Abstract

The aim of this paper is to consider the Europeanisation of national social policy in the specific area of maternity, paternity and parental leave provisions. This is examined with a particular focus on the promotion of gender equality and with emphasis placed upon the problems raised by unpaid caregiving.

Viewed through the lens of gender equality issues, the paper seeks to compare the success of parental and paternity leave provisions with those governing maternity leave. It argues that, viewed as a matter of equal treatment for women in employment, and tied to the protection of the health and safety of workers, the right to maternity leave has a firmer legal base and consequently a harder legal edge. More specifically, the Directive governing maternity provision has introduced a requirement of minimum protection for three categories of female workers: pregnant workers, workers who have recently given birth and workers who are breastfeeding – and provides that the three categories of workers are to be given a minimum of fourteen continuous weeks’ maternity leave before and/or after confinement, including at least two weeks of compulsory maternity leave. Additionally, Member States are prohibited from dismissing such workers during the period of maternity leave other than in exceptional cases unconnected with pregnancy. On the contrary, the Parental Leave Directive has been formulated as a ‘soft law’ equality measure within the context of balancing work and family life. While this seems to be less effective in securing binding provisions and in providing a consistent legislative framework, its symbolic importance cannot be underestimated, setting up a reference and an example especially for those Member States with no existing provisions on this matter.

The paper will go on to present two national case studies (the UK and Spain) in order to illustrate the effects of EC measures on maternity/parental/paternity leave in the domestic systems. These national studies aim to show how European integration in this area has impacted upon the development of national welfare state provision. The concept of ‘Europeanisation’ will be used in the double sense of 1) the influence of European measures on the reconceptualisation at the normative level of certain policy domains and 2) their direct impact on national policies and legislation.

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Introduction

Maternity, paternity and parental leave: pursuing the twin objectives of promoting gender equality and Europeanising national social policy

The aim of this paper is to consider the Europeanisation of national social policy in the specific area of maternity, paternity and parental leave provisions. This is examined with a particular focus on the promotion of gender equality and with emphasis placed upon the problems raised by unpaid care-giving as experienced by both women and men.

Gender equality has of course been a matter of concern in the European Community since its very beginnings. While at that time concerned primarily with sex discrimination in employment, notably in the sphere of equal pay, the mission to promote gender equality has now become an objective in its own right. In particular the inclusion of gender mainstreaming obligations in Articles 2 and 3(2) EC has turned what was previously an economic and market-based concern into a social objective and genuine aim to secure equality between women and men (Barnard, 1999).

Viewed through the lens of the promotion of gender equality in the European Union and with the benefit of hindsight, this paper seeks to compare in particular the outcome, implementation and application of two initiatives taken in the 1990s both with a view to improving the working and family lives of men and women. The two provisions in question, the Pregnant Workers Directive (1992)\(^2\) and the Parental Leave Directive (1996),\(^3\) were the result of complex negotiations between the Member States themselves and the Member States and the social partners, a good deal of which was not primarily concerned with gender equality. That said, the impact of the measures upon the working and family lives of men and women is undeniable. The paper seeks, therefore, to consider the success of the parental (and paternity) leave provisions with those governing maternity leave in terms of their capacity to promote equal rights and responsibilities between men and women.

Beyond the pursuit of gender equality, a second dimension to the provisions which is worthy of consideration is that of furthering European integration in the domain of social policy. Here the context is that of recent initiatives to promote a Social Europe; including developments in the fields of European social policy (eg EMS) and European employment policy (eg EES), together with recent debates on the constitutional future of the EU with their consideration of fundamental social rights, social citizenship, legitimacy and transparency. In this regard, the impact of the two Directives under scrutiny is also viewed within the wider context of welfare state provision and the constitutionalisation of the rights to equality and to the social protection of the family. Here we draw upon the definition of Europeanisation given

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\(^2\) Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

\(^3\) Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.
by Claudio Radaelli (2000:3) which seems appropriate to our own use of the concept. Radaelli defines Europeanisation as referring to:

“processes of construction, diffusion and institutionalisation of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies”.

As the author points out, the definition stresses the importance of transformation and change in the logic of political behaviour together with the consolidation and incorporation of shared European beliefs and norms in the domestic sphere.

In talking of Europeanisation in this paper we too, therefore, seek to draw out both the influence of European measures on the reconceptualisation at the normative level of social policy domains. We also use the term as a means through which to examine the direct impact of European norms on specific national policies and legislation. Inevitably, the whole process is viewed within the context of the constitutional and legal pluralism which characterises the making of EU law and policy and which has been so important in leading the expansion of rights in the area of social policy/gender equality (see Cichowski, 2004).

The paper proceeds in two stages. In Part I we examine the Pregnant Workers and Parental Leave Directives at the European level. This is to say, we compare the processes of their adoption and their contents to show the different motivations and foundations upon which they are premised. In Part II we move on to the issue of implementation at the national level and examine some general problems regarding the incorporation of these measures into the domestic systems followed by two specific case studies (the UK and Spain). In doing so we endeavour to show an example of the results of the Europeanisation of this area of national social policy together with its impact on the promotion of gender equality.

I European initiatives: The Pregnant Workers and Parental Leave Directives

In this first part of the paper we present the two EC measures on maternity and parental leave, highlighting the differences between their background, context, scope and process of adoption. What is apparent from this discussion is the very different policy frameworks within which the two measures were conceived – one as a health and safety initiative and the other as promoting the reconciliation of work and family life. Evidently, both impact upon gender equality, but their emphasis differs to reveal a varied response to questions about work/life balance, patterns of female employment and caring responsibilities.

The diverse underpinnings reveals the constitutional complexity of the EU is so far as they reflect problems in finding a suitable legal base in the Treaties for these measures
and the difficulty in achieving a consensus amongst the Member States.\textsuperscript{4} That said, the alignment in the Charter of Fundamental Rights (Article II-93 of the Constitutional Treaty) of a right to maternity and parental leave goes some way towards bringing together the two provisions and underlining their common fundamental rights component in terms of legal, economic and social protection for the family.\textsuperscript{5} The Charter might, therefore, assist somewhat in the conjunction of the two provisions.

A. Background to the Directives: differing logics - health and safety v. work/life balance

Perhaps not surprisingly given the EC’s attention to matters of equal treatment for women workers, it was maternity, rather than parental, leave which first came to be addressed as a matter of Community law. Even before negotiations on the Pregnant Workers Directive began, pregnancy had been brought into the remit of EC secondary legislation in the Equal Treatment Directive.\textsuperscript{6} This measure set out maternity/pregnancy as one of three exceptions to the principle of equal treatment (along with sex as a specific occupational factor and positive action). Subsequent case law of the European Court of Justice found discrimination in employment (failure to hire) on the grounds of pregnancy to be direct sex discrimination which fell within the scope of the ETD.\textsuperscript{7}

Pushing the matter forward, in 1992, the Council of the European Communities, in co-operation with the European Parliament, approved a Directive for the protection of pregnant workers and workers who have recently given birth or are breastfeeding. This was done specifically with the aim of encouraging improvements in the working environment to protect the safety and health of workers and as such was adopted

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\textsuperscript{4} As a result of the different legal bases used for the adoption of these measures (outlined in the text below), it is to be regretted that both seem destined to fall outside of the current proposal to ‘recast’ the various EC gender equality Directives (on Equal Treatment, Equal Pay and the Burden of Proof) into one new legislative measure for purposes of simplification and modernisation (Proposal for a Directive of the European Parliament and of the council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) COM (2004) 279 final). This is unfortunate in terms of the message it sends out that these provisions are not primarily concerned with the promotion of gender equality and that pregnancy, maternity and parental rights retain their position outside the framework of the gender equality principle rather than being viewed as an essential component of that principle (Carraciola di Torella & Masselot, 2004: 341-2). It also creates a paradox in so far as the Pregnant Workers Directive and the Parental Leave Directive are both referred to in the amended Equal Treatment Directive which is part of the recast project (Masselot, 2005).

\textsuperscript{5} Article II-93 reads:

‘The family shall enjoy legal, economic and social protection.
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.’ (See Hadj-Ayed & Masselot, 2004.)


\textsuperscript{7} Case C-177/88, Dekker v. Stichting voor Jong Volwassenen (VJV) Plus [1990] I-ECR 3941. The case is the first to provide explicit protection for pregnant workers in EC law. It is important too for its emphasis on disadvantage to women through unequal treatment, rather than the requirement for comparable treatment with men.
under Article 118a EC (now 138 EC) which had been newly introduced into the EC Treaty with the Single European Act to provide a new legislative competence and legal base with respect to the ‘working environment’ (and – important in strategic terms - allowed for the adoption of legislation by qualified majority (Cromack, 1993)).

The provision refers in its preamble to, the Community Charter of the Fundamental Social Rights of Workers adopted by the European Council in 1989 which states in para. 19, that: ‘Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made.’ This framing of the measure as one of health and safety of workers is very much to the fore in the preamble of the Directive which reiterates the scope of Article 118a EC. So, precisely not framed as a specific gender equality measure, pregnant workers, workers who have recently given birth or who are breastfeeding, are identified in the preamble as a ‘specific risk group’ which must be protected against the dangers at work which particularly affect them. Their ‘vulnerability’ is also identified as a reason making it necessary for them to be granted maternity leave.

From a gender equality perspective this is not unproblematic. It emphasises the precarious situation of pregnant women and mothers within the workplace and the consequent need for their protection. Furthermore, the leave provisions of the Directive are evidently asymmetrical and reinforce the presumption that it is mothers who should be the primary carers of children. The absence of any specific provisions addressed to fathers underlines this presumption.

The Pregnant Workers Directive has now to be regarded within the context of the newly amended Equal Treatment Directive 2002/73/EC of 23 September 2002 (amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions). Article 2(7) sets out the relationship between pregnancy/maternity and equal treatment – providing in para. 1 that ‘This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity…’. This rather cryptic formula unfortunately reinforces once again the construction of pregnancy and maternity as exceptions to (rather than a condition of) gender equality (exceptions being interpreted restrictively) and has provoked the criticism that the European legislature missed an important opportunity here to redefine the balance between market needs, gender equality and fundamental rights (Masselot, 2004).

The remainder of Art. 2(7) of the amended ETD nevertheless provides for the right of a woman on maternity leave to return to her job or to an equivalent post after the end

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8 The legal base was challenged by the UK which sought to confine the concept of health and safety at work to narrower matters such as dangerous substances and the fencing in of machinery.

9 An attempt to introduce a provision for two days of unpaid paternity leave in connection with the birth of a child under the Pregnant Workers Directive was rejected by the Council. (Caracciolo di Torella, 2005). The Parental Leave Directive also does not directly address fathers. Rather it gives them generic rights as ‘parents’. Equally the European Court of Justice has emphasised in its case law the ‘special bond’ between mother and child (Caracciolo di Torella, 2005).
of her maternity leave. This is in contrast to the old ETD 76/207/EEC where the right to return to the same or similar work was guaranteed only after parental leave and not after maternity leave (Masselot, 2004).

So while maternity leave was framed initially as a health and safety initiative, being related to equal treatment through cross-referencing in other secondary legislation, parental leave, on the other hand has been viewed as a measure to reconcile work and family life. As such, its history reads rather differently. In particular, parental leaves is viewed as providing for the right to **time for care**. This is quite different terrain from the more traditional battleground of gender equality, that of sex discrimination in the workplace. As such it goes some way towards addressing men’s traditional lack of involvement in unpaid caregiving and the largely clandestine area of the distribution of tasks in the private sphere.

The **Parental Leave Directive** materialised four years later, in 1996, as the first agreement concluded by the Social Partners UNICE, CEEP and ETUC under the Agreement on Social Policy. Negotiated as a framework agreement, it set out minimum requirements on parental leave and time off from work on grounds of **force majeure**. The agreement was subsequently translated into Council Directive 96/34/EC on parental leave.

In contrast to the Pregnant Workers Directive, the provision is gender neutral to the extent that it grants rights to ‘parents’ rather than mothers/fathers specifically, apparently acknowledging the changing nature of motherhood/fatherhood and the sharing of roles as carer/worker. So, contrary to the Pregnant Workers Directive, the measure was introduced very much as one concerned to promote the reconciliation of

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10 Article 2(7) of the amended ETD states:

‘This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence. Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85 EEC [the Pregnant Workers Directive] shall constitute discrimination within the meaning of this Directive.

This Directive shall also be without prejudice to the provisions of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC and of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC). It is also without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they shall be entitled to return to their jobs or to equivalent posts on terms and conditions which are not less favourable to them, an to benefit from any improvement in working conditions to which they would have been entitled during their absence.’

11 There is an important and growing body of feminist literature on the ethic of care which seeks to remedy the hitherto paucity of attention given to men’s absence in unpaid domestic caregiving. See Leitner, 2003; Lister, 2002; Pfau-Effinger, 2005; Caracciolo di Torella, 2005.

12 Two further Directives have been concluded in this way: Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
work and family life, together with addressing gender equality concerns (as stated in the preamble) and with an underlying ambition to improve the participation of women in the labour market.

Demographic changes, requirements for a more flexible organisation of the working life and a more equal distribution of family responsibilities between men and women are the key factors which ground this initiative: the expectation being that if men and women were to share domestic care work in the family more equally, then women would be better able to participate in the labour market.\(^{13}\)

It is perhaps this more progressive (controversial?) spirit which explains why it took more than a decade to adopt the Directive. The first Commission proposal for a Directive on parental leave came in 1983 after the ILO Convention of 1981 set up the rationale for Equal Opportunities and Equal Treatment for workers with family responsibilities. However, unanimous agreement on the draft was not possible as a result of opposition by the UK and other Member States. Germany for instance did not accept the principle of non-transferability of the leave provision which had been introduced precisely to encourage fathers to take leave (Treib & Gerda, 2000: 3). The proposal was set aside until the Belgian Council Presidency brought the Directive back on the agenda in 1993 (having deleted the non-transferability clause). The Directive was finally adopted (non-transferability reinstated) as part of the Euro-collective agreements between the major interest groups on social issues. This genesis deserves underlining too for its European integration and gender equality implications.

The Directive, resulting from the first agreement arrived at through collective bargaining between the European social partners, made use of a new and exceptional decision making process whereby “the battlefield for European Social Rights [has] shifted from EU political institutions to the bargaining table of the European social partners” (Bleijenbergh; De Brujn & Bussemaker 2004: 310). Using this novel process, the parental leave puts into action one of the defining features of the European Social Model - that labour regulation should be discussed and implemented through social dialogue and agreements, known as the Open Method of Coordination.

While on the one hand, this process can be viewed positively in so far as it reinforces the role of social partners through collective labour rights with the advantage of promoting positive behaviour patterns and providing a code of good practice. On the other hand, from a gender equality perspective, the process of negotiation of ‘soft law’ measures can be highly dependent upon the representational (im)balance of men and women in the decision-taking bodies amongst the negotiating parties. If social pacts are to play a much greater role in policy-making then efforts towards the democratisation (in terms of an equal balance of men and women in the decision-taking bodies) are required in order to guarantee fair play in the discussion of collective agreements and social pacts. In this aspect, cross-national variation within

\(^{13}\) The recognition that the balanced participation of women and men in both the labour market and in family life is a core aspect of the development of society and that maternity, paternity and the rights of children are social values to be respected by the Member States and the European Community also derives from the jurisprudence of the ECJ: see C-243/95 Hill [1998] ECR I-3739 and C-195 Gerster [1997] ECR I-5253 (Masselot, 2005).
the EU is of key relevance. As O’Connor (2005) has pointed out referring to the Open Method of Coordination more generally, fulfilling the potential of the OMC is dependent on national policy legacies and political contexts. This is particularly true in the context of the Parental Leave Directive which refers back to Member States and the social partners for the establishment of the conditions of access to, and rules of application of, the provisions for parental leave.

Hence, countries with a long tradition of implementing gender mainstreaming and a strong political commitment to equal opportunities stand a far better chance of including a gender dimension in the negotiations and collective agreements. By contrast, other countries where collective agreements still function along corporatist, ‘male’ dominated lines, need explicit commitments and additional methods to incorporate gender mainstreaming into their working practices.  

B. Differing contents and regulatory techniques

It is not only the underpinnings and conceptual framework of the maternity and parental leave provisions that differ, but also the specific contents. Notably, perhaps inevitably, the former are gender specific while the latter are not.

First, as far as maternity rights are concerned, the Pregnant Workers Directive as already mentioned introduces requirements of minimum protection by the Member states for three sets of female workers – those who are pregnant, those who have recently given birth and those who are breast-feeding. As such, the provisions on maternity leave form part of a general package of measures designed to promote the health and safety of all three groups.

In addition, therefore, to other measures requiring employers to assess whether women are exposed to specific risks at work during their pregnancy and to take appropriate action (e.g. adjusting working hours or conditions or moving them to another job), Article 8 of the Directive requires that pregnant workers be granted the right to maternity leave of at least fourteen continuous weeks, allocated before or after the birth, and renders compulsory the allocation of at least two weeks maternity leave. These provisions are to apply in accordance with national legislation and/or practice. During the period of pregnancy and maternity leave, Article 10 provides that the woman cannot be dismissed (other than in exceptional cases not connected to the pregnancy). The Directive also sets the minimum level of pay for workers on maternity leave at the level of sick pay. This unfortunate liaison between pregnancy and sickness is described in the preamble as a ‘technical point of reference’ which ‘should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness.’

The rights provided are, however, merely minimum requirements – as such this is not a fully harmonising measure and does not require the introduction of a uniform

14 Other more general problems relating to the lack of integration of the social dialogue process and social partners into the institutional structure of the European Employment Strategy should also be highlighted (Bercusson, 2004).
15 The analogy in fact results from the insistence of the UK to setting the minimum level of pay for workers on maternity leave at that of sick pay.
standard across all Member States. Instead, it is expressly stated that the Directive may not be used to justify a reduction in higher levels of protection already provided for in the Member States.

Compared with the sex-specific nature of the Pregnant Workers Directive, the Parental Leave Directive provides for a number of gender neutral entitlements. Article 2 provides that male and female workers enjoy a (non-transferable/individual) right to parental leave on the birth or adoption of a child. The provision applies to all workers who have an employment contract or employment relationship and the leave period is guaranteed for a minimum of three months, until a given age up to eight years to be defined by Member States and/or management and labour. Additionally, workers enjoy protection against dismissal on grounds of applying for or taking parental leave. They have the right to return to the same or an equivalent or similar job at the end of the leave, without any other of their acquired rights being affected.

One interesting difference to emerge in the style of the Parental Leave Directive, as compared with that on Pregnant Workers, is its adoption of a new regulatory method. Designed to facilitate agreement, this consists of imposing very few compulsory minimum standards, with instead a preference for non-binding recommendations and a number of possibilities for derogation.

For example, compared with the provisions on parental leave, the Pregnant Workers Directive (despite not being a fully harmonising Directive) contains a higher number of compulsory provisions than the Parental Leave Directive: i.e. fourteen compulsory minimum standards and only one non-binding soft-law provision (the aim of protecting new and expectant mothers at work should be balanced against the goal of female labour market participation). It contains only two opportunities to derogate from the binding standards.

The Parental Leave Directive, on the other hand, contains only seven compulsory minimum standards. It does, however, contain five possibilities for exemption or derogation and nine non-binding soft-law provisions (amongst these is the provision that workers should continue to be entitled to social security benefits and that men should be particularly encouraged to take parental leave in order to assume an equal share of family responsibilities). As a result, access, conditions, and modalities for applying the right to parental leave are largely left to the national governments and social partners (i.e. questions of whether leave is to be granted on a full-time or part-time basis, whether it is to be subject to a period of work qualification, what notice periods may be required, in what circumstances employers may postpone the granting of leave and the making of special arrangements for small undertakings).

All in all, the ‘right to leave granted by the Framework Agreement is a minimum-level right’ (Craig and de Búrca, 2003: 911) with the Member States entitled to introduce more favourable provisions should they so wish. Like the Pregnant Workers Directive, the provisions of the Agreement do not justify a reduction in the general level of protection given to workers in the field.
Part II Transposing the Directives into the national systems

The success of both Directives, but in particular that of the ‘softer’ Parental Leave Directive, depends largely on their implementation in the Member States. As has been noted above, in the absence of either Directive being a fully harmonising measure, this is in turn dependent on the precise measures to be adopted by the Member States and is conditioned by their present national welfare provisions (which in the absence of express European harmonisation retain their distinctive national characteristics). Inevitably conflicting domestic interpretations of the maternity and parental leave provisions are possible and the interpretations which are adopted may have a huge impact on the capacity of the provisions actually to promote gender equality or to be used as a gender equality mechanism.

A. Implementation, interpretation and some implications for gender equality

While, as mentioned above, the maternity leave provisions are gender specific, underscoring the primary role/responsibility of women in caring for children, and designed to protect women’s position in employment in a more directed/obligatory fashion, the capacity of the provisions on parental leave to promote gender equality largely depends on the conditions to be attached to this social right. Put bluntly, depending on how parental leave is formulated, it may assist in encouraging a better balance between work and family responsibilities, but equally it may simply entrench stereotypes and encourage mothers rather than fathers, to stay away from the labour market for long periods.

If this were the case, the result would obviously be to thwart the primary goal of increasing the participation of women in the labour market. Hence, while the rationale behind the formulation of parental leave is to incorporate the right to time for caring for both male and female workers, enabling them to enjoy a more balanced distribution of time (and resources) spent on paid and unpaid work, this might backfire depending on how the provisions are put into effect.

Inevitably, parental leave can be interpreted in conflicting ways and as such can offer varying degrees of support for the family and for the gendered division of labour within it. Leitner (2003) for instance, uses parental leave as an indicator of ‘familialism’ since this is a policy which supports the caring function of the family with respect to child care. Paid parental leave allows parents to be absent from the labour market for a period of time in order to take care of young children. Importantly, therefore, as the author puts it: “the existence (respectively: the absence) of regulations for paid parental leave will be taken as an indicator for the dimension of strong (respectively: weak) familialisation” (2003: 360).16

Nevertheless, there is no simple answer to the question of whether parental leave as an indicator of familialism does or does not promote gender equality. Some

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16 At the other end, the author considers the percentage of children under three years of age who are in formal child care as a dimension of strong and weak de-familialization (2003: 360).
‘familialistic’ instruments, particularly in the form of State support measures for parental leave and care work might be viewed as promoting gender equality since they provide an opportunity for both parents to enter/exit the workforce in order to allow for a more flexible fulfilment of familial obligations. However, that does not negate the possibility of a reformulation of the gendered division of labour within the domestic sphere through a more progressive/less gendered approach to informal care arrangements. As Pfau-Effinger (2005) argues, the suggestion that the degree of formalisation of informal care is determined by the degree to which welfare states support gender equality and the labour market integration of women does not take into account the fact that informal care has itself been modernised and that the promotion of informal family care (and parental leave could be part and parcel of this) does not necessarily contradict ideas about gender equality.

Two crucial issues, however, which remain in determining the effectiveness of parental leave in the promotion of gender equality are the **duration** of the leave and whether it is **paid and unpaid**. As Hardy and Adnett (2002:169) point out, when parental leave is lengthy and unpaid, the measure tends to **encourage** rather than eradicate the ‘male breadwinner model’. Given that within a household the male partner usually has a higher income than the female partner; it is logical/inevitable that mothers will be more likely to take the leave (highlighting the fact that the gender pay gap remains a crucial matter when addressing reconciliation (Caracciolo di Torella, 2005)). A statutory entitlement to parental leave that does not clearly differentiate between maternity and paternity entitlements and that does not provide leave which is proportionate to the salary will very likely encourage mothers to look after their children and stay out of the labour market, working in the end towards a traditional family policy where gender roles are clearly differentiated between care and paid employment. In sum, the question is not so much whether welfare states encourage or discourage the role of carers within the family but whether the role of carer is gendered.

To take into account this complexity in the classification of parental leave, Leitner has elaborated variations of familialism along gendered and de-gendered lines. While **gendered** familialism shows familialistic policies that assign family care to women only, devalue family care in relation to employment, do not provide choices to (re-)move from family care to employment, and focus on (married) heterosexual couple families, **de-gendered** familialism shows familialistic policies that do not refer to biological sex differences, validate family care, enable financial independence of the carer, provide choices to move between family care and employment, and provide comparable benefits for different family care arrangements (Leitner 2003: 368).

Thus, there are a number of possible interpretations of the concept of parental leave and these go some way towards explaining the diverse impact of the parental leave provisions when transposed into the domestic context. We now move on to look at this question in more concrete terms by considering two national examples – Spain and the United Kingdom- considering the extent to which they promote forms of gendered or de-gendered familialism. This is with a view to showing how the European integration initiatives under discussion have impacted upon the development of national welfare state provision, suggesting a more harmonised pan-European perspective.
B Two case studies

Evidently, some Member States with a strong commitment to gender equality had already implemented parental leave mechanisms before the European Commission actually put these forward and the actual entitlements superseded the minimum requirements of the Directives. In these cases, the policy learning process actually moves from the national to the supranational level. Other countries, however, are using EU Directives as a frame of reference to reform their own national legislations. This is largely the case with regard to gender equality mechanisms in our first country of reference, Spain.

i. Spain

In Spain, until the reform undertaken in 1994 to incorporate the provisions of the Pregnant Workers Directive, maternity leave was included within the contingency of employment injuries and occupational incapacity. Thus, the major policy change that had to be implemented was to treat pregnant workers and workers who have recently given birth or are breastfeeding as subject to a distinctive risk different from sick leave. The 1994 reform also improved compulsory maternity leave in the length of the allowance, from 14 weeks in 1989 to 16 weeks in 1994, as well as in the amount of the benefit, from 75% of the employee’s wage to 100%. The minimum requirements to be entitled to the benefit also improved since before the reform the minimum contribution period was one year, but after 1994 it was reduced to 180 days.

Provisions governing unpaid voluntary leave were also reformed. Since 1989, i.e. before the Pregnant Workers Directive, employers have had to guarantee the availability of the same job to the mother during the first year, and this year counts as a contributory period. Before 1989, the mother could request voluntary leave but the same job was not guaranteed to her on her return. Furthermore, whereas previously an employer would have to pay twice-over for the mother on maternity leave and any substitute worker, after 1995 the employer only pays for the substitute worker, and the state takes responsibility for the costs of the employee on maternity leave (with 95% reduction of social security costs for the first year and 60% for the second).

Following the introduction of the Directive on Parental Leave, law 39/1999 on reconciliation between family and working life was approved by the Centre-right government (Popular Party PP) and introduced changes in the Bill of Workers Rights (Estatuto de los Trabajadores) in relation to time off work due to maternity, paternity and care of dependant relatives. The law provides for working breaks for breastfeeding; adoptive mothers are given the same rights with regard to maternity leave; and the right to reduce the number of working hours for parents with dependant children was also introduced, with the correspondent reduction on salary. In addition, the legislation extended the possibility of periods of leave to care for dependent relatives, not just children. As a result of this new provision and the previous reforms mentioned, Spain now conforms de jure to EC standards regarding maternity leave.

De facto, however, the new regulation however, failed to provide real paternity leave, i.e. parental leave has not yet developed into a comprehensive paternity leave policy.
Parents do not have equal rights (or obligations) to take leave. Mothers have the option to transfer a maximum of 10 weeks out of the 16 weeks of their leave to the father (this can be read as breaking the PWD provisions requiring 14 weeks maternity leave). In any case it has not encouraged fathers to take leave or induced mothers to give up their right. This is because, first, the mother has to choose between sharing part of the 16 weeks with the father or keeping the whole period for herself and secondly, because the mother has to be entitled to this benefit. A male worker contributing to social insurance cannot take up this right unless his female partner is entitled to it. Hence, the notion of childbirth is still primarily linked to mothers.

The centre-left government PSOE introduced in December 2005 a new plan called Concilia to increase the rights of employees working for the public central administration (500,000 employees in total) regarding time off to look after dependants. Amongst other measures the “concilia” law grants 10 days of paid paternity leave for the birth or adoption of a child. Civil servants who have recently given birth will also have the right under this new plan to choose between reducing their working hours for breastfeeding or an extended 4 weeks of maternity leave (MAPS 2005). This new intervention from the central government follows similar actions undertaken in the field of work/life balance from regional governments. In 2002, for example, the Catalan Parliament approved legislation with a number of measures related to the reconciliation of work and family life of personnel of the Catalan public administration (BOPC 22 April 2002). The most innovative of the measures has been the right for parents with children under 1 year of age to work part-time (one third reduction in the total working time) without any salary cut. The law also contemplates the right of a one hour absence from work for breastfeeding for the first nine months after birth. Both interventions at the regional and central level had used as justification the Parental Leave Directive and other EU recommendations regarding parental leave and work/life balance.

One particular problem, however, with these initiatives whether they come from the central or regional governments, is that further rights are granted to an already protected sector of the labour market since they only apply to civil servants. Elsewhere, the contents of the Parental Leave Directive have to be implemented through collective agreements and many of the measures contemplated by the new law (time off work, working time reduction, parental leave) have not been incorporated into collective agreement regulations. Moreover, the large number of small enterprises that are not even required to have collective agreements means that an important part of the labour force remain totally excluded from the provisions set up by the Parental Leave Directive. Thus, overall, the Spanish example presents a rather half-hearted picture of implementation.

ii. The UK

The UK by contrast tends to be viewed as a mid-performer, doing somewhat better than Spain, but still falling below the standards set by the model Scandinavian states and others, such as France, which offer higher standards of social protection for workers (Caracciolo di Torella, 2005).
In the UK, the Pregnant Workers Directive has been incorporated to provide for a full package of maternity rights, including the right to maternity leave and maternity pay, the right to reasonable paid time off for ante-natal care and protection from sex discrimination as a result of pregnancy. These provisions are inevitably (given the EC provisions) sex specific and more extensive and obligatory in nature than those regulating parental leave.

Maternity Leave is governed by the Part VIII of the Employment Rights Act 1996, and Maternity and Parental Leave Regulations 1999. Ordinary maternity leave is available (regardless of how long the employee has worked for her employer) for a period of 26 weeks, while compulsory maternity leave is stipulated as two weeks. Additional maternity leave is available to women who have completed 26 weeks continuous service with their employer by the beginning of the 14th week before their estimated week of confinement. This entitles the woman to a further 26 weeks leave. During this period the contract of employment remains in force for some but not all of its terms. There are stringent notice requirements and the woman is protected from any detriment or dismissal.

While maternity leave and the right to return to work after maternity are contained in the employment legislation, statutory maternity pay is covered by social security legislation (Social Security Contributions and Benefits Act 1992 and the SMP Regulations 1986). Statutory Maternity Pay is paid by the employer amounting to 90% of normal weekly earnings for 6 weeks + £106 a week for a further 20 weeks. Qualifying conditions apply but the payment is made whether or not the employee intends to return to employment.

Women who do not qualify for SMP may qualify for Maternity Allowance which is paid as a social security benefit (i.e. not by the employer but by JobCentre Plus) for a period of 26 weeks. This amounts to £100 per week or 90% of the woman's weekly earnings (if less than £102.80 per week). To qualify the woman must have been employed/self-employed for at least 26 weeks, must have earned at least £30.00 per week averaged over a 13 week period; and must have stopped working.

The Parental Leave Directive has generated a right to parental leave, paternity leave and pay, together with a right to adoption leave and pay. In line with the Directive, parental leave is granted for 13 weeks during the first five years of a child’s life. This is available to employees with one year’s continuous service but can only be taken in blocks (a minimum of 1 week and no more than 4 weeks in any given year). The non-transferability principle applies and the leave is (critically) unpaid.

Paternity leave, more specifically, is provided for in the Paternity and Adoptive Leave Regulations 2002. This guarantees two weeks paternity leave which is available to the biological, social or adoptive father. It must be taken within 56 days of the child’s birth/ adoption and the qualifying period is 26 weeks continuous employment with the same employer. This is paid at a flat-rate of £106 per week. Provisions on adoption

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17 Employment Rights Act 1996, s. 71 and MPL Regs, 4 & 7.
18 ERA 1996, s.72.
19 ERA s.73.
20 26 weeks continuous service, plus average earnings requirement, plus compliance with notice requirements.
leave and pay mirror those on maternity/parental leave. Pay requires a qualifying period of 26 weeks continuous employment with payment for 26 weeks at £106 or 90% of weekly earning subject to £106 maximum.

Of these provisions, it is the debate on paternity leave which has proved to be of most interest recently. In a climate where both the prime minister, Tony Blair, and the new leader of the Conservative Party, David Cameron, have had children while in office, the issue is very much on the political and media’s agenda. This is an important step in so far as it would introduce provisions addressed specifically to fathers, thus underlining the role/responsibility of men in caring for their children.

In late 2005, the Trade and Industry Secretary, Alan Johnson, published a new Work and Families Bill that would give men up to six months’ unpaid leave, but proposes to create in addition a new right conferring up to three months’ paid paternity leave if a mother returns to work after six months and before her maternity leave ends. This novelty, it is hoped, will create a modern framework of employment rights offering choice and flexibility to working parents and seeking – in the spirit of the Parental Leave Directive - to balance the demands of their jobs with caring for their children. The proposal has generated warnings, however, that men will find it impossible to take six months’ paternity leave unless this is paid. Again, as outlined above, without payment for paternity leave, however, there remains little incentive for fathers to take leave where they earn more than their partner. Hence, while the goal may be to spread unequal parenting arrangements and to promote women’s workforce participation, this may not be a realistic option until the paternity leave is properly paid.

Labour’s plans include an extension to paid maternity leave to nine months by 2007 and 12 months by the end of the present parliament. The government is also looking at the option of transferable maternity leave allowing mothers to hand over some of their leave (possibly 6 months) to fathers. This, however, might fall foul of the requirement that existing rights should not be taken away from workers. The proposal is, however, backed by fatherhood campaigners who see it as finally giving fathers their own protected right to extended leave and also ensuring that fathers have an individual right to leave even if the mother is not qualified.

Conclusions

In conclusion, it is evident that the different underpinnings, different legal base, and different contents of the maternity and parental leave provisions provide somewhat uneven frameworks in which to view entitlements to leave for both men and women. As a result, the provisions on maternity leave, appear stronger than those on parental leave, since they are of a more compulsory nature and less dependent upon variable transposition in the Member States’ domestic legislation/practice depending on national views of gender relations and family responsibilities.

In broader terms, the Pregnant Workers Directive can be said to be stronger in its promotion of gender equality on two fronts. First, it improves the situation of new and expectant mothers by tightening the health and safety standards in all Member States (conferring for example, a right to time off with pay for medical examination
during pregnancy). Secondly, and somewhat conversely, it removes impediments to the active participation of women in the labour market for reasons of pregnancy, childbirth or breast feeding (Falkner et al., 2004: 92)

As for the capacity of the Parental Leave Directive to promote gender equality, fathers have certainly been placed on a more equal footing with mothers de jure but cannot really speak of equality in practice. For the reasons explained above, the take up rates for parental leave by fathers is still very low in all EU countries. Consequently, it can be seen that innovation in this terrain is still of greater symbolic than practical significance. Yet capacity to reconceptualise fatherhood, together with the relationship between the welfare state, the market and the family in the provision for childcare is important even at the symbolic level. As Leira (2002: 76) points out “the right of employed parents to leave of absence for childcare serves the demands of social reproduction over those of production, and establishes the primacy of parental obligation to children’s care over the demands of the workplace.”

It seems almost inevitable, therefore, that the minimal harmonisation of national social policy in this domain remains conditioned by traditional structural patterns of paid and unpaid employment which in turn are heavily loaded with gender based assumptions about men and women’s roles at home and at work. Until these underlying premises are challenged and evolve (which of course takes time), the legislation, especially in so far as it relates to paternity leave, may retain a symbolic function. While this is not unimportant, it is evidence that further initiatives to transform theory into practice, symbol into reality, are still much needed across the Member States.

References


