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The Evolution of Gender Equality and Related Employment Policies: The Case of Work-Family Reconciliation

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Abstract

EU law and policy on work-family reconciliation has developed by way of two parallel but often incoherent movements. The jurisprudence of the Court of Justice of the EU has been a driving force in its interpretation of sex discrimination provisions in the context of claims concerning women's labour market experiences which have subsequently been codified, for example, to provide positive rights in relation to pregnancy and maternity. Alongside this development, policy has been linked to wider economic concerns such as the goal of full employment leading to specific measures intended to equalise employment conditions for those with non-standard working arrangements and to encourage shared parenting between men and women. The lack of a specific focus on work-family reconciliation as a goal for law and policy in its own right has resulted in a patchwork of provisions rather than an overarching framework. The net result is that EU law provides an unsatisfactory response to what has been termed the unsolved conflict between paid work and unpaid care. Recent developments may provide a solution. The Commission has reinvigorated its interest through its 'New Start' initiative - a package of both legislative and non-legislative measures under the auspices of the European Pillar of Social Rights launched in April 2017. Provisions incorporate, inter alia, a proposed directive which would amend the parental leave regime and introduce paid paternity and carers' leave. This article provides a critique of law and policy to date and assesses the potential for a coordinated EU strategy for work-family reconciliation, focusing specifically on gender

equality. It is argued that, even with the enhanced interest of the Commission, it may be difficult to achieve a coordinated approach to what has always been a contentious policy area within a rapidly changing EU although the UK's departure from the EU may provide an opportunity in this respect.

Introduction

The EU legal acquis does not currently provide an adequate legal response to what has been termed the 'unsolved conflict' (Barbera, 2003) experienced by many individuals – overwhelmingly women - in trying to reconcile the provision of unpaid care with paid work. There is no fundamental 'right to care' under EU law (Busby, 2011). Issues which arise before the courts are problematized with legislative development occurring through subsequent codification of the case law and piecemeal adjustments to pre-existing provisions and institutional arrangements rather than any systemic redesign. Work-family reconciliation has never been a specific EU policy goal but rather has been subordinated to wider social and economic objectives such as full employment (Lewis, 2006). This combination of a policy acquis based around broad economic objectives and the reactive and narrow development of the legal acquis has shaped the way in which unpaid care's intersection with paid work has been incrementally provided for within the EU (Busby and James, 2015).

The European Commission has in recent years been proactively engaged in attempts to strengthen and extend the existing legal framework, most notably by proposing a Work-Life Balance Package European Commission, 2008a) which included two legislative proposals to amend existing directives on self-employment and protection for pregnant workers. Although the former was adopted, the latter was blocked in the

Council due to the opposition of certain Member States, most notably the UK, and was formally withdrawn in 2015 (European Commission, 2015a). In response, the Commission has recently renewed its efforts specifically to address women's underrepresentation in the labour market by taking a broader approach through the announcement of its initiative, the New Start to Support Work-Life Balance for Parents and Carers (European Commission, 2017a) proposed in April 2017 as part of the European Pillar of Social Rights (European Commission, 2017b). However, progress is not guaranteed. The sovereign debt crisis, increased global competition and the EU's existential crisis evident in the UK's decision in June 2016 to 'Brexit' have destabilised the Union and, in times of economic difficulty, social initiatives have historically been marginalised (Busby, 2011). That the Commission has brought forward its 'ground breaking' proposal (Caracciolo di Torella, 2017:196) at this particular moment shows both boldness and a commitment to engender change but its survival and transposition into meaningful legislation is far from assured.

This article provides a critique of the EU's work-family reconciliation law and policy to date and assesses the potential for the development of a cohesive future framework with a focus on gender equality. The first part of the article consists of an overview of the development of law and policy. This is not intended to provide a detailed and comprehensive history of the EU's journey (for which, see Caracciolo di Torella and Masselot, 2010), but rather a means of identifying the shifting priorities of the EU and how these have shaped the area under review. The focus is on the interaction between the wider policy objectives, the jurisprudence of the Court of Justice of the EU ('CJEU' or 'the Court'), and adopted legislation. As this analysis shows, the Court's jurisprudence has led regulation in key areas such as non-standard working arrangements and pregnancy discrimination serving as a precursor to legislative

provision which has taken place largely through codification of the case law. In the second part of the article I provide a critical assessment of the Commission's New Start proposal. I argue that, even with the Commission's enhanced commitment, it may be difficult to achieve a coordinated approach to what has always been a contentious policy area within a rapidly changing EU. The UK's impending departure from the EU could potentially provide the necessary conditions for enhanced social cohesion among the remaining Member States thus laying the path to a more unified policy vision, but this is by no means assured.

EU Work and Family Reconciliation: A Patchwork not a Framework

In the post-war economies of the Member States, the standard (male) worker model epitomised the normative ideal of the full-time, permanent and unencumbered individual as a basis for labour market policy. Women, due to unpaid care commitments and wider domestic responsibilities, were generally unable to comply with this standard and men did so to the detriment of their engagement with family life with their contribution valued almost exclusively through their ability as breadwinner. In the paid employment context this 'othering' of women, and in particular mothers whose primary social contribution was in the service and support of family members, has had a profound and enduring effect on women's relationship with the labour market which has been led by and reflected in EU law and policy over the ensuing decades.

In the contemporary EU, women's participation in the formal economy varies across Member States due to the complex interaction of socio-economic, political and cultural factors. Although the general movement has been away from the domestic regime, by which women are economically dependent on their provision of unpaid care work

within the home, towards a public regime in which women increasingly gain their livelihood from free wage labour, there are still wide variations so that the gender regimes of the EU Member States can be arranged 'along a continuum from neoliberal to social democratic' (Walby, 2015: 151). Under the social democratic model, childcare and other support services are publicly funded whereas under the neoliberal model they are privately provided and purchased in the market. The Nordic states provide the most prominent examples of social democratic gender regimes whereas the UK, following the financial crisis and pursuance of austerity policies since 2010, has increasingly moved towards a neoliberal gender regime.

Whatever model is present, women's participation in unpaid care and paid work has been instrumentalised by state policy in line with the changing dominant ideologies and economic circumstances within the Member States, either through the provision of publicly-funded care or through the marketization of care and associated healthcare and welfare regimes as well as the availability of jobs around which care can be accommodated. One obvious example is the use of a paid female labour force to fill jobs vacated by men during the second world war. In the UK, state-funded nurseries were closed in the post-war era so that mothers were compelled to return to the home and publicly provided childcare declined to an all-time low in the late 1960s (Lewis, 2013: 250). In the wider EU context, a more recent – and arguably more subtle - example relates to the aftermath of the financial crisis. Although the promotion of women's employment pre-crisis had had a generally positive impact on women's opportunities and increases in care services, the adoption of austerity measures in many EU member states reversed the move towards the Scandinavian model of high levels of care provision prevalent in the social democratic gender regime (Fagan and Rubery, 2017). Nonetheless the pressure on women to engage in wage work remains

even when such support is reduced so that the focus on influencing women's behaviour sustains (Lewis et al, 2016).

Women have thus become used to the allocation of their time being manipulated through targeted public policy, be it through welfare provision or employment policy. Men's engagement with paid work and unpaid care has not had the same history and attempts by policy-makers to instrumentalise men's behaviour in relation to their work and wider social arrangements must overcome hostility fuelled by accusations of state interference with the 'private' lives of individuals.

The resulting inequalities experienced by women in the labour market in the general post-war shift from the male breadwinner to dual earner family model (Crompton, 2006) provided justification for a cohesive EU work-family reconciliation strategy aimed at coordinating the development of the law with the provision of policy. This would have contributed to the progressive reconstruction of gender as a means of equalising the provision of unpaid care work and paid work between women and men and incentivising the former for both. However, as the following consideration of the dual development of the policy acquis and the legal acquis shows, the EU's engagement in this area has taken a more circuitous and less directly effective route.

Market Making not Correcting

The core aims and objectives of the European Economic Community (EEC) were focused primarily on the establishment of a common market that would promote inter-state cooperation in the pursuit of economic growth (Treaty of Rome 1957, preamble). The protection of workers was inconceivable as a primary goal as the EEC was 'market making' not 'market correcting' (Streek, 1995: 399). The EU's engagement in the area of work-family reconciliation had an inauspicious beginning arising as an unintended

consequence of the provision of equal pay, itself a by-product of the free market. Although the EU's broader social policy dimension has been considerably strengthened down the years, its originally restrictive conceptualisation has continued to thwart its development.

The reasons for the inclusion of 'equal pay for equal work' for men and women in Article 119 of the Treaty of Rome have been well documented elsewhere (Szyszczak 2000; Lewis, 2006) as being concerned with the achievement of a level playing field between Member States rather than any deep commitment to gender equality on the part of the EEC's founding fathers. However, the provision of a legal base for directives on Equal Pay (75/117) and Equal Treatment (76/207) (now recast Directive 2006/54) and associated legislation fundamentally changed the nature of the EEC's engagement with equality, paving the way for what has become known in the EU's policy lexicon as 'work-family reconciliation'. The transposition of the initially limited provision of Article 119 (now Article 157 TFEU) into a specific rights framework by the directives and subsequent extension by the CJEU using its interpretive function has meant that law's engagement with work-family reconciliation has been rationalised and largely forged through the narrowly conceived principle of sex equality.

In EU policy making the principle of sex equality was more widely conceptualised as gender equality but was matched with broad economic objectives such as targeted improvements in women's labour market participation, increasing fertility rates and improving competitiveness and growth (Lewis, 2006: 424). In the policy acquis gender equality was thus subordinated to the economic imperative and measured by its contribution to the smooth operation of the labour market rather than as a social justice goal in its own right so that the attainment of work-family reconciliation itself has become strongly associated with market making. The following overview

demonstrates how various policy strands from across the EU acquis have been used to rationalise work-family policy. The resulting patchwork of provisions, although the catalyst for progress in some respects, cannot be said to comprise a framework but rather a series of often competing claims by which the principle of gender equality has been co-opted by more dominant policy agendas (Stratigaki, 2004). As this analysis shows, development of the legal acquis in the current context has largely been led by the judicialisation of the Treaties' narrow provision of sex discrimination and subsequent codification of the case law which has had a limiting effect on how deeply law has become embedded in overarching strategy. The CJEU's leading role in interpreting and extending relevant legal provision initially occurred in the 1980s to early-2000s in the context of part-time work through a line of cases which were not expressly conceptualised as being related to work-family reconciliation. In the mid-1980s and 1990s the Court also adjudicated on more obviously related questions, notably whether discrimination on the grounds of pregnancy and maternity was precluded by EU law. As the case law demonstrates, the legal acquis had, from the earliest days of the 'social dimension', strained to contain and adequately to address women's lived experiences of the conflict between paid work and unpaid care (Fredman, 1992; McGynn, 2005). A legal system based on 'equal opportunities' paid no heed to gendered historical inequalities and was incapable of dealing with the fact that women and men were situated differently in relation to both paid work and family responsibility (Masselot and Caracciolo Di Torella, 2001). The limits of the procedural or formal equality model offered by the Treaties and secondary legislation were increasingly evident in the case law (Fredman, 1992; McGlynn, 2000).

Fitting Paid Work around Care

In a line of cases stretching from *Jenkins v Kingsgate (Clothing Productions) Ltd* (Case 96/80 [1981] ECR 911) regarding hourly pay rates to claims concerning retroactive pension entitlement such as *Preston and Others v Wolverhampton Healthcare NHS Trust* (Case C-78/98 [2000] ECR I-3201) the women claimants were disadvantaged by the remnants of an earlier era as they endured the continued discriminatory practices which allowed for different pay rates and terms and conditions of employment from men doing the same or similar work. Invoking their rights to equal pay for equal work women workers brought cases using untested implementing legislation such as the UK's Equal Pay Act 1970 (*Jenkins v Kingsgate*: *ibid*) or challenged public sector regulations such as those relating to Germany's provision of work-related benefits which had been designed with only the standard (male) worker in mind (e.g. Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin NV v Bötzel* [1992] ECR I-3589).

Despite the fledgling and/or obfuscate established domestic provisions under which they arose, the women's claims were simple and hinged on whether, as part-time workers, they were entitled to the same pay rates and pro rata benefits as men doing the same work on a full time basis. Complex legal arguments were constructed around the apparent *indirect* discrimination to which they were subjected, on the grounds that the majority of part-time workers were women. This approach enabled their employers to submit defences using the objective justification test established in *Bilka-Kaufhaus GmbH v Karin Weber Von Hartz* (Case 170/84 [1986] ECR 1607) arguing 'business needs' and later broadened out to include the social policy objectives of public sector employers in *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* (Case 171/88 [1989] ECR 2743). Any consideration of the reasons *why* the women worked part-time work were notably absent from the Court's reasoning, save for occasional

vague references such as ‘the special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension’ (*Bilka-Kaufhaus*, *ibid*). The women’s inability to comply with the standard worker paradigm thus appeared as a choice to prioritise ‘leisure time’ over ‘working time’ undermining the commitment and integration of those who worked part time (see the wording of the questions referred to the Court in Cases C-399/92, C-409 and 425/92, C-34, 50 and 78/93 *Stadt Lengerich v Helmig* [1994] ECR I-5727 and the opinion of Advocate General Darmon of 19th April 1994, para 39 et seq.).

Even where such claims succeeded, their categorisation as indirect discrimination had a limiting effect on future cases which were subject to possible justification. Of course the Court could only consider what had been put before it. An alternative approach would have been to argue such cases as *direct* discrimination claims on the grounds that the need for the different arrangements for performance of the (same or broadly similar) work was due to the gender of the workers (Busby, 2011: Ch.6). The sex discrimination provisions available would have supported such an approach and the whole area would certainly have benefited from a broader consideration of the social construction of gender which would have facilitated engagement with how best to address the ‘double burden’ endured by women (Hervey and Shaw, 1998: 50). That direct discrimination was not pursued meant that an early opportunity to introduce the concept of work and family reconciliation into the EU’s legal acquis was missed. The categorisation of such claims as indirect discrimination sent gender equality law on a long and protracted diversion from a more effective and direct route to which it has never completely returned (Busby, 2011: 152).

As these cases show, women’s need to combine paid work with unpaid care brought a number of specific challenges to the standard worker model. Law’s response was to

further emphasise the importance of equal treatment and to find ever creative ways of accommodating women's relationship with paid work through a narrow conceptualisation of 'non-discrimination'. This provided resolution and remedy in some cases but did little to acknowledge the reasons *why* women were so differently situated from men in terms of their relationship with paid work.

In the late 1990s two directives were introduced which attempted to address the inequality experienced by those whose working arrangements differed from the standard worker model, namely the Part-time Workers Directive (97/81/EC), which requires pro rata treatment of part-time workers, and the Fixed-Term Workers Directive (99/70/EC), which forbids employers from treating fixed-term workers less favourably than permanent workers, unless different treatment can be justified on objective grounds, and seeks to limit the scope of fixed term contracts. They were later joined by the Temporary Agency Workers Directive (2008/04) which provides that basic working and employment conditions of temporary agency workers should be at least those that would apply if they had been recruited directly to the same job. The framing of such arrangements as 'non-standard' or 'atypical' in the policy discourse did little to normalise them, 'othering' the part-time work which best facilitated care commitments and legitimating the supply-driven shift towards precarious work which had been taking place for some time (Busby, 2011).

The next challenge for the CJEU arrived through a series of cases which, rather than encouraging consideration of socially constructed gendered differences, enabled a return to the perhaps more comfortable field of biological difference and the apparent conflict between economic production and sexual reproduction.

Fitting Care Around Paid Work

There is no other paradigm in which the unsolved conflict between paid work and unpaid care and the impossibility of its resolution through conformance with the standard worker model is more apparent than that of the pregnant worker. In its embodiment of an exclusively female state, pregnancy shows how the homogenous provision of equal treatment actually detracts from the attainment of substantive and meaningful progress in the achievement of gender equality. Reproduction is a basic human function achieved by men with no discernible (visible) impact on their working lives. A pregnant woman, on the other hand, will require 'different' treatment including risk assessment, time off to attend medical appointments and a period of leave around the birth with financial compensation. In addition the deep-seated and pernicious discrimination related to pregnancy and maternity requires specific measures protecting against dismissal and detriment.

How best to accommodate pregnancy within a framework whose application in this context had not been envisaged at its design posed considerable difficulties for EU law. In the absence of any coordinated policy response or specific legislation, the CJEU was once again called upon to lead the conceptualisation of such claims and their resolution. As the following overview shows, it did so by adapting the sex discrimination framework to develop the 'pioneering principle' of pregnancy discrimination (Fredman, 2014: 446). However, in its use of the symmetrical non-discrimination principle to protect the incremental gains made by mothers, it was less successful in facilitating fathers' care commitments. Even now, despite a plethora of legal protections, pregnancy discrimination continues to be commonplace across the EU and fathers' rights regarding family commitments are yet to be realised (Caracciolo di Torella and Masselot, 2010).

In its early jurisprudence on pregnancy the CJEU adopted a purposive approach, epitomised most clearly in *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* (Case C-177/88 [1991] IRLR 27) in which it held that the absence of a suitable male comparator in relation to pregnancy-related discrimination was not capable of defeating the claim. The Court held that as only a woman can be pregnant, discrimination on the grounds of pregnancy will amount to direct sex discrimination with no need for a male comparator. When *Dekker* is read alongside its companion case, *Handels-Og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening ('Hertz')* [1990] IRLR 31) the Court's progressive approach results in a protected period lasting throughout the pregnancy and maternity leave during which a refusal to employ or a dismissal based on the pregnancy or absence on leave is, per se, direct sex discrimination.

Despite its promotion of substantive equality in these and other cases such as *Thibault* (Case 136/95 [1998] ECR I-2011) and *Mahlburg* (Case 207/98 [2000] ECR I-549), the Court has been criticised for its reliance on a dominant ideology of motherhood (McGlynn, 2000). This is apparent in a series of cases from the 1980s to the late 1990s in which the Court reproduced and legitimised a traditional vision of motherhood by which women were assumed to have a predilection for caring and related domestic work (see for example Case 163/82 *Commission v Italy* [1983] ECR 3273). The manifestation of such assumptions in the Court's jurisprudence can be said to have limited the potential of sex equality legislation to bring about improvements in women's lives as well as to have discouraged men's active engagement with their family life. In *Hofmann* (Case 184/83 [1984] ECR 3047) the CJEU endorsed the payment of state benefits to mothers only, even though care-giving in this particular case was being provided by the father. In justifying its stance the Court stated that the relevant EU law

was 'not designed to settle questions concerning the organization of the family, or to alter the division of responsibility between parents' (at para.1). The Court in *Hofmann* adopted a protective stance towards mothers, particularly in the early months following childbirth, which can be reconciled with its earlier reasoning in *Dekker and Hertz*.

In *Lommers v Minister Van Landbouw, Natuurbeheer En Visserij* (Case C-476/99 [2004] 2 CMLR 49) the Court extended its 'special treatment' approach beyond pregnancy in finding that a workplace nursery provided by the Dutch Ministry of Agriculture which for the children of female but not male employees was not precluded by EU law as it was capable of addressing a underrepresentation of women workers within the Ministry by facilitating their ability to combine motherhood and paid employment. As Fredman (2014: 452) notes, although the provision of special maternity rights is a 'species of substantive equality', once extended from pregnancy into parenting this approach transforms into a 'reinforcement of women's childcaring role' (ibid). As Fredman observes, rather than recognising the substantive equality offered to the mother by the father's claim, 'the court assumed that a father who was not bringing up his children alone was able to rely on the mother for childcare.' (Fredman 2014: 453).

Notwithstanding such moments of restricted vision by the CJEU, it is difficult to fault its overall approach to pregnancy and maternity protection given the narrow confines of the constitutional and legislative framework of the time and specificities of the questions referred to it. In fact, in leading the way on the development of a specific rights framework in relation to pregnancy and maternity, the CJEU uniquely combined the equality principle with the provision of specific rights (Fredman, 2014: 447). This approach was subsequently codified in the Pregnant Workers Directive (92/85/EEC), ('PWD'). This Directive had, as its legal base, Article 118a EC (now Art 137 TFEU)

which is concerned with workers' health and safety. It provides minimum rights to workers who are pregnant, have recently given birth, and who are breastfeeding. Rights include protection against exposure to harmful substances and processes or any obligation to undertake night work whilst pregnant or breastfeeding, paid time off to attend antenatal appointments and a minimum of 14 weeks maternity leave with payment at least equivalent to sickness benefits. Dismissal is prohibited during the 'protected period'.

The PWD strengthened and embellished the approach taken by the Court in enabling different treatment in respect of pregnancy. Beyond pregnancy and maternity the Court has continued to rely on the non-discrimination principle, extending its application in order to encourage and facilitate fathers' engagement with care as well as mothers' dual role as worker and carer. For example, in *Roca Álvarez v Sesa Start España ETT SA* (C-104/09 [2011]1 CMLR 28) the Court acknowledged that a Spanish scheme providing time off ostensibly for breast feeding was actually intended to provide time to care for the baby more generally and thus should be extended to eligible male workers. In this context *C-222/14 Maïstrellis v Ypourgos Dikaïosynis, Diafaneias Kai Anthropinon Dikaïomaton*, judgment of the CJEU 16 July 2015, is also worthy of consideration. In *Maïstrellis* the Court held that a father's right to parental leave should not be dependent on the mother's profession or lack thereof. However, on the non-transferability of maternity leave to an employed father where the mother is *self-employed*, see case *C-5/12 Montull*, below.

The legislative phase starting with the PWD and encompassing the introduction of the original Parental Leave Directive (96/34/EC), hereinafter 'PLD', has been singled out as being 'transformative' and closely related to the creation of a distinct gender regime (Walby 2004: 19), although its contribution to the unsolved conflict between paid work

and unpaid care has been largely symbolic. The introduction of specific rights in respect of pregnancy appeared to mark a departure from the symmetrical application of equal treatment. In fact the PWD offers a different application of what is essentially the same approach based on the same premise—that women merit protection in respect of their ‘otherness’ in certain restricted circumstances. On its introduction, the PWD undoubtedly made a progressive contribution. However, economic imperative soon trumped social benefit as illustrated by the Court’s interpretation of the Directive in *Gillespie and Others v Northern Health and Social Services Board* (Case C-342/93 [1996] ECR I-475) in which it held that application of the equality principle did not mean that maternity pay constituted ‘pay’ so that it could be paid at a lower rate than the recipient’s usual salary. This decision reversed the Court’s record of applying the equality principle to advance the rights of women in relation to pregnancy (Fredman, 2006:47) highlighting the potential incompatibility of the dual goals of gender equality and women’s enhanced labour market integration which would enable women ‘to reconcile their occupational and family obligations’ (The Community Charter of the Fundamental Social Rights of Workers, para 16, cited in the proposal for the Directive). The Court’s approach is clarified by consideration of the Directive’s legal base which has coloured its implementation and impact.

The choice of health and safety as a legal base shifted the PWD’s focus away from social measures and, more specifically, substantive gender equality. Article 118A was chosen due to its requirement of qualified majority voting rather than unanimity. This was necessary due to the resistance of national governments, most notably the UK, to the EU’s adoption of social legislation. The Directive was thus a compromise which had been considerably diluted before its final adoption with the effect, as *Gillespie* illustrates, of the subordination of the equality principle to the basic protection of health

and safety. Rather than providing a direct challenge to the social construction of gender and its relationship with work-family reconciliation, the Directive conceptualises workplace rights relating to pregnancy and maternity using an essentialist formulation of women's biological difference from men.

The Commission's ill-fated 2008 package (European Commission, 2008a) included a European Parliament-led proposal for a directive to amend the PWD (European Commission, 2008b). The proposal sought to extend the minimum level of maternity leave from 14 to 18 weeks in line with the recommendation of the International Labour Organisation. In addition it contained proposals to revise the provisions on dismissal during maternity leave through further codification of the case law and to clarify the contractual status of women returning to work following maternity leave. The proposed directive also sought to expand the legal base by adding Article 157 TFEU to Article 153(2) in recognition of the fact that maternity rights straddle the areas of health and safety at work and equality between men and women. The proposed directive's preamble referred to the Roadmap for Equality between Men and Women 2006–2010 (European Commission, 2006) in which work-family reconciliation comprised one of six broad priorities. The proposal's ultimate failure is assessed below as it has provided impetus for the Commission's New Start initiative. First the legislative approach adopted in relation to those seeking to provide care for children or others including elders will be considered. As this analysis shows, despite the EU's broad policy concerns and the proliferation of its own political rhetoric regarding the demographic time bomb and the pensions crisis, its legal provision is not an adequate match for the challenges ahead.

Gender-Free Care?

EU policy in this area has developed in response to a range of challenges with the focus very much on parental responsibilities rather than any wider conception of care. With this broad policy focus, the equality principle has become subsumed by the dominant policy preoccupation, namely economic growth through full employment (Stratigaki, 2004; Lewis, 2006). The lack of a clear equality objective has meant that, despite its promise of the equalisation of care between parents the EU's provision of parental leave has, in practice, reaffirmed the gendering of care by leaving too much to Member States' discretion. The legislation takes a reactive approach focusing on the paid work, rather than the unpaid care, aspect of the unsolved conflict (Busby, 2011; Weldon-Johns, 2013) and is underpinned by heteronormative gendered assumptions regarding the organisation of work and family life (Mazey, 2000).

The original PLD (96/34), which was replaced in 2010 by a revised Directive (2010/18) had a difficult and contentious beginning resulting in dilution of its provisions which weakened its ability to achieve its original objectives (Weldon-Johns, 2013: 7). The aim of encouraging shared parenting was preserved and explicitly referred to in the Framework Agreement on Parental Leave annexed to Directive 96/34 through recognition of the need to encourage men to 'assume an equal share of family responsibility' (para 1(8)). However, the rights themselves merely consisted of minimum standards leaving much of the detail to Member States including the critical issue of payment (Clause 2(8)), thus preserving the status quo and preventing the Directive from being a policy-leader (Caracciolo di Torella, 2000).

In 2009 the social partners renegotiated a Framework Agreement on Parental Leave (annexed to Directive 2010/18) which made some improvements which were incorporated into Council Directive 2010/18 which replaced Directive 96/34 in 2012. In line with its predecessor, the new Agreement recognises that parental leave provides

‘an important means of reconciling professional and family responsibilities and promoting equal opportunities and treatment between men and women’ (Preamble). However, in variance to the previous Agreement, the revised version contains several references to the link between the level of income and the take up of parental leave, in particular by fathers (Recitals 18-20 and Clause 5 (5)). Substantive improvements included a requirement for States to consider the need for additional measures to be established to address the specific needs of adoptive parents (Clause 4), an increase in the length of leave available from three to four months, one month of which is strictly non-transferable and will be lost if not taken (Clause 2(2)), a right to request a flexible work arrangement on returning from parental leave (Clause 6(1)) and provided enhanced protection against dismissal and other detriments as a result of using the rights (Clause 5(4)). Like its predecessor, the revised Directive leaves too much open to interpretive implementation by Member States. Furthermore, the non-transferability of only one month’s leave is unlikely to do very much by way of incentivising fathers to provide care beyond that limited period.

Most disappointingly, despite its explicit reference to the relationship between income and take-up rates, the revised Directive does nothing to address the issue of pay which remains a matter for Member State determination. This has led to a diversity of arrangements so that, although most states offer some form of payment, the rate varies from 30% of salary in Italy to 100% in Denmark with eight countries, including the UK, providing no payment (Eurofound, 2015a: 2). The take-up among fathers, although increasing, is still low with pay identified as a key influencing factor (Ibid: 5).

Unlike the areas of non-standard working arrangements and pregnancy discrimination where the CJEU led the EU’s legal intervention, the Courts’ engagement in this area has been limited by restrictive pre-existing legislation. Asked to rule on the costs of

parental leave and related payments and benefits, its judgment in *Lewen v Denda* (C-333/97 [1999] ECR I-7243)) has been criticised for reinforcing gender stereotypes (Caracciolo di Torella, 2000). Furthermore the Court has held that EU law does not grant any rights to transferable leave to an employed father unless the mother is also employed (Case C-5/12 *Montull v Instituto Nacional de la Seguridad Social* [2014] 1 CMLR 35), thus reaffirming the association between parenting and motherhood and the derivative nature of fathers' entitlement.

The lack of any clearly applicable legal base means that the EU acquis offers very little to those providing alternative forms of care outside of the parent-child relationship, including for elders. As the population ages, 'informal' eldercare – that is unpaid and unsupported - is increasingly becoming defamiliarised (Busby and James, 2015). The prevalence of the neoliberal gendered regime within Member States, either as the dominant model or as part of a mixed-model (Walby, 2015), has led to increases in the marketization of care in most Member States. However, corresponding reductions in state provision, changes to pension arrangements and retirement laws by which workers are required to stay in the labour market for longer, mean that most workers will inevitably have to undertake informal care at some point in their working life and will, at some stage, require such care (Busby and James, 2015). Despite the obvious policy challenges and gendered nature of care-giving beyond the parent-child relationship, the EU's legislative provision is confined to the short-term and unpaid emergency leave for an 'urgent family reason' offered under the PLD 2010 (clause 7). 'Short term' is not quantified, although the general presumption is a couple of days at most.

EU law does provide protection against discrimination for carers in certain circumstances. The CJEU's judgment in *Coleman v Attridge Law* (C-303/06 [2008]

ECR I-5603 (2008) extended the principle of non-discrimination in respect of disability so as to provide protection against discrimination for those associated with a disabled person including through a relationship of care. Although *Coleman* was concerned with a care relationship between a mother and her disabled son, its provision does extend beyond parental care.

Despite the lack of any clear legal competency in this area, save for the general provision of Article 153 TFEU, the Commission and the Parliament have sought to raise the profile of and to encourage greater policy support for workers with eldercare responsibilities, in particular in relation to carers' leave. Relevant initiatives include the European Commission's Consultation on Carers Leave (European Commission, 2011) and the Parliament's Resolution calling for a Directive (European Parliament, 2013). However, the lack of hard law means that it remains largely a matter for Member States.

A New Start: The Convergence of Broad Policy and Specific Legislative Provision?

That the CJEU was initially required to take the lead in developing the EU's legal acquis concerning work-family reconciliation comes as no surprise as constitutional and legislative provision in the area was almost non-existent. Provision thus developed through carefully crafted and narrowly constructed answers to the specific questions posed by Member States under the Article 267 TFEU preliminary reference procedure. Legislative instruments have subsequently codified the case law with careful attention paid to the wording of judgments so as not to extend their provision.

By the 1990s new patterns of family formation reflected in changing social arrangements had led to a series of demographic, economic and fiscal challenges to

the Member States' welfare systems catalysing EU legislative responses including the Directives on part-time, fixed term and agency work, the PWD and PLD. Competing policy objectives underpinned these developments so that, 'The growing willingness to address family care issues insofar as they impinged on labour market participation, especially of women, was as much a part of these considerations as the equal opportunities agenda' (Lewis 2006: 2).

The net result is a patchwork of provisions stitched together in a somewhat incongruous fashion in response to the issues raised using the narrowly conceived legal provisions available at the time. Even when combined these provisions are unsurprisingly not comprehensive enough to extend beyond a very limited application of formal equality with no scope for the proactivity required to provide a positive right to care (Busby, 2011). It has long been argued that greater use could have been made of the constitutional provision of the Treaties as a means of developing an overarching strategy including a robust and focused legal response to what is undoubtedly one of the greatest challenges facing developed economies, namely the unsolved conflict between unpaid care and paid work. Combined with appropriate soft law provision, such as gender mainstreaming in employment policy, this could have established work-family reconciliation as a core policy objective in its own right (Caracciolo di Torella and Masselot, 2010; Busby, 2011).

The addition of the Charter of Fundamental Rights (CFR) to the EU's acquis in 2009 gave much needed status to the area by joining the equality principle (Article 23 CFR) with the reconciliation of work and family (Article 33) within the EU's constitutional provision for the first time. Article 33 (1) CFR proclaims that 'The family shall enjoy legal, economic and social protection' which is then qualified in its provision that 'To 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' (Article 33(2) CFR). The cautious drafting enshrines a constitutional right to paid maternity and (unpaid) parental leave and nothing more. However, its express reference to the reconciliation of work and family is notable and it does offer scope for improvements to the provision of family leave as the rights enshrined are minima so can be expanded. In this way the CFR's application in the current context is more than merely symbolic, although its potential is still limited in practice by the EU's legal competence which does not extend to social welfare provision.

Despite the fact that the CFR has now been in place for some time, only very recently has there been any notable development of an overarching strategy for law and policy in the current context and provision remains piecemeal, reactive and reflective of the formal equality model that underpins the EU's legal acquis generally. The lack of progress is hardly surprising. The EU is at a delicate stage in its development. As well as the ongoing negotiations concerning the UK's impending departure and the resulting unrest among the remaining 27 Member States that Brexit will leave in its wake, there were already cracks in the constitutional and institutional architecture. These arise from the stresses and strains of attempting to coalesce the widely divergent priorities of Member States grappling with their own attempts to recover from the sovereign debt crisis whilst retaining a foothold within an increasingly competitive global economy. In such turbulent and economically bullish times, the likelihood that what is often perceived as a costly and intrusive form of social engineering aimed at the reorganisation of family life and greater labour market regulation would find its way to the top of the EU's policy agenda looked very slim indeed. However, in April 2017 the Commission announced an ambitious and comprehensive package (European

Commission, 2017a), namely the New Start to Support Work-Life Balance for Parents and Carers, which puts work and family reconciliation right at the heart of the new European Pillar of Social Rights. The Pillar is a broad programme for ‘delivering new and more effective rights for citizens’ (European Commission, 2017b) comprising 20 principles including gender equality and work-family reconciliation based on three categories: equal opportunities and access to labour market; fair working conditions; social protection and inclusion. The institutions will share joint responsibility for its implementation with an online scoreboard tracking progress.

The New Start initiative is based on Article 151 TFEU which provides the EU institutions with the legal competence to pursue ‘the promotion of employment, improved living and working conditions...with a view to lasting high employment and the combating of exclusion.’ The package, includes a proposal for a new Directive on Work-Life Balance for Parents and Carers (European Commission 2017c) which has the stated objectives of improving access to work-life balance arrangements, including leave and flexible working arrangements, and increasing take-up of family-related leaves and flexible working arrangements by men.

The Commission’s decision to take action in this area dates back to the failure of its 2008 proposal to revise the PWD which reached stalemate at the Council stage in 2011. In 2014 the Commission announced its intention to replace the 2008 proposal with a broader initiative to address the challenges of work-life balance and, in 2015, issued a Roadmap on the ‘New start to address the challenges of work-life balance faced by working families’ (European Commission, 2015a).

Formal consultation involving the social partners is required for social policy proposals made under Article 153 TFEU. The two-stage process which includes consultation on

the direction of Union action and the legislative content (Article 154 TFEU) ultimately collapsed with the social partners unable to reach agreement on appropriate future action. Whilst the trade unions were favourably disposed towards a legislative approach through a combination of amendment and the introduction of new measures, the employer organisations were firmly opposed and argued that current EU regulation was sufficient and that work-life balance was primarily the responsibility of Member States and social partners. In launching the second stage consultation the Commission had stressed the need for 'A comprehensive package that includes legislation' as non-legislative machinery, such as the open method of coordination, the European Semester and country-specific recommendations, whilst of great importance in areas such as childcare or elder care where the EU lacks legislative competence, had been inadequate in improving women's labour market participation rates (European Commission, 2016: 6). Following the social partners' failure to reach agreement, the Commission reclaimed the initiative and launched its new package alongside the Social Pillar in April 2017.

The New Start proposal is intended to address certain gendered inequalities including an employment rate for women which is 11.6% less than that of men despite their increasing educational attainment. As clearly articulated in the consultation process, the Commission's view is that the EU needs to modernise its legal framework to ensure a better balance between work and family life for both women and men. 'Fairness' and 'economic imperative' are cited as the drivers for the initiative, justified by social and economic gains,

The cost of the employment gender gap amounts to 370 billion euros, equivalent to 2.8% of GDP. Closing this gap would be essential for society and

the economy, especially as all European countries will be confronted with the challenges of demographic ageing (European Commission, 2017d).

The proposed Directive provides for, inter alia: the introduction of 10 days of paid paternity leave following the birth of a child; 4 months paid parental leave with take up extended until the child is aged 12 (currently 8); 4 months of non-transferable leave (currently 1 month); a new right to 5 days of carers' leave per year per worker to take care of seriously ill or dependent relatives; a new right to request flexible working arrangements for parents of children up to 12 years old and workers with caring responsibilities. Paternity, parental and carers' leave is to be paid at least at the level of sick pay.

In addition the Commission has proposed a number of 'non-legislative measures' in the Work-Life Balance package aimed at the creation of a coordinated policy framework. These include a range of broad EU policy actions (as outlined in the Commission's Communication – see European Commission 2017a, Section 2 'Priority Areas for Action'), including: maternity leave measures to ensure enforcement of existing legislation to protect women from discrimination and dismissal involving the cooperation of national equality bodies; enhanced policy guidance and sharing of best practices at different levels; the use of the EU semester to monitor Member States' performance on Work-Life Balance measures such as childcare and long-term care, the promotion of women's employment and reduction of the gender pay gap through the development of appropriate benchmarks; and greater use of EU financial instruments such as the European Social Fund and the European Regional Development Fund to provide support services including the training of professionals and service infrastructure. Focus is placed on improving the enforcement of existing rights and protection under EU law including enhanced monitoring of the Member

States' implementation of EU legislation and the use of infringement procedures when necessary. Improved EU data collection by Eurostat on the take-up of family leave and flexible working arrangements is also proposed.

There is much to be welcomed in the holistic approach taken by the Commission in its New Start. Its vision of work-family reconciliation as an overarching objective and the coordinated approach, which matches broad policy objectives with specific legislative and non-legislative actions, are all important steps in the right direction. Conceptually the proposed Directive attempts to shift the focus for work-family reconciliation away from mothers, towards parents. The distinction between pregnancy and parenthood is crucial if the necessary societal change is to be encouraged and facilitated with the latter promoted as an important social goal in its own right (Fredman, 2014). The provisions themselves highlight the difficult path to be navigated in maintaining the important gains made by the provision of different treatment in relation to pregnancy, correcting women's over association with all things care-related and acknowledging the reality of lived experience for both women and men given that the take-up rate of parental leave by fathers in the EU is 10% (European Parliament, 2015). Men's lack of engagement with care and the endurance of pregnancy discrimination will not be addressed by passivity and, although the Directive attempts to frame its provisions as contributing to the necessary sea change, it unfortunately falls short in this respect.

First the non-compulsory nature of the proposed paternity leave and its payment at the sick pay rate is likely to weaken its impact on persuading and enabling fathers to engage with care. Incentivising uptake of paternity leave by providing payment encourages men to use it, as does a 'use it or lose it' approach (Van Belle, 2016). The obvious impact on single or dual earner households by replacement of the fathers' income with a relatively low level of pay is unlikely to be enough to shift cultural norms

even marginally. Furthermore, unlike women, men are simply not used to the instrumentalisation of their time by the state and this is something that will have to be borne in mind if statutory provision of leave for fathers is intended to be a game changer.

The introduction of carers' leave and the right to request flexible work do have the potential to improve the compatibility between paid work and care. However, without the required societal change in perceptions of women's and men's caring roles these provisions risk further entrenching existing inequalities as those making such requests and utilising such leave are most likely to be women. Further, the provision of five days' of carers' leave per year is unlikely to make much difference to those with ongoing and significant care commitments.

Disappointingly there are no proposed changes to the PWD although this is unsurprising given the previous failure of the 2008 proposal (see above) which was attributed to the 'broad diversity of maternity protection and social security amongst the Member States... [and] the financial implications, especially during the crisis' (Council of the European Union 2011). The attempted extension of the maternity leave period from 14 to 18 weeks would not in fact have made any difference in the majority of Member States, which actually already offer more generous provision, with only Germany and Malta offering the minimum amount with enhanced periods of leave available in practice through sectoral collective bargaining (Eurofound, 2015b). Thus it appears that the proposal's failure was as much to do with the Member States' intransigence in the general area of social provision as with the fine detail, with the UK among others once again notable for its resistance. What this defeat does demonstrate is the subordination of work-family reconciliation policy to a narrowly conceived economic imperative.

The perceived conflict between broad economic objectives on the one hand and the promotion of a comprehensive work-family reconciliation framework on the other has been the cause of stagnation since the earliest days of the EU's engagement with this area. As far as the proposed Directive and its placement in the Social Pillar are concerned, there appears to be little opportunity for movement in this respect. The Social Pillar itself is based on the premise that,

A stronger focus on employment and social performance is particularly important to increase resilience and deepen the Economic and Monetary Union. For this reason, the European Pillar of Social Rights is primarily conceived for the euro area but it is applicable to all Member States that wish to be part of it. (European Commission, 2017b: Recital para 13).

This offers the distinct possibility for a two-track system in the development of social law and policy across the EU with the non-Eurozone states free to remain outside of the Pillar, which carries an obvious risk of downgrading the gender equality goal and wider social objectives. As the proposed Directive's legal base Article 153 TFEU makes clear, the imposition of administrative, financial and legal constraints which would hold back the creation and development of small and medium-sized companies are to be avoided, thus subordinating the Directive's apparently bold aims to narrow economic concerns further undermining the commitment for necessary change.

Conclusions

This article has highlighted the historical divergence between the EU's policy acquis and its legal acquis in the area of work-family reconciliation. The focus on wide economic goals such as full employment has led to a widening and lack of specificity in the policy context, thus subordinating gender equality to economic objectives. At the

same time the legal acquis, which has to a large extent been led by a process of judicialisation through the codification of case law, has retained the narrow conception of formal sex equality provided by the Treaties. Previous attempts by the Commission and Parliament to introduce a coordinated and proactive approach capable of prioritising work-family reconciliation as a policy objective in its own right accompanied by an appropriate legislative strategy have failed to attract the necessary support at the Council stage. However, the Commission's bold New Start initiative which links policy and law through an holistic approach may offer a way out of this impasse.

The placement of the initiative within the wider Social Pillar programme has obvious appeal but the distinction made in the Pillar between those Member States within and outside the Eurozone could provide a worrying precedent for future social development. Furthermore, the Directive's chances of success in the legislative process may depend on the watering down of its provisions so that potential gains are diminished. A critique of the provisions themselves identifies the difficulty in changing cultural and social ideologies and behaviours through law, particularly at the supranational level. However, the Commission should not be criticised for trying to develop a coordinated law and policy framework in this crucially important area, particularly in what are undoubtedly challenging times. It is better to make some progress – however incremental – than no progress at all. One parallel development may offer cause for optimism for some in this context. As the analysis presented here shows, the UK's traditional reluctance to sanction legislative development in the area of work-family reconciliation was largely responsible for the PWD's choice of legal base, which has limited its ability to contribute more directly to the gender equality goal, and contributed to the failure of the 2008 attempt to amend the PWD. As the UK prepares to leave the EU, the remaining Member States may perhaps be moving,

albeit slowly, towards a more unified social democratic gender regime and a much needed law and policy framework for work-family reconciliation.

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