown v. Rentokil*, [1998] ECR I-4185.

them. Here the Court has opted for the concept of indirect discrimination which, arguably, is a more apt tool to tackle the inequality of the employment market. Indirect discrimination has in fact substantially contributed to the development of the situation of employed parents, in particular women, by improving the situation of part-time workers²¹⁶ and so called atypical workers and challenging the assumption that they are peripheral workers.²¹⁷ Its potential is, however, hampered by two facts. Firstly, by not being expressly based on sex, indirect discrimination can be justifiable if certain circumstances occur. These circumstances were established in *Jenkins*²¹⁸ where the Court held that if objectively justified, different rates of pay depending on hours of work were not in themselves contrary to the principle of equal pay. This principle was further developed in *Bilka* where three conditions were established, namely that “the means chosen for achieving correspond to a real need on the part of the undertaking [and] are appropriate with a view to achieving the objective in question and are necessary to that end”.²¹⁹ Secondly, indirect discrimination relies on numerical evidence.²²⁰ Furthermore, since it is up to the national courts to decide whether a justification is objective, this leads to different justifications on similar issues.²²¹ Therefore, it appears that the distinction between direct and indirect discrimination is particularly important as only in the latter can cases of discrimination be justifiable. This area is particularly difficult to regulate because it mirrors the compromise between

²¹⁶ For a more recent example see Case C-1/95, *Gerster*, [1997] ECR I-5289.

²¹⁷ **J. Lewis**, “Work Family Reconciliation and the Law: Intrusion or Empowerment?”, in *The Work-Family Challenge*, Lewis, Lewis (eds.), 1996, Sage, 34.

²¹⁸ Case 96/80, *Jenkins v. Kingsgate (Clothing Production) Ltd*, [1981] ECR 911, see also Case C-127/92, *Enderby*, [1993] ECR I-5535.

²¹⁹ Case 170/84, *Bilka*, [1986] ECR 1607.

²²⁰ Case C-167/97, *R. v. Secretary of State for Employment ex parte Seymour-Smith and Perez*, [1999] ECR I-623; see **C. Barnard, B. Hepple**, “Indirect Discrimination: Interpreting *Seymour-Smith*” (1999) 58 CLJ 399.

²²¹ **C. McGlynn, C. Farrelly**, “Equal Pay and the Protection of Women in Family Life” (1999) 24 ELRev. 202.

balancing the interests of the market (employers) and disadvantaged groups (employees). The Court of Justice has been in two minds. On the one hand, it has held that measures should not be imposed in such a way so as to add administrative, financial and legal constraints upon small businesses.²²² On the other hand, however, it seems to have recently strengthened this concept so as to require Member States to extend the principle of equal treatment beyond the end of the employment relationship.²²³

In order to have a complete picture of the principle of sex equality, it is also important to look at the approach which the Court uses when applying it: this can be formal or substantive.²²⁴ Contrary to what has been said on direct and indirect discrimination, the classification into formal and substantive approaches was not initially created by the Court but by legal commentators.²²⁵ In early cases the Court, by ignoring the domestic sphere and its impact on the public one, strictly relied on a formal approach to the concept of sex equality.²²⁶ The tension between formal and substantive equality becomes evident when looking at the positive action cases which can be crucial in order to achieve substantive equality. In *Kalanke*,²²⁷ the issue at stake was a German system of women's quotas. The Advocate General, Mr Tesouro, in a lengthy opinion argued that a system of women's quotas was contrary to the principle of equality as this is a *universal* right to non discrimination. According to the Advocate General Mr

²²² Case C-317/93, *Nolte v. Landesversicherungsanstalt Hannover*, [1995] ECR I-4625.

²²³ Case C-185/97, *B. Coote v. Granada Hospitality Ltd.*, [1998] ECR I-5199, see "Extended Work Relationship", *The Times*, 6 October 1998.

²²⁴ For a more detailed discussion on formal and substantive equality see *supra* Chapter I.

²²⁵ However, the Court has followed this terminology see Case 312/86, *Commission v. France*, and more recently Case C-136/95, *Thibault*, [1998] ECR I-2011.

²²⁶ E.g. *Hofmann*, [1984] ECR 3047 discussed by C. Kilpatrick, "How Long is a Piece of String? European Regulation of the Post-Birth Period", in *Sex Equality in the European Union*, T. Hervey D. O'Keeffe (eds.) 1996, Wiley, 81.

²²⁷ Case C-450/93, *Kalanke*, [1995] ECR I-3051. See S. Prechal, Case note on *Kalanke*, (1996) 33 CMLRev. 1245, S. Scarponi, "Pari Opportunit  e "Frauenquote" davanti alla Corte di Giustizia" (1995) 4 RDE 717, E. Szyszczak, "Positive Action after *Kalanke*" (1996) 59 MLR 876, and more recently H. Fenwick, "From Formal to Substantive Equality: the Place of Affirmative Action in European Union Sex Equality Law"(1998) 4 EPL 331.

Tesauro, the positive action system provided went well beyond the aim of ensuring equality of opportunity. The Court largely followed the reasoning of the Advocate General but outlawed a system of quotas only when they are, as in the case in point, “absolute and unconditional”. The decisions reached in more recent cases, however, seemed to provide evidence of a shift in the reasoning of the Court. In the next case raising this issue, the Court clarified *Kalanke* and stated that, if not exclusive, a system of quotas can be compatible with EC law.²²⁸ In the following passage the Court, by acknowledging that women and men are placed differently concerning caring responsibility, promoted equality.

“[e]ven where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and the capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.”

This approach is echoed in *Thibault*, where the Court expressly stated that the aim of the Equal Treatment Directive is to achieve substantive sex equality. But is the Court really moving to a more substantive approach? Despite *Marshall* and *Thibault*, there is evidence that the Court has not yet embraced a family principle. In fact, it still invokes the protection “of the special relationship between the mother and her child” which does not help a substantive equality view of the problem.²²⁹ Furthermore, in *Boyle*, by stating that Article 8 of the Pregnancy and Maternity Directive establishes a “special advantage” granted to women, the Court consolidates the idea of the “traditional

²²⁸ Case C-409/95, *Marschall*, [1997] ECR I-6363, at para. 29.

²²⁹ Case C-411/96, *Boyle*, [1998] ECR I-6401 at para 41, quoting case 184/83, *Hofmann*, [1984] ECR 3047, at para 25.

family” where childcare is not equally shared between the parents, but mainly by the mother who should be able to combine work with family responsibilities.²³⁰

As a consequence of the mixed signals sent by the Court and the limited scope of application of the legislation, women are still in a position of disadvantage both in the family and in the employment market. The main reasons for this disadvantage are that primarily women and men still do not share the responsibility of caring for children and the impact of caring responsibilities on paid employment is still not acknowledged. As it stands now, in fact, EC sex equality is still narrow and rigid as it is based on the male norm and the domestic/public sphere distinction and any attempts to go beyond this have proved insufficient. The concept of sex equality does not have the capacity to restructure the employment market and society.²³¹ The law is still in the position that, being based mainly on a formal approach, sex equality legislation does not offer an adequate answer to the need of the working mothers with young families. Finally, sex equality is a static concept which helps only women who are already well assimilated to the male standard. It does not, for example, give a specific right to employees to resume work on a part time basis after the end of maternity leave in order to meet their caring responsibilities, but merely prohibits any form of discrimination against them. Accordingly, sex equality legislation cannot always protect the interests of a woman who is on an atypical contract (because of family responsibility): if certain circumstances occur, she can be lawfully discriminated against.

The alternative to a sex discrimination approach is to rely on employment rights. EC legislation, however, does not specifically mention an “employment rights approach”. Instead, Article 118a EC (now 137 EC *et seq.*), which is the legal base of the Pregnancy and Maternity Directive, focuses on the protection of “health and safety in the working environment”. From an institutional point of view, this approach had the advantage of avoiding the obstacle of unanimity required by Article 235 EC (now 308

²³⁰ See also the decision in Case C-249/97, *Silhouette*, decided on 14 September 1999, where the Court equated child care responsibilities with “non important reasons”.

²³¹ **R. Holtmaat** “Overtime Payments for Part-Time Workers” (1995) 24 ILJ 387.

EC) to enact sex equality legislation.²³² From a substantive point of view, however, its main limit is that it classifies pregnancy as an illness.²³³ The concept of the working environment was introduced in Article 118a EC under Danish pressure in 1986, but it has been interpreted by the ECJ only recently in the *Working Time Directive* case.²³⁴ In his opinion, Mr Léger AG supported an interpretation of the concept of working environment in the light of the Danish interpretation:

“covering the performance of work and conditions at the workplace, as well as technical equipment, and the substance and material used. Accordingly the relevant Danish legislation is not limited to classic measures relating to safety and health at work in the strict sense, but also includes measures concerning working hours, psychological factors, the way work is performed, training in hygiene and safety, and the protection of young workers and worker representation with regard to security against dismissals or any other attempt to undermine their working conditions. The concept “working environment” is not immutable, but reflects the social and technical evolution of society.”²³⁵

Regrettably the Court did not follow the solution proposed by the Advocate General. Although it did not deny the validity of the Danish interpretation, it focused on health and safety. For this purpose it followed the standard proposed set out in the statute of the World Health Organisation (WHO) where “health” is defined as “a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity”.²³⁶ The Court concluded simply by saying that the “the words “especially in the working environment” militate in favour of a broad interpretation of

²³² E.g. the Working Time Directive.

²³³ J. Lewis, “Work-Family Reconciliation and the Law: Intrusion or Empowerment?”, in *The Work-Family Challenge - Rethinking Employment*, J. Lewis, S. Lewis (eds.) 1996, Sage, 34; see also J. Conaghan, “Pregnancy in the Workplace: a Question of Strategy” (1992) 20 JLS71, at 82.

²³⁴ Case C-84/94, *United Kingdom v. Council of the European Union*, [1996] ECR I-5755.

²³⁵ Opinion of Mr Léger AG in the Case C-84/94, at para 42. See further B. Fitzpatrick, “Straining the Definition of Health and Safety?” (1997) 26 ILJ 115 and R. Nielsen, *Arbejdsmiljøret*, 1993, Jurist-og økonomiforbundets Forlag.

²³⁶ Case C-84/94, *United Kingdom v. Council of the European Union*, [1996] ECR I-5755, at para 15.

the powers which Article 118a confers upon the Council for the protection of the health and safety of workers”.

In light of the discussion carried out it is necessary to ask whether it is more appropriate to employ the EC model of equality or the EC employment rights approach as an adequate framework to regulate caring responsibilities. This is discussed in the following section with reference to the relevant legislation.

18 The EC legislation on maternity

As indicated above, originally the EC did not regulate pregnancy, maternity, paternity and parenthood. Recently a growing concern about these issues has, however, led to the drafting of several provisions. The EC legislation which directly relates to these issues comprises the Equal Treatment Directive,²³⁷ the Pregnancy and Maternity Directive²³⁸ and the Directive on Parental Leave.²³⁹ Furthermore, the Equal Pay Directive, in so far as it provides for “the elimination of all discrimination on grounds of sex with regard to all aspects and condition of remuneration”,²⁴⁰ the Social Security Directive,²⁴¹ the Burden of Proof Directive,²⁴² the Part Time Workers Directive²⁴³ and the Directive on Fixed Time Workers²⁴⁴ are also relevant in this context. Considering the scant attention originally given to these issues, the EC legislation can be seen as a development. A

²³⁷ Council Directive 76/207 EEC OJ (1976) L 39/40.

²³⁸ Council Directive 92/85 EEC OJ (1992) L 348/1.

²³⁹ Council Directive 96/34 EEC OJ (1996) L 145/4-9.

²⁴⁰ Art. 1 Council Directive 75/117 EEC OJ (1975) L 45/191.

²⁴¹ In particular Council Directive 79/7 EEC OJ (1979) L 6/24.

²⁴² Council Directive 97/80 OJ (1998) L-14/6 which will enter into force on 1 January 2001 (22 July 2001 for the UK).

²⁴³ Council Directive 97/81 OJ (1997) L 014 15 December 1997, further discussed in Chapter IX.

²⁴⁴ J. Murray, “Normalising Temporary Work” (1999) 28 ILJ 269.

closer analysis of the area, however, provides evidence that this legislation should not be overestimated and that there are still several problems.

First, regulation is by means of directives which, although aimed at increasing equality between men and women, have different legal bases. The Equal Pay Directive has its legal base in Article 100 EC (now Art. 94 EC), the Social Security Directive and the Equal Treatment Directive are based on Article 235 EC (now 308 EC), the Pregnancy and Maternity Directive on Article 118a EC (now Arts. 137 EC *et seq.*), the legal base of the Parental Leave Agreement/Directive is to be found in Article 2 of the Social Policy Agreement (now 137 EC) annexed to the EC Treaty by the Treaty of Maastricht (now Article 138 EC) following a proposal of the Social Partners. The Part-Time Workers Directive and the Directive on Fixed Time Workers have Article 2 SPA as legal base. This research argues that the result of these different approaches is piecemeal legislation which does not help the coherent development of the field. Furthermore, the fact that they have been enacted using Articles 100 EC (approximation of provisions directly affecting the functioning of the market) and 235 EC (measures where the Treaty does not provide appropriate power) (now respectively Articles 94 and 308 EC) as legal bases, provides evidence of the market rationale behind these measures. Arguably, things have changed with the Treaty of Amsterdam. But does it provide for a more coherent legal framework in which these issues can be tackled?²⁴⁵

Secondly, so far the EC legislation which has regulated these situations has been mainly in the context of sex equality law. The previous paragraph has already discussed in some length the main criticisms of sex equality. Broadly, these are that EC legislation in this area is based on a stereotyped concept and misleading assumptions such as that women prefer to work part time because they do not need money as they rely on the financial support of their partners.²⁴⁶ It is more accurate to say that women work part time because they have family obligations and the legislation, despite

²⁴⁵ For a more detailed discussion see *infra* Part. III.

²⁴⁶ C. Bovis, C. Cnossen, "Stereotyped Assumption versus Sex Equality: a Socio Legal Analysis of Equality in the European Union" (1996) 12 IntJCompLLIR 7.



cosmetic improvements, is still based on the assumption that only mothers can take care of young children - as opposed to both parents. Needless to say, these assumptions do not provide for an adequate solution to the problem and they merely reinforce stereotypes.²⁴⁷ Furthermore, the concept of sex equality is open to criticism as it is subordinated to that of market order, in that it gives priority to economic issues and promotes sex equality only as long as it overlaps with these.²⁴⁸ Being linked to economic actors,²⁴⁹ the principle of equality protects mothers *qua* workers and not *qua* parents. But what about those individuals who are not economic actors? However, More has recently put forward a more positive view arguing that this situation is gradually changing. The principle of equality has started growing "free from market roots" and it will eventually become a constitutional principle: *Martinez Sala*²⁵⁰ may be the first step in this direction.²⁵¹ Finally, the sex equality approach *alone* has proved insufficient: to limit pregnancy to the context of the sex equality legislation has raised the unavoidable formal treatment *versus* substantive treatment debate which has often

²⁴⁷ C. Bovis, C. Cnossen, "Stereotyped Assumption versus Sex Equality: a Socio Legal Analysis of Equality in the European Union" (1996) 12 IntJCompLLIR 7.

²⁴⁸ *Inter alia*, S. Fredman, "European Discrimination Law: a Critique" (1992) 21 ILJ 119; to a certain extent see also H. Fenwick, T. Hervey, "Sex Equality in the Single European Market: New Directions for the European Court of Justice" (1995) 32 CMLRev. 443. However they use this argument to criticise the Court and not the EC legislation. G. More, "Equality of Treatment in European Community Law: The Limits of Market Equality", in *Feminist Perspectives on the Foundational Subjects of Law*, A. Bottomley (ed.), 1996, Cavendish, 261; L. Flynn, "The Internal Market and the European Union: Some Feminist Notes", in *Feminist Perspective on the Foundational Subjects of Law*, A. Bottomley (ed.), 1996, Cavendish, 279; C. Barnard "The Economic Objectives of Article 119", in *Sex Equality Law in the European Union*, T. Hervey, D. O'Keeffe (eds.), 1996 Wiley, 321.

²⁴⁹ In this sense Everson talks about "market citizens", M. Everson, "The Legacy of the Market Citizen", in *New Legal Dynamics of European Union*, J. Shaw, G. More (eds.), 1995, Clarendon, 73.

²⁵⁰ Case C-85/96, *Martinez Sala v. Freistaat Bayer*, [1998] ECR I-2961.

²⁵¹ G. More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?", in *The Evolution of EU Law*, P. Craig, G. de Búrca (eds.), 1999, Oxford University Press, 517.

resulted in a protectionist approach imposing on women an undesirable protection which often limits their position in the employment market.²⁵²

Thirdly, legislation presents institutional problems: negotiations involve a great deal of time and results can take a long time to be achieved; furthermore Directives leave a large discretion to the Member States as to the implementation, a system open to abuse at the expense of individuals. On the top of this, to claim remedies before the Court of Justice has not proved to be easy!²⁵³ Finally, despite the improvements achieved, legislation in this field is still very much a political compromise, carrying with it all the problems associated with these arrangements.

18.1 The Equality Directives

The first Equality Directives were issued in the mid 1970s as part of the programme for the extension of the non-discrimination principle established by Article 119 EC (now 141 EC), following a report which emphasised the problems of sex discrimination.²⁵⁴ Although the Equal Pay Directive does not explicitly mention the issues under analysis, it is relevant as it prohibits any discrimination in pay on grounds of sex. The first EC measure which explicitly considered the issues under analysis was the Equal Treatment Directive. Despite the fact that it can be regarded as an “extension” of the equality

²⁵² **S. Demosthenes**, *Protective Barriers: The Discriminatory Effects of Women Protection Laws in the European Community*, Det Juridiske skrifteserie nr 59, University of Bergen. Furthermore the necessity to link the sex equality and the health and safety approach, appears from recent decisions of the Court such as Case C-411/96, *Boyle*, [1998] ECR I-6401 and Case C-66/96, *Høy Pedersen*, [1998] ECR I-7327.

²⁵³ E.g. the *via crucis* of Ms. Gabrielle Defrenne and Ms. Helen Marshall; Case 80/70, *Defrenne (I)*, [1971] ECR 445; Case 43/75, *Defrenne (II)*, [1976] ECR 455; Case 149/77, *Defrenne (III)*, [1978] ECR 1365; Case 152/84, *Marshall (I)*, [1986] ECR 723; Case 271/91, *Marshall (II)*, [1993] ECR I-4367. For a detailed comment on these cases see **H. Cullen, A. Charlesworth**, “Portia’s Daughters the Role of the Individual Litigant in Developing Sex Discrimination Law” (1995) 97 *West Virginia Law Rev.* 751.

²⁵⁴ **E. Sullerot**, “L’Employ des Femmes et ses Problèmes dans les Etats Membres de la Communauté Européenne”, 1970, EC Commission, Bruxelles, as discussed in **G. More**, “Equal Treatment of Sexes in European Community Law: What does Equal Mean?” (1993) 1 *FLS* 45.

principle which provided only for equal pay in Article 119 EC (now 141 EC), its legal basis is Article 235 EC (now 308 EC). This provision is used when the Commission lacks any other means to achieve one of the objectives of the Community and requires unanimity.²⁵⁵ The Directive aims at putting “into effect in the Member States the principle of equal treatment for men and women as regards access to employment (...), vocational training and (...) working conditions” (Art. 1).²⁵⁶ For the purpose of the Directive “equal treatment” means that discrimination on grounds of sex, either directly or indirectly, by reference in particular to marital status or family, is forbidden. It is, however, limited to pregnancy and maternity and does not call into consideration either paternity or parenthood. Article 2 sets out derogations to this principle and Article 2(3) specifically mentions maternity, stating that “[t]his Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity”. The Directive seems to include a paradox: maternity came into EC legislation both as a part of the equal treatment principle and, at the same time, as a derogation from it. In doing that it is based on the Aristotelian concept of equality: when women are in the same situation as men they must be treated equally but when they are similarly situated they can be treated differently, *in casu* it sets out a derogation in order to protect them.

The protective aim of the Equal Treatment Directive has been emphasised by the Court of Justice on several occasions, the most well known being the infamous statement in *Hofmann*. Here the Court stated that the Directive aims at protecting women in two respects:

“[f]irst (...) to ensure the protection of woman’s biological condition during pregnancy and thereafter until such time as her physiological

²⁵⁵ For an in depth analysis of the evolution of these provisions under the Treaty of Amsterdam, see **H. Cullen, A. Charlesworth**, “Diplomacy by other Means: the Use of Legal Basis Litigation as Political Strategy by the European Parliament and Member States” (1999) 36 CMLRev. 1243.

²⁵⁶ The first draft of the Equal Treatment Directive had a wider scope of application COM (75) 36 final, 12 February 1975. It was accompanied by a Memorandum which specifically acknowledged that despite the fact that the situation of women at work was as important as the situation of women at home, the Community did not have the competencies to deal with it and had to limit its intervention to the position of women in the employment market.

and mental functions have returned to normal after childbirth; secondly (...) to protect the special relationship between a woman and her child".²⁵⁷

The Court also supported the idea that the Directive was based on the assumption that women must enjoy special protection because they form a "weaker category". This was reiterated in *Johnston* where the Court held that the women's vulnerability can be a "determining factor" and can justify the exclusion of women from certain jobs (*in casu* the R.U.C reserve).²⁵⁸ Ellis has argued that in this case the Court has adopted a "superficial and non analytical approach"²⁵⁹ and omitted to consider that women, if adequately trained, could be employed in the same position as men.²⁶⁰ The protection offered by the Directive may also be undesirable. It established "protective barriers"²⁶¹ namely, it protected women to the extent that they were not always able to enjoy the same freedom as that given to men and therefore it limited their opportunities in the employment market.²⁶² Seen in this light, the Equal Treatment Directive does not really encourage the establishment of sex equality. Rather, by offering special protection to women, it endorses the idea of the two separate spheres and the fact that women "belong" to the domestic sphere, thus reinforcing sex inequalities.²⁶³ Although the

²⁵⁷ Case 184/83, *Hofmann*, [1984] ECR 3047, at para 24; see also Case 163/82, *Commission v. Italy*, [1983] ECR 3273; Case 312/86, *Commission v. France*, [1988] ECR 6315.

²⁵⁸ Case 222/84, *Johnston v. Chief Constable the RUC*, [1986] ECR 1651; see also Case 318/86, *Commission v. France*, [1988] ECR 3559.

²⁵⁹ E. Ellis, "Can Public Safety Provide an Excuse for Sex Discrimination?" (1986) LQR 496.

²⁶⁰ G. More, "Equal Treatment of the Sexes in EC Law" (1993) 1 FLS 45; see also, A. Arnall, "EC Law and the Dismissals of Pregnant Police Women" (1995) 24 ILJ 215.

²⁶¹ S. Demosthenes, *Protective Barriers: The Discriminatory Effects of Women Protection Laws in the European Community*, Det Juridiske skrifteserie nr 59, University of Bergen.

²⁶² Following this approach, an English Court ruled to prevent an employee from driving tankers containing a substance that was dangerous to women of child-bearing age, despite the fact that she stated that she did not want children; *Page v. Freight Hire Ltd*, [1981] 1 All ER 394.

²⁶³ E.g. H. Fenwick, "Special protection for Women in European Union Law", in *Sex Equality in the EU*, T. Hervey, D. O'Keeffe (eds.), 1996, Wiley, 63.

Court has recently held that the Equal Treatment Directive aims to achieve substantive rather than formal equality,²⁶⁴ the necessity of protecting the relationship between mother and child has consistently been emphasised.²⁶⁵ *Prima facie* the Pregnancy and Maternity Directive, by recognising the unique position and needs of pregnancy and attempting to give women employment rights, represents an attempt to move away from the protectionist approach inherent in the sex equality legislation.

18.2 *The Pregnancy and Maternity Directive*

The Pregnancy and Maternity Directive is an example of the employment rights/health and safety approach discussed above. It can be argued that, although they have different legal bases, the Pregnancy and Maternity Directive is a development of Article 2(3) of the Equal Treatment Directive, to the extent that it further specifies the contents of the "provisions concerning the protection of women". An important difference remains between the two Directives, however: while the Equal Treatment Directive aims to prevent challenges to national legislation, the Pregnancy and Maternity Directive sets specific standards.

Its adoption was controversial: it was proposed by the Commission in September 1990 as an implementing measure for Articles 16 and 28 of the Community Charter of Basic Social Rights for Workers,²⁶⁶ but only in 1992 did the Member States reach an agreement. The Pregnancy and Maternity Directive was in fact adopted on 19 October

²⁶⁴ Case C-136/95, *Thibault*, [1998] ECR I-2011.

²⁶⁵ Case C-421/92, *Habermann-Beltermann*, [1994] ECR I-1657, at para 21; Case C-32/93, *Webb*, [1994] ECR I-3567 at para 20; Case C-394/96, *Brown v. Rentokill*, [1998] ECR I-4185 at para 17; Case C-136/95, *Thibault*, [1998] ECR I-2011, at para 25 and Case C-411/96, *Boyle*, [1998] ECR I-6401, at para 41.

²⁶⁶ According to Article 16 "measures should also be developed enabling men and woman to reconcile their occupational and family obligations"; Article 28 of the Social Charter states that "[t]he European Council invites the Commission to submit as soon as possible initiatives which falls within its powers (...) with a view to the adoption of legal instruments for the effective implementation (...) of those rights which come within the Community's area of competence".

1992 and, according to Article 14 had to be implemented by 19 October 1994.²⁶⁷ Article 1 states that the purpose of the Directive is to "implement measures to encourage improvements in the safety and health of pregnant workers and women workers who have recently given birth". Although it can be regarded as a step forward from the Equal Treatment Directive, the Pregnancy and Maternity Directive still raises doubts on both the institutional²⁶⁸ and substantive²⁶⁹ levels.

18.2.1 Institutional issues

As far as the institutional issues are concerned, the legal base of the Directive is Article 118a EC (now 137 EC), as opposed to Articles 100 and 235 EC (now Arts.94 and 308 EC). Article 118a was introduced by the Single European Act (SEA) and provides that the EC Council decides by a qualified majority on a proposal from the Commission, in co-operation with the Parliament and after consulting the Economic and Social Committee. In other words this Article achieves two goals. First, it provides for increased co-operation between the institutions, in particular giving more power to the Parliament, which is well known for being the most progressive institution when it comes to social policy. Secondly, directives adopted under this procedure avoid the stumbling block of unanimity.²⁷⁰ This was crucial for the adoption of the Pregnancy and

²⁶⁷ The Commission has already brought infringement procedures *ex* Article 169 EC (now 226. EC) for the non-communication of national implementing measures against Portugal, Italy, France, Germany, Belgium, Greece and Luxembourg. See also EC Commission Report on the Implementation of Council Directive 92/85, COM (1999) 100 final.

²⁶⁸ **D. Muffat-Jandet**, "Protection of Pregnancy and Maternity" (1991) 20 ILJ 76.

²⁶⁹ *Inter alia*, **E. Ellis**, "Protection of Pregnancy and Maternity" (1993) 22 ILJ 63.

²⁷⁰ Although Article 118a, especially the majority system, is crucial for the development of social policy, it should not be overemphasised. Commenting on Directive 92/85, Ellis remarks that "it is an over-simplification to say that the principle of majority voting means that a Member State can now be obliged to go along with legislation of which it disapproves: the reality remains that is still plenty of scope for a recalcitrant Member State to scupper proposed legislation"; **E. Ellis**, "Protection of Pregnancy and Maternity" (1993) 22 ILJ 63. However the situation has changed following the Treaty of Amsterdam, for amore detailed discussion see *infra*, Chapter VII.

Maternity Directive, which faced considerable opposition from both the UK and Italy. On the one hand, the UK Government argued that the aim of the proposed Directive was too wide and it would have caused a “dramatic change” within the UK. Furthermore, the UK maintained that only health and safety issues justify the use of Article 118a EC as a legal base.²⁷¹ The Italian government, on the other hand, abstained as a protest against the UK. Paradoxically, however, one of the main limits of the Directive is the legal basis itself. Article 118a states that “Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers ...”. This means that, although the legal base is Article 118a, the emphasis of the Pregnancy and Maternity Directive is on health and safety rather than on the working environment, which goes further than physical hazards.²⁷² In the Preamble of the Pregnancy and Maternity Directive, the Commission attempted to justify the health and safety approach with “the fatigue associated with the conditions of pregnant women (...) the ergonomic difficulties faced at the workplace by women workers in late pregnancy (...) the delicate conditions of women workers in late pregnancy and immediately after giving birth”. It is arguable that this approach has undermined the social and human status of pregnancy and maternity by classifying them almost as mere “medical provisions”. Furthermore, by addressing these “medical provisions” to women only, the Pregnancy and Maternity Directive reinforces the stereotype that pregnancy is a sort of sickness. Why is a similar concern towards men’s reproductive health not contemplated?²⁷³ It is submitted that had the emphasis been on the working environment, the scope of the Pregnancy and Maternity Directive, would probably have been wider.

²⁷¹ Background Report on Protection at Work for Pregnant Women or Women who have recently Given Birth (ISEC/B 25/90, 5 October 1990) London CEC, at 1.

²⁷² The Pregnancy and Maternity Directive was in fact introduced within the framework of Health and Safety Framework Directive; Council Directive 89/391 EC OJ (1989) L 183/1 which provides for the introduction of measures to encourage improvements in the safety and health of workers at work.

²⁷³ F. Beveridge, S. Nott, “A Hard Look at Soft Law”, in *Law Making in the European Union*, P. Craig, C. Harlow (eds.), 1998, Kluwer, 285.

18.2.2 *The content of the Pregnancy and Maternity Directive*

Concerning the content of the Pregnancy and Maternity Directive, the first ambiguity arises from the subjects to which it applies. Article 2 specifies that a pregnant worker is a worker who has recently given birth or a worker who is breast-feeding “who informs her employer of her condition”: does it mean that women working in agriculture or self-employed assisting a spouse are not protected? Or that a visibly pregnant woman who has not informed her employer of her pregnancy is not protected? Although there is a clear EC definition of “worker”²⁷⁴ the definitions of “pregnant worker” and “worker who has recently given birth” are left to the Member States. This has led to disparate treatment as in certain States certain categories of women are excluded and this can potentially lead to a breach of the Directive.²⁷⁵ This, however, is not the main drawback of the Pregnancy and Maternity Directive, which lies in the fact that this measure is a political compromise carrying all the inherent problems of such arrangements. As a consequence of this, the substantive provisions have been considerably weakened and this appears clearly when comparing the first draft of the Directive with the final outcome.²⁷⁶

The Pregnancy and Maternity Directive provides for a certain degree of protection both *ante* and the *post* confinement. During the *ante* confinement period, Articles 3 to 6 require a certain degree of safety in the workplace. A specific obligation on employers to keep employees informed of how to avoid these dangers, which was included in the first draft, is not included in the final version. The main drawback of these provisions is

²⁷⁴ *Inter alia*, Case 75/63, *Hoekstra*, [1964] ECR 177; Case 53/81, *Levin*, [1982] ECR 1035; See P. Craig, G. de Búrca, *EU Law - Text, Cases and Materials*, 1998, Oxford University Press, Chapter 16.

²⁷⁵ EC Commission Report on the Implementation of Council Directive 92/85, COM (1999) 100 final, Brussels 15 March 1999.

²⁷⁶ F. Beveridge, S. Nott, “A Hard Look at Soft Law”, in *Law Making in the European Union*, P. Craig, C. Harlow (eds.), 1998, Kluwer, 285; see also, “Draft Pregnancy Law Strengthened” (1992) 44 EOR 3.

that they focus on the employee rather than on the risk.²⁷⁷ Article 7 states that during pregnancy and for a period after the childbirth, women are not obliged to perform night work. In this provision the tension between equal and special rights appears clearly. Article 7 can be regarded as a specification of Articles 3 to 6. A specific problem is, however, that it can result in the granting of leave to women without an obligation of economic benefits.

Furthermore, according to Article 9 expectant mothers are allowed to be on leave without loss of pay in cases of *ante* natal examination. The most important provision of the Pregnancy and Maternity Directive is, at least potentially, Article 8 which states that Member States shall take the necessary measures in order to ensure that pregnant workers are entitled to a continuous period of maternity leave of at least fourteen weeks, two of which must be compulsory. The first draft of the Directive also provided for a few days of paternity leave at the time of the birth, but this was not included in the final draft.

Following Article 11, during this period the employee is entitled to the "maintenance of a payment (...) and/or entitlement to an adequate allowance". Also on this point, the first draft of the Pregnancy and Maternity Directive was more generous in providing for sixteen weeks fully paid maternity leave. As it is left to the Member States and employers to determine the amount of the "adequate allowance", the fact that a woman suffers a loss of pay in this period does not in itself constitute a breach of the Directive. The Court has provided some guidelines by stating that the adequacy of the allowance must be determined with the same criteria of "other forms of social protection (...) in the case of justified absence from work".²⁷⁸ As the "justified absence" refers to sick leave, this provision relies on the male norm. Furthermore the right to receive benefits is conditional on a qualification period of up to twelve months. The difficulties surrounding the question of pay provide a good example of the low "market

²⁷⁷ H. Fenwick, "Special Protection for Women in European Union Law", in *Sex Equality in the European Union*, T. Hervey, D. Keefe (eds.), 1996, Wiley, 63, at 76.

²⁷⁸ Case C-342/93, *Gillespie*, [1996] ECR I-475, at para 20.

importance” which is attached to parenthood and caring responsibilities. Article 10 prohibits dismissal of an employee from the beginning of the pregnancy to the end of the maternity leave “save in particular cases not connected with their conditions” which the employers must cite in writing. Can the unavailability for work during a specific period, such as would be the case for employees on a fixed term contract, be considered as one of these cases? Furthermore, the Pregnancy and Maternity Directive does not cover a ban on dismissal or non-selection for a job on account of pregnancy. Provisions in this respect were contemplated by the draft Directive but do not appear in the final version. A further gap in the Pregnancy and Maternity Directive is that it does not have any provisions contemplating the return of women to work. The right to return to work is a corollary to the ban on dismissals. Finally, Article 11 protects employment rights and under Article 12 Member States shall ensure that individuals have the means to enforce the Directive before their National Courts.

The majority of the Member States provide for a higher degree of regulation than that offered by the Directive. In cases where the protection of the Pregnancy and Maternity Directive is less comprehensive, Article 13(1) prohibits Member States from using it as an excuse to lower the national standards. Fears have, however, been expressed that the EC legislation could lead to the dilution of rights provided by national legislation.²⁷⁹

18.3 The relationship between sex equality and employment rights

After having analysed the main features of both the Equal Treatment Directive and the Pregnancy and Maternity Directive, the relationship between them must be considered. The Pregnancy and Maternity Directive shifts the focus from a pure sex equality approach to an employment rights/health and safety approach. This means that these situations are regulated independently from the (ill-male) comparator implied in the sex

²⁷⁹ M. Lai, “Tutela della Maternità nella Legislazione Europea” (1993) DPL 77.

equality principle that, although the ECJ has on many occasions reiterated that this comparison must be removed,²⁸⁰ it is still disturbingly present.²⁸¹ Therefore, *prima facie*, it can be seen as a step forward: it makes it easier, for example, to claim protection against dismissals during the period of maternity leave without having to prove discrimination. It still has pitfalls, however. For example, as discussed above, it does not cover the situation where a woman is refused appointment on the grounds of pregnancy or maternity. In *Dekker*, the Court solved this situation in the light of the Equal Treatment Directive. The same occurred in the case of dismissals on the grounds of pregnancy related illness. Again this was tackled by the Court in *Hertz, Larsson* and *Rentokil* by applying the Equal Treatment Directive.²⁸² There could also be cases of conflict between the two Directives, for example when a pregnant employee applies for a job for which she is fully qualified, but which necessarily entails exposure to risks listed in the Pregnancy and Maternity Directive, and no alternative work is available.²⁸³

In the light of the above it follows that the two should not be seen as separate and mutually exclusive but should be read in conjunction. Also, now that the Pregnancy and Maternity Directive is fully incorporated in the legal systems of the Member States, Articles 2 and 5 of the Equal Treatment Directive remain crucial for clarifying the essence of the rights. In other words, the specific employment rights have to be interpreted in light of the sex equality principle (*i.e.* women must have 14 weeks maternity leave in order to achieve equality). The need for the clarification of the relationship between the two Directives has been advocated for a long time by legal

²⁸⁰ See in particular, Case C-177/88, *Dekker*, [1990] ECR I-3941 and Case C-32/93, *Webb*, [1993] ECR I-3567.

²⁸¹ E.g. in Case C-394/96, *Brown v. Rentokil*, [1998] ECR I-4185, see **M. Wynn**, "Pregnancy Discrimination: Equality, Protection or Reconciliation?" (1999) 62 MLR 435, at 439.

²⁸² **J. Shaw**, "Pregnancy Discrimination in Sex Discrimination" (1991) 16 ELRev. 430.

²⁸³ **Jacqmain**, "Pregnancy as Grounds for Dismissal" (1994) 23 ILJ 355.

writers²⁸⁴ and was anticipated by the Court in *Rentokil* where it became clear that the Pregnancy and Maternity Directive does not “replace” the Equal Treatment Directive. The relationship between the two Directives was further clarified in *Boyle* and *Høy Pedersen*. Following the principles established by these cases pregnant employees can rely on both the Pregnancy and Maternity Directive and the Equal Treatment Directive, but while on maternity leave, since their situation cannot be compared with that of a sick man, they cannot rely any longer on the equal treatment principle and therefore their situation is regulated only by the Pregnancy and Maternity Directive. Although the relation between the two Directives established in *Rentokil* must be welcomed, the line which the Court has drawn can be questioned. Why, if discriminated against on grounds of pregnancy, can an employee claim a breach of the Equal Treatment Directive as pregnancy is a situation unique to women, but when on maternity leave she cannot? A possible explanation could be that, as stated in *Gillespie*, a woman on maternity leave is no longer a “worker” and thus is different from both a man at work or a man off work.²⁸⁵ It is, however, arguable that, considering that the principle of equal treatment between men and women is expressly mentioned in the Preamble of the Pregnancy and Maternity Directive, its provisions should be interpreted in light of the Equality Directives: the line drawn by the Court does not seem to achieve this purpose.²⁸⁶

18.4 The Directive on Parental Leave and Leave for Family Reasons

²⁸⁴ J. Shaw, “Pregnancy Discrimination in Sex Discrimination” (1991) 16 ELRev. 430 and see also A.G. Ruiz-Jarabo Colomer’s Opinion in Case Case C-394/96, *Brown v. Rentokil*, [1998] ECR I-4185, at para. 23.

²⁸⁵ Case C-342/93, *Gillespie*, [1996] ECR I-475, at para 17.

²⁸⁶ E. Caracciolo di Torella, “Recent Developments in Pregnancy and Maternity Rights” (1999) 28 ILJ 79.

“No one is indispensable, except to their children.”²⁸⁷

The Parental Leave Directive is of particular interest as it is the only relevant piece of EC legislation addressed to both parents and that acknowledges the importance of caring responsibilities. There are two main reasons behind its adoption: considerations of social policy and economic concerns. Considerations of social policy are dictated by the need to give full implementation to the principle of equal treatment and the increasing awareness that family life and employment are strictly linked. Economic concerns are due to the acknowledgement that greater participation of women in employment is not only a question of social justice but is also in the EU's economic interests. Accordingly, if adequate provisions are provided to enable men and women to reconcile their occupational and family obligations, women could take advantage of the new job opportunities created by the single market.²⁸⁸

The Commission has been working to introduce parental leave arrangements since the early 1980s.²⁸⁹ On 24 November 1983 it submitted a proposal for a Council Directive on parental and leave and leave for family reasons.²⁹⁰ This proposal “suffered from the same fate as many other unadopted drafts: it failed to gain the requirement of unanimity within the council, mainly due to the negative attitude of the British Government which was reluctant to impose (...) additional costs on employers”.²⁹¹ The first binding Act, the Parental Leave Agreement/Directive, was enacted only in 1996.

²⁸⁷ Swedish postmaster, quoted in “Spending Time with the Family”, *The Financial Times*, 12 November 1998.

²⁸⁸ Agence Europe, n° 7226, 13/14 July 1998.

²⁸⁹ Draft Directive on Parental and Family Leave [1984] OJ C 316/7; see **J. McMullen**, “The New Proposals for Parental Leave and Leave for Family Reasons” (1986) 7 *The Company Lawyer* 30; **F. P. Davidson**, “Parental Leave - Time for Action?” (1986) *JSWL* 281; **E. Ellis**, “Parents and Employment: an Opportunity for Progress” (1986) 15 *ILJ* 97.

²⁹⁰ COM(83) 686 final followed by COM (84) 631 final.

²⁹¹ **M. Schmidt**, “Parental Leave: Contested Procedure, Creditable Results” (1997) *IntJCompLLIR* 113.

The following sections analyse this measure from both an institutional and substantive point of view.

18.4.1 Institutional issues of the Parental Leave Directive

The Framework Agreement on Parental Leave was signed by the Social Partners²⁹² after five months of talks on 14 December 1995 following the procedure of the Protocol and the Agreement on Social Policy. These together form the so called "Social Chapter" which is one of the "bits and pieces"²⁹³ which the Treaty of Maastricht added to the European Union. Due to the opposition of the UK Conservative Government to the development of social issues within the Treaty, social policy was divided into two parts; this division was the celebrated "twin-track Europe".²⁹⁴ There were a few scattered provisions, binding upon all the Member States, in the EC Treaty plus a Social Policy Protocol (SPP) and a Social Policy Agreement (SPA), which were not binding upon the UK, outside the Treaty. The purpose of such unusual arrangements, whose legality is questionable, was to allow the 11 (now 15) Member States to go along with the objectives of the European Community Social Charter. This situation is changed, however. On 1 May 1997, a new UK Government was elected and the new Labour Government appears to be committed to the EU social aims.²⁹⁵ As a result of this commitment, the *status* of EC social policy is also strengthened: now the social protocol

²⁹² The Social Partners are the Union of Industries of the European Community (UNICE), the European Trade Union Confederation (ETUC) and the European Centre for Public Enterprises (CEEP).

²⁹³ **D. Curtin**, "The Constitutional structure of the Union: a Europe of Bits and Pieces" (1993) 30 CMLRev. 17.

²⁹⁴ **J. Shaw**, "Twin-Track Social Europe - the Inside Track", in *Legal Issues of the Maastricht Treaty*, D. O'Keeffe, P. Twomey (eds.), 1994, Wiley, 295.

²⁹⁵ **J. Learmond-Criqui, L. Wilson**, "The Social-Chapter and the EU Social Policy: what's in Store for UK Business?" (1998) BLR 3; see also the comment on the Italian press "La Piccola Rivoluzione di Blair: piu' Diritti ai Lavoratori Inglesi", *La Repubblica*, 29 January 1999.

is part of the main body of the Treaty and the UK is bound to it as the other Member States are.²⁹⁶

After the Framework Agreement between the social partners was signed,²⁹⁷ it was adopted by the Commission *ex* Article 4(2) SPA (now 139 EC) as a proposal for a Directive on 3 June 1996 and it entered into force as a Directive on 3 June 1998 (3 June 1999 in case of special difficulties).²⁹⁸ This means that the Parental Leave Agreement has become “act” within the meaning of Article 189 EC (now Art. 249 EC) and as such it will be “binding as to the result to be achieved”. Originally this act was not considered to be binding on the UK, but as mentioned above, this is no longer the case.²⁹⁹

The Parental Leave Directive was challenged by the European Union of Crafts and Small and Medium-Sized Enterprises (UEAPME) *ex* Article 173 EC (now Art. 230 EC) claiming that the Directive implements an Agreement negotiated without their participation. The claim has, however, been rejected by the Court of First Instance, which considered that the social partners were sufficiently representative. Furthermore, the Court of First Instance has emphasised the fact that it is the position of the employers that must be taken into account and not the type of enterprises.³⁰⁰

²⁹⁶ C. Barnard, “The United Kingdom, the “Social Chapter” and the Amsterdam Treaty” (1997) 26 ILJ 275; for the text of the new provisions and brief comment see A. Duff (ed.), *The Treaty of Amsterdam - Text and Commentary*, 1997, The Federal Trust, Sweet and Maxwell, at 66-73.

²⁹⁷ M. Biagi, “Fortune Smiles on the EU Presidency: Talking Half-Seriously About the Posted Workers and the Parental Leave Directives” (1996) IntJCompLLIR 97.

²⁹⁸ Council Directive 96/34 OJ L 145/4-9.

²⁹⁹ It has, however, been argued that given the weaknesses of the rights conferred by the Parental Leave Directive, its impact on the UK would have not been considerable, see C. McGlynn, “An Exercise in Futility: the Practical Effects of the Social Policy Opt-Out” (1998) 49 NILQ 60.

³⁰⁰ Case T-135/96, *Union Européenne de L'Artisanat et des Petites et Moyennes Entreprises (UEAPME) v. Council of the European Union*, [1998] ECR II-2335; see also Agence Europe, 25 June 1998, n. 7249 at 14-15; Agence Europe, 6 July 1998, n. 7257, at 15 and B. Bercusson, “Democratic Legitimacy and European Labour Law”(1999) 28 ILJ 153.

18.4.2 The content of the Parental Leave Directive

The main aim of the Parental Leave Directive is to enable employees (men and women) with young families to share the care of young children and thus to reconcile their parental and professional responsibility. In this respect, it has been regarded as the measure which finally introduces a significant change. It is interesting to note here that para 8 of the General Considerations states that “men should be encouraged to assume an equal share of family responsibility, for example, they should be encouraged to take parental leave ...”.

As for the specific rights envisaged by the Parental Leave Directive, Clause 1 (2) states that it is addressed to “all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State”. This means that both full-time workers and part-time workers are covered by the Directive. Furthermore, the Parental Leave Directive is applicable to undertakings of any size. This, although not clearly stated, can be assumed from Clause 2 (e) which provides for Member States to give special entitlements to small undertakings. Employees have an *individual* right to *unpaid* parental leave both to look after a child for at least three months up until the age of eight (it is for the Member State to set the exact length of the period), and for urgent family reasons. An important feature of the parental leave is that *in principle* it is *not transferable*. Furthermore, the Parental Leave Directive leaves open the possibility that the leave could be arranged in a flexible way, *id est* full-time, part time, fragmented or in the form of a time-credit system. Also, the definition of the practical details concerning the parental leave, such as conditions for entitlement and access, the modalities of application and the period of notice to be given to the employer, is left to the Member States. Again, Member States are responsible for defining the circumstances where an employer is allowed to postpone the granting of parental leave for “justifiable reasons” related to the operation of the undertaking. The Directive provides some examples of these “justifiable reasons”: the work is of a seasonal nature, a replacement cannot be found within the notice period, a specific function is of strategic importance or a significant proportion of the work-force applies for parental

leave at the same time. Employees are protected against dismissals on account of the fact that they are using the parental leave. The Parental Leave Directive also guarantees that the rights acquired by the start of the leave remain untouched and that there is continuity of social benefits. On this point one case has already been decided by the ECJ. In *Lewen* the issue under discussion was the exclusion of a worker from the payment of a Christmas bonus which was paid when the worker was on parental leave. Unfortunately the Court gave a very restrictive interpretation and held that a Christmas bonus is not a right within the meaning of Clause 2(6) of the Parental Leave Directive. As a result, it is arguable that the Court did not help to promote the social value of the concept of parenthood.³⁰¹

Finally, after using the parental leave, parents have the right to return to the same job or, if this is impossible, to an equivalent or similar job within the same undertaking. Another very important feature of the Directive is that it recognises that parents needs and responsibilities do not finish after the months of parental leave: it also entitles the employees to take time off on the grounds of family reasons, for instance if the child is ill. For this a period of qualification it is not provided: any worker can enjoy it.

Prima facie, the Parental Leave Directive represents a valuable step in reconciling paid work and family responsibilities and in achieving full equality of opportunity between genders. A closer look, however, reveals that it is not flawless and is still based on the idea that mothers still have the main responsibility for child-care. The most obvious weak point of the Parental Leave Directive is the fact that it does not mention any provision concerning financial compensation. This can easily be regarded as a deterrent for many working parents, especially fathers. In the average family the father earns more than the mother and therefore it will be more likely that the family will give up her income. To a certain extent, the problems which the lack of financial support might create were acknowledged by the proposed Directive of 1983 which suggested that "during parental leave, workers may receive a parental leave allowance".

³⁰¹ Case C-333/97 *Susanne Lewen v. Lothar Denda* referred to the Court in 1998; decided on 21 October 1999. See further E Caracciolo di Torella, "Childcare, Employment and Equality in the European Community: First (False) Steps of the Court (2000) 25 ELRev. 310.

A further element of confusion is provided by the fact that the parental leave is *in principle* non-transferable. In cases where maternity leave, such as that provided by the Pregnancy and Maternity Directive, is short, it will be easy to reach the conclusion that this opportunity will more likely be used by mothers rather than fathers. The wording "in principle" actually leaves a door ajar on this possibility and it will be crucial to see how it is interpreted. Furthermore, in this area doubts are reinforced by the fact that, according to Clause 2 point 1, the parental leave can be taken "until a given age up to eight years to be defined by the Member States and/or Social Partners". This makes it possible for Member States to set a lower age limit, such as one year. Again, if the leave is available while the child is under one year it is more likely that it will be taken by mothers rather than fathers. This can be also reinforced by the fact the mother may be breast feeding. Another uncertainty is the fact that it is up to Member States to decide the modalities of application such as the length of the period of employment necessary for qualification.

It is submitted that in order to be meaningful, the Parental Leave should be longer, paid, specifically addressed to either one or the other of the parents and, once terminated, parents should have the opportunity to arrange their (paid) work so as to reconcile it with their family responsibility.

19 *The ECJ pregnancy and maternity saga*

"The European Court has been the major driving force behind recent developments of (...) anti-discrimination law, leading to crucially important changes. It is in the context of pregnancy that the EC has made the greatest strides towards transcending a purely male norm."³⁰²

³⁰² S. Fredman, "European Community Discrimination Law: a Critique" 21 ILJ (1992) 119.

The European Court of Justice has contributed to the development of rights relating to pregnancy and maternity with several cases already decided and many referred.³⁰³ This contribution has left the majority of commentators unsatisfied: it has been argued that there is an (apparent) lack of coherence which has led to some confusion and the achievements made in the earlier cases have been watered down.³⁰⁴ This research maintains that a form of categorisation is the only way to understand the case law in this area. Many attempts have been done in this sense, some of them following a chronological criteria, others in the light of the ECJ's usual technique, that is to establish a broad principle and then to try to define its limits and to specify it.³⁰⁵ Concerning the former, although represents a valuable approach, it is only partially satisfactory, as it still fails to explain the reasoning of the Court. As for the latter, although at first it seemed a logical path to follow, it has had the effect of emphasising the alleged discrepancies.

Furthermore, the distinction between direct and indirect discrimination seems to be less significant in this area as the language used by the Court does not change when dealing with these areas. Wintemute has recently suggested that a possible way to analyse the case law is to reconsider it in the light of the fact that pregnancy discrimination amounts as "*prima facie* indirect discrimination" rather than direct discrimination. In this way, it is possible to argue that the different results outcomes of the ECJ's case law depend on whether a justification exists.³⁰⁶ As a consequence of this

³⁰³ Case C-226/98 *Jørgensen* and Case C-368/98 *Baudin and Blodeau*.

³⁰⁴ *Inter alia*, H. Fenwick, T. Hervey, "Sex Equality in the Single Market: New Direction from the European Court of Justice" (1995) 32 CMLRev. 443; C. McGlynn, "Equality Maternity and Questions of Pay" (1996) 21 ELRev. 327; E. Ellis, "Recent Developments in European Community Sex Equality Law" (1998) 35 CMLRev. 379.

³⁰⁵ E.g., the definition of measures having equivalent effect. The main principle was established in *Dassonville* as "[a]ll trading rules (...) which are capable of hindering *directly or indirectly, actually or potentially* intra-Community trade". The Court further specified in the following cases three categorises of "measure": measures related to *characteristics of the product*, measures related the *circumstances in which goods are sold*, and recently in *Keck*, measures related to the *selling arrangements*; Case 8/74, *Procureur du Roi v Dassonville*, [1974] 2 CMLRev. 436; Cases C-267-268/91, *Criminal Proceedings against Keck and Mithouard*, [1993] ECR I-6097.

³⁰⁶ R. Wintemute, "When is Pregnancy Discrimination Indirect Discrimination?" (1998) 27 ILJ 23.

debate, for a long time it has been very difficult to identify the approach of the Court of Justice.

However, as the number of the cases decided has increased, it is now possible to attempt a classification.³⁰⁷ This research suggests dividing them into two main categories, namely judgments on pregnancy and maternity which have an effect within family life and those who have an effect on employment life. These two broad categories should not come as a surprise because the Court has simply followed the division already anticipated by the legislator as it results from the Memorandum annexed to the first draft of the Equal Treatment Directive.³⁰⁸ The border line between these two categories, however, is not always clear cut. Some judgments may well be located within the context of employment life and still have an effect on family life,³⁰⁹ and other judgments might have an impact on both areas.³¹⁰ Furthermore, the cases in the first category focuses on the wider concept of caring responsibility and parenthood; here the ECJ has adopted a limited approach. By means of contrast, in the cases belonging to the second category, the Court has been asked to interpret the direct effects of pregnancy and maternity on the employment market. This area has proved to be easier to regulate and a set of legal principles has began to emerge. Within these two categories there are further distinctions which are analysed in the following sections.

³⁰⁷ The author has made several attempts to classify the case law of the ECJ in this area. An early attempt can be found in **E. Caracciolo di Torella**, "A Place for Maternity in the European Union", in *Legal Feminisms: Theory and Practice*, C. McGlynn (ed.) 1998, Ashgate Dartmouth, 179.

³⁰⁸ **E. Sullerot**, "L'Employ des Femmes et ses Problèmes dans les Etats Membres de la Communauté Européenne", 1970, EC Commission, Bruxelles, as discussed in **G. More**, "Equal Treatment of Sexes in European Community Law: What does Equal Mean?" (1993) 1 FLS 45.

³⁰⁹ E.g. Case 184/83, *Hofmann*, [1984] ECR 3047; Case 22/84, *Johnston*, [1986] ECR 1651.

³¹⁰ E.g. Case 411/96, *Boyle*, [1998] ECR I-6401.

19.1 *The first category: pregnancy and maternity within family life*

As mentioned above, the contribution of the Court to the first category of cases was minimal and disappointing. It relied strictly on a formal equality approach, on the male norm and on the assumption that life is divided into two spheres and that the parental role of (women) employees does not affect their position in the employment.

In *Commission v. Italy*³¹¹ the Court considered a national law giving compulsory maternity leave to the mother of an adopted child under six years of age but not to the father. The Court considered Italy's "legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new born baby in the family during the delicate initial period" and ruled that the adoptive father does not have the same right of leave given to the adoptive mother. However, by failing to explain why fathers need not to be involved in this delicate period, it reinforced the idea that only mothers can take care of young children. The same approach was confirmed in *Hofmann* where a German father failed to obtain a period of paid leave in order to care for his newborn child.³¹² He challenged this refusal on the basis that had he been the mother he would have been entitled to such benefits. His argument was that the Equal Treatment Directive permits derogation from the equal treatment principle only in order to protect women before and after childbirth and therefore if the provision of leave goes beyond that function and entails measures for the care of the child in the long term, it should be open to both men and women. The Court did not share this view. It held that the purpose of the Equal Treatment Directive was not to settle questions related to the organisation of the family or to alter the division of responsibility between the parents, but to protect women's biological condition during pregnancy and special relationship between mother and child.³¹³ Here again it appeared unwilling to alter the traditional division of roles where the mother is the primary childcarer and the father is accordingly denied the possibility to develop a closer

³¹¹ Case 163/82, *Commission v. Italy*, [1983] ECR 3273.

³¹² Case 184/83, *Hofmann*, [1984] ECR 3047.

³¹³ Case 184/83, *Hofmann*, [1984] ECR 3047, at paras 24 and 25.

relationship with the new born child.³¹⁴ This point was further emphasised by the Advocate General who stated that leave for mothers after childbirth was also necessary for the “upkeep of the household”.³¹⁵ A few years later in *Commission v. France*,³¹⁶ the Court ruled that extensive privilege for women only, not directly connected with pregnancy and maternity *stricto sensu*, such as extended maternity leave, time off work in case of sickness of children, and extra day of holidays per year per child, were not justified by Article 2(3) of the Equal Treatment Directive. The argument of the Court was that there was no inequality requiring these advantages. By doing this, it relied not only on a formal approach of sex equality, but it clearly denied that family life (*id est* the domestic sphere) can have an impact on employment (*id est* the public sphere). Had the Court used the argument of the Commission, namely that “the evolution of society is such that in many cases working men, if they are fathers, must share the tasks previously performed by the wife as regards the care and organisation of the family”,³¹⁷ it might have been more convincing! It might be arguable that, if there is a positive element in these judgments is that they have highlighted existing gaps. The timid (and inadequate) response given by the legislation to these questions was the adoption of the Pregnancy and Maternity Directive (filling some of the gaps in highlighted in *Commission v. France*) and the Parental Leave Directive (*Commission v. Italy* and *Hofmann*).

Over the years, however, the Court has not modified its approach. Rather, it seems to have adopted a more definite position and this appears clearly from cases recently decided. In *Hill* the issue at stake was a policy which discriminated against

³¹⁴ *Inter alia*, S. Fredman, “EC Discrimination Law: a Critique” (1992) 21 ILJ 119 and N. Burrows, “Maternity Rights in Europe - An Embryonic Legal Regime” (1991) 11 YEL 285.

³¹⁵ Opinion of Mr. Darmon AG in Case 184/83, *Hofmann*, [1984] ECR 3047, at para 11.

³¹⁶ Case 312/86, *Commission v. France (Re Protection of Women)*, [1988] ECR I-6315; see also G. More, “Equal Treatment of the Sexes in European Community Law: What does Equal Mean?” (1993) 1 FLS 43.

³¹⁷ Case 312/86, *Commission v. France (Re Protection of Women)*, [1988] ECR I-6315, at 6322.

jobsharers.³¹⁸ The Court, after having noted that the vast majority of jobsharers “do so to combine family and work responsibilities”,³¹⁹ continued by saying that Community law aims to protect “women within family life [and to] encourage and if possible to adapt working conditions to family responsibilities”.³²⁰ The Court did indeed also mentioned the role of men within the family but it failed to explain what exactly this role involves. From the silence of the Court in this case, it might be assumed that the role of men is the traditional one, namely that of the breadwinner. The idea that men and women have different roles within the family has been reiterated by the Court in *Boyle* where it held that the supplementary unpaid maternity leave as a “special advantage, over and above the protection provided for by Directive 92/85, (...) available only to women”.³²¹ In doing that the Court ignored the Opinion of the Advocate General who pointed out that reserving solely to women the availability of unpaid leave to look after new born children does not help the promotion of equal opportunity.³²²

From the cases above discussed above, it is possible to assess the development of the reasoning of the Court. In *Commission v. Italy* it acknowledged that men and women have different roles when it comes to caring responsibilities and in *Hofmann* it refused to alter them. This was recently reiterated in *Abdoulaye*³²³ where a group of fathers was refused the payment of paternity benefits on the grounds that the benefits in questions are designed to offset the occupational disadvantages inherent in *maternity* leave. In *Commission v. France* it refused to accept that care responsibilities often have an impact on paid employment. This position was taken further in *Hill* where it was

³¹⁸ Case C-243/95, *Hill and Stapleton*, [1998] ECR I-3779 in particular paras 41 and 42; see also C. McGlynn, C. Farrelly, “Equal Pay and the Protection of Women within Family Life” (1999) 24 ELRev. 202 see also Case 411/96, *Boyle*, [1998] ECR I-6401.

³¹⁹ Case C-243/95, *Hill and Stapleton*, [1998] ECR I-3779, at para 41.

³²⁰ Case C-243/95, *Hill and Stapleton*, [1998] ECR I-3779, at para 42.

³²¹ Case 411/96, *Boyle*, [1998] ECR I-6401, at para 79.

³²² Opinion of the Advocate General in Case C-411/96, *Boyle*, [1998] ECR I-6401, at para 60.

³²³ Case C-218/98, *Abdoulaye*, decided on 16 September 1999.

held that paid employment must change in order to allow women to pursue both paid employment and keep caring for young families.

19.2 The second category: pregnancy and maternity within the employment market

The second category of case law focuses on the effect of pregnancy and maternity on the employment market. As mentioned above, here the Court has been quicker in establishing a relatively clear set of principles. The cases decided in this area can be divided into two further categories: cases involving **dismissals on grounds of pregnancy and maternity**, and cases concerning **issues other than dismissals**, such as refusal to appoint a woman on grounds of pregnancy, promotion and pay.³²⁴ In the latter category the Court has not hesitated to establish broad principles in order to protect pregnant employees and working mothers, such as pregnancy discrimination leads to direct discrimination and that the Equal Treatment Directive aims to achieve “substantive, not formal equality”.³²⁵

By way of contrast, in the cases dealing with dismissals the situation has proved to be more complex and, as a consequence, the Court has been more cautious. It is arguable that this complexity is due to the fact that the area of dismissal on the grounds of pregnancy involves not only economic considerations but also a restructuring of the employment market which would require employers to have a very high degree of flexibility. Such a restructuring implies the need to find a balance between the interests of the market and employers and the interests of the employees. On the one hand, employees have the right to be treated according to the principle of equality, and on the other hand, employers cannot be expected to leave a position open for an unspecified period of time. Ignoring these factors will create both administrative difficulties and

³²⁴ E. Caracciolo di Torella, “Thibault in Context: Exiting the Maze?” (1998) 27 ILJ 373.

³²⁵ Case C-136/95, *Thibault*, [1998] ECR I-2011, at para 26.

detrimental consequences for women employees of childbearing age.³²⁶ The following sections analyse the case law in the light of the classification proposed.

19.2.1 Dismissals on grounds of pregnancy and maternity

Dismissals on grounds of pregnancy and maternity have proved to be the most complicated to regulate. Within the category of dismissals it is possible to see a further distinction: **dismissals on the mere grounds of pregnancy**, and **dismissals on grounds of complications arising from the pregnancy**, which focuses on the dichotomy between pregnancy-related illness and generic illness. On the one hand, it has been relatively straightforward to state that dismissals for which the sole reason was (temporary) unavailability for work because of pregnancy are unjustifiable. “Relatively” straightforward because the Court has not explicitly pronounced a ban on dismissals in this context. Instead, it has enacted specific distinctions, such as between permanent and temporary contracts, the practical outcome of which, paradoxically, has been a wide protection against dismissals on grounds of pregnancy. On the other hand, when complications connected with pregnancy occur, the justification for a ban on dismissal is less obvious. When do these complications cease to be considered - and protected - as part of the pregnancy (pregnancy related illnesses) and instead become ordinary illnesses subject to the rules applicable to both men and women? Here in trying to improve the position of pregnant employees the Court has established various distinctions which, although in the majority of the cases have resulted in individual victories,³²⁷ have confused the overall picture.

The following sections analyse the relevant cases not in chronological order but according to the specific issues in question. The first three cases analysed, *Hertz*,

³²⁶ AG. Darmon in his opinion of Case C-179/88 *Hertz*, [1990] ECR I-3979 and Case C-177/88, *Dekker*, [1990] ECR I-3941, at para 9.

³²⁷ In *Habermann, Webb and Rentokil*, the Court upheld the claims of the plaintiff.

*Larsson*³²⁸ and *Rentokil*, focus on the distinction between illness and pregnancy related illness. In the other two cases, *Habermann* and *Webb*, the Court has interpreted questions related to the impact of temporary contracts on dismissals on grounds of pregnancy and maternity.

(i) *Hertz*

Hertz, was decided on the same day as the *Dekker* principles were established.³²⁹ The plaintiff was dismissed after failing to return to work following the expiration of the period of pregnancy, maternity and parental leave. Her absence of over 100 working days was due to an illness originating in pregnancy and childbirth. According to Danish law, it is lawful to dismiss on grounds of prolonged absence, which may be due to illness. The argument of the Danish Court was therefore that men who were been absent for such a long period would also have been dismissed. The case went before the *Højesteret* (Danish Supreme Court), which asked the ECJ for a preliminary ruling on the compatibility of Danish law with the Equal Treatment Directive. In case the answer was affirmative, the *Højesteret* further asked whether that protection applied without any time limit.

In his Opinion, the Advocate General acknowledged that the issue of dismissals on grounds of pregnancy and maternity is less straightforward than the issue of refusal to appoint which was at stake in *Dekker*. This specific case is further complicated by the fact that it does not deal “merely” with dismissals on grounds of pregnancy but it deals with dismissals on grounds of pregnancy related illness. The solution therefore was in the establish a border line between the two. After admitting that he was tempted to suggest a solution where medical conditions which are directly and definitely due to pregnancy and confinement enjoy a sort of immunity, in the sense that the principle of

³²⁸ Case C-400/95, *Larsson*, [1997] ECR I- 2757.

³²⁹ According to the so called *Dekker* principle discrimination on the grounds of pregnancy and maternity is direct discrimination.

equality of treatment would restrain the employer from dismissing his employee for a reasonable period after the event in question, he realised the practical inapplicability of such a suggestion.³³⁰ In fact in cases where complication resulting from confinement are severe, a female worker may remain unable to work for several years, and the implications for the employer could be very onerous.³³¹ In light of the above considerations, he suggested that dismissals on grounds of pregnancy related illness does not constitute direct discrimination.

The ECJ followed the interpretation proposed by the Advocate General. It started by reaffirming the principle established on the same day in *Dekker*, namely that discrimination on grounds of pregnancy is direct discrimination and it confirmed that dismissals on grounds of pregnancy is a form of direct discrimination.³³² However, it immediately departed from principle and held that during the period of maternity leave a woman must be protected against dismissal due to absence, but *after* the expiration of this period the distinction between pregnancy and pregnancy-related illness becomes irrelevant. After the end of maternity leave, therefore, pregnancy discrimination becomes indirect discrimination: in this way also the degree of protection offered is weaker. Furthermore, *Hertz* opens the gate to justification to indirect discrimination. Although somewhat understandable, the distinction proposed by the Advocate General and the Court is an affront to logic. The line drawn is artificial and it is very difficult not to regard the facts in *Hertz* as direct discrimination: it is in fact very unlikely that a man can suffer from illness originating in pregnancy! Had the Court better explained the *ratio* behind this distinction, possibly the outcome would not have been controversial as it has been.³³³ This case can be explained only when

³³⁰ Advocate General Darmon's opinion in Case C-177/89, *Dekker*, [1990] ECR I-3941 and *Hertz*, [1990] ECR I-3979, at para 43.

³³¹ Advocate General Darmon's opinion in Case C-177/89, *Dekker*, [1990] ECR I-3941 and *Hertz*, [1990] ECR I-3979, at paras 45 and 47.

³³² Case C-179/88, *Hertz*, [1990] ECR I-3979, at para 13.

³³³ *Inter alia*, I. Asscher-Vonk, "The Place of Maternity in European Society" (1991) 20 ILJ 152.

considering the tension between the various interests of the employment market. On the one hand, it is unreasonable to require an employer to employ a person who can be on sick leave at any time for an unlimited and undetermined period. On the other hand, however, the interests of the pregnant employees must be considered and the principle of sex equality must be applied.

(ii) *Larsson and Rentokil*

Not surprisingly, a few years later, the Court was asked again to clarify the distinction between illness and pregnancy related illness established in *Hertz*. This happened in two cases, *Larsson* and *Rentokil*, which, despite focusing on a very similar issue, had opposite outcomes.

In *Larsson*, the defendant, who was employed by Føtex Supermarked A/S (Føtex) informed her employer that she was pregnant. During her pregnancy she was twice on sick leave because of pregnancy related illness. Immediately afterwards she took her maternity leave and after this period has expired, she took her annual leave and then, as she was still under treatment, she was again on sick leave. Before the date she was supposed to resume work, she received a letter from Føtex informing her that her employment was terminated. Føtex justified the dismissal on the grounds of "the lengthy period of absence and (...) that it is scarcely likely that you will at any time in future - on grounds of health - be again in the position of to carry out your work in a satisfactory manner". Mrs Larsson claimed that the dismissal was contrary to the national legislation on equal treatment and therefore she brought an action before the Danish Court which referred the case to the ECJ.

In his opinion the Advocate General, Mr Jarabo Riuiz Colomer, departed from *Hertz*. In order to assess whether pregnancy related illness can be considered the same as generic illness he focused not only on the chronological aspect but also on the *cause* of the illness. He suggested that for the purpose of equal treatment, a line at the end of maternity leave should be drawn. From that moment any illness from which a women suffers, whether or not occasioned by pregnancy, will fall under the general rules

applicable to all workers. However, pregnancy related illnesses arising up to the point of the childbirth should not be considered as generic illnesses for the purpose of dismissals after maternity leave.

The Court did not follow the reasoning of the Advocate General. Its answer was very brief and in many respects disappointing. Following its reasoning in *Hertz*, it held that “[t]he Directive does not envisage the case of an illness attributable to pregnancy or confinement”³³⁴ and that “in case of an illness manifesting itself after maternity leave there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness”.³³⁵ Men and women are equally exposed to illness and although certain disorders are specific to one or the other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man. If this is the case, then there is no direct discrimination on grounds of sex.³³⁶ In light of its analysis, the Court concluded that the principle of equal treatment requires that during the period of maternity leave a woman is protected from dismissals but that it “does not (...) preclude account being taken of a woman’s absence from work between the beginning of her pregnancy and the beginning of her maternity leave when calculating the period providing for her dismissals under national law”³³⁷ not even where her absence is due to pregnancy and confinement. This outcome, albeit disappointing is understandable.³³⁸ It must be borne in mind that in dealing with issues related to maternity which imply the unavailability of a person for work, the Court cannot avoid considering the delicate balance between the interests of the employer and employee mentioned in *Hertz*.³³⁹ In this sense *Larsson* can be regarded as a foreseeable

³³⁴ Case C-179/88, *Hertz*, [1990] ECR I-3979, at para 15.

³³⁵ Case C-179/88, *Hertz*, [1990] ECR I-3979, at para 16.

³³⁶ Case C-179/88, *Hertz*, [1990] ECR I-3979, at para 17.

³³⁷ Case C-400/95, *Larsson*, [1997] ECR I- 2757, at para 24.

³³⁸ On this point, see also E. Ellis, *EC Sex Discrimination Law*, 1998, Oxford University Press.

³³⁹ Case C-179/88, *Hertz*, [1990] ECR I-3979, at para 9, see also *supra* section 19.2.

consequence of *Hertz*. In fact, although phrased differently, the questions posed in the two cases focus on the same point: whether for the purpose of dismissal a distinction should be made between pregnancy related illness and generic illness. In *Hertz* the Court refused to make such a distinction as to the period *after* maternity leave and in *Larsson*, as to the period *before* maternity leave.

Does the proposal of the Advocate General to draw a line between pregnancy related illness arising after and that arising before maternity leave offer a more reasonable alternative? Why should pregnancy related illness arising before maternity leave be considered as different from those arising after this period? Furthermore, in both cases the same legislation, namely the Equal Treatment Directive, was applicable. In other words, the Court had to answer to a very similar question with the same instrument. Accordingly the fact that the answer is similar cannot come as a surprise. On the whole, however, it can be said that the formalistic approach adopted by the Court has led to a step backwards in this area. The Court concluded by acknowledging that according to Article 10 of the Pregnancy and Maternity Directive, women are entitled to protection from dismissals during the period from the beginning of the pregnancy to the end of maternity leave. Unfortunately at the time of the case the Directive had not yet entered into force. This point raises some questions: does the statement of the ECJ refer to the same situation of Article 10? Article 10 in fact prohibits "the dismissals of workers (...) during the period from the beginning of their pregnancy to the end of maternity leave ...". It does not mention that absence during this period would not be taken into consideration for subsequent dismissal. It is submitted that the interpretation of the Advocate General, which excludes the application of the Pregnancy and Maternity Directive in this case, is preferable.

More surprising than the practical outcome which, although disappointing, was predictable, was the reasoning of the Court. Immediately after stating that "certain disorders are (...) specific to one sex", it concludes that "the directive (...) does not preclude dismissals on the grounds of absence due to an illness that first appeared during pregnancy or confinement, even where such illness first appeared during

pregnancy and continued during and after the period of maternity leave".³⁴⁰ It seems here that the Court refers neither to direct discrimination as in *Dekker*, nor to indirect discrimination as in *Hertz*, but it considers this case as *absence* of discrimination.

The Court had the occasion to interpret again the distinction between pregnancy related illness and generic illness a few months later, in *Rentokil*. This case differs from these previously decided as here the applicant was dismissed *before* the end of the maternity leave.

Mrs Brown informed her employer (Rentokil) that she was pregnant in August 1990. Immediately afterwards she started experiencing difficulties associated with pregnancy and submitted several medical certificates mentioning various pregnancy-related disorders and she did not come back to work. According to Rentokil's standard contract of employment, if an employee was on sick leave for more than 26 weeks continuously, he/she would be dismissed. Therefore, she received a letter of dismissal taking effect on 8 February 1991. As her child was born on 22 March 1991, she was dismissed while pregnant. She brought the case before the national court which, referring to *Webb* and *Hertz*, dismissed it by stating that it was "reasonably clear and free from doubt".³⁴¹ It reached this conclusion in the light of the distinction drawn by the European Court of Justice between pregnancy and illness related to pregnancy. The House of Lords, however, did not reach the same conclusion and asked the ECJ whether the Equal Treatment Directive prohibits to dismiss a female employee, at any time during her pregnancy as a result of absence through illness arising from that pregnancy.

The Court stated that dismissal of a woman during pregnancy cannot be based on her inability, as a result of her condition, to perform her duties as this would have the effect of rendering ineffective the provisions of the Equal Treatment Directive.³⁴² In reaching this conclusion, it agreed with the Advocate General that "pregnancy is a

³⁴⁰ Case C-400/95, *Larsson*, [1997] ECR I- 2757, at para 20.

³⁴¹ *M. Brown v. Rentokil Ltd.* [1995] IRLR 211, at para 28; see also "No Bias in Dismissals Through Pregnancy Illness", *The Times*, 10 March 1995.

³⁴² See also Case C-32/93, *Webb*, [1994] ECR I-3567, at para 26.

period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some case, to rest absolutely for all or part of her pregnancy".³⁴³ It then went further by acknowledging that these disorders form part of the risks inherent in the pregnancy and therefore are to be regarded as *specific features* of it (emphasis added). Although the protection afforded by the Equal Treatment Directive is limited to the period of maternity leave, it would be against the principle of non-discrimination not to extend it to the period of the pregnancy. In the light of these considerations the Court held that, contrary to what it had stated in *Larsson*, the meaning of the Equal Treatment Directive requires that the period of protection from dismissal must be intended to include the period from the beginning of the pregnancy to the end of the maternity leave. Therefore the Equal Treatment Directive precludes dismissals of a female worker at any time during pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy.

The importance of *Rentokil* lies particularly in two points. First, it clarifies the Court's previous approach. By overruling *Larsson*, the Court specifically acknowledged its intention to follow a new direction. The importance of this cannot be overemphasised. Secondly, it started providing guidelines to understanding the relationship between the provision of the Equal Treatment Directive and the Pregnancy and Maternity Directive. The relationship between the two Directives became confused as a result of *Larsson*. Here the Court stated that the plaintiff's claim was *ratione temporis* unfortunate and that the problem of a women dismissed after maternity leave, but taking into account the period of leave occurred during the pregnancy, in future would be solved by Article 10 of the Pregnancy and Maternity Directive. However, as pointed out above, Article 10 did not cover the situation of Mrs Larsson who was dismissed after maternity leave. As now appears clearly from *Rentokil*, the principle of equal treatment in working conditions as guaranteed by the Equal Treatment Directive

³⁴³ Case C-32/93, *Webb*, [1994] ECR I-3567, at para 22; see also the Opinion of the Advocate General at para 56.

remains crucial in assessing whether illnesses occurring after maternity leave should be considered as generic illness or pregnancy related illness.³⁴⁴

Rentokil therefore clarifies two important issues and in this sense represents a significant step towards the conciliation of motherhood and professional life.³⁴⁵ The Court, however, still has not come to term with the *cause* of the illness. It is now clear that employees with pregnancy related illness arising during pregnancy are protected from dismissal, but those with such illnesses arising after maternity leave are treated as employees with ordinary illnesses. However, what is difference between complications arising before maternity leave and those arising after? Why should they be treated differently? This question will never receive a satisfactory answer because, although this distinction seems difficult to justify, it represents the compromise that the balance between the interests of the employers/market and employees require.

(iii) *Haberman-Beltermann and Webb*

The conflict between the interests of employers and employees discussed above is illustrated clearly also in the other two cases concerning dismissals of grounds of pregnancy, where the Court considered the issue of temporary contracts. In *Habermann-Beltermann* the applicant had been employed under a contract of indeterminate duration to work only during the night. Shortly afterwards she became pregnant. German law prohibits pregnant women from working at night.³⁴⁶ The case went before the German Court which asked the ECJ whether in light of the *Dekker* principle,³⁴⁷ the German law prohibiting night work for pregnant women was compatible with the sex equality principle. Instead of focusing on the German law, the ECJ

³⁴⁴ J. Shaw, "Pregnancy Discrimination in Sex Discrimination" (1991) 16 ELRev. 430.

³⁴⁵ *Contra*, E. Ellis, Case note on *Rentokil*, (1999) CMLRev. 625.

³⁴⁶ *Mutterschutzgesetz* (MSchG), para 8(1).

³⁴⁷ See *infra* section 19.2.2 (i).

considered the length of the contract. It held that “the termination of a contract without a fixed term on account of the woman’s pregnancy (...) cannot be justified on the ground that a statutory prohibition, imposed because of pregnancy, temporarily prevents the employee from performing night-time work”.³⁴⁸ In this way the Court introduced a difference between permanent and temporary contracts: does this mean that if on a fixed term contract indirect discrimination is possible?³⁴⁹

This difference was reiterated in *Webb* where the plaintiff was employed as a replacement for a clerk who was on maternity leave. It was anticipated that she would stay in employment when the person on leave returned. The plaintiff was employed in advance of the maternity leave period because she would need six months’ training. She herself became pregnant after a few weeks and was dismissed. The case went before the English courts which asked the ECJ for a preliminary ruling. It is submitted that in this case the Court simply should have applied the *Dekker* formula: *Webb* is a case of direct discrimination because the fundamental reason for Mrs Webb’s dismissal was her pregnancy. This, however, was not the reasoning of the Court. Instead of focusing upon the reason why Mrs Webb was dismissed it, again, concentrated its efforts on the distinction between temporary and permanent contract. In light of this, the ECJ concluded that the dismissal of an employee who is recruited for an unlimited term with a view, initially to replacing another employee during the latter’s maternity leave and who cannot do so because shortly after her recruitment, she is herself found to be pregnant was contrary to the principle of equal treatment. Accordingly, this judgment can also have the effect to provide an incentive for employers to recruit women in child bearing age on temporary rather than permanent contract.³⁵⁰

³⁴⁸ Case C-421/92, *Habermann-Beltermann*, [1994] ECR I-1657, at para 25.

³⁴⁹ On this point see also E. Szyszczak, “Community Law on Pregnancy and Maternity” in *Sex Equality in the European Union*, Hervey, O’Keeffe (eds.) 1996, Wiley 53.

³⁵⁰ E. Szyszczack, “Community Law on Pregnancy and Maternity” in *Sex Equality in the European Union*, T. Hervey, D. O’Keeffe (eds.) 1996, Wiley 53. See also the argument put forward by Lord Keith when the case returned to the House of Lords [1995] IRLR 245.

Habermann-Beltermann and *Webb* have caused mixed reactions. On the one hand legal writers have argued that, despite their need for further clarification, the two judgments should be applauded for affirming the protection of pregnant women from being disadvantaged due to factors unique to the female sex.³⁵¹ On the other hand, the Court seems to suggest a possible justification to direct discrimination, that is the use of temporary contracts.³⁵²

19.2.2 Pregnancy, maternity and employment conditions other than dismissals

This category can be further divided into three sections: issues related to recruitment, issues related to promotion and issues related to pay.

(i) Refusal to appoint on grounds of pregnancy and maternity: *Dekker*

The Court was asked to rule on the refusal to appoint a woman on grounds of pregnancy only in *Dekker*. Here the applicant applied for the post of instructor at the VJV, a training centre for young adults, and informed the applications committee that she was three months pregnant. Although she was considered by the Committee as the most suitable candidate for the job, VJV informed her that she would not be appointed. The reason given was that VJV's insurer would not reimburse the benefits that it would be obliged to pay during her maternity leave, which meant that it would be unable financially to employ a replacement during her absence and would be short-staffed. The case went before the *Hoge Raad*, the Supreme Dutch National Court, which asked the ECJ for a preliminary ruling. The Advocate General Darmon carried out an invaluable and still up to date discussion on the relation between motherhood and professional life and reached the conclusion that as "motherhood can only ever affect women, taking

³⁵¹ *Inter alia*, N. Bamforth, "The Treatment of Pregnancy under European Community Sex Discrimination Law" (1995) 1 EPL 59.

³⁵² H. Fenwick, T. Hervey, "Sex Equality in the Single European Market: New Directions for the European Court of Justice" (1995) 32 CMLRev. 443.

account of it in order to justify a refusal of employment is (...) *ipso facto* direct discrimination on grounds of sex".³⁵³ The Court shared the same view and established two (very broad) pivotal principles. First, as only women can become pregnant, the refusal to engage a pregnant women because of pregnancy or maternity amount to direct discrimination. To qualify dismissal on grounds of pregnancy as direct discrimination means that it cannot be justified in any way except with explicit exemptions.³⁵⁴ The test used was the causation test, according to which if the reason for dismissal applied exclusively to one sex, it would constitute direct discrimination. The second principle established by the Court was that in certain circumstances, such as pregnancy, the absence of a male comparator is irrelevant.

Dekker has been welcomed by the majority of the legal writers. It has been stated that "[n]ow European women will look back upon these times as the years in which the European Court of Justice (...) began to make good the promises of equal treatment of men and woman at work".³⁵⁵ Needless to say, this case represents a turning point in judicial reasoning since the tendency by, for example, the UK Courts, was to compare a pregnant woman with an ill man.³⁵⁶ However, it has not been free from criticisms. In *Dekker*, probably because it was the first case on this issue, the Court held a very broad and important principle without considering its implications. The lack of awareness has made it difficult to apply it in subsequent cases and has left it open to the most disparate interpretations.³⁵⁷ Recently, Wintemunte has criticised the meaning

³⁵³ Case C-177/88, *Dekker*, [1990] ECR I-3941, at para. 25.

³⁵⁴ Case 248/83, *Commission v. Germany*, [1985] ECR 1459; case 22/84, *Johnston v. Chief Constable RUC*, [1986] ECR 1651.

³⁵⁵ **M. Rubenstein**, (1991) IRLR 1.

³⁵⁶ This has been for a long time the approach of the UK Courts. See, for example, *Turley v. Alder Department Stores*, [1980] IRLR 4.

³⁵⁷ This problem was foreseen by many commentators; see *inter alia*, **G. More**, "Reflections on Pregnancy Discrimination under European Community Law" (1992) JSWFL 48.

of the *Dekker* principles.³⁵⁸ He states that with being equality a comparative exercise, a comparator is always necessary and this comparator is a non-pregnant, usually male, person. Moreover he argues that the view taken by the Court that pregnancy discrimination is always, or generally, direct discrimination does not help the coherent analysis of the case law in this area. The tension between direct and indirect discrimination was emphasised by the fact that *Dekker* was decided together with *Hertz* where the Court linked issues concerning pregnancy and maternity with indirect discrimination. Nielsen has advanced a “social explanation” for the direct/indirect discrimination. She argues that in the Netherlands, because of the old-fashioned nature of the legislation on leave connected with the birth, the financial burdens for employers are mainly on those who employ women and rarely on those who employ men. Conversely, in Denmark where the legislation on maternity/parental leave is available to both men and women, it is more common that men are also discriminated against. Accordingly, the same form of discrimination can be regarded as indirect in one country and direct in another due to differences in social development.³⁵⁹

Overall, the mixed approach of the Court, has led many commentators to argue that the principles established in *Dekker* have been watered down.

(ii) The question of pay: Gillespie, Boyle and Høy Pedersen

The issues related to the relationship between pregnancy, maternity and pay are very technical, and regrettably, the case law has completely not clarified the area.

In *Gillespie* some employees of the Northern Ireland Health Services took maternity leave. Under a collective agreement they received full pay for four weeks, 90% for the next two weeks and twelve days of half pay. During their maternity leave a pay backdated increase was negotiated but the women were denied the benefit of the backdated rise. The national court asked the ECJ to determine whether Article 119 EC

³⁵⁸ R. Wintemute, “When is Pregnancy Discrimination Indirect Discrimination?” (1998) 27 ILJ 23.

³⁵⁹ R. Nielsen, Case note on *Dekker* and *Hertz* (1992) 29 CMLRev. 160.

(now 141 EC) and the Equal Pay Directive applies in case of maternity pay. In case of a negative answer, the Court was asked whether EC law provides specific criteria for determining the amount of maternity benefits. The argument of the applicants was straightforward: they relied on the *Dekker* principle according to which any unfavourable treatment (*in casu* the reduction of pay) on the ground of pregnancy was to be considered as direct discrimination and therefore in breach of the equal treatment principle.

The judgment of the Court was very brief. First, following its established case law,³⁶⁰ it held that maternity benefits, when they are granted pursuant to an employment relation, are to be considered pay within the meaning of Article 119 of the EC Treaty.³⁶¹ Thus Article 119 EC and Article 1 of the Equal Pay Directive have to be interpreted also as prohibiting paying men and women different rates for the same work or for work of equal value.³⁶² The potential importance of this statement, however, was immediately reduced. The Court, referring to its decision in *Schumaker*,³⁶³ stated that discrimination arises only when different rules are applied to comparable situations *and vice-versa*. Consequently since a woman on maternity leave is in a different (special) position from a man or a pregnant woman who is actually working, the payment of a woman at reduced rate does not constitute discrimination.³⁶⁴ Following from this point the Court held that neither Article 119 nor the Equal Pay Directive apply to the question of maternity benefits, where the relevant legislation is the Pregnancy and Maternity Directive. Although this latter at the time of the case was not yet implemented, the Court concluded by saying that “the amount payable could not (...) be so low as to

³⁶⁰ Case 12/81, *Garland*, [1982] ECR 358; case C-360-90 *Arbeitswohlfahrt der Stadt Berlin v. Bötzel* [1992] ECR I-3589; case C-33/89 *Kowalska v. Freie und Hansestadt Hamburg* [1990] ECR I-2591 and case C-262/88 *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

³⁶¹ Case C-342/93, *Gillespie*, [1996] ECR I-475, at paras 12, 13 and 14.

³⁶² Case C-342/93, *Gillespie*, [1996] ECR I-475, at para 15.

³⁶³ Case C-276/93, *Finanzamt Köln-Altstadt v. Schumaker*, [1995] ECR I-225.

³⁶⁴ Case C-342/93, *Gillespie*, ECR I-475, at paras 16 and 17.

undermine the purpose of maternity leave, namely the protection of women before and after giving birth”.³⁶⁵

Although it is undeniable that the practical outcome of this cases should be regarded as a victory,³⁶⁶ the lack of a clear explanation diminishes both the importance of the statements of the Court and the legal reasoning underpinning these. Despite the attempt of the Court to improve the position of women in employment, it is not clear for which reason employees on maternity leave should be entitled to benefits.³⁶⁷ Furthermore, what the definition of discrimination would be following *Gillespie*? The Court in fact refers to the definition of discrimination given in *Schumaker* and *Webb* but not to the definition provided in *Dekker*. *Gillespie* suggested that a woman on maternity leave is both in a special situation which may not be compared to the situation of those workers not on maternity leave, *and* if she is treated differently from those women workers who are not on maternity leave she is the victim of sex discrimination. In this way the Court tried at the same time to make a distinction between the Equal Pay Directive and the Pregnancy and Maternity Directive *and* to apply the principles contained in both Directives, without, however, explaining their relationship.

The Court was asked to reinterpret the same issue a few years later, in *Boyle* where a group of employees working for the Equal Opportunities Commission (EOC) challenged its maternity scheme. According to this scheme, women on a permanent contract with at least one year service were entitled to three months *plus* one week maternity leave on full pay. It is relevant to emphasise that the period of leave with benefits provided by the EOC was higher than the period provided by the Statutory Maternity Scheme. The EOC scheme contained a clause according to which, at the end of the maternity leave the employee had to resume work with the EOC, and in case she failed to do that for at least one month, she had to repay any maternity benefit over and

³⁶⁵ Case C-342/93, *Gillespie*, ECR I-475, at para 20.

³⁶⁶ Brick Court Chamber, “Victory over Maternity Pay”, *Financial Times*, 27 February 1996.

³⁶⁷ C. McGlynn, “Equality, Maternity and Questions of Pay”(1996) 21 *ELRev* 327.

above the Statutory Maternity Pay. The same scheme applied to employees on any form of paid leave including periods of sick leave without, however, the latter repayment clause. The national court asked the ECJ to rule on the compatibility of this scheme with the relevant EC law, namely Article 119, The Equal Pay Directive, the Equal Treatment Directive and the Pregnancy and Maternity Directive. In particular, the Court was asked to decide on the legitimacy of the following clauses:

- the requirement that Maternity Pay, *beyond* the 14 weeks provided by the Statutory Maternity Pay was paid only on condition that the employee would return to work for at least one month;
- the condition requiring that a woman absent on paid sick leave because of pregnancy related illness who gave birth during such absence, might have her maternity leave backdated to either six weeks before the expected date of childbirth or when the sickness began;
- the prohibition for a woman who was unfit for work for any reason during the maternity leave, to take sick leave unless she terminated her maternity leave;
- the conditions limiting the time during which annual leave accrued to the statutory minimum period of 14 weeks maternity leave and accordingly excluded any other period of maternity leave;
- finally, the condition limiting, in the context of an occupational scheme wholly financed by the employer, the accrual of pension rights during maternity leave to the period during which the woman receives the pay provided for by the employment contract or national legislation.

Concerning the first question, the Court found that the relevant legislation was the Pregnancy and Maternity Directive. It held that the purpose of Article 11(2) (b) and (3) of the Pregnancy and Maternity Directive is to provide an employee with an income at least equivalent to sickness allowance and not to guarantee her a higher income. Thus the EOC condition to repay benefits *beyond* the Statutory Maternity Leave was not incompatible with EC law. As for the discrimination issue, the Court reiterated that discrimination involves the application of different rules to comparable situations or

vice versa, and concluded that a clause provided for the application of a more favourable set of rules cannot be considered in breach of the Article 1 of the Equal Pay Directive. A conclusion on the same line was reached for the second question. Here the Court started by analysing the scope of Article 8 of the Pregnancy and Maternity Directive. This provision requires Member States to provide a continuous period of leave of at least 14 weeks with two compulsory weeks before or after confinement, but it leaves Member State to decide the starting date of the maternity leave. Accordingly, a provision requiring a woman, who has expressed the intention to commence her maternity leave during the six weeks before the expected date of birth, and is on sick leave with a pregnancy related illness before her maternity leave, to anticipate the starting date of her maternity leave is not incompatible with both the Equal Treatment Directive and the Pregnancy and Maternity Directive. On the third point the Court ruled that a clause prohibiting a woman from taking sick leave during the 14-week protection period is against the purpose of Article 8 of the Pregnancy and Maternity Directive; on the contrary a clause prohibiting a woman from taking sick leave during the period of supplementary leave is compatible with EC law. Concerning question four, the Court held that a clause including the period of supplementary maternity leave when calculating the annual leave was not contrary to Article 8 of the Pregnancy and Maternity Directive. To the argument that this clause was indirectly discriminatory because it applied to more women than men, it answered that this is the result of the exercise of the right to unpaid maternity leave granted to women by the employers in addition to the minimum period of protection.³⁶⁸ The Court has defined indirect discrimination as “a national measure that, albeit, formulated in neutral terms, works to the disadvantages of far more women than men”.³⁶⁹ Thus if the clause applies to more women than men it is because of a “special advantage” available only to women and therefore cannot amount to less favourable treatment of women.³⁷⁰ Finally, the

³⁶⁸ Case C-411/96, *Boyle*, [1998] ECR I-6401, at para 78.

³⁶⁹ Case C-1/95 *Gerster*, [1997] ECR I-5253 and Case C-100/95 *Kording* [1997] ECR I-5286.

³⁷⁰ Case C-411/96, *Boyle*, [1998] ECR I-6401, at para 79.

Pregnancy and Maternity Directive precludes a clause in a employment contract from limiting, in the context of an occupational scheme wholly financed by the employer, the accrual of pensions rights during the 14-week period of maternity leave to the period during which the woman receives the pay provided by that contract or national legislation.³⁷¹

A few weeks after *Boyle* was decided, the Court was asked again to interpret similar issues. In *Høy Pedersen* the applicants were four pregnant non-manual workers. According to the relevant Danish legislation, in the event of total incapacity for work on grounds of illness, the employee continues to receive full benefits. However when turning specifically to pregnant employee, the act states that the employer is required to pay half of her salary for a maximum of five months over a period limited from three months before confinement to three months after confinement. A similar obligation exists where the employer considers it impossible to provide work for the employee and also if she is not unfit for work. Therefore, in principle Danish law does not provide for the same rights regarding incapacity for work on grounds of pregnancy and incapacity for work on grounds of illness. Three of the applicants were declared totally unfit for work and, as this happened at a date prior to the three months before the confinement period, their employer ceased to pay them and they were advised to claim benefits from the national authority. The fourth applicant was declared partially unfit and thus suggested to her employer that she could resume work on a part-time basis but he refused. Since he had engaged a full-time replacement, she was no longer paid. The applicants claimed that the Danish legislation was in breach of EC law and the national court sought a preliminary reference. Although the facts in *Høy Pedersen* took place before the date of implementation of the Pregnancy and Maternity Directive, the national court asked the ECJ to interpret them according to the new legislation and in particular the following questions.

³⁷¹ Case C-411/96, *Boyle*, [1998] ECR I-6401, at para 87.

- Does EC law (in particular Article 119, the Equal Pay Directive, the Equal Treatment Directive and The Pregnancy and Maternity Directive) allow national legislation to declare that a pregnant woman, who is unfit for work because of a pathological condition connected with her pregnancy before the beginning of maternity leave, is not entitled to receive full pay but only benefits paid by the local authority although any other employee on leave on the grounds of illness is entitled to full pay?
- Is it compatible with EC law not to grant full pay to an employee when, before her maternity leave, she is absent not due to incapacity to work, but because of either routine pregnancy-related conditions or a medical recommendations to protect the unborn child, but not based on an actual pathological condition or any special risk for the unborn child;

As to the first question, the Court started by reiterating the relevant principles established in its previous case law. Firstly, pay provided by an employer during the period of sick leave constitutes pay within the meaning of Article 119 EC.³⁷² Secondly, the well established fact that, although pregnancy is not a pathological condition,³⁷³ during this period disorders and complications might arise which might compel a woman to cease work for all or part of her pregnancy.³⁷⁴ In light of the above the Court concluded that it is in breach of the principle of equal treatment established in Article 119 (now 141 EC) and the Equal Pay Directive not to provide full pay to a pregnant employee who is unfit for work because of reasons connected with her pregnancy before her maternity leave, when any employee on leave on the grounds of illness would be fully paid. Accordingly the Court answered negatively to the second question: it is not contrary to EC law not to provide full pay for an absence taking place before maternity leave when this is based not on treatment based on the pregnancy, but on a specific choice of the employee.

³⁷² Case C-171/88 *Rinner Kühn*, [1989] ECR I-2743.

³⁷³ Case C- 32/93, *Webb*, [1994] ECR I-3567, at para 25.

³⁷⁴ Case C-394/96, *Rentokil*, [1998] ECR I-4185.

(iii) The question of promotion: Thibault

Mrs. Thibault was employed by the Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS) in 1973 as an "agent technique". According to CNAVTS policy, any employee after six months was automatically entitled to an assessment of his/her performance in order to evaluate the possibility of a promotion. In 1983 she was promoted to the post of "rédacteur juridique". In the same year Mrs. Thibault was on leave for over six months because of both sickness and pregnancy. As a result of her absence, she worked for only five months and therefore she was denied her assessment. However, had she not taken her maternity leave, she would have accumulated the required six-month period necessary for the assessment. The ECJ was asked by the national Court whether the Equal Treatment Directive must be interpreted as meaning that a woman may not be deprived of the right to an assessment of performance, and consequently to the possibility of an advancement in career, on the grounds that she was absent from work by reason of maternity leave.

The judgment of the Court is very brief. Referring to what it had previously stated in *Hertz*,³⁷⁵ the ECJ held that the Equal Treatment Directive allows Member States to guarantee women specific rights on account of pregnancy and maternity. These rights are constructed so as to ensure the implementation of the principle of equal treatment between men and women. Accordingly, the Equal Treatment Directive cannot be interpreted so as to lead to unfavourable treatment against women. The Court went further and stated clearly that, seen in this light, "the result pursued by the Directive is substantive, not formal equality".³⁷⁶ Therefore a woman who continues to be bound to her employer by an employment contract should not be deprived of the benefit of working conditions which apply to both men and women as a result of that employment relationship (*in casu*, the assessment of her performance). The Court also

³⁷⁵ Case C-179/88, *Hertz*, [1990] ECR I-1657, at para 15.

³⁷⁶ Case C-136/95, *Thibault*, [1998] ECR I-2011, at para. 26. Emphasis added.

added that, as stated in *Hofmann*³⁷⁷ and reiterated in *Habermann*³⁷⁸ and *Webb*,³⁷⁹ Member States enjoy discretion on how to implement these rights. However, this discretion must be exercised within the limited bounds prescribed by the Directive.³⁸⁰ Again despite the importance of the principle established, the lack of clear reasoning has militated against its potential importance. What does it mean that the Equal Treatment Directive aims to achieve substantive equality? Does it mean that the Court of Justice is willing to reconsider its position in the positive actions cases in a stronger way than in *Marschall*?³⁸¹

(iv) *The adaptation of the workplace: Høy Pedersen*

In *Høy Pedersen* the Court was also asked for the first time to interpret the rules governing the duties of employers to adjust the workplace to the needs of pregnant employees. The Court focused on Article 4 (Assessment of information) and Article 5 (Action upon the results of the assessment) of the Pregnancy and Maternity Directive. According to these provisions an employer is required to introduce temporary adjustments to working conditions/working hours in response to a risk assessment of the situation of a pregnant worker and, if these adjustments are not feasible, to move the employee to another job. Only if this is not possible is the worker granted leave. In this specific case the employer did not fulfil the steps for the required assessment. Accordingly the Court stated that the Danish legislation did not aim to protect pregnant women's conditions, but the interests of the employer and as such was in breach of EC law.

³⁷⁷ Case 184/83, *Hofmann*, [1984] ECR 3047.

³⁷⁸ Case C-412/92, *Habermann-Beltermann*, [1994] ECR I -1657.

³⁷⁹ Case C- 32/93, *Webb v. Emo Cargo*, [1994] ECR I-3567.

³⁸⁰ Case C-136/95, *Thibault*, [1998] ECR I-2011, at para 31.

³⁸¹ Case C- 409/95, *Marshall*, [1997] ECR I-6363. See also the discussion *supra* section 17.

20 *EC measures concerning child-care arrangements*

An analysis of the EC position would be incomplete without an overview of child care facilities. This will help to provide the reader with an overall picture of the provisions aiming to reconcile work and family life. There is evidence that in those countries where extensive child care arrangements are provided, mothers have a stronger link with the employment market.³⁸² In fact, even if caring for children should be a parental responsibility *id est* a responsibility to be equally shared between the two parents, it is in reality a task pursued mainly by mothers.³⁸³ However, although child care structures can play a crucial role within sex equality programmes, they cannot provide an adequate solution to the wider issue of restructuring the employment market. Child care facilities can improve the position of women in the labour market but they cannot increase the involvement of fathers in the care of young children. They challenge neither the structure of the employment nor the stereotype that mothers are responsible for the care of young children. Often they are not structured in such a way to meet the needs of full-time employed parents, for example they do not provide full time care, or they start and finish at the same time of their jobs. In this way one of parents must be unemployed in order to be available to provide the rest of the care. Furthermore, they might perpetuate problems already existing within the employment market: as child care services are often low paid and provided by women, they can reinforce stereotyping and therefore job segregation.

This is not to deny the importance of child care arrangements. As they are structured now in many countries, however, child care arrangements are still seen as an alternative to the restructuring of the employment when they should be seen as an

³⁸² H. Joshi and H. Davies, *Childcare and Mothers' Lifetime Earnings: Some European Contrasts*, 1992, Centre for Economic Policy Research, Discussion Paper N. 600; see also (1996) EOR n° 69.

³⁸³ *Inter alia*, K. Ketscher, *Offentlig børnepasing i retling belysning*, 1990, Copenhagen.

addition to other measures aiming at restructuring the employment market. For this purpose, child care arrangements should be open to low income groups, should be of high quality and should be flexible *id est* co-ordinated with different kind of employment positions. This is still not the case.

This situation is reflected at EC level. The EC does not have a common strategy in this area. Its intervention on child care policies is limited to soft law, such as the non binding Recommendation on Child-Care.³⁸⁴ The idea of a Directive on this issue was suggested by the European Commission Childcare Network. The Recommendation regards child care as essential to achieve equality and it establishes important principles. Its results, however, have been disappointing. The main drawback of the Recommendation is that it does not place enough emphasis on the role of the public sector. It merely "advises" Member States to "encourage" initiatives on child care and "suggests". Furthermore, the recommendation is not binding.

21 *Evaluation of the EC position*

"A satisfactory solution can only be achieved by abandoning the attempt to rely on a traditional equality-difference. Instead, it is necessary to make a conscious and explicit decision on the social value of parenthood and to formulate legal rules to reflect this."³⁸⁵

In the light of the discussion above it follows that the EC still fails to promote the social value of parenthood and has not developed a family principle. As it is framed now, in fact, within the EC only limited rights relating to parenthood and caring responsibilities are provided. Whilst Part III will explore whether the amendments introduced by the Amsterdam Treaty can facilitate changes to the situation in this area, the previous sections have discussed the limits of both the EC legislation and case law.

³⁸⁴ Council Recommendation on Child Care, OJ 1992 L 123/16. On the potential role of child care see also A. Borchost, "Working Lives and family Lives in Wesern Europe" in *The Equality Dilemma*, S. Carlsen, J. Larsen (eds.), 1993, The Danish Equal Status Council, 167.

³⁸⁵ S. Fredman, "A Difference with Distinction: Pregnancy and Parenthood Reassessed" (1994) 110 LQR 106.

Concerning the legislation, section 18 has already discussed its limits. In this context, suffice it to say that the framework provided by the Equal Treatment Directive is limited in its scope of application and it has been interpreted with a protectionist approach which does not help the development of the issues under analysis.³⁸⁶ Also, the pragmatic approach of the Pregnancy and Maternity Directive, although *prima facie* appearing to offer wider protection, cannot *alone* provide for a satisfactory regulation. The limited scope of application of the Parental Leave Agreement/Directive also raises doubts. Overall these Directives either that they are enacted from an equality perspective or an employment rights approach, they reinforce the stereotype of mothers as the primary carer. Furthermore, the relevant rights are scattered in different Directives and do not seem to have a *leit motif*. There is the need to put together these directives and to create a comprehensive set of principles on this issue. Finally, the soft law of the Recommendation on child care has not proved to be very successful.

The principles developed by the relevant case law of the Court of Justice have not provided for a better alternative. When considering pregnancy and maternity *in the workplace* the “bench on which a woman never took a seat³⁸⁷” did not hesitate to take the part of women. Employees have now the right not to be discriminated against on grounds of pregnancy when applying for a position (*Dekker*); their condition cannot be compared with a pathological conditions (*Webb*); they can be dismissed neither during pregnancy nor maternity leave (Article 8 of the Pregnancy and Maternity Directive), nor can periods of leave for pregnancy related illnesses be taken into consideration in order to dismiss them after the maternity leave (*Rentokil* overruling *Larsson*); if necessary, during pregnancy the employer is required to undertake adjustments to their working conditions (*Høy Pedersen*); during maternity leave their contractual rights remain untouched (Article 11 of the Pregnancy and Maternity Directive, *Boyle* and *Thibault*); maternity benefits are to be regarded as pay within the meaning of Article 119

³⁸⁶ H. Fenwick, “Special Protection for Women in European Union Law”, in *Sex Equality in the European Union*, T. Hervey, D. Keeffe (eds.), 1996, Wiley, 63, at 76.

³⁸⁷ H. Rasmussen, *The European Court of Justice*, Gad Jura, 1998, at 206.

(*Gillespie*), must be “adequate” (Article 11 (2) (b) and 11 (3) of the Pregnancy and Maternity Directive) not “so low as to undermine the purpose of maternity leave” and finally expectant mothers may be entitled to payment also during the period preceding maternity leave (*Boyle and Høy Pedersen*). With the exception of *Larsson*, the Court has steadily used the applicable legislation to improve the status of pregnancy and maternity in the workplace. Although this improvement has appeared to be more complicated when focusing on issues relating to dismissals rather than other issues strictly related to the employment relationship, remarkable results have been achieved. Overall it appears clearly that the Court is eager to regulate the *status* of pregnancy and maternity in the workplace but still fails to address the effects of Pregnancy and Maternity outside the context of paid employment.³⁸⁸ After having held that the roles of the mother and father are different (*Commission v. Italy*), it went on by saying that EC law did not want to alter them (*Hofmann and Abdoulaye*). It not only denied that caring responsibility can have an impact on (paid) employment (*Commission v. France*) but also suggested that employment should be altered as to allow women to pursue both (*Hill*). Until this will not change the substantive equality claimed in *Thibault*³⁸⁹ will not be achieved.

As it stands now, the main limit of the EC system in this area is that it is still based on the domestic/public dichotomy. There is the need to rethink the structure of the employment market in order to eliminate the dichotomy and to give full recognition not only to pregnancy and motherhood but also to parenthood and caring responsibilities. If the continuous developments undergone in the last period have made

³⁸⁸ T. Hervey, J. Shaw, “Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law” (1998) 8 JESP 43.

³⁸⁹ Case C-136/95, *Thibault*, [1998] ECR I-2011, at para 31.

it difficult to assess the whole area, they may also offer the opportunity for further developments.

CHAPTER VI: THE SCANDINAVIAN POSITION

22 *Introduction*

This chapter focuses on the legal arrangements establishing a “family principle” in employment law in the Scandinavian countries, namely Norway, Sweden and Denmark. In this context the political climate which has led to the establishment of such elements it is also considered. Denmark and Sweden are members of the European Union.³⁹⁰ the reason for dealing with them in a separate chapter is that, despite their membership, they are part of what can be considered as the Scandinavian model together with Norway. Although these countries do not have exactly the same rules, their legislation in this area and the ideology underpinning it share many common features, making it possible to regard them as a single model.

This chapter argues that, although the legal framework in this area provided by the Scandinavian model is not perfect, it is closer to the family principle discussed in this research, than the system offered by the European Community or those of the other EC Member States. Thus, in terms of sex equality, equal opportunity and employment rights it offers a satisfactory - or at least the best existing in practice - solution to adapt the employment market to the needs of the parents. This arguments has nonetheless been criticised by several legal writers.³⁹¹ Accordingly, a detailed analysis of the Scandinavian model will take into account the main points of these critiques. Ultimately, however, the Scandinavian model offers the prospect of an improved integration of the family principle into the employment market which the EC would do well to adopt.

³⁹⁰ Respectively from 1972 and 1995.

³⁹¹ *Inter alia*, E. Vigerust, *Arbeid, barn og likestilling - Rettslig tilpasning av arbeidsmarkedet*, 1998, Tano Aschehoug.

The structure of this chapter is as follows. The first part analyses why it is possible to refer to a Scandinavian model (23. *The Scandinavian model*). The following sections focus on the relevant legislation in the Scandinavian countries. In order to do this, the general legal framework of this area provided by sex equality legislation is considered (24 *Norway*, 25 *Sweden* and 26 *Denmark*). This is followed by the analysis of the provisions concerning the position of pregnancy, maternity, paternity and parenthood in the employment market. Although they are not the main focus of the this research, in order to provide a complete overview of the Scandinavian model, child-care leave and child-care provisions are also briefly covered. Finally, the last section of this chapter evaluates the legislation analysed, with the view of highlighting both positive elements and pitfalls. (27 *Summary and evaluation of the Scandinavian model*).

23 *The Scandinavian model*

It is common usage to consider Norway, Sweden, Denmark, Finland and Iceland as the Nordic countries and only the first three as the Scandinavian countries.³⁹² Following this usage, for this thesis any reference to the Scandinavian model will refer solely to the first three countries. These can be regarded as a single model because they share many common features.³⁹³ In the context under discussion there are three main characteristics which play relevant roles.

Firstly, the structure of employment relations of these countries is very similar and it is often seen as an alternative to the “continental” model.³⁹⁴ Two elements should be

³⁹² E.g. **R. Nielsen**, *Employers' Prerogative - in a European and Nordic Perspective*, 1996, Handelshøjskolens Forlag; **A. Leira**, “Ligestilling, barn og marked - eksempler fra Scandinavia og EF” (1993) 3 NK 69; **G. Esping-Andersen**, *The Three Worlds of Welfare Capitalism*, 1990, Polity Press; **S. Evju**, “European Labour Law from a Norwegian Perspective”, in *Developing the Social Dimension in an Enlarged European Union*, Neil, Foyen (eds.) 1996, Universitetsforlaget, Oslo, 125 at 130.

³⁹³ *Inter alia*, Tema Nord, *Orlovsordninger i norden*, 1996: 612,.

³⁹⁴ **N. Bruun et al.**, *The Nordic Labour Relations Model*, 1992, Dartmouth; on the Scandinavian

noted: the importance of collective agreements and the so called “employers’ prerogative”.³⁹⁵ Accordingly, in the three countries, the employment rights regulating the system of birth leave and the related benefits are “variations” of the same model. Secondly, Norway, Sweden and Denmark are inspired by the same idea of equality and especially equality of opportunity. Thirdly, the Scandinavian countries are based on the same welfare state model: a common and distinctive feature of the Scandinavian model is that it is “family-friendly”.³⁹⁶ A good example of this is the fact that the birth benefits are paid by the State and not by the employer. This may solve many problems in the employment market, *in primis* the discrimination (both direct and indirect) against women of child-bearing age. The Scandinavian common model of welfare state has been thoroughly discussed by Esping-Andersen who has elevate of Scandinavian Welfare State to one type of the three-fold typology of welfare state.³⁹⁷ Esping-Andersen’s theory, however, breaks down as soon as gender and unpaid work are taken into consideration: in fact, as Lewis has pointed out “women disappear from the analysis when they disappear from the labour market”.³⁹⁸ His work has been criticised as it fails to consider the issue of unpaid work (*id est* caring responsibilities).³⁹⁹ Leira, in particular, suggests that while Danish and Swedish welfare state policies support the

model see also S. Evju, “European Labour Law from a Norwegian Perspective”, in *Developing the Social Dimension in an Enlarged European Union*, A. Neil, S. Foyen (eds.), 1996, Universitetsforlaget, Oslo, 125 at 130.

³⁹⁵ R. Nielsen, *Employers’ Prerogative - in a European and Nordic Perspective*, 1996, Handelshøjskolens Forlag.

³⁹⁶ J. Kvist, “Welfare Reform in the Nordic Countries in the 1990s: Using Fuzzy-Set Theory to Assess Conformity to Ideal Types” (1999) 9 JESP 231.

³⁹⁷ G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, 1990, Polity Press; see also *supra* Chapter II.

³⁹⁸ J. Lewis, “Gender and the Development of the Welfare Regimes” (1992) 2 JESP 157; P. Taylor Gooby, “Welfare Regimes and Welfare Citizenship” (1991) 1 JESP 93; A. Leira, “The Woman-Friendly” Welfare State? The Case of Norway and Sweden”, in *Women and Social Policies in Europe*, J. Lewis (ed.), 1994, Edward Elgar, 49; A. Leira, “Likestilling, barn og marked - eksempler fra Scandinavia og EF” (1993) 3 NK 69.

³⁹⁹ *Inter alia*, P. Taylor Gooby, “Welfare Regimes and Welfare Citizenship” (1991) 1 JESP 93.

dual roles of women as both employees and mothers, in Norway the concept of the employed mother does not receive the same attention.⁴⁰⁰ It is arguable, however, that this situation has gradually changed: issues relating to caring responsibilities have been a priority for recent Norwegian Governments. In the last decade the priority has been to enact family policies which would increase equal opportunity both at work and in the family. Accordingly, several measures, such as a form of "mild coercion" to take up paternity leave and flexible working hours available for parents of young children have been enacted.

24 Norway

This section deals with the legislation concerning pregnancy (*svangerskaprettigheter*), maternity (*morsrettigheter*), paternity (*pappapermisjon* and *fedrekvote*) and parenthood (*fødselrett*, *foreldrettighetene*, and *omsorgsrett*) in Norway. Norway has its own legal rules dealing with these issues and in addition, since 1 January 1995, it has been one of the contracting Parties to the Agreement on the European Economic Area (the Agreement or the EEA). By virtue of the Agreement the majority of the EC *acquis communautaire* becomes part of the domestic law of the signatory countries. In this case the relevant provisions are Article 69 EEA, which is a mirror of Article 119 EC (now Art. 141 EC), and the Directives which are contained in the Annex XVIII EEA. In this context, of particular interest are the Equality Directives which were incorporated as a part of the original "package", the Pregnancy and Maternity Directive⁴⁰¹ and the Parental Leave Directive which were incorporated later. It is interesting to observe that the Norwegian Government did not have any problems in incorporating these principles. Indeed when the EEA entered into force, Norwegian

⁴⁰⁰ A. Leira, "The Woman-Friendly" Welfare State? The Case of Norway and Sweden" in *Women and Social Policies in Europe*, J. Lewis (ed.), 1994, Edward Elgar, 49.

⁴⁰¹ Beslutning 7/94.

legislation had to be in line with the EC standards. At that time there was the presumption that Norwegian law in this area did not need any amendments.⁴⁰²

24.1 Overview of the relevant Norwegian legislation

It is useful at this stage to provide the reader with an overview of the relevant Norwegian legislation. In Norway, as in the other systems under analysis, the relevant legislation is in different Acts.⁴⁰³ This is so because maternity, paternity and parenthood are complex legal concepts and in order to be thoroughly developed they need to be tackled from different angles. The most important legislative measures are the Working Environment Act (*Arbeidsmilølov*),⁴⁰⁴ the National Insurance Act (*Folketrygdlov*),⁴⁰⁵ and the Sex Equality Act (*Likestillingslov*).⁴⁰⁶ Furthermore, Acts often provides for the possibility to legislate on further provisions resulting in regulation (*forskrifter*), similar to statutory instruments, which are binding in the same way as legislative Acts.

A complete overview of the relevant legislation should also mention the *travaux préparatoires* (*forarbeider*) such as Norges Offentlige Utredninger (NOU), the *høringsbrev*, the *Odelstingsproposisjon* (Ot. Prp) and the Stortingsmeldings (St. meld). These are the studies leading to the adoption or to the amendment of Acts and they play a crucial role in both the Norwegian legislation making process and in the interpretation of the Acts adopted or amended. Furthermore, it should be noted that in certain areas of

⁴⁰² St. prp. nr. 100, at 282.

⁴⁰³ Norwegian legal writers have suggested that a more coherent approach would help the development of the area, M. Fastvold, *Fødselsrett og likehet - et kvinneperspektiv*, 1977, Kvinnerettslige studier n° 2, Avdeling for kvinnerett, University of Oslo and M. Fastvold, *Fødsels og-omsorgsrett for foreldre*, 1990, Grøndahl Oslo.

⁴⁰⁴ Lov om arbeidsvern og arbeidsmiljø, 4 June 1977 n° 4 (Working Environment Act).

⁴⁰⁵ Lov om folketrygd, 28 June 1997, n° 19 as amended by Act 19 June 1997 n° 88 (National Insurance Act). This version substitutes the Lov om folketrygd 17 June 1966 n°12; see also the Lov om barnetrygd, 4 October 1964 n° 2, as amended by Act 23 December 1988 n° 109.

⁴⁰⁶ Lov om likestilling mellom kjønnene (Likestillinglov), 9 June 1978, n° 45 as amended by Act n° 36, 13 June 1997.

Norwegian law (maternity and paternity provisions are an appropriate example), the legislation sets basic minimum requirements which are generally improved by collective and individual agreements (*kollektiv/tariff avtaler*).⁴⁰⁷ Finally, the cases decided by the Norwegian courts (*Byrett/Herredsrett, Langsmannrett, Høyesterett* and *Arbeidsretten*) and the Equal Status Ombudsman (*Likestillingsombud* and *Nemda*) provide useful guidance and practical examples of the problems which can arise in practice.⁴⁰⁸

24.2 *The principle of sex equality in Norway*

In the context of Norwegian law, as in the other legal systems under analysis, issues relating to the position of parents in the employment market create, *inter alia*, problem of sex equality. In order to achieve equality and especially equality of opportunity, it is crucial to find a balance between the principle of equality and the entitlements under employment rights (*in casu*, birth rights).

The relevant legislation in this area is the Equal Status Act which was introduced in 1978. § 1 states that the Equal Status Act aims to “promote equal status between the sexes and in particular at improving the position of women”. Furthermore, it appears from the *travaux preparatoires* that the Act aims at ensuring substantive equality as well as influencing attitudes towards sex roles in society.⁴⁰⁹

The core of the Act is § 3 where the first paragraph contains the general clause prohibiting discrimination between the sexes: it refers to both direct and indirect discrimination.⁴¹⁰ The provision goes further by stating that “different treatment which

⁴⁰⁷ *Inter alia*, H. Koll Larsen, *Rettigheter ved fødsel og adopsjon*, 1997, Juristforbundets Forlag, at 145. Tove Stang Dahl, however, notes that collective and individual agreements have been based on the male norm: they consider the interests of employees as a group and do not distinguish between men and women; T. Stang Dahl, “Innledning til kvinnerett”, in *Kvinnerett I*, T. Stang Dahl (ed.), 1985, Oslo.

⁴⁰⁸ For a detailed analysis see T. Eckhoff, *Rettskildelære*, 1993, Tano.

⁴⁰⁹ Ot. prp. nr. 33 (1974-75), at 27.

⁴¹⁰ Norwegian legal writers have also referred to direct and indirect discrimination as *de jure* and *de facto* discrimination; T. Stang Dahl, *Women's Law*, 1987, Universitetsforlaget, Chapter 3.

promotes gender equality (...) is not in conflict with the first paragraph". This applies also to women's special rights aimed at balancing specific situations. In the *travaux préparatoires* it is further specified that special rights in case of pregnancy and maternity cannot be seen as a different treatment in conflict with the law.⁴¹¹

When it entered into force the Act was considered a success as it contains provisions which are gender neutral rather than gender specific.⁴¹²

24.3 *Pregnancy in the workplace*

The different rights connected with the birth (*fødselsrettigheter*), namely right to leave and related economic benefits, are regulated mainly by the Working Environment Act and the National Insurance Act. In order to have a full understanding of the system, therefore, the two Acts should be analysed in conjunction.⁴¹³ With that said, the two Acts have developed in a different way and this has had (and still has) a considerable impact on the whole system. The first Act deals with the protection of pregnant employees in the workplace and the possibility for working parents to take leave. Accordingly, it is specifically addressed to "any person who performs work in the service of another". The National Insurance Act has a more general scope of application. It regulates the disbursement of birth benefits and it is addressed to any person who has an income. However, although this is the general rule, there are also provisions aiming specifically to meet the financial needs of people without an income, such as students. This section focuses on the provisions of the Working Environment Act while the National Insurance Act is analysed in the following section.

It is worth briefly considering the concept of the working environment in Norwegian law (*arbeidsmiljø*). It could provide a useful model for the development of

⁴¹¹ Ot. prp. nr. 33 (1974-75) at 25.

⁴¹² T. Stang Dahl, "Likestilling og fødselsrett" (1991) JV 353.

⁴¹³ On the interaction between the two Acts, see St Meld n° 70 (1991-92) *Likestilling for 1990-åra*.

the equivalent concept and the relevant legislation within the EC. The working environment is a distinctive feature of employment law in the Scandinavian countries which was developed in the 1970's.⁴¹⁴ It is very similar in all three countries: it aims to secure a working environment which affords employees full safety against harmful physical and mental conditions where safety, occupational health and welfare standards evolve dynamically in line with the technological and societal development. Furthermore there are also provisions to ensure that the enterprises themselves can solve the relevant internal problems in co-operation with the organisations of employers and employees. In other words, the working environment legislation does not merely focus on the protection of the health and safety of the workers, but is concerned also with the organisation of the work as well as how the employees can influence it. It is based on the idea that health, safety and dignity are the result of the interaction of many elements: work can not be seen merely as a value in itself but rather as a tool for productivity as well as profitability.⁴¹⁵ When it comes to the position of parents in the workplace the Norwegian Working Environment Act differs from the Swedish and Danish legislation in that it is more complete. In fact, the relevant provisions in these other two countries are scattered in diverse Acts.

The Working Environment Act regulates in detail the right to leave,⁴¹⁶ the opportunity to perform reduced work (the "partial leave of absence" or "time account"⁴¹⁷ and the "right to work reduced hours"⁴¹⁸) and issues related to recruitment and dismissal

⁴¹⁴ Norwegian *Arbeidsmiljølov* 1977 (see also Ot prp n° 3-4 (1975-76), Swedish *Arbetsmiljölagen* 1977, Danish *Arbeidsmiljøloven*, 1975; for a thorough overview of the relevant legislation in the Scandinavian Countries see T. Sigeman, *et al.*, *Arbets-rätten i norden*, 1990, Stockholm; Tema Nord 1990:42 and for the *travaux préparatoires* of the Working Environment Act see Ot Pr n° 3-4 (1975-76).

⁴¹⁵ Ot prp n° 50 (1993-94).

⁴¹⁶ § 31 *et seq.* Working Environment Act.

⁴¹⁷ § 31A Working Environment Act.

⁴¹⁸ § 46A Working Environment Act.

in connection with the birth and the care of young children.⁴¹⁹ Furthermore, it provides some guidance concerning the safety of the working environment for pregnant women.⁴²⁰ This section focuses on these latter aspects while the others are discussed further below.

§§ 1 and 7 impose a general requirement *id est* that the working environment must be “fully secure”; this means that potential risks/dangers to both mental and physical health should be eliminated. This principle does not imply that any risk must be eliminated because every activity involves unforeseeable risks; instead it states that any risk, as far as possible, should be eliminated. It is not necessary to prove the actual damage but the potential harm is sufficient.⁴²¹ As a result of these provisions the employer is under a duty of care towards the employees (*omsorgsplikt*). Under this duty, the employer must provide the employees with the necessary information on the potential risks of the working environment and how to avoid them. Specific rules concerning the protection of the pregnant employee from the physical and psychological hazards of the working environment are not expressly mentioned in the Act but they are deemed to be implicit in the general concepts included in the Working Environment Act. The general rule, in fact, is that the working environment should be equally safe for somebody who is pregnant as for any other employee.⁴²² More detailed provisions in this area are to be found in § 8(2) and § 14 of the Working Environment Act. The first Article states that “the workplace shall be arranged so that employees of both sexes can be employed”; the second provision requires that the employer shall “organise and arrange the work giving due consideration to the age, proficiency, working ability and

⁴¹⁹ § 65 Working Environment Act.

⁴²⁰ § 14 Working Environment Act.

⁴²¹ **E. Vigerust**, *Arbeid, barn og likestilling - Rettslig tilpasning av arbeidsmarkedet*, 1998, Tano Aschehoug.

⁴²² See further, **M. Fastvold**, *Fødsels og omsorgsrett for foreldre*, Grøndahl, 1990, Oslo.

other capabilities of individual employees". Moreover, the pregnant employee is entitled to three options: to have her work adapted, substituted or to stop working.

Adaptation of the employment means that the work is altered in order to meet the needs of the pregnant employee and to avoid any danger to her and the unborn child during the pregnancy. Examples of this include simpler duties, changes in the duration of working time and frequent breaks. It has been argued that the meaning of the employer's duty is far from clear: doubtless it implies a genuine evaluation in order to eliminate the danger and a considerable degree of flexibility.⁴²³

If it is impossible to adapt the employment, the employer is under an obligation to try to find alternative work, *id est* to substitute it.⁴²⁴ This means that he or she must find another job within the same undertaking which suits the pregnant employee. The criterion for the substitution must be in proportion to the actual risk in the work currently done by the pregnant employee. It has however been observed that substitution can also imply drawbacks since it implies complications such as new colleagues, and different duties.⁴²⁵ In particular it may have a direct impact on the financial situation of the pregnant employee. As a general rule, the employee does not keep her original wage but is paid for the job she is actually doing. Thus if the "substituted" job is less well paid, she will suffer an economic loss without that being contrary to the law.

Finally, in cases where substitution is required but is practically impossible, the pregnant worker may be forced to leave. In this case, the pregnant woman no longer has the right to retain her wages but she is entitled to pregnancy benefits (*svangerskapspenge*) from the moment when she is to leave her job because substitution is not available up to when she can claim birth benefits (*fødselspenge*).

⁴²³ *Inter alia*, S. Evju, H. Jakhelln *et al.*, *Arbeidsrettlige emner*, 1979, Universitetsforlaget, at 285-286.

⁴²⁴ § 12 Regulation 25 August 1995 n° 768.

⁴²⁵ E. Vigerust, "Graviditet, arbeidsmiljø og likestilling", in *Den sociale dimension i kvinderetlig perspektiv*, Ketscher, Lindgård, Nielsen (eds.), 1995, Copenhagen, 171, at 173.

These rules constitute a specification of the general duty of care of the employer; therefore he or she has to issue a written statement which must include the legal source, *id est* the law or the regulation stating that the pregnant women must stop working. In fact, according to § 14-13 National Insurance Act only women who “pursuant to statutory law or government regulation” are forced to stop working, are entitled to birth benefits.⁴²⁶ These are specific cases covering employees working with poisonous materials such as anaesthetic gas,⁴²⁷ cyanogenic substances,⁴²⁸ ionising radiation, and those employed in shipping, air transport and off-shore industries. However, Vigerust points out that the criteria used to choose which work can be substituted or when employees have to stop working are often a “lottery”.⁴²⁹ This becomes evident when considering the improvements achieved by technical and medical knowledge on the awareness and prevention of risks inherent in certain jobs. Instead, there are many other cases, such as painters⁴³⁰ where the pregnant employee is in contact with poisonous substances implying risks, for which substitution/granting leave has not been provided by law. The same can be said for many tasks which are stressful or monotonous and this is in breach of the general requirements of established in §§ 1-7 of the Working Environment Act. If a pregnant employee is not entitled to pregnancy benefits, she may be entitled to unemployment benefits, or social welfare benefits. Neither of these two benefits will correspond to her original wage. Therefore, in the absence of a specific individual agreement between the employer and the employee or specific provisions in collective agreements, she may lose a significant part of her wages.

Thus despite the detailed legislation, pregnant employees still suffer disadvantages. This is so for several reasons, such as the fact that only a restricted

⁴²⁶ Riksrtygdeverkets Rundskriv Kom. 03-21 A, 15 October 1992, at 10-11.

⁴²⁷ Regulation 13 September 1984 n° 1737.

⁴²⁸ Regulation 18 December 1980 n° 9418.

⁴²⁹ E. Vigerust, “Graviditet, arbejdsmiljø og ligestilling”, in *Den sociale dimension i kvinderetlig perspektiv*, Ketscher, Lindgård Nielsen (eds.), 1995, Copenhagen, 171.

⁴³⁰ E.g. Equal Status Ombud Case n° 86/430.

category of women are allowed to stop working, detrimental economic implications arising from substitution or withdrawal and, last but not least, the incorrect implementation of the principle. A recent survey has provided evidence that by the end of the sixth month of pregnancy one quarter of employees have stopped work or are on sick leave; by the end of the eighth month this is true for one half of the employees. Very seldom is the work adapted (one third of cases heard) or substituted (2% of the cases heard). According to the employees interviewed, the main reason for this is that the employer has a little idea of his/her legal duties. Furthermore, the provision which restricts the number of women who may be required to leave with economic compensation is potentially in breach of Article 5 of Pregnancy and Maternity Directive which establishes an obligation upon the employer to grant leave to any employee, in case it is not possible to adjust her working conditions.

24.3.1 The Regulation on the protection of fertility

In order to bring the Norwegian legislation in line with the EC requirements, in 1995 a Regulation related to damage to fertility and the working environment was introduced.⁴³¹ The Government Regulation, by further specifying the provisions of the Working Environment Act, improves Norwegian standards and goes further the requirements imposed by EC law (both the Pregnancy and Maternity Directive and the Health and Safety Framework Directive). In particular two elements deserve consideration: the definition of “damage to fertility” and the nature of the obligation of the employer and its implications for the employee.

§ 3 of the Regulation provides for a wide definition of “damage to the fertility” (*forplantminskader*) which includes any damage/illness transmitted to the new-born child as a consequence of influences occurring in the working environment before birth and/or transmitted *via* the mother’s milk. § 3(b) further specifies that these influences

⁴³¹ 25 August 1995 n° 769, Regulation on damages to fertility and working environment (*Forskrifter om forplantminskader og arbeidsmiljø*), in (1995) *Norsk lovstidend* 1995.

can be caused by both physical, psychological and organisational circumstance in the working environment. A distinctive feature of the Regulation is that it is addressed to any employee: women and men. Besides, the reference to the organisational and physical circumstances implies that there are not only elements generally linked to the working environment which must be taken into consideration, but also elements very common in many “women’s jobs”, such as nurses, involving spending long hours standing and stressful night shifts. In this respect the Swedish legislation goes even further as it provides leave with benefits for pregnant employees working in physically heavy jobs.

Concerning the obligations imposed upon the employer, it appears clearly that the obligations provided in the Regulation are more stringent than the “duty of care” stemming from the Working Environment Act. Vigerust, summarising the view of many Norwegian legal writers, argues that the problem is exacerbated by the fact that these principles are regarded as public law obligations and therefore employees cannot invoke them against the employers.⁴³²

Finally, in order to comply with Article 9 of the Pregnancy and Maternity Directive, a pregnant employee has now the right to take paid leave in the event that she has to undergo medical visits in connection with her pregnancy during working time.⁴³³

24.4 Employment rights

It is common usage of both Norwegian academics⁴³⁴ and practitioners⁴³⁵ to draw a clear distinction between rights to leave and economic entitlements. The main reason for

⁴³² *Inter alia*, S. Evju, H. Jakhelln *et al.*, *Arbeidsrettlige emner*, 1979, Universitetsforlaget.

⁴³³ § 31(7) of the Working Environment Act; for the *travaux preparatoire* see Ot prp n° 78 (1993-94).

⁴³⁴ E. Vigerust, *Arbeid, barn og likestilling - Rettslig tilpasning av arbeidsmarket*, 1998, Tano Aschehoug.

⁴³⁵ H. Koll Larsen, *Rettingheter ved fødsel og adopsjon*, 1997, Juristforbunndets Forlag, at 145.

doing so is that the two rights, although linked, have developed in different ways; the right to leave, for example, is longer than the period during which the employee is entitled to receive benefits.

24.4.1 Maternity, paternity, parental leave

The right to leave is the right to be absent from work in connection with the birth or the care of young children. It can be granted to the mother, the father, or both parents simultaneously. Furthermore, its length and application can vary: it can last weeks or months and it can be full-time or part time. It falls outside the context of this research to provide a detail account of the historical evolution of this right in Norway. It is, however, important to note that the first provision on maternity leave appeared in 1936.⁴³⁶ Since then they have evolved in several respects. Firstly, maternity leave was originally formulated as a right, rather than an obligation in order to protect women. Secondly, the length of the leave has been extended from a few weeks granted only to the mother in connection to the birth, to several months and, in certain cases, even years. Thirdly (and possibly most importantly) since 1977, the father as well as the mother, is entitled to the leave.

The pregnant employee has the right - but not the obligation - to stop working up to twelve weeks during pregnancy.⁴³⁷ These weeks are part of the whole period of leave. Thus if the mother uses this time before confinement, she will have three months less afterwards. This creates a problem in the event she stops working before the confinement but she is not doing a job included in one of the Regulation which would allow her to pregnancy leave with pregnancy benefits.⁴³⁸ The mother has instead the obligation to be on leave for the first six weeks following the confinement. This period

⁴³⁶ Lov om arbeidsvern, 19 June 1936 n° 8, § 25.

⁴³⁷ § 31 (1) Working Environment Act; for the *travaux préparatoires* see Ot. Prp. 3.

⁴³⁸ Riksrttygdeverkets Rundskriv Kom. 03-21 A, 15 October 1992, at 10-11.

aims to protect her health and therefore it cannot be shared with the father.⁴³⁹ To confirm the protection of health purpose of this provision is the fact that the obligation to be on leave also exists in case of abortion. However, if there is a medical certificate stating that it would be preferable for the mother to resume work before the completion of the six weeks (for example if the child is born dead or is adopted) she is allowed to do so.⁴⁴⁰ In connection with the birth of the child the father has two weeks paternity leave which can be taken at any time between two weeks before and two weeks after the birth (*pappapermisjon*). The father, however, is entitled to this period only "if he lives with the mother and spends the time taking care of family and home".⁴⁴¹ The purpose behind this provision is twofold: on the one hand, the mother receives help and on the other hand the father has the opportunity to take care of the child. In this way the aims of equal opportunity and the welfare of the child are both pursued. If the parents do not live together the two weeks leave can be taken by somebody else, such as a friend or a grandparent, who is actually taking care of the mother and the child. The same applies if both parents are not taking care of the child.⁴⁴² After the six-week period has expired the remaining weeks (42 or 52 weeks) can be shared between the parents. Since 1994, parents are entitled to a further unpaid year of leave which must be taken immediately after the first year of leave (two years for single parents). This means that the maximum leave that an employee can have in connection with the care of young children is two years. The Ministry in charge for employment issues (*Kommunale-og Arbeidsdepartementet*) has proposed to the Parliament (*Storting*) the extension up to three years of this period but it has not been deemed to be a good idea as it may have a

⁴³⁹ The background of this provision is the ILO Convention n° 103; NOU 1983:38 *ILO-Konvensjoner som Norge ikke har ratifisert*, at 46.

⁴⁴⁰ Ot Prp n° 3 (1975-76) at 72; see also A. Svingen, *Retten til lønnet fødselspermisjon i Norge og EF*, *Kvinnerettsslige Studier* n° 33, Institutt for offentlig retts skrifterserie n° 2/1994 and J. Jakhelln, *Oversikt over arbeidsretten*, 1993, NKS-Forlaget.

⁴⁴¹ § 31(2) Working Environment Act.

⁴⁴² Ot prp. n° 3 (1975-76) at 73.

detrimental impact on industrial relations.⁴⁴³ The leave discussed above are examples of full-time leave which are unconditional and cannot be opposed by the employer. The only “limitation” is the fact that the employee is under an obligation to inform the employer.

In addition, once a period of full-time is terminated, employees have the possibility to use the leave on a part-time base: this the so called partial leave of absence or time account (*delvis permisjon* or *tidskonto-ordningen*). This is, at least potentially, a very important measure which was introduced in 1994. It provides parents with possibility of combining part-time work with reduced birth benefits and therefore to “stretch” the period of leave. Employees have a further option to reconcile work and their needs as parents of young children. According to § 46A of the Working Environment Act, an employee can work reduced hours (*redusert arbeidstid*) if this is necessary on the grounds of “health, social or other material welfare reasons”. The care of young children is considered as a “material welfare reason”. As with the partial leave of absence, the right to work reduced hours can be used up to two years. They differ because the right to work reduced hours does not “stretch” the birth benefits. Obviously the introduction of the partial leave of absence has reduced the importance of § 46A of the Working Environment Act at least for the parents of children under two years old.

(i) *Partial leave of absence or time-account (delvis permisjon or tidskonto)*

When the period reserved respectively to the mother and the father have expired, the birth benefits available (*stønadsperioden*) for the remaining weeks, which the parents decide to share (29 or 39 weeks), can be arranged according to the partial leave of absence. This arrangement entered into force on 1 July 1994⁴⁴⁴ and it is regulated by § 31A of the Working Environment Act and the provisions in Chapter 4-III of the National Insurance Act. The purpose of this arrangement is to provide parents of young

⁴⁴³ Ot prp. n° 50 (1993-94).

⁴⁴⁴ Act 11 June 1993 n° 71; see also the *travaux preparatoires* in NOU 1993:12 *Tid for barna*.

children with more flexibility, as they can choose how to organise their leave and whether to resume work gradually.⁴⁴⁵ When the employee is working, he or she receives the ordinary wage, and when on leave he or she is entitled to birth benefits. However, it can be used only by those employees working at least half time of the post. Accordingly they combine the reduced working time with reduced benefits, and the period of leave is consequently “stretched”. For example, if the employee decides to work 50% of the post and to receive 50% of the birth benefits, the duration of the leave will be double than full time; if he/she decides to work 75% of the position and to receive 25% of the birth benefits, the leave will be four times longer. Furthermore, if there is agreement between the employer and the employee, it is possible to combine further models of the partial leave of absence. Normally it can be used for a minimum of twelve weeks (three months) up to a maximum of 104 weeks (two years). Part-timers also are entitled to use it but only if they work at least in half post of a full time post. It has been argued that this arrangement discriminate against part-timers and, it has been questioned in the light of the EC equal treatment principle.⁴⁴⁶

Furthermore, the partial leave of absence can be used by both parents who, to a certain extent, can decide themselves how to arrange it. Where the mother is the only person who is providing care for the child, she is entitled to the 33 or 43 weeks depending upon the length of leave she has decided to take. She can arrange this period as she wish as and she can divide it between full time leave and partial leave of absence. If she is not the only person who is caring for the child, she must reserve four weeks to the father,⁴⁴⁷ irrespective from the fact that he uses them or not. Furthermore, both parents may use the partial leave of absence. There are a number of possibilities: either

⁴⁴⁵ Ot Prp n° 107 (1992-93).

⁴⁴⁶ H. Aune, *Likebehandling prinsippet og arbeidstakere i deltidstilling*, Institutt for offentlig retts skrfteserie n° 2/1997.

⁴⁴⁷ This is the so called father’s quota, see *infra* section 24.4.2 (i).

they can combine full time and part time or they can use the partial leave of absence at the same time or they can use it one after the other .

Unlike the full time leave, the partial leave of absence is a conditional right. In fact, it must be based on a written agreement between the employer and the employee which includes its duration, degree and how it will be arranged.⁴⁴⁸ When establishing it, certain circumstances must be taken into consideration in particular whether it can create problems in the organisation or involving economic loss for the company. It is likely that those employers most adversely affected by the implementation of the partial leave of absence are small and medium-size enterprises where it is more difficult to replace an employee for only part of his or her position. The employee who wishes to take advantage of the partial leave of absence must give notice as soon as possible to the employer. The idea behind this is to avoid, as far as possible, particular inconveniences for the employer. This, however, does not mean that if the employee fails to do so the partial leave of absence cannot be arranged. Finally, the partial leave of absence can be interrupted in case of special circumstances.

Theoretically, the partial leave of absence provides an excellent solution in order to allow parents of young children to meet their responsibilities and still play an active role in the employment market. However, the first evaluation since it entered into force provides evidence that only a minimal percentage of parents take advantage of this opportunity: around 2% of mothers and less than 1% of fathers.⁴⁴⁹ A possible explanation could be that not many jobs can be satisfactorily performed in a few hours a week. In order to be successful, the partial leave of absence should be combined with an increased flexibility in the structure of the vast majority of the jobs. In other words, parents can be required to be flexible only in a flexible employment market.

⁴⁴⁸ For this purpose there is a standard module provided by the Social Security Office, the RTV-blankett 3B.01.

⁴⁴⁹ Statistisk Årbok 1997, Tab. 123.

24.4.2 Economic entitlements during the leave

The economic rights relating to the birth are regulated by the National Insurance Act. Depending upon the type (full-time or part-time) and the length (42 or 52 weeks) of leave, the parents are entitled to different economic treatment. Despite the use of the word "parents", the person who is entitled to collect birth benefits is, first of all, the mother. She can choose between a paid period of leave (*stønadsperiode*) of 52 weeks with reduced wage (80% of her gross income) or 42 weeks with full wage (100% of her gross income).⁴⁵⁰ At the moment a further possibility is under discussion, that is to extend the period of leave to 70 weeks with 60% of earnings. It is doubtful, however, whether it will enter into force.⁴⁵¹

Apart from the pregnancy benefits which have already been discussed above, starting from the third week before confinement the mother is entitled to birth benefits.⁴⁵² The fact that the mother decides to start using the birth benefits three weeks before the confinement, does not affect her right to choose between the 52/42 week-leave. It implies, however, that the duration of the period of payment after confinement is accordingly reduced. The mother is entitled to receive birth benefits "if she has been connected with working life". This means that she has to fulfil three requirements:

- she must have been employed for at least six of the last ten months before the delivery paying her pension
- her annual income is at least the 50% of the National Insurance basic amount;

⁴⁵⁰ This is the so called "80% rule" and was introduced in 1989; see § 14-6 of the National Insurance Act (*Dekningsgrad for fødselspenger*); see also A. Kjønstad, A. Syse, *Velferdsrett*, 1997, Ad Notam. The period of birth leave has been under constant review since 1909 and has gradually increased. Commentators have argued that the reasons for that have been the development of equal opportunity policies and the increasing number of women in the labour market; A. Svingen, *Retten til lønnet fødselspermisjon i Norge og EF*, *Kvinnerettslige Studier* n° 33, Institutt for offentlig retts skrifteserie n° 2/1994

⁴⁵¹ A. Kjønstad, A. Syse, *Velferdsrett*, 1997, Ad Notam; see also the debate in the Norwegian press, "YS: Øk fedrekvoten, ikke permisjonen!", *Aftenposten*, 25 September 97.

⁴⁵² § 14-8 (*Stønadsperioden for moren*) National Insurance Act.

- she must not be working because she is taking care of her child.⁴⁵³

These conditions are open to criticism as they do not reflect the real position of working mothers. Women are in fact likely to have a loose (or at least looser than men) connection with working life (for example, it is more likely that she has not been working continuously for the last six to ten months or that she has been in another form of atypical work because of childcare responsibilities).

For the father the situation is more complex, however. His right to benefits is limited in several respects and overall is subordinated to the rights of the mother. First of all, his choices are affected by the decision of the mother on the length of the leave. Secondly, he is entitled to receive birth benefits only if both he and the mother fulfil the conditions prescribed by the National Insurance Act *and* if he has been working for at least two of the last six weeks before the delivery. Thirdly, his entitlement is conditional on the mother resuming work, starting or resuming full-time education or being so ill or hospitalised that she cannot take care of the child.⁴⁵⁴ In this sense, the mother has a first right to use the leave (*førsterett*) and a right to veto the father's use of the leave (*vetorett*).⁴⁵⁵ Finally, the economic rights of the father are linked to the connection of the mother with the employment market, e.g. if the mother is not employed in at least a 50% post he is not eligible for the father's quota. This situation has been criticised by many legal writers⁴⁵⁶ and is a cause of concern for the government.⁴⁵⁷

In addition, there are no provisions in the National Insurance Act providing for the payment of the two weeks father's leave in connection with the birth. The situation is,

⁴⁵³ § 14-4 (*Generelle bestemmelser om fødselspenger*) and § 14-8 National Insurance Act (*Stønadsperiode for moren*).

⁴⁵⁴ § 14-9 National Insurance Act (*Stønadsperiode for faren*).

⁴⁵⁵ **E. Vigerust**, *Arbeid, barn og likestilling - Rettslig tilpasning av arbeidsmarkedet*, 1998, Tano Aschehoug, at 151 *et seq.*

⁴⁵⁶ *Inter alia* **H. Aune**, *Likebehandling prinsippet og arbeidstakere i deltidstilling*, Institutt for offentlig retts skrifteserie n° 2/1997.

⁴⁵⁷ NOU 1995:27 *Pappa kom hjem*.

however, mitigated as special provisions are arranged in almost all the collective/individual agreements.⁴⁵⁸ The restrictions imposed upon the economic rights of the father has been deemed to be one of the main causes for low take-up of the birth leave by fathers. The Ministry in charge for issues related to the Children and Family (*Barne-og familie departement*) has proposed a solution which has proved to be a success and this is discussed in the following section.

In addition to the aforementioned birth benefits, any parent in charge of the daily care of a child is given child security benefits (*barnetrygd*) irrespective of how much they earn or whether they work or not. This provision has been heavily criticised because it does not take into account the real needs of the family.

(i) Father's quota (*fedrekvote*)

On 1 April 1993⁴⁵⁹ a new development which aimed to encourage fathers to take time off in order to care for new-born children was introduced. On that occasion the period of paid parental leave was expanded and four weeks of this period were allocated exclusively to the father: this is the so called father's quota (*fedrekvote*). Since it was introduced together with the extension of the parental leave, this does not erode the rights of the mother. It is important to emphasise that the father's quota was not the first provision to give fathers a right to leave. Such a right has been provided by the law since 1977. The father's quota adds to the existing right an economic incentive. As a general rule, if the father does not use the father's quota, the four weeks cannot be transferred to the mother and the benefit period (*stønadsperiode*) is accordingly shorter. The law is in fact very restrictive concerning the possibility of transferring this period to mothers. This general rule, however, can be derogated from if certain conditions occur,

⁴⁵⁸ NOU 1995:27 *Pappa kom hjem*.

⁴⁵⁹ Ot prp n° 13 (1992-93); the provisions regulating the father's quota are in § 14 - 10 National Insurance Act.

id est the father suffers from an illness which make it unreasonable for him to use this period; he has been unemployed and has resumed work only during the last six months of the mother's leave; he spends significant time abroad because of his work and it would be difficult for him to come home in order to use the father's quota; if he is employed in a small company and his absence will have considerable consequences and finally if he has an irregular link with the employment market.⁴⁶⁰ The father's quota can be taken any time before the end of the parental leave and must be used after the period reserved exclusively to the mother. There is evidence that the vast majority of the fathers prefer to use it at the end of the parental leave.

Like the other benefits reserved to fathers, also the father's quota is not a "primary" right. It is a derived right and in order to enjoy it, certain conditions must be met by both parents. Concerning the mother, she must have been working for at least six of the last ten months before confinement. Her income must have been at least ½ of the National Insurance basic amount. Furthermore, she must have been employed for at least half of a full-time post (*id est* not 40% or 30%) during the required period. If the father is taking the leave, the amount of the birth benefits is calculated on the basis of his income but it is gradually reduced according to the employment position of the mother: if the mother has worked part-time the birth benefits available to the father is accordingly reduced. In practice, most of the time this results in an economic loss for the family. Because of that, the National Insurance Act provides fathers with the opportunity to use two weeks with higher compensation or to use the father's quota part-time (*gradert uttak av fedrekvoten*). Moreover, theoretically, the father can use all the period of leave apart from the nine weeks expressly reserved to the mother.

The idea behind the father's quota is that it should influence the role of the father within the family. A recent research conducted by the Ministry of Foreign Affairs finds that this "form of mild social coercion" has indeed produced astonishing results. When the father's quota was introduced only 4% of fathers used it. Four years later, however,

⁴⁶⁰ Regulation 20 March 1993 which was incorporated in § 14-10 (5) a-e National Insurance Act.

this figure increased to 80%. Most importantly the vast majority of fathers said that they were taking leave because they were willing to and not because they were forced.⁴⁶¹

24.5 Employment protection

In Norway, recruitment and dismissals are regulated by both the Working Environment Act and the Equal Status Act. The general provision concerning recruitment is § 55 of the Working Environment Act, which states that the employer cannot request information on “political, religious or cultural views or whether candidates are members of any labour organisations”. Although it does not mention “information on gender”, this provision is to be interpreted in light of the principle of sex equality (§§ 3 and 4 Equal Status Act). Dismissals are regulated by Chapter XII of the Working Environment Act. In particular § 65 deals with dismissals in cases of pregnancy, birth or adoption. The main rule is set out in § 65(1) which states that pregnant employees may not be dismissed on grounds of their pregnancy. Dismissals taking place during pregnancy are considered to be solely on the grounds of pregnancy itself “unless other valid reasons are given”. In other words, pregnancy must not be the only reason for dismissals. Conversely, in the case of an employee who would have been dismissed even if she were not pregnant, the dismissal is regarded as lawful. The principle established in § 65 Working Environment Act is to be read in conjunction with § 4(4) Equal Status Act which states that the burden of proof is upon the employer.

The general rule established in § 65(1) Working Environment Act is elaborated upon in § 65(2) which states that during the period in which the mother, or the father, is on birth leave *ex* §§ 31-32 Working Environment Act the prohibition against dismissal is absolute. There are however derogations to this rule (for example, curtailed operations and rationalisation measures); in this case the dismissals take effect *after* the completion of the period of leave. The reason for this protection is to ensure that the

⁴⁶¹ NOU 1995: 27 *Pappa kom hjem*, at 13; see also the debate in the Norwegian press, “70 prosent av fedrene tar permisjon”, *Aftenposten*, 26 September 1997 and in English, “Dad’s Revolution”, 22 October 1997, available on the internet at <http://odin.no/publ/nn/97/19/soci-1.html>.

employee will not lose her/his position during birth leave. The same rule applies during the period in which the pregnant employee is on leave for the ante natal medical visits taking place during the working time *ex* § 31(7). The employee has to notify the employer of her pregnancy without delay and, if so required, a medical certificate has to be provided.⁴⁶² It has been noted that there is a potential clash between § 65(1) and § 65(2), as the first paragraph mentions dismissals on the grounds of pregnancy, and the second refers to dismissals on the grounds of absence due to pregnancy.⁴⁶³ It is difficult to draw a line between these two situations. In case of doubts the provisions should be read as outlawing any dismissals during the period of the pregnancy. Dismissals because of the impossibility of adaptation/substitution of work are to be considered in breach of § 65(1) Working Environment Act.

24.6 Rights of unemployed, single and student parents

Unemployed, single parents and parents in full time education are three very different categories: the reason to deal with them in the same section is that they receive extra economic help from the State. In other words, to a certain extent, in Norway birth benefits are not merely related to the working status of the parents but are regarded as a part of the organisation of the welfare state. Weakness, however, still exist with two main drawbacks. Firstly, in reality the economic benefits are primarily linked to the mother and only to a limited extent to the father. Secondly, in order to be entitled to collect them, one is required to fulfil certain conditions (for example, a student is required to have been in education for at least six months before the birth). The welfare state approach is further confirmed by the provision of social security for children. These benefits are not regulated in a consolidated piece of legislation but in a variety of Acts, in particular the National Insurance Act (Part V "Benefits linked to the career and

⁴⁶² § 65(2) Working Environment Act.

⁴⁶³ O. Friberg, *Arbeidsmiljø - loven med kommentater*, 1995, Tano.

family situation), the Tax Act (*Skattelov*) and the Child Social Security Act (*Barnetrygdlov*).

If the mother is unemployed she will not qualify for the ordinary birth benefits (*fødselspenger*). Instead, she will be entitled to apply for a lump-sum (*engangstonad*) for each child. The same situation occurs if the birth benefits she would be entitled to according to her income are less than the amount of the lump sum. The amount of the lump sum diminishes if the mother is also in receipt of other social security benefits such as a invalidity pension. The amount of the lump sum is determined on annually by the Norwegian Parliament (*Storting*) and it is non taxable income.⁴⁶⁴ It is a political goal currently under discussion, of certain Norwegian political parties, in particular the Christian Democratic Party (*Kristelig Folkeparti*) that the lump sum should “protect” and “motivate” mothers who for any reason decide to stay at home and because of that not having to feel/be disadvantaged in respect to those who are working.

Normally the father is not entitled to receive this specific benefit. The only opportunity he will have to claim is if the mother dies as a consequence of the birth. Furthermore, to be entitled he must take over the care of the child and the benefit must not already been paid to the mother. In certain circumstances, that is if the parents are widowed, single, separated or divorced, other benefits are available. The parent who is in charge for the daily care of the child is entitled to receive, in addition to the lump sum, further specific benefits. These benefits are regulated under The National Insurance Act. In this context the most relevant is Chapter 15, which deals with the benefits paid to lone parents. The Chapter also contains a provision which specifically applies only to lone mothers and entitles them to a extra specific benefit, namely the birthgrant (*fødselsstipend*). The purpose of this provision is to enable lone mothers to make necessary purchases in connection with the birth.

In cases where the mother is in full time education, she will not be entitled to claim the ordinary birth benefits as she does not fulfil the conditions laid down in the National Insurance Act. In place of these, benefits from the State’s Student Loan

⁴⁶⁴ NOU 1995:27 *Pappa kom hjem*.

Authority (*Student Lånekasse for utdanning*) and the National Insurance are available. The benefits from the State's Student Loan Authority are the birth grant (*fødselsstipend*) and the caring contribution (*forsørgertilleg*). In order to be entitled to receive them, the mother has to provide a birth certificate for the child and must have been in education for at least the 6 months before the birth. The birth grant lasts for 42 weeks (3 weeks before and 39 weeks after the birth) and corresponds to a monthly allowance.⁴⁶⁵ The caring contribution is paid together with the birth grant. The birth grant and the caring contribution differ, because the former is a grant and the mother is required neither to pay tax on it nor to pay it back and this does not apply for the caring contribution.

Normally only the mother is able to receive the benefits mentioned above; however, if the father is taking care of the child and both he and the mother are entitled to benefit, then he may also be entitled to receive it. If both the parents are in education the benefit may be shared.⁴⁶⁶

24.7 Child care leave, child care provisions and the child care allowance (kontantstøtte)

In 1977 a child care leave provision was added to the Working Environment Act in order to alleviate the problems that many working parents faced when their children were ill. According to § 33A parents were entitled to be on leave for ten days per year in order to care for sick children. The number of days was the same regardless of the number of children. Following a 1992 amendment to the Working Environment Act, parents are now entitled to fifteen days if they have more than two children. The right is valid up to the twelfth year of the child. Furthermore, specific provisions concerning

⁴⁶⁵ In case of adoption the birth grant last 39 weeks only.

⁴⁶⁶ For a critique of the provisions of the National Insurance Act discussed in this section see, *inter alia*, T. Svedrup, "Folketrygdloven i kvinneperspektiv" in *Folketrygdloven i støpeskjeen*, A. Kjønstad (ed.), 1984, Oslo.

particular situations, such as chronically handicapped children and/or employees who have the sole responsibility for the child, are also included.

As far as child care provisions are concerned, Norwegian parents can choose between various options such as state kindergarten, local daycare institutions (*fylke kindergarten*) or childmanders (*dagmamma*). Although the number of children in child care is increased during the last years, this is still relatively low. The low use of child care institutions can be partly explained by the introduction of the partial leave of absence. There is also another reason which is a measure recently introduced by the Children and Family Ministry of Bondevik Government, namely the child care allowance (*kontantstøtte*).⁴⁶⁷ This alternative, aims to help families with children under three years old with a subsidy who do not make use of child care institutions

According to the Barne-og Familie Departement, the aim of the child care allowance is first of all to enable parents to spend more time with their children. Furthermore, it gives parents the opportunity to choose the form of child care they consider most appropriate for their children. Finally, this measure is regarded as an equality measure. In fact, since it is given to family who are not using kindergarten, this equalises families using public funds with families who do not. This measure, however, faces very strong opposition to several aspects.⁴⁶⁸

The main criticism is that there are reasons, mainly economic, to believe that this measure will encourage mothers rather than fathers to leave their job or to go to some form of atypical/low paid job, in order to stay at home with the children. It is also likely that mothers who make such a choice, will be those mothers who are already usually low paid or unsatisfactory jobs. Instead, mothers who are in highly satisfactory and well paid jobs probably chose to use a private form of child-care. This can hardly be

⁴⁶⁷ Act n° 441, 26 June 1998. For the *travaux préparatoires* see St prp n° 53 (1997-98), Innst S n° 200 (1997-98) and Ot prp n° 56 (1997-98).

⁴⁶⁸ E. Vigerust, "Kontantstøtte til småbarnsforeldre" (1998) 3 KJ 205. See also the debate in the Norwegian press "Kampen om ny velferd: kontantstøtten - valfrighet eller trussel?", Arbeiderbladet, 7 October 1997; "Kontantstøtte vil ramme farsrollen", Aftenposten, 2 October 1998.

seen as a step towards a "family principle" in employment law; instead it reinforces gender differences and stereotypes. Indeed it appears to be in sharp contrast with the existing measures. It is also difficult to see how it would increase the choices for those parents who need or wish to work. Moreover, if the argument behind this measure is to ensure equality, it can easily be argued that a form of subsidy with this intention is already provided by the Norwegian system. Furthermore, the considerable cost that child care allowance would involve for the State should be evaluated. Instead it has been suggested that the government should use these funds in order to improve existing facilities.

25 *Sweden*

Sweden has one the most advanced set of provisions concerning pregnancy, maternity, paternity and parental leave (birth leave).⁴⁶⁹ It is a piece of legislation of which Sweden is proud and other countries regard as an ideal model. In broad terms any *parent* living in Sweden who is insured with the National Insurance (*Allmän försäkringskassa*) is also entitled to parental benefits (*föräldrapenning*) and if he/she is working is entitled to parental leave (*föräldraledighet*). In Sweden the right to take paid birth leave is not linked to the mother or the father, but to the person who has the daily care of the child (*id est* it is gender neutral right). No other country examined allows both parents such a long leave with full economic benefits in order to take care of young children. Furthermore, the Swedish system is very flexible and offers parents the opportunity to organise their leave as they wish. Finally, as in Norway, in Sweden people outside the workforce also have the right to birth benefits. Swedish legislation aims, not simply to improve the position of women, but also to challenge the relationship between genders; the absence of specific provisions addressed to the mother makes it clear. It is, so far,

⁴⁶⁹ *Inter alia* NOU 1993: 12 *Tid for barna*, at 27; see also *Leave Arrangements for Workers with Children*, DGV/773/94, at 1. For a discussion in English of the Swedish system, see A. Numhauser-Henning, "Sweden", in *The Harmonization of Working life and Family Life*, Blanpain (ed.), 1995, Kluwer, 91.

one of the best example of how legal provisions can contribute to the development of the society.

This system, however, is not flawless: commentators argue that these provisions do not match the practical reality.⁴⁷⁰ The purpose of this section is to analyse the Swedish system of birth leave and to scrutinise its implementation.

25.1 Overview of the relevant Swedish legislation

The relevant Swedish legislation in this area is arranged in a similar way to that in Norway and it is based on three Acts: the Working Environment Act (*Arbetsmiljölöag*)⁴⁷¹ the Parental Leave Act (*Föräldraledighetslag*)⁴⁷² and the National Insurance Act (*Allmen Försäkring*).⁴⁷³ The Parental Leave Act and the National Insurance Act were amended in 1994 in order to introduce the child care allowance (*vårdnadsbidrag*) which was eventually withdrawn. As in Norway, these two Acts do not cover precisely the same period of time. The period of leave is longer than the period during which the parents are entitled to receive economic benefits: any employed parent has the right to be on leave for 18 months but the economic benefits are paid for 64 weeks (15 months). Also in the context of Swedish legislation, the *travaux préparatoires* must be mentioned.⁴⁷⁴ Furthermore, the provision of collective/individual agreements “stretch”

⁴⁷⁰ *Inter alia*, K. Wiedeberg, “Reformer for kvinner - på mannens premisser. Den svenske lovgivningen vedrørende omsorgspermisjon for foreldre” (1991) 6 JV 314; see also A. Dalberg, “Jämställdhetslagen som paradox och dekonstruktion”, in *Kvinnoperspektiv på retten*, Nordborg (ed.), 1995, Iustus forlag, 21.

⁴⁷¹ Arbetsmiljölöag 1977:1160 (Working Environment Act), in particular Chapter 4.

⁴⁷² Lag 978:410 Om rätt til ledighet för vård av barn, as amended by. Föräldraledighetslag 1995:584 (Parental Leave Act). These Acts replace legislation dated back to 1939 which prohibited dismissals of pregnant women and provided some provisions concerning leave in connection with pregnancy and maternity.

⁴⁷³ Lag 1962:381 Om allmen försäkring (National Insurance Act), in particular Chapter.4 on Parental Benefits.

⁴⁷⁴ A good example is SOU:1982:36 *Enklare föräldraförsäkring* which launch the idea that it should be made easy for fathers to be entitled to the leave and the economic benefits.

the standards provided by the legislation and finally, as Sweden has been a member of the EC since 1995, the relevant EC legislation plays an important role.

25.2 *Pregnancy in the workplace*

The Working Environment Act regulates the position of women in the workplace. § 2 states the general conditions which are further specified in § 6. As in Norway, the pregnant employee has the right to have her work adapted, substituted or can stop working. However, by way of contrast with Norwegian provisions, according to Swedish legislation, a pregnant employee working in a *physically* heavy job, can be granted leave with benefits (*havandeskapspenning*) which are paid from 60 days up to the day before confinement.⁴⁷⁵ Special consideration should be given to specific difficulties individually experienced. It has however been pointed out that, as there is no definition of specific difficulties in the law, often women who experience specific problems suffer disadvantages.⁴⁷⁶

25.3 *The legislation on sex equality in Sweden*

The Swedish system of birth leave, at least on paper, is a tribute to sex equality. In Sweden, a ban on discrimination on grounds of sex is to be found in the Constitution: "the community shall guarantee the same rights to men and women". Furthermore, more detailed provisions regulating sex-equality legislation were enacted in the 1979. Since then these have constantly evolved: the last amendment to the Sex Equality Act was introduced in 1991 in order to comply with EEA and, eventually, EC

⁴⁷⁵ Chapter 3, 9§ and 10 § National Insurance Act; see also K. Wiedeberg, "Reformer for kvinner - på mannens premisser. Den svenske lovgivningen vedrørende omsorgspermisjon for foreldre" (1991) 6 JV 314

⁴⁷⁶ S.-E. Olsson, *Kvinnor i arbete och reproduktion. Havandeskapspenningens tillampning*, 1993, Lund.

requirements.⁴⁷⁷ The aim of the Act is to promote equal opportunity between men and women and to improve the position of women in the workplace and it expressly refers to both direct and indirect discrimination. The Swedish Equal Status Act differs from the Norwegian and Danish Equal Status Act as it specifically require the employers to pursue equal opportunities and to make it possible for both male and female employees to combine work and parenthood.⁴⁷⁸ Finally, the implementation of the Sex Equality Act is monitored by the Equal Opportunity Ombudsman (*Jämställdhetsombudsmannens*).⁴⁷⁹

25.4 Maternity, paternity and parental leave and related economic benefits

The Parental Leave Act deals with rights to leave in connection with the birth. It provides for 5 kinds of leave.⁴⁸⁰ These are the following.

- the leave reserved to the mother in connection to the birth (*mammaledighet*). This is regarded as part of the parental leave and it gives the mother the right to take off seven weeks before and seven weeks after confinement: this period is intended to protect the health of the mother, the foetus and the new born child and therefore and cannot be shared with the father (*morskvote*).⁴⁸¹ This provision was amended from six weeks in order to comply with Article 8 of the Pregnancy and Maternity Directive. Swedish legislation, however, does not provide for two weeks of compulsory leave. This was not considered necessary as 98% of Swedish women take the leave, but from the point of view of EC legislation, a good practice does not

⁴⁷⁷ Jämställdhetslag 1991:433 (Equal Status Act).

⁴⁷⁸ § 15 Equal Status Act.

⁴⁷⁹ **R. Eklund**, "The Swedish Case - the Promised Land of Sex Equality?", in *Sex Equality Law in the European Union*, Hervey, O'Keeffe (eds.), 1996, Wiley, 337; see also St inled n° 70 (1991-92) *Likestilling politikk for 1990-åra*.

⁴⁸⁰ 2 § Parental Leave Act.

⁴⁸¹ 4 § Parental Leave Act.

amount to full implementation.⁴⁸² Furthermore, the mother has a further right to leave if she is breastfeeding. In order to use these forms of leave the mother does not have to meet any specific requirements.

- In connection with the birth the father has the right to two weeks paid paternity leave (*pappadagar*).
- the leave which parents have until the child is eighteen months old (*hel ledighet med eller utan föräldrapenning*); The Swedish government, similarly to the Norwegian government, in recent years has strongly emphasised during recent years the fact that *both* parents should share the responsibility for the care for young children.⁴⁸³ Following the Norwegian model of father's quota, as from 1 July 1994, Sweden has implemented a system according to which parents can transfer to each other any days apart from four weeks. However, although this period is potentially addressed to both parents it is known as "daddy's month" (*pappamånad*)! If these four weeks are not used, they cannot be transferred to the other parent (the mother). This period can be used in one block or in the form of separate days until the child is eight years old or has completed his/her first school year.
- Swedish law provides for some provisions similar to the Norwegian partial leave of absence. After the period expressly allocated to the mother, if both the parents share the responsibility of the child, they can choose how to allocate the remaining weeks. In this respect, the Swedish system is very flexible: parents can choose to have full-time leave until the child is eighteen months and then they can work reduced days (half-time or 1/4 post) until the child is eight years old or is in the first school year. Parents can also decide whether to have a period of leave full-time, part time, in one block or in separate periods. Contrary to what happen in Norway, the law entitles

⁴⁸² S. Prechal, L. Senden, *Implementation of Directive 92/85, DGV/1717/96*. Furthermore, the Court held that although Member States may leave the interpretation of a principle to representatives of management and labour, that possibility, especially in light of the principle of legal certainty, does not discharge them from the obligation of ensuring, by appropriate legislative and administrative provisions, the correct implementation of these principles; see Case 143/83, *Commission v. Denmark*, [1985] ECR 427.

⁴⁸³ Prop 1993/94 om Jämställdhetspolitiken, *delad makt, delat ansvar*.

parents to make up to three changes in the use of their parental leave (and allowance) and further changes can be agreed with the employer. Furthermore, as long as they do not receive birth benefits simultaneously, the parents can use the leave at the same time. As a general rule, employees who wish to use the leave must notify their employer at least two months before the leave starts. In order to be entitled to use the parental leave certain conditions must be fulfilled: the employee must have been employed for at least six months in the year before the birth or twelve months in the two years prior to the birth. If these conditions are satisfied, parents are entitled to eighteen months leave each. During the period of leave, the employee is protected against unfair dismissals and once the parental leave is finished they have the right to return to their previous job.

- The leave that the parents can take in the form of reduced working hours until the child is eight years old (*delleledighet utan föräldrapenning*). This is a right similar to the possibility to work reduced hours provided by the Norwegian Working Environment Act.

		(18 months) parental leave			
7 weeks mother's leave <i>ante</i> birth (<i>manma ledighet</i>)	birth	7 weeks	4 weeks	this period can be shared between the mother and the father	until the child is 8 years old part time parental leave
		mother's leave <i>post</i> birth (<i>mamma kvote</i>)	leave for one of the parents (<i>pappa månad</i>)		
		2 weeks <i>pappa dagar</i>			

Birth leave system in Sweden

Chapter 4 of National Insurance Act regulates the right to birth benefits, (*Föräldrapenning*). This was introduced in 1974 in order to substitute the maternity benefits (*moderskapsförsäkringen*). It can be appreciated how, from the very beginning, Swedish legislation has tried to encourage both parents to take the responsibility for newborn children⁴⁸⁴ and the birth benefits are a result of this attitude. Parents are entitled to 450 paid days (15 months) of leave. Of this period, the first 12 months are paid at 80% of the original wage and the rest at a flat rate (*garantibelopp*). The parents can transfer these days to each other with the exception of the *pappamånad*. In other words, the mother and the father enjoy the same economic rights and, most importantly, the economic rights of the father do not depend, as in the Norwegian birth benefit system, upon the right of the mother. The only condition that the parents must satisfy is that they must have been insured for illness for at least 180 days before the birth benefits. The parents can share the birth benefits between them, as long as they do not claim them at the same time.

As in Norway, economic benefits are calculated on the basis of previous income and in the same way as sickness benefits. The condition to fulfil is that the person has to have been insured for at least for 34 weeks (240 days) before the birth. The mother can claim the benefits 60 days before the birth and for the 30 days following the confinement. Contrary to the position in Norway, here the mother has a right, but not an obligation, to take the birth benefits. These, however, have to be claimed within 60 days of confinement.

People who are not insured are entitled to receive a flat rate 420 per week during the whole period of leave. Finally, as in Norway, adoptive parents enjoy the same rights as natural parents.

⁴⁸⁴ SOU 1982:36 *Enklare föräldraförsäkring*.

25.5 *Child care leave*

In addition to the birth leave provisions, Sweden provides for a system of paid leave which parents are entitled occasionally in case of illness of the child (*ledighet med tillfälliga föräldrapenning*). This amounts to 120 days per child per year. Furthermore two contact days (*kontaktstager*) in order to visit the nursery/school are provided.

26 *Denmark*

The position of Denmark differs from that of Norway and Sweden.⁴⁸⁵ Denmark has in fact been a member of the European Community since 1972. Until then, domestic labour legislation did not provide any specific provision in this area. Suffice is to mention that protection against dismissals was tackled mainly by means of collective agreements! Although these have always enjoyed a very high status in Denmark, it is easy to understand why this legislative “gap” was dangerous in cases involving sex discrimination issues such as pregnancy and maternity. When Denmark joined the EC, it was forced to introduce many changes. Thus it is arguable that Danish sex discrimination legislation was developed in order to comply with EC standards.

Finally, in Denmark as in the other Scandinavian Countries, the legislation sets standards which are further developed in collective and individual agreements.

26.1 *Overview and evolution of the relevant Danish legislation*

Pregnancy and maternity were addressed for the first time in 1981 in an *ad hoc* Act: the Maternity Act (*Barseorlov*).⁴⁸⁶ Prior to this, these situations were regulated by diverse provisions in the context of different agreements and Acts. The situation was further complicated by different rules and degrees of protection applying to different

⁴⁸⁵ For a discussion in English of the Danish system see, K. Ketscher, “The Danish Social System”, in *Danish Law in a European Perspective*, Dahl, Melchior, Rehof, Tamm (eds.), 1996, Gad Jura 293.

⁴⁸⁶ Lovbekendtgørelse n° 234, 4 June 1980 om Barseorlov (Maternity Act) which entered into force on 1 January 1981.

categories: blue collar (regulated by *Fabrikslov*, 1901), white collar (regulated by *Funktionærlov*, 1938) and civil servants (regulated by *Tjenestmandslov*, 1919). In addition, protection of employment positions was very limited.

The Maternity Act was seen as a welcome reform, as it (partly) erased the differences between the three categories of employees and introduced common legislation. Now all women in the labour market are entitled to the same amount of leave and to protection from dismissal. The Maternity Act was amended in 1983 when parental leave and two weeks paternity leave were introduced, and in 1989 it was incorporated in the Equal Treatment Act (*Ligebehandlingslov*).⁴⁸⁷ This latter Act was introduced in 1978 in order to comply with the EC Equal Treatment Directive.⁴⁸⁸ It has since been amended on several occasions, most recently in 1994 in order to implement the EC Pregnancy and Maternity Directive.⁴⁸⁹

Following this last amendment, the general rules concerning birth leave are contained in Chapter 3, §§ 7 to 10 of the Equal Treatment Act. These provisions are discussed in detail below. As Hartlev notes, the structure of the legislation concerning pregnancy, maternity, paternity and parenthood has a wide scope of application and is the sum of many interests.⁴⁹⁰ It ensures the right to leave, to receive economic benefits, protection of employment positions as well as the protection of the health of the mother, the foetus and the new born child. In doing so it aim to achieve a balance between the interest of the employer and the pregnant employee. This legislation enhances equal opportunity in two main ways: firstly by involving the father in the care of the child and second by establishing a prohibition on discrimination on grounds of pregnancy and maternity.

⁴⁸⁷ Lovbekendtgørelse n° 244, 19 April 1989 om Ligebehandlig af mænd og kvinder med hensyn til beskæftigelse om Barseorlov (Equal Treatment Act). See, in general, **A. Andersen, R. Nielsen, K. Pretch**, *Ligestillingslovene*, 1996, Jurist-og Økonom forlag.

⁴⁸⁸ Council Directive 76/207 EEC OJ (1976) L 39/40.

⁴⁸⁹ Council Directive 92/85, EEC OJ (1992) L 349/1.

⁴⁹⁰ **M. Hartlev**, "Graviditet, barsel og ligebehandling i lønarbejd", in *Kvindelig arbejdsret*, Petersen (ed.), 1995, Gad Jura, 19.

However, it is still open to criticisms as it is too closely connected with the employment market.

In addition to the legislation providing for leave and benefits for parents, the Social Assistance Act provide for specific benefits for children.

26.2 *Pregnancy and maternity in the “working environment”*

As mentioned above, the “working environment” is a distinctive feature of labour relations in the Scandinavian countries. The Danish concept of the working environment - *arbejdsmiljø* - has been accurately described by A.G. Léger in the opinion for the *Working Time Directive* case as:

“a very broad concept, covering the performance of work and conditions in the workplace, as well as technical equipment and the substances and material used. Accordingly, the relevant Danish legislation is not limited to classical measures relating to safety and health at work *stricto sensu*, but also includes measures concerning working hours, psychological factors, the way work is performed, training in hygiene and safety and the protection of young workers and worker representation with regard to security against dismissals or any other attempt to undermine their working conditions. The concept of working environment is not immutable, but reflects the social and technological evolution of the society”.⁴⁹¹

The concept of working environment was introduced in Article 118a of the EC Treaty in 1986 due to Danish pressures. Since then, Article 118a EC has been used as a legal base in order to enact several Directives, one of which is the Pregnancy and Maternity Directive. However, in the Danish Working Environment Act there are no detailed provisions concerning the protection of pregnancy and maternity in the working environment. There is only § 15 which generally provides for the protection of the pregnant employee. These requirements are fulfilled and monitored by decisions of the *Arbejdsministeriet*. Further specifications of these requirements are contained in both

⁴⁹¹ Opinion of the AG Léger on Case C-84/94 [1996] ECR I-5755, at para 42. On the concept of working environment and its origin see R. Nielsen, *Arbejdsmiljøet*, Jurist- Økonomforbundets forlag, 1993, in particular at 31 *et seq.* The last amendment to the Act is in the Lovbekendtgørelse n° 184, 23 March 1995 om Arbejdsmiljø (Working Environment Act). See also *supra* Chapter V.

the Equal Treatment Act and the Daily Benefits Act. § 1 (2) Equal Treatment Act allows the granting of special protection to women in connection with pregnancy and maternity⁴⁹² and § 12 (2) Daily Benefits Act states that pregnant employees who are working in a dangerous working environment are entitled to leave with pregnancy benefits.

26.3 *Maternity, paternity, parental leave and related economic benefits*

The pregnant employee has the right to leave in order to undergo medical visits.⁴⁹³ She can stop working four weeks before the confinement (*graviditetsorlov*)⁴⁹⁴ unless she is incapacitated. After the confinement, she is entitled to fourteen weeks maternity leave (*barseorlov*), the first two of which are compulsory. These fourteen weeks cannot be shared with the father. During this period the mother is entitled to weekly benefits. However, if the mother resumes work before the end of 14 weeks she loses any entitlement for the rest of the period.⁴⁹⁵ Although the reason behind this provision is to avoid the possible misuse of public resources, it can be regarded as turning the right into an obligation. There is no requirement on the length of service for eligibility.

The father is entitled to two weeks paid leave in conjunction with the birth (*fædreorlov*); these two weeks can be taken either immediately after the birth or at any time within the fourteen weeks of maternity leave. If the father resumes work before the two weeks, he also loses the benefit.

The Danish legislation does not provide for a system of father's quota such as that envisaged in Norway and Sweden. It merely provides that, after the 14-week period

⁴⁹² See further M. Hartlev, "Graviditet, barsel og ligebehandling i lønarbejd", in *Kvindelig arbejdsret*, Petersen (ed.) 1995, Gad Jura, 19, at 26.

⁴⁹³ § 7(6) Equal Status Act.

⁴⁹⁴ § 7(1) Equal Status Act. However, following an agreement with the employer, she can be on leave for 8 weeks before confinement.

⁴⁹⁵ §7(2) Equal Status Act.

reserved to the mother, the parents are entitled to ten further weeks of parental leave (*forældreorlov*). This was introduced in 1984 and became fully effective as from July 1985. If the father wishes to make use of part of this period, he must give at least 8 weeks notice to his employer. The system of parental leave in Denmark is not as flexible as in Norway or Sweden. Parents have only a limited possibility to combine paid work with reduced benefits and they cannot be on leave at the same time.

The economic benefits for both mothers and fathers are established by the Child care Benefits Act (*Barseldagspenger*) at §§ 11-19. As far as the mother is concerned, only women connected with the employment market are eligible for economic benefits (*barseldagspenger*): there are no economic benefits available for housewives. The basic requirement for entitlement is that at the moment of the leave or at latest at the moment of the birth, she is resident in Denmark. There are further conditions depending on whether she is employed, unemployed or self employed. If the mother is employed she must have been employed at least for 13 weeks before the leave and during that period she must have worked for at least 120 hours. It has been pointed out that this requirement discriminates between women who have been employed for different lengths time.⁴⁹⁶ Economic benefits for an employed mother correspond to 90% of her gross wage. According to a collective agreement women working in the public sector receive the full amount of their wages. If the mother is unemployed, she is entitled to unemployment cash benefits. Finally, a woman who has not been working during the last months of pregnancy but has been in education for at least 18 months is also entitled to economic benefits.

The entitlement to economic benefits starts four weeks before the birth. In some circumstances, however, birth benefits can be paid before that period. This is the case, for example, when the working environment is dangerous or the employer did not

⁴⁹⁶ E. Vigerust, *Arbeid, barn og likestilling - Rettslig tilpasning av arbeidsmarkedet*, 1998, Tano Aschehoug.

succeed in substituting the woman's job.⁴⁹⁷ The economic benefits are calculated on the basis of sickness benefits, that is on the basis of hour by wage and working time: there is a maximum hourly amount. Contrary to the situation provided for by the Norwegian provisions, Danish law states that any economically active father is entitled to collect birth benefits independently from the fact that the mother is entitled to them.

Besides the above mentioned benefits, Danish law entitles parents to further economic benefits. Since 1986, according to the Social Assistance Act (*Lov om Social Bistand*),⁴⁹⁸ parents are entitled to the "family allowance", a benefit similar to the barnetrygd provided by Norwegian law. This is a tax free sum paid by the state, in order to enable them to meet the extra cost connected with the child. The sum is usually paid to the mother until the child is 18 years old. Ketscher has criticised both benefits. She questions the family allowance as it is paid independently from the income of the parents.⁴⁹⁹ Instead benefits could be paid to single or with low income parents.

Another form of economic help is the "child benefit", which is granted to single parents, children of prisoners and orphans. Also this benefit as a general rule is paid to the mother. Since 1970, however, it is subject to the fulfilment of certain requirements.

4 weeks mother's leave (<i>ante</i> birth) <i>barseorlov</i>	birth	14 mother' (<i>post</i> birth)	weeks s leave birth)	10 weeks parental leave	26 weeks	26 weeks
		2 weeks comp.				
		2 weeks paternity leave				

Birth leave in Denmark

⁴⁹⁷ § 12 (2) Daily Benefits Act (Lovbekendtgørelse nr. 549 af 23.6.1994 om Dagpenge ved sygdom eller fødsel).

⁴⁹⁸ Lovbekendtgørelse n° 1024, 16 June 1994 om social bistand (Social Assistance Act).

⁴⁹⁹ **K. Ketscher**, "The Danish Social System", in *Danish Law in a European Perspective*, Dahl, Melchior, Rehof, Tamm, (eds.), 1996, Gad Jura, 293.

26.4 Protection of employment positions

Danish law provides for the so called "employer's prerogatives" which give the employer wide discretion when appointing and dismissing an employee. The law, however, sets limits to these prerogatives. One of these limits is contained in § 2 of the Equal Treatment Act which requires employers to respect the principle of equal treatment. For example, when recruiting an employee the employer cannot take into consideration the gender of the candidates. Furthermore, according to § 9 (2) of the Equal Treatment Act, the period of leave is protected from dismissals.

26.5 Child care provisions and child-care leave

As mentioned above, the provisions concerning parental leave in Denmark are not as satisfactory as the Norwegian and Swedish provisions. This situation however, has been mitigated by the introduction of childcare leave (*børnepasingorlov*) which entered into force on 1 January 1994. This aims to provide parents with the opportunity to care for their children. Parents with children aged 0-8 are entitled to up to 26 weeks leave for each child, which must be used for at least 13 weeks. The right however is personal and cannot be transferred from one parent to the other. Furthermore, following agreement with the employer, the leave can be extended by another 26 weeks (*id est* to a full year). In a family with two children, for example, parents can be on leave for 208 weeks. The parent who is on child-care leave is entitled to benefits equivalent to maternity benefit, namely circa 80% of the ordinary wage. Local authorities may compensate for the loss of earnings.⁵⁰⁰ The justification for this is that if parents are on child-care leave, the local authority saves on childcare structure. In Denmark, in fact, the majority of childcare facilities are public and children whose parents are on child-

⁵⁰⁰ Circa 3/4 of the Local Authorities compensate (Source NOU 1995:27 *Pappa kom hjem*).

care leave have limited opportunities to attend them.⁵⁰¹ Local authorities, however, enjoy discretion whether or not to compensate parents for this loss of facilities and this, as Ketscher points out, creates a further problem, namely inequality between parents on child-care leave.⁵⁰²

27 *Summary and evaluation of the Scandinavian Model*

The previous sections have discussed the steps which the Scandinavian countries have taken in order to introduce legal provisions aimed at establishing what this research identifies as the family principle in employment law. These provisions have been a priority on the agenda of the Governments of these three countries for a long time but, particularly in the last decade, this commitment has steadily increased.

This chapter has provided evidence that a certain degree of uniformity among the Scandinavian countries exists: broadly speaking, in these countries any wage earner has the right to go on leave, to (theoretically) arrange the form of the leave according to his/her needs and to claim benefits. In Sweden and Norway people outside the workforce are also entitled to claim economic benefits. These family principle provisions regulate four kinds of situations: the protection of the pregnant employee in the working environment, a system of leave which includes maternity, paternity and parental leave, a system of related economic benefits and flexible working time. As a general remark, it is interesting to note that in these countries the "roots" of these legal arrangements are to be found in employment (welfare) policies rather than in sex equality legislation.

⁵⁰¹ K. Ketscher, *Offentlig børnepasning i retlig belysning*, 1991, Copenhagen.

⁵⁰² K. Ketscher, "The Danish Social System", in *Danish Law in a European Perspective*, T. Dahl, O. Melchior, S. Rehof, L. Tamm, (eds.), 1996, Gad Jura, 293.

27.1 *The protection of pregnancy in the working environment*

In the Scandinavian countries legal provisions are provided concerning the protection of employees against both actual and potential risks which could be present in the working environment. These provisions are the expression of a very important principle of Scandinavian employment law, which imposes on the employer a duty of care towards the employees. The protection of pregnant employees and working mothers is to be regarded as a specification of this principle. Where protection is not feasible, alternative solutions are available and finally, as a last resort, the pregnant employee may be granted leave with economic compensation. What is important to point out here, is that these rules do not focus upon the protection of the individual (pregnant) employee only, but also on the higher standard of security on which the working environment must (should) be based. With that said, there is evidence that pregnant employees and working mothers still suffer disadvantages. One of the reasons for this is that, despite the improvements made, there is still no full medical knowledge of all the substances/situations potentially dangerous to the mother and the foetus,⁵⁰³ and therefore, it is impossible to ensure a "fully secure" working environment. Another, and possibly more convincing reason, is the detrimental economic situations.

When compared with the EC legislation these provisions represent an improvement, however. First in the EC, although the concept of working environment may be found in the EC Treaty, it has not been developed as thoroughly as in the Scandinavian countries. In the EC, in fact, the emphasis appears to be more on health and safety rather than on the working environment. The Health and Safety Framework Directive aims "to introduce measures to encourage improvements in the safety and health of workers at work" and states that "the employer shall have a duty to ensure the safety and health of workers in every aspect related to work". The approach of the Pregnancy and Maternity Directive is not very different. Furthermore, while the EC focuses its efforts on the protection of pregnant employees and working mothers, the recently

⁵⁰³ E. Vigerust, "Graviditet, arbeidsmiljø og likestilling", in *Den sociale dimension i kvindelig perspektiv*, K. Ketscher, J. Lindgård, Nielsen R. (eds.), 1995, Copenhagen, 171; M. Fastvold, *Fødsels og-omsorgsrett for foreldre*, Grøndahl, 1990, Oslo, at 47 *et seq.*

introduced Norwegian Regulation aims to protect the fertility of both women and men. To extend the protective legislation to both women and men has the effect of increasing equality and, accordingly, of avoiding discrimination in the labour market.

Finally, concerning pregnancy benefits, it is true that if an employee in Scandinavia experiences health difficulties during her pregnancy, she is also likely face a detrimental economic situation. However, the situation is probably worse in the EC legislation. As appropriate provisions to cover this situation appear in neither the Equal Treatment Directive nor the Pregnancy and Maternity Directive, it is arguable that the Scandinavian situation can still be seen as a model.

27.2 System of birth leave: brilliant but who is entitled?

So far as the system of birth leave is concerned, the Scandinavian standards are to be considered well above the standards required by the Pregnancy and Maternity Directive, which merely states that Member States must provide for a period of *maternity* leave of at least 14 weeks and at least two weeks must be allocated before confinement. Danish legislation provides for four weeks maternity leave before confinement and 14 weeks after confinement. Although Swedish and Norwegian legislation do not comply precisely with the EC standards, it can hardly be argued that the overall arrangements provided are any worse. A very important feature of the system of leave provided by the Scandinavian model is that it aims to give to both parents the same (leave) rights. Thus, the provisions relating to maternity leave are to be considered not in isolation but together with other related rights, namely the rights specifically reserved to the father and the parents. As a consequence of these provisions, both the role of the father in the family and the role of the mother in the employment market are strengthened. However, the mother is still the primary childcare provider and the father is still in a secondary position. Several studies have shown that despite the introduction of provisions facilitating the possibility for fathers to take leave, such as parental leave and

child-leave provisions, these are still used mostly by mothers.⁵⁰⁴ In Denmark, for example, in 1993 only 3% of fathers took parental leave and those who did did not use the whole period. Furthermore, five months after it entered into force only 8,5% of fathers took the child-care leave. Instead, fathers are keen to use the two weeks in conjunction with the birth (in 1993, 52% of fathers). The situation is not very different in Sweden and Norway: fathers are eager to take off the two weeks in connection with the birth, but they are still not ready (or willing?) to take a significant amount of the parental leave. The question which follows from this evidence concerns the reason for the scarce use of leave by fathers. The answer to this question is complex and multifaceted. There could be many reasons for the lack of use of leave by fathers.⁵⁰⁵ Furthermore, these reasons are not always necessarily linked to "legal elements": mentality and stereotypes still play a very important role in this area. One reason is likely to be that the overall period of parental leave is relatively short. Thus it becomes necessary for the mother to take it as she needs it for her recovery or because she is breast-feeding. Another reason could be the structure of the employment market in its widest meaning. It might be difficult for a father to take time off at work and he may also work in an environment where there is a considerable social pressure from both the employer and colleagues. It is still more acceptable for an employee to be on maternity leave than on paternity leave! However, this research submits that the main reason for the limited participation of fathers lies in financial considerations. The introduction of forms of "mild coercion" such as the father's quota (in Norway and see the *pappamånad* in Sweden), provides evidence of that. If fathers are paid, they are more likely to be willing to stay at home. The reason for this is that in many families the father's income is still higher than that of the mother and the family cannot afford to lose it.

⁵⁰⁴ *Inter alia*, Leave Arrangements for Workers with Children, January 1994 V/773/94.

⁵⁰⁵ **K. Ketscher**, "Man har ikke råd til barselsorlov", Retsvdenksbeglig Institut B, studier nr. 18. Årsberetning 1986.

Despite these difficulties, this research still regards the Scandinavian system as a model to follow. Firstly, in these countries the problem, although not completely solved, has been a priority. Secondly, the existing arrangements offer a better alternative than those provided by the EC system. In fact, the Pregnancy and Maternity Directive only partially addresses the issue of maternity leave and does not even mention the participation of the father. Furthermore, the content of the Parental Leave Directive is too vague to provide any workable solution to the problem. The Scandinavian legislation on parental leave provides evidence that legislation can, if not actually change, at least challenge stereotypes and influence society.⁵⁰⁶

27.3 *Economic benefits*

Generally speaking, as far as the provisions relating to benefits are concerned, the overall situation is more favourable in the Scandinavian countries than the one in the EC. In the three countries employees can take birth leave with birth benefits equivalent to circa 75% - 90% of their gross wage. In Sweden, and to a certain degree also in Denmark, the relevant provisions are gender neutral *id est* both parents are entitled to share parental benefits. On paper this is the same in Norway. However, the situation is different. Here the economic rights of the father are subordinated to the rights of the mother; it has been argued that this could be in breach of the EC equal treatment principle.⁵⁰⁷

The problem is mitigated, however, by individual and collective agreements. A positive element of the Scandinavian model is that the birth benefits are paid by the State rather than the employer. In practice the employer pays in the first instance and is then reimbursed by the National Insurance. In other words, it is not the employer who bears

⁵⁰⁶ E. Caracciolo di Torella, "A Critical Assessment of the EC Legislation Aimed at Reconciling Work and Family Life: Lessons from the Scandinavian Model?", in *Legal Regulation of the Employment Relation*, H. Collins, P. Davies, R. Rideout (eds.), Kluwer, (forthcoming).

⁵⁰⁷ NOU 1995:27 *Pappa kom hjem*, at 36 and A. Svingen, *Retten til lønnet fødselspermisjon i Norge og EF*, Kvinnerettslige studier n. 33, Institutt for offentlig retts skrifterserie n° 2/1994.

the cost of parental responsibilities. This is also a deterrent to the detrimental treatment to women employees.⁵⁰⁸

It is therefore easy to reach the conclusion that the situation is better in the Scandinavian Countries rather than in the EC. The relevant provision of the Pregnancy and Maternity Directive states that employees are entitled to 14 weeks leave paid with “an adequate allowance” and the Parental Leave Directive does not even mention the issue of pay.

27.4 Flexible working time

The last element of the “family principle” is the fact that parental leave is characterised by a considerable degree of flexibility: parents can use it in one block or part-time in connection with part time work. In this way the system can be arranged in order to meet the needs of both parents. It provides for an alternative to full-time leave as it permits to “stretching” of the leave and offer potential for combining it with part-time work. Although in the Scandinavian countries these provisions were introduced relatively recently, there is already evidence that they do not really work very well. It is arguable that these provisions potentially offer the best opportunity to employees to combine their needs as parents and to keep on being part of the employment market. However, in order to implement them efficiently, a reconsideration of the whole employment market is required. So far the principles work solely for those jobs which already have a high degree of flexibility.

⁵⁰⁸ See, for example, the situation in the Case C-177/88, *Dekker*, [1990] ECR I-3941, discussed *supra* in Chapter V.

	Norway	Denmark	Sweden
Relevant Acts	Arbeidsmiljølov (1977)	Ligebehandling af Mænd og Kvinder med Hensyn til Beskæftigelse og Barseorlov (1990)	Föräldraledighets lag
Collective agreements	Yes	Yes	Yes
Who is eligible?	Employee and unemployed	Employee and unemployed	Employee and unemployed
Requirements for eligibility	Residence	Residence	Residence and insurance
Leave for Mothers	<ul style="list-style-type: none"> • 3 weeks <i>ante</i> confinement • 6 weeks <i>post</i> confinement 	<ul style="list-style-type: none"> • 4 weeks <i>ante</i> confinement • 14 weeks <i>post</i> confinement (2 compulsory) 	<ul style="list-style-type: none"> • 7 weeks <i>ante</i> confinement • 7 weeks <i>post</i> confinement
Leave for Fathers	<ul style="list-style-type: none"> • 2 weeks in connection with the birth (<i>pappa permisjon</i>) • 4 weeks (<i>fedreqvote</i>) 	<ul style="list-style-type: none"> • 2 weeks in connection with the birth (<i>fædreorlov</i>) 	<ul style="list-style-type: none"> • 2 weeks in connection with the birth (<i>pappa permisjon</i>) • 4 weeks (<i>pappamånad</i>)
Leave for Parents and arrangement of the leave	39 or 29 weeks to be arranged according to the tidskonto system	<ul style="list-style-type: none"> • 10 weeks (parental leave) • 26 + 26 weeks (childcare leave) NB. very limited flexibility	18 months leave for each parent
Can the parents be on leave at the same time?	Yes	No	Yes
Flexible leave?	Yes, time account scheme -2 years (<i>tidskonto</i>)	No	Yes
Further arrangements	Yes, (<i>Redusert arbeidstid</i>)		Yes, (until the child is 8 years old)
Protection from dismissal	Yes	Yes	Yes

Birth leave in the Scandinavian Countries

	Norway	Denmark	Sweden
Relevant Acts	Folketrygdlov (1997)	<ul style="list-style-type: none"> • Barseldagpen ger • Dagpengerlov 	Föräldrapenningslag
Ind./coll. agreements	Yes	Yes	Yes
Who is eligible?	Employee, unemployed and self-employed.	Employee and unemployed	Everybody
Requirements for eligibility	Residence and membership of the National Insurance		Residence and membership of the National Insurance
	Mother <ul style="list-style-type: none"> • she has worked for at least 6 of the last 10 months before confinement • her pensionable income is at least 50% of the basic amount • she is not working because she is taking care of the child 	Father <p>The same as the mother <i>plus</i> he must have been working for the <i>plus</i> the mother must</p> <ul style="list-style-type: none"> (a) resumes work (b) starts or resumes full time education (c) is sick (d) is hospitalised 	
Benefits for the Mother	<ul style="list-style-type: none"> • 12 (3) weeks <i>ante</i> confinement • 6 weeks <i>post</i> confinement 	<ul style="list-style-type: none"> • 4 weeks <i>ante</i> confinement • 14 weeks <i>post</i> confinement 	30 days
Benefits for the Father	<ul style="list-style-type: none"> • 2 weeks in connection with the birth (<i>pappa permisjon</i>) if so provided by individual/collective agreement • 4 weeks (<i>fedreqvote</i>) 	2 weeks in connection with the birth	<ul style="list-style-type: none"> • 2 weeks in connection with the birth (<i>pappapermisjon</i>) • 4 weeks (<i>pappamånad</i>)
Benefits for the Parents	<ul style="list-style-type: none"> • 29 weeks at 100% of earning • 39 weeks at 80% of earning 	<ul style="list-style-type: none"> • 10 weeks • 26 weeks 	450 days
Benefits for the Parents at the same time	No	No	No
Further benefits	Yes	Yes	No

Birth benefits in the Scandinavian Countries

**Part III: Proposals for Amendments of EC
Legislation**

CHAPTER VII: A "FAMILY PRINCIPLE" IN EC EMPLOYMENT LAW

"This does not mean making women more like men, or men more like women. Rather it means radically increasing the options available to each individual and, more importantly, allowing the human personality to break out of the present dichotomized system."⁵⁰⁹

28 *Some introductory remarks*

With differing degrees, both the protection of the family and a high rate of employment have been on the agenda of the European Community for a long time.⁵¹⁰ Concerning the family the EC, despite not having specific competence, has always recognised its social importance. For example, for sometime now the Court acknowledged that "the respect for family life set out in Article 8 of the Convention for the protection of Human Rights and Fundamental Freedoms (...) is one of the fundamental rights which, according to the Court's settled case-law (...) are recognised by the Court".⁵¹¹ There are also other initiatives which, although not binding, provide evidence of the commitment towards family life.⁵¹² The EC action in this area is, however, open to criticisms in two main

⁵⁰⁹ F. Olsen, "The Family and the Market", in *Feminist Jurisprudence* Smith (ed.) 1993, Oxford University Press, 65, at 89.

⁵¹⁰ See in particular the discussion in the Introduction and in Chapter II.

⁵¹¹ Case 249/86, *Commission v. Germany*, [1989] ECR 1263, at para. 10; Case 36/75, *Rutili*, [1975] ECR 1219, at para. 32; see also the opinion of the Advocate General in Case 7/75, *Mr and Mrs F. v. Belgium*, [1975] ECR 679 and Case 12/86, *Demirel*, [1987] ECR 3719.

⁵¹² Communication from the Commission on family policies (COM (89) 363 final); Resolution of the European Parliament stating that "family policy (...) should become an integral part of all Community policies" (OJ C 184/116, 11.7.83); Conclusion of the Council and of the Ministers Responsible for Family affairs Meeting within the Council of 29 September 1989 regarding family policies where it pointed out the essential role assumed by the family "in the cohesion and future of society" and that the necessity for "a regular exchange of information and views at Community level on major themes of common interest as regards family policy" was agreed (OJ C 277/2 31.10.89). See also *The European Union and the Family*, DG V Social Europe 1/94; *The Right to Live in Family is a Universal Right for All*, Quarterly Bulletin 3/1995; more recently see also the

respects. Firstly, measures are justified on economic grounds rather than on a more social justice oriented ideology. Secondly, the specific idea of the family behind the EC action reflects stereotypes rather than the reality of today's society.⁵¹³ This appears clearly from the pragmatic approach adopted by the Court in its case law. The Court has not extended protection towards spouses to cohabitants⁵¹⁴ and single sex couples⁵¹⁵ but did not object to considering as such married couples not yet divorced but who were *de facto* separated.⁵¹⁶ Arguably, the narrow and traditionalistic approach adopted by the Court has influenced the overall attitude towards issues relating to family policy.

This approach is not the only difficulty, however. A more complex question is whether and why the EC should have competence to regulate it. As mentioned above, despite its interest, the EC has no express competence in this area. Furthermore, the EC cannot take up issues at will. There are only few fields where the EC can legislate, indirectly influencing matters relating to the family, namely sex equality in the employment market,⁵¹⁷ free movement of workers and the areas listed in the new Article 137 EC. By means of contrast, the right to perform (paid) work has always been

Second Report on Citizenship of the Union COM (97) 230 where the Commission links the idea of family with that of citizenship.

⁵¹³ T. Hervey, "A Gendered Perspective on the Right to Family Life in European Community Law", in *The European Union and Human Rights*, N. Neuwahl, A. Rosas (eds.), 1995, Martinus Nijhoff, 221.

⁵¹⁴ Case 59/85, *Nederlands v. Reed*, [1986] ECR 1283.

⁵¹⁵ Case C-249/96, *J. Grant v. Southwest Train Ltd*, [1998] ECR I-621. The same approach was adopted also by the Court of First Instance in Case T-264/97, *D, Roayaume de Suède v. Conseil de l'Union Européenne*, decided on 28 January 1999; this case has been appealed before the ECJ Joined cases C-122/99 - C-125/99, *P & D v. Conseil de l'Union Européenne*. It will be interesting to see whether the ECJ is moving towards a different approach.

⁵¹⁶ Case 267/83, *Diatta v. Land Berlin*, [1985] ECR 567.

⁵¹⁷ See for example the Social Policy Agreement which obliquely refers to family matters under the equality heading; P. Moss, "Reconciling Employment and Family Responsibility: A European Perspective", in *The Work and Family Challenge - Rethinking Employment*, J. Lewis, S. Lewis (eds.), 1996, Sage, 20, at. 21.

regarded as a fundamental right by both various national⁵¹⁸ and international⁵¹⁹ documents and as a fundamental principle in Community documents.⁵²⁰ At EC level this commitment has been recently reinforced by the provisions focusing on employment introduced by the Treaty of Amsterdam.⁵²¹

Despite the involvement in the two areas, it has however emerged from this research that the necessity to link the two has only recently become apparent. Often EC employment policies still fail to consider that employees have dependent families (and when they do, they assume that employees have wives who take care of them!) and thus need to balance family commitments with the demands of their job. This should not come as a surprise when considering the overall attitude of EC law towards issues relating to the organisation of the family and the division of roles between men and women.⁵²²

The difficulties encountered in trying to reconcile the two spheres reflects the situation at national level. These difficulties have been analysed in the previous sections in respect of both the Member States and in the EC.⁵²³ In the Member States, the system of leave is unsatisfactory because, at present, it focuses mainly on mothers. In some Member States the situation has been also tackled with the creation of family

⁵¹⁸ *Inter alia*, Article 3 of the Norwegian Constitution and Articles 1 and 35 of the Italian Constitution.

⁵¹⁹ *Inter alia*, Article 23(1) UN Declaration on Human Rights and Article 11 CEDAW.

⁵²⁰ Green Paper, *European Social Policy: Options for the Union* (1993) Section II.C.3, "The Role of Work in Society", at 19.

⁵²¹ Title VIII of the Treaty of Amsterdam, Articles 125 to 130. See M. Weiss, "Il Trattato di Amsterdam e la Politica Sociale" VII: 1 DRI 7; M. Biagi, "The Implementation of the Amsterdam Treaty with Regard to Employment: Co-ordination or Convergence?" (1998) 14 IntJCompLLIR 325. However see also the Title on Social Policy. For a detailed discussion see E. Szyszczak, "The Parameters of European Labour Law" in *Legal Issues of the Treaty of Amsterdam*, D. O'Keefe, P. Twomey (eds.), 1999, Hart, Oxford, 141.

⁵²² Apart from the criticism of EC legislation in this area discussed *supra* in particular Chapter V, see also the attitude of the ECJ in particular, Case 184/83, *Hofmann*, [1984] ECR 3047; Case C-243/95, *Hill and Stapleton*, [1998] 3 CMLR 81 and Case C-411/96, *Boyle*, [1998] ECR I-6401.

⁵²³ See *supra* the discussion in Chapters IV and V, respectively.

friendly policies aiming at re-arranging working hours. These agreements, however, do not always achieve satisfactory results. In the majority of cases the Member State's concern to reconcile work and family life is subordinated to that of creating flexibility in the employment market.⁵²⁴ An example is the Italian system where, although many initiatives in this area have been introduced recently, the justification behind them is still the flexibility of the employment market.⁵²⁵ Another problem inherent in family friendly agreements is that, most of the time, they have been proved to reinforce sex segregation.⁵²⁶ In Belgium, for example, in practice the outcome has been to relegate women to low skilled and poorly paid jobs.⁵²⁷ In other Member States these policies are not always easily available: for example a recent survey has demonstrated that in the UK only half of all employees are entitled to them.⁵²⁸

The measures introduced at EC level follows the same pattern. The system of leave is still very much *in nuce* and, as in the Member States, the main problem is that the legislation is mainly addressed to mothers. The situation of family friendly policies is also no better than that of the Member States. It is true that recent measures, such as Working Time Directive,⁵²⁹ the newly adopted Part Time Workers Directive⁵³⁰ and the Fixed-Term Directive have been introduced and they might facilitate the reconciliation of work and family life. It is, however, legitimate to reflect on how and whether these measures work towards this aim. Are they truly structured so as to permit both parents to take care of their children or is the increase in the flexibility and productivity of the

⁵²⁴ In general R. Blanpain (ed.), *The Harmonization of Working Life and Family Life*, 1995, Kluwer.

⁵²⁵ M. Lai, "I Congedi Parentali e Familiari" (1998) 40 DPL 2686.

⁵²⁶ R. Anker, "Theories of Occupational Segregation by Sex: An Overview" (1997) 136 ILRev. available on the internet at <http://www.ilo.org/public/english/180revue/articles/ank97-3.htm>.

⁵²⁷ C. Engels, "Belgium", in R. Blanpain (ed.) *The Harmonization of Working Life and Family Life*, 1995, Kluwer, 1.

⁵²⁸ "Family Friendly Working Denied to Half of the Workforce" (1998) 82 EOR 6.

⁵²⁹ Council Directive 93/104 (1993) OJ L 307, further discussed *infra* in Chapter IX.

⁵³⁰ Council Directive 1999/70 (1999) OJ L 175/43.

employment market the main issue? It is indicative to mention that, for the measures strictly aimed at reconciling work and family life, the Commission has emphasised that when considering the existing differences between the Member States, their regions, infrastructures and the structures of their employment markets and lifestyles, no standard approach of reconciliation is either practical or desirable.⁵³¹ Furthermore, the 1994 White Paper on Social Policy, although emphasising the need for a social policy for the Union which takes into account family life, does not propose the adoption of any measures before the year 2000.⁵³²

By way of contrast, the analysis carried out in Chapter VI of the relevant provisions in the Scandinavian countries has suggested that there is a lesson to learn from the experience of those countries. Although not above criticism,⁵³³ their approach has offered a more satisfactory legal framework and, more importantly, has shown that legislation can, if not change, at least challenge stereotypes and influence attitudes in society. In the light of the Scandinavian model, this concluding part of the research aims to suggest some amendments to the EC legislation. Before focusing on the substantive amendments, however, which are addressed further in Chapters VIII and IX below, this chapter analyses some preliminary questions. How can these amendments be introduced? Which legal base can be used to support them? Finally is this task more likely to be achieved by ordinary legislation or *via* the social dialogue?

For this purpose it is divided into four sections. The first section evaluates the possible implications of the family principle on the EC legal systems (*29 The implications of the family principle*). The second section emphasises the fact that EC measures have so far been inadequate because they are based on the reconciliation of work and family life without establishing a family principle (*29.1 Reconciling,*

⁵³¹ "Working and Caring: a Guide to Implementing the Council of Ministers' Recommendation on Childcare", 1992, at 7.

⁵³² White Paper, *European Social Policy - a Way Forward for the Union* COM (94) 333 final, 27 July 1994 Chapter 1.13, 1.

⁵³³ E. Vigerust, *Arbeid, barn og likestilling - Rettslig tilpasning av arbeidsmarked*, 1998, Tano Aschehoug.

accommodating and restructuring). The following section focuses on the possible legal base (29.2 *The legal base*) and finally, the last section aims to establish whether these amendments could be brought forward by legislation or *via* the social dialogue (29.3 *A task for the social partner?*).

29 *The implication of the family principle*

It is obvious that in order to tackle these situations in a meaningful way, the concept of family life needs a stronger evaluation. The narrow interpretation given by the Court and the scarce competencies in this area have not helped the development of the concept. By way of contrast, the relevant legislation enacted in the Scandinavian countries emphasises the importance of the family. Giving more importance to family life also implies regarding parents as citizens and not merely as employees. This could only be achieved by enacting a set of measure aimed at the complete re-valuation of the welfare state provisions of the different Member States which, as has already been seen, would be highly unlikely.⁵³⁴

What is more likely to happen is that certain benefits, such as maternity and parental benefits, would be granted in the EC on a non discriminatory base to any EC citizens. This scenario has become reality following the decision of the Court in the *Martinez-Sala* case where, for the first time, the principle of non discrimination on the grounds of nationality has been linked to the concept of citizenship rather than to the status of workers.⁵³⁵ Another realistic option is to expand further the scope of application of existing provisions, by amending or adding elements to the existing

⁵³⁴ See *supra* the discussion in Chapter II.

⁵³⁵ Interestingly this case concerns child-care allowance; Case C-85/96, *Martinez-Sala*, [1998] ECR I-2961; see S. O'Leary, "Putting Flesh on Bones of European Union Citizenship" (1999) 24 ELRev. 68 and S. Fries, J. Shaw, "Citizenship of the Union: First Steps in the European Court of Justice" in (1998) 4 EPL 533. Szyszczak and Moebius, however, criticise the outcome of this case and argue that the Court had the possibility to make a judgment on the value of caring work but did not use this opportunity; I. Moebius, E. Szyszczak, "On Raising Pigs and Children" (1998) 18 YEL 126.

legislation. This approach, rather than establishing new principles, is not only preferable because it is more likely to work but is also the route that the Commission has recently followed (see for example the “amendments” indirectly introduced to the Equal Treatment Directive⁵³⁶ and the Equal Pay Directive⁵³⁷ by the Burden of Proof Directive).⁵³⁸ Furthermore, there is evidence that the process can also happen by case law.⁵³⁹ Arguably, the weak point of this approach is that, as it works on the existing model, it does not change the overall structure of EC legislation.

29.1 Reconciling, accommodating and restructuring

Despite its inherent limitations it is undeniable that the EC has, in recent years, enacted a set of provisions in order to reconcile work and family life. This research has divided these measures into two categories.⁵⁴⁰ The first set of provisions concerns child care arrangements. The second set of provisions ranges from pregnancy leave and pregnancy protection in the workplace to forms of leave available to both parents after the birth of the child.

The first set of measures, namely initiatives aimed at fostering a redistribution of child care arrangements, presents clear limits. The Recommendation on Child Care was adopted on the basis that child care facilitate mothers’ entry into employment. It aims at encouraging initiatives to enable parents (mainly mothers) to reconcile their occupational and family responsibilities.⁵⁴¹ This measure might indeed help *mothers* to

⁵³⁶ Council Directive 76/207 OJ (1976) L 39/40.

⁵³⁷ Council Directive 75/117 OJ (1975) L 45/191.

⁵³⁸ Council Directive 97/80 OJ (1998) L 14/6.

⁵³⁹ *Inter alia*, S. Fredman, “Social Law in the European Union: the Impact of the Lawmaking Process”, in *Law Making in the European Union*, P. Craig, C. Harlow (eds.), 1998, Kluwer, 386 at 397.

⁵⁴⁰ See *supra* in the Introduction.

⁵⁴¹ Council Recommendation 92/241 of 31 March 1992 on Child Care (1992) OJ L 123/16.

have both a job and a family, but is not capable of reshaping the structure of society and, more specifically, the employment market. Furthermore, as already pointed out above⁵⁴² to improve child care facilities does not achieve the aim of involving fathers in the care of new born and young children. For the purposes of this research, better solutions are more likely to come from the second set of measures.

These measures also present limits, however, the main one being that they are structured in such a way to be in practice addressed only to mothers. These measures are in fact based on the idea that men are expected to work full time while women are expected to adapt their (paid) working patterns in order to care for the household and young children. Accordingly, as already discussed, EC measures are based on the assumption that only mothers and not fathers are the primary carers for children. Several consequences stem from this assumption: only women and not men are responsible for rearing children and for women paid employment is only a “secondary” need.⁵⁴³ This ideology of the “imaginary mother”⁵⁴⁴ has arisen from the assumption that life is based on two separate spheres: the public and domestic spheres. One of the main criticisms which has been advanced against this dichotomy is the fact that it is false or at least it is based on wrong beliefs.⁵⁴⁵ This research explores the consequences of this distinction, in particular in the light of the fact that as more women are entering the employment market the division between the two spheres is no longer clearly defined. This not only challenges the *status quo* of the present situation, but also alters the balance between the two spheres. Hence the need to *reconcile* them.⁵⁴⁶

⁵⁴² See *supra* in the Introduction and in Chapter V.

⁵⁴³ *Inter alia*, J. Conaghan, “Pregnancy and the Workplace: a Question of Strategy?” (1993) 20 JLS 71.

⁵⁴⁴ C. McGlynn, “The Court of Justice and Ideologies of Motherhood in Community Sex Equality Legislation” (2000) 6 ELJ 29.

⁵⁴⁵ *Inter alia*, N. Rose, “Beyond the Public/Private Division: Law, Power and the Family” (1987) 14 JLS 61.

⁵⁴⁶ B. Bercusson, *European Labour Law*, 1996, Butterworths, at 205 *et seq.*

But what does reconciliation mean? According to a definition given a few years ago by a DG V document, it means “harmonising, bringing together or making consistent different activities or interest so that they can coexist without friction, stress or disadvantage”.⁵⁴⁷ In other words, it implies the restoration of the harmonious relationship between employment and family responsibility which once existed and has subsequently been lost as a result of women entering the labour market.⁵⁴⁸ It is arguable, however, that an effective solution cannot come from the “harmonious balance” between the two spheres and to base any measure on this is destined to achieve limited results independently from the fact that these are structured as part of employment rights or the sex equality principle. Reconciliation in fact, at least in practice, does not alter the existing gender roles, namely that women are primarily responsible for the household and childcare while men are responsible for the economic viability of the household (e.g. family wage). This division of roles is based *inter alia* on the allocation of time:⁵⁴⁹ men are expected to work full time while women are expected to adapt their (paid) working patterns in order to care for the household and young children. In this scenario almost always only mothers will take “advantage” of the provisions for reconciling work and family life.

As it stands now, within the EC context, reconciliation merely means to *accommodate* mothers, namely to give them the possibility to perform a paid job and to care for young families.⁵⁵⁰ This research submits that a more satisfactory situation could

⁵⁴⁷ “Working and Caring: a Guide to Implementing the Council of Ministers’ Recommendation on Childcare”, 1992.

⁵⁴⁸ **P. Moss**, “Reconciling Employment and Family Responsibility: A European Perspective”, in *The Work and Family Challenge-Rethinking Employment*, J. Lewis, S. Lewis (eds.), 1996 Sage, 20, at. 23.

⁵⁴⁹ **K. Scheive**, “The Gender Dimension in German Labour Law: Time Revisited”, in *The Sex of Labour Law in Europe*, Kravaritou (ed.), 1996, Kluwer, 53.

⁵⁵⁰ Unfortunately often the paid job turns out to be low skilled and poorly paid: on this point see *inter alia*, **T. Hervey**, **J. Shaw**, “Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law” (1998) 8 JESP 43, **A. McColgan**, “Regulating Pay Discrimination”, paper presented at WG Hart *Legal Workshop Legal Regulation of the Employment Relation*, 6-8 July 1999.

be achieved with the implementation of measures which do not simply reconcile the domestic and the public spheres, but which acknowledge the importance of the concept of family life and its impact on the employment market. This would necessarily lead to a *restructuring* of the employment market (the public sphere) so as to take into consideration the needs of employed parents (which belong to the domestic sphere). Being a parent should be regarded as a moment which eventually and normally will happen during the life of any employee and not as a "risk" which might put in danger a career (which is often that of the mother). It is acknowledged that this is not solely an equality or an economic issue, but it is also a sign of an unprecedented process of change whose realisation depends upon the removal of institutional and structural as well as cultural barriers.

The measures which would in practice achieve such restructuring should comprise a set of measures addressed to both parents ranging from pregnancy to parenthood: this research has termed them as the family principle. These measures are divided into three main sets. In the first set of measures the importance of a safe working environment not only for the mother but for both parents should be emphasised. The second set of measures should provide a meaningful system of leave and related economic benefits available to both parents before and after maternity leave has expired, to enable both of them to be involved in the care of young children. In this way any detrimental consequence deriving from a loose connection with the employment market is shared between the parents. Finally, the third set of measures should be complemented with a system of family friendly policies such as flexible arrangement of working hours, structured in such a way not to force parents to choose between a family and a meaningful career. All these provisions should be enacted as employment rights implemented with the specific aim to ensure sex equality. While the first two sets of provisions, namely those related to a safe working environment and a system of leave, are already provided within the EC legal system and "merely" need to be developed and improved, the third set of measures, namely the family friendly working arrangements, needs to be established *ex novo*. The question which follows is which legal base can be used order to develop these provision; this is analysed in the next section.

29.2 *The legal base*

The importance of a correct legal base which could be used to introduce these amendments cannot be underestimated.⁵⁵¹ A correct legal base is crucial as it justifies the content and states the reason for adopting a certain measure; it conversely also provides the opportunity to question it. Under the Treaty of Maastricht, the binding measures aimed at reconciling work and family life were based mainly on the generic market oriented provisions of Articles 100 and 235 EC (now Arts. 95 and 308 EC respectively), and, to a certain extent, also on Article 118a EC⁵⁵² and the Social Policy Agreement. Chapter V has already discussed the problems with this legal base, namely institutional as well as substantive problems, the emphasis on the market rather than on the social importance attached to these provisions and the unclear legal status of the social partners. To some extent, the Treaty of Amsterdam has changed this *status quo*: although problems still exist, it is arguable that the situation under analysis will now have a clearer position.

In her analysis of the changes recently undergone in EC employment law, Szyszczak has argued that the Treaty of Amsterdam marks a departure in the EC history in this area.⁵⁵³ In fact, by expressly introducing a new Title on Employment and ordering the existing social provisions, it strengthens the legal base in both these areas. Issues related to employment/social policy are now arranged in two separate titles: Title VIII (Employment) and Title XI (Social policy, education, vocational training and youth). While Title XI is a consolidation of accepted judicial and political practice the

⁵⁵¹ E.g. Case C-300/89, *Commission v. Council*, [1991] ECR I-2867 (*Titaniumdioxide* case). For a more detailed discussion on the legal base see H. Cullen, A. Charlesworth, "Diplomacy by Other Means: The Use of the Legal Basis Litigation as a Political Strategy by the European Parliament and Member States" (1999) 36 CMLRev. 1243.

⁵⁵² There is not a precise "replacement" of this provision. In this context it is suffice to note that the concept of working environment is now in Article 137 EC.

⁵⁵³ E. Szyszczak, *EC Labour Law*, 2000, Longman.

new Title on employment represent a codification of years of political thinking at both EC and national level which goes under the name of soft law.⁵⁵⁴

The purpose of this section is to evaluate whether these institutional changes in the Treaty can be used to provide a potential legal base to enact provisions specifically aimed at establishing a family principle in EC employment law. This section analyses the new provisions introduced by the Treaty of Amsterdam which are likely to play a role within this context and in particular it focuses on Title XI as this is the most relevant instrument for the development of the issues under scrutiny.

As a preliminary remark, the relevant changes can first be appreciated in the structure of the Treaty itself: employment strategy, social protection and gender equality are now expressly within the aims and the activities of EC law (respectively Articles 2 and 3 EC). These introductory provisions are important because they clearly set the EC framework for the development of further action. The Treaty of Amsterdam introduces another important novelty in the EC Treaty, namely a general non discrimination provision (new Article 13 EC) which reads as follows:

“[w]ithout prejudice to other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

The relevance and possible impact of the new Article 13 EC on gender have already been speculated upon.⁵⁵⁵ Generally speaking, the importance of this clause cannot be understated. It is arguable that it adds a new dimension to discrimination policy under the EC Treaty. First, it has the advantage that it is not aimed at combating

⁵⁵⁴ E. Szyszczak, “The Evolving European Employment Strategy”, in *Social Law and Policy in an Evolving European Law*, Shaw (ed.), 2000 Hart, Oxford (forthcoming). For a discussion in this thesis of soft-law and its impact on this area see *supra* section 16.

⁵⁵⁵ E.g. M. Bell, “The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?”, (1999) 6 MJ 5; L. Waddington (editorial), “Throwing Some Light on Article 13 EC Treaty”, (1999) 6 MJ 1.

discrimination only for economic reasons or so as to complete a single market. This means that it can go behind the limitations of the market. Second, the use of the word "combat", rather than "prohibit discrimination", implies that the Community could take positive action.⁵⁵⁶ Third, it has a wide scope of application as it provides for eight grounds. Fourth it may prompt the ECJ, when interpreting cases involving discrimination, to consider the principle of equality in more expansive terms.⁵⁵⁷

A closer analysis of Article 13 EC, however, reveals that its potential importance can be limited by several elements. *In primis*, this provision does not have direct effect, *id est* it cannot be invoked by citizens to challenge acts of Community institutions.⁵⁵⁸ In other words, Article 13 EC does not confer on individuals a right not to be discriminated against. Furthermore, there are institutional limitations. First, the European Parliament is assigned a mere consultative role. This is likely to negatively affect the measures adopted under this provision, because the Parliament has proved to be the most committed of the EC institutions to the issue of non discrimination. Second, measures under Article 13 EC require adoption on the basis of unanimity. Therefore any Member State can veto the adoption of a measure or can at least threaten to impose a lower standard.⁵⁵⁹ Finally, when looking at the impact which Article 13 EC might have on sex equality, the result is disappointing. It is in fact doubtful whether it adds something to the existing *status quo* unless the EC wants to go beyond the employment market. There are other provisions in the Treaty which can be of more help. The new Article

⁵⁵⁶ On this point, however, Biondi notes that the measures that the Council can take do not have to be legislative but can be soft law measures which might not be as effective as binding legislation. A. Biondi, "The Flexible Citizen: Individual Protection After the Treaty of Amsterdam" (1999) 5 EPL 245.

⁵⁵⁷ L. Waddington, "Testing the Limits of the EC Treaty on Non-discrimination" (1999) 28 ILJ 135.

⁵⁵⁸ C. Barnard, "Article 13: Trough the Looking Glass of Union Citizenship" in *Legal Issues of the Amsterdam Treaty*, D. O'Keefe, P. Twomey (eds.), 1999, Hart, 375. See also M. Bell, "The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?", (1999) 6 MJ 5.

⁵⁵⁹ On this point see further M. Bell, "The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?" (1999) 6 MJ 5.

141 EC (formerly Article 119 EC), for example, can actually offer better protection as it is capable of being horizontally directly effective.

In this context however, possibly the most relevant amendment lies in the provisions of the new Title on social policy, namely Articles 136 to 145 EC (formerly Arts. 117 to 122 EC). These considerably broaden the existing provisions and transpose the provisions of the Social Policy Agreement, previously outside the Treaty, into the main body of the Treaty. Article 136 EC states that in achieving its aim, *inter alia* promoting employment, improving living conditions proper social protection etc., the Community and the Member States will have in mind fundamental social rights such as those set out *inter alia* in the 1989 Community Social Charter on Fundamental Social Rights. This document expressly recognises the importance of reconciling work and family life.⁵⁶⁰

It is arguable that for the development of the family principle issues, Article 137 EC is particularly relevant. This provision is a much broader version of the former Article 118a EC. Article 137(1) and (2) specifically empower the Community to take action in several fields, including in particular:

- the improvement of the working environment in order to protect to protect workers' health and safety;
- working conditions;
- equality between men and women with regard to labour market opportunities and treatment at work.

In these areas, the Council may adopt directives using *qualified majority* voting provided by the co-decision procedure (and not the co-operation provided in the old Art. 118a) which gives a wider say to the Parliament than the other decision-making provisions. This is important as the Parliament is well known to be very supportive of social policy issues.

⁵⁶⁰ Article 16 states that "Measures should also be developed enabling men and women to reconcile their occupational and family obligations".

Article 137(1) and (2) are complemented by Article 137(3) which enables the Council to legislate, this time unanimously, *inter alia*, on issues related to social security and social protection of workers. While the first two paragraphs could be used as a legal base to introduce amendments to the system of maternity, paternity and parental leave and family friendly working arrangements, Article 137 (3) can be used as a legal base to regulate some of the benefits connected with the leave, such as the “allowance” provided for by Article 11 of the Pregnancy and Maternity Directive.⁵⁶¹ However, the ECJ has emphasised that benefits paid in connection with the birth do not always fall into the category of “allowance” but can sometimes be regarded as pay.⁵⁶² For this reason, when legislating on parental benefits Article 137 EC should be read in conjunction with Article 141 EC (formerly Article 119 EC). This is essentially a codification of existing case law, in particular where it introduces the principle of equal pay for work of equal value. It is also important to mention that Article 141 (4) seems to explicitly acknowledge not only formal but also substantive equality, by stating that

“the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Labour and social law are certainly the areas of EC law which have been most affected by the entry into force of the Treaty of Amsterdam. It is arguable that the amendments introduced in these areas will enable the development of a family principle in EC employment law. This section has analysed the relevant amendments which are on both a theoretical (such as Articles 2, 3 and 13 EC) and a more practical level (in particular, Article 137 EC).

Although the most important provision for the development of a family principle is Article 137 EC, the potential importance of an interplay between all the provisions

⁵⁶¹ Council Directive 92/85 EEC OJ (1992) L 348/1.

⁵⁶² See the discussion *supra* in Chapter V.

analysed must not be underestimated. The combined use of Articles 13 and 141 EC will add a new dimension to the concept of equality while Article 137 EC, if used together with Article 141 EC, due to the express acknowledgment of the need for substantive equality, could not only deal with inequalities in the employment market but also with the *causes* of such inequalities. The downside of these provisions is that they still make use of different decision-making procedures which may affect the coherent development of the area.

Apart from the provisions discussed above, the Treaty of Amsterdam formally codifies the consultation/negotiation process between management and labour. This is discussed in the next section

29.3 *A task for the social partners ?*

This section seeks to assess whether the social partners are placed in a better position than the EC political institutions to carry out the amendments to the relevant legislation discussed below.⁵⁶³ Before going into this discussion, this section briefly introduces the history of the social dialogue. The idea behind the social dialogue was to involve the social partners or management and labour in the discussion leading to the decision making process. The issue was already addressed as early as the 1970s but the turning point for the development of the social dialogue was in the 1980s. At that stage, social policy depended on the unanimous voting of the Council of Ministers.⁵⁶⁴ The difficulties often encountered in achieving unanimity explain the slow developments and staleness in this area. This was the reason why in 1985 at the Val Duchesse meeting, President Delors launched the idea of the social dialogue as part of a strategy towards social harmonisation and to reinvigorate social policy. The social partners are UNICE (Union of Industrial and Employers' Confederation of Europe), CEEP

⁵⁶³ See *infra* Chapter VIII.

⁵⁶⁴ **R. Nielsen, E. Szyszczak**, *The Social Dimension of the European Union*; 1997, Handelshøjskolens Forlag; see also **H. Cullen, E. Campbell**, "The Future of Social Policy-Making in the European Union" in *Law Making in the European Union*, P. Craig, C. Harlow (eds.), 1998, Kluwer, 262.

(European Centre of Public Enterprises) on the employers side and, on the employees side, ETUC (European Trade Union Confederation). The idea of social dialogue was further consolidated by the 1989 Community Social Charter,⁵⁶⁵ but the first measures aimed at legitimising it are to be found in the Social Policy Agreement added by the Treaty of Maastricht,⁵⁶⁶ and eventually in the Treaty of Amsterdam.⁵⁶⁷ The Treaty of Maastricht expressly conferred on the Social Partners a role in both consultation and negotiation: this has been reiterated in the Treaty of Amsterdam.

Under Article 138 EC the Commission, before submitting a proposal to the Council, shall now consult the social partners on the possible direction of Community action and on the content of such proposal. At this stage the social partners, if they wish, can initiate negotiations with a view to producing agreements. The legislative process, nonetheless, remains under the direction of the Commission. It is in fact up to the Commission to initiate the legislative process and then to involve the social partners. In its first years of life this procedure has mainly been used to overcome the difficulties in the Council, such as the continuous veto of the UK Government.⁵⁶⁸ Apart from facilitating the development of social policy there are also arguments for the use of the social partners rather than the ordinary legislative procedure in the specific field of reconciling work and family life: the main one is that they are closer to the parties. This was made clear in the General Consideration of the Parental Leave Directive.⁵⁶⁹

⁵⁶⁵ Article 27 of the EC Social Charter.

⁵⁶⁶ *Inter alia*, G. Falkner, "The Maastricht Protocol on Social Policy: Theory and Practice" (1996) 6 JESP 1.

⁵⁶⁷ *Inter alia*, B. Keller, B. Sörries, "The New European Social Dialogue. Old Wine in New Bottles?" (1999) 9 JESP 111.

⁵⁶⁸ *Inter alia*, C. McGlynn, "An Exercise in Futility: the Practical Effect of the Social Policy Opt-Out" (1998) 49 NILQ 60; G. Brinkmann, "Lawmaking Under the Social Chapter of Maastricht" In *Law Making in the European Union*, W. G Hart Legal Workshop Series, P. Craig, C. Harlow (eds.), 1998, Kluwer, 239.

⁵⁶⁹ E.g. Para 13 General Consideration of the Framework Agreement on Parental Leave stating that "the Social Partners are best placed to find solutions that correspond to the needs of both employers and workers and shall therefore be conferred a special role in the implementation and application of the present agreement".

Furthermore, in the area of the reconciliation of work and family life, the social dialogue has achieved more results than the ordinary legislative procedure.

But is legislation adopted under social dialogue really a method? One of the perplexities is that the Commission is still dominating the law-making process. As mentioned above, the Commission is still responsible for initiating the legislative procedure. Another element of concern is that, although the Commission has made an effort to regularly inform the Parliament, Article 138 EC does not confer an official role on it. A further drawback is that in order to reach an agreement it compromises between the interests of the market (employers) and labour (employees), thus it does not necessarily contain references to general principles, such as human rights and democratic accountability, which are normally included into the ordinary legislative process. Furthermore, despite the guidelines offered by the Commission⁵⁷⁰ and the *dictum* of the Court of First Instance in the UEAPME case, doubts as to the representative nature of the three organisations involved remain.⁵⁷¹ Finally, although the social dialogue might have overcome some of the difficulties encountered in the Council of Ministers, it has not always proved successful. Not all the negotiation that it started has resulted in agreement. There is agreement amongst legal writers that what has been achieved cannot be regarded as a major result.⁵⁷² Although there are "Eurooptimists" who have argued in favour of this agreement, the majority of the

⁵⁷⁰ The Commission gave guidelines on the criteria that organisations are required to fulfill in order to take part in the social dialogue. Communication of Commission concerning the application of the Agreement on Social Policy COM (93) 600 final.

⁵⁷¹ Case T-135/96, *UEAPME v. Council of the European Union*, [1998] IRLR 602 further discussed in **B. Bercusson**, "Democratic Deficit and European Labour Law" (1999) ILJ 153. See also **M. Schmidt**, "Representativity - A Claim Not Satisfied: The Social Partners' Role in the EC Law-Making Procedure for Social Policy" (1999) IntJCompLLIR 259; **B. Fitzpatrick**, "Community Social Law After Maastricht" (1992) 21 ILJ 199.

⁵⁷² *Inter alia*, **B. Keller**, **B. Sörries**, "The New European Social Dialogue. Old Wine in New Bottles?" (1999) 9 JESP 111, at 116.

academic interpretations regard it as a success only insofar as, on certain occasions, an agreement has been possible.⁵⁷³

In 1993 a first attempt to use the procedure took place on a proposal concerning Works Councils. Here the social partners failed to reach an agreement during the second stage of negotiation. The reason for this failure has never been clarified but the highly political issues could be one reason. A few years later, in 1995, the Commission invited the social partners to a discussion on the burden of proof in sex discrimination cases. This time the social partners, after two rounds of discussion, reached the conclusion that they did not have competence on the issue.⁵⁷⁴ So far only three attempts overall have been successful, namely the Framework Agreements on Parental Leave, on Part-Time Workers and on Fixed Term Workers. The first two have already been transposed into Directives whilst on 1 May 1999 a proposal for a Council Directive was adopted for the third. The content of these agreements is analysed in the next Chapters; here it suffices to say that they do not represent a substantial development in this area. The Parental Leave Framework Agreement provides for a minimum right to unpaid parental leave which adds little to the legislation existing in the Member States. The Part-Time Workers Directive and the Fixed Term Workers Directive, although establishing important principles, present so many derogations as to greatly water down the principles established. Keller and Sörries argue that this provides evidence that only non-conflictual issues can be successfully dealt with by the Social Partners: the standards were probably already higher in the majority of the Member States.

In conclusion, although the formal introduction of the social partners as legislative actors in the EC context must be welcomed because of their proximity to the issues, it is still too early to assess whether they can really make an improvement in this area. There are still issues which are cause of concern. Overall, however, when considering all the

⁵⁷³ M. Jeffery, "The Commission's Proposals on Atypical Work" (1995) 24 ILJ 269.

⁵⁷⁴ A draft directive was later presented by the Commission and adopted by the Council in 1997, Council Directive 97/80 (1998) L14/6.

amendments introduced by the Treaty of Amsterdam,⁵⁷⁵ it is arguable that there are reasons to be optimistic.

⁵⁷⁵ See *supra* section 29.2.

CHAPTER VIII: AMENDMENTS TO EXISTING EC LEGISLATION

30 Introduction

This chapter focuses on possible amendments to the existing EC legislation in this area, namely the Pregnancy and Maternity Directive⁵⁷⁶ and the Parental Leave Directive,⁵⁷⁷ which would be necessary to advance the family principle in EC law.

The rights and the duties involved in the first of the Pregnancy and Maternity Directives are related to the period ranging from the beginning of pregnancy to the end of maternity leave; these provisions are addressed only to the mother. This research maintains that this is the main problem of the Pregnancy and Maternity Directive. Although it might improve the situations of pregnant employees and employed mothers at work, overall the Directive does not challenge the stereotype of mothers being the primary childcarers.⁵⁷⁸ The main amendment suggested is thus facilitating greater involvement of the father.

The Parental Leave Directive focuses on the period starting after the maternity leave is completed. The most important element of its provisions is that, being addressed to both parents, they potentially establish gender neutral rights and duties. As discussed above, this research submits that the main problems of the Parental Leave Directive are that the leave provided for is too short, it is unpaid and, as it is structured now, it is in practice addressed only to mothers.⁵⁷⁹ Accordingly this chapter explores the

⁵⁷⁶ Council Directive 92/85 (1992) OJ L 348/1.

⁵⁷⁷ Council Directive 96/34, OJ 1996 L 145/4.

⁵⁷⁸ On this point see, *inter alia*, H. Fenwick, "Special Protection for Women in European Union Law" in *Sex Equality Law in the European Union*, Hervey, O'Keeffe (eds.), 1996, Wiley, 63.

⁵⁷⁹ See *supra* Chapter V, Section 18.1.

opportunity to amend the Parental Leave Directive in order to orient it more towards a family principle.⁵⁸⁰

With that said, a satisfactory regulation of the family principle is unlikely to come only from a development of the provisions in the existing Directives. These should in fact be complemented by family friendly agreements, which are analysed in the next Chapter: it is important to emphasise that, in order to establish a successful strategy, *all* these provisions should interplay.

This chapter is divided as follows. The first section explores the possibility of introducing amendments to the Pregnancy and Maternity Directive. It analyses its most important elements, namely the subjects to which it is addressed, the protection in the workplace and benefits, as well as those elements which it still lacks such as provisions specifically addressed to the father (31. *The subjects of the Pregnancy and Maternity Directive et seq.*) Finally, the last section focuses on the Parental Leave Directive (32. *A longer and paid parental leave*).

31 *The subjects of the Pregnancy and Maternity Directive*

The first issue concerns the subjects of the Pregnancy and Maternity Directive. Article 2 is addressed only to pregnant workers, workers who have recently given birth and workers who are breast feeding, who are required to inform their employer. It is not clear what is meant by this requirement: can it be that a woman who is clearly pregnant but fails to inform her employers will not be entitled to adequate protection? This is actually what the situation is in the UK where an employer who has not been informed is not under an obligation to undertake risk assessment.⁵⁸¹ Furthermore, the requirement

⁵⁸⁰ E. Caracciolo di Torella, "A Critical Assessment of the EC Legislation Aimed at Reconciling Work and Family Life: Lessons from the Scandinavian Model?", in *Legal Regulation of the Employment Relation*, Collins, Davies, Rideout (eds.), Kluwer, (forthcoming); C. McGlynn, "Time is Ripe for Parental Leave", *The Times Law*, 27 May 1997.

⁵⁸¹ EC Report from the Commission on the Implementation of Council Directive 92/85 COM (1999) 100 final; see also the discussion *supra* in Chapter V.

of information is interpreted in different ways in other Member States: in Spain, for example, it is only necessary that the employer is aware of the pregnancy. This requirement has led to different treatment and it is thus advisable to remove it.

31.1 Provisions specifically addressed to the father

As argued above in order to challenge the stereotype of the “imaginary mother”⁵⁸² it should be made clear that fathers could and should also play a role in the upbringing of young children. The Scandinavian model shows that by addressing rights and duties specifically to fathers this can be achieved. Unfortunately, the Pregnancy and Maternity Directive fails to do so, and in this it reflects the situation at national level in most Member States. In fact, as pointed out in Chapter IV, the majority of the Member States have only recently started tackling the involvement of fathers in the upbringing of young children and certainly it had not when the Directive was negotiated. Furthermore, in those States where some sort of provisions are provided, they can hardly be regarded as equal to the provisions addressed to mothers. The argument supporting the lack of provisions addressed to fathers in the Pregnancy and Maternity Directive, is that, being this an health and safety measure direct to pregnant workers, which role could fathers play and why should they? Here again the answer can come by looking at the relevant legislation in the Scandinavian countries. Here fathers can take time off (ranging from two days to two weeks) in connection with the birth. The aim of this provision is to take care of the mother rather than of the new born child and its importance should not be underestimated. A few days off in connection with the birth can indeed mean a lot: fathers can care for other small children and do the housework. In this light it can be regarded as an *health and safety* measure. A further obstacle remains on the financial side. Who is going to pay for the father’s leave? Again the Scandinavian model can be useful. Here paternity leave is generally paid by for

⁵⁸² C. McGlynn, “The Court of Justice and Ideologies of Motherhood in Community Sex Equality Legislation” (2000) 6 ELJ 29.

collective agreements rather than by statutory provisions. It is submitted that it would not be difficult to insert a form of unpaid paternity leave at EC level, especially as this practice is already in use in many Member States. Furthermore the introduction of provisions in this sense would not require any amendments in the Pregnancy and Maternity Directive. This in fact states that an allowance must be paid but it does not specify who should pay it.

31.2 The protection of fertility

Articles 3 to 6 of the Pregnancy and Maternity Directive provide for measures aimed at protect the health of the pregnant employees. The protection refers to chemical and biological etc. elements as well as “mental and physical fatigue and other types of physical and mental stress” considered hazardous for the health of pregnant employees and working mothers (Article. 3). In order to provide employers with relevant guidance in this respect, the Pregnancy and Maternity Directive is accompanied by two Annexes including lists of dangerous elements.⁵⁸³ As these lists are non-exhaustive, employers are required to carry out an assessment of the possible risk involved in the employees’ activities (Article 4). Following the result of the assessment, the employer faces three options: to adjust the job technically, to move the employee to another job (Article 5) or to grant her leave. These rights can, however, act so as to discriminate against women. In fact, if an employer is aware of the fact that employing a woman will necessarily involve (costly) adjustments to the workplace, he/she will be more likely to prefer to employ a male candidate and this is likely to cause forms of discrimination.⁵⁸⁴ In this respect it is useful to consider the relevant legislation in this area enacted in the

⁵⁸³ Annex I on “Non-Exhaustive List of Agents, Process and Working Conditions” referred to in Article 4(1); Annex II on “Non-Exhaustive List of Agents and Working Conditions” referred to in Article 6.

⁵⁸⁴ Although unfortunate, it is unlikely that the outcome of ECJ decisions such as Case C-77/88, *Dekker*, [1990] ECR I-3941 and Case C-66/96, *Høj Pedersen*, [1998] ECR I-7327 will alone be enough to stop all the discriminatory practices in the Member State.

Scandinavian Countries (for example in Norway, §§ 1 and 8 of the Working Environment Act and in particular the Regulation on the Protection of Fertility)⁵⁸⁵ where a right to the protection of health exists for any employee (male and female) and is matched by a duty on the employer to keep the working environment safe. It should also be pointed out that there is statistical evidence that not only pregnant women and women of childbearing age can suffer from working in a dangerous environment; men can also suffer damage to their fertility. In addition at EC level the solution would therefore be to impose a broader duty on employers concerning safety in the workplace. This would also diminish the risk of discrimination against women.

Such a provision, at least potentially, already exists in the EC legal order. In fact the Framework Directive on Health and Safety,⁵⁸⁶ which is the general framework in which the Pregnancy and Maternity Directive has been adopted, imposes such an obligation on employers. Article 15 states that “particularly sensitive groups must be protected against the dangers which specifically affect them” without, however, listing the fertility of men. The best way to enact it would be as a gender neutral provision, namely the protection of fertility.

31.3 Provisions addressed to the mother

As mentioned at the beginning of this chapter, the provisions of the Pregnancy and Maternity Directive are specifically addressed to the mother. These cover the duration of the leave (Article 8), protection from dismissals during that period (Article 10), and the protection of employment rights such as the right to receive benefits (Article 11). These provisions could be improved although to different degrees. It is submitted that the main *lacuna* of the Directive is not in the existing provision but in what it is lacking:

⁵⁸⁵ Regulation on damages to fertility and working environment (*Forskrifter om forplantiskader og arbeidsmiljø*), n° 769, 25 August. 1995 (1995) Norsk Lovstidend, further discussed *supra* in Chapter VI.

⁵⁸⁶ Council Directive 89/391 OJ (1989) L 183/1, on the introduction of measures to encourage improvements in the safety and health of workers at work.

the possibility to resume work on an a non conventional basis and, if certain circumstances occur, to transfer the maternity leave to another person.

31.3.1 The duration of the maternity leave

Concerning the provisions relating to leave, Article 8 of the Pregnancy and Maternity Directive is, at least in principle, the main achievement of the Directive. As already mentioned, it gives mothers the right to be on maternity leave for at least fourteen weeks, with two of them immediately before or after confinement being compulsory. This period aims at protecting the health of the mother and the child and therefore it cannot be shared with the father. A report of the Commission points out that, overall, this provision can hardly be regarded as having achieved any improvement in the Member States.⁵⁸⁷ Only few Member States seem to have benefited from the implementation of the Directive: one of these is Sweden. When considering the standard of the Swedish leave provisions, however, it appears clearly that the level of the EC provisions is higher only on paper. It is arguable that if the period of maternity leave can be deemed long enough for the protection of the health of the mother, it is too short to actually care for young children. Arguably the problem here is the legal base (the old Art. 118a EC) which is limited to health and safety. As explained above, it is likely that, Article 137 EC will be able to overcome this difficulty.

As mentioned above, what is most interesting is the provisions which have not been included. For instance, the Pregnancy and Maternity Directive should also contemplate the possibility to extend this period to another person (possibly the father): what happens to the child if the mother is unable to care because she is ill? In this case the example can also be taken from the Scandinavian model where the possibility to extend the leave (and the benefits) is expressly provided.

Furthermore the Directive does not expressly provide for the right to return to work. In practice this does not cause problems, as almost all the Member States do

⁵⁸⁷ EC Commission Report on the implementation of Council Directive 92/85, COM (99) 100 final.

actually regulate this period. Most of the time, however, they provide the right to go back to the “same job”. But what if the mother would prefer (or needs) to resume work on, for example, a part-time basis?⁵⁸⁸ As it now stands she can only rely on sex discrimination legislation.

31.3.2 Other rights connected with the employment relationship

Article 11 provides for the protection of so called employment rights. Among these rights, possibly the most important is the one providing that the period of maternity leave must be paid. This research, however, has already emphasised how the importance of this principle is watered down by the many conditions which Member States are entitled to impose. Here the suggestion is to specify the requirements and to prohibit Member State from adding further clauses.

The main loophole lies in the fact that employees are entitled to “the maintenance of a payment, and/or entitlement” to be made “an adequate allowance [which] shall be deemed adequate if guaranteeing income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health”. The Pregnancy and Maternity Directive does not further clarify this and the interpretation given by the Court of Justice of this provision cannot be regarded as satisfactory. In the cases decided on this issue the Court of Justice has drawn a line between “allowance” and “payment”. The latter are those paid before or after maternity leave, while the first are those paid during the maternity leave.⁵⁸⁹ On the one hand, to regard maternity benefits as allowances within the meaning of Article 11(2) of the Pregnancy and Maternity Directive in practice means that they are not subject to the equality principle and as, they merely have to be “adequate”, if a woman on maternity leave suffer an economic loss, this is not *per se* in breach of the EC

⁵⁸⁸ Case C-243/95, *Hill*, [1998] ECR I-5289.

⁵⁸⁹ Case C-342/93, *Gillespie*, [1996] ECR I-475, Case C-411/96, *Boyle*, [1998] ECR I-6401, Case C-218/98, *Abdoulaye*, decided on 16 September 1999.

legislation. On the other hand, to regard these benefits as pay, means that they are subject to the equality principle enshrined in Article 119 (now Article 141 EC) and, therefore, if men are not receiving payment because of illness, women suffering from complications during pregnancy will not be entitled to payment either. Thus in both cases the fact that they might result in a financial loss for women on maternity leave. Finally, Chapter V discussed how Article 11(2) is based on the male norm and also implies that women are entitled to a subsidy for the work that they are not performing rather than for the work that they are actually performing, namely caring for a child.

32 *A longer and paid parental leave*

Chapter V has already shown that the Parental Leave Directive does not provide an adequate answer to the needs of parents. First of all, in the majority of the Member States it does not result in a substantial improvement: forms of parental leave are already been implemented in many Member States.⁵⁹⁰ More specific problems have been identified in the fact that it is very short and unpaid. These two circumstance partly explain why is used mostly only by mothers. The main obstacle to a wider use of the parental leave is, however, another one, namely attitudes towards it.⁵⁹¹ Fathers still see their roles in the family more as that of breadwinner and, sad but true, for employers is still more acceptable that the mother rather than the father takes the leave.

The question which this begs is whether the law can play a role in shaping attitudes. The analysis undertaken in Chapter VI of the relevant situation in the Scandinavian countries has shown that this will not happen overnight, but is possible. In these countries excellent provisions are available: parental leave is paid at a very high

⁵⁹⁰ "Parental and Family Leave in Europe" (1996) 66 EOR 22 and more recently see **G. Brunning, J Plantega**, "Parental Leave and Equal Opportunities: Experiences in Eight European Countries" (1999) 9 JESP 195.

⁵⁹¹ **S. Carlsen**, "Men's Utilization of Paternity Leave and Parental Leave Schemes", in *The Equality Dilemma*, S. Carlsen, J. Larsen (eds.), 1993, The Danish Equal Status Council, 79.

rate and it is longer. Although it is still used mainly by mothers, fathers are increasingly taking the opportunity to use part of the leave. Also at EC level, therefore, provisions in this sense should be introduced.

CHAPTER IX: FAMILY FRIENDLY WORKING ARRANGEMENTS

33 Introduction

Although crucial, a system of leave available for both parents during the first months of the life of a child might in practice mean little if is not followed by the possibility of re-arranging working hours. Arguably, measures aimed at combining work and family life become even more important after the completion of maternity and parental leave. The needs of a small child do not stop at the end of the first months but are likely to be equally demanding for the first few years. This necessity is, admittedly, partly addressed by the Parental Leave Directive, but very weakly. During the first months or years of life of a the child, parents often need to introduce changes to their ordinary working patterns.⁵⁹² This necessity is in many cases driven by a lack of⁵⁹³ or the cost of child care, or the necessity for the mother of being in paid employment.

As discussed in previous sections, considerable improvements have been achieved *via* the principle of sex equality. Although the enthusiasm of the ECJ in sex discrimination cases has done a great deal for the rights of part-timers, and thus succeeding in challenging the organisation of the workplace, when turning to the specific issue of flexibility, has not established a clear framework. The legislation enacted outside the framework of sex equality, *id est* the legislation following the employment rights approach can be seen, to a certain extent, as an alternative. The current structure is inadequate, however. Neither the Pregnancy and Maternity Directive nor the Parental Leave Directive addresses the problems which parents (usually mothers) face when resuming work after the end of maternity, paternity or parental leave.

⁵⁹² S. Cox, "Flexible Working After Maternity Leave: the Legal Framework" (1998) 78 EOR 10

⁵⁹³ Case C-249/97, *Gruber v. Silhouette*, decided on 21 October 1999.

At present, many working parents have overcome the problem by shifting to atypical working hours such as part time work or to temporary contracts. This situation has become increasingly frequent and both the Member States and the European Community have tried to provide an answer by adopting measures concerning new forms of working arrangements giving to parents the opportunity to work in such a way to combine it with the care of young children. But do these arrangements represent the ideal solution?

After having analysed the concept of flexibility (*34 Flexibility v. family friendly agreements*), this chapter briefly looks at the main forms of atypical work provided in the Member States (*34.1 Forms of flexible working arrangements*) and the two EC measure, namely the part-time Workers Directive and the Atypical Workers Framework Agreement (*34.2 The EC measures*). In the light of the analysis it focuses on the advantages and disadvantages of flexible working arrangements and attempt to assesses whether they really represent the answer to the needs of working parents or whether an alternative framework could be established.⁵⁹⁴

34 Flexibility v. family friendly arrangements

It follows from the above that working parents need to organise their working lives by taking into account the needs of their young families: this need has been identified with the need for flexibility.

Flexibility was initially employed to describe working hours in addition to normal ones.⁵⁹⁵ Today the term has a more general connotation and indicates any job which does not conform with standard full time work: in other words any form of employment which does not need to be performed within the framework of the traditional working hours. These might *prima facie* appear the perfect answer to working parents who, for

⁵⁹⁴ J. Lewis, "Work-Family Reconciliation and the Law: Intrusion or Empowerment?", in *The Work and Family Challenge - Rethinking Employment*, Lewis, Lewis (eds.), 1996, Sage, 34.

⁵⁹⁵ K. Borg, "Family Life and Flexible Working Hours", in *The Equality Dilemma*, S. Carlsen, J. Larsen (eds.), 1993, The Danish Equal Status Council, 67.

example, need start to work later in the morning because their children must be dropped at school or need to perform their work from home because of the lack of childcare arrangements. It must be kept in mind, however, that flexibility was not introduced with the needs of working parents in mind but as a device to tackle specific aspects of the employment market such as its changing structure, (for example variations in the level of trade or extended opening hours), or to tackle unemployment. These forms of jobs also respond to another business need: they are often cheaper than ordinary jobs. In many cases part time jobs are low paid jobs. This has led to a perception of these forms of work as peripheral. Another problem with flexible working arrangements is that they could have a negative impact on the family. Sometimes the pressure of night shifts or working during week-ends can actually add strain to the family.⁵⁹⁶

This not only fails to offer an adequate response to the demands of the family, but also has gendered consequences. Rubery and Tarling have drawn a link between the increasing participation of women in employment and forms of flexible work.⁵⁹⁷

This brings us to the conclusion that in many cases flexible working arrangements are not the same as family friendly working arrangements.⁵⁹⁸ The fact that many parents rely on them as the last resort does not mean that they are necessarily the best solution. Working parents with young families need family friendly working arrangements which would help to reconcile work and family responsibilities.

⁵⁹⁶ **K. Borg**, "Family Life and Flexible Working Hours", in *The Equality Dilemma*, S. Carlsen, J. Larsen (eds.), 1993, The Danish Equal Status Council, 67. See also "Landmark Ruling for Mothers", *The Times*, 15 January 1999 which reports a recent case where an employment tribunal decided against unsociable shifts imposed by the NHS which rendered impossible for two women to conciliate their working commitments with their family lives.

⁵⁹⁷ **J. Rubery, R. Tarling**, "Britain", in *Women and Recession*, Rubery (ed.) 1988, Routledge; "Flexible Working: the Impact on Women's Pay and Conditions" in (1996) EOR 19.

⁵⁹⁸ On this point see also **S. Fredman**, "Discrimination Law: Labour Market Regulation or Individual Rights?", in *Legal Regulation of the Employment Relation*, H. Collins, P. Davies, R. Rideout (eds.), Kluwer, (forthcoming).

34.1 Forms of flexible working arrangements

In the majority of the EC Member States, arrangements concerning flexible arrangements of working hours have become increasingly popular since the 1980s.⁵⁹⁹ This paragraph analyses them and their effects on both the employment market and the reconciliation of work and family life.

- **Seasonal working.** This arrangement allows the person who is performing it to work only during certain periods of the year. If the employee works only during school time this arrangement gives families more time together during school holidays. However, it is often coincides with the school holiday period.
- **School - time working.** This is a similar solution to the previous one but is specifically designed to give families more time together. It is often arranged on an informal basis, but it can be part of a formal contract. This form of flexible work preserves the worker's continuity of employment and gives the employer more stability and flexibility in staffing requirements. During working periods, employees may be able to extend their daily or weekly hours, e.g. by taking shorter meal breaks or attending earlier/later than usual. The extra hours accumulated can then be used to boost earnings, holidays, improved holiday pay or to cover unexpected emergencies.
- **Term-time only working** and **Sunday working** are other variations of the above arrangements.
- **Annualised hours.** Under this system, individual employees contract to work an overall number of hours per year, rather than a fixed number per week. It is used in variety of situations, including continuous processes of manufacturing and in the educational and services, where a seasonal variations of patterns of work would otherwise require increased use of casual labour or short time/overtime working.
- **Flexible hours** (or flexi-time). Within this arrangement the employee can choose when to start and when to finish working during the day, on condition that he/she attends work for a specified number of hours on a daily, weekly, monthly or even, yearly basis. This can be useful in the case of extended opening hours, but also when

⁵⁹⁹ "Il Telelavoro al Debutto tra I Dipendenti Pubblici", *Il Sole 24 Ore*, 22 July 1999.

the employees has children who need to be dropped at school. However, it assumes that the employee has a partner whose working arrangements allows him/her to pick up the children from school.

- **Longer days/shorter weeks.** Subject to employment legislation and collective agreements, some organisations allow workers to complete their full weekly hours over a shorter working week by extending the length of their daily attendance. This can reduce travel or childcare costs for the employee and increase the number of days per week spent with the family.
- **Part time working.** This is possibly the most popular form of non-conventional employment. It involves attending for less than the standard weekly hours. It allows parents to work during school hours or when the children have alternative care. Part time working arrangements can be permanent or temporary. The advantages for both sides are clear: it is often cheaper for employer and it gives more time to spend with the family to employees.
- **Job sharing.** The principle is the same as the part time. However, it differs as the in job sharing two or more people share a full time job, plus the benefits associated with that post, and take joint responsibility for the duties involved.
- **Teleworking.** This form of work allows the employee to work from home by using a computer.

34.2 The EC relevant measures

Some sort of flexibility has been introduced also at EC level, namely the Part-Time Workers Directive⁶⁰⁰ and the Fixed Term Workers Directive. These Directives are part of a project attempting to legislate non conventional forms of employment which started in 1980s.⁶⁰¹

⁶⁰⁰ Council Directive 97/75 OJ (1998) L14/9.

⁶⁰¹ M. Jeffery, "The Commission's Proposals on Atypical Work" (1995) 24 ILJ 269.

Both Directives aim at regulating the position of workers employed on a non permanent contract. The Part Time Directive has two main aims: to eliminate discrimination against part-time workers and to encourage employers to take up part time work on a voluntary basis. Both aims have been strongly criticised.⁶⁰² As for the removal of discrimination the criticism is based on the fact that the principle is subject that to numerous qualifications which can seriously undermine it. Firstly, the principle is limited to employment conditions; secondly discrimination against part timers is permitted if justified "on objective grounds" such as the period of service; thirdly it excludes the self employed, atypical workers, and "part-time workers who work on a casual basis" and finally, by stating that considerations including seniority and qualification/skills, may be taken into consideration, it seems to put a significant limit to the principle. In this respect, Scarponi argues that it will be crucial to interpret the Directive in conjunction with the relevant case law of the Court.⁶⁰³ Also the main aim of the Framework Agreement on Fixed Term Work is to eliminate discrimination against certain categories of workers.

These measures may be welcomed for combating discrimination in the employment market. Whether they can prove useful for improving the position of working parents, however, is another issue. Indeed they raise the same questions that measures aiming at increasing flexibility at national level have raised. Are these measures directed to increase flexibility in the employment market and to solve specific problems, or are they structured so as to meet the demands of working parents? Furthermore, these measures prohibit discrimination but do not give parents a substantive rights to resume work on an atypical base in order to care for young

⁶⁰² M. Jeffery, "Not Really Going to Work? Of the Directive on Part-Time Work, "Atypical Work" and attempts to Regulate It" (1998) 27 ILJ 193.

⁶⁰³ *Inter alia*, Case C-96/80, *Jenkins*, [1981] ECR 911, Case 170/84, *Bilka*, [1986] ECR 1607, Case C-102/88 *Ruzious-Wilbrink*, [1989] ECR 4311, Case C-171/88, *Rinner Kühn*, [1989] ECR 2743; Case C-33/89, *Kowalska*, [1990] ECR I-2591, Case C-246/96, *Magorrian and Cunningham*; [1997] ECR I-7153, Case C-184/89, *Nimz* [1991] ECR I-297 and Case C-243/95, *Hill and Stapleton*, [1998] ECR I-3779; S. Scarponi, "Luci ed Ombre dell' Accordo Europeo in Materia di Lavoro a Tempo Parziale" (1999) 2 *Rivista Giuridica del Lavoro - Note e Commenti* 399.

children. It follows that, although, they may increase flexibility but they are not necessarily family friendly.

CONCLUSIONS

This research has advocated the need to restructure the employment market in order to meet the needs of working parents. It has suggested that such a restructuring can be satisfactorily achieved by introducing a family principle.

This has become a necessity for several reasons. First of all, today's society is no longer based on the sharp distinction between the domestic and the public sphere. It has become increasingly common that both men and women take active part in the employment market. This has caused a change in the composition of the work force (*id est* in the public sphere) which has not been supported by an adequate change within the family (*id est* the domestic sphere) and has, therefore, created an unbalanced situation. There is a clash between the two spheres which can have detrimental consequences. This research has focused on the effects of one of these consequences, namely the care of young children. How can parents in full time employment care for young children? This issue has been exacerbated by several elements: the most important being attitude and stereotypes. Finally, although this issue is particularly relevant for women it involves the whole of society: the structure of society has changed, mothers are now likely to be in full time employment, the model of the extended family no longer exists, and there is the growing concern that both parents should be involved in the daily care of their children. In other words, appropriate measures must be found to meet the changes that society has undergone. This research has analysed this issue, with the aim of assessing what is the role that the law can play in meeting these changes, improving the existing situation, and promoting new values.

Measures in order to address this issue have been adopted at both national and international level. This research has focused in particular on the relevant EC legislative framework and has reached the conclusion that, as it structured now, it is inadequate and so far it has had a limited impact. A reason for that is because the EC is

trying to *reconcile* the two areas of family life and working life. When considering that, within the EC, employment life has clearly a more important status than family life, it appears clearly that reconciliation merely means adaptation of the needs of family life so as to suit those of employment life. This appears clearly when looking, for example, at the issue of flexible working arrangements. Although these are often used by working parents in order to reconcile work and family life, they can have detrimental consequences. First they are not designed to suit working life but the changing needs of the employment market. In this context it is compelling to ask whether flexibility is a concept for employers or for employees. Furthermore, flexibility has gendered implications. Another problem with the EC approach is that it still adopts a stereotyped conception of motherhood and its legislative measures are adopted in light of this concept. In other words, the solutions proposed by the EC is still based on the assumption that life is divided into spheres which should be kept separate and it still denies that these spheres are actually connected.

This research has contended that so far, the only legal systems which seem to have come to terms with this issue are the Scandinavian countries, namely Norway, Sweden and Denmark. In these countries, possibly because they have a long welfare state tradition, the relevant measures enacted are not based on the assumption that life is divided into two separate spheres. These measures do not aim to reconcile the two spheres but to adapt them according to their reciprocal needs. They are based on the awareness that family life is equally important as employment life. The Scandinavian model has also proven to work efficiently. Measures aiming at introducing a family principle have been gradually enacted since the 1970s and both men and women take advantage of them.⁶⁰⁴ The Scandinavian model has also demonstrated another important element, namely that legislation can influence if not change, stereotypes and assumptions of society.

⁶⁰⁴ "Baby Comes too as EU Ministers Meet", The Times, 5 May 1998 reporting that Ms Messing, Sweden's Employment and Women's Minister, thanks to the Swedish legislative provisions in this area, was able to successfully combine work with motherhood.

For this purpose, this research has proposed to amend the relevant EC provisions in order to introduce measures which have proven successful in the Scandinavian countries. This research has fully acknowledged that there are difficulties in attempting to use the Scandinavian legislation as a model for the EC.⁶⁰⁵ This is the reason why, for the time being the amendments proposed are limited and focused. not such as bringing upon a constitutional change. First, provisions aiming at protecting the fertility of employees in the workplace. These measures go further than the health and safety approach used at the moment, because they address both parents and not only mothers. Secondly, a system of leave and benefits which would allow the father to play a more active role in the care of young children. Thirdly, these provisions should be complemented by family friendly working arrangements such the possibility to resume work on a non conventional basis in order reconcile work and family life.

In conclusion, the changes undergone in the structure of society, require a full recognition of the struggle that parents face daily in juggling their work and family commitment. The Scandinavian model has provided evidence that legislation cannot change social attitude overnight. The message that this model is sending, however, is that the legislator cannot ignore the changes in the structure of society and can, ultimately, contribute to changing the structure of employment market.

⁶⁰⁵ See the discussion *supra* in the Introduction.

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