

Fathers and the Reconciliation between Work and Family Life: the swallows that did not make a summer?

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The Reconciliation between Work and Family Life has evolved beyond recognition over the Years

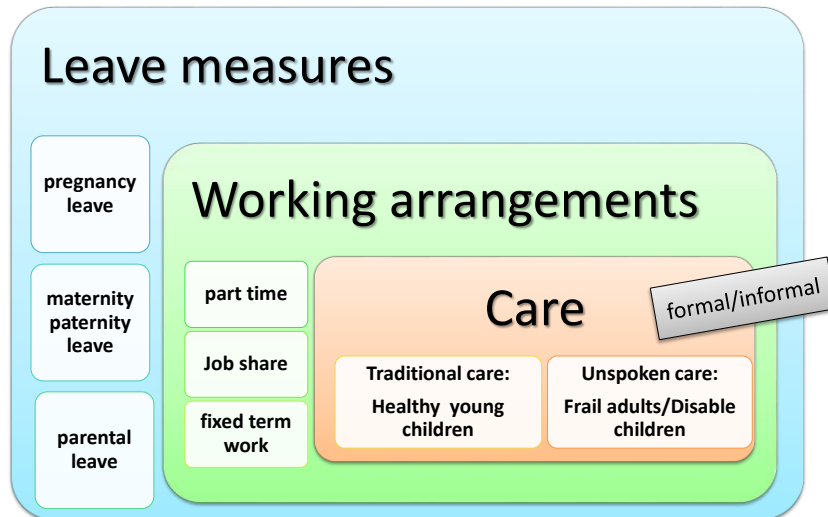
- **Quantity**

(leave provisions, time provisions and, to an extent, care provisions).

- **Quality**

(from a non discrimination provision to a fully fledged fundamental right)

In terms of *quantitative* development:



In terms of *qualitative* development

- Case C-177/88 *Dekker* ECR I-394
- Article 33(2) EU Charter of Fundamental Rights:

“[t]o reconcile family and professional life, *everyone* shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.” .

However, something is missing:
where are fathers?

The Court has played an essential Role in the development of these policies

- It has relentlessly further the position of women as both workers and carers
- It has striven to emphasise the *substantive* equality element of reconciliation
- However, when it comes to fathers the position is less clear cut

a look at the statistics

- There is a potential link between parenthood and employment for persons aged 25-49 years with at least one child below the age of 12.
- There is also a substantial *gender divide* of parenthood, with men with children under the age of 12 having higher rates of employment compared with mothers. These have lower employment rates in the vast majority of EU Member States, with sizeable differences for some (eg Czech Republic and Hungary).

Employment rates (age 15-64)

72.8% men
59.1 % women

Part time employment

7.9 % men
31.1 % women

Employment rates (age 29-49)

with children under 12

91.6 % men
67.1 % women

without children under 12

84.8 % men
78.5 % women

source: Equality between Men and Women 2010, COM (2009) 694 final)

What *fathers* have to do with the reconciliation of work an family life?

gender equality/employment strategy

supporting mothers who can then take a more substantial role in the employment market
breaking down stereotypes

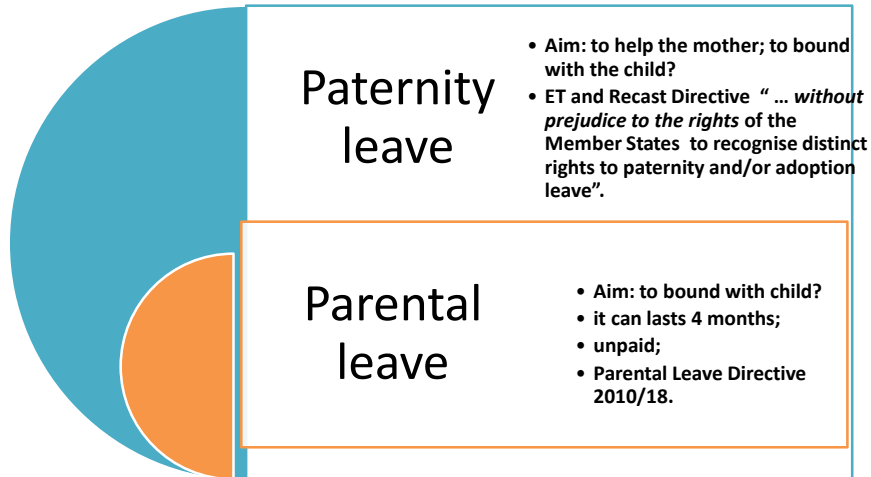
children's rights/benefit

human rights

more fathers are willing to play a meaningful role
right to *paid work* for women/right to *care* for men



The relevant provisions at EU level



The traditional approach of the CJEU: the “de fault fatherhood ideology”



C. McGlynn, “Ideologies of Motherhood in EU Community Sex Equality Law” ELJ 6 (2000) 29-44.

inter alia ...

Case 184/83, Hofmann [1984] ECR 3047: “The equal treatment directive is not designed to settle questions concerned with the organization of the family or to alter the division of responsibility between parents” ;

Case 163/82 Commission v Italy [1983] ECR 3275:
on the rights of adoptive mothers as different from rights of adoptive fathers;

Case C-243/95 Hill and Stapleton [1998] ECR I-3739:
on the role of mothers and fathers;

Case C-218/98 Abdoulaye [1999] ECR I-572:
on the disadvantages of maternity leave

An alternative approach? Case C-366/99 *Griesmar*, [2001] ECR I-9383

a French *magistrat* and father of three children, in accordance with the domestic legislation, received a retirement pension calculated on the basis of the years of service that he had actually completed. By contrast, the retirement pension of a female civil servant, credited years for each child that she had.

The Court had to consider whether the credit granted in respect of each child was linked to the career-related disadvantages incurred during maternity leave or whether it was intended to offset disadvantages that result from bringing up a child. In the first case it would have been legitimate to reserve the policy to women only, whilst the opposite was true in the second instance.

The Court noted that the latter was the case and concluded that if a father has brought up a child, “the situation of a male civil servant and a female civil servant *may be* comparable as regards the bringing up of children” (at para 56).

Case C-104/09, *Roca Alvarez* [2010] ECR I-08661

- Spanish law which offered both parents the right to take time off to wean a child. However, whilst the mother would have automatically qualified for the right, the father was entitled only if both parents were employed, thus making him dependent on the status of the mother: in this case the father was not entitled because the mother was self-employed.
- the domestic legislation reiterated the message that the mother is the principal carer and the father is merely the fall-back option.

Case C-104/09, *Roca Alvarez* [2010] ECR I-08661

- The Court found this contrary to the principle of equal treatment as “it is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties” (at para 36; see also the Opinion of AG Kokott, at para 59). Furthermore, as the AG noted, the emphasis of the right encapsulated into the domestic legislation was on the *child* rather than on the mother, and that the “the necessary love and attention can also be provided by the child’s father,” (Opinion of AG Kokott, at para 42).

Relevant legislation:
Art. 2(3) Equal Treatment 76/207



- “the position of a male and female worker, father and mother of a young child, *are* comparable with regard to their possible need (...) to look after the child”. (Case *Roca Álvarez* C-104/09 [2011]).



but ... 2 and 2 still makes 5!

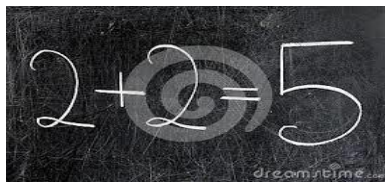
Case C 5/12 *Betriu Montull* [2013] ECR I-571

- The facts of the two cases are remarkably similar:
- both fathers wanted to take the leave but were not entitled to it because they had only a derivative right;
- in both cases the mother was *self*-employed rather than employed;
- the period of leave that Mr BM asked for was leave designed for *both* parents. Specifically, it related to the period of ten weeks following the six weeks' compulsory leave which, the Spanish legislation accord exclusively to the mother immediately after the birth of the child.



- Indeed, following the *dictum* of the Court in *Roca Álvarez*, AG Wathelet convincingly argued that ten weeks' leave is accorded to workers in their capacity as *parents* of the child rather than being linked to the protection of the biological condition of the woman (para. 73). Thus, ultimately, also in *Betriu Montull*, the leave was for the benefit of the child.

- the Court choose to emphasise that the measure at stake was justified to protect women in relation to pregnancy and maternity because “pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable position” (at para 49).
- it concluded that the domestic measure was intended to protect a woman’s “biological condition” during and after pregnancy (at para. 63).



We also need a “cultural revolution”

[w]hat has been missing from policy and reform discussions thus far is a debate about the nature of fatherhood and the transformation of the role of the father in response to changing expectations, norms and practices. (Fineman, *The Autonomy Myth* (The New York Press, 2004), at p. 195)



is the “new father” here yet ?

- Clear right based strategy: compulsory legislation

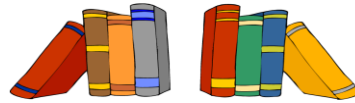
paternity leave should be established on a binding basis so as to ensure that men will not be made, on account of social pressure, to forgo their entitlement. A signal should be sent to the labour market to the effect that men too have to spend time away from the workplace and their job when they have children (European Parliament, 2009 at p.14)

- a change in the traditional understanding of the role of individuals as parents: a “cultural revolution”

[h]ow society works in general, with its unwritten rules, institutions and schedules tends to assume that someone [usually, the mother] is still working full time on family care” (ILO-UNDP, 2009 at p. 41).

- a proactive Court of Justice that expresses commitment to the “social value of parenthood” (Fredman, 1994)

Further reading



- G. James, “Mothers and Fathers as Parents and Workers; Family Friendly Employment Policies in an Era of Shifting Identities” *Journal of Social Welfare and Family Life* 31 (2009) 271-283.
- M. Fineman, *The Autonomy Myth* (The New York Press, 2004), at p. 195.
- S. Fredman, “Reversing Roles: bringing Men into the Frame” *10 International Journal of Law in Context* 442-459.
- E. Caracciolo di Torella, “Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union”, (2014) *20 European Law Journal* 88-106.



any
questions?
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