



## **Female work, family needs and equal opportunities. A comparative analysis among some EU legal System<sup>\*</sup>**

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**Abstract** - *Italy has been classified by the World Economic Global Forum on Gender Gap in a terrible position. It is the 84<sup>o</sup> country, as its policies are not able to improve female job market and family condition. In particular, other countries with similar PIL have a range of semi-completed female occupation and it is not a question of a low level of education and studies. Actually, recent studies shows that Italian woman education, specialization and skills have a high level and that they have access to the job market, but, at the same time, there are many difficulties to preserve and maintain the job in a certain period of woman life. Exactly, the critic period is connected to the choice of having children or a "traditional family" and, in general, with family duties. Some economists have underlined that an important key to explain the different percentage of women participation to job market in different Countries are connected to peculiar institutional structure of "municipal" job market and to social support measures offered at "municipal level". For what, specifically involve southern Europe job markets, some scientists reveal that this area is characterised by "over-ruled" job markets, especially on matters as employment, dismissal, and different and peculiar contractual schemes. These elements, together with costly initial wages, make difficult women entrance in the job market. The public offer of child care and family support explains lots of the differences among different countries, but it is a complex datum, really hard to detect, collect and interpret. Not by chance, lots of economic and statistics studies do not pretend to interpret and explain this datum, but use it only to describe a phenomenon. The welfare system seems to be stronger in France and in the Scandinavian area, while the public effort is absent in English language Countries. A relevant data are statute provisions on parental leave (mother or father oriented), which are really heterogeneous in different Countries. A systematic approach and analysis of the collected data let us considering that we have, both at a national and at a European level, legal rules and models which should promote equal opportunities, but that we miss cultural promises going in the direction of assisting and supporting families, as a way to encourage the preservation of female job place. The point is to ensure instruments to avoid the exit from job market in the critics years when a woman wants to build up both her family and her career, even if she pretend to be a top manager, a lawyer, a judge, a public administrator. This study will investigate two different kinds of answer, analysing and comparing micro-choices (tech-*

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*nical and juridical instruments) and macro-choices (legal policies) that different legal system have adopted in the European context to promote an effective integration between life time and job time, to support families in terms of public services and suggest possible new instruments connected with partnership of public and private programmes.*

**Riassunto** - *L'Italia occupa nell'ambito della classifica del World Economic Global Forum on Gender Gap una posizione molto bassa, che testimonia politiche economiche e sociali non adeguate a garantire un adeguato inserimento e la permanenza della donna nel mondo del lavoro, nonché strumenti per coordinare i carichi di lavoro e la cura familiare. In particolare, altri Paesi con PIL analogo a quello italiano sono caratterizzati da una maggiore percentuale di "semi-completed female occupation" e ciò non dipende da un basso livello di educazione ed istruzione. Infatti, studi recenti mostrano un elevato livello di educazione e specializzazione delle donne, le quali, però, una volta riuscite ad accedere al mondo del lavoro, incontrano non poche difficoltà a mantenere il proprio lavoro, soprattutto in relazione ad una peculiare fase della vita. Più precisamente, il periodo critico è connesso alla scelta di avere figli ed, in genere, all'aumento del peso delle esigenze familiari. Alcuni economisti, hanno evidenziato che un'importante chiave di lettura per spiegare le differenti percentuali relative alla partecipazione delle donne al mercato del lavoro nei diversi Paesi è data dall'analisi del mercato del lavoro a livello locale e dalle misure di sostegno sociale offerte allo stesso livello. Per quanto riguarda, in particolare, il mercato del lavoro del Sud-Europa, alcuni studiosi hanno rilevato che si tratta di un mercato "over-ruled", specialmente avuto riguardo all'assunzione, al licenziamento ed ai differenti schemi e livelli contrattuali (collettivi, aziendali, individuali). Questi elementi, insieme ai bassi livelli stipendiali iniziali rendono difficile l'ingresso delle donne nel mondo del lavoro. L'offerta di servizi pubblici in tema di cura dei figli e di supporto ai bisogni familiari incide in maniera notevole e spiega alcune delle differenze tra i diversi Paesi, ma si tratta di un dato complesso e difficile da raccogliere ed interpretare. Il sistema di welfare sembra essere più efficace in Paesi, quali la Francia e quelli afferenti all'area Scandinava, mentre è meno determinante in Paesi di tradizione e lingua inglese. Un dato giuridicamente rilevante è rappresentato dalla normativa sui congedi parentali, che è presente in vari Paesi. Un'analisi comparata dei modelli esaminati ci ha portato a considerare che, sia a livello Europeo sia a livello delle legislazioni degli Stati membri, esistono strumenti a garanzia delle pari opportunità, ma che le differenze tra le soluzioni analizzate non sono, tranne in qualche raro caso, sostanziali. Dunque, il processo di armonizzazione promosso attraverso gli interventi normativi europei è stato efficace. Ciò che sembra mancare, invece, sono le premesse culturali che vadano nella direzione di assistere e supportare le famiglie ovvero a incoraggiare gli sforzi delle donne che non vogliono rinunciare al lavoro. Il punto non è, quindi, solo prevedere e regolare i congedi parentali (sia dell'uomo sia della donna), ma di assicurare strumenti in grado di evitare l'uscita delle donne dal mondo del lavoro negli anni cruciali e critici in cui esse intendono in genere costruire sia una famiglia sia la propria carriera. Questo studio si propone di esaminare due diversi tipi di risposte, analizzando e comparando micro-scelte di carattere tecnico-giuridico e macro-scelte di public policy che alcuni sistemi giuridici dell'area europea hanno adottato per promuovere un'effettiva integrazione tra "tempi di vita" e "tempi di lavoro" a supporto delle famiglie in termini di servizi pubblici e non solo. Infatti, nella parte finale vengono proposte alcune soluzioni che vedono sinergie tra programmi pubblici e privati.*

**Résumé**- *L'Italie occupe dans le classement de World Economic Global Forum on gender gap une position très basse, qui témoigne des politiques économiques et sociales pas adéquates à garantir une appropriée inclusion et permanence de la femme dans le monde du travail et aussi des instruments pour coordonner les charges de travail et le soin familial. En particulier, d'autres Pays avec un Pil le même que l'Italie, ont un tas en pour-cent plus grand de "semi-completed female occupation" qui ne défend pas d'un bas niveau d'éducation et d'instruction. En effet, des études récentes ont un élevé niveau*

*d'éducation et spécialisations des femmes, le quelles, tonte-fois, depuis qu'elles sont reussies à accéder au monde de travail, rencontrent beaucoup de difficultés pour maintenir leur travail, surtout pendant une particulière phase de la vie. Plus précisément, la période critique est connexe à la choix d'avoir des fils et à l'augmentation du poids des exigences de la famille. Quelques économistes pensent que les différents pourcentages relatifs à la participation des femmes au marché du travail dans les différents pays est donné par l'analyse du marché du travail à niveau locale et par les mesures de soutien social offertes ou même niveau. En ce qui concerne, en particulier, le marché du travail du Sud-Europe, quelques studieux ont relevé qu'il s'agit d'un marché "over-ruled" surtout en rapport à l'engagement, au licenciement, et à des différents schémas et à des niveaux contractuels (collectifs, de l'entreprise, individuels). Ces éléments, avec des bas niveaux de traitements initiaux, rendent difficile l'entrée des femmes dans le monde du travail. L'offre de services publics pour le soin desfils et pour des besoins familiaers a un poids remarquable et elle explique des différences entre les diverses pays, mais il s'agit d'un donné complexe et difficile à rassembler et à interpréter. Le système de Welfare paraît être plus efficace dans un Pays comme la France et dans les Pays afférents à la zone Scandinave, alors qu'il est moins déterminant en Pays de tradition et de langue anglaise. Un fait important au point de vue juridique est représenté par la normative sur le congé parental, qui est présent en beaucoup de pays. N'analyse comparée des modèles examinés nous a porté à prévoir que, soit à niveau européen, soit à niveau des législations des états membres, il y a des instruments à garantie des mêmes opportunités, mais que les différences, entre les solutions analysées, ne sont pas substantielles, excepté quelques rares cas. Donc, le procès d'harmonisation reçu à travers des interventions des réglés européennes a été efficace. Ce qu'il paraît manquer, sont des préliminaires culturels qui aillent à la direction d'assister et de soutenir les familles où d'encourager tous les efforts des femmes qui ne vellent pas renoncer au travail. Le point n'est pas, donc, seulement prévoir et régler le congé parental (soit de l'homme, soit de la femme) mais assurer des instruments à même d'éviter la sortie des femmes du monde du travail pendant les ans cruciaux et critiques où elles ont l'intention de construire soit une famille soit sa carrière. Cette étude se propose d'examiner deux différents genres de reponses qui analysent et comparent des micro-choix de public-policy que quelques systèmes juridiques de la zone, européenne ont adopté pour promouvoir une effective intégration parmi "temps de vie" et "temps de travail" comme soutien des familles en délais de services publics et non seulement. En effet dans la partie finale on a été proposé des solutions qui voient des synergies entre des programmes publics et privés.*

**Resumen - Italia ocupa en el ámbito de la clasificación del World Economic Global Forum on Gender Gap una posición muy baja, que testimonia políticas económicas y sociales no adecuadas a garantizar una adecuada inserción y la permanencia de la mujer en el mundo del trabajo, además de instrumentos para coordinar las cargas de trabajo y la cura familiar. En particular, otros Países con PIB análogo a aquel italiano son caracterizados por un mayor porcentaje de " semi-completed female occupation " y eso no depende de un bajo nivel de educación e instrucción. En efecto, estudios recientes enseñan un elevado nivel de educación y especialización de las mujeres, las que, en cambio, una vez logradas a acceder al mundo del trabajo, encuentran no pocas dificultades a mantener el propio trabajo, sobre todo en relación a una peculiar fase de la vida. Más precisamente, el período crítico es conectado a la elección de tener a hijos y, generalmente, al aumento del peso de las exigencias familiares. Algunos economistas, han evidenciado que una importante llave de lectura para explicar los diferentes porcentajes relativos a la participación de las mujeres al mercado del trabajo en los diversos Países es dada por el análisis del mercado del trabajo a nivel local y por las medidas de sostén social ofertas al mismo nivel. Por cuánto concierne, en particular, el mercado del trabajo de Sur-Europa, algunos estudiosos han notado que se trata de un mercado "over-ruled", especialmente tenido respeto a la asunción, al despido y a los diferentes esquemas y niveles contractuales (colectivos, empresariales, individuales). Estos elementos, junto a las bajas remuneraciones iniciales hacen difícil la entrada de las mujeres en el**

*mundo del trabajo. La oferta de servicios públicos en tema de cura de los hijos y sostén a las necesidades familiares incide de manera notable y explica algunas de las diferencias entre los muchos Países, pero se trata de un dato complejo y difícil que recoger e interpretar. El sistema de welfare semeja ser más eficaz en Países, como Francia y aquellos de la área Escandinava, mientras que es menos determinante en Países de tradición y lengua inglesa. Un dato jurídicamente relevante es representado por la normativa sobre los permisos parentales, que está presente en varios Países. Un análisis comparado de los modelos examinados nos ha llevado a considerar que, sea a nivel europeo sea a nivel de las legislaciones de los Estados miembros, existen instrumentos de garantía de las igualdad de oportunidades, pero que las diferencias entre las soluciones analizadas no son, excepto en algún raro caso, sustanciales. Pues, el proceso de armonización promovido por las intervenciones normativas europeas ha sido eficaz. Lo que semeja faltar, en cambio, son las premisas culturales que vayan en la dirección de asistir y respaldar las familias o bien a animar los esfuerzos de las mujeres que no quieren renunciar al trabajo. El punto no es, por lo tanto, sólo prever y regular los permisos parentales (sea del hombre sea de la mujer), sino asegurar instrumentos capaz de evitar la salida de las mujeres del mundo del trabajo en los años cruciales y críticos en que ellas generalmente quieren construir sea una familia sea su propia carrera. Este estudio se propone de examinar dos diferentes tipos de respuestas, analizando y comparando micro-elecciones de carácter técnico-jurídico y macro-elecciones de public policy que algunos sistemas jurídicos de la área europea han adoptado para promover una efectiva integración entre "tiempos de vida" y "tiempos de trabajo" a sostén de las familias en términos de servicios públicos y no sólo. En efecto, en la parte final son propuestas algunas soluciones que ven sinergias entre programas públicos y privados.*

**Summary** – 1. Introduction. Female work and competitiveness. – 2. Current state of female work in Italy. - 3. The Italian legal system from the Constitution to the Code for equal opportunities. – 4. Legislation on parental leave: a comparative approach. - 5. Solutions between family support and welfare policies.

## 1. INTRODUCTION. FEMALE WORK AND COMPETITIVENESS.

This study aims to an overview on female work and competitiveness, looking – in the first part - to the current state of female work in Italy and to the normative data (from the Constitution to the more recent legislative provisions). In the second part, through a comparative approach, it analyses specifically equal opportunity and parental leave legislation in some Countries of the EU area, such as in particular, the United Kingdom, France and Spain.

The last part of the paper suggest some of the solutions - in terms of family support and welfare policies - that the comparative analysis has showed us.

It is a widespread assumption that there is a strong correlation between the competitiveness of industrialised Countries and the points of difference in the relation between male and female work.

As the World Economic Forum stated in its research on global gender gap index<sup>1</sup>, “the long term competitiveness of a nation depends significantly on if and how women are educated and employed”.

According to Laura D. Tyson, University of California Berkeley, co-author of the above mentioned research, “a country – such as Italy – which does not exploit efficaciously 50 per cent of its human resources undergoes the risk of compromising its own competitive potential”<sup>2</sup>.

In the 2012 ranking Italy has been given a particularly discouraging position. It was ranked – among 135 Countries - 80th (it was 84th in 2007), just before Hungary and after Cyprus. Botswana, Honduras, Kenya, Ghana and China. According to the most common estimates, Italy is a Country where an increase in women employment and in the possibility of climbing in their working careers would generate a 7% increase in the GDP<sup>3</sup>.

This datum is even more important if it is taken into account that in the projections made by Manager Italia, in Italy male and female work level parity is expected to occur in 2033 – while it has been reached in the USA in 2013 already<sup>4</sup>.

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<sup>1</sup> In [www.weforum.org/docs/WEF\\_GenderGap\\_Report\\_2012.pdf](http://www.weforum.org/docs/WEF_GenderGap_Report_2012.pdf). The research reports the major gender-based unequal treatments and traces the evolution on such an issue in many different Countries all over the world. The index employed to measure the “national gender gaps” is based on economic, political, educational and healthcare criteria, through which Countries are ranked, by comparing those same index, and divided into groups. In particular, the four “pillars” to examine the gap between men and women are represented by as many fundamental categories: *economic participation and opportunity, educational attainment, health and survival, and political empowerment*. In order to measure these gender based gaps the access to certain resources and opportunities in the single Countries are evaluated, but also and most importantly the current levels of availability of resources and the opportunities in these same Countries are taken into account, so as to ensure that the *Global gender gap index* is an independent measure for the level of development of each Country, making variables such as the African Countries and the so-called developed ones commensurable. According to these variables – such as female and male labour force participation; wage equality survey; estimated earn income; enrolment of primary, secondary and tertiary education; and many others, that we don’t think it’s useful to list here – the other countries that we examine in the comparative section of this study have been ranked: United Kingdom as 18<sup>th</sup>, Spain as 26<sup>th</sup>, France as 57<sup>th</sup>.

<sup>2</sup> “Un Paese che – come l’Italia - non sfrutta efficacemente il 50 per cento delle proprie risorse umane corre il rischio di compromettere il proprio potenziale competitivo”: see the interview contained in the article *Italia, le donne senza parità in Europa nessuno peggio di noi*, in *La Repubblica*, November 9, 2007.

<sup>3</sup> This (PIL) datum is reported in many public researches carried out by prestigious national institutions, Banca d’Italia above all, and international institutions such as *Goldman & Sachs*. As far as the non-juridical literature is concerned, see the data collected in D. DEL BOCA-L. MENCARINI-S. PASQUA, *Valorizzare le donne conviene, Ruoli di genere nell’economia italiana*, Il Mulino, Bologna, 2012.

<sup>4</sup> See [www.manageritalia.it/chi\\_siamo/associazioni/milano/gruppi\\_lavoro/g\\_donne\\_manager/eventi\\_iniziativa.html](http://www.manageritalia.it/chi_siamo/associazioni/milano/gruppi_lavoro/g_donne_manager/eventi_iniziativa.html).

The above mentioned link between the economical success of a Country and female work has been proved in the US system where, according to the research carried out by the Pew Research Center in Washington, women are the engine of its competitiveness: 40% of the female population with children aged under 18 is, today, the main or only income source for their family; inside this group there are two categories: 37%, 5,1 million people, are women who are over 40, married, mostly white, with a degree and earn much more than their husbands; 63%, 8,6 million people, are younger single mothers, Hispanic and African American, less educated and with low income.

According to co-director of Pew Social and Democratic Trend Project Kim Parker this research “portrays the new American family, which is deeply different compared to fifty years ago... when the rate of the so-called breadwinner stopped at one per cent”. In fact, today in the USA women represent 47% of the workforce, working in 10 of the 15 sectors which are expected to expand even more in the future and have been spared by the economic crisis in a considerable way compared with their male colleagues<sup>5</sup>.

Prima facie these two data seem consistent with the above quoted study on global gender gap index, which for the year 2012 ranked USA eight in economic participation and opportunities; first in educational attainment; thirty-third in health and service (yet such a parameter should be considered in the wider and more complex framework of US Health Care) and fifty-fifth in political empowerment.

It has to be made clear, though, that the authors of the research themselves had carried out a survey that apparently shows how the social and cultural perception of the model of family drawn from the statistic datum is not always fully positive, and that sometimes the model itself basically results not to be always appreciated. In fact, 79% of the respondents refuses the hypothesis of women turning back to their traditional role; 21% considers this to be a positive trend for society; 51% thinks that when children are very young they are better if their mother doesn't work; 8% think this latter consideration applies also if it is the father who doesn't work.

Therefore, the sociological cultural datum confirms that traditional gender roles are deeply characterised, even though not corresponding exactly to the reality in which society actually lives. The study also shows the importance of the absence of both pro-childhood facilities, such as kindergartens, and of a European stand-

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<sup>5</sup> As mentioned above, the source of this data is the *Pew Research Center* in Washington, in [www.pew-socialtrends.org/2013/05/29/breadwinner-moms/](http://www.pew-socialtrends.org/2013/05/29/breadwinner-moms/).

ards-based regulation on paid maternity leave (in the USA there is no such discipline on parental leave as the European one).

## 2. CURRENT STATE OF FEMALE WORK IN ITALY.

Given the firm belief that economically stronger (i.e. with higher GDP) Countries have female work levels that exceed certain standards, it is absolutely understandable how in Italy the issue of the presence of women in labor has, still nowadays, a central place in the scientific debate on labor law.

Moreover, the statistical data collected show a complex situation, which is hard to work out.

First of all, Italy has a strikingly positive position in a ranking which includes 135 Countries, where it occupies the 65th position for “education”, and going down to n. 101 for “participation to the economic life and job opportunities”<sup>6</sup>.

As far as the level of education is concerned, in Italy there are more women than men who graduate and acquire post-graduate qualifications and specialisations, which leads to question the reasons why those same women not only find it hard to enter labor, way more than their male colleagues, but also why they find so many obstacles in maintaining their employment, once they obtain it, and in reaching the top positions in the careers taken into account.

Economic studies have shown that an important interpretative key of the difference in rate of female participation to labor in different Countries is represented by the peculiar structure of “local” labor market and by the measures of social support provided, always on a local basis.

From this perspective, Italy's situation in particular is significant, and as far as the analysis carried out by the researchers of Harvard and Berkeley Universities are concerned those data have to be compared with other data showing that there are two situations occurring in Italy: Southern Italy, with a 31% rate of female employment, and Northern Italy almost reaching 57%<sup>7</sup>. In 2010 ISTAT data confirmed higher rates of female unemployment in southern regions, in the 15/24 age group (nearly 50%). Such circumstance can be interpreted in a double perspective<sup>8</sup>.

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<sup>6</sup> Besides the ones cited in the text (education and participation to the economic life and job opportunities), there are two more parameters which were singled out as descriptors of the phenomenon: “health-care and health” (76<sup>th</sup> position for Italy); “participation to the political life” (71<sup>st</sup> position for Italy).

<sup>7</sup> The data collected date back to 2007, as reported in *Italia, le donne senza parità in Europa nessuno peggio di noi*, in *La Repubblica*, November 9, 2007 already quoted in note n. 2.

From a first point of view, as far as the Southern Europe labor market in general is concerned, some scholars have pointed out that this area is characterised by hyper-regulation, especially regarding hiring, firing and contractual models; these elements together with high hiring costs could quite possibly make the entry of women the the labor market more difficult<sup>9</sup>.

From another perspective instead, those are areas where there are persisting cultural heritages and social models which could orient individual choices towards more traditional courses.

The research on the 2011-2012 period carried out by ISTAT within its sample survey on births is instead more complex to understand: the results show that once they entered the world of labor, those female workers who have just had a child are forced to leave their job for the following reasons and in the following rates: firing 23,8 %; cessation of activities 19,6 %; resignation 56,1%. A particularly alarming datum is that resulting from the 2012 Save The Children<sup>10</sup> report which confirms that 800 thousand Italian mothers have been forced to leave their job in the last 2 years<sup>11</sup>. According to this same research, the relation between employment and number of children is also revealing: 50,6 % of employed women have no children; 45,5 % have one child; 35,9% have two children; 31% have three or more children.

The framework gets more articulate when considered by two other points of view: the first one is represented by the different treatment “in the paycheck”, es-

<sup>8</sup> [www.istat.it/it/files/2011/06/16\\_Occupazione-e\\_Disoccupazione-per-regione.pdf](http://www.istat.it/it/files/2011/06/16_Occupazione-e_Disoccupazione-per-regione.pdf); and also R CARLINI-G. PAVONE, [Istat: l'Italia all'ingiù: le donne corrono al lavoro](http://www.ingenere.it/articoli/listat-italia-allingi-le-donne-corrono-al-lavoro), in <http://www.ingenere.it/articoli/listat-italia-allingi-le-donne-corrono-al-lavoro>.

<sup>9</sup> This is the usual interpretation according to which an excessive protection of the position of the employee would slow down the competitiveness of enterprises, thus raising unemployment rates. Yet the relation between the legal regulation in support of the weak part of the employment relationship and unemployment is questioned by the majority labor law doctrine. In fact, according to the prevailing opinion the persistence of the gap between north and south in a Country, even when at a national level strong doses of flexibility are introduced in favour of the enterprises, explains why the hyper-regulation of the employment relationship can not be considered the only variables of unemployment having to deal with.

<sup>10</sup> The title of the report, which was commissioned by *Save The Children Italia*, is “*Mamme nella crisi*” (“*Mothers in the crisis*”), and it can be consulted at [www.immages.savethechildren.it/It/f/img\\_pubblicazioni/img190\\_b.pdf](http://www.immages.savethechildren.it/It/f/img_pubblicazioni/img190_b.pdf).

<sup>11</sup> With an unexpected intensification of the phenomenon more in the Northern regions of Italy than in the Southern ones. On this point, C. SARACENO, *Il lavoro è rosa*, in *La Repubblica*, January 8, 2010, as well as the document *Italia 2020*, written by both the Minister For Equal Opportunities and the Minister Of Labour themselves.



pecially if related with the issue of the personal choice of university-level studies and, consequently, of career (the second one)<sup>12</sup>.

The research carried out by Fondazione De Benedetti<sup>13</sup> shows how “hard to die” the theme of gender pay gap is, which in Italy records a medium hiatus of 37%. This, though, has to be explained on the basis of a complex of factors. In fact, the research studies the role of both family background and gender discrimination in the access to labor market in Italy, and is based on a collection of data which follow the career of a group of individuals starting from secondary high school<sup>14</sup>. According to the framework it can be drawn from it, women do not choose to enroll in those University faculties which grant jobs with higher incomes, such as engineering, economics and mathematics in particular. As a matter of fact, besides medicine, where the rate of women enrolled equals that of men, those faculties that lead towards more remunerative careers have been chosen by 65% of the boys and only 20% of the girls, the majority of which (35%, against 10% of males) chooses educational science, arts faculties, architecture and design instead: i.e. courses of study leading to certainly less remunerative job opportunities. Besides, though being very good (they graduate with an average of three months in advance, with better marks, and in a greater number compared to their male colleagues), women are less competitive, they accept 37% lower wages compared to their male colleagues for equal work, they don't negotiate, and don't complain about the unequal pay treatment.

According to the research there are three reasons for these choices, which are hardly measurable though being as they are related with individual inclinations: 1) women are less competitive of men (competitiveness is assessed through the predisposition towards certain sport activities instead of others); 2) women are more

<sup>12</sup> M. BELL-L. WADDINGTON, *Diversi eppure eguali. Riflessioni sul diverso trattamento delle discriminazioni nella normativa europea in materia di eguaglianza*, in *Giorn. dir. lav. rel. ind.*, 2003, 373. Ed and also C. PISSARIDES-P. GARIBALDI-C. OLIVETTI-C. PETRONGOLO-E. WASMER, *Women in the labour force: how well is Europe doing?*, in T. BOERI-D. DEL BOCA-C. PISSARIDES (eds.), *Women at work: an economic perspective*, 2004, Oxford University Press; for a summary on the recent evolution of male and female occupation in Italy see. L. SABBADINI, *Come cambia la vita delle donne. Ministero per le Pari opportunità*, 2004.

<sup>13</sup> [www.frdp.org/language/eng/topic/labour/iear/2012/scheda/conference-unexplored-dimension-of-discrimination](http://www.frdp.org/language/eng/topic/labour/iear/2012/scheda/conference-unexplored-dimension-of-discrimination). The study *Il gap salariale nella transizione tra scuola e lavoro*, coordinated by Giovanni Peri, University of California, has been presented on June 9, 2012 at the XIV European Conference held by the *Rodolfo De Benedetti* Foundation, which dealt with all the different dimensions of discrimination.

<sup>14</sup> It has to be made clear that since the data collection involved 30.000 graduates from 13 “licei classici” and “licei scientifici” (respectively classical and scientific studies high schools) in Milan between 1985 and 2005, who then continued their studies in the five city universities, the sample is strongly characterized at the identity level.

concerned about the neighbour (such an attitude has been pointed out by reporting the participation to voluntary activities); 3) women are less inclined to look for a necessarily well paid job.

The role they feel they should cover in the future family certainly has its influence, so the issue of the lack of facilities and welfare, which would allow women to build their own future work without having to worry about the care of children and elderly members of their family, rises again.

However, the so-called structural and individual inclinations are just those same factors that according to Manager Italia<sup>15</sup> would justify the turnaround caused by the 3,3% decrease in the presence of male managers who may have been fired or marginalised, and the simultaneous 15,4% increase in the presence of women managers. Basically, from 2009 to 2011, during the crisis the whole Europe is undergoing, labor market has expelled 1% of the managers, with a simultaneous increase in the number of women occupying a managerial position, with an overall result which tends towards a balance between the two genders. The regional datum is also interesting, since it points out that southern regions have been characterised to a greater extent by such a turnaround (Calabria and Molise, followed by Valle D'Aosta and Lombardia). As mentioned before, the explanation of the “turnaround” in apical positions is significant too, supported by a qualitative survey proposed by Jack Zenger and Joseph Folkman<sup>16</sup>, based on an interview of three thousand employees: this survey shows how women managers are particularly appreciated for 11 of the 12 skills acknowledged by employees to a top leader (taking initiatives, improving themselves, integrity and honesty, motivating their subordinates, networking, team working, fixing flexible goals, supporting changes, achieving results, communicating effectively, solving problems, connecting the group with the outside world); compared to their female colleagues, men managers are first only in the development of strategic visions<sup>17</sup>.

Indeed the overall datum of the feminine presence in apical position remains discouraging, since managing places in Italy are occupied by women only for 13,8%,

<sup>15</sup>[www.manageritalia.it/chi\\_siamo/associazioni/milano/gruppi\\_lavoro/g\\_donne\\_manager/eventi\\_iniziative.html](http://www.manageritalia.it/chi_siamo/associazioni/milano/gruppi_lavoro/g_donne_manager/eventi_iniziative.html).

<sup>16</sup> [www.zengerfolkman.com/joe.html](http://www.zengerfolkman.com/joe.html). The method and the ideological premises followed in carrying out the research can be found *in nuce* in J.H. ZENGER-J.R. FOLKMAN-F. MONOPOLI-B. DEMICHELIS-A. PADOVA, *Il leader straordinario. Trasformare buoni manager in leader eccellenti*, Franco Angeli, 2010.

<sup>17</sup> According to a recent study, for every 100 workplaces occupied by a woman a virtuous circle would activate, capable of creating 15 new workplaces in the tertiary industry; see D. DEL BOCA-L. MENCARINI-S. PASQUA, *Valorizzare le donne conviene*, quoted above in note n. 3.

against a European average of 33%: in Latvia (first Country) they are 44,6%, 37,4 % in France and 34,9% in the UK. Greece has a lower rate with its 14,9%<sup>18</sup>.

In such a framework, a datum of opposite sign comes from the experience lived and made public by a movement of women who have touched the “glass roof”, but have given up assignments of great prestige and very well paid in both private and public in several Countries of the western world, due to the difficulty in reconciling both family and working times and responsibilities. This trend exploded, on a public opinion level, after Anne Marie Slaughter's resignation from the role of US Secretary of State and the publication of her article on The Atlantic with the title “Why women still can't have it all”<sup>19</sup> (a paraphrase of the American feminist movement slogan), which was followed by an intense exchange of personal experiences, not only by women.

Those everyday life experiences that were told in that occasion report for a labor organisation which is more functional for the relational and life needs of the average working man, rather than of the woman. More specifically, on one hand there is a great social pressure over maternity through old stereotypes and, on the other hand, a working culture conceived for men workers of other times. Actually many girls and boys approach labor with the intention of not having to sacrifice their private life.

This trend has been confirmed also by Alan Manning<sup>20</sup> researches, that have registered a woman way of thinking, among those woman borne between 1985-1994 in Great Britain and US, according to which the mother role inside the family is fundamental and not exchangeable with the father one, so that finding a place in the labour market is a matter of secondary relevance or no relevant at all.

Therefore, the so-called tempo macho reveals to be a trap for both women and men, who became new main actors of solidarity appeals towards Anne Marie Slaughter's outing<sup>21</sup>.

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<sup>18</sup> On the point, see also the research commissioned by Banca d'Italia in collaboration with Consob (the Italian supervisory authority on the Stock Exchange) to monitor the increase in the presence of women in board of directors pursuant L. n.120/2011 on the rate of female managers in listed companies and in those controlled by public shareholders, which was followed by Consob Regulation n.18098/2012.

<sup>19</sup> [www.theatlantic.com/magazine/archive/2012/07/why-women-still-can-t-have-it-all/309020/](http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-can-t-have-it-all/309020/).

<sup>20</sup> A. Manning, [Minimum wages: a view from the UK](#), in *Perspektiven der Wirtschaftspolitik*, 2013, 57-66; Id., [One nation under a groove? Understanding national identity](#), in *Journal of economic behavior & organization*, 2012.

<sup>21</sup> See A. M. SLAUGHTER's testimony reported in the article by A. GINORI, *Donne fuga dalla carriera*, in *La Repubblica*, October 24, 2012, page 32.

The search for alternative solutions followed, which in the non-juridical debate were identified in tele-working, co-working, part-time, and more generally in the idea of measuring productivity more through the results rather than the hours of work.

The most common systematic reading of the data - not only the statistical ones - summarised here, suggests that when facing both national and communitarian regulatory models that sufficiently grant equal opportunities, one should act on cultural levers and through family assistance in order to encourage both the access and the persistence of women in labor, even in apical positions.

Therefore, the crucial point becomes to plan instruments to avoid the exit from labor during those critical years when a female worker desires to both create her family and accomplish her career, in any given field she may work.

In fact, according to Brewster and Rindfuss<sup>22</sup>, social security for infancy and support to families give other numbers which allow to show the differences between various Countries, but these data are complex to collect, investigate and understand. That's why the majority of economic and statistical studies do not claim to understand and explain them, but uses them only to illustrate the analysed phenomenon.

If faced with such a framework, normally the task of the jurist is to carry out a critical analysis of the legal instruments adopted by the legal system in concern, to assess what other measures are needed to correct the still unsolved critical points. Therefore, in the following paragraphs a synthetic analysis of both the national and supranational normative data concerning female work, also through the comparison with other regulatory models adopted by different legal systems in the European area.

### **3. THE ITALIAN LEGAL SYSTEM FROM THE CONSTITUTION TO THE CODE FOR EQUAL OPPORTUNITIES.**

In Italy, the guiding line which has marked the shift from the safeguard of female work to that of equal opportunities, leading towards the promotion of equal opportunities, can be drawn from art. 37 of the Italian Constitution, according to which “a woman worker has the same rights and, for equal work, the same wages as men. Working conditions have to allow the fulfilment of her essential role in the

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<sup>22</sup> K. BREWSTER-R. RINDFUSS, *Fertility and women's employment in industrialized nations*, in *Annual Review of Sociology*, 2000, 26, 271-296.

family and ensure the mother and the child with a special and adequate protection”<sup>23</sup>.

Prior to the Republican Constitution the protection of female work (dating back to the end of XIX century – early XX century) had been characterised by its assimilation in that of child labor (to whom women were united by the nature of “half forces”, because of their alleged psycho-physical inferiority compared to men), thus justifying the particular protection and consequently a series of prohibitions and exclusions from almost any profession and public employment in general, also connected with the exercise of public judicial powers and of political rights or of military defence of the State<sup>24</sup>.

Art. 37 of the Constitution leaves this protective attitude behind: undoubtedly, this article emphasises on equal treatment, and justifies the need to adopt special protection measures only for working mothers. However, some concern has emerged in the troubled interpretative trail of art. 37, because of its reference to the “essential role in the family” of female workers, and due to the uncertain relation between the principle of equality and that which would justify the peculiarity of those protection measures. Basically the idea has prevailed of the supremacy of the first principle over the second one which, moving within the general framework traced by equal treatment, responds to the principle of substantial equality stated in comma 2, art. 3 of the Italian Constitution (“it is the duty of the Republic to remove all economic and social obstacles which, limiting de facto freedom and equality among citizens, prevent the full development of the human being and the

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<sup>23</sup> “La donna lavoratrice ha gli stessi diritti e, a parità di lavoro, le stesse retribuzioni che spettano al lavoratore. Le condizioni di lavoro devono consentire l’adempimento della sua essenziale funzione familiare e assicurare alla madre e al bambino una speciale e adeguata protezione”. On this article, abundantly, see T. TREU, *Commento all’art. 37*, in *Commentario della Costituzione* (by G. Branca), Bologna, Zanichelli, 1979, 170 et seq.; M. BARBERA, *Discriminazioni ed eguaglianza nel rapporto di lavoro*, Giuffrè, Milano 1991, and ID., *L’evoluzione storica e normativa del problema della parità retributiva fra uomo e donna*, in *Lav. dir.*, 1989, 593 et seq.

<sup>24</sup> L. n. 242/1902 and n. 1176/1919. This legislation is basically considered responsible for the so-called women employment segregation, later completed by R.D. n. 898/1939, containing the list of forbidden jobs and followed by the enumeration of particularly suitable services, and by L. n. 653/1934 aiming at granting a better job security, by placing limits to the employment of both women and children, and also through a list of unhealthy or dangerous or heavy jobs. It should be noted that only L. n. 977/1967 would make for the first regulatory intervention introducing a diversified protection for women and children, breaking the assimilation between women and children once and for all. On the legislation before the Constitution, see M. L. DE CRISTOFARO, *Tutela e/o parità. Le leggi sul lavoro femminile tra protezione ed eguaglianza*, Cacucci, Bari, 1979.

effective participation of all workers to the political, economical and social organisation of the Country”)<sup>25</sup>.

Nonetheless, the first laws approved after the Italian Republican Constitution entered into force have continued to follow the trend towards protection, particularly when dealing with protection against discriminations (L. n. 7/1963, which introduced the nullity of the so-called “spinsterhood clauses” and of the dismissal because of marriage) and the protection of motherhood and puerperium (L. n. 1204/1971). Therefore, post-constitutional legislation has substantially improved formal equality and has, instead, neglected the principle of substantial equality<sup>26</sup>.

However, as it is known to have been also in other European legal systems, the real impulse for the achievement of an anti-gender based discrimination right came from EU law<sup>27</sup>.

The principle of equal treatment between men and women, contained in art. 119 of the Treaty of Rome (later art. 141 TCE, now 157 TFUE) only from a retributive standpoint, was introduced in EU law with Directive n. 75/117 (retributive equality) and with Directive n. 76/207/CEE, which mainly aims at finding remedy to all discriminations prejudicing women's opportunities in sectors such as access to employment, professional training and working conditions; these two directives will be followed by: Directive n. 79/7/CEE on (compulsory) social security, Directive n. 86/378/CEE, on equal treatment concerning professional and social security schemes, as modified by Directive n. 96/97/CE, and Directive n. 86/613/CEE, which contains provisions on equal treatment between men and women who are engaged in a self-employment activity, later replaced by Directive n. 2010/41. Directive n. 97/80/CE will deal with the burden of proof of the discrimination.

<sup>25</sup> “E’ compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l’eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l’effettiva partecipazione di tutti i lavoratori all’organizzazione politica, economica e sociale del Paese.” M. ROCCELLA, *Manuale di diritto del lavoro*, Giappichelli, Torino, 2010, 233.

<sup>26</sup> M. V. BALLESTRERO, *Dalla tutela alla parità*, Il Mulino, Bologna, 1979, 250 et seq.

<sup>27</sup> For obvious systematic reasons, the writers of the present article chose to put a deeper understanding of EU law aside, to give more space, in a comparative perspective, to an analysis as much extensive as possible, of the peculiar aspects of the national legal system. Therefore, only for the sake of completeness, the principles contained in EU legislation will be illustrated synthetically. For a deeper understanding, see M. ROCCELLA, T. TREU, *Diritto del lavoro dell’Unione europea*, Cedam, Padova, 2012, 287 et seq. On the rich elaboration over the concepts of equal treatment and of discriminations given by the European Court Of Justice, see M. ROCCELLA, *La Corte di giustizia e il diritto del lavoro*, Giappichelli, Torino, 1997, 127 et seq.; G. F. MANCINI, *Le nuove frontiere dell’eguaglianza fra i sessi nel diritto comunitario*, in ID., *Democrazia e costituzionalismo nell’Unione europea*, Il Mulino, Bologna, 2004, 225 et seq. On the evolution of European anti-discrimination right, see M. BELL, *Anti-discrimination law and the European Union*, Oxford University Press, Oxford, 2002.

The kind of protection women are granted by EU law can be said to configure a “gender protection” i.e. a protection granted to a certain subject (women) when belonging to a certain group with specific characteristics, which you can not possibly leave out of consideration if the aim is to promote substantial equality between subjects belonging to groups with different characteristics.

In fact, the principle of substantial equality implies equal treatment of analogous situations and vice versa different treatment for different situations. Such statement is not compatible with a consideration of women as weak subjects, who are therefore recipient of a “hyper-protection”, but it can instead translate in particularly protective interventions when this is justified by circumstances and situations which are typical of the female condition.

In fact, the main and most evident derogation to the principle of equal treatment concerns the protection of motherhood and “putting into effect measures aiming at promoting the improvement of security and health at work for female workers who are pregnant, have recently given birth to a child or are breastfeeding” (Directive n. 92/85/CEE). Such Directive, also in the light of the previous national laws already in force, provides for a mandatory minimum protection, which however can be modified in melius by member States.

In particular, at art. 8.1 the Community legislator provides for a maternity leave for at least fourteen uninterrupted weeks, allocated before and/or after the child-birth; this period of time should also include a compulsory leave of at least two weeks, allocated before and after the childbirth (art. 8.2).

The period of leave has to be counted for the purpose of service and gives right to a remuneration or to an “adequate allowance”, granting the female worker with an income which equals at least what would be earned in case of leave for health reasons (art. 11). Furthermore, working mothers are protected through the prohibition of dismissal from the beginning of pregnancy until the end of the leave; providing them with the possibility to temporarily reorganise times and working conditions; and finally through the possible exemption from work, if risky for the health of the woman.

As pointed out before, the single States can integrate this system, but the absences of the mother worker, except when the legislation on parental and other special permits can be applied, are treated in the same way as in case of illness and therefore with the same treatment provided for the absences of male workers. Such system is not surprising when considering the fundamental principle according to which the exceptions to equal treatment, related to maternity, should be interpreted in a restrictive sense.

In fact, the principle of formal equality will have its definitive consecration in Italy with L. n. 903/1977 which implements the principle of equal treatment with reference to all aspects of a woman's working relationship, consequently repealing any inconsistent legislation (art. 19, L. n. 903/1977). In spite of some mitigation being kept (with reference to night work – except for specific exceptions –, and to the possibility granted to collective bargaining to single out particularly heavy works which should be forbidden, regardless the general repeal of such prohibition), in principle since 1977 equal treatment will touch each and every sector, both public and private (apart from the sectors of fashion, art and entertainment, because of the specificity of duties), each and every phase of the working relationship (employment, training and professional development, assignment of duties and qualifications, career progression). Moreover, the 1977 law modified art. 15 of L. n. 300/1970 (the so-called “Statuto Dei Lavoratori” - “Workers' Statute”), by adding gender to the already covered discriminating factors<sup>28</sup> and, consequently, introducing the general sanction of nullity for any pact or act resulting in gender discrimination, as well as the prohibition to discriminate through the marital, family or pregnancy status, or rather, in an indirect way, with pre-selection mechanisms – either through newspapers or in the advertising form – which refer to the belonging to a specific gender. In terms of pay, instead, the directive for equality will imply the same remuneration for equal (or of equal value) working performances, and the abolition of any professional ranking system not contemplating homogeneous criteria, through the differentiated assessment of female work (adopted by collective bargaining), and based on the assumption of female lower-yielding<sup>29</sup>.

Aiming at the fulfilment of the principle of substantial equality<sup>30</sup>, the real turning point towards the effectiveness of sanctions and of prevention, something on which L. n. 903/1977 failed, and towards the achievement of the promotion of equal opportunities, will be L. n. 125/1991<sup>31</sup>, whose contents can be classified into four fundamental aspects. The introduction of the difference between direct and indirect

<sup>28</sup> The final structure of the factors of discrimination covered in art. 15 after D. Lgs. n. 216/2003 includes the following: affiliation to trade unions or trade union activities; participation to strikes; political, religious, racial discrimination; discrimination based on language, disability, age or sexual orientation or personal beliefs.

<sup>29</sup> M.V. BALLESTRERO, *I giudici e la parità*, in *Pol. dir.*, 1982, 463 et seq.; G. DE SIMONE, *I giudici e la discriminazione sessuale*, in *Quad. dir. lav. rel. ind.*, 1990, 7, 109 et seq.

<sup>30</sup> D. IZZI, *Eguaglianza e differenze nei rapporti di lavoro. Il diritto antidiscriminatorio tra genere e fattori di rischio emergenti*, Jovene, Napoli, 2005, 131 et seq.

<sup>31</sup> T. TREU, *La legge sulle azioni positive: prime riflessioni*, in *Riv. it. dir. lav.*, 1991, I, 108 et seq.; M. V. BALLESTRERO-T. TREU (ed. by), *Commentario alla legge 125/1991*, in *Nuove leggi civ. comm.*, 1994, 1 et seq.



discrimination<sup>32</sup>, with the aim of overcoming the so-called structural conditioning (distribution of family roles, cultural stereotypes, deficits due to professional qualifications) which would be an obstacle for a full participation of women to labor market. The introduction of positive actions, which are optional by now for both private and public sectors (L. n. 183/2010), but were initially compulsory for public administrations and, among other things, burdened by a heavy penalty system and by the provision of forms of positive legal actions (see for instance art. 57, D. Lgs. n. 165/2001, which provides for a 1/3 reserve requirement of female presence in selection committees and the preparation of training and refresher courses for women in proportion with their presence)<sup>33</sup>. The provision of the Institutions for Equality (National Committee and Councillors for Equality, at all levels of government), with the aim of correcting the weakness of the judicial and institutional penalty system provided by L. n. 903/1977.

Moreover, the analytical provision of a capillary system of judicial protection based on the following responds to the same logic: the ordinary invalidity action; the special action ex L. n. 903/1977 (calibrated in line with art. 28, L. n. 300/1970); the institutional action (also based on the same model outlined by art. 28, L. n. 300/1970), which has to be promoted both when the discrimination has a collective relevance (with the possibility of obtaining at the end a collective timetabled plan of removal of the discriminating effects), and when delegated by the discriminated person, with the aim of substituting it with the institutional entity, in order to obtain the nullity of the discriminating act and the ceasing and removal of its effects<sup>34</sup>. As well as the principle of the partial inversion of the burden of proof, according to which once facts are alleged, even on a statistical basis, regarding the assumption of the existence of a discriminating case, the burden of proof of the groundlessness of the discrimination is on the defendant.

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<sup>32</sup> Both definitions have been later modified by D. Lgs. n. 215/2003 and n. 216/2003; in their final version, they have been included in the Code for equal opportunities between men and women, D. Lgs., n. 198/2006. On the many factors provided by the new anti-discrimination law, M. BARBERA (ed. by), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Giuffrè, Milano, 2007.

<sup>33</sup> U. ROMAGNOLI, *L'eguaglianza delle opportunità*, in *Riv. trim. dir. proc. civ.*, 1989, 957 et seq.; T. TREU, *Azioni positive e discriminazioni alla rovescia*, in *Lav. dir.*, 1988, 65 et seq.; M.V. BALLESTRERO, *Azioni positive. Punto e a capo*, in *Lav. dir.*, 1996, 117 et seq.; M.G. GAROFALO, *Lavoro delle donne e azioni positive*, Cacucci, Bari, 2002.

<sup>34</sup> On the subject of legal protection, see C. RAPISARDA, *Tecniche individuali e collettive a confronto nella tutela giudiziale dei diritti di parità*, in *Quad. dir. lav. rel. ind.*, 1990, 7, 102 et seq.; C. ASSANTI, *Discriminazioni indirette e rimedi nel rapporto di lavoro*, therein, 15 et seq. It should be noted that Directive. 2006/54/UE has merged Directives no. 75/117/EEC, 76/207/EEC and 97/80/EC 86/738/CEE, which had been repealed by now, into a single text. Also Directives no. 96/34/EC and 86/613/EEC have been repealed and replaced by Directives no. 2010/18/EU and 2010/41/EU.

After L. n. 53/2000 and L. n. 151/2001, that will be mentioned below, the whole regulation concerning equal opportunity will be preorganized by D. Lgs. n. 198/2006 which gave rise to the current code for equal opportunities, a regulation that would be then modified by D. Lgs. n. 5/2010, in implementation of EU Directive n. 2006/54<sup>35</sup>.

Therefore, the Code summarizes the whole subject by organising it into four books.

The first book contains the general principles, the second governs equal opportunities in ethic-social and familiar relationships, the third deals with the protection of equal opportunities in economic relations, and the fourth grants equal opportunities in civil and political relations.

So, labor law notions<sup>36</sup> are contained in the third book, where the current definitions of direct, indirect discrimination (art. 25) and of harassment (art. 26) can be found<sup>37</sup>; these definition are followed by the provision of the following: prohibition on discrimination in access to employment, to training, to professional promotions; in working conditions (art. 27), in remuneration (art. 28), in the assignment of working duties and in career (art. 29), in the access to social security services (art. 30) and to complementary and collective pensions (art. 30-bis)<sup>38</sup>, in the access to public employment (art. 31); prohibition on discrimination in joining the Army, the special forces (art. 32) and the Revenue Guard Corps (art. 33) as well as, more generally speaking, any military career (art. 34); prohibition of dismissal on the grounds of marriage (art. 35); judicial protection (through the provisions concerning legal legitimacy (artt. 36 e 37), the measure against discriminations (art. 38), the appeal in urgency (art. 39) the burden of proof (art. 40)); the promotion of equal opportunities, with particular reference to the definition of the positive actions (art. 42) and their aim, their promoters and financial coverage (artt. 43-47),

<sup>35</sup> M. G. GAROFALO, *Una riflessione sul codice delle pari opportunità tra uomo e donna*, in *Riv. giur. lav.*, 2007, I, 719 et seq.; T. GERMANO, *Il codice delle pari opportunità tra uomo e donna*, in *Lav. giur.*, 2006, 748 et seq.

<sup>36</sup> It should be noted that art. 27 addresses the prohibition of discrimination in employment, as an employee or self-employed or in any other form.

<sup>37</sup> On which, broadly, P. CHIECO, *Una fattispecie dai contorni sfuggenti: la molestia nei rapporti di lavoro*, in *Riv. it. dir. lav.*, 2007, I, 65 et seq.; G. DE SIMONE, *Le molestie di genere e le molestie sessuali dopo la direttiva CE 2002/73*, in *Riv. it. dir. lav.*, 2004, I, 399 et seq.; A. PIZZOFERRATO, *Molestie sessuali sul lavoro*, Cedam, Padova, 2000, but also D. IZZI, *Molestie sessuali e rapporti di lavoro*, in *Lav. dir.*, 1995, 285 et seq.

<sup>38</sup> On which, in general, P. OLIVELLI, *Donne e previdenza*, in *Riv. dir. sic. soc.*, 2008, 367 et seq.; O. BONARDI, *Da cavallo di Troia a leva di Archimede. Previdenza complementare e diritto antidiscriminatorio in Europa*, in WP C.S.D.L.E. “Massimo D’Antona”.INT, n. 83/2010.

and of the positive actions in public administrations (specifically regarding employment and promotions, art. 48).

Moreover, in the public sector the regulation has been followed by a directive of the Presidenza del Consiglio – Dipartimento della funzione pubblica (Premiership Head Office – Public Office Department) of May 23, 2007 containing some guidelines for public administrations and local authorities in order to achieve a better implementation of the principle of equal opportunities. In particular, some measures are provided to prevent direct and indirect discriminations, as well as the adoption of triennial plans and of positive actions to include women in those sectors where they may be under-represented, whenever there may be a gap between the female and male presence which is not under 2/3; all this aiming at an organisation of work able to promote the reconciliation between working time and private life times turning the skills of women into better account; other aims of the above mentioned measures are the following: to avoid penalizing women as far as senior positions and remuneration are concerned, when taking care of recruitment and personnel management; to organise training through refresher courses in proportion to the female presence and consistent with their own family needs; to promote the creation of the Sole Guarantee Board.

Finally, as mentioned above, with D. Lgs. n. 5/2010, in implementation of EU Directive n. 2006/54/UE (concerning the fulfilment of the principle of equal opportunity and of equal treatment between men and women in respect of employment and occupation) Italy intervened, although very late, on the code for equal opportunities. However, the most shared opinion on such last intervention expresses concerns, since though being rich in statements of principle about the introduction of significant positive actions, it is not followed by an adequate financial coverage to implement the measures it provides<sup>39</sup>.

The Decree adopted by Ministero del lavoro e delle Politiche Sociali (22 December 2012) introduce, as a pilot project, new measures (for the period 2013/2015), such as a compulsory and voluntary leave regime for the father that it cannot be exchanged with the mother one, as it is in addition to other periods. Moreover the new provisions foresee also the opportunity – for the mother - to exchange the whole voluntary leave period or part of it with child care services, such as babysitting, kindergarten or nursery schools offered by public or private certified entities. (artt. 4-8).

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<sup>39</sup> For the contributions contained in the newspapers see Emma Bonino's interview, *Direttiva sulla parità senza budget*, in *Il Sole 24 ore*, December 21, 2009, p. 26.

Once the analysis of the legal framework has been completed, it is possible at this point to forward an early consideration: apart some critical observations, which can not be dealt in depth here, the Italian legal system appears to be complete, in perfect conformity with the EU legal system like many other legal systems in the European area, and sufficiently suitable therefore for the fulfilment of equal treatment. Even the promotion of equal opportunities appears to be granted: despite of the absence of compulsoriness of its adoption in the public sector, the possibility to activate plans of positive actions whenever a significant hiatus between the female and male presence may be reported, seems to be an appropriate measure to schedule a future alignment between the two genders in advance. Even under the profile of effectiveness, the apparatus of judicial solutions and procedural instruments offered reveals to be appropriate to put the person, or the group, who may be victims of discrimination (even just potentially) under the conditions of asserting their rights.

If anything, the problem could be different, but does not relate to the type of solutions abstractedly proposed by the legal model, and concerns their appliance as proposed by the labor market, given the recent case of the anti-pregnancy clauses contained in the RAI (the national Public Italian TV Broadcast) employment forms<sup>40</sup>.

Nevertheless, the issue has caused scandal in public opinion, which shows how time has come by now for a general refusal of discriminating gender-based practises, even only under the social and cultural profile.

At this point, however, it is necessary to combine two of the data obtained, especially in light of one of them which, among all the others represented, cannot but appear relevant; if the regulatory action has succeeded in harmonising the legislation on equal opportunities at a European level, it is not easy to justify how Italian women, who even compared to other European are particularly present and very good in education, even in postgraduate training, are weak in the entry phase of the world of work and give in their career progression and in the occupation of apical

<sup>40</sup> Point 10 in the consulting contract form adopted by RAI stated: “in case of illness, accident, pregnancy, force majeure timely communication must be given. If the above mentioned facts prevent, in our opinion, the regular and permanent fulfilment of the obligations agreed, the contract could be resolved by law, without any extra payment or compensation in your favour” (“nel caso di suo malattia, infortunio, gravidanza, causa di forza maggiore dovrà darcene tempestiva comunicazione. Ove i fatti richiamati impedissero, a nostro parere, il regolare e continuativo adempimento delle obbligazioni convenute, quest’ultima potrà essere risolta di diritto, senza alcun compenso o indennizzo a suo favore”). The state-owned enterprise defended by asserting that that formula referred only to advises, and therefore not the employment contracts, but it has to be said that RAI counts more than 1600 “temporary employee” advisor and that collaboration, in the journalistic sector, is the tool of choice for acquiring work.

positions, until they disappear completely; moreover, if they ever reach those apical positions they are particularly appreciated up to induce, even in less favourable times, their preference on their male colleagues.

Faced with this reality, if law, as it seems, does not appear capable of providing adequate response, before looking for further satisfying correctives, the jurist is required a different effort leading him to deal with other types of approaches: this reason lies underneath the striking position expressed recently by the Global Entrepreneurship Monitor, based on a 2004 study which confirmed a positive and relevant relation in all Countries between the fact of a woman being convinced she holds the skills, the capabilities and the experience required to start a new business and her chances to succeed. As well as, vice versa, there is a strong and significant negative correlation between fear of failure and the probability for a woman not to make it in starting a new business. This should lead to investigate the possibility that the answers to the questions raised could be found elsewhere, perhaps within personal choices and individual bent, if it is true that, besides fear of failure, on both sides there is the so-called fear of success which seems to articulate on two levels: on one hand it induces the female worker to fear that “daring” on career could mortify her real bonds (those with the family of origin, with a newly formed one, or of future creation); on the other hand, there is the fear that men could be intimidated by the success of their partners and that this eventuality could influence the future of the relationship. As if success and professional achievement could act as factors likely to affect the more traditional cultural canons of femininity<sup>41</sup>.

All this leads to move the level of the analysis on another area, that of preconceptions and prejudices, of social and cultural conditioning<sup>42</sup>, even within the couple, or the family, but in a perspective that is different from the traditional one, according to which the female worker is seen not so much as a victim of the system, but rather as the main responsible for individual choices and propensities, and it is on these that legislation should focus to grant female workers with better chances of professional achievement.

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<sup>41</sup> In such perspective the so-called "personal fail trend" seems interesting: a formula developed in the literature which would explain the feelings of female employees facing the prospect of earning more than their husbands. This type of approach has found partial confirmation in the survey carried out by the Ivy League universities, according to which women fear to stand out intellectually because this may influence the opinions men have about them negatively.

<sup>42</sup> On a sociological level, see the analysis by S. SCHERER-E. REYNERY, *Come è cresciuta l'occupazione femminile in Italia: fattori strutturali e culturali a confronto*, in *Stato e Mercato*, 2008, 183 et seq.

#### 4. LEGISLATION ON PARENTAL LEAVE: A COMPARATIVE APPROACH.

In fact, the aim of affecting the distribution of roles within the family in an attempt to relieve the position of women from those weights that culture and tradition have entrusted them almost exclusively has been pursued at EU level through the legislation on "parental leave".

With a view to full implementation of equal opportunities, the EU legislator promoted a policy aiming at equalizing both the role and responsibilities of men and women within the family and in the professional circle.

With Directive n. 96/34/CE, which regulates this matter in the specific, the European legislator intervenes for the first time with measures aiming at supporting motherhood and at the same time at the implementation of Equality policies. As a matter of fact, the previous Directive n. 92/85/CEE on "granting security and health to female workers who are pregnant, have just given birth to a child or are breastfeeding" certainly had a more restricted field of action.

Therefore, the regulation deals more carefully with the issue of equalization of working mothers and fathers, also due to the ever-growing presence of women in the labor market and the consequent need, for the latter, to reconcile working times and spaces with family needs.

Directive n. 96/34/CE concerning parental leave, in acknowledging the *Accordo Quadro* (Framework Agreement) signed in December 1995 between the inter-branch general organisation (UNICE-CEEP and CES), clarifies the terms of implementation and scope of such legislation within the State members (artt. 1 and 2) and entrusts the latter and their national social partners with the power to determine the conditions of access and the mode of application of the protection afforded in the light of the provisions of the above mentioned Framework Agreement.

According to the provisions in the Agreement, parental leave consists in the right for parents (both of them, unlike what happens in the case of maternity leave) to refrain from work for an extended period for the care of children, both adoptive or natural, in their first eight years of life, upon notice. Such right is granted to "all workers, of both sexes, having signed a contract or being employed as defined by the law, collective agreements or the practices in force in each State member" (clause 1.2) and the period of leave for each parent has to have a minimum total duration of three months.

Therefore, the Community legislation lays down the mandatory minimum requirements and the scope of parental leave, allowing the possibility for the State to

introduce provisions that would modify such regulation<sup>43</sup>. Indeed, pursuant to clause 2.3 national laws and collective agreements can regulate various aspect, such as for instance the time course of the leave; its subjective requirements; timing and mode of notice; conditions and rules of the leave in case of adoption or of other peculiar forms of entry of a child in a family, such as temporary or pre-adoptive fostering for instance.

Besides, the Framework Agreement and the directive provide State members and national social partners with the obligation to adopt all necessary measures to protect workers who make use of their leave entitlements from a possible dismissal and from any other form of penalisation or deskilling which could result from the application or enjoyment of parental leave.

To this end, clause 2.5 provides for the right of the worker, who finished the leave, to return to the same job, and hopefully, if this is not possible, to an equivalent or similar job consistent with its contract and its employer-employee relationship, as it existed prior to the use of the leave. This is to prevent, on the one hand, the return to work from resulting in an unfair penalisation for the working parent (whether male or female) and, second, that in case the return to work involves a transfer to another production unit, the transfer is turned in an instrument of “forced” sacking from the family.

It seems appropriate to point out, though, that the exercise of this right is subject to the actual business needs and can not therefore be considered as absolute.

Clause 2.6 of the *Accordo Quadro* (Framework Agreement) aims at protecting the “acquired or being acquired rights” and the economic and normative position of the parent who decides to take leave, as well as granting its eventual continuation and update.

For the foregoing reasons, at the end of the leave period the rights in relation to pay accrued during that same time should be considered in the light of any changes made by the law, collective agreements or national practice.

Such a system, then, has the advantage of allowing a “constant adjustment” of the protection within the minimum common standards shared by all State members.

The Community legislator has intervened again on the regulation concerning parental leave, on March 8, 2010 (directive n. 2010/18/UE) with the same formula provided by the 1996 directive, preceded by a framework agreement, which has improved some aspects of it yet without overcoming the most critical issues raised

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<sup>43</sup> See clauses 4.2 and 4.3 of the above mentioned Agreement.

in different State Members. In particular, the new directive has affected the minimum duration of the leave to which each parent is entitled raising it to four months, one of which, however, can not be transferred to the other parent for any reason, with the obvious aim to involve the father in the birth and care of the child; other measures deal with the return to work after the leave and the provision of rules which make work more flexible in light of the needs of families, among which the maintenance of contacts between the worker and the company during the period of leave is the most important<sup>44</sup>.

Just in relation to the different pertinent discipline in force in several legal systems<sup>45</sup>, it is interesting to note that the Italian legislature has proved more indulgent than others, providing for a right for leave in addition to parental leave, when particular specific events and causes occur<sup>46</sup>, but also establishing longer periods of leave and expanding the sphere of the protected subjects as much as possible. Moreover, as we shall see, even other States, including the UK<sup>47</sup> (only following directive no. 97/75/EC and the 1999 Employment Relation Act), have complied with their obligations under Community law, putting the measures provided for in Directive n. 96/34/EC into practice.

Parental leave today makes for a valid instrument for the implementation of the principle of equality between men and women with respect to family and professional responsibilities, because it aims at promoting the contribution of both parents in the care and education of children, without any distinction or separation of roles but rather, if anything, according to an idea of mutual integration of man and woman in the family as well as in extra-familiar activities.

## ITALY

The drafting of the Consolidation Act (D. Lgs. n. 151/2001) "for the protection and support of motherhood and fatherhood" is out as an important outcome in the field of social policies and is certainly a milestone in the long journey for the protection of women, because, also in line with the latest Community guidelines, it co-

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<sup>44</sup> As it was with the 1996 Directive, also this provision does not lead to particularly stringent obligations on the States, which are left with wide discretion in the implementation phase, whereby the level of harmonization can only be said to be minimal. See also F. TORELLI, *La difficile condivisione del lavoro di cura. Spunti sui congedi parentali*, in *Lav. dir.*, 2010, 463 et seq.

<sup>45</sup> For a detailed analysis see the sections of the present article dealing with the single EU legal systems.

<sup>46</sup> Significant provisions on the issue are contained in L. n. 53/2000.

<sup>47</sup> In a first phase the UK weren't even bound by the minimum regulation contained in the Agreement due to the "exemption clause" from Social Policies contained in the Treaty of Maastricht.



ordinates a number of provisions previously in force to reconcile the role of the woman-mother and the woman-worker.

In fact, as we have seen above, it is however the Constitution (art. 37) itself that establishes equality between male and female workers, while recognizing the need to ensure women with working conditions which enable women to fulfil their "essential" role in the family.

Indeed, the laws approved during the first Republican phase had taken the idea that child care and related family activities were exclusive duties of women as a starting point and, therefore, had to provide for a limited number of not only economic welfare remedies, in order to avoid that the accomplishment of these duties could affect the mother-worker, her income and the ability to continue working in a period following the child's birth.

The Constitutional Court has played a propulsive role in the evolution of the regulations concerning motherhood; this is also made evident by the case law analysis of the provisions contained in the Laws n. 1204/71, n. 903/77 and n. 53/2000, as combined and coordinated in the Consolidation Act n. 151/2001, some of which seem to have acknowledged principles sanctioned by the Court in its decisions.

The extension of some forms of protection, which were traditionally reserved for the mother, also to the father certainly has a "constitutional" matrix aiming at the protection of the interests of the child and at the co-responsibility of the fatherly figure. Another innovation which shares a judicial matrix and has been later acknowledged by the legislator, is represented by the extension of the safeguard of motherhood also to adoptive and foster parents.

Therefore, thanks also to the contribution of the Constitutional Court the standards of protection in the field result being particularly high compared to both the indications contained in Directive n. 96/34/EC, and the solutions adopted by other European Countries.

With specific regard to the forming of legislation, however, the key idea of the Consolidation Act and of the legislation of the last years has been to provide instruments to support motherhood and fatherhood in a perspective of integration of roles in both the family and work dimension. Therefore, it seems clear what was the underlying intention: to promote both equal opportunities and equal treatment between men and women.

Art. 3, comma 1, in fact, forbids "any gender-based discrimination in access to employment, regardless of the mode of application and whatever the sector or

branch of activity (...) carried out by making reference to the marital or family status or to pregnancy”.

The same prohibition is provided for the matter of treatment in terms of pay and regulatory work tasks, career progression and professional qualification (art. 3, comma 3).

As far as motherhood protection is concerned, the Consolidation Act continues in considering the employee as the sole entity entitled, primarily, to the use of “compulsory leave” (artt. 16 et seq.) yet still aiming at a general equalization.

Compulsory leave has to be taken for the two months before and the three months after childbirth, but flexibility correctives are allowed in dependence of special circumstances, such as in the case of premature birth. And in fact, in this case, the days of leave which have not been taken before the birth will be counted among those to enjoy post-partum<sup>48</sup>.

Art. 25 of the already mentioned Consolidation Act, provides the right for compulsory leave also for the father worker in case of death or serious insanity of the mother or in case of abandonment, as well as in the case of sole custody of the child to the father<sup>49</sup>.

In any case, the person who takes compulsory leave is granted the right for the benefit provided by art. 22 of the Consolidation Act, as well as the right to have this period of time computed towards the length of service<sup>50</sup>. Also, the prohibition of dismissal for the entire period of compulsory leave and until the completion of one year of age of the child finds application for both men and women.

As far as the regulation on optional leave (i.e. parental leave) is concerned, the Consolidation Act contains a fundamental innovation (yet already provided in L. n. 53/2000) compared to the previous legislation, since it grants the right for such leave to each parent (art. 32, comma 1). Specifically, while L. n. 903/1977 provided the father with the right for optional leave only if the mother had expressly waived it, the new regulation gives each parent a six months period of leave, provided that added together they do not exceed the maximum of ten months. In this regard, it is interesting to observe how the father has the possibility

<sup>48</sup> Moreover, such need had already been pointed out by the Constitutional Court, which hoped for a modification of the pre-existing regulation in order to grant “terms suitable to ensure an adequate protection for both the mother and the child”. See Corte Cost., 7 luglio 1999, n. 270, in G.U., prima serie speciale n. 27.

<sup>49</sup> See the verdict of the Constitutional Court, January 19, 1987, n. 1, in *Dir. fam. pers.*, 1987, I, 507 et seq., where such right was acknowledged to the father in case of “impossibility” for the mother to benefit from it.

<sup>50</sup> See. Art. 25, D. Lgs. n.151/2001.

to increase the period of optional leave up to seven months, with the consequent increase in the overall length of the leave to eleven months, "if he exercises his right to be absent from work for a period of no less than three months "(art. 32, comma 2). This rule has the main function of promoting a greater participation of male workers in the care of children and in managing the family. Such a provision not only has no correspondence in the systems of protection implemented by the other Countries considered by this analysis, but it certainly goes far beyond the measures contained in the Community legislature which though provides for it as an optional measure.

The scope of this incentive seemed so innovative that someone even concluded that with this rule some "kind of positive action provided ex lege" had been imposed, to promote equality of opportunity and treatment between men and women<sup>51</sup>.

Another important innovation is represented by the acknowledgement of the right to be absent from work in favour of one of the parents even when the other hasn't got that right due to the fact that he/she is not an employee or is unemployed. And moreover, failed the idea according to which the holder of the right for optional leave would mainly be the mother, any different solution does not appear feasible. In fact, once the father is recognized as the holder iure proprio of the right for leave it would not make sense to deny him that same right if the woman is unemployed or is self-employed.

The new legislation on maternity benefit and parental leave, however, is also applicable with regard to self-employed and freelancers (respectively artt. 66 et seq., and artt. 70 et seq.), even if they have a reduced period of abstention and different conditions of remuneration compared to female employees. The policy of extending protection to such persons has begun with L. n. 546/1987 and the subsequent L. n. 379/1990.

The Consolidation Act, in particular, regulates this matter by distinguishing the different existing systems, in full compliance with the principles laid down in a series of decisions of the Constitutional Court. In fact, according to the Court the principle stated in art. 37 Const. relates only to dependent job and aims at granting "the protection of employees against the employer and not of the way how self-employed workers self-manage the performance of their freelance activity"<sup>52</sup>.

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<sup>51</sup> V. L. CALAFÀ, *Congedi e rapporto di lavoro*, Cedam, Padova, 2004 and also R. DEL PUNTA-D. GOTTARDI (ed.), *I nuovi congedi*, il Sole 24 ore, Milano, 2001.

<sup>52</sup> See Corte Cost., February 12, 1996, n. 31, in *Giur. Cost.*, 1996, 293 et seq.

It appears clear, then, that given the structural differences between self-employment and dependent job, the same pension scheme for both would not be justifiable. Therefore, in relation to the same event of motherhood, different economic and regulatory treatments are needed for self-employed and subordinate female workers, just depending on the different situations in which they operate, as well as for the different contributory systems.

In particular, relating to the issue of maternity benefit for female notaries, the Court has confirmed the inapplicability of art. 37 Const., pointing out how the self-management of their activity allows self-employed women to choose times and modality of work in order to reconcile professional needs with the prevailing interest of taking care of the child.

Besides, according to the Court the maternity benefit has the main aim of “granting the mother worker the possibility to live this phase of her existence without a radical reduction in the standard of living her job has allowed and to avoid, therefore, motherhood to be linked with a state of economic need”. In the case of the freelancer “the probable decrease in income due to the suspension or reduction of the working activity is compensated by the economic support from the solidarity of the category to which the woman belongs” and such protection seems to be adequate for the peculiar characteristics of the category in concern<sup>53</sup>.

As already pointed out before, the Consolidation Act did not fail to grasp the warning of the Constitutional Court, developing a discipline that seems to ensure increased and adequate protection of the value of motherhood also in favour of self-employed, not on the basis of a comparison, pursuant to art. 3 of the Constitution, through the rules provided for female employees, but rather taking into account the need to protect the health of the mother and the child (art. 32 Const.), and the value of maternity (art. 37 Const.), yet always respecting diversity.

As far as the right for daily rest is concerned, it is provided for both parents in the cases and with the modalities regulated by artt. 39 and 35 of the Consolidation Act (respectively for the mother and for the father); the right for “leave because of sickness of the child” (art. 47) is also granted to both parents.

Perfectly in line with Directive. 96/34/EC, the legislator also took care in providing for measures to prevent all forms of criminalization of both male or female worker, linked to the application for leave or its use<sup>54</sup>.

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<sup>53</sup> See Corte Cost., January 29, 1998, n. 3, in [www.giurcost.org/decisioni](http://www.giurcost.org/decisioni).

<sup>54</sup> Artt. 17 and 18 L. n. 53/2000 (already embodied in the Consolidation Act) containing “Provisions for the support of motherhood and fatherhood, the right to care and education, and for the coordination of the timing of the cities”.

In particular, at the end of the period of compulsory leave both female and male workers have the right to retain their job and to return back in the same production unit where he/she was occupied at the beginning of the abstention or otherwise located in the same Municipality, as well as the right to remain there until the child is one year old. Both are also given the right to be assigned to the last covered duty or to duties of equivalent value. Moreover the law provides for the nullity of the "dismissal caused by the application or the taking of leave."

According to the analysis carried out, the Italian law in force is, therefore, not only in harmony with Community law, but also more rigorous than the latter in the protection of working mothers and working fathers<sup>55</sup>. Lastly, in fact, in the implementation of Directive 2010/18/EU, the L. n. 92/2012 (aka "Legge Fornero" - "Fornero Act") introduced a statutory period of leave for the father, which can not be transferred to the other parent, and that will therefore be lost if the father does not use it.

It must be said that the Community policy is inspired by a concept of equal treatment between men and women which sometimes reduces the space to a minimum in order to better consider the specific needs of working mothers. Such a perspective may, perhaps, appear markedly "egalitarian" to an Italian observer and, in some respects, even in contrast with the rigidly protective mark of our legislation, but in a careful analysis the importance of an intervention aimed at creating those common minimum standards necessary to the concrete realization of equal treatment between men and women in respect of the different solutions prepared by the various EU Countries can not be overemphasised.

## UNITED KINGDOM

As in Italy, also in the UK a first phase of the man-woman equality policies has been characterised by the choice of the legislator to protect the woman, considered as the weak subject compared to man and therefore deserving a special protection.

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<sup>55</sup> Anyway, it is good to remember that the Community directives in the field of support for motherhood and fatherhood only provide minimum levels of protection, with the aim of improving the most under-developed national situations. Therefore, the indications of the Community legislator are the result of a sort of weighted average of the protective measures provided for by the laws of the various Member States. See BALLESTRERO, *Maternità*, voice in *Dig. Disc. Priv.*, 1993.

Important moments in the evolution of the regulation on the issue are represented by the issuing of the 1970 Equal Pay Act and of the 1975 Sex Discrimination Act<sup>56</sup>.

The legislator chose a different perspective only in 1986 with the reform of the second Act just cited, aiming at reconciling the equal opportunity policies with the ones concerning social security and maternity protection.

Within a few years, in fact, the 1986 Sex Discrimination Act and the 1989 Employment Act modified the text of the '75 in order to standardize the English law with the Directives on equal treatment between men and women<sup>57</sup>. Therefore, in this phase the idea that the promotion of the emancipation of women can also pass through the legislation on working mothers finds its way to the normative fabric. To tell the truth, however, the British reforms of the 80s were not sufficient to promote a change in the effective role of the woman in the family and her subsequent equalization to man, neither in employment nor in the family.

It can be interesting to observe how Italian law lived such a development well in advance compared to the UK. This is evident if we consider that the reforming work of the Constitutional Court and the legislation itself, since the 70s, pushed in the direction of promoting gender equality also through an adjustment of the working conditions of women to their family functions<sup>58</sup>.

The 1986 Social Security Act clears up the matter through a number of provisions some of which, albeit with a number of corrective measures, are still in force.

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<sup>56</sup> The first had the elimination of all discrimination between the sexes in terms of salary and, more generally, with regard to working conditions as its main objective. The second, in addition to providing a set of instruments aiming at the removal of all kinds of discrimination of a sexual nature, introduced for the first time in Europe, the originally American distinction between direct and indirect discrimination. In addition, the scope of the SDA concerned, albeit marginally, also the sphere of social security and maternity protection.

<sup>57</sup> In particular, consider Directives n. 76/207 on "equal opportunities" and no. 79/7 on "the progressive implementation of the principle of equal treatment between men and women in matters of social security."

<sup>58</sup> Among the many innovations made by the *SDA* in 1986, include the provision of an equal treatment of men and women in matters of retirement due to age limits (artt. 2-3); as well as the repeal of all rules concerning restrictions on working hours and conditions of employment, such as those relating to night work or very tiring jobs. With regard to the issues of night work and pensions, these have been solved in Italy, at the same time the *SDA* was issued in 1986, through a number of rulings by the Constitutional Court. In particular, see: on night work, Corte Cost., July 24, 1986, n. 210 ([www.giurcost.org](http://www.giurcost.org)); for the equalization of the pension, Corte Cost., June 18, 1986, n. 137 ([www.giurcost.org](http://www.giurcost.org)) and Corte Cost., April 27, 1988, n. 498 ([www.giurcost.org](http://www.giurcost.org)).

In particular, it recognises the right for a period of paid maternity leave equal to eighteen weeks to women working in possession of certain requirements, specifically mentioned in the law itself; this period begins, unless specific exceptions occur, not before the eleventh week and not after the sixth week preceding the birth (Compulsory Maternity Leave).

Its corresponding benefit (Statutory Maternity Pay) is to be distinguished from the maternity compensation (Maternity Allowance), provided by the 1975 Social Security Act. The latter is paid to all female workers who did not make use of the first, but which have been employed for a certain period of time prior to child-birth<sup>59</sup>.

With the 1999 Employment Relation Act UK acknowledged<sup>60</sup> Community Directive n. 92/85/EC aiming at the "improvement in the safety and health at work of pregnant, puerpera or breastfeeding workers" and the following one, n. 96/34/EC on "parental leave". Therefore, the British Parliament provided for the enactment of a law for the protection of motherhood and fatherhood, which contains the fundamental imperative principles and tells the government which coordinates to follow for the development of a set of regulations, to which the sorting out of detailed normative solutions is devolved<sup>61</sup>.

<sup>59</sup> As for the propulsive role of case law in the evolution of the matter, it should be noted that the Courts have been concerned to extend the regulation to situations not expressly provided for by the legislator but that according to criteria of reasonableness and advisability appeared worthy of protection. Therefore, just through the propulsive role of case law the legislator had tried for a number of years to ensure standards of protection consistent with the levels contained in the EU guidelines. In Italy, the same results were secured at the level of forming legislation, whereby there is a two-track system in the field. In addition to the remuneration referred to in the Consolidation Act "for the protection and support of motherhood and fatherhood" issued by D. Lgs. no. 151/2001, there will be another bonus for mothers who do not benefit from social security treatment of maternity (see art. 80 comma 10, L. no. 388/2000).

<sup>60</sup> Directive n. 97/75/EC made the clause of the Maastricht Treaty which provided for the exclusion of the UK from the Social Policies of the European Union ineffective.

<sup>61</sup> The *ERA* recognizes the female worker the right to take time off work for the so-called *Ordinary Period*, in any case for not less than six weeks (*section 71*) and it is up to the worker, except as provided in relation to *Compulsory Maternity Leave*, i.e. compulsory leave, to choose the time when to start to benefit from that period and its related pay and pension regime. A worker who enjoys the *o.p.* Leave has the right to enjoy the same "*terms and conditions*", that would have been recognized if she had not entered into motherhood. This provision concerns the regulatory treatment but not the retribution, since the *ERA* specifically leaves the task of regulating specifically the terms and conditions of the latter to the Government. It is provided in favour of the working mother also to have the possibility to enjoy an additional period of leave (*Additional Maternity Leave*). At the end of the period of leave the female worker has the right to keep the same job she had before the application for the abstention from work, or at least to a similar one with the same regulatory conditions and pay; as well as all rights accrued for pension and social security over of this period. In the event of dismissal or redundancy payment of the female worker for reasons completely independent from motherhood a regulatory standard

The provisions of the ERA concerning "parental leave", issued to implement Directive 96/34/EC are still to be considered as maintaining the perspective of integration between the sexes<sup>62</sup>.

The legislator, in particular, grants the male and/or female worker, who has worked continuously for at least one year and with the same employer, the right for a period of unpaid leave of up to thirteen weeks. This right is granted to both parents in order to ensure the care and education of children who are up to five years old; as well as to the adoptive parents who can, however, enjoy it for a period not exceeding five years and provided that the adopted has not yet reached eighteen years of age.

The first striking finding is related to the fact that it is a period of unpaid leave, which results inevitably in an economic loss borne by the male or female worker who intend to benefit from it. Therefore, they will rather prefer, where possible, to use any other instrument, which ensure a minimum of pay treatment such as, for example, the optional leave for the working mother, or the so-called Additional Maternity Leave, or else the Dependant Care Leave.

A system of this type, however, ends up penalizing the woman, forcing her to be absent from work more than necessary in order to avoid that devoting herself to the care and education of the child, results in a financial loss for the family.

In other words, even though ERA provides, like the other national laws on the same issue, the institution of parental leave, it fails in achieving the same results in terms of integration of parental roles. From a substantive point of view, especially with regard to the most socially disadvantaged families, the instrument of parental leave is not usable and, therefore, in practice, the goal of a fairer distribution of family and working responsibilities between the parents can not be said fully achieved.

It is true, however, that beyond the statutory provisions the British, also due to the influence of the American model, are more accustomed to the idea of an equal

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provides for the particular obligation on the employer to offer her an alternative job even if such a place becomes available at a time prior to that in which the worker is expected to return from maternity leave. Through this rule, therefore, the working mother is entitled to be preferred, qualifications being equal, to any other person just in consequence of her particular condition. If, however, there should not be, in practice, no chance of an alternative job, the working mother must receive redundancy payment, but the criteria followed for its possible subsequent selection must never take her position as pregnant woman or puerpera into account.

<sup>62</sup> The text of the law expressly refers to the directive in *section 79*, 3, and asks the Government to provide for the preparation of all provisions that may be required to implement all the obligations deriving from this Convention.



division of roles within the family. Moreover, the female employment rate in England is higher than that of Continental Countries, implying a greater incorporation of women into labor and the need to entrust men with a series of prerogatives, which until not so long ago were "institutionally reserved" to women<sup>63</sup>.

As far as the scope of the English discipline on "parental leave" is concerned, it must be noticed that it is narrower than that of other Countries taken into consideration, both as regards the duration of the period of leave, both as regards the sphere of the recipients<sup>64</sup>.

It seems appropriate to point out, however, that ERA provides for the possibility that the individual employment contract or collective bargaining change such regime by establishing different terms and conditions for the exercise of the rights in concern and, therefore, the choice to remunerate the employee for the period of leave may be of contractual matrix.

In the absence of any other agreement, however, the regulation which shall be applied is that referred to in sections 76 et seq. of ERA, which provides that the period of leave is to be enjoyed, except in the case of parents with children with disabilities or in special situations, in blocks of minimum one week and multiples of this; and also that an employee who wishes to benefit from it is required to give the employer notice of at least three weeks; and in any case the leave period shall not exceed four weeks in a year. Moreover, except in the case of the birth of a child and for the period after that event, the employer has the right to postpone the leave, even for six months, whenever it is essential for the continuation of the working activity.

Thus, the right is provided at a formal legislative level, but there is a sort of dissociation between legal rule and operational solution, since the restrictive regime of terms and conditions for exercising it, the total loss of pay for the period, the obligations of a prior communication to the employer limit its use in concrete<sup>65</sup>.

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<sup>63</sup> See In [www.weforum.org/docs/WEF\\_GenderGap\\_Report\\_2012.pdf](http://www.weforum.org/docs/WEF_GenderGap_Report_2012.pdf). The research reports the major gender-based unequal treatments and traces the evolution on such an issue in many different Countries, as explained and cited at pag. 1, footnote n. 1, the United Kingdom were ranked 18<sup>th</sup>.

<sup>64</sup> As far as Italy is concerned, see art. 32 of the Consolidation Act n. 151/2001, which provides for the right for parental leave regardless of the length of service, for a total period of ten months covering the first eight years of life of the child.

<sup>65</sup> On legal formants theory and the dissociation between statute law rules and concrete and operative solutions, see R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, in *The American Journal of Comparative Law*, 1991, n. 39, pp. 1-34 and 343-402; R. Sacco-A. Gambaro (eds), *Sistemi Giuridici Comparati in Trattato di Diritto Comparato*, UTET, 1996, pp. 4-7; R. Sacco, *Introduzione al diritto comparato*, Vth edn, UTET, 1992, p. 43; A. Watson, *From legal transplants to legal formants*, in *Am L J of Comp Law*, 1995, n. 43, p. 469.

The periods of parental leave must be counted for the length of service and for pension and social security purposes.

With regard to the protection of the male or female worker returning to work after the period of parental leave, the English legislator has also complied with the EU guidelines on the subject, granting the right to return to the same job or, at least, to one similar to that previously carried out; this in particular with regard to the duties formerly performed, the salary and regulatory treatment.

Moreover, the following are to be considered unjust and discriminatory: dismissal and any other retaliatory behaviour, carried out by the employer, to the detriment of the male or female worker due to the application or taking of parental leave.

Finally, in order to implement Directive 2010/18/EU, the Additional Paternity Leave Regulations 2010 introduce the possibility for the mother to "give" her right for the unpaid leave to her partner, if the woman has the "need" to go back to work.

In particular, the employee must have worked for at least 26 weeks and be responsible, together with the mother, of the care of the child, and the mother should have the right to leave (Reg. 4).

The right can be exercised between the twentieth and the fifty-second week after birth, for a continuous period between the second and the twenty-sixth week (Reg. 5). These rights may be exercised, subject to timely notice to the employer, to be made in the manner and within the limits set by Regulations 6-7-8<sup>66</sup>.

## FRANCE

The preamble to the French Constitution guarantees equal rights for both women and men, thus sanctioning the principle of equality, equal treatment and non-discrimination and assuring free access to paid work on equal terms.

Even France, after an initial phase of hyper-protective legislation in favour of women workers, which lasted until the eighties, has complied with the Community guidelines and the idea that, in order to achieve "professional equality" is not enough to eliminate gender-based discrimination at work, but it is necessary to provide instruments capable of granting equal opportunities to both male and female workers.

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<sup>66</sup> Other rules of interest concern the right for leave in case of death or impossibility for the mother to benefit from it (Reg. 10-13).

The positive discrimination measures are justified, therefore, as instruments for carrying out this policy and to facilitate the access of women to jobs in which they are traditionally under represented or excluded<sup>67</sup>.

With the parental leave, set up with L. n. 77/766<sup>68</sup>, both parents who have a minimum length of service of one year have the right to suspend or reduce their working activity for a period of twelve months, which can be renewed two times. Such right has to be exercised within the first three years of life of the child regardless him being natural, adoptive child or in foster care.

The male or female worker who decide to take this period of leave are granted the right for the preservation of the duties previously carried out or for other related ones<sup>69</sup> and the time spent on leave is computed for the purpose of contribution, although the extent of the half. All acquired rights, which the employee had accrued before the leave started, remain unaffected<sup>70</sup>.

As for the beneficiaries, the reform of family law in 1994 has extended the right for parental leave to all employees<sup>71</sup>.

It seems worth noting that the institution of parental leave was born in France at a much earlier time than the adoption of the EU Directive on the issue<sup>72</sup>, so the French model has some different characteristics compared to those of other EU countries. The rules laid down in Italy, Spain, United Kingdom and some other countries, in fact, are more homogeneous precisely because of the Community har-

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<sup>67</sup> As far as positive discrimination is concerned, the special protection afforded to working women in case of maternity comes into consideration. The development of a number of provisions that recognize particular rights and powers to female workers has been then carried out through law-making activity and collective bargaining. In addition to the prohibition of dismissal, to maternity leave (16 weeks, with a daily allowance guaranteed by the maternity insurance, but partially completed by the employer and also extended to the father); the norm according to which, at the end of the leave, the woman can return to work or choose to terminate his employment relationship without notice or any "break" compensation is particularly interesting. Should she opt for the resolution, she shall be granted the right to be preferred to any other female or male worker with her same own professional qualifications, in the event of reinstatements occurring during the following year.

This standard provides a fast track for the woman who wishes to re-enter labor following maternity and this, although it involves some sort of positive discrimination, is perfectly in line with the idea of an equal opportunities policy that goes also through "privileged" measures, provided that they are justified by circumstances and situations, such as motherhood, which are typical of the female condition. All this still in compliance with the provisions of art. 2 of Directive 76/207/EEC.

<sup>68</sup> Amended many times through subsequent laws: L. nn. 84/9, 86/1307, 91/1, and n.93/121.

<sup>69</sup> *Code du travail*, art. L 122-28-3.

<sup>70</sup> *Code du travail*, art. 122-28-6

<sup>71</sup> See art. 12-II, L. n.94-629.

<sup>72</sup> Directive n. 96/34/CE.

monisation, especially if we consider that the institution of parental leave was born in these legal systems, precisely as a result of Directive 96/34/EC.

The peculiarity of the French system, which seems to maintain its own identity while respecting the common minimum standards, is the split between the recognition of the right for parental leave and its monetisation.

The law recognises the right for the Allocation Parentale d'Éducation (APE) to the father or the mother, who interrupt their full or part time and salaried working, professional or vocational training activity, on the occasion of the birth of a child or of the adoption of a minor under the age of sixteen<sup>73</sup>.

To get the APE one must already have another dependent child and have worked as a freelance for at least two years during the last five preceding the birth or adoption of the second child for whom the application was made, or one must already have two other dependent children and have worked as a freelance for at least two years during the last ten prior to the birth or adoption of the third child.

There are other various and additional conditions, which determine a different treatment in terms of pay depending on the number of dependent children, the type of work performed, the time span during which the parent has been busy, and more. Overall, the sphere of potential beneficiaries is quite extensive, although the absence of a necessary link between the right for parental leave and the right for payment of the APE and any other form of compensation coverage, ends up determining a low rate in the use of leave entitlements. Moreover, the very characteristics of the APE and its quantification in a lump sum represent cryptotypes, not even too hidden, so beyond the declamation of the legal rule (the guarantee is attributed to both men and women), this instrument is mainly used on the operational level by women, who give up work to devote to family and child care.

The parallel evolution of parental leave legislation and of APE has determined a sort of internal contradiction between the idea of the APE as a maternity salary and the idea of parental leave as a matter of employment which is comparable, from the social security point of view, to illness, unemployment, etc...

However such a system, as already mentioned, reveals a still too traditional conception on family roles, as the mother is still the subject most encouraged in using them.

Also with regard to retirement benefits it is to be noted<sup>74</sup> that, on the one hand, there is the mandatory continuity of the pension relationship of the parent who has

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<sup>73</sup> See P. VIELLE, *Congedi Parentali e Tutele Previdenziali. Un'analisi comparata.*, in *Giornale di diritto del lavoro e di relazioni industriali*, n.80, 1998, 4.

taken leave, without any distinction of sex; on the other hand, the woman who has dedicated herself to the care of the children some retirement benefits are recognized<sup>75</sup>.

These and other provisions seem to suggest that the intention of the French legislator was to "reward" because of the educational expenses related to the care of children, and that in view of the difficulty of reconciling work and family life.

And in fact, the system as a whole is supported by the general presumption that, except in the event that the father decides to take advantage of parental leave, it is often the mother who takes on the burdens of childcare, often continuing in carrying out her previous working activity.

Always concerning pensions it is worth mentioning that, recently, the d. lgs. n. 105/2001 and no. 106/2001 have made a number of amendments to the Social Security Code in order to coordinate the legislation on parental leave and, in particular, the "allocation parental d'éducation" system of remuneration with that of other subsidies for the benefit of parents and of the family. The "family complement", the "subsidy of parental presence" (APP) and other instruments should be taken into consideration with this respect.

Each of these forms of welfare responds to specific requirements and needs of the beneficiaries, but all have as recipients both parents or, however, the family unit, and therefore they all respond to the only ratio of promoting the participation of the father and mother, in equal measure, to family life and to the care and assistance of children, even when this results in an impairment for their working activities or in a reduction in their remuneration.

A further step is represented by the regulatory intervention occurred on January 1, 2004, which introduced the Prestation d'Accueil du Jeune Enfant (PAJE), with the aim of rebalancing the burden of caring for children and especially new born ones between man and woman, recognising the right to take leave for a period of three years from the birth and providing even a social contribution to the care and treatment of the newborn to be parameterised on the income conditions, as well as on the size and real needs of the family.

In France also, therefore, we are witnessing an evolution which is by this time irreversible, so that many of the discrimination between men and women in professional life are significantly diminished thanks, above all, to the parity and promo-

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<sup>74</sup> See also P. VIELLE, *Le coût indirect des responsabilités familiales. Sa reconnaissance en droit comparé, européen et international de la sécurité sociale dans la perspective de l'égalité de chances entre les hommes et les femmes*, Bruxelles, 1998.

<sup>75</sup> Code de la Sécurité Sociale, Artt. L351-4 e R351-14.

tional legislation for women's work. Nevertheless, there are still reflections, similar to those that are common in Italy, over those psychological and behavioural brakes which slow down the progress towards the achievement of full equality.

## SPAIN

The idea of equal treatment and opportunity is grounded in the 1978 Spanish Constitution, which establishes the principle of equality and the prohibition of discrimination on grounds of nationality, race, sex, religion, opinion or any other condition (art.14).

In particular, with regard to the equality of treatment between men and women in employment, art. 35 of the Constitution recognises the right to work and states that "in no case any gender-base discrimination can take place." In addition, the Fundamental Charter defers to "public authorities" to ensure the social, economic and legal status of the family and also (art. 9.2) to promote the necessary conditions to accomplish effectively the equality of citizens, ensuring their participation in the social, political, economic and cultural life<sup>76</sup>.

The approval of L. n. 39/1999 on "reconciling work and family life for female workers" is a "step in the journey towards equal opportunities between men and women"<sup>77</sup> and a tool to facilitate the insertion and tenure of women in the labor market<sup>78</sup>.

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<sup>76</sup> Although the principle of equality and equal treatment between men and women have a constitutional basis, it was necessary to admit some exceptions to these principles even in Spain, as required by art. 2.3 Directive. 76/207/EEC and, therefore, in the interest of "protection of women, particularly with regard to the protection of pregnancy and maternity." Special rules in such cases, far from being discriminatory and highlighting the "differences" between men and women, have the primary purpose of ensuring effective "implementation of the principle of equal treatment between men and women as regards access to employment, training, professional career and working conditions ", yet taking into account the particular characteristics of female condition. It seems worth noting that, while in the other jurisdictions surveyed here a significant effort had to be made to adapt domestic legislation to EU guidelines, as far as Spain is concerned, however, the law on female labor and for equal opportunity is for the most part subsequent to the first Community action in the field. For this reason, the Spanish legislation has always been, historically, more in line with Community policies; and in fact, it is no coincidence that Spain has not been addressed, such as Italy and France, by decisions of the Court of European Justice relating to night work or particularly heavy work. See art. 39.1.

<sup>77</sup> See the "Statement of the reasons" preceding the text of L. n. 39/1999.

<sup>78</sup> In the Spanish labor law system a series of rules to promote women's access to the labor market already existed, but it is undeniable that these were not sufficient to ensure the presence of women in some particular fields of the labor market. Some provisions from the Statute of Workers should be taken into consideration on the point (D. Lgs. no. 1/1995), together with others on "Prevention of occupa-

L. n. 39/1999 therefore, by acknowledging the directive n. 92/85/EC concerning "safety and health at work of workers who are pregnant, have recently given birth or are breastfeeding" and no. 96/34/EC on "parental leave", aims at "reconciling professional and family life of female workers" and promoting the principle of equal treatment between men and women.

This law not only adapts the Spanish legal system to the Community regulation, but it ensures an overall level of protection that is way higher than that specified in those same Directives, comparable to those guaranteed by the Italian legislation on the point<sup>79</sup>.

The new regulation introduces a series of instruments of protection for workers, who wish to participate in family life and child care from the moment of birth.

The legislator aims at achieving a more equitable distribution of permits for maternity and paternity leave, in order to prevent the condition of woman and mother from having a negative impact on that of being a worker. In the case of maternity, the Spanish law provides for an "ordinary" hypothesis of absence from work for the period in question, as well as another hypothesis related to particular circumstances which can occur during pregnancy<sup>80</sup>, but in both cases it grants the working mother with the right to retain her job on her return. Other provisions, however, respond to the spirit of making the father participate as much as possible to the care and education of the child, from the moment of birth or entry in the family (in the case of adoption or foster care)<sup>81</sup>.

It should be noted that the model chosen by the Community legislator (directive n. 2010/18/EU) which provides for a compulsory period of leave for the father, which can not be transferred to the mother, certainly meets the above highlighted

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tional hazards" (L. no. 31/1995), and even some predictions regarding "Social Security "(D. Lgs. no. 1/1994). Given the breadth of the subject and the many implications of various kinds, one can not expect the legislation in question, by itself, to have a revolutionary impact, but the latter should certainly be given credit for having addressed and partially solved matters relating to maternity-related discrimination.

<sup>79</sup> On the point, see the section of the present work dealing with the analysis of the Italian regulation on the matter.

<sup>80</sup> See art. 6, L. n. 39/1999 "suspension subject to the reservation of workplace in the case of risks during pregnancy".

<sup>81</sup> For example, the father has by law the possibility to take ten of the sixteen weeks he is entitled for "*permiso de maternidad*" (literally "permit for maternity") provided that the mother respects the period of compulsory maternity leave of six weeks following the birth. This period can be enjoyed by the father at a later time or simultaneously with the mother, but always in an uninterrupted manner. And in case of impediment of the latter, the father will be entitled to use the entire leave period or its remaining part (art. 5, L. n. 39/1999 "suspension subject to the reservation of workplace").

ratio; it is a measure which has already successfully been adopted in the Scandinavian countries, as well as in Spain.

Under another and different aspect, art. 6<sup>82</sup> of the national law contains a provision intended to protect the health of the mother and foetus and provides, in the case of particular risks<sup>83</sup> during the gestation, for a period of suspension, which starts with the beginning of the period of suspension for maternity leave and shall not affect in any way the rights acquired by the female worker.

As far as the rules on the "excedencia por cuidado de familiares" are concerned, art. 4 recognises the workers (of both sexes) the right for a period of leave not exceeding three years to take care of each child and the right to take shorter periods for the care of other family members. This period shall be computed for the purposes of length of service and the employee will retain the right for his workplace throughout the first year. After the first year, however, he will be entitled to a place similar to his previous professional status and duties.

Another important provision that has been introduced in the regulation on the issue concern the nullity of the dismissal summoned because of pregnancy, of the application or of the use of maternity leave, paternity leave or to take care of family members; as well as the dismissal of workers with employment contract which has been suspended for the reasons referred to in artt. 5 and 6 of the same law. The employer has the burden of proof that the reason for dismissal is of another nature and does not constitute discrimination.

As far as the dismissal is concerned, it seems appropriate to highlight how, even in the other countries surveyed in the present analysis, the sanction of nullity and the ability to act in court are provided for discriminatory dismissals. It should be clear, however, that in some of these countries the sanction of nullity is accompanied by reintegration into the workplace and compensation for damages, while in others the female or male worker are provided with compensation claims only.

It must be noted that the choice of the Spanish legislator not to burden the employer of the economic costs arising from the "maternity suspension in case of risks to the health of the mother or the child" has the main function of promoting an effective policy for equal opportunities, since it provides favourable treatment for the female worker which is justified by her special status (art. 10). This provision aims at preventing, as often happens, the employer from preferring to hire a man instead of a woman, qualifications being equal, so as not to bear the economic burden associated with the possible pregnancy of female workers.

<sup>82</sup> Which amends art. 48 of the Statute of Workers.

<sup>83</sup> As provided in art. 26.2 and 3 of L. n. 31/1995 (*Ley de Prevención de Riesgos Laborales*).



## 5. SOLUTIONS BETWEEN FAMILY SUPPORT AND WELFARE POLICIES.

A systematic approach and analysis of the collected data lead us to consider that, as mentioned above, both at a national and European level, the rules and legal models adopted seem more than adequate to promote the goals of equal opportunity and of a redistribution of family and work responsibilities within families, albeit with different nuances emerged from the comparative analysis which has been carried out in the present work<sup>84</sup>.

However, what probably is weaker are the cultural premises which should lead in the direction of assisting and supporting families in a perspective which is functional to the presence of women in the labor market (by broadening the scope of this formula both the sphere of the access to it, as well as that of employment maintenance and career progression).

The point becomes, therefore, to ensure instruments to avoid the exit from the labor market during the critical years in which the female worker wants to build both her family and her career, at worst by differentiating the instrument also in function of the peculiar needs related to the type of career undertaken. The directions of all feminist revolutions are mainly three: the educational one is basically almost completed, the one dealing with work is at a stalemate<sup>85</sup>; while the third, the cultural one, is still dawning<sup>86</sup>.

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<sup>84</sup> See F. BETTIO-M. CORSI-C. D'IPPOLITI-A. LYBERAKI-M. SAMEK LODOVICI-A. VERASHCHAGINA, *The Impact of the Economic Crisis on the Situation of Women and Men and on Gender Equality Policies*, in [http://ec.europa.eu/justice/genderequality/files/documents/enege\\_crisis\\_report\\_dec\\_2012\\_final\\_en.pdf](http://ec.europa.eu/justice/genderequality/files/documents/enege_crisis_report_dec_2012_final_en.pdf); and also European Commission, (2011) *Labour Market Developments in Europe, 2011*. Directorate-General for Economic and Financial Affairs. [[http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2011/pdf/ee-2011-2\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2011/pdf/ee-2011-2_en.pdf)].

<sup>85</sup> It is worth to note that according to Istat (i.e. the Italian Institute for Statistics) (*Rapporto 2013*), in 2012 female workers increased by 110,000 units compared to 2011. In addition to the occupied ones, the number of women willing to work and the share of those who pass to the potential labor force or to unemployment grew from 16.5 to about 24%. Three factors emerge from this data: the increase in female foreign workers, increased by 76,000 (+7.9%); the 148,000 over-fifty women who, as a result of the pension reform, have remained in their jobs (+6.8%), a datum which has moreover offset the decline in employment of young women; and the growth of women induced by the period of economic hardship to enter the labor market (even under conditions previously considered not acceptable) to replace the loss of male revenue. For a further in-depth understanding, see R. CARLINI-G. PAVONE, *L'Istat: Italia all'ingiù, le donne corrono al lavoro*, in [www.ingenere.it/articoli/list-at-italia-allingiu-le-donne-corrono-al-lavoro](http://www.ingenere.it/articoli/list-at-italia-allingiu-le-donne-corrono-al-lavoro).

<sup>86</sup> In particular, the idea of a *Pink New Deal* has been launched, which could succeed in carrying out the above mentioned revolutions, D. DEL BOCA, L. MENCARINI, S. PASQUA, *Valorizzare le donne conviene*, cited above.

To complete the objectives related to the revolution in the education sector, in the light of the data collected in § 2., one of the viable solutions involves the need for women to be directed towards scientific studies, supported by dedicated scholarships; a phenomenon which is already present, moreover, in the U.S. university system.

In terms of employment, traditionally, several measures are identified, among which those considered in this seat the most effective are the following:

first, companies that hire women should be favoured from the taxation point of view, in order to encourage the phenomenon, or by giving a quality mark to those companies that effectively apply gender equality;

also in the light of what was mentioned in § 3, part-time, a secure instrument identified at European level as an institute of flexibility that fosters women's employment, should be stripped of all those elements capable of transforming it into a trap nailing the female worker to marginal roles and arresting her progression of career<sup>87</sup>; to this end, the proposals consist in a reversible transformation on a voluntary basis of full-time work into part-time, regardless of being this request made by the mother or the father worker;

introduce a tax credit for the lowest wages, statistically most common among female employees<sup>88</sup>, or else the deductibility of medical expenses only for female workers, regardless of the type of contract with which they are employed; such measure would also contribute to the emergence of black labor, making it more convenient to regularize all working services;

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<sup>87</sup> According to the already quoted *Rapporto Istat 2013*, 2012 saw an increase in the number of female workers, but this increase occurred mainly in the involuntary *part-time* and was segregated in low-skilled jobs: since 2008 the growth in unskilled occupations is in fact more than double compared to men (+24.9% compared to 10.4%), so that to explain half of male employment 51 professions need to be mentioned, and only 18 for women. The presentation of the report states: "retail trade shop assistant, domestic worker and secretary are the professions that are receiving the greatest number of occupied". For an account on the doctrine about the purpose and the use of *part-time* see E. RUSTICHELLI, *Il nuovo part-time: la concertazione della flessibilità*, Monografia Isfol Mercato del lavoro 7/05, in [www.isfol.it](http://www.isfol.it); M.C. BOMBELLI, S. CUOMO, *Il tempo al femminile : l'organizzazione temporale tra esigenze produttive e bisogni personali*, Etas, 2003; M. BROLLO, *Il lavoro a tempo parziale*, in C. CESTER (ed.), *Il rapporto di lavoro subordinato: costituzione e svolgimento, diritto del lavoro*, in *Commentario* directed by F. CARINCI, Utet, Torino, 2007, 1301 et seq.

<sup>88</sup> Also tax law has an important weight in woman decision to enter or remain in the job market, considering also the distinction between individual and familiar taxation, which meant a different and higher tax pressure in front of a second earner in the same family. A concrete proposal on the point was put forward in Italy by A. ALESINA-A. ICHINO, *Tasse più leggere per le donne*, in "Il Sole 24 Ore" (an Italian business newspaper), April 15, 2007.

introduce another tax credit, but in favour of large families<sup>89</sup>;

expand the protection for mother workers to the maximum in the event of resignation in white (whose regulations in Italy has been recently revised by L. no. 92/2012);

provide incentives for women entrepreneurs;

or else provide incentives for people who start or restart their working activity after spending a period of time taking care of up the family;

provide for gender quotas at the top managerial position in the companies;

make the rule on compulsory paternal leave effective<sup>90</sup>, perhaps through the provision of economic incentives depending on the actual use of the period of leave by the father.

From the cultural revolution standpoint it would be appropriate:

as far as the working relationship is concerned, and therefore with regard to the private law dimension of the possible measures, to study corporate reconciliation policies, leading the company and the worker to a fruitful dialogue - also through the use of qualified internal or external personnel - in order to arrange physical and non-physical spaces (nurseries and playrooms or other instrument provided by the company such as breastfeeding room, baby-sitting, canteens) and working time (shifts, breaks, telecommuting, part-time, leave...);

as far as the public policy dimension is concerned, i.e. concerning social and economic policies, to invest and do not cut back on childcare (nurseries<sup>91</sup> and play-

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<sup>89</sup> A role model in this regard could be accounted for by the 2013 *Working Family Tax Credit Act* and the 2003 *Child Tax Credit Act*, with coverage up to a top rate for the actually incurred and documented expenses for the care of children and family dependent, up to a predetermined maximum limit.

<sup>90</sup> S. COLTRANE, *Family Man. Fatherhood, Housework and Gender Equity*, Oxford University Press, New York, 1996; For a complete study on parental leave legislation in Europe, USA and Japan, see S. TANAKA, *Parental leave and child health across OECD countries*, in *The Economic Journal*, 2005, 115.

<sup>91</sup> The deterioration of the socio-economic conditions of families in Italy in 2013 also covers almost one-fifth of children who live in households below the poverty line. In this context, access to daycare is essential. The economic crisis, from 2008 onwards, has exacerbated the difficulties of families, aggravating the structural problems both in terms of income and employment opportunities and savings. The most recent data shows that it's the women from southern regions, living in families with lower incomes and education, who increase their participation in the labor market despite the worst conditions of the services they are offered. Moreover, the increase in the importance of childcare services in the context of the economic crisis was not enough to prevent the revenue of the municipalities from undergoing a drastic decrease because of the cuts and the reduction of regional funds distributed throughout the provinces. In most cases there is an ongoing rationalization in the offer of nursery places, but unfortunately their number is lower than their demand. Given that each reality, for the purpose of access to the service, adopts peculiar selection criteria, the types of families who are "entitled" for those services

rooms, caregivers, co-share baby-sitting for example, through a system that would allow two different families to hire the same person by a combination of two compatible part-time and share its economic burden, both in terms of pay and of social security): a concrete proposal, named "Women and Work. Ideas and proposals to support women's employment " had been formulated in the 2008 Programme of the "Partito Democratico" (the Italian Democratic Party), providing an incentive to the regions in order to achieve targeted services to support mothers in situations of social economic hardship (special maternity assistants from childbirth and up to the child's access to nursery), as well as extended and flexible opening hours for kindergartens, schools and public offices that provide key services to citizens;

at both private and public levels, to spread among firms the idea that motherhood is not an incisive cost for the company and that, therefore, to have female employees does not constitute a danger; instead, not employing her would surely expose to the risk of anti-discrimination actions.

So these are some of the technical legal solutions (micro-choices) which respond to different models of legal policies (public macro-choices), some of which have been adopted in several countries of the European Union to promote an effective integration between lifetimes and working time (life time and job time) to support families.

An emblematic example is offered by the French and German legal systems, which have introduced a model of social insurance to support the costs of care and family, as well as the services to children, elderly and disabled, with the possibility for the insured to modulate premiums, requiring specific benefits in terms of services or economic support to address the peculiar family needs<sup>92</sup>.

This model allows the family to choose the right mix of care and support of public or private nature and avoids the "social sanction" reserved for those who rely on care services acquired on the market, rather than providing for them in person, yet giving up something else<sup>93</sup>. The system requires the insurance market to provide for sophisticated and comprehensive services, this resulting in the creation of job opportunities for traditional and new skills, such as caregivers, baby-sitters, house-

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change depending on the criteria employed. For example, in some Municipalities discomfited, unemployed and large families are privileged; elsewhere, families where both parents work are privileged instead. On the point, see D. DEL BOCA, C.PRONZATO E G. SORRENTI, *Criteri di accesso, tariffe, orari e assegnazione dei posti-nido*, Compagnia di San Paolo, Torino 2013.

<sup>92</sup> This seems to be the direction of the Government programs. Actually, at the moment we have only legislative drafts and proposals, but nothing is certain.

<sup>93</sup> See T. BOERI-D. DEL BOCA, *Chi lavora in famiglia?*, in [www.lavoce.info/news/view.php?id=10&cms\\_pk=2713](http://www.lavoce.info/news/view.php?id=10&cms_pk=2713).

keepers, psychologists, doctors, with a formula which moreover is appropriate to help the emergence and / or not to create additional undeclared work<sup>94</sup>.

It is now an accepted fact that the employment of foreigners is increasing, and among other things, in eight cases out of ten, this increase involves women, employed in household services. This is explained by the need to secure the help of a caregiver for elderly care at home, in the context of a population that registers an increasingly older average age. "The number of immigrant women employed in household services is growing throughout the crisis period, a sign that this is a more and more incompressible need, something of which you can not do without. In the face of family expenses containment strategies, it's obvious that you give up other things but you can not do without the caregiver"<sup>95</sup>.

The above mentioned situation suggests that public services or private choices are then needed, and also instruments which combine the provision of public services with private programs<sup>96</sup>.

It is true that these solutions are not always harbingers of an effective intervention of welfare policies, as their costs rest on the shoulders of families or entrepreneurs-employers, since the need to coordinate work and family results in an excessive load for the woman-mother-worker or in an obligation for the employer to reorganise the company in accordance with the needs of flexibility to which we are trying to answer.

Therefore, public intervention in support of private choices (carers, house nurseries, baby sitters in co-share<sup>97</sup> and female entrepreneurship), which are more easily adaptable to different needs related to the individual career and the peculiar family context (private micro-choices), but also to the different cultural, educational and social contexts (private macro-choices), is the most appropriate and less damaging to the private autonomy of the two parts in the employment contract (employer and employee, man or woman it may be)<sup>98</sup>.

<sup>94</sup> On the point, for all see A. BELLAVISTA, *Il lavoro sommerso*, Giappichelli, Torino, 2002.

<sup>95</sup> In this sense, the presentation of *Rapporto Istat 2013*, as reported by R. CARLINI-G. PAVONE, *L'Istat: Italia all'ingiù, le donne corrono al lavoro*, (cited above), of Istat manager Linda Laura Sabbadini.

<sup>96</sup> This model seem to be the one that the Italian legislative has implemented in the already cited D. M. 22 December 2012, artt. 4-8.

<sup>97</sup> S. PASQUINELLI, «Assistenti familiari: le questioni aperte», *Prospettive Sociali e Sanitarie*, n.14, 2006; and many other interventions on the newsletter [www.qualificare.info](http://www.qualificare.info). See D. MESINI-S. PASQUINELLI-G. RUSMINI, *Il lavoro privato di cura in Lombardia*, Milano, 2006; and also <http://www.-qualificare.info/index.php?id=92>.

<sup>98</sup> See L. CALAFÀ, *Paternità e lavoro*, Il Mulino, Bologna, 2007; for an interesting comparison between European and USA policies on mother hood and work see C. J. RUHM, *How well do parents with young*

Not even the pure and simple intergenerational pact can be considered a solution, since it does not provide for any public intervention, apart from a mere statement of great symbolic value such as the one contained in the model proposed by the last Berlusconi Government<sup>99</sup>.

It is a program that just took note of an existing social situation which is widespread in all social strata<sup>100</sup>, so the generational pact within families sees the grandparents contributing to the care, growth and education of grandchildren while the parents try to find a job or keep the professional position they have acquired. This generates almost naturally a moral, but also practical obligation, for daughters and daughters in law, to take care of their grandparents at the time of non-self-sufficiency.

In effect, all this creates a system of both formal and informal mutual obligations which, on the one hand, it is devoid of public support, and is based on the intergenerational and endo-familial pact, yet this way betraying the very idea of social pact and welfare state; and, on the other hand, on a cultural level, it inhibits and restricts the circulation of alternative and competitive models aiming at reconciling family and work<sup>101</sup>.

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<sup>99</sup> According to the last joint document by the Minister of social and employment policies and the Minister of equal opportunity of the Italian Government, *Italia 2020*: «The number of elderly people, cohabitants or not, who offer their support to family care and needs is surprisingly increasing. They give help by accompanying and assisting minor children, giving women the possibility to remain in the job market. In other cases they use their retirement pension for family needs and at the same time they find an answer to their loneliness and fears. This is the intergenerational pact that we intend to promote».

<sup>100</sup> Which has already been portrayed in many studies, for all see A. ALESINA-A. ICHINO, *L'Italia fatta in casa*, Mondadori, 2009.

<sup>101</sup> N.BERNARD, *A New Governance. Approach to Economic, Social and Cultural Rights in the EU*, in *Social and Labour Rights in a Global Context International and Comparative Perspectives*, B. HEPPLE (ed.), Cambridge, 2003, 247; and also C. BARNARD-S. DEAKIN, *Corporate Governance, European Governance and Social Rights*, *ibidem*, in B. HEPPLE (ed.), Cambridge, 2003, 122.