

The ECJ and the evolution of fundamental (social) rights standards

The case of the right to work-life balance

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Article 33(2) of the Charter, a relic of a bygone era?



- ▶ Charter reflects traditional conception of division of functions between men and women (di Torella, 2014).

Article 33(2) of the Charter: « 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 ».

- ▶ Women as primary caregivers for children.
- ▶ No (explicit) reference to fathers : distinction paternity leave and parental leave.
- ▶ Conception reflected in secondary legislative instruments applicable at the time.

The traditional emphasis on women as primary caregivers



- ▶ Directive 92/85 on the health and safety of pregnant women.

Art. 8: « Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of *maternity leave of a least 14 weeks* allocated before and/or after confinement in accordance with national legislation and/or practice ».

Art. 10: « Member States shall take the necessary measures to *prohibit the dismissal of workers*, within the meaning of Article 2, during the period from the beginning of their *pregnancy* to the end of the maternity leave ».

The traditional emphasis on women as primary caregivers



- ▶ Directive 96/34 implementing agreement concluded by social partners on parental leave.

Clause 2: « This agreement grants, subject to clause 2.2, *men and women* workers an individual *right to parental leave* on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour ».

- ▶ Absence of provision on remuneration reinforces gender stereotypes on who should be responsible for caring (Weldon-Johns, 2013).

The traditional emphasis on women as primary caregivers



- ▶ Article 8 of the European social charter: maternity leave of at least 12 weeks, prohibition of dismissal, protection of health and safety of pregnant female workers.
- ▶ Article 27 of the revised social charter: contracting parties to provide for possibility to obtain parental leave.

A new approach to the distribution of parental responsibilities?



- ▶ Shift towards (more) equality as regards distribution of caring and parental responsibilities (Oliveira, De la Corte-Rodriguez, Lütz, 2020).
- ▶ European pillar of social rights.

Principle 2: « Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market (...) ».

Principle 9: « Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have *equal access* to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a *balanced way* ».

A new approach to the distribution of parental responsibilities?



- ▶ Directive 2019/1158 on work life balance.
- ▶ New rights: right to paid paternity leave of at least 10 days (Art. 4); right to carers' leave of at 5 days (Art. 6); right to flexible working arrangements (Art. 9).
- ▶ Augmentation of existing rights: paid parental leave (Art. 8(1)); extension of non-transferable period (Art. 5(2)).

The Charter, lagging behind?



- ▶ Tension between EU primary law and EU secondary law (see also directive on pay transparency).
- ▶ Gap in the judicial protection of individuals in the event of non-compliance with the directive.
- ▶ Does EU primary law guarantee a fundamental right to paid paternity leave?

Potential pathways to bridge the gap between the Charter and the current conception of work-life balance



- ▶ Does Article 33(2) of the Charter guarantee a fundamental right to paid paternity leave?
- ▶ Evolutive interpretation of Article 33(2) of the Charter (Di Torella, 2014).
- ▶ Literal interpretation of the Charter (Conway, 2012).
- ▶ The Charter as a new parameter of interpretation (Lenaerts and Gutiérrez, 2020).

Potential pathways to bridge the gap between the Charter and the current conception on work-life balance



- ▶ General principles as a 'safety valve' (Prechal, 2010 ; Amalfitano, 2018), or 'living constitution' (Lenaerts, 2010 ; Weiler, 2009).
- ▶ General principle derived from the EPSR and the Work-Life balance directive?