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 **Table of Contents**

**Part I. Equality and Non-Discrimination**

**Chapter I. Non-Discrimination: Part and Parcel of Human Rights Protection**

Section I. Relevant Provisions outside the EU Framework

Section II. The Principle of Non-Discrimination in the European Union

**Chapter II. Core Concepts in Anti-Discrimination Law**

Section I. Equality and Discrimination: Two Sides of the Same Coin

§1. Equality: A Complex Notion

§2. Prohibited Classifications

§3. Comparability

Section II. Direct Discrimination

Section III. Indirect Discrimination

Section IV. Justifications

Section V. Affirmative Action

**Part II. Human Rights at Work**

**Chapter I. Relevant Provisions outside The EU Framework**

Section I. International Instruments

Section II. Regional Instruments

**Chapter II. The European Union**

Section I. The EU and Social Rights: Elusive or Crystal Clear?

§1. The EU’s Social Policy

§2. Social Rights in the European Union

Section II. The EU, Employment Law and Labour Rights

§1. EU Employment Law

§2. Labour Rights in the European Union

**Part III. Women’s Labour Rights: Some Key Issues**

**Chapter I. Employment Opportunities and Fair Working Conditions**

Section I. Job Opportunities

Section II. Equal Pay

Section III. Sexual Harassment

**Chapter II. Reconciling Work and Family Life**

Section I. Part-Time Work

Section II. Pregnancy

§1. Recruitment and Job Security

§2. Child-Birth Leave

Section III. Parental Leave and Child-Care Services

§1. Parental Leave

§2. Child-Care Services

**Conclusion**

 **List of Abbreviations**

EU Charter Charter of Fundamental Rights of the European Union

CEACR Committee of Experts on the Application of Conventions and Recommendations

CO Concluding Observations

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

CC Collective Complaint

ECHR Convention for the Protection of Human Rights and Fundamental Freedoms

ECSR European Committee of Social Rights

ECtHR European Court of Human Rights

ECJ European Court of Justice

ESC European Social Charter

GOR Genuine Occupational Requirement

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ILO International Labour Organization

RESC Revised European Social Charter

TEEC Treaty establishing the European Economic Community

TEU Treaty on the European Union

TFEU Treaty on the Functioning of the European Union

**Part I. Equality and Non-Discrimination**

**Chapter I. Non-Discrimination: Part and Parcel of Human Rights Protection**

Section I. Relevant Provisions outside the EU Framework

*1.* Although the general principles of equality and non-discrimination already appeared sporadically in the beginning of the 20th century[[1]](#footnote-1), they only really became visible after World War II[[2]](#footnote-2). The same is true for the gender equality principle. Women in several European countries had already received voting rights in the first half of the twentieth century[[3]](#footnote-3), but their struggle for equality in other areas of life was only really taken seriously in the post war years[[4]](#footnote-4). The Charter establishing the United Nations contains several references to a right to equality and non-discrimination[[5]](#footnote-5). The Universal Declaration of Human Rights includes no less than three articles expressly referring to non-discrimination and equality[[6]](#footnote-6). Today, the principles can be read in virtually every important human rights treaty, regardless of its international[[7]](#footnote-7), regional[[8]](#footnote-8), general[[9]](#footnote-9) or specialized[[10]](#footnote-10) nature. Although nowadays there is indeed a universal consensus on the importance of the equality and non-discrimination principles, they have not yet received a uniform interpretation or definition.

*2.* The scope and weight allocated to the non-discrimination principle also varies from treaty to treaty. A few instruments hold an autonomous prohibition on non-discrimination[[11]](#footnote-11). In most instances however, the non-discrimination provision only applies to rights protected by the relevant treaty[[12]](#footnote-12). In the latter case, the principle does not have an independent existence and thus can only be invoked before a treaty body or court in conjunction with another substantive convention right[[13]](#footnote-13).

Section II. The Principle of Non-Discrimination in the European Union

Human Rights in the European Union

*3.* Before locating the principle of non-discrimination, it is necessary to review the general status of human rights in the EU. The treaty of Rome did not expressly refer to human rights[[14]](#footnote-14). In 1957, the development of the international human rights framework was still in its infancy and the drafters of the treaty primarily focused on the establishment of an economic community[[15]](#footnote-15). The European Court of Justice was responsible for launching the idea of human rights within the EU. For the first time in 1969, the Court balanced human rights and economic freedoms[[16]](#footnote-16). Although no human rights violation was determined, the importance of this judgment cannot be underestimated. In the last paragraph it is stated that human rights constitute one of the general principles of Community law protected by the Court[[17]](#footnote-17). These general principles attained notable value because they surpass specific areas of law and, as it were, underpin the whole EU legal order. As far as possible, both primary and secondary EU law need to be interpreted in conformity with the general principles[[18]](#footnote-18). They are often used to initiate annulment[[19]](#footnote-19) or preliminary rulings procedures[[20]](#footnote-20) before the Court. When a general principle has been violated this may also entail the liability of the EU institutions[[21]](#footnote-21). Partly owing to pressure exercised by national Constitutional Courts[[22]](#footnote-22), the Court subsequently elaborated on its initial human rights stance. It defined that, when dealing with human rights, its sources of inspiration are the common constitutional traditions of member states and international treaties to which the member states are a party[[23]](#footnote-23). Within the latter category particular gravity is allocated to the European Convention on Human rights[[24]](#footnote-24). Other institutions only hesitantly pursued the Court’s initiatives. It took until 1977 for the European Parliament, the Commission and the Council to declare that they consider the protection of human rights important[[25]](#footnote-25). The first express reference to human rights may be read in the preamble of the 1986 Single European Act[[26]](#footnote-26). Each subsequent treaty has been building further on this reference. Article F of the Maastricht treaty[[27]](#footnote-27) obliged the EU to respect fundamental rights and iterated that they are general principles of Community law. Furthermore, the European Convention on Human Rights has been explicitly mentioned in the founding treaties since then[[28]](#footnote-28). The Amsterdam treaty included respect for human rights in the values fostered by the EU[[29]](#footnote-29). It also determined that a state with a deficient human rights record cannot become a member of the EU[[30]](#footnote-30). Another major invention was a procedure enabling suspension of a member state’s voting rights when it persistently violates human rights[[31]](#footnote-31). In December 2000 the Charter of Fundamental Rights[[32]](#footnote-32) was proclaimed in order to give the EU its own human rights Charter. It is necessary to reflect a bit more in detail on this instrument. At the date of its adoption, the Charter did not have legally binding value. It only became part of primary EU law with the coming into force of the Lisbon Treaty[[33]](#footnote-33). It contains both first and second generation rights, respectively civil and political rights and economic and social rights[[34]](#footnote-34). The Charter does not comprise an exhaustive list of rights. Many more rights are guaranteed within both the EU framework and the national legal orders[[35]](#footnote-35). Mindful of the third part of this dissertation (*infra no. 43 and onwards*), we should explain why the EU Charter was adopted. The Charter’s drafters did not want to create any new powers or tasks for the Union[[36]](#footnote-36). Their main goal was to increase the visibility of fundamental rights for EU citizens[[37]](#footnote-37). As will be seen in the third part of the dissertation, some scholars do not take into account the drafters’ intentions. They want to read new rights or obligations in the Charter and they are disappointed when the text of the Charter does not appear to add anything new (*infra nos*. *53, 75, 80 and 93*). Furthermore, it needs to be observed that the Charter only appears to apply in vertical relationships between individuals and the EU institutions or a member state[[38]](#footnote-38). Finally, it needs to be mentioned that the EU has had its own human rights institution since 2007. The Agency for Fundamental Rights provides the EU institutions and the member states with advice, conducts studies on particular topics and educates people on their rights[[39]](#footnote-39).

*4.* The foregoing survey demonstrates that today, the European Union pays considerable attention to human rights protection. Its policy is however not without controversies. Some scholars argue that the EU applies a double standard, especially towards third states. Others maintain that economic freedoms still prevail[[40]](#footnote-40). Finally, one should always keep in mind that the EU does not have a general or unlimited competence to deal with human rights[[41]](#footnote-41). According to the principle of conferral[[42]](#footnote-42), the European Union can only act within the competences it received from the member states. The protection of human rights within policy fields not conferred to the EU thus largely remains a national matter.

Equality and Non-Discrimination in the European Union

*5.* The Treaty on the Establishment of the European Economic Community did not contain a general prohibition of non-discrimination. It did include, however, more specific prohibitions. Articles within the treaty dictated that member states could not discriminate on the basis of nationality[[43]](#footnote-43). Although limited to the issue of pay, it also stated that women and men must be treated equally[[44]](#footnote-44). It is clear that the adoption of these initial provisions was not instigated by a concern for human rights, but by an economic rationale[[45]](#footnote-45). The primary goal of the European Economic Community was the establishment of a common market[[46]](#footnote-46). By discriminating against other member states’ nationals or women workers, member states could gain a competitive advantage within this common market[[47]](#footnote-47). The original equal pay provision[[48]](#footnote-48) subsequently served as an inspiration for the adoption of secondary EU law on equal treatment between women and men, chiefly in the field of employment[[49]](#footnote-49). Also very significant is that the European Court of Justice declared several times that the principle of sex equality is one of the fundamental rights within the EU[[50]](#footnote-50). The Amsterdam treaty represents another important step on the path towards gender equality. It inserts a general principle of equality between women and men into primary EU law and makes its attainment one of the EU’s goals[[51]](#footnote-51). At the start of the new millennium, part of the Court’s case-law on gender equality was codified in a number of updated directives[[52]](#footnote-52). It is remarkable that some of these new instruments, unlike their predecessors, explicitly enumerate the European Convention on Human Rights and all the important United Nations conventions[[53]](#footnote-53). One must briefly mention that the European institutions have been active as well in contesting other forms of discrimination. Article 19 of the Treaty on the Functioning of the European Union allows for the adoption of measures against discrimination on the basis of race, religion, disability, age and sexual orientation[[54]](#footnote-54).

*6.* One must not forget the EU Charter of Fundamental Rights. Its third chapter is entirely devoted to the equality and non-discrimination principles. Article 21 sets out a general prohibition on discrimination. It mentions sex as one of the protected grounds. Article 23 on equality between women and men was inspired by a provision in the Revised European Social Charter[[55]](#footnote-55) (*infra nos 34-35*). It states that equality must not only be ensured in employment but in all areas. Article 23 thus resonates the content of the provisions introduced by the Amsterdam Treaty. As indicated above (*supra no. 3*) , it appears that the Charter articles only operate vertically. This means for example that article 23 cannot be relied upon against private employers[[56]](#footnote-56).

*7.* It may be concluded that EU law contains a rather disorganized amalgam of equality and non-discrimination provisions. The European Court of Justice’s case-law made a significant contribution to the early development of the latter two principles. As regards sex discrimination and gender equality, most legally binding measures have been taken in the employment context.

**Chapter II. Core Concepts in Anti-Discrimination Law**

Section I. Equality and Discrimination: Two Sides of the Same Coin

§1. Equality: A Complex Notion

*8.* As already mentioned above (*supra no. 1*), divergent opinions exist on the exact meaning of and the relationship between equality and non-discrimination. Some scholars argue that the two principles substantially have the same meaning. For others they signify two different things[[57]](#footnote-57). It is submitted that they are actually twin notions. They are closely linked to each other but they do not have the exact same meaning. The principle of equality is articulated as a command, as a positive obligation to do something. The principle of non-discrimination, in contrast, is phrased as a prohibition; you cannot do something[[58]](#footnote-58).

*9.* It should be mentioned that both case-law and literature make a difference between distinct types of equality. Formal and substantive equality are two generally recognized equality models. Formal or Aristotelian equality corresponds to a liberal vision on equality. According to this model similar situations need to be treated alike and dissimilar situations need to be treated differently[[59]](#footnote-59). The formal equality model has been subject to a lot of criticism. Many scholars indicate that it is not clear what is exactly meant with ‘alike’[[60]](#footnote-60). Some authors have argued that the Aristotelian equality is an empty shell[[61]](#footnote-61). The concept is also frequently criticized for leaving power and privilege structures intact. Formal equality does not focus on the causes of inequality or on a particular result[[62]](#footnote-62). Direct discrimination is often associated with Aristotelian equality[[63]](#footnote-63). Substantive equality is sometimes referred to as ‘real equality’ or ‘de facto equality’[[64]](#footnote-64). It is claimed that substantive equality strives for inclusion[[65]](#footnote-65). It takes into account social reality and tries to improve the societal position of deprived groups[[66]](#footnote-66). Real equality seeks to ensure that the different societal groups are represented proportionally in for example, the workplace. The concepts of indirect discrimination and affirmative action (*infra nos 17-20 and 25-28*) are often linked to substantive equality[[67]](#footnote-67). Another term often encountered is equality of opportunity. According to some, this is a subcategory of substantive equality[[68]](#footnote-68). For others it is an independent concept which is located between formal and substantive equality[[69]](#footnote-69). For the purpose of this dissertation, the second approach will be adhered to. Equality of opportunity reflects the idea of a ‘level playing field’[[70]](#footnote-70). It wants to guarantee that everybody sets off from the same starting line when competing for valuable social goods. Equality of opportunity does however not strive for equality of results or proportionate representation. Once each person has received the same opportunities to ‘compete in the race’, the attention shifts to choice and individual merit and qualities[[71]](#footnote-71). Finally, it must be admitted that the distinction between formal equality, substantive equality and equality of opportunity is not always fully apparent.

*10.* From a merely linguistic point of view the verb ‘to discriminate’ does not have a negative connotation. To discriminate means to differentiate. From a social and legal perspective discrimination nevertheless has a detrimental undertone. At present, lawyers agree that discrimination can only be constituted by arbitrary and illegal discrepancies in treatment[[72]](#footnote-72). ‘Discrimination’ has not yet been defined in a universal manner. As regards EU law, it is not always easy to figure out the difference between equality, equal treatment and non-discrimination. The European Court of Justice is not always consistent and sometimes uses these concepts interchangeably.

*11.* One may wonder whether a discriminatory intent or motive is required before a distinction in treatment is considered to be illegal. In other words, does the prohibition on discrimination require that the perpetrator knew that his practice, measure or rule would disadvantage a certain group or individual? One can answer this question in the negative. Neither EU law[[73]](#footnote-73), nor the relevant human rights instruments require a discriminatory intent[[74]](#footnote-74).

§2. Prohibited Classifications

*12.* A legal provision normally does not interdict discrimination per se. In most instances, it prescribes prohibited grounds of discrimination. There are authors who prefer to use the word ‘protected’ instead of ‘prohibited’[[75]](#footnote-75). Both words will be used interchangeably here. For this dissertation, the most important protected ground is of course sex. Other protected grounds are for example skin colour, disability, religion, sexual orientation or political conviction[[76]](#footnote-76). It has been demonstrated that women or other persons possessing one or more of these specific characteristics or features often belong to the more vulnerable groups in society[[77]](#footnote-77). Adverse differential treatment cannot be based on one of the protected grounds. For example, an employer is not allowed to pay a female employee less than a male one just because she happens to be a women. The workers’ sex is totally irrelevant to the determination of wages. A provision enumerating protected grounds can be open-ended or closed[[78]](#footnote-78). In EU legislation we find a combination of open and closed anti-discrimination provisions[[79]](#footnote-79). The Revised European Social Charter’s non-discrimination provision[[80]](#footnote-80) is of an open-ended nature[[81]](#footnote-81). The UN Convention on the Elimination of All Forms of Discrimination against Women[[82]](#footnote-82) and the ILO anti-discrimination Convention[[83]](#footnote-83) comprise closed proscriptions on discrimination[[84]](#footnote-84).

§3. Comparability

*13.* Paragraph one of this section made clear that, in principle, application of the non-discrimination concept requires a comparison[[85]](#footnote-85). You need to compare the treatment of two individuals or two groups of persons in a similar situation. One of the two has a protected characteristic or feature, the other has not. When the individual or group *with* the characteristic is treated less favourably than the individual or group *without* the characteristic and this difference in treatment is owing, directly or indirectly, to the characteristic, then there is discrimination. In most cases where sex is the protected characteristic, comparability is not an issue. The comparator requirement however does become more problematic when one is confronted with pregnancy discrimination and sexual harassment (*infra nos 55 and 74*).

Section II. Direct Discrimination

*14.* Most direct discrimination cases are rather straightforward. A person *with* a protected characteristic is treated detrimentally in comparison to another person *without* the characteristic exactly because she or he has the characteristic. The less favourable treatment is thus directly owing to the characteristic[[86]](#footnote-86). Direct discrimination will often, but not always, be of an overt nature[[87]](#footnote-87). An example would be a an advertisement for a job in a factory stating ‘team leader or foreman wanted, men only’. In this case there is clearly direct discrimination on the basis of sex. The cause for direct discrimination can often be found in persistent prejudices or stereotypes[[88]](#footnote-88). In the case of the factory the people responsible for recruitment might think ‘women are sensitive and have difficulties in maintaining authority; being a team leader is no job for a woman’.

*15.* In the early years of anti-discrimination legislation, direct discrimination played a significant role. As the prohibition on discrimination became more integrated in national and international systems, it also became apparent that it is often easy to circumvent a direct discrimination provision. The principle of indirect discrimination was consequently contrived in order to support and complement the latter.

*16.* The Treaty on the Establishment of the European Economic Community did not distinguish between direct and indirect forms of discrimination. For a long time, it was left to the European Court of Justice to give substance to the concept of discrimination[[89]](#footnote-89). In the early 2000s, a definition of direct discrimination on the basis of sex was included in the equal treatment directives[[90]](#footnote-90). Direct discrimination on the grounds of sex is also universally recognized in international and regional human rights law[[91]](#footnote-91).

Section III. Indirect Discrimination

What is Indirect Discrimination?

*17.* In general, three distinct elements shape the concept of indirect discrimination. The first element is a provision, rule or practice which appears to be neutral at first sight. It does not mention one of the prohibited grounds and thus seems to apply to all people without any distinction[[92]](#footnote-92). The second element concerns the operation of the seemingly neutral rule in practice. We already referred to the comparability requirement (*supra no. 13*). When applying this requirement to the rule under consideration, one may ascertain that it may not be as neutral as it seems. An at face neutral rule often has, when in operation, a different impact on distinct groups of people. In the majority of the cases the impact of the rule will be more detrimental for a group with a protected characteristic[[93]](#footnote-93). The third element has to do with the detrimental impact itself. Not just any negative impact gives rise to indirect discrimination. The incurred disadvantage for the group with the protected characteristic needs to be considerable[[94]](#footnote-94). The following example may clarify the working of the indirect discrimination concept. An employer who uses the recruitment slogan ‘warehouse workers wanted, at least one meter 75 tall’ in principle commits indirect discrimination. The slogan seems to contain a neutral requirement. A person’s length is not considered to be a prohibited ground. In practice however, the slogan will have a negative influence on women’s chances to get the job. The third element which shapes indirect discrimination is also present. The negative impact of the slogan on women will be vast because the bulk of female jobseekers is smaller than one meter 75. Some other remarks need to be made. It is noteworthy that indirect discrimination is rather concerned with groups of people than with individuals[[95]](#footnote-95). To establish whether indirect discrimination has occurred one will consider a group in its entirety in order to determine the extent of the detrimental impact. It is also clear that when looking for indirect discrimination one should focus on the effect of a rule, not on its form[[96]](#footnote-96). Since it may be complex to detect the specific effects of a rule, indirect discrimination cases are often less easily uncovered. The concept’s existence is nevertheless important for the overall effectiveness of anti-discrimination legislation. Employers may attempt to circumvent direct discrimination prohibitions by using apparently impartial rules[[97]](#footnote-97). A prohibition on indirect discrimination will render this more difficult. In contemporary Europe, most cases of discrimination on the grounds of sex are of an indirect nature.

Origins of the Principle of Indirect Discrimination

*18.* The earliest traces of the concept of indirect discrimination can be found in advisory opinions adopted by the Permanent Court of International Justice[[98]](#footnote-98). Since the reasoning employed in these cases is still of a rudimentary nature, it is preferred to discuss the evolution of indirect discrimination from the early seventies onwards. In the late 1950s the European Court of Justice already applied some kind of prohibition on indirect discrimination, but only so in the context of the free movement of goods, not of workers[[99]](#footnote-99). Although we may thus detect early traces of the concept in case-law of the European Court of Justice[[100]](#footnote-100), it is reasonable to argue that the US Supreme Court was the first to clearly define the term indirect discrimination. It found that a formally neutral rule used by an employer in fact disadvantaged black employees[[101]](#footnote-101). The law relied upon by the Supreme Court for its reasoning did not distinguish between direct and indirect discrimination[[102]](#footnote-102). The first legislative act expressly describing the phenomenon of indirect discrimination was the United Kingdom’s 1975 Sex Discrimination Act[[103]](#footnote-103).

The Concept of Indirect Discrimination in the European Union

*19.* The Treaty of Rome did not expressly mention the principle of indirect discrimination (*supra no. 16*). Neither did the first directive which dealt with the implementation of the principle of equal pay for women and men[[104]](#footnote-104). A second directive, adopted to improve equal treatment of women in the wider employment sphere[[105]](#footnote-105) did mention that ‘there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly’. It did not, however, clarify what was exactly meant with ‘directly or indirectly’. It may therefore be concluded that the development of the concept of indirect discrimination in the Community was left to the European Court of Justice. It pronounced its first landmark case in 1974. In this case, a general definition of indirect discrimination was provided for. It was stated that ‘the rules regarding equality of treatment do not only forbid overt discrimination but also all covert forms of discrimination, which, by the application of other criteria of differentiation, lead in fact to the same result’[[106]](#footnote-106). The last part of the previous sentence indicates that the Court adopts an effect based approach. Another important case, concerning indirect discrimination of female part-time workers was adopted several years later[[107]](#footnote-107). A statutory definition, modelled on the case-law of the Court, for the first time appeared in a 1997 directive[[108]](#footnote-108). Nowadays, indirect sex discrimination occurs where ‘an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’[[109]](#footnote-109) (*infra no. 21*).

The Concept of Indirect Discrimination in the Relevant Human Rights Instruments

*20.* The Revised European Social Charter does not expressly refer to indirect discrimination. Case-law of the European Committee of Social Rights nonetheless clarifies that the concept is recognized[[110]](#footnote-110). Much like the European Social Charter, the ILO’s non-discrimination Convention[[111]](#footnote-111) does not explicitly prohibit indirect discrimination. It is nevertheless clear that the notion is covered by broadly defined article 1[[112]](#footnote-112). Lastly, indirect discrimination plays an important role under the UN Convention on the Elimination of All Forms of Discrimination against Women[[113]](#footnote-113). It is evident to conclude that indirect discrimination was devised in Anglo-Saxon law but that today, it is also firmly rooted in EU and human rights law.

Section IV. Justifications

*21.* Not all differential treatment amounts to a violation of the non-discrimination principle. Statutes or case-law may provide for justifications. In international human rights law, only one system of justifications applies. In EU law, a distinction is made between direct and indirect discrimination.

Justifications under EU Law

*22.* In case of direct discrimination, the general rule is that no justifications will be accepted. Sometimes it is however possible for the employer or other defendant to rely on an express legislative provision stating that differential treatment on the basis of a prohibited criterion does not constitute discrimination[[114]](#footnote-114). For the sake of accuracy such a provision should be referred to as an exception rather than as a justification. The most important exception in the context of sex discrimination is the ‘Genuine Occupational Requirement’ (GOR). It may be determined that the 1976 equal treatment directive already mentioned the GOR[[115]](#footnote-115). It can also be read in the current equal treatment recast directive [[116]](#footnote-116). The GOR exception actually turns over the principle of non-discrimination. It allows an employer to hire somebody exactly because of a prohibited characteristic. Applicants who do not have the characteristic may be lawfully refused. The prohibited characteristic in question must be inherently linked to the capacity to perform the job or to the qualifications required for it[[117]](#footnote-117). Typical examples may be the hiring of female models to show off the newest bikini collection or the casting of a male actor to perform the role of a male character in a play. A second express exception to the prohibition on direct discrimination relates to religious institutions. When recruiting they are allowed to limit the pool of suitable candidates based on the ethos of their religion[[118]](#footnote-118). The Catholic church or the board of a mosque are thus not liable for discrimination when refusing to recruit women as priests or imams.

*23.* In order to excuse a case of indirect discrimination, there is no need to rely upon an express and specific legislative provision. The concept of indirect discrimination allows for the usage of so-called ‘objective justifications’. The European Court of Justice developed the ‘objective justifications’ test when dealing with indirect discrimination of female part-time workers[[119]](#footnote-119). The Court used a partly different wording for cases concerning practices of private employers[[120]](#footnote-120) on the one hand and cases concerning member states’ legislation[[121]](#footnote-121) on the other, but by and large it may be concluded that two requirements need to be met for an objective justification to exist. Firstly, the defendant needs to prove that he or she has a legitimate aim for the indirectly differential treatment[[122]](#footnote-122). ‘Legitimate’ indicates that the aim is objective, thus independent of prohibited grounds of discrimination. It is also requires that there is a real need on the part of the employer or the government to achieve the aim[[123]](#footnote-123). Secondly, the measure that causes the differential treatment needs to be appropriate and necessary for attaining the aim pursued[[124]](#footnote-124). ‘Appropriate and necessary’ signifies that the measure can only be used when there is no less far-reaching alternative. The relationship between the aim pursued and the means employed must thus be proportionate[[125]](#footnote-125). Today, the Court’s ‘objective justifications’ test can also be read in secondary EU law[[126]](#footnote-126). When a member state needs to provide a justification for indirectly discriminatory legislation, it often enjoys a ‘broad margin of discretion’[[127]](#footnote-127).

Justifications in Regional and International Human Rights Law

*24.* Since the Revised European Social Charter does not contain any detailed rules on direct or indirect discrimination, the European Committee of Social Rights needed to provide for clarification. Taking the case-law of the European Court of Human Rights[[128]](#footnote-128) as a model, it was decided that no discrimination takes place when the differential treatment is based on an objective and reasonable justification[[129]](#footnote-129). Under the term ‘margin of appreciation’, the Committee of Social Rights often grants states a considerable degree of discretion when deciding on these justifications[[130]](#footnote-130). The situation is less clear in the case of the International Labour Organization and the UN Convention on the Elimination of All Forms of Discrimination against Women. The ILO’s discrimination Convention[[131]](#footnote-131) and its Committee of experts remain silent on the issue. From other publications by the ILO, we may deduce that differential treatment can be justified if it pursues a legitimate aim and is necessary and proportionate[[132]](#footnote-132). As to the UN Convention on the Elimination of All Forms of Discrimination against Women, one may refer to the statements of the other UN treaty bodies. According to the Human Rights Committee[[133]](#footnote-133) and the Committee on Economic, Social and Cultural Rights[[134]](#footnote-134), a distinction in treatment based on objective and reasonable criteria does not constitute a prohibited discrimination. It can reasonably be argued that the same is true under the UN Convention on the Elimination of Discrimination against Women.

Section V. Affirmative Action

*25.* In the context of affirmative action, several terms are utilized to refer to the same concept[[135]](#footnote-135). Throughout this text, the phrases ‘positive action’ and ‘affirmative action’ will be used interchangeably. The second meaning of ‘positive action’, namely positive *state* action - as opposed to a state’s duty to refrain from doing something- is of less significance here. ‘Temporary special measures’ are furthermore deemed to indicate the same as ‘affirmative action’ (*infra no. 47*). The term ‘positive discrimination’ will not appear because it is not believed to be accurate. Within the legal framework, ‘discrimination’ has a negative connotation (*supra no. 10*). It may therefore be argued that ‘positive’ and ‘discrimination’ are two contradictory terms[[136]](#footnote-136).

*26.* In much the same way as there is no common agreement on terminology used in the positive action sphere, a uniform definition of the concept is also lacking. We define positive action as an amalgam of mostly temporary measures consciously proclaimed to ameliorate the situation of specific groups in society. These groups are often characterized by one or more of the protected features.

*27.* There may be several reasons behind the adoption of positive action measures. The majority of scholars maintain that they are often adopted to compensate for historical discrimination[[137]](#footnote-137). Some groups of people have been discriminated against for decades or even centuries. In these cases the enactment of anti-discrimination legislation is considered to be far from sufficient. Because of the prolonged maltreatment the groups under consideration cannot start from the same position as other groups. They need some extra help to enable them to compete from a similar position. Women are well-known victims of historical discrimination. They have been treated as second-class human beings for a very long time. It is thus not reasonable to expect that a piece of anti-discrimination legislation would entirely remedy their situation. Affirmative action measures may also be enacted in order to enhance diversity within the workplace, to provide for role models that stimulate other members of disadvantaged groups and to prevent social unrest[[138]](#footnote-138).

*28.* Affirmative action can take on diverse forms. Broadly speaking, four types of measures are used in the employment sphere. The first type largely concerns recruitment, vocational guidance and job training. The disadvantaged group may be strongly encouraged to apply for a certain job or receive additional training to become as competitive as the other groups[[139]](#footnote-139). Measures such as these may also, although less frequently, provide for a flexible arrangement of working hours or assist in finding an equilibrium between a career and family responsibilities[[140]](#footnote-140). The second kind focuses on the fairness of the system[[141]](#footnote-141). It attempts to ensure that decisions related to for example promotion or hiring are exclusively merit based. Considerable attention is often dedicated to the establishment of complaint procedures and control mechanisms[[142]](#footnote-142). The third type is referred to as ‘preferential treatment’. The latter itself can be divided into two subcategories: strong and weak preferential treatment. The strong version gives absolute priority to a female job candidate, even when the competing male candidate is better qualified. The weak version only favours the female job candidate in case of competition between similarly qualified job applicants[[143]](#footnote-143). The fourth type of positive action is no doubt the most controversial one[[144]](#footnote-144). It involves the use of so-called goals or quotas. The latter may be rigidly fixed, for example the requirement that within three years 40% of the senior management of a company needs to be female. Less rigorous use can also be made of a quota system. For example, a rule may state that 30% of the newly recruited employees need to be female. If however, no sufficient number of qualified female applicants presents itself, the remaining vacancies may be filled by male employees[[145]](#footnote-145). This last kind of affirmative action has both strong opponents and proponents. It is true that quotas offer an efficient way to swiftly remedy the inferior position of a disadvantaged group. On the other hand, questions of individual merit and free choice arise[[146]](#footnote-146). Scholars belonging to a disadvantaged group do not invariably argue in favour of quota systems. They sometimes warn for a ‘reverse effect’. According to them, it may well be that strong affirmative action measures bolster harmful stereotypes and lead to a belief that the members of the disadvantaged group are less skilled and could never have gained the same success without the quota system[[147]](#footnote-147).

**Part II. Human Rights at Work**

**Chapter I. Relevant Provisions outside the European Union Framework**

Introduction

*29.* The first part of this dissertation endeavoured to outline the various building block of the equality and non-discrimination framework. Since this thesis’ main solicitude lies with the treatment of female workers, the current part will elaborate on employment related human rights and the relevant organizations, instruments and treaty bodies.

*30.* According to the traditional human rights doctrine, there are three different generations of human rights[[148]](#footnote-148). When discussing the EU Charter of Fundamental Rights (*supra no. 3*), brief reference was already made to the first and second generation. Civil and political rights are generally considered as constituting the group of first generation rights[[149]](#footnote-149). Amongst others, they include the right to liberty and security, the right to a fair trial, the right to freedom of expression, the right to freedom of religion and the prohibition of torture and slavery[[150]](#footnote-150). The designation given to second generation rights depends on the particular framework. At the United Nations level, the term economic and social rights is used when referring to second generation rights[[151]](#footnote-151). At the European level, it is more common to refer to them with the umbrella term ‘social rights’[[152]](#footnote-152). The second generation of human rights is composed of, on the one hand, social rights such as for example the right to social security, the right to an adequate standard of living and the right to education[[153]](#footnote-153). On the other hand there are the labour rights or economic rights. Labour rights, in turn, can be divided into two categories. Firstly, there are the collective labour rights. Some well-known examples are the right to form a trade union and the right to strike[[154]](#footnote-154). Secondly, individual labour rights can be distinguished. The right to work, the right to safe and healthy working conditions and the right to a fair and equal remuneration partly make up this second category[[155]](#footnote-155).

Section I. International Instruments

The International Labour Organization

*31.* Accounts on the history of gender equality often forget to mention the International Labour Organization. Since its creation in 1919, this organization has been striving for improvements in workers’ living conditions[[156]](#footnote-156). In 1946, it became the first specialized agency of the United Nations[[157]](#footnote-157). The ILO’s composition is unique. Several of its organs have a tripartite structure, which means that both national employer and employee organizations and government officials are represented[[158]](#footnote-158). The ILO’s main occupation is the adoption and implementation of international labour standards by means of Conventions and Recommendations. The former are international agreements. When ratified, they impose obligations on the state parties. Recommendations do not have legally binding value but they often provide useful guidelines and supplement the Conventions[[159]](#footnote-159). In the past, minimum standards were set in a variety of fields including wages[[160]](#footnote-160), holidays with pay[[161]](#footnote-161), termination of employment[[162]](#footnote-162), hygiene[[163]](#footnote-163), hours of work[[164]](#footnote-164) and social security[[165]](#footnote-165). Supervision of compliance with the Conventions mainly takes place through a reporting system. The Committee of Experts on the Application of Conventions and Recommendations receives the reports and enters into dialogue with government officials[[166]](#footnote-166). Special representation procedures exist of complaints and representations[[167]](#footnote-167). Opinions on the effectiveness of the ILO’s supervision system vary. According to some it is one of the best in the entire United Nations framework. Others claim that it is deficient due to a ‘lack of teeth’[[168]](#footnote-168).

*32.* The International Labour Organization was the first to adopt women specific conventions[[169]](#footnote-169). Between the two World Wars, several conventions of a predominantly protective nature were adopted[[170]](#footnote-170). They were based on the paternalistic idea that women are frail and therefore need to be excluded from certain types of employment. Both contemporaries and 21st century feminists have criticized these conventions for being discriminatory and ignoring individual choice[[171]](#footnote-171). Around the end of World War II one may already discern early evidence of a shift in mentality[[172]](#footnote-172). The 1944 Philadelphia Declaration - currently annexed to the ILO’s Constitution - instructs that all human beings, irrespective of sex, have the right to pursue their material well-being in conditions of economic security and equal opportunity[[173]](#footnote-173). Shortly afterwards, the Convention on equal remuneration for women and men[[174]](#footnote-174) and the discrimination Convention[[175]](#footnote-175) were drafted. As their name already suggests, they deal with equality and non-discrimination, not with protection. Other relevant instruments are the workers with family responsibility Convention[[176]](#footnote-176), the part-time work Convention[[177]](#footnote-177) and the most recent maternity protection Convention[[178]](#footnote-178). The year 1998 is of particular significance because of the acceptance of the Declaration of Fundamental Principles and Rights at Work by employees, employers and governments. By accepting this instrument, representatives in the ILO wanted to reaffirm their commitment to fundamental rights. The Declaration does not impose new obligations on state parties, yet it designates 8 conventions as ‘core conventions’[[179]](#footnote-179). The latter receive special attention. All ILO members need to report on the application of the principles in the core conventions on a yearly basis, irrespective of whether they ratified them or not[[180]](#footnote-180). Global reports on compliance with these conventions are also published. The equal remuneration Convention[[181]](#footnote-181), as well as the discrimination Convention[[182]](#footnote-182) were qualified as core conventions[[183]](#footnote-183).

The UN Convention on the Elimination of All Forms of Discrimination against Women

*33.* The UN Convention on the Elimination of All Forms of Discrimination against Women, also referred to as the Women’s Convention[[184]](#footnote-184) or the International Bill of Women’s Rights[[185]](#footnote-185), is unique in its kind. By focusing on the elimination of *all forms* of discrimination against women, it goes beyond other instruments prohibiting sex discrimination and recognizes that it is women who have been subjected to subordination for centuries[[186]](#footnote-186). Opinions on the Convention are deeply divided. Opponents blame it for comprising ‘equal rights provisions on steroids’[[187]](#footnote-187), for being an anachronism[[188]](#footnote-188) and representing outdated 1970s feminism[[189]](#footnote-189). On the other hand of the spectrum, the Women’s Convention has been called ‘innovative and ambitious’[[190]](#footnote-190), ‘potentially of great importance’[[191]](#footnote-191) and ‘strong and progressive’[[192]](#footnote-192). Article 1 broadly defines discrimination against women as ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’. This definition includes both de jure and de facto as well as direct and indirect discrimination[[193]](#footnote-193). Needless to say that both intentional and unintentional adverse treatment are covered[[194]](#footnote-194). ‘Any other field’ has been interpreted as referring to the family sphere[[195]](#footnote-195). The UN Committee on the Elimination of Discrimination against Women confirmed the latter interpretation by stating that discrimination in private spheres is not accepted[[196]](#footnote-196). Two other of the Convention’s provisions already deserve attention. Article 5 obligates state parties to take measures in order to challenge gender stereotypes and fixed parental gender roles. When looking at the UN Committee’s practice, the logical deduction is that article 5 not only has a far-reaching scope of application, but that it is also of pivotal importance for the rest of the Convention[[197]](#footnote-197). According to the UN Committee, gender stereotypes have a pronounced impact on women’s human rights[[198]](#footnote-198). Substantive equality cannot be reached as long as they persist. Article 11 requires states to get rid of discrimination in the field of employment and is therefore a key to women’s economic empowerment. Greater economic independence for women is indispensable because it fortifies their position in society and makes them less easy targets of malpractices such as domestic violence. Echoing the prevailing literature, some other brief observations need to be made. Only a few states did not yet ratify the Women’s Convention. The high number of reservations is nonetheless disquieting according to many authors[[199]](#footnote-199). It appears that they also alarm the Committee, since its members increasingly call for their withdrawal[[200]](#footnote-200). A second caveat raised repeatedly relates to the UN Committee’s weak enforcement powers[[201]](#footnote-201). Each state parties is expected to submit reports discussing the measures taken to comply with the Convention[[202]](#footnote-202). After studying these reports the Committee adopts concluding observations and potentially a general recommendation[[203]](#footnote-203). As the Committee cannot impose any sanctions for non-compliance, its role is largely limited to the ‘naming and shaming’ of unruly state parties[[204]](#footnote-204). By introducing complaint and inquiry procedures[[205]](#footnote-205), the 1999 Optional Protocol slightly brightened up the situation, but the contracting parties’ good will remains significant. Also, the Committee was referred to as ‘the poor cousin and stepchild of the UN human rights treaty bodies’, because of a lack of resources and meeting time[[206]](#footnote-206).

Section II. Regional Instruments

The Revised European Social Charter

*34.* The ideological divide between first and second generation human rights left its marks on the European human rights system. The European Convention on Human Rights[[207]](#footnote-207), containing civil and political rights, was adopted in 1950. It took however more than a decade before agreement could also be reached on economic and social rights. Eventually, the European Social Charter was adopted in 1961[[208]](#footnote-208). While the European Convention was at the center of scholarly attention over the years, the European Social Charter received considerably less attention. Therefore it is not surprising that people refer to the Social Charter as the European Convention’s little sister[[209]](#footnote-209). There are however other reasons behind the use of this nickname. Firstly, scholars often criticized the Social Charter for its weak supervision mechanism[[210]](#footnote-210). Until 1998, state compliance was only supervised on the basis of reports. The European Committee of Social Rights, the Charter’s Expert Committee[[211]](#footnote-211), receives state reports and pronounces on compliance with the Charter provisions[[212]](#footnote-212). No penalties can be imposed for non-compliance. In 1998, the Collective Complaints Protocol[[213]](#footnote-213) entered into force. It allows employers’ organizations, trade unions and recognized NGO’s to file a quasi-judicial complaint against their governments[[214]](#footnote-214). This protocol whittled down criticism but the Charter’s compliance system is still no match for that of the European Convention on Human Rights. The latter provides for a system of individual judicial complaints[[215]](#footnote-215) and just satisfaction[[216]](#footnote-216). Secondly, article 20 of the Social Charter operates an ‘à la carte’ system. States can pick and choose certain provisions for ratification; they do not need to ratify all the Charter’s provisions[[217]](#footnote-217). Even before the text of Collective Complaints Protocol was finished, there had been calls to do more to revitalize the Charter[[218]](#footnote-218). They resulted in the adoption of the 1996 Revised Social Charter[[219]](#footnote-219). The 1961 Charter is not suddenly replaced by the Revised Charter. States that choose not to ratify the new Charter remain bound by the 1961 Charter[[220]](#footnote-220). The Revised Charter increases the number of protected rights and removes outdated provisions[[221]](#footnote-221). The ‘a la carte’ ratification system is maintained but a higher number of rights needs to accepted[[222]](#footnote-222).

*35.* There are only two provisions in the 1961 Charter which explicitly relate to women’s labour rights. Article 4, paragraph 3, aims to guarantee that female workers get equal pay for work of equal value. Article 8’s heading refers to the right of employed women to protection. Its first three paragraphs are concerned with the protection of pregnant workers and women who have recently given birth. The fourth paragraph of article 8 was no doubt inspired by the early intrusive ILO conventions (*supra no. 32*) [[223]](#footnote-223). In broad terms, it excludes women from night work and other work which is ‘unsuitable for them by reasons of its dangerous, unhealthy or arduous nature’. During the drafting of the Charter, Scandinavian representatives nevertheless expressed to no avail that they disagreed with the inclusion of the fourth paragraph of article 8[[224]](#footnote-224). After some time, the European Committee of Social Rights also began to interpret article 1 on the right to work and article 16 on the right of the family to protection in a manner which is beneficial for female workers[[225]](#footnote-225). The Revised European Social Charter is more promising from a feminist perspective. The explanatory report to the Revised Charter explains that all amendments were made bearing in mind the need to ensure equal treatment of men and women[[226]](#footnote-226). With article E of the Revised Charter, a general prohibition on the basis of sex was introduced. Article 8 was re-written and now only excludes pregnant women from dangerous, unhealthy or arduous work. New article 20 on the right to equal treatment in matters of employment and occupation without discrimination on the grounds of sex reacts against practices which disadvantage women in access to employment, dismissal arrangements, working conditions, training and promotion. New article 26 pays attention to sexual harassment. And finally, article 27 provides workers with family responsibilities - mainly women - with a right to equal opportunities.

**Chapter II. The European Union**

Section I. The EU and Social Rights: Elusive or Crystal Clear?

*36.* Commenting on the relationship between the European Union and social rights is rather a complex task. EU intervention in the social sphere is not clearly a black or white matter. Scholarly opinions diverge considerably as to the necessity of EU intervention, its exact role and the results achieved in the social sphere[[227]](#footnote-227). Paragraph 1 below briefly looks at social measures taken by the EU outside the human rights framework. Paragraph 2 on the contrary, departs from a human rights perspective. The same two-tiered exercise is repeated in the context of labour law and employment rights.

§1. The EU’s Social Policy

*37.* There is general agreement on the fact that an ‘EU social policy’ exists[[228]](#footnote-228). It is however less clear what it exactly comprises. In one book, a social policy is compared to an elephant. You recognize it when you see it but it is notoriously difficult to describe[[229]](#footnote-229). It is submitted that it is indeed difficult to adequately define ‘social policy’. In this thesis, ‘social policy’ is understood to include the netting of rules, measures and programmes dealing with social security, employment, equality, poverty, health and education. Typically, nation states stand guard over rules dealing with poverty, health, education and so forth. Hence it is not surprising that the transfer of social policy competences to the EU has not always been received with open arms by the member states[[230]](#footnote-230).

*38.* Various provisions of primary EU law served as a legal basis for the adoption of social measures. The articles on the free movement of workers[[231]](#footnote-231) and self-employed[[232]](#footnote-232) provide a first example. The EU’s Common Market is characterized by the so-called ‘four freedoms’, including free movement of services, capital, goods and the economically active persons[[233]](#footnote-233). Inadequate social protection would hinder the movement of the latter. In order to avoid such a hindrance, several regulations were enacted to guarantee the mobile workers’ adequate social security entitlements[[234]](#footnote-234). The European Court of Justice then again relied on the rules on the free movement of services when deciding on issues related to health care provision[[235]](#footnote-235). A second legal base can be found in the Treaty on the Establishment of the European Economic Community. The latter already included a chapter on ‘Social Provisions’[[236]](#footnote-236). The chapter was inserted in the Treaty because some of the participating states feared the phenomenon of social dumping[[237]](#footnote-237) (*supra no. 5)*. During the first two decades of European integration, the chapter’s only important article was article 119 on the principle of equal pay for women and men. The other social policy provisions were too vague and did not transfer any specific competence to the Community institutions[[238]](#footnote-238). Subsequent treaty changes increased the relevance of the provisions in the social policy chapter. Today, they explicitly refer to the European Social Charter and the 1989 Community Charter (*infra no. 40*)[[239]](#footnote-239). The role of the social partners is promoted at EU level[[240]](#footnote-240). Another article allows for the adoption of directives on several work related issues[[241]](#footnote-241). Non-legally binding EU programmes can be drafted in the context of social exclusion and the modernization of social protection systems[[242]](#footnote-242). The EU also received confined competences in the field of education and public health[[243]](#footnote-243).

§2. Social Rights in the European Union

*39.* The EU Charter of Fundamental Rights (*supra no. 3*) encloses several social rights. EU citizens are reminded of the fact that they have a right to access to health care[[244]](#footnote-244), a right to social security and social assistance[[245]](#footnote-245) and a right to education[[246]](#footnote-246). Their inclusion was inspired by both the European Social Charter and an additional protocol to the European Convention on Human Rights[[247]](#footnote-247).

*40.* The adoption of the EU Charter of Fundamental Rights was actually preceded by the proclamation of another relevant instrument. In 1989 all the member states, with the exception of the United Kingdom, accepted the Community Charter of Fundamental Social Rights[[248]](#footnote-248). References to the ILO and the European Social Charter make clear that human rights concerns inspired its acceptance. The Community Charter’s influence nonetheless remained fairly limited because it was not assigned any legally binding value[[249]](#footnote-249).

Section II. The EU, Employment Law and Labour Rights

§1. EU Employment Law

*41.* It is a fact that most of the measures adopted in the EU social sphere relate to employment. Many of the articles in the social policy chapter concern worker related issues[[250]](#footnote-250). As in the case of the general EU social policy, it has not always been easy to strike a balance between preserving a competitive market and protecting workers’ rights. It has often been argued that protective employment laws increase costs and inefficiency[[251]](#footnote-251). Throughout the years, a series of relevant directives have been adopted. They have been dealing with topics such as working-time[[252]](#footnote-252), health and safety[[253]](#footnote-253), protection in case of collective redundancies[[254]](#footnote-254) or employer’s insolvency[[255]](#footnote-255), protection of atypical and part-time workers[[256]](#footnote-256), protection of pregnant workers[[257]](#footnote-257), parental leave for workers[[258]](#footnote-258) and of course equal treatment and non-discrimination in employment[[259]](#footnote-259) (*supra no. 5*).

§2. Labour Rights in the European Union

*42.* The EU Charter of Fundamental Rights pays attention to both collective and individual labour rights. The latter category includes for example the right to protection in the event of unjustified dismissal[[260]](#footnote-260) and the right to fair and just working conditions[[261]](#footnote-261). All individual labour rights need to be read in conjunction with the general prohibition on discrimination in article 21 of the Charter. Also interesting for the purpose of the present text is article 33 on family and professional life. It includes a right to parental leave and protects pregnant workers and new mothers from discrimination.

**Part III. Women’s Labour Rights: Some Key Issues**

**Chapter I. Employment Opportunities and Fair Working Conditions**

Section I. Job Opportunities

Introduction

*43.* Several reports produced by the European Commission indicate that sex segregation in employment persists in the EU and even increases in some of the member states[[262]](#footnote-262). By and large, two types of segregation are discerned in the literature. Vertical or hierarchical segregation, also known as the glass ceiling, is aligned with the nature of a woman’s career[[263]](#footnote-263). It means that considerably more women are stuck in jobs which only entail a low level of authority and responsibility. Women are clearly under-represented at the top of the occupational pyramid[[264]](#footnote-264). The existence of this glass ceiling continues to negatively influence women’s wages (*infra no. 49*), occupational credibility and their position in society at large[[265]](#footnote-265). Horizontal segregation refers to the concentration of women in other kinds of professions than men[[266]](#footnote-266). Affirmative action schemes and the measures supporting a more equal distribution of work and family responsibilities (*infra no. 64*) are of particular importance in correcting sex segregation in employment[[267]](#footnote-267).

The European Union

*44.* Positive action has been on the EU agenda since the 1980s. Early soft law instruments[[268]](#footnote-268) and case-law[[269]](#footnote-269) attracted little attention. It was only in 1995[[270]](#footnote-270), when the European Court of Justice began to develop its confusing and controversial line of case-law, that more scholarly eyes turned towards Luxembourg. By way of preliminary observation, it should be mentioned that neither primary, nor secondary EU law obligates the adoption of positive action measures[[271]](#footnote-271). If member states choose to introduce such measures they however need to take into account the following observations. Firstly, for the European Court of Justice, affirmative action in favour of women constitutes an exception or derogation to the principles of equality and non-discrimination[[272]](#footnote-272). Secondly, the Court appears to differentiate between access to places of employment[[273]](#footnote-273) on the one hand and access to certain working conditions and employment related opportunities on the other[[274]](#footnote-274). In its initial 1995 case on access to places of employment, the Court assumed a formal and rigid position to positive action. The provisions in a German public sector scheme were found to be incompatible with the 1976 equal treatment directive. They provided that, in sectors where women are under-represented, the female candidate with equal qualifications needs to be given priority over the male candidate[[275]](#footnote-275). The latter judgment was negatively received by the majority of scholars and criticized for the judgment’s briefness, lack of attention for the principle of subsidiarity[[276]](#footnote-276) and the failure to demonstrate sensibility towards the position of women[[277]](#footnote-277). In the next case brought before it[[278]](#footnote-278), the Court appeared to move away to a certain extent from its 1995 judgment. The facts were largely similar to the ones set out in the 1995 case, with the exception of a so-called savings clause. According to such a clause an equally qualified female candidate must be given priority, unless reasons specific to the individual male candidate tilt the balance in his favour[[279]](#footnote-279). The public scheme was found to be compatible with the equal treatment directive because, due to the savings clause, no absolute and unconditional priority was given to women applicants[[280]](#footnote-280). This second judgment provoked more mixed reactions. For some authors, it was a step in the right direction because the Court appeared to balance the conflicting interests more delicately[[281]](#footnote-281). For others, Marschall is an important case because recognition is given to the fact that prejudices and stereotypes concerning the role and capacities of women in working life still exist[[282]](#footnote-282). Contrarily, a third group of scholars rightly believe that the Court’s reliance on the concept of a savings clause is artificial and may well be used to the detriment of women workers[[283]](#footnote-283). The distinction ‘savings clause or no savings clause’ has been maintained in later cases[[284]](#footnote-284). As regards working conditions and employment related opportunities, the Court’s standpoint turns out to be more generous.

In case of training places and calls for a job interview, rigid or strict quotas passed the test[[285]](#footnote-285). The Court is also more inclined to accept working conditions designed to facilitate the pursuit of a career such as the reservation of child-care places for women by a public employer[[286]](#footnote-286). The Amsterdam treaty[[287]](#footnote-287) and the EU Charter of Fundamental Rights[[288]](#footnote-288) have given positive action constitutional value but this did not notably change the Court’s approach[[289]](#footnote-289).

The Revised European Social Charter

*45.* When the original European Social Charter took effect, it lacked any explicit reference to positive action. At present, an additional protocol[[290]](#footnote-290) and the appendix to the revised Charter[[291]](#footnote-291) clarify that it is permitted to adopt affirmative action measures to improve women’s employment situation[[292]](#footnote-292). In recent years the European Committee of Social Rights has requested several parties to explain whether or not they have established positive action schemes[[293]](#footnote-293). The Committee’s more precise point of view however remains opaque. One conclusion might be interpreted as stating that affirmative action constitutes a derogation to the equality principle[[294]](#footnote-294). Another conclusion then again might impose an obligation to set up positive action schemes[[295]](#footnote-295). When confronted with quota systems and target numbers the Committee refrained from ruling on their compatibility with the Charter[[296]](#footnote-296).

The International Labour Organization

*46.* ILO Convention 111 on discrimination in employment and occupation does not expressly refer to affirmative action. Article 5(2) does mention that special measures of protection or assistance will not be deemed discriminatory. Special measures of protection are understood to cover measures aimed at pregnant women and mothers who have just given birth (*infra no. 85*). Since it is unclear what is exactly meant with ‘special measures of assistance’, one must try to find out whether affirmative action is covered by the Convention in a different way. The ILO Committee of Experts’ work clarifies the situation. By referring to affirmative action in its observations and by asking states to provide information on their affirmative action schemes[[297]](#footnote-297), the Committee of Experts confirms that such measures fit in the Convention’s structure[[298]](#footnote-298). Convention 111 is thus one of the oldest, if not the oldest international treaty under which the use of affirmative action is recognized[[299]](#footnote-299). Parties to the Convention are not compelled to introduce affirmative action measures, but their adoption is welcomed[[300]](#footnote-300). Characteristic to the International Labour Organization is the requirement to engage both employer representatives and the trade unions in discussions on affirmative action[[301]](#footnote-301). The Committee of Experts has requested EU member states to clarify the impact of EU law on their positive action schemes but refrained from criticizing the Court of Justice’s case-law[[302]](#footnote-302).

The UN Convention on the Elimination of All Forms of Discrimination against Women

*47.* Article 4 of the Convention on the Elimination of Discrimination against Women can be found in the first, general part of the Convention. This means that it needs to be read together with each substantive provision in parts two and three[[303]](#footnote-303). One must watchfully distinguish the first and second paragraph of article 4 from each other. Paragraph one refers to ‘temporary special measures’. These measures are of a compensatory and corrective nature and are therefore similar to positive or affirmative action measures[[304]](#footnote-304). Paragraph two, on the other hand, provides for special measures aimed at protecting maternity. The latter are of a permanent and protective nature[[305]](#footnote-305). The work of the Committee on the Elimination of Discrimination demonstrates that temporary special measures are of great importance to the effective application of the Convention provisions, in particular the ones related to employment. Within the CEDAW framework they are not reckoned as exceptions but as an integral part of the non-discrimination and equality regime[[306]](#footnote-306). Moreover, temporary special measures are regarded as a powerful tool in the gradual expulsion of prejudicial gender roles and stereotypes[[307]](#footnote-307). At first sight, the Committee appears to be using affirmative action as some kind of magic wand. In virtually each concluding observation, state parties are told that they need to introduce or increase the amount of positive action schemes[[308]](#footnote-308). On a closer look, one may however conclude that the Committee’s approach is multifarious. Its members have recognized that special measures are often controversial[[309]](#footnote-309). This is why measures of different strength, proportionate to the circumstances, are recommended[[310]](#footnote-310). As regards women’s employment, the Committee distinguishes between private and public sector employment. For the former sector, specific educational, (re)training programmes and awareness-raising campaigns are preferred[[311]](#footnote-311). Special credit and loan programmes should be available for women entrepreneurs[[312]](#footnote-312). Except for a few rare cases[[313]](#footnote-313), quotas, goals and timetables are reserved for public sector employment[[314]](#footnote-314). The adoption of quotas has been encouraged for, amongst others, state-owned enterprises[[315]](#footnote-315), government and public administration[[316]](#footnote-316), university professors[[317]](#footnote-317), judges[[318]](#footnote-318), the diplomatic service[[319]](#footnote-319) and representation in international organizations[[320]](#footnote-320). For several years, it remained unclear whether the first paragraph of article 4 is of a mandatory or a merely permissive nature. While relying on a textual reading the provisionand the travaux préparatoires, it was argued from different angles that the Convention solely allows the adoption of temporary special measures[[321]](#footnote-321). In its 2004 general recommendation on article 4, the Committee decided to make short work of these assertions. States are obliged to adopt and implement affirmative action measures in relation to any of the substantive provisions in the Convention, if there is no less far-reaching way to accelerate the achievement of substantive equality for women[[322]](#footnote-322). ‘Maternity’ in the second paragraph of article 4 must be interpreted narrowly, as only referring to a woman’s biological features (*infra no. 84*). Protective measures cannot be extended to child rearing because this would reaffirm and perpetuate the gendered division of labour and the archaic view of women as the weaker sex[[323]](#footnote-323).

*48.* It can be concluded that, in terms of positive action, the EU institutions and the Committee on the Elimination of Discrimination against Women are located on the opposite sides of the spectrum. According to the latter, temporary special measures are indispensable to the attainment of substantive equality. In the eyes of the former, positive action measures are optional and derogate from the equality scheme. The affirmative action under the International Labour Organization and the European Social Charter may be situated somewhere in between the EU and the UN Convention regimes.

Section II. Equal Pay

Introduction

*49.* Widely discussed amongst feminists is the sex differential in earnings, also referred to as the pay gap or wage gap. This expression refers to the difference between average female and male hourly earnings[[324]](#footnote-324). The result of blatant discrimination, this gap in earnings could be as wide as 50% in the first half of the 20th century. Due to the introduction of measures by international organizations, the gap has significantly decreased. Up to this day however, it has not yet been completely effaced. Research shows that pay differences between 25% and 10% persist in the distinct EU member states[[325]](#footnote-325). They are thus, as expressed by one particular scholar, ‘woven into the fabric of society’[[326]](#footnote-326) and anti-discrimination measures alone might not be sufficient to eradicate them.

The International Labour Organization

*50.* Since the ILO equal remuneration Convention[[327]](#footnote-327) inspired the drafters of other equal pay provisions, it is useful to discuss this regime first. Convention no. 100 is one of the eight fundamental ILO Conventions[[328]](#footnote-328) (*supra no. 32*). It is nevertheless partly of a promotional nature. State parties are only bound to ensure the application of the equal pay principle where they are in a position to affect the wage-fixing process. Where the assignment of the level of remuneration is left to collective bargaining, the government merely has a promotional duty[[329]](#footnote-329). The ILO regime does not oblige states to include the principle of equal remuneration in their national legislation[[330]](#footnote-330). Convention no. 100 wants to guarantee equal remuneration for female and male workers for work of equal value. The latter term covers not only the same or similar work but also work of a different nature, which is nonetheless of equal value[[331]](#footnote-331). The inclusion of distinct jobs of equal value is essential for the reduction of structural inequality. Owing to historical and stereotypical assumptions, work performed by women is often undervalued. This leads to lower wages being paid in sectors where women are over-represented (*supra* no. 43) [[332]](#footnote-332). Ascertaining whether a male-dominated job and a female-dominated job are of equal value is however far from easy. The Convention therefore requires that the parties promote objective job appraisals, based on a comparison of skills, physical and emotional demands, responsibility and working conditions[[333]](#footnote-333). According to the Committee of Experts, job comparison should be as wide as possible and should not be limited to a single establishment or enterprise[[334]](#footnote-334). If it is determined that two jobs are of equal worth, equal remuneration needs to be granted to the women and men performing them[[335]](#footnote-335). In order to prevent both direct and indirect pay discrimination, a broad interpretation has been given to ‘remuneration’[[336]](#footnote-336). It includes amongst other increments based on seniority and marital status, cost-of-living allowances, dependency allowances and housing allowances[[337]](#footnote-337). Social security benefits paid for by the employer are likewise situated under ‘remuneration’[[338]](#footnote-338). Compensation conferred to female workers when they resign due to marriage or pregnancy has been found to be incompatible with the equal remuneration Convention[[339]](#footnote-339).

The UN Convention on the Elimination of All Forms of Discrimination against Women

*51.* The travaux préparatoires of the UN Convention on the Elimination of Discrimination against Women convey that article 11(1)(d) on the right to equal remuneration is mainly based on the provisions in ILO Convention no. 100[[340]](#footnote-340). The Women’s Committee has also emphasized the importance of Convention no. 100 on several occasions. The ILO equal remuneration Convention is mentioned twice in a very brief General Recommendation[[341]](#footnote-341) and the Committee has encouraged states to ratify it[[342]](#footnote-342). The pay gap is touched upon in nearly every concluding comment[[343]](#footnote-343), which evidences how widespread and persistent it is. States are reminded of the causal link between the wage gap and occupational segregation[[344]](#footnote-344). Both the text of the UN Convention[[345]](#footnote-345) and the Committee’s statements[[346]](#footnote-346) indicate that objective job evaluation is of great importance. The latter is considered to be an inherent part of the principle of equal pay for work of equal value[[347]](#footnote-347). ‘Remuneration’ is, not surprisingly, given the same broad definition as under Convention no. 100[[348]](#footnote-348).

The Revised European Social Charter

*52.* Article 4(3) on the right to equal pay for work of equal value in both the Revised and the original European Social Charter[[349]](#footnote-349) has been referred to as ‘one of the most important provisions of the Charter’[[350]](#footnote-350). Since the adoption of the revised Charter, the right to equal pay is strengthened by the general provision on sex equality[[351]](#footnote-351). As in the case of the EU and the Convention on Discrimination against Women, article 4(3) was based on ILO Convention no. 100. The European Committee of Social Rights however before long clarified that the Charter goes further than Convention no. 100[[352]](#footnote-352). The obligation for parties under the Charter to ensure enjoyment of the right to equal pay is absoluteand it must be expressly mentioned in national legislation[[353]](#footnote-353). These requirements contrast with Convention no. 100. According to the Committee, parties are obliged to develop appropriate schemes for job appraisal. These schemes must be based on the features of the posts under consideration, not on the personal characteristics of the workers[[354]](#footnote-354). Criteria such as willingness to work overtime, to take on jobs with difficult working hours or muscular effort are not accepted by the Committee, as they may be discriminatory against women workers[[355]](#footnote-355). In the footsteps of the Committee of Experts, it was stated that comparisons of male and female dominated jobs cannot be limited to one enterprise alone. Wage and job comparisons must extend to other companies[[356]](#footnote-356). ‘Pay’ has been defined broadly, in a manner similar to the ILO Convention[[357]](#footnote-357).

The European Union

*53.* Although written to the example of Convention no. 100, original article 119 on the right to equal pay for equal work of the Treaty on the European Economic Community was narrower in scope[[358]](#footnote-358). Reference to ‘work of equal value’ only appeared for the first time in a 1975 directive and became part of primary EU law with the Amsterdam Treaty[[359]](#footnote-359). The EU equal pay principle owes its wide scope to the European Court of Justice, resulting in a large quantity of case-law. Already relatively early, it became clear that what is now article 157 TFEU on the right to equal pay is a potent provision. The Court rather boldly decided that article 157 TFEU has not only vertical but also horizontal direct effect[[360]](#footnote-360). Women workers can thus invoke their right to equal remuneration against both the state and their individual employer in national courts[[361]](#footnote-361). Furthermore, the Commission successfully brought several infringement actions against member states for not respecting the equal pay principle[[362]](#footnote-362). Occupational social security schemes are covered by article 157 TFEU, state social security schemes are not[[363]](#footnote-363). As to the determination whether work performed by female and male workers is of equal value, the approach of the Court appears to be more lenient than that of the other experts.A number of factors such as the nature of the work, the training requirements and the working conditions need to be taken into account[[364]](#footnote-364).There is however no obligation to use or create a job evaluation scheme. Other methods may be used to ascertain whether jobs are of equal value[[365]](#footnote-365). If however a job appraisal scheme is used, it cannot contain any criteria which may give rise to sex discrimination[[366]](#footnote-366). The case-law of the Court on whether job comparison is limited to a single enterprise or employer is rather confusing. One may assume that cross-employer comparison is possible if the two jobs are covered by the same collective agreement or legislative provision[[367]](#footnote-367). Article 157 TFEU defines ‘pay’ in broad terms. Accordingly, the Court has ruled that all employer-based payments constitute pay[[368]](#footnote-368). Included are for example: payment for extra hours[[369]](#footnote-369), family and marriage allowances[[370]](#footnote-370), special bonus payments made by the employer[[371]](#footnote-371), maternity benefits paid under legislation[[372]](#footnote-372), sick leave payments[[373]](#footnote-373), compensation for attending training courses and training facilities[[374]](#footnote-374). Article 23 of the EU Charter states that equality between men and women must be ensured in all areas, including pay. It is however questionable whether this provision is of any additional value, since the Court already confirmed that equal pay constitutes a fundamental right[[375]](#footnote-375). The same can be argued with regard to the general non-discrimination article in the Charter.

*54.* The likely conclusion to be drawn is that there are many similarities between the various equal pay regimes. There are however also discrepancies. The strength of the equal pay provisions differs. The most solid and effective equal pay provisions can be found in EU law, followed by article 4(3) of the Revised European Social Charter. Different importance is attached to job appraisal schemes, with the UN Committee on the Elimination of Discrimination against Women at one end of the spectrum and the European Court of Justice at the other.

Section III. Sexual Harassment

Introduction

*55.* The term sexual harassment originated in writings of American feminist scholars in the 1970s[[376]](#footnote-376). In the second half of the 1980s, the US Supreme Court for the first time recognized that it constitutes unlawful sex discrimination under Title VII of the 1964 Civil Rights Act[[377]](#footnote-377). Subsequently, the concept penetrated into the work of international organizations and other national legal orders. Remarkable however are the differences in the concrete shaping of sexual harassment. In the United States, the question of employer liability is pivotal when dealing with sexual harassment cases. Employers found liable for sexual harassment risk being subjected to - sometimes extreme – damages claims[[378]](#footnote-378). In other systems, employer liability appears to be of a lesser concern.

*56.* It is rather difficult to adequately delineate the term sexual harassment. To date, no uniform definition has been developed. For the purpose of this dissertation, it may be described as ‘unwanted conduct or expressions of a sexual nature which occur within the employment context’[[379]](#footnote-379). Sexual harassment may take on two main forms. Quid pro quo harassment points to situations where the keeping of a job or the acquisition of an employment related benefit[[380]](#footnote-380) is made conditional upon the performance of sexual favours or subjection to other sexually tinted behaviour[[381]](#footnote-381). It often manifests itself in vertical employer – employee relationships[[382]](#footnote-382). The second type of harassment is of a more general nature. Hostile environment harassment occurs when a worker’s performance is negatively affected by verbal or physical conduct of a sexual nature. The latter is more common to horizontal relationships between employees[[383]](#footnote-383). Examples covered by this type of harassment are demands for sexual favours, touching, staring, sexual or insulting jokes, sexual postering, asking questions about someone’s sex life, the display of pornographic material and sexual assault[[384]](#footnote-384).

*57.* Sexual harassment is clearly a gendered problem. Numerous studies have shown that the large majority of victims are women workers[[385]](#footnote-385). According to several feminist scholars, instances of sexual harassment perpetuate uneven power relationships between women and men in the labour context. By harassing women colleagues or subordinates men often, consciously or unconsciously, try to validate a sense of dominance[[386]](#footnote-386). Sexual harassment may have several negative consequences for victims. They are often dismissed, transferred, or leave their jobs altogether[[387]](#footnote-387). Research has also demonstrated that it often has damaging effects on the victim’s health and may lead to loss of self-confidence, anxiety, sleeplessness, stress and depression[[388]](#footnote-388).

The European Union

*58.* In the second half of the 1980s, the EU institutions recognized that sexual harassment has a detrimental impact on workers. In several soft law instruments[[389]](#footnote-389), the member states were encouraged to launch campaigns in order to educate both employers and employees on sexual harassment. When compared with American case-law, these early instruments display a different approach. Sexual harassment was not explicitly referred to as illegal sex discrimination but was rather seen as a violation of the dignity of both men and women at work[[390]](#footnote-390). By including a definition of sexual harassment in the 2002 equal treatment directive[[391]](#footnote-391), the EU partly adjusted its position. The current recast directive determines that both sex-based harassment[[392]](#footnote-392) and sexual harassment[[393]](#footnote-393) are forms of sex discrimination[[394]](#footnote-394). No consensus exists on the added value of these two separate definitions. Their inclusion was applauded based on the argument that many female workers are subjected to the two types of harassment at the same time. The two definitions thus strengthen the victims’ position[[395]](#footnote-395). Opponents mainly argue that the distinction between sexual harassment and sex-based harassment creates unnecessary confusion and will lead to difficulties in interpretation[[396]](#footnote-396). Sex-based harassment and sexual harassment have two attributes in common. Firstly, dignity remains a constructive element. Only if the perpetrator’s conduct endangers the dignity of the victim, there is sexual harassment or sex-based harassment[[397]](#footnote-397). Secondly, both sex-based harassment and sexual harassment are atypical forms of discrimination. They do not fit into the traditional EU equality and non-discrimination framework, because their definitions demonstrate that no comparison needs to be made[[398]](#footnote-398). Sex-based harassment however does still require a causal relationship between the protected ground sex and the bad treatment[[399]](#footnote-399). A worker is harassed because she is female but the harmful treatment is of a non-sexual nature. Sexual harassment does not necessarily require such a causal relationship, although there will often be one in practice. For harmful treatment to be sexual harassment, it needs to be of a sexual nature[[400]](#footnote-400). Because women workers are the primary victims of harmful treatment of a sexual nature, it was decided to categorize sexual harassment as sex discrimination. Making the distinction between sex-based harassment and sexual harassment is not always easy and the two will often overlap. This is why some scholars unsuccessfully proposed to tackle sexual harassment as a health and safety issue at work in a separate directive[[401]](#footnote-401). An attentive reading of the recast directive also shows that, contrary to what a few authors claim[[402]](#footnote-402), both quid pro quo and hostile environment sexual harassment are condemned within the EU legal framework[[403]](#footnote-403). Beside the divergent weight attached to the victim’s dignity, there are other disparities between European and American attitudes towards sexual harassment. Title VII of the Civil Rights Act does not formally require the adoption of preventive measures. Owing to the risk of damages claims, virtually any American employer nowadays has a mechanism for preventing and remedying instances of sexual harassment. Case-law of the US Supreme Court also appears to be imposing a de facto preventative obligation on employers[[404]](#footnote-404). In EU law, the role of prevention appears to be less significant. The recast directive only expects member states to *encourage* (not oblige)the adoption of preventive measures[[405]](#footnote-405). Furthermore, European employers are less inclined to set up internal anti-discrimination policies because of the more moderate financial risks relating to sexual harassment. The Civil Rights Act does not expressly mention sexual harassment. The American courts, not the legislature, brought it within the scope of Title VII of the Act. In the EU, in contrast, the Union judicature is the notable absentee in the sexual harassment debate. To this day, there are no important rulings by the European Court of Justice.

*59.* The EU Charter of Fundamental Rights does not make express reference to sexual harassment. Its provisions on human dignity[[406]](#footnote-406), the integrity of the person[[407]](#footnote-407), non-discrimination[[408]](#footnote-408), equality between men and women[[409]](#footnote-409) and fair and just working conditions[[410]](#footnote-410) might be of assistance to the European Court of Justice in future cases.

The Revised European Social Charter

*60.* The 1961 European Social Charter was devised some 15 years before the term sexual harassment obtained a foothold in the doctrine. In this way it is not surprising that the concept was not mentioned in the original Charter. Article 26 of the Revised Charter on the other hand explicitly notifies sexual harassment. Both quid pro quo and hostile environment harassment are covered[[411]](#footnote-411). The heading of article 26[[412]](#footnote-412) manifests that the drafters drew inspiration from the early EU documents[[413]](#footnote-413). Unlike in the EU, no shift took place away from a dignity perspective to a conception of sexual harassment as sex discrimination later on. By denying that sexual harassment is a form of sex discrimination in several of its conclusions[[414]](#footnote-414), the European Committee of Social Rights affirmed that it predominantly views sexual harassment as a threat to a worker’s dignity. In 2006, a second approach to sexual harassment was assumed. While pronouncing on a worker’s right to privacy under article 1(2) of the Charter, the Committee referred to article 26[[415]](#footnote-415). This may signify a conception of sexual harassment as a violation of the right to respect for someone’s private life[[416]](#footnote-416). This position reflects the approach of the Committee’s counterpart, the European Court of Human Rights. According to the latter, a person’s moral and physical integrity, including his or her sexual integrity, are covered by the right to a private life[[417]](#footnote-417). By refusing to qualify sexual harassment as a workplace safety and health issue, the Committee conforms to the Union’s conception. Lastly it must be remarked that, within the Council of Europe, additional measures were taken. The Convention on preventing and combating violence against women obliges parties to subject sexual harassment to criminal or other legal sanctions. The influence of the UN Women’s Committee is clearly visible throughout the Convention.

The UN Convention on the Elimination of All Forms of Discrimination against Women

*61.* Since the drafting of the UN Convention on the Elimination of Discrimination Against Women predated the general recognition of the concept sexual harassment, it does not explicitly recognize the concept. The Committee on the Elimination of Discrimination against Women has nevertheless devised several strategies in order to combat the phenomenon. In two of its General Recommendations, sexual harassment has been qualified as a form of gender-based violence[[418]](#footnote-418). According to the Committee, gender-based violence is violence that is directed against a woman, because she is a woman or that affects women disproportionately[[419]](#footnote-419). Gender-based violence is covered by the broad definition of ‘discrimination against women’ in article 1 of the Convention[[420]](#footnote-420). One may wonder whether the latter description is capable of covering all forms of sexual harassment. Some types of sexual harassment, such as sexual assault and rape undoubtedly constitute serious physical violence. Other types of sexual harassment however do not involve the use of any physical force. If they nonetheless result in harm to the mental state of the victim, they may be seen as incidents of psychological violence. A close reading of the relevant General Recommendation manifests that the Committee intended to include psychological violence[[421]](#footnote-421). Within the broader UN framework, the decision was made to adhere to the categorization under the Women’s Convention[[422]](#footnote-422). The Committee’s second strategy contrasts with the choices made within the EU and the Council of Europe. It expressly recognizes that sexual harassment may constitute a health and safety issue[[423]](#footnote-423). In line with the Committee’s statements, it can reasonably be argued that article 11(1) f) of the Convention on the protection of health and safety in working conditions obliges state parties to adopt adequate measures against sexual harassment. In the concluding observations to state reports, sexual harassment is tackled under the article 11 in general, without referral to any specific paragraph. Several states have been criticized for a lack of legislative measures countering sexual harassment[[424]](#footnote-424). Others have been reprimanded for not implementing their existing legislation[[425]](#footnote-425). In a few cases, the Committee relies on statistics to caution states on high levels of workplace sexual harassment in their territory[[426]](#footnote-426). Recently, it became apparent that the Committee recognizes the difference between quid pro quo and hostile environment harassment[[427]](#footnote-427). The Convention’s provision on the elimination of stereotypes[[428]](#footnote-428) also matters when discussing this subject. According to the Committee, the conduct of perpetrators of sexual harassment can often be explained with reference to stereotypes[[429]](#footnote-429). In the modern day media and advertising business, women are often sexualized. A part of the male population therefore tends to believe that all women enjoy being subjected to explicit sexual behaviour[[430]](#footnote-430). The Committee has expressed its concern on this depiction of women as sex objects[[431]](#footnote-431).

The International Labour Organization

*62.* In the ILO framework it was not deemed necessary to adopt general provisions expressly mentioning sexual harassment. The only convention which provides explicit protection against sexual harassment has a narrow scope of application and is therefore of limited importance for this dissertation[[432]](#footnote-432). The ILO’s Committee of Experts clarified that sexual harassment is a form of sex discrimination falling within the broad ambit of article 1 of Convention 111 on discrimination[[433]](#footnote-433). Just as under the other legal regimes, the two types of sexual harassment are recognized[[434]](#footnote-434). Noteworthy is that the individual worker is not considered to be the only victim of sexual harassment. Such incidents are found to be damaging to the enterprise as a whole[[435]](#footnote-435). It has also been assumed that sexual harassment can be tackled under the occupational health and safety conventions[[436]](#footnote-436). These conventions place a strong emphasis on prevention[[437]](#footnote-437).

*63.* The previous paragraphs prove that there exists a general awareness of the fact that sexual harassment constitutes a serious obstacle to gender equality. Women’s rights activists looked for a practical remedy and found it in the equality and anti-discrimination framework. Sexual harassment however fits rather uncomfortably within this framework. This is why alternative approaches were resorted to, such as human dignity, the right to privacy, violence against women and health and safety issues.

**Chapter III. Reconciling Work and Family Life**

Section I. Part-time Work

Introduction

*64.* Over the last decades, the number of workers employed on a part-time basis has shown a steady increase[[438]](#footnote-438). The ratio female – male part-time workers is however anything but balanced. For every male part-time worker, there are no less than four female part-time workers[[439]](#footnote-439). This is problematic because part-time work is often connected to inferior employment conditions. Part-time workers are often victims of discrimination, they perform work which requires less skills, they are given less training opportunities and have reduced prospects of progressing in their careers[[440]](#footnote-440).

The International Labour Organization

*65.* In 1994, the International Labour Conference adopted the Part-Time Work Convention[[441]](#footnote-441) and Recommendation[[442]](#footnote-442). This was however not the first time that part-time work was on the ILO’s agenda. The older Workers with Family Responsibilities Convention[[443]](#footnote-443) clearly also tries to influence the status of part-time workers. Reality shows that women are still regarded as having the main responsibility for children and other dependent family members[[444]](#footnote-444). For that very reason, they will find themselves more often in part-time employment. States parties are encouraged to increase protection by adequate regulations and supervision[[445]](#footnote-445). Part-time workers should also be given the option to return to full-time work[[446]](#footnote-446). Article 3 of Convention 156 on workers with family responsibilities states they cannot be subjected to discriminatory treatment, which brings us to the third relevant convention. Broadly defined article 1 of Convention 111 on discrimination prohibits both direct and indirect sex discrimination[[447]](#footnote-447). A seemingly value neutral criterion such as length of service may negatively affect part-time workers. As over 75% of them are female, this gives rise to indirect discrimination. Although confronted with a considerable lack of clarity, we may argue that under the ILO regime indirect discrimination can be justified on the basis of objective and reasonable criteria[[448]](#footnote-448). As Convention 111 does not include working-time or part-time work as protected grounds, it was found necessary to adopt Convention 175 on part-time work[[449]](#footnote-449). The latter trades the female – male comparison for a comparison between part-time and full-time workers[[450]](#footnote-450). The Convention confers specific rights on part-time workers. Included are amongst others, the right to receive the same protection as a full-time worker in respect of discrimination in employment[[451]](#footnote-451) and the right to equivalent conditions in the fields of termination of employment, paid leave and sick leave[[452]](#footnote-452). Wages and social security benefits must be calculated on a pro-rata basis[[453]](#footnote-453). The Convention only includes one exception. A party is permitted to exclude part-time workers who do not reach a low threshold of hours of work or earnings[[454]](#footnote-454). In addition to protecting (largely female) workers, the Convention has a second goal. It wants to promote access to part-time work[[455]](#footnote-455). Within the ranks of the International Labour Organization it is believed that part-time work positively contributes to gender equality. Without it, many more women would be excluded from the labour market.

The European Union

*66.* In the EU, part-time work initially came to the fore through case-law of the Court of Justice. The part-time work directive[[456]](#footnote-456) was only adopted later on. The first case[[457]](#footnote-457) in which it was recognized that differential treatment of part-time workers constitutes indirect sex discrimination was brought before the Court on the basis of equal pay provisions in primary[[458]](#footnote-458) as well as secondary EU law[[459]](#footnote-459). One may determine that a large number of subsequent cases also related to remuneration (*supra no. 53*). With the help of the Court, part-timers are now strengthened in their claims for severance grants[[460]](#footnote-460), over-time pay[[461]](#footnote-461), sick pay[[462]](#footnote-462), and seniority supplements[[463]](#footnote-463). The beneficial effects of the Court’s rulings yet also stretch beyond pay issues. The situation of part-time workers has improved as regards promotion[[464]](#footnote-464), access to professions[[465]](#footnote-465) and social security[[466]](#footnote-466). Of course, not all case-law elicited positive reactions. Judgments dealing with the dismissal of part-time workers[[467]](#footnote-467) and a requirement of full-time postgraduate training[[468]](#footnote-468) were disapproved of by some scholars for ignoring social reality[[469]](#footnote-469).

*67.* One cannot forget that indirect sex discrimination can be justified. As soon as the alleged victim provides evidence of prima facie discrimination, the employer may defend the rule or practice by relying on objective factors unrelated to any discrimination based on sex[[470]](#footnote-470). Generalizations about female part-time workers, such as the belief that they are not as integrated in the undertaking as full-time (male) employees, cannot be used as justification[[471]](#footnote-471).

*68.* The drafters of the part-time directive were clearly inspired by the above-mentioned ILO Convention 175[[472]](#footnote-472). The latter’s dual aims – the removal of discrimination against part-time workers and the promotion of part-time work – and the direct comparison between part and full-time workers resonate in the directive[[473]](#footnote-473). It is notwithstanding unclear how strong the directive’s provisions are. According to some, the Convention and the directive are in complete harmony[[474]](#footnote-474). According to, what appears to be the majority of scholars, the directive’s clauses are considerably weaker than the Convention’s. For them, it seems that the directive does not really contribute to the case-law of the Court of Justice or the already existing national regimes[[475]](#footnote-475). The directive does not contain specific rights but a general principle of non-discrimination[[476]](#footnote-476). Less favourable treatment of part-timers as compared to full-timers is nevertheless permissible when justified on objective grounds[[477]](#footnote-477). This is rather peculiar because the general EU equality regime only tolerates direct discrimination when based on explicit legislative provisions[[478]](#footnote-478) (*supra no. 22*). Other exceptions to the non-discrimination principle can be discovered in the directive[[479]](#footnote-479). Protection of social security benefits falls largely outside the scope of the directive[[480]](#footnote-480). The EU Charter does not grant any additional rights to part-time workers. They may nevertheless rely on the articles on non-discrimination[[481]](#footnote-481) and equality between women and men[[482]](#footnote-482) to bolster their claims.

*69.* Convention 175 as well as the EU directive have been heckled for not paying sufficient attention to the issues of choice and voluntarism. Women may only ‘voluntarily’ choose part-time work since this is the only form of paid employment possible[[483]](#footnote-483).

The Revised European Social Charter

*70.* Neither the original European Social Charter, nor the Revised Charter mention part-time work in one of their provisions. As a general non-discrimination clause was also lacking, the European Committee of Social Rights began to question states parties on part-time work under the right to work[[484]](#footnote-484). If a state party today has ratified the additional protocol to the Charter or the article on equal treatment on the grounds of sex in the Revised Charter[[485]](#footnote-485), the treatment of part-time workers will be reviewed thereunder. The Committee recognizes that less favourable treatment of part-time workers constitutes indirect sex discrimination[[486]](#footnote-486). Differential treatment of part-time workers can be justified on objective and reasonable grounds not related to sex[[487]](#footnote-487). Along the lines of ILO Convention 156[[488]](#footnote-488), part-time work is also dealt with under the right of workers with family responsibilities to equal treatment[[489]](#footnote-489). By stating that workers with caring responsibilities should be allowed to work-part time[[490]](#footnote-490), the Committee appears to be in favour of its facilitation. More than the EU and the ILO, the Committee is however mindful of the ambiguous value of part-time work for structural gender equality. It closely watches whether part-time work is equally available to both parents[[491]](#footnote-491). A rule which obliges an employer to accept a request for reduced working hours by a woman but not by a male is incompatible with article 27 of the Revised European Social Charter[[492]](#footnote-492).

The UN Convention on the Elimination of All Forms of Discrimination against Women

*71.* The Women’s Treaty does not expressly refer to part-time work. Two of its articles are however of particular relevance in this context. Article 11(1) c) is important because it includes the right to free choice of profession and employment. Article 5 is interesting because it aims at the elimination of stereotypes and the recognition of common responsibilities for men and women in the upbringing of children. The UN Committee on the Elimination of Discrimination against Women is concerned about the high representation of women in part-time work. It does not accept the argument that part-time work is an adequate way to reconcile paid work and care responsibilities. On the contrary, a high number of female part-timers points to persistent hidden or indirect discrimination[[493]](#footnote-493). The Committee adheres to the dominant feminist view that part-time work is forced upon women due to a lack of child-care services and shared caring responsibilities[[494]](#footnote-494). Governments are advised not to encourage female part-time work. On the other hand, they must take all necessary measures in order to allow women to work full-time[[495]](#footnote-495). Decreased working hours are also associated with the persistence of stereotypes such as the male breadwinner and the secondary importance of female employment[[496]](#footnote-496).

*72.* Under EU law, the ILO Conventions and the European Social Charter, a dual approach is adopted. On the one hand, detrimental treatment of part-time workers will often be regarded as indirect sex discrimination. The case-law of the European Court of Justice appears to offer the most extensive protection here. On the other hand, treatment of part-time workers is looked at in a gender-neutral manner and compared with full-time work. Part-time work must be promoted because it allows women to cope with their caring responsibilities. The Women’s Committee’s opinion is at odds with these beliefs. Only the latter really takes into account the potential dangers linked to part-time work.

Section II. Pregnancy

Introduction

*73.* Having children is not only something that is pursued by many individuals, women and men, for their own happiness. It is also a social necessity, especially in Europe. Only women happen to have the biological characteristics to carry a child and give birth. It is unfair to sanction women for having these characteristics. The female workers’ economic independence should not be endangered, neither during the pregnancy nor during the period of physical recovery after giving birth.

*74.* The discussion on where exactly to locate pregnancy in the equality – non-discrimination frame has been dragging on for years. The reason for pregnancy being such a difficult topic can be found in the comparator requirement. Traditionally, discrimination occurs when, by comparing two similarly situated individuals or groups of individuals, it is established that one of them is treated less favourably. The ability to become pregnant is a unique feature of the female body and is therefore one of the hard nuts to crack in scholarly discussions[[497]](#footnote-497).

§1. Recruitment and Job Security

The European Union

*75.* In the European Union, pregnancy is approached in two ways. On the one hand, there is the case-law of the European Court of Justice under the equal treatment directives[[498]](#footnote-498). On the other hand, there is the pregnancy directive[[499]](#footnote-499). Its legal basis[[500]](#footnote-500) demonstrates that this directive is rather more concerned with the health and safety of pregnant workers than with equality at work[[501]](#footnote-501). EU law protects pregnant job applicants. In the landmark case Dekker, it was held that the refusal to hire a pregnant woman constitutes direct discrimination on the basis of sex[[502]](#footnote-502). By rejecting the requirement of a male comparator, the Court clarified that detrimental treatment on the grounds of pregnancy constitutes per se direct sex discrimination. Despite dissatisfied reactions of some scholars[[503]](#footnote-503), one may conclude that the Court’s decision was positively received by most feminist authors[[504]](#footnote-504). Both the Court[[505]](#footnote-505) and the pregnancy directive[[506]](#footnote-506) prohibit the dismissal of a pregnant worker during the period from the beginning of the pregnancy to the end of the period of childbirth leave. The worker must formally notify the employer of her pregnancy in order to be protected[[507]](#footnote-507). The prohibition of dismissal is not of an absolute nature. Female workers may still be laid off for reasons not related to pregnancy[[508]](#footnote-508). The member states have the discretionary power to decide on these reasons[[509]](#footnote-509). They arguably include matters such as collective dismissals, force majeur and disciplinary grounds[[510]](#footnote-510). Article 33(2) of the EU Charter on the reconciliation of family and professional life offers protection against dismissal for reasons connected with maternity. Job applicants are thus not covered. It has been argued that article 33(2) has a broader scope of application than the corresponding provisions in the pregnancy directive[[511]](#footnote-511). This appears to be correct because no formal notification of the employer is required.

The Revised European Social Charter

*76.* The Revised European Social Charter does not expressly protect pregnant job applicants. The European Committee of Social Rights’ position is rather unclear. Both direct and indirect sex discrimination in access to employment are prohibited under the Charter[[512]](#footnote-512). The Committee however never explained how it classifies a refusal to hire a pregnant woman. Already employed women who are with child are explicitly covered by the Charter after notification of the employer[[513]](#footnote-513). No dismissals can take place from the beginning of the pregnancy to the end of the childbirth leave, except for reasons not related to the pregnancy. The latter include amongst others misconduct, expiry of the employment contract and undertakings which cease to operate[[514]](#footnote-514). At the same time, the Committee is wary of abuse and therefore judges exceptions in a rather restrictive manner[[515]](#footnote-515). Exceptions that are articulated broadly or vaguely are held to be incompatible with the Charter[[516]](#footnote-516).

The International Labour Organization

*77.* The ILO’s discrimination Convention applies to recruitment[[517]](#footnote-517). The Committee of Experts seems to have been inspired by the case-law of the European Court of Justice when it stated that rejection of job applicants on grounds of pregnancy constitutes direct sex discrimination[[518]](#footnote-518). The maternity protection Convention now also interdicts recruitment practices which disadvantage expectant mothers[[519]](#footnote-519). Prospective employers are banned from requiring a pregnancy test or certificate during hiring campaigns[[520]](#footnote-520). Protection against dismissal related to pregnancy goes beyond that in the pregnancy directive and the Social Charter. The new mum’s job is safeguarded until the expiry of a period after her return from childbirth leave[[521]](#footnote-521). Dismissal is still possible on grounds unrelated to pregnancy and nursing[[522]](#footnote-522). Accepted exceptions resemble those recognized by the European Committee of Social Rights[[523]](#footnote-523).

The UN Convention on the Elimination of All Forms of Discrimination against Women

*78.* Article 11(2) a) of the Convention on the Elimination of Discrimination against Women forbids dismissal on the grounds of pregnancy and maternity leave. The Committee’s recommendations on pregnancy are rather reserved and general (*infra no. 83*). In a number of concluding observations it just repeats that a woman’s dismissal on grounds of pregnancy and childbirth is illegal[[524]](#footnote-524). Furthermore, it is also remarked upon that pregnancy has a social function and that society cannot tolerate discrimination against expectant mothers[[525]](#footnote-525). In order to learn something more scholars must rely on the text of the Convention. Dismissal *on the grounds* of pregnancy or maternity leave is prohibited. This may indicate that it is possible, as is the case in the other systems, to lay off female workers on grounds other than pregnancy. Article 11 remains silent on job applicants. It has nevertheless been argued that the Convention provisions cannot be interpreted narrowly and hence also reject pregnancy discrimination in hiring[[526]](#footnote-526). The Committee indirectly confirmed this argument by condemning compulsory pregnancy tests as a condition for employment[[527]](#footnote-527).

*79.* In conclusion, it may be claimed that similar results are reached in the four legal frameworks. They all ban dismissal based on pregnancy or childbirth leave. Pregnant workers can yet be laid off for other serious reasons. With the potential exception of the Social Charter, pregnancy discrimination is also unacceptable in recruitment.

§2. Child-Birth Leave

The European Union

*80.* The EU pregnancy directive states that pregnant workers or workers who have recently given birth are entitled to 14 weeks of leave[[528]](#footnote-528). Each worker is obliged to take up at least 2 of these weeks before or after confinement[[529]](#footnote-529). Member states are required to ensure that the woman worker receives an adequate allowance during her leave[[530]](#footnote-530). The determination of what an adequate allowance consists of, is left to the national state and consequently considerably differs from one member state to another[[531]](#footnote-531). According to the European Court of Justice, the directive does not require that an adequate allowance is equivalent to a worker’s previous full salary[[532]](#footnote-532). It is not defined who is responsible for the payment of the allowance. The EU Charter of Fundamental Rights states that there is a right to paid maternity leave[[533]](#footnote-533). Scholars’ opinions on the added value of this provision are mixed. Some believe that it merely affirms the entitlement to an adequate allowance[[534]](#footnote-534). Others argue that the Charter goes further than the pregnancy directive. They interpret ‘the right to paid maternity leave’ as transferring a right to payment of the full salary during the leave[[535]](#footnote-535). The Charter does not provide additional information on who should bear the costs. In 2008 the European Commission proposed to amend the pregnancy directive. The duration of the leave would be increased to 18 weeks, including 6 compulsory weeks after confinement[[536]](#footnote-536). Other suggested novelties were a childbirth benefit equivalent to the worker’s prior full monthly salary and a compulsory paternity leave of 2 weeks[[537]](#footnote-537). During its first reading, the European Parliament again raised the leave from 18 to 20 weeks. The 2 weeks compulsory paternity leave were unfortunately not retained[[538]](#footnote-538). To the present day, the new version of the directive has not been adopted due to disagreement in the Council of Ministers[[539]](#footnote-539).

The Revised European Social Charter

*81.* Inspired by the pregnancy directive, the Revised European Social Charter also provides for a maternity leave of at least 14 weeks[[540]](#footnote-540). In line with the early ILO instruments[[541]](#footnote-541), the European Committee of Social Rights determined that there must, in principle, be a compulsory period of postnatal leave of no less than 6 weeks[[542]](#footnote-542) (*infra no. 82*)*.* Guidance on the amount of the allowance and the method of payment is more detailed than under the pregnancy directive. States parties may hold employers liable for payment of the allowance[[543]](#footnote-543). They can also finance the leave by social security benefits or taxpayer money[[544]](#footnote-544). Benefits are preferably equal to the salary of the woman worker[[545]](#footnote-545). States that do not guarantee continued payment of the full salary, should provide a benefit of at least 70% of the latter[[546]](#footnote-546). A situation where women workers only received half of the average salary while on leave, has been found to be incompatible with the Charter provisions[[547]](#footnote-547).

The International Labour Organization

*82.* The fairly recent ILO Convention 183 on maternity protection likewise prescribes a period of leave of at least 14 weeks[[548]](#footnote-548), including 6 weeks of compulsory leave after confinement[[549]](#footnote-549). The amount of the childbirth benefit must correspond to two-thirds of a woman’s previous earnings [[550]](#footnote-550), thus approximately the same as under the Social Charter. The ILO Convention distinguishes itself from the pregnancy directive and the Social Charter, as regards the manner of financing of the allowance. Clear preference is given to provision of the benefits by the social security system or taxpayer money. Employers can only exceptionally be required to disburse maternity benefits[[551]](#footnote-551). The corresponding Recommendation even raises the period of leave and the amount of benefits to respectively 18 weeks[[552]](#footnote-552) and the full amount of a woman’s previous earnings[[553]](#footnote-553).

The UN Convention on the Elimination of All Forms of Discrimination against Women

*83.* The relevant provision in the Convention on the Elimination of Discrimination against Women is of a brief and general nature[[554]](#footnote-554). It does not stipulate the duration of the leave. The UN Committee on the Elimination of Discrimination against Women clarified that there must be a period of mandatory leave but failed to state for how long[[555]](#footnote-555). Since ratification of the ILO maternity protection Conventions is encouraged[[556]](#footnote-556), it may be argued that the period of mandatory leave is six weeks. The mere introduction of a period of leave is insufficient[[557]](#footnote-557). It must be maternity leave *with pay* or with comparable social benefits[[558]](#footnote-558). A textual reading of the latter provision implies that the compensation awarded during the leave must amount to 100% of the previous income[[559]](#footnote-559). The Committee seemed to endorse such a reading when it expressed its concern about the reduction of pay during childbirth leave[[560]](#footnote-560). Echoing the ILO, the Committee has also expressed a preference for allocation of the benefits through social security schemes instead of employer payments[[561]](#footnote-561).

Additional Observations

*84.* The above-described provisions demand some additional observations. To begin with, a terminology related observation is in order. All four of the legal instruments referred to employ the term ‘maternity’ leave. In the doctrine, the use of this term has been criticized[[562]](#footnote-562). ‘Maternity’ is a synonym for ‘motherhood’. The latter term goes far beyond indicating the actual reason for granting women a period of absence from work after delivery. The leave under consideration is granted for biological reasons. It wants to guarantee that women get the chance to physically recover from being pregnant and giving birth. The term ‘childbirth’ leave is hence preferred over ‘maternity’ leave. ‘Childbirth’ leave is clearly distinct from ‘child-care’ leave and therefore does not validate the stereotype of women as child-rearers[[563]](#footnote-563). With this criticism in mind, one needs to turn to some cases pronounced by the European Court of Justice. When confronted with an indignant father claiming an allowance under the equal treatment directive, the Court legitimized a woman’s leave after giving birth for two reasons: firstly, in order to ensure the protection of her biological condition, secondly, in order to protect the special relationship between her and her child[[564]](#footnote-564). This second argument is challenged by a considerable number of female academics as a reinforcement of the stereotype of women as the self-evident child-rearers[[565]](#footnote-565). The Court is also accused of mixing up the concepts ‘pregnancy’, ‘maternity’ and ‘motherhood’[[566]](#footnote-566).

*85.* In general, childbirth leave and the accompanying financial compensation are characterized as protective measures. A careful balancing exercise must precede the adoption of such measures[[567]](#footnote-567). A total lack of protective measures arguably does not contribute to a better treatment of women workers but the UN Committee on the Elimination of Discrimination against Women has notwithstanding also disapproved of overprotective legislation. The latter type of measures may limit women’s employment opportunities and demonstrate miscomprehension of concepts such as de facto inequality and indirect discrimination[[568]](#footnote-568).

*86.* The next observation concerns the compulsory nature of the childbirth leave. As stated above, the pregnancy directive imposes two weeks of compulsory leave[[569]](#footnote-569) while the other regimes require six weeks[[570]](#footnote-570). Two main reasons for compulsory leave are quoted by its proponents. According to them, part of the leave must be of a compulsory nature in order to protect the health of the mother and to shield her from undue pressure by the employer to return to work[[571]](#footnote-571). The minimum period was set at six weeks because for the average woman, the first stage of physical recovery takes about that long[[572]](#footnote-572). In this sense, the decision of the EU legislator to impose only two weeks of compulsory leave which can be taken even before giving birth is rather peculiar. It could be observed that this discrepancy in the length of compulsory leave can lead to the engagement of EU member states’ liability under the ILO Convention or the Social Charter. We must however point out that the majority of EU member states did not ratify the ILO maternity protection convention[[573]](#footnote-573). As regards the Social Charter, the European Committee of Social Rights decided that a period of two weeks compulsory leave may also be accepted if the surrounding legal safeguards are sufficiently strong[[574]](#footnote-574). The compulsory nature of the leave has been rightly criticized from various angles[[575]](#footnote-575). It is based on the position of the average woman and consequently ignores a woman’s individual physical condition and willingness to go back to work. Compulsory childbirth leave imposes too much emphasis on the vulnerability of women and does not recognize that women are competent individuals who can make their own thoughtful decisions. It is indeed necessary to protect female workers from pressure exercised by their employers but this can be achieved in other ways than by imposing an obligation on the worker.

*87.* It appears that many authors and organizations are in favour of extending child-birth leave[[576]](#footnote-576). It is however submitted that a leave of 18 or 20 weeks falls within the ambit of the overprotective measures rejected by the Committee on the Elimination of Discrimination against Women. The period of childbirth leave needs to be limited to the amount of time necessary for the mother’s physical recovery[[577]](#footnote-577). All other additional weeks must be granted as parental leave and must be equally accessible to both parents. Lengthy periods of leave after confinement do not strengthen the equal opportunities of young female workers. On the contrary, they reaffirm the stereotype that women must be the primary child-rearers and that their employment is only of secondary importance. An increase in the period of leave may well lead to more covert attempts to discriminate against women workers[[578]](#footnote-578).

*88.* This paragraph’s final remark concerns the financing of the childbirth benefits. There is agreement on the fact that it would be unfair to significantly reduce the income of a worker during her childbirth leave[[579]](#footnote-579). Positions on who should bear the costs of the benefits are clearly less homogenous. The ILO’s approach is the most appealing[[580]](#footnote-580). By imposing the financial burden on the employer, women become more expensive workers and consequently less attractive to hire[[581]](#footnote-581). Ideally, society as a whole should bear the costs, not the individual employer.

Section III. Parental Leave and Child-Care Services

§1. Parental Leave

Introduction

*89.* Parental leave – also referred to as child-care leave – must be clearly distinguished from childbirth and paternity leave. It allows both parents to interrupt their career for a longer period of time to take care of a young child[[582]](#footnote-582). The gender-neutral concept parental leave has been developed in order to stimulate a more equal division of caring tasks. As already mentioned, many more women than men still bear the main responsibility for raising children. It is believed that, by opening up periods of leave to all workers, more men will engage in child-care. This may in turn alleviate the dual burden imposed on women and partly remedy their disadvantaged employment position[[583]](#footnote-583).

The European Union

*90.* Parental leave first appeared on the European Community’s agenda in the early 1980s. While finding support in the newly adopted Convention on the Elimination of Discrimination against Women and an ILO Convention and Recommendation[[584]](#footnote-584), the Commission pushed for the adoption of minimum standards on parental leave[[585]](#footnote-585). Its choice favouring the draft of an autonomous directive on parental leave proved to be the proper one as the European Court of Justice ruled that the existing equal treatment framework[[586]](#footnote-586) could not be used to influence the division of responsibilities between parents[[587]](#footnote-587). Eventually, it took another 10 years before the first parental leave directive was approved by the Council of Ministers[[588]](#footnote-588). In 2012, a revised version of the original parental leave directive entered into force[[589]](#footnote-589). It grants all full-time and part-time workers[[590]](#footnote-590) an individual right to a period of parental leave of at least 4 months[[591]](#footnote-591) until the child reaches a given age up to 8 years[[592]](#footnote-592). The leave should - in principle - be provided on a non-transferable basis[[593]](#footnote-593). One may however read in the preamble that ‘in principle’ means that the member states are still at liberty to make the leave transferable[[594]](#footnote-594). Member states are also free to decide on the conditions of access to the parental leave[[595]](#footnote-595) and to define circumstances in which the employer is allowed to postpone the parental leave[[596]](#footnote-596). Several important rights are set out under the heading ‘employment rights and non-discrimination’[[597]](#footnote-597). After expiry of the period of parental leave workers are entitled to return to the same or a similar job[[598]](#footnote-598). The member states need to ensure that workers do not lose their acquired rights during the period of leave[[599]](#footnote-599). Workers need to be protected against dismissal or discrimination on the grounds of an application for or the taking of parental leave[[600]](#footnote-600). The directive does not oblige the member states to provide some kind of compensation during the leave.

*91.* Scholarly reactions to the parental leave directives have been mixed. Some saw them as steps in the right direction[[601]](#footnote-601). Others warned that the directives would have a counterproductive effect and boost existing stereotypes[[602]](#footnote-602). Their criticism can be summarized in three arguments. Firstly, they regret that the directive does not obligate member states to ensure that workers on parental leave receive some kind of allowance. Unpaid leave may deter many workers from taking it, fathers in particular. As demonstrated in Chapter II, women often continue to be paid less than their male counterparts. If the leave is unpaid, parents will often choose to relinquish the lowest income, mostly the mother’s[[603]](#footnote-603). Secondly, the directive still permits that fathers transfer their period of leave to the mother. In order to increase men’s participation in caring responsibilities the leave must be non-transferable, granted on a ‘use it or lose it’ basis[[604]](#footnote-604). Thirdly, as long as the member states adhere to the maximum age of 8 years[[605]](#footnote-605), they can also establish a lower age threshold such as one or two years[[606]](#footnote-606). The lower the age threshold, the more chance that the parental leave will be taken up by the mother immediately after the end of her child-birth leave[[607]](#footnote-607).

*92.* If the directive were to be revised a second time, it would be recommended that the stakeholders draw on the Swedish parental leave system. The latter is often praised as one of the most effective in the world[[608]](#footnote-608). Two Swedish parents are entitled to a 15-month period of parental leave. The leave can be taken until the child is 8 years old. Two so-called ‘daddy months’ are exclusively reserved for fathers on a ‘use it or lose it’ basis[[609]](#footnote-609). Workers who take up their leave are well compensated through the taxpayer’s money. The compensation’s exact amount is calculated on the basis of both the parents’ previous earnings. This method of calculation is used because it supports the dual-earner family model with two economically independent parents instead of the out-of-date model of the male breadwinner[[610]](#footnote-610). Several studies have shown that the number of Swedish fathers taking parental leave is remarkably higher than in other European countries[[611]](#footnote-611). Despite the fact that of course not all academics are equally happy with the system[[612]](#footnote-612), one may argue that caring responsibilities slowly become more equally distributed in Swedish society.

*93.* The EU Charter expressly validates that a right to parental leave exists[[613]](#footnote-613). Several authors at the same time believe that the Charter’s influence will once again remain limited because it does not grant a right to paid parental leave[[614]](#footnote-614).

The Revised European Social Charter

*94.* In the 1960s, parental leave was not a common arrangement[[615]](#footnote-615). Therefore it should not surprise us that the original Social Charter does not confer a right to parental leave. The European Committee of Social Rights notwithstanding began to ask questions on parental leave schemes under the Charter’s articles concerned with the protection of the family[[616]](#footnote-616). Article 27(2) of the Revised Charter introduces an express right to parental leave. This provision is not as detailed as the corresponding article in the EU parental leave directive[[617]](#footnote-617). It does not state a minimum period, any conditions of access or the child’s age upon which the right to parental leave expires. Quite like the European Court of Justice[[618]](#footnote-618), the Committee has found it necessary to emphasize that parental leave is not the same as childbirth leave[[619]](#footnote-619). The Committee has expressed concern in cases where a period of child-care leave is granted per family. The right to parental leave must be given to each parent as an individual right[[620]](#footnote-620). The Committee appears to have been inspired by the EU directive when it states that the right to parental leave should – in principle – be provided on a non-transferable basis[[621]](#footnote-621). States parties are asked to report on whether or not employees receive an income during their leave and if so, how much. Despite the fact that there is no obligation for the states parties to provide workers on parental leave with a compensation, the Committee recognizes its vital importance for the taking up of the leave[[622]](#footnote-622). As is the case in the EU directive[[623]](#footnote-623), the Revised Charter also protects workers who take parental leave against dismissal and discrimination[[624]](#footnote-624).

The Convention for the Protection of Human Rights and Fundamental Freedoms

*95.* The European Court of Human Rights has also been confronted with parental leave cases in the context of the right to a family life[[625]](#footnote-625) and the prohibition of discrimination[[626]](#footnote-626). The facts giving rise to the first case[[627]](#footnote-627) took place at the end of the 1980s, at a time when most European states did not yet pay a parental leave allowance to fathers[[628]](#footnote-628). It is clear that, from a purely legal perspective, one cannot criticize the judgment of the Court in which it held that no discrimination had occurred. Due to lack of a common standard, the decision on whether or not to pay a parental leave allowance to fathers fell within the state’s wide margin of appreciation. More important about this case is that it is recognized that women and men are in the same position as regards child-care[[629]](#footnote-629). It could be inferred from this judgment that the Court implicitly rejects the notion that women are primarily responsible for young children. In 2012, the Court went a step further. While relying on the Convention on the Elimination of Discrimination against Women and other relevant instruments[[630]](#footnote-630), the Court explicitly rejected the state’s argument relating to the special role of women in the raising of children[[631]](#footnote-631). Men’s caring role has gained recognition[[632]](#footnote-632) and states parties cannot impose traditional gender roles and gender stereotypes[[633]](#footnote-633). The refusal to grant a male service member a period of parental leave was found to violate his right to a family life and the non-discrimination principle[[634]](#footnote-634). Also interesting is the concurring opinion of the Portuguese judge Pinto de Albuquerque. He argues that the right to parental leave is not only a social right but also a core element of the right to a family life, independent from the non-discrimination principle[[635]](#footnote-635).

The International Labour Organization

*96.* None of the ILO Conventions explicitly confers a right to parental leave. The recommendations to Conventions 156[[636]](#footnote-636) and 183[[637]](#footnote-637) do encourage states to give parents the opportunity to take parental leave[[638]](#footnote-638). The leave may be introduced gradually if necessary but it cannot be restricted to the mother only[[639]](#footnote-639). Since female and male workers with young children are equally positioned, refusal to grant parental leave to a man amounts to direct sex discrimination under Convention 111 on discrimination[[640]](#footnote-640).

The UN Convention on the Elimination of All Forms of Discrimination against Women

*97.* The Convention on the Elimination of Discrimination against Women does not explicitly recognize parental leave. A combined reading of the Convention’s preamble[[641]](#footnote-641) and several of its articles[[642]](#footnote-642) however demonstrates that it has been covered. The Convention’s drafters believed that real equality between women and men cannot be achieved as long as stereotyped roles were conserved[[643]](#footnote-643). Men’s involvement in unpaid household work and the upbringing of their children is viewed as an effective way to erode the stereotyped beliefs of women as homemakers and men as breadwinners and heads of the family. The provision of parental leave is one way to increase such involvement on the part of men. The Committee’s concluding observations display that a more equal sharing of domestic and family tasks between men and women is of the utmost importance for women’s employment position[[644]](#footnote-644). Countries that have not as yet made provision for a period of parental leave are instigated to pass the necessary legislation[[645]](#footnote-645). When the state party already has a parental leave system it will ascertain whether or not it entrenches stereotypical expectations and discrimination against women[[646]](#footnote-646). The Committee’s evaluation standards are stricter than the EU and European Social Charter requirements. Parental leave can only improve women’s position when it is granted, without exception, on a non-transferable basis[[647]](#footnote-647). The period of leave must be compensated[[648]](#footnote-648). If the percentage of men availing themselves of their right to parental leave remains low, then the state must institute additional incentives such as an increase in the amount of compensation[[649]](#footnote-649). In one concluding observation it appears as if the Committee requests the state to compel fathers to take parental leave[[650]](#footnote-650). Parties who succeeded in increasing the number of fathers on parental leave have been applauded by the Committee[[651]](#footnote-651).

*98.* Parental leave is a double edged sword. If it is granted, organized and used correctly it may considerably contribute to an improvement in women’s employment and societal position. If it is used incorrectly, it will only perpetuate the stereotype of women as homemakers[[652]](#footnote-652). The UN Committee on the Elimination of Discrimination against Women is fully aware of the potential dangers of parental leave[[653]](#footnote-653). The European Committee of Social Rights appears to, at least partially, adhere to the UN Committee’s position. The EU legislator however does not. The EU directives’ adoption was well-meant but they will probably not contribute to a better position for women workers[[654]](#footnote-654).

§2. Child-Care Services

Introduction

*99.* Parental leave, as discussed in the previous section, is a kind of informal child-care. Other persons who often engage in informal child-care are grandparents, other relatives and friends[[655]](#footnote-655). This section will be concerned with formal child-care, organized by registered and qualified providers[[656]](#footnote-656). A lack of adequate child-care facilities negatively affects women’s careers because they are under the most pressure to stay home to take care of the child themselves. It must however be mentioned that access to child-care services does not target more entrenched gender inequality. The existence of formal child-care does not increase men’s participation in caring responsibilities and hence does not modify existing stereotypes[[657]](#footnote-657).

The European Union

*100.* The political EU institutions have already recognized for quite some time that the provision of decent child-care services positively influences women’s employment opportunities. Soft-law instruments have been adopted[[658]](#footnote-658), targets have been set[[659]](#footnote-659) and child-care facilities are mentioned in the preambles of two directives[[660]](#footnote-660). For all that, the EU still lacks a legally binding instrument on child-care. This absence of minimum standards has led to considerable differences in available child-care services in the various member states[[661]](#footnote-661). When the European Court of Justice faced the topic of child-care facilities[[662]](#footnote-662), it chose a rather shallow approach[[663]](#footnote-663). Austrian law provided for a higher termination payment if a worker resigned for an ‘important reason’. A female employee needed to terminate her employment contract because she could not find a nursery place for her very young children. According to the Court, lack of child-care facilities did not constitute an important reason. The woman’s claim for the higher termination payment under article 157 TFEU was accordingly rejected.

*101.* Not surprisingly, the EU Charter does not make explicit reference to child-care services. Article 33(1) states that the family will enjoy legal, economic and social protection. According to the Charter’s explanatory report, article 33(1) is based on article 16 of the European Social Charter (*supra no. 42*)[[664]](#footnote-664). This may indicate that once the EU legislator approves legally binding provisions on child-care facilities, article 33(1) of the Charter can be used for reinforcement and interpretation.

The Revised European Social Charter

*102.* The European Committee of Social Rights recognizes that child-care services are important for women’s employment opportunities[[665]](#footnote-665). In the absence of a more detailed provision in the original Charter, child-care facilities were classified under article 16 on the protection of the family[[666]](#footnote-666). States parties that accepted article 27(1) c) of the Revised Charter on child-care arrangements need to supply information on their child-care system under this article. Other states parties’ facilities are still being investigated under article 16[[667]](#footnote-667). The Committee analyses provided information with considerable precision. It examines amongst others whether or not there are sufficient child-care places[[668]](#footnote-668), whether the staff working in the facilities has suitable qualifications[[669]](#footnote-669) and how the facilities are inspected[[670]](#footnote-670). States parties may arrange their system in many ways, such as crèches, kindergartens, family day care or as a form of pre-school[[671]](#footnote-671). The Committee has also paid considerable attention to the method of funding because the more expensive child-care is, the more likely it is that the parents will decide to care for the child themselves, often at the expense of the mother’s career[[672]](#footnote-672).

The UN Convention on the Elimination of All Forms of Discrimination against Women

*103.* When the Convention on the Elimination of Discrimination against Women was adopted at the end of the 1970s, it was the first piece of international legislation that pointed at the importance of a child-care network[[673]](#footnote-673). Because of the wording of the relevant provision[[674]](#footnote-674), some doubts were raised as to its exact meaning[[675]](#footnote-675). It may be assumed that states parties are expected to gradually establish a coordinated system of child-care facilities[[676]](#footnote-676). Article 11(2) c) on the combination of family obligations and work responsibilities is expressed in general terms. This indicates that, as with the European Social Charter, the facilities can be created in a variety of ways[[677]](#footnote-677). The UN Committee’s inquiries into national child-care systems are less profound than those of the European Committee of Social Rights. Several states have nevertheless been recommended to increase the number of available places[[678]](#footnote-678). Others were criticized for a lack of child-care or attempts to close existing facilities[[679]](#footnote-679). A second similarity between the Convention and the Social Charter is the weight attached to the financial aspects. Child-care must be affordable so that parents are not put off[[680]](#footnote-680). In one particular concluding observation a state was advised to finance the system out of the budget[[681]](#footnote-681). In another one, the Committee expressed disappointment about a state’s refusal to allow a tax deduction for child-care costs[[682]](#footnote-682). Significant is also that the Committee encourages states to ratify ILO Convention no. 156[[683]](#footnote-683)

The International Labour Organization

*104.* ILO Convention 156 on workers with family responsibilities[[684]](#footnote-684) demands that the states parties develop or promote community services, such as child-care facilities[[685]](#footnote-685). The Convention’s preamble[[686]](#footnote-686) demonstrates that the latter requirement was probably included under the influence of the newly drafted Women’s Convention[[687]](#footnote-687). Hopes that the ILO provision would be stronger and more detailed than article 11(2) c) of the UN Convention on the Elimination of All Forms of Discrimination against Women[[688]](#footnote-688) proved to be vain, but Recommendation 165 nevertheless provides us with some guidelines. Ideally, the competent authorities should investigate the needs and preferences for child-care in their territory[[689]](#footnote-689). Depending on these particular preferences many different types of child-care can be set up, such as pre-primary school, licensed day care, kindergartens, crèches, in-home child-care, etc.[[690]](#footnote-690). Financial aspects are again important. Child-care needs to be free or provided at a rate in accordance with the worker’s ability to pay[[691]](#footnote-691). The drafters of the Recommendation shared concerns with the European Committee of Social Rights as regards staff qualifications. Competent authorities need to ensure that the personnel working in the facilities are well-trained[[692]](#footnote-692).

*105.* It may be concluded that the European Committee of Social Rights and the Women’s Committee are the most energetic advocates of adequate child-care services. They appear to have influenced the ILO regime. The EU clearly lags behind in this field.

**Conclusion**

In the research proposal, I asked myself whether the relevant legal regimes demonstrate differences in the interpretation of the equality and non-discrimination principles in the context of sex and more broadly, gender. While writing this dissertation, it became clear that such a question requires a well-considered and differentiated answer.

In this conclusion, something will be said first about the perceived views on equality and non-discrimination. Secondly, some brief comments will be made on the relationship between the European Union and the UN Convention on the Elimination of Discrimination against Women. Next, concluding remarks will be formulated on the potency of the four discussed legal regimes. Fourthly, an attempt is made to discern different outlooks the working woman.

As regards the principle of discrimination, we can be rather brief. Under all four regimes, it is admitted that direct discrimination does not get us very far. Indirect discrimination is a necessary tool in the struggle against sex discrimination. According to the UN Committee on the Elimination of Discrimination, stereotypes are at the basis of most instances of discrimination. In the European Union and the ILO and under the Revised European Social Charter the connection between discrimination and stereotypes does unfortunately not receive half as much attention.

There is more to be said about the perspectives on the adequate equality model. In the case of the UN Convention of the Elimination of All Forms of Discrimination against Women it is easy to figure out which equality model is preferred. The UN Committee on the Elimination of Discrimination has clarified time and again that the Convention’s ultimate goal is the achievement of substantive equality. States parties are not let off the hook after the creation of a ‘level playing field’. For example, the Committee’s approach to affirmative action in the public employment sector and part-time work demonstrates a pursuit for equality of results and proportionate representation. A less clear picture emerges when looking at the other three discussed regimes. As regards the European Union, it is clear that a shift has taken place. In the early years when article 119 on the principle of equal pay for women and men was the only significant provision, EU law was oriented towards formal equality. As consecutive treaty amendments and the adoption of above-mentioned directives such as the 2002 equal treatment directive, the part-time work directive and the parental leave directives succeeded each other, an orientation towards women’s equality of opportunity became increasingly discernible. The current recast directive explicitly validates the latter orientation[[693]](#footnote-693). The EU’s equality vision is however still a far cry from that adhered to under the UN Convention on the Elimination of Discrimination against Women. It may be deduced from the Union’s approach to affirmative action and child-care facilities and some of the above identified weaknesses in the parental leave and part-time work directives that substantive equality is not yet fully embedded in the EU. Some of the UN Women’s Committee’s concluding observations establish that it feels the same way. According to the latter, mere compliance with secondary EU law will not lead to real gender equality[[694]](#footnote-694). The equality visions perceived in the context of the International Labour Organization and the European Social Charter can also be positioned in between formal and substantive equality. The less hostile attitude towards affirmative action may indicate that they, more than the EU, move in the direction of real equality.

In this conclusion’s previous paragraph, it was stated that the European Union’s position on equality does not match that of the UN Committee on the Elimination of Discrimination against Women. The sections discussed under Part III also indicate that the differences in approach are most often the largest between the EU and the UN Committee on the Elimination of Discrimination against Women, with the European Committee of Social Rights and the ILO somewhere in between those two. This encourages authors into comparing the EU and UN Women’s Convention regimes. Part of these authors subsequently conclude their articles with the remark that the EU can learn a lot from both the provisions in the UN Convention on the Elimination of Discrimination against Women and the statements of the UN Committee. I agree with them to a certain extent, but I also feel compelled to express some caveats. It should always be kept in mind that the various legal regimes stem from profoundly different backgrounds. The UN Convention was adopted with one and only one purpose: the defense of women’s rights. The original reasons for the creation of the European Union were of an entirely different nature. By means of economic co-operation its founding fathers aimed at bringing closer together the different peoples of Europe, an objective which cannot so easily be associated with women’s rights. Over the years, we have seen the Union’s commitment to gender equality grow, but it still covers only a small part in the entire field of EU competences. Each time the EU legislator wants to adopt a new piece of legislation on gender equality, it needs to take into account a multitude of different interests. A considerable amount of scholars keep a watchfull eye on each case pronounced by the European Court of Justice. Many of them will not shun criticizing what the Court says. The two previous comments cannot be repeated with the same strength in the context of the UN Convention. Members of the UN Committee are under significantly less political pressure. They do not represent their state but serve in their personal capacity. Furthermore, the UN Committee’s work is not at all unravelled to the same extent as the European Court of Justice’s case-law. It is quite difficult to find a comprehensive work on the UN Committee’s work. Hence, it is clear that the UN Committee draws less attention than the European Court of Justice and the EU legislator. So yes, the EU can learn from the UN women’s regime, and yes, EU scholars need to be informed about the UN Convention but it is always necessary to refer to the systems’ different backgrounds.

The strength of the four examined legal regimes also deserves some attention. The Revised European Social Charter and the UN Convention on the Elimination of Discrimination against Women are sheer human rights instruments. The same can be said of the discussed ILO Conventions. As already mentioned in Part II, human rights schemes are often criticized for their weak enforcement mechanisms. Contrarily, the European Union’s enforcement methods are not exactly frail. The European Committee of Social Rights, the ILO Committee of Experts and the UN Women’s Committee enjoy high moral respect, but swift compliance with their decisions or recommendation remains rather limited. The UN Committee’s observations in particular are sometimes not taken seriously or just linger in thin air. In general, compliance with EU law is high and defectors are brought back in line, either by the European Commission as guardian of the Treaties, or by individuals in national courts. Where the EU succeeded in adopting legally binding measures, these appear to be the most efficient. The description under Section II on equal pay can be used as an example to support this proposition.

Through writing this thesis, it has become my personal opinion that within the four legal frameworks, two different conceptions of the working woman are supported. I am aware that others may not agree with me or read something entirely different in the examined case-law, observations, conclusions, recommendations and literature. One conception is, maybe not surprisingly, supported by the UN Committee on the Elimination of Discrimination against Women. The other conception appears to be endorsed by the EU institutions, the ILO and the European Committee of Social Rights. The UN Committee goes to great lengths to depict the working woman as strong and ambitious. It appears to assume as self-evident the fact that as many women as men aim at becoming government officials, judges, university professors, diplomats, and all kinds of other professionals with great responsibilities or a lot of prestige. A woman in employment is first a worker with her own qualities and skills, only thereafter is she a mother and carer. The EU, ILO and European Committee of Social Rights appear to put a less strong emphasis on the woman as a ‘career hunter’. A woman in employment is a worker, mother and carer at the same time. A woman is free to decide that employment is only of secondary importance. A spot on the starting line is reserved for ambitious women but it is in no way guaranteed that they make it to the end.

Finally, we may conclude that over a period of approximately sixty years, great progress has been made in the field of gender equality. However, even in Europe, we have not yet reached the finish line. I believe that it is very important to maintain a constant dialogue on gender related issues. Each of the four existing legal regimes offers, in its own way, a valuable contribution to this dialogue.

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408. Article 21 EU Charter. [↑](#footnote-ref-408)
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681. CEDAW CO Austria, A/55/38 (2000), para. 234. [↑](#footnote-ref-681)
682. CEDAW CO Switzerland, CEDAW/C/CHE/CO/3 (2009), paras 37-38. [↑](#footnote-ref-682)
683. CEDAW CO Belarus, CEDAW/C/BLR/CO/7 (2011), para. 34; CEDAW CO Mexico, CEDAW/C/MEX/CO/7-8 (2012), para. 29; CEDAW CO New Zealand, CEDAW/C/NZL/CO/7 (2012), para. 32. [↑](#footnote-ref-683)
684. Convention no. 156 on Workers with Family Responsibilities, 1981. [↑](#footnote-ref-684)
685. Article 5(b) Convention no. 156. [↑](#footnote-ref-685)
686. Recital 5 preamble of Convention no. 156 on Workers with Family Responsibilities. [↑](#footnote-ref-686)
687. CEDAW was adopted in 1979: 2 years before Convention no. 156. [↑](#footnote-ref-687)
688. Article 11(2) c) CEDAW. [↑](#footnote-ref-688)
689. Paragraph 24 Recommendation no. 165 on Workers with Family Responsibilities, 1981. [↑](#footnote-ref-689)
690. International Labour Conference, General Survey on the Reports on the Workers with Family Responsibilities Convention no. 156 and Recommendation no. 165, 80th Session, 1993, 77 and 80-81. [↑](#footnote-ref-690)
691. Paragraph 25(b) Recommendation no. 165. [↑](#footnote-ref-691)
692. Paragraph 26(2) and (3) Recommendation no. 165. [↑](#footnote-ref-692)
693. Article 1 Directive 2006/54/EC. [↑](#footnote-ref-693)
694. CEDAW CO Czech Republic, CEDAW/C/CZE/CO/3 (2006), para. 7; CEDAW CO Germany, A/59/38 (2004), paras 26-27; CEDAW CO Slovenia, A/58/38 (2003), paras 217-219. [↑](#footnote-ref-694)