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Work-life balance in times of pandemic: the legal and judicial implementation of the Italian Constitutional Principle of Protection of Working Mothers in a comparative framework

Equilíbrio entre vida profissional e pessoal em tempos de pandemia: a implementação legislativa e judicial do Princípio Constitucional Italiano de Proteção de Mães Trabalhadoras em uma estrutura comparativa

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Abstract: This paper examines the issue of life-work balance for working mothers in light of recent data proving that the burden has been disproportionate during the COVID-19 pandemic with respect to

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fathers. It starts describing the constitutional foundation of the special protection recognized to this category according to Article 37 of the constitution, inserted in a comparative framework. After a critical analysis of the evolution of both case law and legislation concerning the role of both parents in the care of kids and the progressive emergence of the interest of the child as core-value in this field, the author goes back to the current situation and draws conclusions on recent developments.

Keywords: Working mothers. Constitutional law. Legal comparison. Best interest of the child. COVID-19 pandemic.

Resumo: Este artigo examina a questão do equilíbrio para mães trabalhadoras entre vida e trabalho à luz de dados recentes que provam que a carga foi desproporcional durante a pandemia de COVID-19 quando em comparação com os genitores pais. Inicia descrevendo o fundamento constitucional da proteção especial reconhecida a essa categoria nos termos do artigo 37 da Constituição, inserido em um quadro comparativo. Após uma análise crítica da evolução da jurisprudência e da legislação sobre o papel de ambos os pais no cuidado dos filhos e a progressiva emergência do interesse da criança como valor central nesse campo, a autora volta à situação atual e propõe conclusões sobre os recentes desenvolvimentos.

Palavras-chave: Mães trabalhadoras. Direito constitucional. Comparação jurídica. Melhor interesse da criança. Pandemia de COVID-19.

1 Introduction

The COVID-19 pandemic has had an unprecedented impact on constitutional law, as it is proven by the multiple publications that have been devoted, over the past months, to the sources of law employed to face the emergency, the effects on political systems, territorial decentralization and several fundamental rights, from education to religious freedom and free movement. Of course, other branches of law have been affected, in particular labour law due to the emergence of "new" remote working ("smart working" in Italian) instruments, which have changed organizational arrangements and family dynamics. In particular, inequalities between men and women seem to have arisen due to the current situation in terms of life-work balance and care of kids, sparking interest in the media and political debates.[1]

According to recent statistics, in fact, working mothers have suffered a higher burden than fathers.[2] On a total of almost ten million female workers, there are around three million women with a child under 15 years old, which represent the

[1] See Save The Children. Report "Le equilibriste: la maternità in Italia nel 2020", 25th of May 2020. Available at: https://s3.savethechildren.it/public/files/uploads/pubblicazioni/le-equilibriste-la-maternita-italia-nel-2020.pdf.

[2] See Fondazione Studi Consulenti del Lavoro. Dossier "Mamme e lavoro al tempo dell'emergenza Covid-19". May 2020. Available at: http://www.consulentidellavoro.it/home/storico-articoli/12588-emergenzaconciliazione-per-3-milioni-di-mamme-nella-fase-2.

group most severely under stress in terms of work-life balance, due to the lockdown of schools, means of online educations and the establishment of remote working arrangements. These data show as well that almost half of these working mothers have low-skill jobs for which they would be compelled to leave their house (and half of them have a salary under 1.000 euros). A point for intersectional vulnerability for these female workers can also be seen in the numbers concerning mothers taking care of a kid as single parents (around 300.000) vis-à-vis fathers in the same condition (47.000).[3]

This trend may go against decades of legislative and judicial improvements of the labour conditions of mothers, which have progressively recognized certain benefits for female workers and then shifted towards the protection of the interests of kids. In fact, this later paradigm changed the focus of the regulation of leaves and benefits, to a certain extent equalizing the roles of both parents. The adjustments and advancements achieved within the Italian legal system will be analysed to prove this point (§§ 3-7), after a reconstruction of the rationale and content of the constitutional basis of the special protection of working mothers, also with respect to comparative constitutional law (§ 2).

2 The Constitutional Principle of Protection of Working Mothers

The starting point of this paper concerns one of the most modern features of the constitution, which proves the founding fathers' foresight: the provision of special protection for working mothers. The inquiry focuses on the jurisprudence of the Constitutional Court, in order to identify its contribution to the progressive adaptation of labour law to the constitutional principle, alongside legislative measures.

Article 37 of the constitution is the foundation of this special protection. It enshrines gender equality at work, specifying and detailing the principle of equality set out in Article 3, while at the same time acknowledging the intrinsic features of working mothers' condition. A series of legislative measures have further developed this (new) perspective adopted by the constitution, progressively putting in place instruments for protection, positive discrimination and equality, finally pointing at a sort of equalization of parenting roles. In this regard, the most significant stages of the legislative process led to the rationale and norms embedded in the legislative decree n. 151/2001.

[3] See Fondazione Studi Consulenti del lavoro. Dossier "Meno figli, meno lavoro. La conciliazione che ancora manca per le donne italiane", March 2020, p. 14. Available at: http://www.consulentidellavoro.it/files/PDF/2020/AnalisiStatistiche/MenoFigliMenoLavoro.pdf.

As it has been mentioned, the actual scope of the protection and the recognition of a peculiar condition for working mothers was primarily defined through constitutional case law, which provided guidance to the Parliament, interpreting legislative clauses through the lens of both the constitutional principle and social evolution. These judgments can be divided into three categories, according to the most significant trends.

The first of these trends was the awareness of the ongoing social change, supported by the constitution, which led to a more accomplished recognition of the role of women as citizens and as mothers as well. Therefore, initially, the Court endorsed the first legislative measures directly enforcing the constitutional principle enshrined in Article 37, responding to claims of unconstitutionality basically stating their legitimacy according to the constitutional regulation of family and motherhood.

The second set of judgments includes the cases in which the Court has provided indications on the differentiation of diverse categories of working mothers. As constitutional provisions and legislation used to be specifically addressed to female employees, the Court in several cases extended the protection to different jobs and positions, while considering others intrinsically different.

The third trend is currently the most relevant, and is linked to the progressive recognition of the best interest of the child as the guiding principle. Consequently, this shift of perspective was co-essential to the gradual equation of the positions of both parents and derived from the combined application of the constitution and the amended Civil Code after 1975.

Through a systematic examination of the most relevant judgments which have led to the aforementioned point, the phases of the constitutional case law on the protection of working mothers are analysed, highlighting their complementary role with respect to the corresponding legislation. In this context, in fact, the Constitutional Court and the Parliament carried out a fruitful cooperation,[4] through which the legal system was gradually made consistent with the constitution. In the conclusion recent measures adopted to respond to the COVID-19 pandemic are contrasted to this approach, in order to check to what extent they respond to this logic and what outcome they can produce.

[4] Loyal cooperation among institutions was the core of the official dossier on the activity of the Constitutional Court in 2019, presented by the chief justice of the Court Marta Cartabia in April 2020. Available at: https://www.cortecostituzionale.it/documenti/relazione_cartabia/1_relazione.pdf.

3 The "essential function" of female workers within families enshrined in Article 37: a comparative assessment

Article 37, paragraph 1, of the constitution states that female workers «are entitled to equal rights and, for comparable jobs, equal pay as men. Working conditions must allow women to fulfil their essential role in the family and ensure appropriate protection for the mother and the child», while the second paragraph of the article relates to child labour, which is also subject to special protection. Unlike the third paragraph, which specifies that the Republic has to provide specific rules on child labour, the first paragraph concerning female workers does not seem to establish exclusive obligations for the State. Therefore, respect for gender equality in workplace is fixed *erga omnes* and the provision is addressed to both the State, private employers and collective bargaining.

In spite of their joint regulation, the protection of women's work and that of child labour are rooted in different issues: 1) about women, the objectives are equalisation with respect to men and preservation of the maternal role within the family; 2) about child labour, the target is to preserve the development and growth of the kid.

Therefore, the dichotomy inspiring the regulation with respect to point 1) is represented by the balance between the achievement of equality with men and the recognition/protection of peculiarities.[5] The debate in the Constituent Assembly focused on these two elements: the need to include a reference to the equivalent contribution as a condition for access to equal treatment with respect to men and the qualification of the family role of women as "essential".

The first facet of the debate depended on the assumption that workers of different sexes shall have different skills and performances. There were, in fact, those who advocated for an explicit reference to "equal performance" as the necessary condition for equal economic treatment.[6] The response to similar claims was that the performance of the female workers is "identical and even higher" than that of their male colleagues.[7]

The second key point of the constituent debate was the qualification of the role of women within families as "essential". More specifically, the adjective used to define the function of wife and mother was criticized as long as it represented

[5] Similarly TREU, Tiziano. Lavoro femminile e principio di uguaglianza. *Rivista trimestrale di diritto e procedura civile*, n. 1, p. 1-73, 1977, p. 6.

[6] See the speech by Lucifero, Session of the 8th of October 1946. In: *Assemblea costituente. Commissione per la Costituzione. Prima Sottocommissione*, Roma: Camera dei deputati, p. 204ff.

[7] See the observations by Mastrojanni, in the same Session, *ibidem*, p. 205. On this aspect: *Art. 37*. In: PALADIN, Livio; CRISAFULLI, Vezio (coord). *Commentario breve alla Costituzione*, Padova: CEDAM, 1990, p. 247.

the corollary of a traditional viewpoint, obsolete in light of the economic and social evolution of the country.[8] The impasse was overcome thanks to the contribution of Aldo Moro, a prominent member of the Christian Democracy, who argued that the explicit mention of the essentiality of female role would be required in order to guide the legislature in the posterior regulation of the topic.[9]

Along with Article 37 of the constitution (which is applied in relation to female employees), the basis of the protection of working mothers also relies on Article 31 of the constitution, which provides protection to motherhood itself,[10] and Article 32, which protects the health of both mother and child.[11] Furthermore, the expression "family function" implicitly refers to the constitutional concept of family enshrined in Article 29[12] (this explains why several relevant judgments employ both articles, 29 and 37).

Two constitutional amendments passed many decades later can be considered as the result of similar views on the protection of female workers, namely constitutional amendments 3/2001 and 1/2003. Article 117.7 states, since 2001, that Regions, through their legislation, are expected to "remove any hindrances to the full equality of men and women in social, cultural and economic life and promote equal access to elected offices for men and women".[13] The objective of equality thus becomes a mission that the State shares with the other territorial political entities. Later, Article 51 of the constitution, fostering equal access to public and elected offices, was complemented with this clause: "to this end, the Republic shall adopt specific measures to promote equal opportunities between women and men".

Regarding the normative context in which the constitutional principles were situated at the entry into force of the constitution, family law was based on the

8 Session of the 10th of May 1947. In: *La Costituzione della Repubblica nei lavori preparatori dell'Assemblea costituente*, II, Roma: Camera dei deputati, p. 1574ff.

9 The position of few founding fathers emphasized the value of the natural and therefore essential function of women at home, so that all public and work commitments were to be considered ancillary (for instance, Mastrojanni). A debate followed on the possibility of replacing the adjective with "special" or "prevalent", or eliminating it altogether, but in the end the choice of the term "essential" prevailed, with seven favourable votes against four in the first Subcommittee (session of the 8th of October 1946).

10 Article 31: "The Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic protects mothers, children and the young by adopting necessary provisions". The translation provided by the Senate is the one referred to in this text. Available at: http://www.senato.it.

11 Article 32: "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for humans".

12 Article 29: "The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to ensure the unity of the family".

13 With regard to electoral equality, one may recall judgments n. 422/1995 and n. 49/2003. On this specific provision, see CARTABIA, Marta. Il principio della parità tra uomini e donne nell'art. 117, 7º comma. In: GROPPI, Tania; OLIVETTI, Marco (coord.). *Regioni ed enti locali nel nuovo titolo V*, Torino: Giappichelli, 2001, p. 109ff.

patriarchal model, which stayed the same until the reform approved in 1975 with law n. 151. That piece of legislation was adopted in order to implement the right to moral and legal equality between spouses required by Article 29 of the constitution. This is why at an early stage Article 37 was considered a programmatic clause, in need of further application and specification. Such constitutional provision, however, over time has allowed legislation and constitutional case law to achieve higher levels of protection for working mothers (and a contribution has also been provided by EU law). Gradually, it evolved "from mere enunciation of principles into an active instrument of progress and civilisation".[14]

Comparatively, the phrasing adopted by the founding fathers with respect to female workers was pretty far-sighted, as posterior constitutions went into the same direction only decades later.

Article 68 of the Portuguese constitution passed in 1976, devoted to "Fatherhood and motherhood", provides an example of the balance between equal parental roles and special protection for working mothers that inspired the Italian case law over time: "1. In performing their irreplaceable role in relation to their children, particularly as regards the children's education, fathers and mothers shall possess the right to protection by society and the state, together with the guarantee of their own professional fulfilment and participation in civic life. 2. Motherhood and fatherhood shall constitute eminent social values. 3. Women shall possess the right to special protection during pregnancy and following childbirth, and female workers shall also possess the right to an adequate period of leave from work without loss of remuneration or any privileges. 4. The law shall regulate the grant to mothers and fathers of an adequate period of leave from work, in accordance with the interests of the child and the needs of the family unit". Also the constitution of Panama (passed in 1972) established a dedicated protection to motherhood, delving into specific welfare and labour benefits.[15] In fact, constitutionalizing norms aimed at protecting female workers in the workplace became more common years later, independently from the geographical area and legal culture of the country. One may recall, for instance, the constitutions of Guatemala (1985);[16] Lithuania (1992, Article 39: "[...]

[14] COLAPIETRO, Carlo. Dalla tutela della lavoratrice madre alla tutela della maternità e dell'infanzia: l'evoluzione legislativa e giurisprudenziale. *Giurisprudenza italiana*, n. 6, p. 1317-1329, 2000, p. 1319.

[15] Article 72: "Motherhood of the working woman is protected. The pregnant woman may not be separated from her public or private employment for this reason. For a minimum of six weeks prior to confinement and eight weeks thereafter, she is entitled to rest with the same remuneration that she was receiving, and her job shall be kept for her, as well as all the rights inherent to her contract. Upon returning to work, the mother may not be dismissed for one year, except in special cases prescribed by law [...]".

[16] Article 102, "Minimum Social Rights of Labour Legislation", point k): "The protection of the working woman and the regulation of the conditions under which she must render her services. There may not be differences established between married and single women in terms of work. The law will regulate the protection of the maternity rights of the working woman, who may not be required to conduct any work that may require an effort that puts her pregnancy in jeopardy. The working mother will enjoy a compulsory rest

The law shall provide to working mothers a paid leave before and after childbirth as well as favourable working conditions and other concessions"); Ghana (1992, Article 27: "Special care shall be accorded to mothers during a reasonable period before and after child-birth; and during those periods, working mothers shall be accorded paid leave. 2. Facilities shall be provided for the care of children below school-going Age to enable women, who have the traditional care for children, realise their full potential […]"); or Seychelles (1993, Article 30: "The State recognises the unique status and natural maternal functions of women in society and undertakes as a result to take appropriate measures to ensure that a working mother is afforded special protection with regard to paid leave and her conditions at work during such reasonable period as provided by law before and after childbirth"). The constitution of Armenia also fixes the prohibition of dismissal due to pregnancies and allots protection to both parents[17] and the Mexican one contains a very detailed regulation in terms of welfare and labour protection.[18]

The Italian constitution, which combines the protection of working mothers with the one of children's, is not unique either, as clauses also from different periods adopt a similar viewpoint, essentially comparing mothers to vulnerable categories.[19]

period paid on the basis of one hundred percent of her salary, during the thirty days prior to giving birth and during the subsequent forty-five days. During the period of lactation, she will have the right to two periods of extraordinary rest, during her workday. The prenatal and postnatal rest periods will be expanded according to her physical conditions, by medical prescription […]."

17 Article 57 of the Armenian constitution: "1. Everyone shall have the right to free choice of employment. 2. Every worker shall have the right to protection in case of groundless dismissal from employment. The grounds of dismissal from employment shall be stipulated by law. 3. It shall be prohibited to dismiss from employment due to reasons related to maternity. Every employed woman shall have the right to paid leave in case of pregnancy and child delivery. Every employed parent shall have the right to leave in case of child birth or child adoption. Details shall be stipulated by law".

18 See Title VI, "Labour and Social Security", Article 123, B, section XI: "[…] During pregnancy, women shall not perform such work that requires excessive physical effort and could be dangerous regarding pregnancy. Women have the right to enjoy a disability leave due to childbirth, which shall cover one month previous to the birth and two months thereafter. During such disability leave, women shall receive their full wages and retain their employment and the rights acquired under their labour contract. During the nursing period, they shall have two special rests per day, consisting of half hour each one, to feed their babies. In addition, they shall enjoy medical and obstetrical services, medicines, nursing aid and nursery services".

19 See Article 64 of the constitution of Croatia (1991): "Everyone shall have the duty to protect children and helpless persons. Children may not be employed before reaching the legally determined age, nor may they be forced or allowed to do work which is harmful to their health or morality. Young people, mothers and persons with disabilities shall be entitled to special protection at work"; or Article 23 of the constitution of Peru (1993): "Work, in its diverse forms, is a matter of priority concern for the State, which provides special protection for working mothers, minors, and persons with disabilities. The State promotes conditions for social and economic progress, in particular through policies aimed at encouraging productive employment and work education. No working relation can limit the exercise of constitutional rights, nor disavow or disrespect the dignity of workers. No one is obliged to work without pay or without his free consent".

Modern approaches in terms of non-discrimination[20] and even work-life balance represent more recent exceptions.[21]

4 Basic steps of legal measures

The adaptation of the labour system to the new protection requirements imposed by the constitution was gradual. The first legislative intervention (law n. 860/1950, devoted to "Physical and Economic Protection of Working Mothers") was still marked by a rather limited protection with respect to the standards required by the constitution. Later, law n. 7/1963, concerning the prohibition of firing female workers because of marriage, punished conducts which were still quite frequent in practice.

The key to the discipline was the law on the "Protection of Working Mothers", namely law n. 1204/1971 (passed after the general regulation of the workers' statute, law n. 300/1970). It regulated both pay and health issues.[22] In particular, the powers of the employer were amended with respect to female workers, prohibiting the dismissal of employees during pregnancy and until the completion of the first year of the kid, as well as forbidding assignments that would not be adequate for the condition of pregnant workers, up to seven months after childbirth.

Law n. 903/1977, concerning equal treatment in the workplace, was approved, not coincidentally, after the reform of family law, and proved a change not only within the social concept of family, but mainly in the society with respect to the role of men and women. Without affecting the basics of law n. 1204/1971, some of the means of protection were extended to additional categories, such as adoptive or foster mothers and, in some cases, to working fathers, who were given the possibility of replacing mothers under certain conditions (Article 7). The progressive inclusion of

[20] See Article 43 of the constitution of Ecuador (2008): "The State shall guarantee the rights of pregnant and breast-feeding women to: 1. Not be discriminated for their pregnancy in education, social, and labour sectors. 2. Free maternal healthcare services. 3. Priority protection and care of their integral health and life during pregnancy, childbirth and postpartum. 4. The facilities needed for their recovery after pregnancy and during breast-feeding".

[21] See Article 11 of the constitution of Egypt (2014): "[...] The state commits to the protection of women against all forms of violence, and ensures women empowerment to reconcile the duties of a woman toward her family and her work requirements. The state ensures care and protection and care for motherhood and childhood, and for breadwinning, and elderly women, and women most in need". Previously, see Article 24 of the constitution of Ukraine (1996): "[...] Equality of the rights of women and men is ensured: by providing women with opportunities equal to those of men, in public and political, and cultural activity, in obtaining education and in professional training, in work and its remuneration; by special measures for the protection of work and health of women; by establishing pension privileges, *by creating conditions that allow women to combine work and motherhood*; by legal protection, material and moral support of motherhood and childhood, including the provision of paid leaves and other privileges to pregnant women and mothers".

[22] On this aspect, see GALLI, Ginevra. Parità di trattamento uomo-donna e astensione obbligatoria dal lavoro dopo il parto. *Rivista giuridica del lavoro e della previdenza sociale*, n. 5-6, p. 604ff., 1979.

further groups continued thanks to the provisions regarding self-employed female workers (law n. 546/1987) and freelancers (law n. 379/1990).

The legislature then went on to undertake positive actions to achieve gender equality at work through law n. 125/1991. These actions, in some cases funded and coordinated by the Ministry of Labour and Social Security, aimed to the equalisation of treatments. Law n. 215/1992 was based on the technique of affirmative actions as well, responding to that systemic disadvantage with respect to men for predominantly cultural reasons.[23]

The reordering of the matter was realized through the legislative decree n. 151/2001;[24] the corresponding law of delegation[25] focused on leaves: maternal, paternal, parental,[26] and due to health conditions of children.[27] The first category includes compulsory absence from work in the two months prior to the scheduled date of birth and the following three months. Cases of childbirth after the expected date and those of premature birth are expressly regulated as well (consistently with constitutional jurisprudence, as it will be explained later).[28] However, according to Article 12, while the total duration of the leave is fixed, female workers can, under certain conditions, benefit from it starting from the month before the birth and up to the four months of the child. Male workers are also allowed to take leaves during the first three months, in special cases and under the same conditions as the mother (Article 13).[29] This decree established equal rights for both parents in terms of daily leaves (Articles 39-41) and, above all, of the prohibition of dismissal.

[23] In this regard see *Art. 37*, in BIFULCO, Raffaele; CELOTTO, Alfonso, OLIVETTI, Marco (coord.), *Commentario alla Costituzione*, Torino: UTET, 2006, p. 767. On positive actions, see D'ALOIA, Antonio, *Eguaglianza sostanziale e diritto diseguale*. Contributo allo studio delle azioni positive nella prospettiva costituzionale, Padova: CEDAM, 2002, and on law n. 125/1991 and the "paradoxes" of the principle of equality, see AINIS, Michele. Azioni positive e principio d'uguaglianza. *Giurisprudenza costituzionale*, n. 1, p. 582-608, 1992.

[24] "Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità, a norma dell'art. 15 della legge 8 marzo 2000, n. 53".

[25] Legislative decrees require a previous law, passed by the Parliament, and the posterior adoption of the decree by the Government. In this case, the law was named "Disposizioni per il sostegno della maternità e della paternità, per il diritto alla cura e alla formazione e per il coordinamento dei tempi delle città".

[26] Parental leaves entitle to a total of ten months within the first eight years of the child's life (Article 3.2); additionally, according to Article 3.4, parents can take medical leaves for children under the age of eight.

[27] See, *ex aliis*, DEL PUNTA, Riccardo. La nuova disciplina dei congedi parentali, familiari e formativi. *Rivista italiana di diritto del lavoro*, vol. 19, n. 2, p. 149-180, 2000 and, more in general, BERRUTI, Mario; VASSALINI, Adriana. *La donna e il lavoro*: diritti e tutele, Padova: CEDAM, 2003; PALMIERI, Maria Luisa. Il sostegno della maternità e della paternità alla luce delle recenti novità normative e della circolare n. 53 del 19 luglio 2000. *Diritto di famiglia e delle persone*, vol. 30, n. 1, p. 412ff., 2001.

[28] Article 11 of law n. 53/2000 amended Article 4 of law n. 1204/1971 in order to establish that, in cases of premature birth, the days of mandatory leave not enjoyed before the birth sum up to the period of mandatory leave after childbirth.

[29] There were also measures to support flexibility with respect to working schedule and hours (Article 9) and the hiring of staff to replace workers on leave (Article 10). On this second point, in judgment n. 997/1988, the Constitutional Court had rejected the appeal against a law of the Abruzzo Region which regulated the temporary hiring of staff for cases of maternity, in application of Article 11 of law n. 1204/1971.

Such decision adopted by the employer would be void when it happened during the pregnancy or the first year of the child's life (Article 54).

5 The first mission of Constitutional Case Law: supporting legislative measures protecting motherhood

The analysis of constitutional case law based on Article 37 of the constitution showed that the preservation of the legislative discipline in relation to the protection of working mothers was the first mission undertaken by the Constitutional Court. Already in judgment n. 56/1958 the Court recalled the original intent of the founding fathers and stated that the constitutional provisions were to be inserted into a traditional context of legal and social inequality between sexes. Constitutional provisions, however, do not imply the elimination of any form of differentiation: Articles 29 and 37 do not require an "absolute and indiscriminate levelling parity between men and women", since the former refers to a law for the establishment of limitations to guarantee family unity and the latter concerns appropriate working conditions, taking into account the essential function of spouse and mother of the woman.[30]

Of course, progressively new cases were brought before ordinary courts which raised a constitutional question to the Court, as the legal system was not consistent with constitutional principles. At the same time, once the legislator started to different cases aimed to derogate the new norms and preserve the previous *status quo*. In fact, the Court had to decide upon the prohibition of dismissal of female workers because of marriage and its qualification as void, alongside the contractual "celibacy clauses". The challenged regulation established a temporal presumption: the employer was entitled to prove that the dismissal had not been decided because of marriage, even during the period covered by the presumption, under the conditions set by law n. 860/1950.[31] The ordinary court which triggered the constitutional case argued that such norms violated the principle of equality and the freedom of economic initiative: these restrictions would result in unjustified discrimination among workers, as well as in a serious reduction in the business freedom embedded in Article 41 of the constitution.

[30] Despite the premises, the challenge against law n. 1441/1956 (which accepted women as members of popular judicial colleges of some criminal courts, however limiting their participation in the sense that women could not be in the majority over men) was judged unfounded, as the Court considered that the clause was inspired by the need for a more appropriate functioning of these colleges. Consequently, the legislator was granted a margin of appreciation in defining the implementation of the principle pursuant to Article 51 of the constitution, for a better organization of public offices.

[31] That is, pursuant to letters a, b and c of Article 3.2 of law n. 860/1950, in cases of just cause for dismissal depending on the worker's behaviour; termination of the activity of employment; completion of the service for which the worker was hired or termination of the contract subject to a deadline.

In the corresponding judgment (n. 27/1969), the Court took into account the situation of inequality, confirmed by experience, trade unions' debates and claims, doctrinal studies and statistics. The decision taken by the legislature to adopt these norms fulfilled its obligation to balance and combine the interest of women in the preservation of their employment with the interest and rights of employers. The protection of women was thus allotted a legitimate foundation inherent to a plurality of constitutional principles, which jointly justified legislative measures aimed to prevent that women were obliged to choose between their job and their family role.[32] Motherhood, therefore, was described as a protected interest by the constitution, according to Articles 2, 3.2, 31 and 37, the latter of which necessarily postulates the freedom for women to become wives and mothers. Limitations and prohibitions of dismissal were instrumental with respect to the constitutional mission to be pursued, and the Court stated they were a proportionate response to the social context and to the need to protect "freedom and human dignity" of the affected subjects.[33]

There is also a series of judgments which dealt with specific issues of law n. 1204/1971, an essential step in the evolution of the protection of working mothers. For instance, an interpretation of Article 17.2 was rejected, which included, within the calculation of the 60 days immediately before the beginning of the compulsory leave, also the optional leaves provided by the law and enjoyed for previous pregnancies (judgment n. 106/1980).[34] A different interpretation would irrationally discriminate working mothers, against the spirit of the law and the constitutional principles, especially Article 37.

Interesting in view of the social changes that the Court highlighted and supported is judgment n. 83/1983, in which the presumption regarding the role of husband and wife in mutual maintenance (and with respect to children) was considered inconsistent with the evolution of the country's socio-economic structure, still struggling to accept and implement new standards of equality between the sexes in accordance with the fundamental law.[35]

[32] The jurisprudence concerning the prohibition of dismissal is rich. In judgment n. 405/2001, the Court confirmed the payment of maternity allowances in cases of dismissal for just cause. On this point, see, for instance, FERRARA, Maria Dolores. Dalla legge n. 1204/1971 al testo unico n. 151/2001: alcuni aspetti problematici in tema di licenziamento della lavoratrice madre. *Diritto delle relazioni industriali*, vol. 16, n. 1, p. 151-156, 2006; NUNIN, Roberta. Licenziamento per giusta causa ed indennità di maternità: la consulta si pronuncia ancora a tutela delle lavoratrici madri. *Famiglia e diritto*, n. 2, p. 123-126, 2002; LUPOLI, Marcello. La consulta riconosce anche alla lavoratrice licenziata per giusta causa il diritto a percepire l'indennità di maternità. *Il nuovo diritto*, n. 1, p. 48-52, 2002.

[33] *Foro italiano*, p. 545ff., 1969.

[34] *Foro italiano*, p. 2092ff., 1980.

[35] The judgment concerned Article 4.5 of law n. 130/1950 ("Economic improvements for state employees"), as amended by law n. 212/1952, on the right for financial support for female employees with kids, allotted only for a limited period, shorter than the overall duration of the spouse's unemployment subsidies. See *Foro italiano*, p. 1829ff., 1983.

An explicit reference to the objective of redeeming women from social and legal inferior status, guaranteeing gender equality, was also enshrined in judgment n. 137/1986.[36] The case was decided upon on the basis of Article 37 of the constitution: according to the Court, this constitutional provision entitles working women not only to the same rights and equal pay, but also to the right to working conditions that would allow them to fulfil their "essential" family function. From this point of view, a principle emerges that was later developed: the legislation is also inspired by the protection of children and, in relation to this, by equal rights and duties within marriage.[37]

Judgment n. 374/1989 supported the legitimacy of the benefit provided exclusively for female employees.[38] The Court, after recalling that law n. 903/1977, while equating the position of men and women, had nevertheless maintained certain differences in the regulation of retirement, rejected that those norms containing privileged treatment for women would have been implicitly repealed. The justification for such treatment would depend on the particular "family vocation" of women, as stated by Article 37 of the constitution, and the challenged norms actually aimed to protect her role mitigating potential economic adverse conditions.

Conclusively, on the basis of Article 37 of the constitution, the Court at first faced challenges against legislation adopted to protect working mothers. One of the main missions that both constitutional case law and legislative measures undertook was to avoid that women were compelled to choose between employment and motherhood. Further pursuing this target, the Court stroke down different rules in order to prevent possible conditions of financial need related to motherhood.[39]

6 Second step: balancing equality and differentiation

Many of the cases submitted to the Constitutional Court regarded issues concerning different categories of female workers and employees. Therefore, it was necessary to assess the reasonableness of equal or differentiated protections according to the peculiar features of each situation. The examined issues span from domestic employees to apprentices, from part-time workers to those employed in agriculture, as well as self-employed women and freelances.

[36] In *Foro italiano*, p. 2959ff., 1986. See the note by CERRI, Augusto, Divieto di differenziazioni normative per ragioni di sesso e carattere «privilegiato» delle valutazioni del legislatore. *Giurisprudenza costituzionale*, n. 6, p. 956ff., 1986. The judgment regarded discriminatory dismissal of female workers in comparison with men at the fixed age for retirement.

[37] The following judgment n. 498/1988 endorsed the existence of the right for female workers to keep their employment until reaching the same age limits set for men. See *Foro italiano*, p. 1769, 1988.

[38] It was a privilege provided by decree n. 1092/1973 (see *Foro italiano*, p. 347ff., 1990): for married women who resigned or with dependent children, there were specific (more favourable) conditions.

[39] See judgment n. 423/1995, in *Giurisprudenza costituzionale*, p. 3293ff., 1995.

The first category analysed in constitutional jurisprudence was the one of domestic employees, partially excluded from the regime of both law n. 860/1950 and law n. 1204/1971. This differentiation has always been considered legitimate (see judgment n. 27/1974)[40] in the light of the "specific nature" of that type of employment, which shall be qualified as substantially different as it takes place in a peculiar context. Any regulation that would not take into account these essential peculiarities would be irrational and inconsistent. Furthermore, the specific nature of the employment depends as well on the burden upon the corresponding family's financial conditions that would derive from a prohibition of dismissal of twenty-one months in total (see as well judgment n. 86/1994).[41] The Court decided differently with respect to apprentices, extending the protection provided by Article 17 of law n. 1204/1971 also to these workers (see judgment n. 276/1988);[42] the same applies to female home workers.[43] Another specific category of workers taken into account was that of young women employed in public utility functions.[44] There are also cases concerning part-time[45] and agricultural workers.[46] With respect to self-employed workers, the Court supported a certain degree of differentiation with respect to female employees due to the divergent working conditions and social security regimes (see judgments n. 181/1993 and n. 3/1998).[47]

7 The Best Interest of the Children as the Guiding Principle

The final step of the evolution of the case law relies on a change of perspective, namely the adoption of the point of view of children, therefore equalizing the role of

40 In *Foro italiano*, p. 595ff., 1974.

41 In *Foro italiano*, p. 1318ff., 1994. See the comment by PICCININI, Iolanda. Specialità del rapporto di lavoro domestico e tutela della lavoratrice madre contro il licenziamento. *Giurisprudenza costituzionale*, vol. 39, n. 1, p. 2981ff., 1994.

42 See *Giurisprudenza costituzionale*, p. 1155ff., 1988.

43 Judgment n. 360/2000 (in *Foro italiano*, p. 361ff., 2002), on law n. 1204/1971, extends the applicability of Article 5 to female home workers as well.

44 They were expressly excluded from the law n. 25/1993 of the Sicily Region from the applicability of Article 15 of law n. 1204/1971, but the existence of a contractual salary would be against the exclusion of maternity leaves (which are proportional to the salary): legislative margin of appreciation with respect to social security and welfare matters cannot exceed the limitations set by the constitution to protect certain conditions, among all maternity and motherhood (see judgment n. 310/1999, in *Foro italiano*, p. 1444ff., 2000).

45 In the case of an annual part-time contract, the daily allowance for the period of compulsory leave pursuant to Article 15 of law n. 1204/1971 (judgment n. 132/1991). The Court also decided upon cases of part-time employment that is converted into a full-time contract (see judgment n. 271/1999, in *Giurisprudenza costituzionale*, p. 2258ff., 1999).

46 See judgment n. 364/1995, on female agricultural workers (see *Giurisprudenza costituzionale*, p. 2704ff., 1995) and judgment n. 361/2000, on female entrepreneurs and the application of law n. 546/1987 (see *Foro italiano*, p. 3412ff., 2000).

47 See, respectively, *Giurisprudenza costituzionale*, p. 1260ff., 1993 and *Foro italiano*, p. 664ff., 1998, with a comment by CIOLLI, Ines. L'indennità di maternità a favore delle libere professioniste: nessun obbligo di astensione e irragionevole duplicazione del reddito.

both parents. Already when Article 37 was being debated within the first Subcommittee of the Constituent Assembly, the question arose of to what extent and why the role of the mother was to be considered "more essential" than that of the father, or whether such a choice would end up discriminating against fathers.[48]

In this regard, the leading case was judgment n. 1/1987: the challenge concerned Articles 4 and 10 of law n. 1204/1971, some articles law n. 903/1977 with respect to the lack of any provision attributing to fathers the same means of protection in case mothers could not take care of the children for health reasons or had passed away.[49] The judgment focused on Article 7 of law n. 903, which regulated the status of working fathers, who were expressly granted the right to enjoy optional leaves in two cases. The Court affirmed that law n. 1204 provided an organic regulation that had significantly improved the previous legislation, enhancing the social function of motherhood and women's work. Nevertheless, next to the mother, there was a new centre of interest: the child, "equivalently addressee, if not prevalently and exclusively, of significant clauses of the law itself".[50] The viewpoint was then focused on the protection of the relationship between mother and child, considered crucial for the physical and mental development of the child.

Therefore, the enjoyment of parental leaves, in addition to protecting the mother's health, must also be directed to the guarantee of the interests of the child. The exclusion of the father from the scope of such measures cannot apply in the cases in which the mother's assistance is not possible. If it were not so, Article 3 of the constitution and even more Articles 29, 30 and 37 would be infringed upon, since the legislation would hinder those family relationships required by these Articles, and would impede the protection of children, who are subjects "in need of the greatest and most careful protection".

The recognition of the paramount maternal role for the growth of the child continued in judgment n. 61/1991,[51] which annulled the interpretation given by the Court of Cassation to Article 2 of law n. 1204/1971, according to which the dismissal during pregnancy or just after childbirth would be temporarily ineffective and not void. Without a generalized prohibition of these dismissals, the privilege regulated by the law for mothers would be useless, as the employer could fire female workers more easily, in the end leading women to renounce to optional leaves or even to

[48] Basso and Togliatti, in the Session of the 8th of October 1946. In: *Assemblea costituente. Commissione per la Costituzione. Prima Sottocommissione*, Roma: Camera dei deputati, p. 206.

[49] Three cases, in fact, dealt with male employees whose wives had died giving birth to their kid; in the fourth, the mother was disabled. See *Foro italiano*, p. 313ff., 1987 and the comment by GALLI, Ginevra. La Corte costituzionale e i diritti dei padri lavoratori. *Rivista giuridica del lavoro e della previdenza sociale*, p. 3-11, 1987.

[50] On this trend, see ROSSI, Emanuele. Alcune recenti tendenze della Corte costituzionale in materia di parità fra i sessi. *Foro italiano*, p. 1759ff., 1989.

[51] In *Foro italiano*, p. 697ff., 1991.

motherhood, in order to avoid negative consequences on their working conditions. The mere postponement of the effectiveness of the dismissal would have violated Article 37 of the constitution from several points of view: firstly, a negative impact on the relationship between mother and child, with respect to biological needs, but even more to relational and emotional connections affecting the proper development of the child's personality (cases n. 1/1987 and n. 332/1988); secondly, motherhood itself would become the reason for discriminatory consequences.[52]

With respect to the cases of foster care of minors, the need to safeguard the child[53] as an autonomous centre of interest has gradually become more intense as well. The enjoyment of the maternal leave of three months following the child's entry into the family was extended to the father, if the mother did not use it (judgment n. 341/1991).[54] The protection of children requires an equal participation of both parents, without clear-cut separations of roles, through a mutual integration of tasks: also fathers are "suitable–and therefore required –to provide material assistance and emotional support to the child, so that there is no reason to deny the father– that precisely in accordance with that duty and that ability to assist can enjoy optional leaves–the right to enjoy, when the mother cannot, the obligatory leave regulated for the first three months of the child's life". The maternal function of the mother is very important in cases of foster care, but the father's is so as well: the assessment of the actual arrangement of family tasks is up to the spouses jointly, with the aim of ensuring the best possible care for the child.

The constitutional principle of equality fostered a cultural process towards the overcoming of a rigid separation of roles between men and women –both within and outside home–, with a joint participation of both in the tasks of care and education of children (judgment n. 385/2005).[55] Participation to the physical and psychological development of children, also in the light of the evolution of family law, does not allow for a strict differentiation of roles between parents, to whom equal rights and

[52] As a result, legislative measures must aim, in addition to the preservation of the employment, to avoid conducts that may "unjustifiably affect the condition of the woman and alter her psycho-physical balance, with serious repercussions on the pregnancy or, subsequently, the development of the child" (and this would be the case of an announced dismissal).

[53] Cases concerning adoption and foster care initiated with judgment n. 150/1985, as the Government challenged a law passed by the Region Valle d'Aosta, which had extended the provisions of law n. 1204/1971 to such cases. See as well the later judgment n. 332/1988 (in *Foro italiano*, p. 642ff., 1989; and the comment by COLACURTO, Laura. Brevi riflessioni sul riconoscimento dell'applicabilità alle lavoratrici adottive o affidatarie della normativa di tutela delle lavoratrici madri. *Rivista giuridica del lavoro e della previdenza sociale*, n. 6, p. 194ff., 1988).

[54] In *Foro italiano*, p. 2297ff., 1991.

[55] This judgment extended the application of Articles 70 and 72 of the legislative decree n. 151/2001 to self-employed fathers with the foster care of a kid, if the mother did not enjoy the three-month maternity leave. See *Giurisprudenza costituzionale*, p. 3793ff., 2005 and the comment by CHIRULLI, Piermassimo. Una problematica sentenza additiva di principio della Corte costituzionale in materia di maternità delle libere professioniste.

duties have been assigned. As a result, the right to days off according to Article 10 of law n. 1204/1971 was extended in general to working fathers for the care of children under one year (judgment n. 179/1993).[56]

This decision was a key-point of arrival for the case law, considering that the Court specifically mentioned the content of various judgments (n. 1/1987, n. 276/1988, n. 332/1988, n. 972/1988, n. 61/1991 and n. 341/1991), in which, in addition to protecting the rights of the mother, it had already focused on the position of the child. In the first of the mentioned rulings, the Court did not examine different impediments, which were present in the judgment from 1993. The Court advocated for the "right balance between the different constitutional principles" devoted to the protection of motherhood and the interest of children, equality between spouses, as well as equality between men and women at the workplace, as well as the legislative and jurisprudential evolution on family relationships. The mother's right, however, still remained the priority and the prerequisite for the subsidiary father's right (judgment n. 150/1994).[57]

The leave to be taken after the birth of kids protects the relationship between mother and child, also in its relational and affective dimension. Therefore, fixed deadlines and schedules have to be avoided, in order to consider those periods in which the child, in cases of premature birth, must be entrusted to medical care and cannot be with the mother. This would force the mother to go back to work precisely when the child should be cared for (judgment n. 270/1999,[58] which complemented the interpretation of Article 4 of law n. 1204/1971 providing, for these cases, a period of compulsory leave suitable to ensure adequate protection for the mother and child).[59]

The same *ratio* was adopted in judgment n. 104/2003, reinterpreting Article 45 of the legislative decree n. 151/2001: days off to be taken "within the first year of the child's life" must be applied in reference to a different timeframe, i.e. "within the first year of the child's adoption or concession of custody or foster care".[60] The starting moment of the actual presence of the child within the family can be the

[56] See *Foro italiano*, p. 1333ff., 1993.

[57] See *Foro italiano*, p. 1651ff., 1994.

[58] In *Giurisprudenza costituzionale*, p. 2248, 1999, with a comment by D'AMICO, Marilisa. Le insidie delle decisioni "di principio" (a margine di una pronuncia sulla tutela delle lavoratrici madri nel caso di parto prematuro).

[59] Judgment n. 197/2002 concerned Article 3 of law n. 546/1987 which did not regulate a five-month leave in cases of premature birth. The evolution of legislative measures was considered by the Court also in judgment n. 495/2002 with respect to self-employed mothers for the calculation of the total number of months for the leave.

[60] The judgment relies upon the evolution of the regulation of daily rests/days off (and parental leaves), which have been progressively recognized also cases distinct from biological motherhood, being addressed above all to the harmonious development of the personality of the child and his insertion within the family. See *Foro italiano*, p. 1960ff., 2003.

only reference and this aspect must be evaluated on a case-by-case basis, and not through an *ex ante* judgment.

8 Concluding remarks

With respect to the protection of working mothers, and later parents, the Constitutional Court has made use over time of a variety of judgments, namely interpretive, manipulative and additive, often adopting a reasonableness scrutiny as well.[61] To this extent, the analysis of the judgments provided in this text proves the (almost)creative role performed by constitutional case law applying Article 37 of the constitution and explains why this would be a ground on which to assess the relationship with the legislature, in addition to the judiciary (as ordinary judges can submit questions to the Court).[62]

Of course, the Court adapted the regulation one step at a time, avoiding excessive accelerations and endorsing legislative measures supporting working mothers. A turning point was represented by the reform of family law in 1975, after which the Court could affirm the need for the participation of both parents in the care and education of kids, striking a balance between the "essential" role of mothers and the material and affective care provided by fathers. Thanks to the amendment to the Civil Code, therefore, the Court had a more significant and coherent set of norms to implement the constitutional principle and progressively extend the privileges to new categories of parents. In addition to the recognition of fathers' role, a second line of jurisprudence is relevant, with reference to the equalization of the birth of a biological child with situations like adoption.

The Court was conscious of the role it played in the evolution of this legislative domain. In judgment n. 385/2005, for instance, while reconstructing the essential steps that led to the legislative decree n. 151/2001, it underlined the importance of its jurisprudence in this matter. The decree was described as "the outcome of a legislative development that has profoundly changed the discipline of the protection of motherhood, extending to working fathers and adoptive parents the rights previously held by the mother, in order to protect the pre-eminent interest of the child". The extension of certain rights to adoptive or foster parents was also the outcome of previous judgments which provided a "substantial contribution" (the Court mentioned n. 1/1987, n. 332/1988, n. 341/1991, n. 179/1993, and n. 104/2003). According to the Court, the evolution led by both the legislative and

[61] On the judicial techniques used by the Court, see BARSOTTI, Vittoria; CAROZZA, Paolo G.; CARTABIA, Marta; SIMONCINI, Andrea. *Italian Constitutional Justice in Global Context*. Oxford: OUP, 2017; and PEGORARO, Lucio. *Sistemi di giustizia costituzionale*. Torino: Giappichelli, 2019.

[62] See PEGORARO, Lucio. *La Corte e il Parlamento*: sentenze-indirizzo e attività legislativa, Padova: CEDAM, 1987, p. 5ff.

the judgments would be clear in the text of the legislative decree n. 151/2001 which allots the same rights to both working parents. Institutions, measures, leaves originally conceived to safeguard motherhood are now aimed not only at the protection of women, but mainly at the protection of the child, which is even more pressing in cases of adoption and foster care, in order to favour the insertion of the kid into the family.

Nevertheless, the complete equality between women and men which is recognized and pursued by the constitution within the domestic realm, is not the exact same principle that inspires the regulation of working conditions. Article 37, in fact, aims to ensure that the mother has suitable working conditions for her role: for this reason, differentiated benefits and treatments shall be considered legitimate. The Court was more cautious when extending these privileges to different categories of female workers, also calling on the legislature to adopt more appropriate legislation on maternity leaves and benefits for self-employed workers, relying mainly to the right to health (Article 32) and the protection of motherhood (Article 31). The legislator, therefore, is obliged to establish differentiations according to the peculiarities of the different situations. In other words, Article 37, along with Article 3 (on the principle of equality), requires protective measures to prevent and compensate potential discrimination against women. The protection of motherhood and then parenthood has been shaped through judicial interventions and legislative measures aiming at providing children with the contribution of both parents in their education and care, as Article 30 of the constitution establishes that being a parent implies rights and duties.

A similar approach was adopted by the Government and the majority forces in Parliament within the measures to tackle the pandemic providing means for work-life balance to working parents.

The so-called “decreto rilancio” (n. 34/2020), one of the latest dedicated measures, increased up to 30 the maximum of days off for employees of the private sector who have kids under 12 years old until the end of July and with half retribution with respect to their ordinary salary. Additionally, if they have children under 16 years old (and the other parent is not unemployed or enjoys the same benefit), they are allowed to take a voluntary unpaid leave for the duration of the suspension of educational activities of their kids, keeping their job. Another bonus which can be spent to hire a baby-sitter or alternatively pay for educational services was set at first at 600 euros and then increased up to 1200 euros (with special, higher limits, for strategic sectors such as health workers, civil protection or armed forces). For public employees, remote working can be extended until the end of 2020 and, in the private sector, employees with a child under 14 years old were allowed until the end of July, under certain conditions.

Of course, these measures are "gender-neutral" in their legal configuration. Nevertheless, numbers have demonstrated that women have shouldered more child care during the pandemic than men, and that working mothers have been severely under stress in terms of life-work balance. Future statistics will show whether the pandemic has brought, among other pernicious side-effects, setbacks for working mothers which would justify a renovated approach based on differentiation between mothers and fathers.

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