

Autonomy and Equality in the Context of Parental Labour Rights A Legal Gender Studies Approach to Mandatory Parental Leave Policies¹

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¹ This paper is based on my dissertation ‘*Elternschutzrechte im Lichte von Gleichheit und Autonomie*’.

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1. Introduction

Ideally, the law provides a framework for people to conduct their lives as autonomous actors. However, depending on its specific form, it might well hinder them in this regard.² The ruling idea behind the ideal of personal autonomy is that people should be able to make their own decisions, to be at least ‘(part) author’ of their own life.³ In doing so, they depend on a number of intrinsic as well as extrinsic factors. Besides personal intellectual and emotional abilities, as well as basic freedom from external constraints, an adequate range of options to choose from must be available.⁴ If certain options are – formally or de facto – available only to a specific group, autonomy might be considered limited. Equality, therefore, is an important measure to evaluate if options can be considered adequate.⁵ In providing or limiting such options, legal norms are part of the conditions of autonomy.

As most people depend on employment to earn a living, this is particularly true for social rights, especially in the broad sense including labour law.⁶ When it comes to the choices people have regarding the reconciliation of work and family life, parental leave frameworks play an especially important role.⁷ In this paper, I will take a close look at the law’s potential to enhance people’s autonomy concerning the reconciliation of work and family. The specific legal form parental rights take – as entitlements, as compulsory provisions, or as mere rights to apply – is crucial to determine the actual scope of action made available by them.

I will focus on gender-specific birth-related leave schemes: maternal and paternal leave. Other than parental leave, these types of leave typically differentiate between birth mothers and other parents.⁸ Maternal leave [Mutterschutz] provides a

² Elisabeth Holzleithner, ‘Emanzipation durch Recht?’ (2008) *Kritische Justiz* 250-256.

³ Joseph Raz, *The Morality of Freedom* (Oxford: University Press, 1986), p. 369.

⁴ Raz, ‘Morality of Freedom’; Beate Rössler, *Autonomie. Ein Versuch über das gelungene Leben* (Berlin: Suhrkamp, 2017); Elisabeth Holzleithner, *Dimensionen gleicher Freiheit. Recht und Politik zwischen Toleranz und Multikulturalismus* (Vienna, 2011).

⁵ Holzleithner, ‘Dimensionen’, p. 375.

⁶ Claire Kilpatrick and Bruno De Witte, ‘A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone’ (2014) 7 *European Policy Analysis* 1-12, p. 4.

⁷ As does the availability of childcare services outside the home, see e.g. Annette von Alemann and Mechthild Oechsle, ‘Vereinbarkeit und Work-Life-Balance: Forschungen zu Erwerbsarbeit, Lebensführung und Geschlecht’, in Beate Kortendiek, Birgit Riegraf and Katja Sabisch (eds.), *Handbuch Interdisziplinäre Geschlechterforschung* (Wiesbaden: Springer, 2019) 1151-1160.

⁸ Iceland is an exception: Since 2006, it has renounced any reference to gender in order to avoid unequal treatment based on gender (identity) or sexual orientation. Irrespective of this, a two weeks’ leave is obligatory for the person giving birth in accordance with the maternity leave directive; Björk Guony Eydal and Ingolfur Gislason, ‘Iceland’, in Sonja Blum, Alison Koslowski, Alexandra Macht and Peter Moss (eds.), *International network on leave policies and related research, 14th International*

compulsory leave for pregnant women and women who have recently given birth.⁹ It combines health protection purposes with the purpose of childcare.¹⁰ Paternal leave [Frühkarenz and Papa- and Baby-Monat] grants fathers and co-mothers a short leave for the period immediately following the birth of a child; it aims at the second parent to support the mother and enables the family to spend time together after childbirth.¹¹ Parental leave [Karenz] is a gender-neutral entitlement to childcare leave following the maternal leave period. Parental leave is additionally used as an umbrella term for maternal and paternal leave.

Regarding maternal leave in Austria, I find it to be precisely its rigid legal form that provides an adequate framework for female workers to reconcile childbirth with wage labour.¹² To this extent compulsory labour law provisions exemplify Kant's figure of the double negation of force. As far as force is put into action as a hindrance of yet another hindrance of force, it is legitimate.¹³ While the compulsory nature of maternity protection formally limits choices, it actually increases the agency of female employees, protecting them within the unequal power relations towards their employers.¹⁴ Fathers and social mothers, on the other hand, have no mandatory leave period provided to them by Austrian law, which, to this regard, is in accordance with most legal systems.¹⁵

While in the case of gendered birth-related leaves, the law provides different options for parents, depending on their gender and biological relation to their child, parental

Review of leave policies and related research 2018, 205-211, p. 205, accessed via http://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/Leave_Review_2018.pdf%20 (20 April 2020).

⁹ In Austria, the entire 16 weeks of leave are compulsory; in other legal systems, only a smaller amount is compulsory, while the vast part of the leave is an entitlement.

¹⁰ Martin Risak, 'Art 1 RL 92/85/EWG 440', in Martin Franzen, Inken Gallner and Hartmut Oetker (eds.), *Kommentar zum europäischen Arbeitsrecht*, 2nd edn. (München: Beck, 2018), para 4.

¹¹ ME FamZeitbG 2017, 181/ME 25. GP, Erläuterungen, 1.

¹² It prescribes 16 weeks of mandatory leave, with protection from dismissal and wage replacement, §§ 3, 5, 10 MSchG and § 162 Allgemeines Sozialversicherungsgesetz (ASVG), BGBl 189/1955; all Austrian federal statutes can be accessed via <https://www.ris.bka.gv.at/Bund/> with their title, amendments can be found by their OJ number.

¹³ Immanuel Kant, *Die Metaphysik der Sitten* (1797), XXXV; Otfried Höffe (translated by Mark Migotti), *Categorical Principles of Law. A Counterpoint to Modernity* (Pennsylvania State University Press, 2002), p. 98.

¹⁴ Peter Schöffmann, 'Schein und Zeit. Arbeitszeitrecht im Wandel' (2019) *juridikum* 131-146; Robert Rebhahn, 'Arbeitszeitrecht und Erwerbsfreiheit des Arbeitnehmers – eine Erwiderung' (1996) *WBL* 56-58.

¹⁵ Alison Koslowski, Sonja Blum, Ivana Dobrotic, Alexandra Macht and Peter Moss (eds.), *15th International Review of Leave Policies and Related Research 2019*, pp. 16-17; exceptions: Italy, Belgium, and Portugal have a few days of obligatory paternal leave.

leave in formal terms treats mothers and fathers equally. However, formal equality entails that extra-judicial constraints come into play. Gendered norms as well as economic constraints influence if and how parents actually take up their entitlements.

Up until today, women do the vast share of unpaid care and household work and bear its negative impact on their professional lives.¹⁶ Women more often take leave and work part-time, and as a result, they earn less and have smaller pensions than men.¹⁷ There are many legal measures aiming to lessen this burden on women and to support their participation in the labour market, but as long as such measures only address women, they risk reproducing gender stereotypes. While differentiations concerning pregnancy and birth can be justified legally, the current situation also limits the availability of care arrangements and stabilises the gendered division of labour. Gender-specific leave partially pre-empts the choices parents have regarding the decision on how to divide their care responsibilities.

In this regard, parental leave policies seem to perfectly exemplify typical problems of equal treatment law and the legal handling of differences in general: not addressing pregnancy and parenthood would mean neglecting the needs of mothers and workers with care responsibilities and leaving masculine norms of the workplace untouched. Addressing only mothers, on the other hand, assigns the responsibility for childcare to them alone. This problem is well known in legal gender studies and will be discussed further on as the ‘dilemma of difference’.¹⁸

In section two, I will give a brief overview of the legal history of maternal and parental leave policies in Austria. Insights into the relevant international frameworks, especially the relevant International Labour Organisation (ILO) conventions, will be included to develop an extensive appreciation of the general objectives of leave policies, ranging from the safety and health of pregnant workers and mothers to reconciling workers’ professional and parental responsibilities and promoting equal treatment of men and women. Special emphasis will be put on the development

¹⁶ Henrik Kleven, Camille Landais, Johanna Posch and Josef Zweimüller, ‘Child Penalties Across Countries: Evidence and Explanations’ (2019), accessed via henrikkleven.com/uploads/3/7/3/1/37310663/klevenetal_aea-pp_2019.pdf (12 September 2019); Statistik Austria, ‘Zu Verteilung und Gründen von Teilzeitarbeit in Österreich’, accessed via http://statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/erwerbstaetigkeit/index.html (12 March 2019).

¹⁷ Statistik Austria, ‘Zu Verteilung und Gründen von Teilzeitarbeit in Österreich’, accessed via statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/erwerbstaetigkeit/index.html (12 September 2019); Eurostat, ‘Quote der von Armut bedrohten Personen nach Armutgefährdungsgrenze, Alter und Geschlecht - EU-SILC Erhebung’, accessed via <https://bit.ly/2rVYrrM> (14 September 2019).

¹⁸ Martha Minow, ‘Justice Engendered, Foreword, The Supreme Court Term 1986’ (1987) 101/10 *Harvard Law Review* 10-95, p. 12.

within European Court of Justice [ECJ] jurisdiction, to which I will turn in section three, where a shift towards the inclusion of fathers can be noticed. Nowadays, parental rights for fathers are considered important with regard to gender equality, not only because they recognise fathers as equally entitled parents but also because they ease the burden of unpaid childcare work on women through fathers' involvement.

Not only special rights for mothers but also parental protection rights for fathers may function as stepping stones to a more equal distribution of unpaid care work. This insight has been successfully established in the past few years. Just recently, in July 2019, the new directive on work-life balance for parents and carers came into force, including ten days of voluntary paternal leave.¹⁹ Also in Austria, from September 2019 on, employed fathers will be entitled to a short leave of their own,²⁰ which is an improvement compared to the precarious status that the 'Family-time Bonus Act' [Familienzeitbonusgesetz (FamZeitbG)]²¹ granted them so far. Moreover, academic research on fatherhood, masculinities, and care has increased,²² and in mainstream media 'new fathers' play quite a prominent role.²³

¹⁹ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

²⁰ § 1a Väter-Karenzgesetz (VKG), BGBl 73/2019.

²¹ Bundesgesetz, mit dem ein Gesetz über die Gewährung eines Bonus für Väter während der Familienzeit (Familienzeitbonusgesetz – FamZeitbG) erlassen wird sowie das Kinderbetreuungsgeldgesetz, das Allgemeine Sozialversicherungsgesetz, das Gewerbliche Sozialversicherungsgesetz, das Bauern-Sozialversicherungsgesetz, das Beamten-Kranken- und Unfallversicherungsgesetz, das Arbeitslosenversicherungsgesetz, das Familienlastenausgleichsgesetz 1967, das Einkommensteuergesetz 1988 und das Allgemeine Pensionsgesetz geändert werden, BGBl 53/2016.

²² See e.g. Andreas Heilmann, Gabriele Jähnert, Falko Schnick, Charlott Schönwetter and Mascha Vollhardt (eds.), *Männlichkeit und Reproduktion. Zum gesellschaftlichen Ort historischer und aktueller Männlichkeitsproduktionen* (Wiesbaden: Springer, 2015); Rosy Musumeci and Arianna Santero (eds.), *Fathers, Childcare and Work: Cultures, Practices and Policies, Contemporary Perspectives in Family Research 12* (Yorkshire: Emerald, 2018); Henning Heddenorp and Inga Laß, 'Nur aufgeschlossen oder wirklich überzeugt? Konzeption und Rahmenbedingungen aktiver Vaterschaft', in Irene Gerlach (ed.), *Elternschaft. Zwischen Autonomie und Unterstützung, Familie und Familienwissenschaft* (Wiesbaden: Springer, 2017) 71-103; Verena Florian, *Mut zum Rollentausch* (Wien: Falter Verlag, 2019); Cornelia Behnke, Diana Lengersdorf and Michael Meuser, 'Vaterschaft: familiäre Geschlechterordnung im Fokus', in Beate Kortendiek, Birgit Riegraf and Katja Sabisch (eds.), *Handbuch Interdisziplinäre Geschlechterforschung* (Wiesbaden: Springer, 2019) 1131-1139.

²³ See e.g. Erich Lehner, 'Die Vorteile aktiver Vaterschaft. Kommentar der anderen', https://derstandard.at/2000092834348/Die-Vorteile-aktiver-Vaterschaft?fbclid=IwAR2zftp2K8Mc_HVheyTUzZJI_8kN9ozZZ61iOxpWJcyCKBhFLfcB5HNYUMs (20 June 2019); Christine Tragler, 'Die Angst der Väter vor der Karenz (Interview mit Arno Hraschan)', [derstandard.at 27 September 2018](https://derstandard.at/2000088119796/Die-Angst-der-Vaeter-vor-der-Karenz), accessed via <https://derstandard.at/2000088119796/Die-Angst-der-Vaeter-vor-der-Karenz> (20 June 2019).

However, fathers' actual involvement is still by far not comparable to the amount of unpaid care work women shoulder. As will be shown in the fourth section, the mere creation of entitlements is insufficient, as extra-judicial constraints hinder fathers' actual use of their rights. Further, as long as only maternal leave is compulsory, women's autonomy is at least formally limited compared to that of men. Therefore, compulsory regulations for fathers are necessary. An approach to compulsory paternity leave is still rather underdeveloped; this paper makes a case for the implementation of such measures. To truly challenge the sexual division of labour, legal measures must aim to redistribute unpaid labour between men and women, addressing fathers as well as mothers.²⁴

2. A Brief Legal History of Maternal (and Parental) Leave in Austria

Maternal leave has been an important gender-specific right from the very beginning of labour protection law development; the first provisions came into effect in 1884.²⁵ Parental leave for men has a rather short history. The first country to introduce parental leave for fathers was Sweden in 1972.²⁶ Austrian fathers gained the possibility of parental leave [Karenz] only in 1990.²⁷ A short birth-related leave [Papa- or Baby-Monat] for fathers was implemented in 2011 for public employees, and, in the meantime, it has become available to all employed fathers and co-mothers.²⁸ This birth-related leave is to be taken during the time of the mother's postnatal maternity leave.

This historical gap is initially due to the main goal of early maternal leave policies: to protect the health of pregnant workers and women in childbed. Health risks for fathers were not and are not a factor. But postnatal maternal leave has always had at

²⁴ Of course, families are diverse. There are many families that do not consist of mother, father, and child. The law must recognise and support their needs as well. The main concern of this paper, however, is the sexual division of labour between men and women and possibilities to change the distribution of work between both; therefore, the focus lies on heterosexual couples. Some of the special implementations as well as the legal gaps concerning the needs of same-sex parents, adoptive or foster parents, and single parents will be highlighted in this paper; for a comprehensive description, see my dissertation, in particular chapter 4.2.4.

²⁵ Gesetz vom 21.6.1884 über die Beschäftigung von jugendlichen Arbeitern und Frauenspersonen, dann über die tägliche Arbeitsdauer und die Sonntagsruhe beim Bergbaue, RGBl 115/1884.

²⁶ Corinna Schein, 'Väter und bezahlte Elternzeit – Ausgestaltungsmerkmale und Inanspruchnahme im europäischen Vergleich', in Irene Gerlach (ed.), *Elternschaft. Zwischen Autonomie und Unterstützung, Familie und Familienwissenschaft* (Wiesbaden: Springer, 2017) 263-284, p. 265.

²⁷ Bundesgesetz vom 12.12.1989 mit dem ein Karenzurlaub für Väter geschaffen wird (Eltern-Karenzurlaubsgesetz – EKUG), BGBl 651/1989.

²⁸ Budgetbegleitgesetz 2011, BGBl 111/2010; Bundesgesetz, mit dem das Väter-Karenzgesetz und das Landarbeitsgesetz 1984 geändert werden, BGBl 73/2019.

least an implicit secondary purpose, namely, to enable the mother to care for her child,²⁹ not to mention parental leave, which serves exactly this purpose. From a contemporary perspective, this purpose might well concern fathers or co-mothers. This perspective is, of course, the outcome of long debates on gender roles and family politics.

A. Early Maternal Leave Regulations

The first maternity protection norms came into force in 1884 for workers in the mining industry.³⁰ They were soon expanded to all industrial workers and workers in large commercial enterprises.³¹ These early maternal leave schemes only covered the first weeks following birth. Mothers were not to be put to work for six weeks following childbirth in the mining industry.³² In the other commercial areas, the leave period was set to four weeks.³³ While, nowadays, health protection seems just as relevant for pregnant women as it is for women in childbed, early legislation only included a postnatal leave period. There was no leave period provided for pregnant women; neither were there measures to ensure that pregnant women were not obliged to perform especially hard work or work which is prejudicial to the health of the mother or the foetus.

Further, the postnatal leave period effectively was a rather weak measure. The lack of wage-replacement benefits and protection against dismissal put workers in a precarious situation. Often, pregnancy would result in the loss of one's employment, despite the early maternity protection framework.³⁴ Agricultural workers, outworkers, and day-labourers were generally not included in the maternity protection scheme.

²⁹ Adelheid Popp, 'Schutz der Mutter und dem Kinde' (Vienna 1910), Austrian Literature Online, accessed via <http://www.literature.at/viewer.alo?objid=11144&viewmode=fullscreen&scale=3.33&rotate=&page=11> (10 October 2019).

³⁰ Gesetz vom 21.6.1884 über die Beschäftigung von jugendlichen Arbeitern und Frauenspersonen, dann über die tägliche Arbeitsdauer und die Sonntagsruhe beim Bergbaue, RGBl 115/1884 [first maternity protection act for mining industry workers].

³¹ § 94 Gesetz vom 8.3.1885 betreffend die Abänderung und Ergänzung der Gewerbeordnung, RGBl 22/1885.

³² § 1 Gesetz vom 21.6.1884 über die Beschäftigung von jugendlichen Arbeitern und Frauenspersonen, dann über die tägliche Arbeitsdauer und die Sonntagsruhe beim Bergbaue, RGBl 115/1884; by way of exception, and with a medical confirmation, they could return to work after four weeks already.

³³ § 94 Gesetz vom 8.3.1885 betreffend die Abänderung und Ergänzung der Gewerbeordnung, RGBl 22/1885.

³⁴ Karin Hausen, 'Arbeiterinnenschutz, Mutterschutz und gesetzliche Krankenversicherung im Deutschen Kaiserreich und in der Weimarer Republik. Zur Funktion von Arbeits- und Sozialrecht für die Normierung und Stabilisierung der Geschlechterverhältnisse', in Ute Gerhard (ed.), *Frauen in der Geschichte des Rechts* (München: C.H.Beck, 1997) 713-743, pp. 732-733.

Further, it appears that many women did not actually take up their maternity leave, considering the wage loss.³⁵ Therefore, the introduction of a maternity allowance within the first ‘Health Insurance Act’ [Krankenversicherungsgesetz] in 1888 was an important measure,³⁶ although only roughly 11% of the female workers were entitled to it.³⁷ To sum up, Austria did have one of the earliest maternity leave policies worldwide, but it had only a small influence on the reality of working mothers.

Little progress was made up to and during World War I. In 1919, the ILO adopted its first maternity protection resolution.³⁸ It contained leave periods before and after childbirth, protection from dismissal, and financial benefits. Austria did not comply with those provisions then. In the same year, though, for the first time, eight women became members of the Austrian parliament, all of which were active in women’s movements and concerned with women’s political interests.³⁹ In 1921, Austria introduced financial aid for mothers and for the first time included protection measures for pregnant workers. However, maternal leave still only applied to a postnatal period of six weeks for the majority of workers.⁴⁰ Better off was a subgroup of employees who were categorised as ‘Angestellte’ as opposed to ‘Arbeiterinnen’.⁴¹ ‘Angestellte’ were entitled to six additional weeks of leave before birth as well as to continued remuneration. They were further protected from dismissal during the leave period.

Austrian Fascism as well as National Socialism propagated women’s roles as mothers.⁴² The Nazis were able to build on a lively discourse on the need for maternal protection rights, which they instrumentalised and integrated into their own political agenda. Women were expected to give birth to a large number of children and were

³⁵ Hausen, ‘Arbeiterinnenschutz’, pp. 732-733.

³⁶ Gesetz vom 30. März 1888 betreffend die Krankenversicherung der Arbeiter, RGBl 33/1888.

³⁷ Gerda Neyer, ‘Die Entwicklung des Mutterschutzes in Deutschland, Österreich und der Schweiz von 1877 bis 1945’, in Ute Gerhard (ed.), *Frauen in der Geschichte des Rechts* (München: C.H.Beck, 1997) 744-758, p. 756.

³⁸ ILO, C003 - Maternity Protection Convention, 1919 (No. 3).

³⁹ From the socialist party *Anna Boschek, Adelheid Popp, Emmy Freundlich, Therese Schlesinger, Amalie Seidel, Gabriele Proft, Lotte Furreg, Maria Tusch* and the conservative *Hildegard Burian*; Parlamentsdirektion (ed.), ‘Frauen im Parlament’, accessed via www.parlament.gv.at/ZUSD/PDF/Publikation_Frauen_im_Parlament_NR_BR_BF_01032019.pdf (20 April 2020).

⁴⁰ Bundesgesetz betreffend die Änderung einiger Bestimmungen des Gesetzes über die Krankenversicherung der Arbeiter (VI. Novelle zum Krankenversicherungsgesetz), BGBl 170/1921.

⁴¹ Bundesgesetz über den Dienstvertrag der Privatangestellten (Angestelltengesetz), BGBl 292/1921, § 8 paras 4, 5.

⁴² Nina Kogler, ‘Religiös fundierte Geschlechterverhältnisse im austrofaschistischen Österreich’ (2012) *Femina Politica* 29-40, p. 32.

supported legally on this behalf. Following the ‘Anschluss’ in 1938, the German maternity protection law came into force in Austria in 1940.⁴³ Compulsory leave was prescribed for six weeks after childbirth. Additionally, mothers were entitled to a voluntary leave for a period of six weeks before childbirth. Financial aid and protection from dismissal were provided for ‘all’ insured female workers. While this maternal protection scheme was a much stronger legal aid compared to the old Austrian framework, its introduction must be seen critically in its context. Jewish women and other women who in the Nazis’ view did not contribute to the ‘strengthening of the German nation and people’ [‘Festigung des deutschen Volkstums’]⁴⁴ were not covered by the maternal protection framework but often subject to forced sterilisation and/or abortion.

B. Second Austrian Republic

After 1945, the German framework for maternity protection remained in force in Austria in an adjusted form.⁴⁵ It remained almost unchanged until 1957, differentiating between foreigners and Austrian women until then. In 1952, an adjustment was made to include a limited group of foreigners, so-called ‘Volksdeutsche’, women who were German native speakers with undetermined nationality.⁴⁶ The selective inclusion of this group shows that the exclusion of others was deliberately upheld.⁴⁷ Leitner, in 1992, bluntly criticized the exclusion of foreigners as a relict of ‘National Socialist xenophobia’; at the same time, he appears somewhat surprised that such a thing could be found in ‘our resurrected democratic Austria’.⁴⁸ From today’s perspective it can rather be seen in the context of

⁴³ Kundmachung des Reichskommissars für die Wiedervereinigung Österreichs mit dem Deutschen Reich wodurch die dritte Verordnung zur Einführung von Arbeitszeitvorschriften in der Ostmark vom 23.1.1940 bekannt gemacht wird, GBlÖ 25/1940; das Gesetz über die Beschäftigung vor und nach der Niederkunft vom 16.7./29.10.1927, dRGebl 325/1927.

⁴⁴ § 1 Geltungsbereich, Gesetz zum Schutz der erwerbstätigen Mutter vom 17.5.1942 mit amtlicher Begründung, Erläuterungen durch H. Backendorf, Berlin 1944; see also Neyer, ‘Die Entwicklung des Mutterschutzes’, p. 753.

⁴⁵ Verfassungsgesetz vom 1.5.1945 über die Wiederherstellung des Rechtslebens in Österreich (Rechts-Überleitungsgesetz, R-ÜG), StGBI 6/1945.

⁴⁶ Bundesgesetz: Gleichstellung der Volksdeutschen mit den österreichischen Staatsbürgern auf dem Gebiet des Mutterschutzes, BGBl 167/1952.

⁴⁷ Erwin Leitner, ‘Aus der Geschichte des Arbeits- und Sozialrechts. Was vor 50 Jahren geschah’ (1992) 42/3 DRdA 253-254, p. 254.

⁴⁸ Leitner, ‘Aus der Geschichte’, p. 254: „als Relikt des nationalsozialistischen Fremdenhasses ganze zwölf Jahre in unserem wiedererrichteten demokratischen Österreich fortbestehen konnte“ (translation MS).

continuances of xenophobic and nationalist tendencies well into the Second Austrian Republic.⁴⁹

In 1957, the Austrian ‘Maternity Protection Act’ [Mutterschutzgesetz (MSchG)] was newly drafted. It resembled its predecessor in content but included all working women, including foreigners.⁵⁰ Also, it took into account the latest ILO convention 103 from 1952.⁵¹ The revised MSchG now included a compulsory period of leave of six weeks after and for the first time also of six weeks before childbirth. It prescribed (and still prescribes) protection from dismissal from the beginning of the pregnancy until four months after childbirth. One significant amendment was the introduction of ‘Karenz’, an entitlement to an additional period of parental leave for childcare purposes for initially up to six months.⁵² Nowadays, parental leave is available for up to two years according to § 15 MSchG; fathers are entitled to the same amount of leave on the grounds of the ‘Fathers’ Parental Leave Act’ [Väter-Karenzgesetz (VKG)].

The next major revision of the maternity protection act took place in the 1970s. The maternal leave period was extended to its current duration of eight weeks before and eight weeks after childbirth, all of it compulsory.⁵³ Finally, special measures to protect the health of pregnant workers were included, banning certain dangerous materials and activities.⁵⁴

C. Parental Leave for Fathers in Austria

A first harbinger of the recognition of fathers as parents with actual care responsibilities was installed in 1976: one week’s leave to care for one’s sick child.⁵⁵ This was the first time a parental claim was drafted to be available to both parents equally. The possibility of parental leave for fathers was introduced in 1990 and for the first time allowed the sharing of parental leave. However, the mother’s role remained privileged until 2004.⁵⁶

⁴⁹ See e.g. Cornelius Lehngruth, *Waldheim Und Die Folgen. Der Parteipolitische Umgang Mit Dem Nationalsozialismus in Österreich* (Frankfurt: Campus-Verlag, 2013).

⁵⁰ ErlRV zum MSchG 1957, 197 BlgNR 8. GP (gescanntes Original), 26.2.1957, 10.

⁵¹ ILO, C103 – Maternity Protection Convention (Revised), 1952 (No. 103).

⁵² Bundesgesetz vom 13.3.1957 über den Mutterschutz (Mutterschutzgesetz), BGBl 76/1957.

⁵³ Bundesgesetz vom 6.3.1974, mit dem das Mutterschutzgesetz geändert wird, BGBl 178/1974, 1088.

⁵⁴ Bundesgesetz vom 6.3.1974, mit dem das Mutterschutzgesetz geändert wird, BGBl 178/1974, 1089.

⁵⁵ § 16 Angestelltengesetz, BGBl 390/1976.

⁵⁶ Bundesgesetz, mit dem die als Bundesgesetz geltende Verordnung über den Schutz des Lebens und der Gesundheit der Arbeitnehmer bei Arbeiten in Druckluft sowie bei Taucherarbeiten und das Mutterschutzgesetz 1979 geändert werden, BGBl 123/2004.

Up until 2000, the father's entitlement depended on the mother's employment status. If both parents were employed, his claim was subordinate to hers. If only the father was employed, his claim existed only when the mother was prevented from looking after the child herself on the grounds of self-employment.⁵⁷ Fathers, therefore, were prevented from the possibility of leave precisely in traditional single-income households. In general, if the mother was unemployed or in education, the father was not entitled to parental leave. This shows that fathers were not recognised as equal parents. The legislative initiative to establish an independent claim to parental leave for fathers of 2000⁵⁸ further pointed out that the existing legislation validated a 'traditional role model whereby women are primarily responsible for childcare'.⁵⁹ In addition, the regulation at that time was contrary to the parental leave directive, which demanded an independent individual claim to four months of parental leave for each parent.⁶⁰ The parental leave directive was introduced in 1996 and amended in 2010; it was just recently replaced by a new directive on work-life balance.⁶¹ Still, each parent is granted an individual entitlement to four months of leave.⁶²

Even following the initiative in 2000, the mother's entitlement remained privileged in Austria, in the sense that the father's claim was subsidiary to the mother's. He could only take his leave if she did not take hers. Only in 2004, following an EU regulation

⁵⁷ 1166 BlgNR 17. GP - Ausschussbericht NR (gescanntes Original), Ausschussbericht vom 8.11.1989, 2.

⁵⁸ Bundesgesetz, mit dem das Mutterschutzgesetz 1979, das Eltern-Karenzurlaubsgesetz, das Karenzgeldgesetz, das Arbeitslosenversicherungsgesetz 1977 und das Karenzurlaubsgeldgesetz geändert werden, BGBl 153/1999.

⁵⁹ '[T]raditionelles Rollenbild, wonach Frauen vorrangig für die Betreuung des Kindes zuständig sind' (translation MS), 502/A 20. GP - Initiativantrag, Antrag der Abgeordneten Karl Öllinger und Genossen betreffend ein Bundesgesetz, mit dem das Eltern-Karenzurlaubsgesetz (EKUG) geändert wird - eigenständiger Anspruch des Vaters auf Karenzurlaub, 16.7.1999.

⁶⁰ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

⁶¹ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

⁶² Art 5 Directive (EU) 2019/1158.

infringement procedure, § 15 para 1a MSchG was introduced,⁶³ prohibiting the simultaneous use of leave but not preferring one parent's claim over the other.⁶⁴

D. International Developments in Maternity Protection

On an international level, the ILO Conventions concerning maternity protection have already been mentioned. Similar to the early Austrian framework, the first ILO Convention from 1919 focused on postnatal maternal protection. In this first version, a compulsory leave period was provided for six weeks following childbirth; pregnant workers, on the other hand, should not be obliged but entitled to a leave of up to six weeks.⁶⁵ The first Convention from 1919 was altered in 1952 when Convention 103 was passed.⁶⁶ The proposed leave period was extended to twelve weeks, six weeks after childbirth and six weeks at the determination of the member states, whereas the 'prenatal portion of maternity leave shall be extended by any period elapsing between the presumed date of childbirth and the actual date of childbirth'.⁶⁷ In 2002, the most recent ILO Convention 183 extended the period of leave to 14 weeks and now includes atypical employment.⁶⁸

The European Social Charter from 1961 recommends twelve weeks of maternal leave.⁶⁹ The European directive on maternal protection contains 14 weeks of maternal leave, only two of which are compulsory, while the rest is prescribed as an entitlement. The mother is entitled but not obliged to take the full 12 weeks without interruption. The UN social pact of 1966⁷⁰ on the other hand speaks of an appropriate amount of time in Art 10 para 2, without stating a specific number of weeks. The same can be said for Art 11 of the United Nations' Convention on the

⁶³ Rahmenvereinbarung über Elternurlaub/Vertragsverletzungsverfahren gegen Österreich Nr. 1999/2197 (53464/EU 22. GP), Schreiben der Kommission an den Ständigen Vertreter Österreichs bei der EU Woschnagg, eingelangt am 14.6.2005, Bundeskanzleramt (BKA-VV.99/2197/0001-V/A/8/2005), accessed via www.parlament.gv.at/PAKT/EU/XXII/EU/05/34/EU_53464/index.shtml (15 June 2019).

⁶⁴ Bundesgesetz, mit dem die als Bundesgesetz geltende Verordnung über den Schutz des Lebens und der Gesundheit der Arbeitnehmer bei Arbeiten in Druckluft sowie bei Taucherarbeiten und das Mutterschutzgesetz 1979 geändert werden, BGBl 123/2004.

⁶⁵ ILO, C003 – Maternity Protection Convention, 1919 (No. 3), Art 3.

⁶⁶ ILO, C103 – Maternity Protection Convention (Revised), 1952 (No. 103), Art 3 paras 2, 3.

⁶⁷ ILO, C003 – Maternity Protection Convention, 1919 (No. 3), Art 4 para 5.

⁶⁸ ILO, C183 – Maternity Protection Convention, 2000 (No. 183).

⁶⁹ European Social Charter 1961, BGBl 1969/460, Art 8.

⁷⁰ International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

Elimination of All Forms of Discrimination Against Women (CEDAW).⁷¹ According to the CEDAW, protective legislation must be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed, or extended as necessary. This also applies to protective measures concerning pregnancy and maternity. Especially compulsory leaves and occupational bans should be reduced to the absolutely necessary minimum to avoid hindering women with regard to equality in the workplace.⁷²

More recent frameworks also consider fathers' involvement and the importance of shared childcare responsibilities for gender equality. As an example, the ILO recommendation 191 from 2002 contains a subrogation of leave entitlement for fathers in case of illness or death of the mother.⁷³ Considerable developments concerning the inclusion of fathers in parental leave policies took place on the European level.

3. The Extension of Parental Labour Rights to Fathers in the Jurisdiction of the ECJ

The extension of rights to parents other than birth mothers relates to a different understanding of the purposes of those rights. While health protection solely concerns the pregnant woman and birth mother, social purposes, such as protection from dismissal, financial security, and the entitlement to take time off for childcare reasons, might well concern fathers and social mothers.⁷⁴ Furthermore, parental rights for fathers must be seen as measures for equal treatment and women's promotion, as becomes apparent when looking at the jurisdiction of the ECJ. If certain leave schemes are only available to mothers, the possibility of fathers' involvement in childcare is legally limited. I will briefly go through a few selected cases to illustrate how notions of equality – and difference – regarding parental responsibilities of men and women have changed and how this correlates with the legal assessment of their equal treatment. Subsequently, I will highlight some of the court's and Advocates General's deliberations on the self-determination of people regarding their parental role. Finally, I will come back to Austrian law and the question of gendered birth-related leave.

⁷¹ United Nations, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 18.12.1979, Treaty Series 1249, p. 13; for Austria, see BGBl 443/1982.

⁷² Andrea Binder and Karine Lempen, 'Art 11, Allgemein', in Erika Schläppi, Silvia Ulrich and Judith Wyttenbach (eds.), *CEDAW Kommentar* (Manz, 2015), para 72.

⁷³ ILO, R191 – Maternity Protection Recommendation, 2000 (No. 191).

⁷⁴ I have written elaborately on the protective scope of maternal protection in my dissertation chapter 3; see also Martin Risak, 'Art 1 RL 92/85/EWG 440', para 4.

A. Changing Notions of Equality

When it comes to assessing if options provided by law are adequate in the sense that they present attractive and actually available choices for people, equality is an important measure.⁷⁵ If certain options are withheld from certain groups, their choices are limited compared to others. But then again, equality in itself is a complex concept. While formal equality often ignores the reality of women's lives and, therefore, tends to reproduce gendered differences, (unjust) differences might well be reproduced by addressing or somewhat exposing a certain group.⁷⁶ This 'dilemma'⁷⁷ concerning the legal treatment of difference is highly relevant to questions of parental leave: the physical dimensions of pregnancy and birth, as well as the sexual division of labour, call for a special treatment of working mothers. Accordingly, in compliance with the Equal Treatment Directive, this special treatment of women does not qualify as discriminatory as far as it is a positive action measure to ensure full equality or a measure to protect women in regard to pregnancy or maternity.⁷⁸ A substantive notion of equality is required that allows for differentiation in order to recognise people in their equivalent diversity.⁷⁹

On the other hand, a recurring concern in the ECJ's jurisdiction is that precisely such a measure, 'whose purported aim is to abolish a *de facto* inequality, might nevertheless also help to perpetuate a traditional division of roles between men and women'.⁸⁰ Addressing merely mothers with childcare issues reproduces stereotypes.⁸¹

Gender-specific parental rights have recurrently been subject to ECJ proceedings.⁸² Since the 1980s, a remarkable change has taken place in the Court's assessment of

⁷⁵ Elisabeth Holzleithner, '*Dimensionen*', p. 375.

⁷⁶ Minow, 'Justice Engendered', p. 12.

⁷⁷ Minow, 'Justice Engendered', p. 12.

⁷⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Art 3 Positive Actions, Art 28 Relationship to Community and national provisions.

⁷⁹ Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Vienna: Verlag Österreich, 2008), p. 162.

⁸⁰ ECJ 19.3.2002, C-476/99, *Lommers*, ECLI:EU:C:2002:183, para 41.

⁸¹ Susanne Baer, 'Chancen und Risiken Positiver Maßnahmen', in Heinrich Böll Stiftung (ed.), *Positive Maßnahmen - Von Antidiskriminierung zu Diversity* (Berlin: 2010) 11-20, accessed via https://heimatkunde.boell.de/sites/default/files/dossier_positive_massnahmen.pdf (2 October 2019).

⁸² Besides the discussed, see ECJ 19.9.2013, C-5/12, *Montull*, ECLI:EU:C:2013:57; ECJ 29.11.2001, C-366/99, *Griesmar*, ECLI:EU:C:2001:648; ECJ 25.7.1991, C-345/89, *Stoekel*, ECLI:EU:C:1991:324, para 13; ECJ 5.5.1994, C-421/92, *Habermann-Beltermann*, ECLI:EU:C:1994:187, para 21; ECJ 14.7.1994, C-32/93, *Webb v EMO*, ECLI:EU:C:1994:300, para 20; ECJ 30.4.1998, C-136/95, *Thibault*, ECLI:EU:C:1998:178, para 25; ECJ 27.10.1998, C-411/96,

parental roles and the merits and risks of exclusive maternal protection. In the early 1980s, the Court found it to be in line with the Equal Treatment Directive to grant mothers a six months long leave in addition to maternal leave, while excluding fathers from the same. It created the infamous *Hofmann clause*, which states that ‘it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth’,⁸³ and, therefore, clearly privileged a mother’s relation to her child over the father’s. In 1996, the directive on parental leave introduced the same right to parental leave for fathers that it grants mothers in addition to their maternal leave.⁸⁴ It is committed to ‘promoting women’s participation in the labour force and the sharing of care responsibilities between women and men’,⁸⁵ making a clear connection between the first and the latter: if men engage more in family responsibilities, this reduces the dual strain of paid and unpaid work on women and enhances their chances in the workplace.

But which legal measures are suitable to encourage men’s participation in childcare? In the 2002 *Lommers* case, the ECJ discussed the supply of nursery places and found that the preference for mothers in a subsidised nursery scheme was justified as a positive measure under Art 2 para 4 (today Art 3) of the Equal Treatment Directive. It was argued that ‘women more often than men do not embark on or abandon a career for reasons linked to child-care’⁸⁶ and that the inadequacy of child-care facilities was likely to play a role in women’s decisions to give up employment. The court found the scheme in question to be ‘precisely the kind of measure needed to help to eliminate this *de facto* inequality’.⁸⁷ Although the risk of perpetuating gender norms by addressing only mothers as parents was explicitly discussed, in the end, the limited number of nursery places available under the measure was decisive. As long as not all female workers were guaranteed a place, one did not want to risk mothers losing a place to a male contender.⁸⁸

While the suitability of the measure to enhance women’s participation in the workforce is undisputed, it did not appear fit to promote shared parenting responsibilities. Indeed, the applicant himself had brought forward that in want of a nursery place not he but his wife might have difficulties in pursuing her career because

Boyle, ECLI:EU:C:1998:506, para 41; ECJ 25.10.1988, C-312/86, *Kommission v Frankreich*, EU:C:1988:485, para 13.

⁸³ ECJ 12.7.1984, Rs 184/83, *Hofmann*, ECLI:EU:C:1984:273, para 25.

⁸⁴ Directive 2010/18/EU.

⁸⁵ Directive 2010/18/EU, recital 8.

⁸⁶ ECJ 19.3.2002, C-476/99, *Lommers*, ECLI:EU:C:2002:183, para 16.

⁸⁷ ECJ 19.3.2002, C-476/99, *Lommers*, ECLI:EU:C:2002:183, para 21.

⁸⁸ ECJ 19.3.2002, C-476/99, *Lommers*, ECLI:EU:C:2002:183, para 43.

of the necessity to take care of the couple's child. The nature of the measure as a workplace regulation determined by one particular employer prevented the court from assessing the effect of the measure on the plaintiff's wife, who was not employed by the ministry in question. The 'principle of equal treatment can, by definition, only be applied as between the employees working for that employer'.⁸⁹ It does not require an employer who adopts a measure to tackle underrepresentation of women amongst his own staff to take account of considerations related to women employed elsewhere. Nevertheless, we learn from this case that not all measures are equally fit to encourage men to share care responsibilities; it seems to have never been part of the equation for *Lommers* himself to reduce his working hours to take care of his child due to the lack of a nursery place.

In the 2010 case *Roca-Álvarez*, a different kind of measure was the subject matter, namely, a national labour law provision. The Spanish Workers' Statute entitled all employed mothers to a certain amount of 'breastfeeding' leave, while fathers with the same employment status were only entitled to it if the child's mother was also employed. In other words: 'for men whose status [was] that of an employed person the fact of being a parent [was] not sufficient to gain entitlement to leave, whereas it [was] for women with an identical status'.⁹⁰ Referring explicitly to 'breastfeeding' as a biological condition of mothering, the court still found that the leave in question had been detached from this biological fact and was to be considered as 'time purely devoted to the child and as a measure which reconciles family life and work following maternity leave'.⁹¹ As a de facto parental and not a maternal leave measure, it should be available to fathers as well as mothers. The fact that the exclusion of men could have negative effects on women became the crucial factor of the court's deliberations. The mother of the plaintiff's child was self-employed and, therefore, not entitled to the leave in question. In lack of her entitlement, the father of the child was not entitled, even though he was not self- but dependently employed. As a result, the mother would have had to limit her self-employed activity and 'bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden'.⁹² The court, therefore, did not consider this gender-specific leave option as a 'measure eliminating or reducing existing inequalities in society' within

⁸⁹ ECJ 19.3.2002, C-476/99, *Lommers*, ECLI:EU:C:2002:183, para 49.

⁹⁰ ECJ 30.9.2010, C-104/09, *Roca Álvarez*, ECLI:EU:C:2010:561, para 23.

⁹¹ ECJ 30.9.2010, C-104/09, *Roca Álvarez*, ECLI:EU:C:2010:561, para 28.

⁹² ECJ 30.9.2010, C-104/09, *Roca Álvarez*, ECLI:EU:C:2010:561, para 37.

the meaning of Art 3 but found it could have exactly the contrary effect; it was found to be precluded by the Equal Treatment Directive.⁹³

In 2015, in the case *Maïstrellis*, a similar argument was made. Again, national labour law had made the father's entitlement to parental leave dependent on the mother's employment status. Advocate General *Kokott* stated very clearly that the deprivation of the right to parental leave for fathers *in no way* constitutes a measure to encourage improvements in the safety and health at work of pregnant workers or working mothers.⁹⁴ The denial of a father's right to a period of parental leave 'is liable precisely to perpetuate the traditional distribution of the roles of men and women'⁹⁵ and would undermine the objective of equal treatment and promoting women's participation in the labour force.

Both cases highlight that making fathers' care difficult is, in fact, a disadvantage for the employment of women. Rules must be found which neither neglect the special protection of mothers in connection with pregnancy and childbirth nor reproduce the gendered division of care work. The key to such a design is to take men as parents seriously and grant them the rights, as well as the obligations, entailed in this role. The developments in jurisdiction reviewed here show that such an understanding is spreading and that an extension of parental rights to fathers under European law is on its way. The recitals to the Parental Leave Directive explicitly link the 'promotion of women's participation in working life'⁹⁶ with the need for men to take 'as much family responsibility'⁹⁷ as women. While parental leave is being considered an appropriate means for this purpose, there is still no birth-related leave comparable to maternal leave for fathers and social mothers. The new directive on work-life balance for parents and carers, including ten days of voluntary paternal leave, has just recently come into force.⁹⁸ Austria introduced an entitlement to one month's birth-related leave for fathers and social mothers in September 2019. These are important measures, but yet again parents are treated differently: neither of these provisions prescribe an obligatory leave period for fathers and social mothers as opposed to birth mothers.

⁹³ ECJ 30.9.2010, C-104/09, *Roca Álvarez*, ECLI:EU:C:2010:561, paras 36-39.

⁹⁴ Opinion of the Advocate General *Kokott*, 16.7.2015, C-222/14, *Maïstrellis*, ECLI:EU:C:2015:473, para 50.

⁹⁵ Opinion of the Advocate General *Kokott* 16.07.2015, C-222/14, *Maïstrellis*, ECLI:EU:C:2015:241, para 39; Directive 2010/18/EU, recital 5.

⁹⁶ Directive 2010/18/EU, recital 7.

⁹⁷ Directive 2010/18/EU, recital 8.

⁹⁸ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

B. Turning to Autonomy

In addition to the arguments concerning equal treatment, the Advocate General *Kokott*, in two of the cases discussed above, *Maïstrellis* and *Roca Álvarez*, put the enablement of self-determination of mothers and fathers at the centre of her argument. A goal of the parental leave directive is ‘to give each parent the opportunity to decide whether he or she – regardless of his or her occupational status – wishes to share in family responsibilities by caring for the child’.⁹⁹ Much is said in this quote; parental leave schemes shape the opportunities available to parents in reconciling work and family and sharing the burden and the perks of this task. While the law has great potential to support equally shared parenting, it might well hinder it, depending on its specific form, e.g. depending on if it grants both parents equal rights or privileges mothers claim above those of fathers. What is overlooked in the above quote is that parental leave is not the only legal remedy for the reconciliation of employment and childcare; in most legal systems, maternal leave for mothers precedes any shared leave.

The Austrian maternal protection framework prescribes four months of compulsory maternity leave; this period is not subject to the mother’s discretion – nor the employer’s. For this period, what was said above is not true: there is no ‘opportunity to decide’ but a compulsory labour law provision. However, what at first sight might seem like a hindrance to personal freedom actually provides for a larger scope of agency for working mothers. Compulsory provisions always formally restrict autonomy, but – as western legal reasoning goes since *Kant* – if a certain use of freedom is an obstacle to the freedom of another, coercion set against this obstacle is yet again consistent with freedom.¹⁰⁰ Therefore, legal coercion is required to hinder the exploitation of formal freedom within the unequal relations of labour. Otherwise, economic compulsions take over. Whenever the law leaves it to individual actors to decide on its up-taking, extra-judicial constraints come into play. Decision-making then is shifted to the private sphere, meaning the private economic sector as well as the family.¹⁰¹ Thus, gendered norms, as well as economic imbalances, are highly relevant when it comes to determining the scope of action made available by legal

⁹⁹ Opinion of the Advocate General *Kokott* 16.07.2015, C-222/14, *Maïstrellis*, ECLI:EU:C:2015:241, para 39; Directive 2010/18/EU, recital 5.

¹⁰⁰ *Kant*, ‘Metaphysik der Sitten’, XXXV; *Höffe*, ‘Categorical Principles of Law’, p. 98.

¹⁰¹ On the ambiguity of the concept of privacy in demarcation from the state see Susan Moller Okin, ‘Gender, the Public and the Private’, in David Held (ed.), *Political Theory Today* (Oxford: University Press 1991) 67-90; Karl Marx, *Zur Judenfrage*, MEW Bd 1, p. 356.

regulations. This becomes particularly apparent with contemporary trends towards flexibilization.¹⁰²

The term autonomy contains one's own abilities as well as the external conditions necessary for a self-determined lifestyle. Autonomy is, according to *Rössler*, a concretisation of a comprehensive notion of freedom, within which negative and positive aspects of freedom interconnect. Negative freedom, the absence of obstacles, is then not to be seen as an end in itself but as a precondition to be free to do certain things, to be a certain person.¹⁰³ And, yet, its core is self-determination, being able to reconsider at any time 'if this life that I live is really the life that I want to live'.¹⁰⁴ Autonomy, therefore, depends on personal abilities as well as on other people and social conditions.¹⁰⁵ These conditions may be more or less pronounced. Autonomy, therefore, is rather a 'matter of degree'¹⁰⁶ than a question of all or nothing. *Rössler* insists that goals and projects that are set within limited options can be set autonomously, and that autonomy is, therefore, to be understood as a gradual concept.¹⁰⁷ Then again, as *Elizabeth Anderson* reminds us, 'free choice within a set of options does not justify the set of options itself'.¹⁰⁸ I believe, as important as it may be not to deny people their *ability* to act autonomously, it is just as important to point out obstacles to their acting according to this ability. To grasp autonomy as dependent on different – also external – conditions, places responsibility on the law to ensure the availability of adequate options for all.¹⁰⁹

¹⁰² Ilse Lenz, Sabine Evertz and Saida Ressel, *Geschlecht Im Flexibilisierten Kapitalismus?* (Wiesbaden: Springer, 2017); a study by Yvonne Lott shows how flexible working hours effect men and women differently: Yvonne Lott, 'Weniger Arbeit, mehr Freizeit? Wofür Mütter und Väter flexible Arbeitsarrangements nutzen', accessed via www.boeckler.de/pdf/p_wsi_report_47_2019.pdf (11 January 2020).

¹⁰³ Rössler, 'Autonomie', pp. 38-39.

¹⁰⁴ Rössler, 'Autonomie', p. 44, 'ob dieses Leben, das ich lebe, wirklich das Leben ist, das ich selbst leben will' (translation MS).

¹⁰⁵ Beate Rössler, Interview 2011, der Tagesspiegel 26 October 2011, accessed via www.tagesspiegel.de/wissen/philosophin-beate-roessler-autonomie-ist-eine-abhaengige-freiheit-seite-2/5733014-2.html (26 October 2019).

¹⁰⁶ Raz, 'Morality of Freedom', p. 373.

¹⁰⁷ Beate Rössler, 'Bedingungen und Grenzen von Autonomie', in Herlinde Pauer-Studer and Herta Nagl-Docekal (eds.), *Freiheit, Gleichheit und Autonomie* (Frankfurt: Suhrkamp, 2003) 327-357, p. 356.

¹⁰⁸ Elizabeth Anderson, 'What is the point of Equality?' (1999) 109/2 *Ethics* 287-337, p. 309.

¹⁰⁹ Isabell Doll, Ines Rössl and Maria Sagmeister, '30 Jahre Genderwahnsinn. Brüche und Kontinuitäten in den Legal Gender Studies' (2019) *juridikum* 7-18, p. 11.

4. Compulsion and Agency: Gender-Specific Birth-Related Leave Policies in Austria

I will now turn back to the Austrian legal framework to discuss the pros and cons of compulsory leave provisions in the light of autonomy, especially considering gendered differences. With the provision of 16 weeks of compulsory maternity leave,¹¹⁰ Austria goes well beyond the European directive, which prescribes only two weeks of compulsory leave, with 12 more weeks as an entitlement.¹¹¹ According to the CEDAW, protective legislation, compulsory leaves, and occupational bans should even be reduced to the absolutely necessary minimum to avoid hindering women in regard to equality in the workplace.¹¹² Different approaches to compulsory leave policies in regard to the enhancement of women's autonomy can be distinguished: due to the unequal distribution of power within labour relations, compulsory measures are necessary to ensure workers' enjoyment of the prescribed leave. At the same time, as long as only women are subjected to such compulsory measures, their agency is – at least formally – limited compared to men's. This brings to mind that '[m]en's power positions are to a great extent formed around their abilities and possibilities to choose – and to form their parenthood in any way they wish'.¹¹³ While this is true from a gender perspective, from a class-informed perspective one must add, that economic compulsions are just as relevant for working fathers as they are for mothers. Even more so, as it is still not as socially accepted for fathers to make use of their parental rights.¹¹⁴

Meanwhile, fathers and mothers are treated equally regarding parental leave [Karenz], as outlined above. Still, Austrian law treats parents differently depending on their gender and their biological relationship to their child when it comes to their rights and obligations in the context of birth-related leave. Maternal and paternal leave immediately preceding or following the birth of a child distinguish between birth mothers and fathers as well as social mothers. The legal basis for maternal leave in Austria is laid out in the MSchG. It provides birth mothers with 16 weeks of

¹¹⁰ §§ 3, 5 MSchG, BGBl 221/1979.

¹¹¹ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), Art 8.

¹¹² Binder and Lempfen, 'Art 11', para 72.

¹¹³ Thomas Johansson and Roger Klinth, 'Caring Fathers: The Ideology of Gender Equality and Masculine Positions' (2008) 11/1 *Men and Masculinities* 42-62, p. 60.

¹¹⁴ Sophie Ruby and Sylka Scholz, 'Care, care work and the struggle for a careful world from the perspective of the sociology of masculinities' (2018) 43 *Österreichische Zeitschrift für Soziologie* 73-83, p. 78.

compulsory maternity leave,¹¹⁵ during which they receive one hundred percent of their average income within the last three months.¹¹⁶ Also, they are protected against dismissal.¹¹⁷

The MSchG generally covers all working mothers, whereas there are limitations due to the nature of the employment contract and the definition of motherhood. According to § 143 Allgemeines Bürgerliches Gesetzbuch [ABGB],¹¹⁸ a mother is a woman who has given birth to a child. Adoptive and foster mothers are entitled to parental leave on the grounds of the MSchG but not to maternal leave in a narrower sense. Social mothers, meaning the partner of the birth mother according to § 144 para 2 ABGB, are entitled to leave not on the grounds of the MSchG but of the VKG and the FamZeitG.¹¹⁹ Besides gender, the employment status is the decisive prerequisite for maternal protection. In general, all female employees are entitled to maternal leave, but there are limitations for ‘freie Dienstnehmerinnen’, who e.g. are not entitled to parental leave [Karenz].¹²⁰ ‘Freie Dienstnehmer_innen’ is a subcategory in Austrian labour law; they are typically only economically dependent on their employer and are included only selectively into protection schemes.¹²¹

Given its strong and rigid legal form, maternal leave provides an adequate framework for female workers to reconcile childbirth with wage labour. While its obligatory nature formally limits the choices female workers have, it actually increases their

¹¹⁵ § 3 para 1, § 5 para 1 MSchG.

¹¹⁶ § 162 ASVG.

¹¹⁷ §§ 10, 11 MSchG.

¹¹⁸ Bundesgesetz, mit dem das Allgemeine bürgerliche Gesetzbuch, das Außerstreitgesetz, das Ehegesetz, das Justizbetreuungsagentur-Gesetz, das Rechtspflegergesetz, das Gerichtsgebührengesetz, das Bundesgesetz zur Durchführung des Übereinkommens vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung und das Namensänderungsgesetz geändert werden (Kindschafts- und Namensrechts-Änderungsgesetz 2013 – KindNamRÄG 2013), BGBl 15/2013.

¹¹⁹ Further, surrogate motherhood and trans*gender persons giving birth challenge the legal definition of motherhood. These phenomena not only raise the question of how to include new forms of motherhood into the existing legal frame but also highlight the necessity of redefining parenthood with regard to changing notions of gender. Also concerning the health protection aspects, it would be more appropriate to simply target the circumstances of pregnancy and birth, regardless of a person’s gender, see Maria Sagmeister, ‘Mutterschutz, Papa-Monat und heteronormative Familienorganisation’ (2019) *Zeitschrift GENDER* 116-131.

¹²⁰ § 1 para 5 MSchG; §§ 3, 5 paras 1, 3 MSchG.

¹²¹ A closer analysis of the parental rights of ‘freie Dienstnehmer_innen’ in Austria can be found in my dissertation, chapter 4.1.11, pp. 69-75; for a general discussion of the term ‘freie Dienstnehmer_innen’, see Robert Rebhahn, ‘§ 1151 ABGB’, in Matthias Neumayr and Gert Reissner (eds.), *ZellKomm*, 3rd edn. (Vienna: Manz, 2018).

agency by protecting them from negotiations under unequal power relations with employers.¹²²

Fathers and social mothers, on the other hand, have no compulsory leave period, they did not even have a statutory entitlement for the time immediately following childbirth up until just recently. Public sector workers are entitled to one month of unpaid leave since 2011.¹²³ The so-called ‘daddy’s month’ [Papa-Monat] is applicable with no regard to the gender of the second parent, the explanatory legal materials explicitly refer to a ‘baby’s month’ [Baby-Monat] to highlight the applicability to social mothers.¹²⁴ From September 2019 on, there is a statutory entitlement to a one month’s leave for all employed fathers and social mothers.¹²⁵ The new § 1a VKG, granting this entitlement to birth-related leave, does not mention adoption. As far as the equal treatment of same-sex couples is concerned, it therefore falls behind the public sector as well as the ‘family-time’, which at least granted a right to application in case of adoption of a new-born baby.¹²⁶

In general, the entitlement to a birth-related leave for fathers and social mothers is a great advancement compared to the previous provision from 2017,¹²⁷ under which employees depended on an agreement with their employer, which could be refused without reasons given. Another important adjustment is that from 2019 onwards; fathers and social mothers will be protected from dismissal during this period.¹²⁸ Still, in contrast to maternal leave, this birth-related leave period is not obligatory and not as well funded; parents may apply for a maximum of €700 ‘family time benefit’ [Familienzeitbonus],¹²⁹ which will be deducted from their later childcare benefit allowance.¹³⁰

¹²² Schöffmann, ‘Schein und Zeit’, pp. 131-146; Rebhahn, ‘Arbeitszeitrecht’, pp. 56-58.

¹²³ Budgetbegleitgesetz 2011, BGBl 111/2010: § 75d Beamten-Dienstrechtsgesetz (BDG) 1979, § 29o Vertragsbedienstetengesetz (VBG), § 75f Richter- und Staatsanwaltsdienstgesetz (RStDG), § 58e Landeslehrer-Dienstrechtsgesetz 1984 (LDG) as well as § 65e Land- und forstwirtschaftliches Landeslehrer-Dienstrechtsgesetz 1985 (LLDG).

¹²⁴ ErlRV 585 BlgNR 25.GP, 2.

¹²⁵ Bundesgesetz, mit dem das Väter-Karenzgesetz und das Landarbeitsgesetz 1984 geändert werden, BGBl 73/2019.

¹²⁶ § 75d para 3 BDG; § 2 para 1 FamZeitbG.

¹²⁷ Bundesgesetz über die Gewährung eines Bonus für Väter während der Familienzeit (Familienzeitbonusgesetz - FamZeitbG) BGBl Nr 53/2016.

¹²⁸ § 1a para 6 VKG.

¹²⁹ § 3 para 1 FamZeitbG grants €22,60 daily, adding up to approximately €700.

¹³⁰ § 2 para 7 KBGG (Kinderbetreuungsgeldgesetz) amended through BGBl 53/2016 Bundesgesetz, mit dem ein Gesetz über die Gewährung eines Bonus für Väter während der Familienzeit (Familienzeitbonusgesetz - FamZeitbG) erlassen wird sowie das Kinderbetreuungsgeldgesetz, das Allgemeine Sozialversicherungsgesetz, das Gewerbliche Sozialversicherungsgesetz, das Bauern-

Paternal leave as a real entitlement is considerably better than a mere right to apply; it entitles fathers to interrupt their employment on their own initiative. However, it depends on the negotiation processes in the private sphere,¹³¹ within the relationship as well as the workplace culture whether this right is actually implemented. As far as the law leaves it up to the parents to put their leave arrangement into specific terms, gender norms play an immense role in the making of those arrangements. This can be seen clearly by looking at parental leave [Karenz]. In spite of their equal entitlement, up until today, fathers take by far not the same amount of parental leave as mothers do: In Austria, though there are provisions in place aiming precisely at enhancing men's involvement,¹³² the actual use of parental leave differs highly with regard to gender. According to the Ministry of Family Affairs, 19,02% of childcare allowance recipients were male in Austria in 2017.¹³³ According to *Statistik Austria*, from 2008 to 2017, men made up only about 5% of the recipients of childcare benefits in Austria.¹³⁴ The discrepancies between these numbers can be explained methodically; one must differentiate between applications for childcare allowance and the annual average number of recipients. While in the first case, each claim/each parent appears once, the second adds the duration of the withdrawal of the period for which childcare allowance is received into the picture. From the perspective of equal parenting, obviously, the duration of each parent's leave must be considered.¹³⁵

Sozialversicherungsgesetz, das Beamten-Kranken- und Unfallversicherungsgesetz, das Arbeitslosenversicherungsgesetz, das Familienlastenausgleichsgesetz 1967, das Einkommensteuergesetz 1988 und das Allgemeine Pensionsgesetz geändert werden.

¹³¹ On the public/private and public/domestic divide, see Moller Okin, 'Gender, the Public and the Private', p. 68.

¹³² § 24b para 2 KBGG provides an extension of the period of childcare benefit in the case of shared use. The total period can be 365 to 851 days if used by a single parent; if the parents divide their childcaring leave, they are entitled to 456 up to 1063 days. In addition, since 2017, § 5b KBGG prescribes a bonus of €500 for each parent, if the division is close to 50:50; Bundesgesetz, mit dem ein Gesetz über die Gewährung eines Bonus für Väter während der Familienzeit (Familienzeitbonusgesetz – FamZeitbG) erlassen wird sowie das Kinderbetreuungsgeldgesetz, das Allgemeine Sozialversicherungsgesetz, das Gewerbliche Sozialversicherungsgesetz, das Bauern-Sozialversicherungsgesetz, das Beamten-Kranken- und Unfallversicherungsgesetz, das Arbeitslosenversicherungsgesetz, das Familienlastenausgleichsgesetz 1967, das Einkommensteuergesetz 1988 und das Allgemeine Pensionsgesetz geändert werden, BGBl 53/2016.

¹³³ Bundesministerium für Frauen, Familie und Jugend, 'Auswertung zur Väterbeteiligung 2018', accessed via www.frauen-familien-jugend.bka.gv.at/familie/finanzielle-unterstuetzungen/kinderbetreuungsgeld-bis-28.2.2017/statistik-vaeterbeteiligung--auswertung.html (2 October 2019).

¹³⁴ Statistik Austria, 'Kinderbetreuungsgeldbezieherinnen und -bezieher nach Geschlecht 2008 bis 2017', accessed via www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/sozialleistungen_auf_bundesebene/familienleistungen/index.html (2 October 2019).

¹³⁵ Sybille Reidl and Helene Schiffbänker (Joanneum Research, eds.), 'Karenzväter in Zahlen. Ergebnisse einer Analyse von Daten des Hauptverbands der Sozialversicherungsträger' (Vienna, 2014), p. 9, accessed via

A closer look further reveals that fathers' and mothers' use of their parental leaves differ: the first few months, which are characterized by irregular rhythm and bodily closeness, are taken by the mother in most cases. Also, often, the mother does not return to work full-time once the father takes his leave; therefore, the already installed task allocation often remains unchallenged.¹³⁶

Heteronormativity and gender stereotypes influence the use individuals make of their leave entitlements. Some legal systems, for example Norway and Iceland, therefore prescribe special fathers' quotas to parental leave, which are forfeited if not used.¹³⁷ The quota for fathers has had a positive effect on the participation of fathers in childcare and is designed with the explicit aim to break with the traditional gender patterns of childcare. The remaining gender-neutral part of the leave is still mostly taken up by women.¹³⁸ This illustrates a well-known problem of formal equality: '[n]eutral means might not produce neutral results, given historic practices and social arrangements that have not been neutral.'¹³⁹ Especially with regard to the use of parental leave schemes, the decision on its division 'is influenced by the encounter with the gendered society and reflects the prevailing gender patterns. Particularly in a field such as care for young children, which is that strongly divided along gender lines, gender-neutral and optional schemes will lead the majority of parents to choose the traditional models.'¹⁴⁰

5. Conclusion: Maternal Protection as the Benchmark

In order to break up the gendered division of labour, parental leave schemes must address men as well as women and not attribute the sole responsibility for childcare to mothers. Since the mere creation of equal opportunities has proven to be

www.joanneum.at/fileadmin/user_upload/imported/content_uploads/Vaeterkarenz_in_Zahlen_11.pdf (2 October 2019).

¹³⁶ Gerlinde Mauerer, 'Alltagshandeln und Männlichkeitsentwürfe von Vätern in Elternkarenz - Postpatriarchale Betrachtungen?', p. 2, accessed via www.vfw.or.at/wp-content/uploads/2016/03/Mauerer_V%c3%a4terkarenz-und-feministische-Diskussion_2016.pdf (28 February 2019).

¹³⁷ Berit Brandth and Elin Kvande, 'Norway', in Sonja Blum, Alison Koslowski, Alexandra Macht and Peter Moss (eds.), *International network on leave policies and related research, 14th International Review of leave policies and related research* (2018) 313-322; Eydal and Gislason, 'Iceland', pp. 205-211.

¹³⁸ For an overview on Iceland, Norway, and Sweden, see Schein, 'Väter und bezahlte Elternzeit', pp. 272-275

¹³⁹ Minow, 'Justice Engendered', p. 22.

¹⁴⁰ Berit Brandth and Elin Kvande, 'Gendered or Gender-Neutral Care Politics for Fathers?' (2009) 624.1 *The ANNALS of the American Academy of Political and Social Science* 177-189, p. 184.

insufficient, compulsory regulations for fathers are necessary. I have argued this from two perspectives concerning the autonomy of working parents.

For one, from a gender perspective, the immense power of stereotypes calls for measures that urge fathers to take responsibility. It is still less socially accepted for fathers to make use of their parental rights.¹⁴¹ Also, negotiations on the division of parental leave periods within the family are affected by the gendered society we live in. Therefore, compulsory measures function as ‘that extra nudge’¹⁴² to get equal parenting started. *Brandth* and *Kvande* argue similarly with regard to the fathers’ quota: ‘workplaces are *forced* to see men as fathers with care responsibilities.’¹⁴³ This leads to the second argument for compulsory leave for fathers. From a class-informed perspective, it must be said that workers, regardless of their gender, depend on mandatory labour law regulations to ensure their rights.¹⁴⁴ The compulsion of non-negotiable paternal leave can be seen as an adequate framework to conciliate childcare with wage labour, as was argued above for compulsory maternal leave policies.

Returning to the question of equality, the case for compulsory birth-related leave for all parents can be made from yet another perspective. While the special treatment of pregnant workers and workers who recently gave birth is justifiable, it derives from a conception of equality which implicitly measures workers according to an unstated male norm. The ‘normal’ worker then is imagined not to have any care responsibilities, while those who do have such responsibilities appear in need of special treatment. But what if the latter were taken as the norm?

According to *Nancy Fraser*, the ‘key to achieving gender equity’ is to ‘make women’s current life patterns the norm’.¹⁴⁵ Today, women combine paid work and caregiving under great difficulty and strain. Social rights must be drafted in a manner to ‘ensure that men do the same, while redesigning institutions so as to eliminate the difficulty and strain’.¹⁴⁶ While, in general, progressive equality policies make the demand that ‘women’s employment conditions are leveled up to those of men, not men’s leveled

¹⁴¹ Ruby and Scholz, ‘Care, care work and the struggle’, p. 78.

¹⁴² Brandth and Kvande, ‘Gendered or Gender-Neutral’, p. 184.

¹⁴³ Brandth and Kvande, ‘Gendered or Gender-Neutral’, p. 188 (emphasis added by author).

¹⁴⁴ Christoph Kietaihl, ‘Zur Ausnahme der „leitenden Angestellten“ aus dem Arbeitszeitrecht’, in Christoph Kietaihl, Felix Schörghofer and Walter Schrammel (eds.), *Rechtswissenschaft und Rechtskunde, liber amicorum für Robert Rebhahn* (Vienna: Manz, 2014) 35-43.

¹⁴⁵ Nancy Fraser, ‘After the Family Wage: Gender Equity and the Welfare State’ (1994) 22/4 *Political Theory* 591-618, p. 611.

¹⁴⁶ Fraser, ‘After the Family Wage’, p. 611.

down to women's'¹⁴⁷ in the special case of parental leave, it might just work the other way around. Along similar lines, *Minow* in her basic description of the apparent 'dilemma of difference' already pointed out that the dilemma itself depends on certain assumptions about what is considered normal in a society.¹⁴⁸ By holding on to outdated normative conceptions of employed persons as (male) full-time employees without care commitments, an employee with care responsibilities appears different and in need of special treatment.¹⁴⁹ She suggests to set 'women's experience as the benchmark' and treat men equally for once.¹⁵⁰

My approach is further informed by the intersectionality theory's demand to set the apparent deviation as the norm. If legal measures take the needs of the potentially most affected group as a starting point but do not focus exclusively on them, those who are less affected will benefit just as much.¹⁵¹ In the context of employees with care responsibilities, this means taking the needs of mothers as the benchmark and extending all rights that are necessary for their protection to all parents. This idea should be applied also to the compulsory aspects of (postnatal) maternal leave. Fathers as well as mothers would leave work for a fixed period without any discussion. This would hopefully decrease discriminatory employment policies directed towards women of a certain age concerning their (possible) motherhood. Further, the fact that maternity protection is designed as mandatory and is accompanied by special protection against dismissal and wage-replacement benefits is essential for its effectiveness. In addition, regarding the right to longer periods of parental leave, a quota would be profitable, as it has proven to be in the Scandinavian examples discussed above. To grant fathers and social mothers equal parental rights benefits not only them as working parents, but also the women with whom they share their care responsibilities.

¹⁴⁷ Jill Rubery, 'Austerity and the Future for Gender Equality in Europe' (2015) 68.4 *ILR Review* 715-741, p. 716.

¹⁴⁸ Minow, 'Justice Engendered', p. 32.

¹⁴⁹ Minow, 'Justice Engendered', p. 32.

¹⁵⁰ Minow, 'Justice Engendered', p. 41.

¹⁵¹ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex' (1989) *UCLF* 139-167, p. 167.

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