

Brave New Fathers for a Brave New World? Fathers as care givers in an evolving European Union

*Eugenia Caracciolo di Torella**

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Abstract: *This article focuses on the growing debate concerning the role that fathers play when it comes to family responsibility and, in particular, the care of young children and how EU policy and legislation have contributed to it. Such debate is important for several reasons. From a theoretical perspective access to care for fathers represents the other side of the access to paid employment for mothers debate, and therefore completes the deconstruction of the two-sphere structure. From a more practical point of view, including fathers in the work/family life reconciliation debate is essential for the achievement of important EU policies, such as employment and gender equality.*

*Although society is arguably ready for a change, the legislator has been slow to address it and, as a result, fathers are still largely missing from the EU's reconciliation policy and legislation. Against this background, the decision of the Court of Justice in *Roca Álvarez* has, potentially, laid down the basis for a new model of fatherhood. In its conclusion this article speculates whether this decision will trigger a much needed change, in particular in the light of the current economic climate.*

“O wonder! How many goodly creatures are there here! How beauteous mankind is! O brave new world! That has such people in it!”¹

I Introduction

In September 2010 in the case of *Roca Álvarez* the Court of Justice of the European Union (the Court of Justice or the Court)² held that “the position of a male and female worker, father and mother of a young child, are comparable with regard to their possible need (...) to look after the child.”³ This represents an unprecedented U-turn from the previous reasoning of the Court – and EU legislation more generally - that had *de facto* consistently construed the care of young children as the mother's main, if

* Lecturer, School of Law, University of Leicester. Many thanks to A. Masselot, G. James, N. Busby H. Sommerlad, R. Collier and A. Stewart who have read earlier drafts of this paper. Thanks also to the participants of the workshop *The European Family: New Challenges to Old Paradigms* European University Institute, Florence, 17 June 2011, where the ideas leading to this article were first discussed and of the second *Family and Work Network* seminar (www.reading.ac.uk/fawn) *Work/Family Challenges: EU and Comparative Investigations*, University of Reading 11 September 2012, where a version of this article was presented.

¹ W. Shakespeare, *The Tempest*, Act V, Scene I.

² Before the entry into force of the Lisbon Treaty, the Court of Justice was referred to as the European Court of Justice or ECJ. For clarity purposes Court of Justice is used throughout this article.

³ Case C-104/09, *Roca Álvarez v Sesia Start España ETT SA*, [2010] ECR I- 08661, at para 24.

not sole, responsibility. This article focuses on the position of fathers as workers and caregivers within the EU legal system with a view to assessing the possible consequences that this U-turn in the Court reasoning might have on this area of law. For this purpose, this article is organised as follows. Part II and III explore why fathers have so far, been ignored by the EU legislator and why this should change. Any change, however, can only happen if supported by a clear theoretical framework which underpins the role of fathers as caregivers; this is considered in the second part. Against this background, in Part IV the (scant) relevant legislation as well as the case law of the Court of Justice is examined, in particular the decision in *Roca Álvarez*. It concludes that, although there are encouraging signs of change, the *status quo* remains unsatisfactory as a right-based approach is still lacking and this reiterates traditional parental models. This situation is further exacerbated by the current economic climate which makes it difficult to introduce any changes in this direction.

II Fathers and EU Law

The last decades have witnessed the rise of a significant change in the attitude that fathers have towards caring responsibilities across Europe.⁴ Although this is not representative of the majority of fathers,⁵ it is a significant minority. As such it has been the subject of intense sociological scrutiny.⁶ To date, however, this change has not been supported and promoted by a comprehensive legislative framework.

At EU Level, the original lack of legislative intervention can be explained by the fact that Community law was created to respond to an economic imperative; it was market creating rather than market correcting. In this context, issues relating to gender equality, such as caring responsibility and the role of parents, were only contemplated in so far as they were ancillary to economic goals, for example the free movement of persons.⁷ In other words, although the importance of gender equality was always acknowledged, arguably it was not intended to be the primary aim. Despite a more stringent focus on social rights,⁸ this paradox and its consequences remain to date

⁴ See V. Miranda, "Cooking, Caring and Volunteering: Unpaid Work Around the World", (2011) OECD Social, Employment and Migration Working Papers, n. 116; European Commission, Employment, Social Affairs and Equal Opportunities, "Men and Gender Equality – Tackling Gender Segregated

Family Roles and Social Care Jobs", 2010; EHRC, Working Better: Fathers, Family and Work – Contemporary Perspectives 2009; see also, "Decline of the Traditional Mum as Dads Take on More Childcare", *The Times*, 25th October 2011, March 2010.

⁵ R. Crompton, M. Brokmann, R. D. Wiggings, "A Woman's Place ... Employment and Family Life for Men and Women", in A. Park, J. Curtice, K. Thomson, L. Jarvis, C. Bromley (eds.) *British Social Attitudes: the 20th Report*, (Sage, 2009-2010) 161-187.

⁶ See *inter alia* E. Dermott, *Intimate Fatherhood, a Sociological Analysis*, (Routledge, 2008); M. Kilkey, "New Labour and Reconciling Work and Family Life: Making it Fathers' Business?" (2006), 5:2 *Social Policy and Society* 167—175; J. Scourfield, M. Drakeford, "New Labour and the Problem of Men" (2002) *Critical Social Policy* 619-640.

⁷ See for example the decisions in *Baumbast and R v Secretary of State for the Home Department* [2002] 3 CMLR 23; *Carpenter v Secretary of State for the Home Department* [2002] 2 CMLR 64; Case C-200/02 *Chen and Zhu v Secretary of State for the Home Department* [2004] 3 CMLR 48; Case C-34/09 *Gerardo Ruiz Zambrano v Office National de L'emploi (ONE)* [2011] All ER 199. For a general overview see C. McGlynn, *Families and the European Union*, (Cambridge University Press, 2006).

⁸ See A. Masselot, "The State of Gender Equality Law in the European Union", *European Law Journal* 13 (2007) 152-168.

built into the relevant policy and legislation.⁹ Furthermore, at the time of writing, to establish uniform provisions on fathers as caregivers across Europe, might be difficult, because the development of domestic policies and legislation is greatly uneven. At one end of the spectrum are the Scandinavian States where the construction of fathers as caregivers has been on the agenda for a few decades already: in these States fathers have an independent and non-transferable quota of the parental leave which they use.¹⁰ At the other end of the spectrum are countries, such as Italy,¹¹ where the idea that the day to day responsibility of children is the mother's responsibility is still firmly embedded in society and in the relevant legislation.¹² "Fathers" thus are not an homogeneous group and the "good father" label fails to take into consideration the many different forms and nuances of fatherhood in the same way as the broad term "feminism" has been criticised for not considering that there are different women with different expectations and needs. Different ethnic, cultural, religious and social backgrounds are likely to shape individuals' perceptions of fatherhood and influence its relationship with caring responsibilities.¹³ A further difficulty lies in the fact that the very structure of the family (whether it is an intact unit or not or) is likely to have an impact on the role that fathers play: the division of caring arrangements between parents who live together in an harmonious situation may well differ to those of parents who no longer live together.¹⁴ The latter will differ again from those parents who still have an amicable relationship as opposed to those who do not. Finally, diverse access to economic resources determines what individual Member States might be able to address and change. This varied panorama explains the sensitivity of the area under analysis and the range of difficulties that the legislator faces. These, in turn, are made more acute by the lack of specific EU competencies in this area.

This is the reason why, so far EU law has so far addressed issues concerning fathers primarily within the framework of soft law instruments. These instruments do not

⁹ See S. Ruddick, "The Idea of Fatherhood", in H. Lindemann, Nelson (ed.), *Feminism and Families*, (Routledge, 1997) at 205.

¹⁰ See AZ Duvander, T. Lappegård, G. Andersson, "Family Policy and Fertility: Fathers' and Mothers' use of Parental Leave and Continued Childbearing in Norway and Sweden", *Journal of European Social Policy*, 2010 (20) 45-57; A Haataja, "Fathers' Use of Paternity and Parental Leave in the Nordic Countries", 2009 Kela/Fpa Working Paper n. 2 available at <http://annazavaritt.blog.ilssole24ore.com/files/paternit%C3%A0-paesi-del-nord.pdf> (as of 15 October 2012).

¹¹ C. Valentini, *O i figli o il Lavoro* (Feltrinelli 2012)

¹² See R. Ray, J. C. Gornick and John Schmitt "Who cares? Assessing generosity and gender equality in parental leave policy designs in 21 Countries", 2010 20: 196 *Journal of European Social Policy*, 196-216; see also ILO, *Maternity at Work – A Review of National Legislation*, Geneva, 2012, in particular Chapter 3, p. 43.

¹³ B. Featherstone, *Contemporary Fathering, Theory, Police and Practice*, The Policy Press, 2009; see also B. Hobson (ed.), *Making Men into Fathers* (Cambridge University Press, 2002). The difficulties that the EU legislator can encounter in this area are exemplified in the discussions leading to the adoption of the Parental Leave Directive. For an overview see J. McMullen, "The New Proposals for Parental Leave and Leave for Family Reasons", *The Company Lawyer*, 7 (1986) 30; F. P.

Davidson, "Parental Leave – Time for Action?", *Journal of Social Welfare and Family Law*, 8(5) (1986)

281-289; E. Ellis, "Parents and Employment: an Opportunity for Progress", *Industrial Law Journal*, 15(1) (1986) 97-109; see also D. Anxo, C. Fagan, M. Smith, M. Letlabier, "Parental Leave in European Companies. Establishment Survey on Working Time 2004-2005", 2007, European Commission.

¹⁴ See M. Maclean (eds), *Parenting after Partnering* (Hart Publishing, 2007).

impose a specific target (which in certain situations might be unfeasible) but emphasise the importance of issues perceived of common interest and aim to promote cooperation.¹⁵ Although this system may have advantages, this article maintains that the law has an important role to play in this area: by being binding, the law is better placed to influence behaviour and promote change. In other words, although the law is limited in what it can achieve in this specific area, it should support the policy development, meet men's growing expectations and reinforce their position as fathers and carers. There are several reasons for this. Firstly, because the role that fathers play within the family is crucial to the success of many other important policies,¹⁶ such as employment¹⁷ and gender equality. Secondly, fundamental rights are increasingly permeating the policy and legislative discourse,¹⁸ not to mention that men have growing expectations about their role within the family, in particular as fathers and, at least in principle, are willing to reorder their priorities to achieve it.¹⁹ Thirdly, there is evidence that a strong paternal involvement is beneficial to children,²⁰ and the protection of children's rights is now expressly on the EU agenda,²¹ and in particular is now becoming an aim of the work/family life reconciliation strategy.²² At domestic level it is increasingly becoming apparent that involving fathers in the early care of their children is often vital for gaining important care-giving skills²³ and a pre-condition for a more stable paternal involvement later in life: fathers who are willing to take time off when their children are young, will be more likely to be willing to acquire parental responsibility and to be successful in securing a shared residence order in case of marital breakdown.²⁴

¹⁵ E. Korkea-Aho, "EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?" *Maastricht Journal of European and Comparative Law*, 13 (2009) 271-290.

¹⁶ EC Commission, Communication Strategy for Equality between Women and Men 2010-2015 COM (2010) 491 final; at p. 10 it states that "[t]he pay gap also reflects other inequalities on the labour market mainly affecting women – in particular their disproportionate share in family responsibilities and the difficulties in reconciling work with private life."

¹⁷ See "Europe 2020: a Strategy for Smart, Sustainable and Inclusive Growth" which contains five Headline targets, *inter alia*, to achieve employment for 75% of the 20-64 year olds; available at http://ec.europa.eu/eu2020/index_en.htm (as of 20 October 2012).

¹⁸ E. Caracciolo di Torella, "Is There a Fundamental Right to Reconciling Work and Family Life?" in Busby, and James (eds.) *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar, 2011) at 52-65.

¹⁹ *Inter alia*, E. Dermott, *Intimate Fatherhood*, (Routledge, 2008); E. Caracciolo di Torella, "New Labour, New Dads – the Impact of Family Friendly Legislation on Fathers", *Industrial Law Journal*, 36 (2007) 316-326; see also COFACE, "Men and Families: Men's Changing Family Roles in Europe", December 2006. R. Crompton, *Employment and the Family*, (Cambridge University Press, 2006); J. Lewis, *Work-Family Balance, Gender and Policy*, (Edward Elgar, 2009); R. Crompton, C. Lyonette, "Work-Life Balance in Europe", *Acta Sociologica* 49 (2006) 379-393.

²⁰ *Inter alia*, M. Lamb (ed.), *The Role of the Father in Child Development*, (Wiley, 2010).

²¹ Article 3 of the Treaty of Lisbon states that the Union shall promote the protection of the right of the child. This commitment is reinforced by Article 24 of the EU Charter of Fundamental Rights which is dedicated to the rights of the child. For a background of this see S. Ruxton, *What About Us? Children's Rights in the European Union: Next Steps*, 2005, EURONET available at http://www.nspcc.org.uk/Inform/publications/downloads/whataboutus_wdf48010.pdf (as of 10 November 2013).

²² G. James, "Forgotten Children: Work-Family Reconciliation in the EU" *The Journal of Social Welfare and Family Law* (forthcoming).

²³ T. Miller "It's a Triangle that's Difficult to Square: Men's Intentions and Practices Around Caring, Work and First-Time Fatherhood", *Fathering* 8 (2010) 362-378.

²⁴ To a certain extent, this is acknowledged in some domestic measures; see for example the UK Children and Families Bill 2012 which discussed in the same Bill shared parental leave, parental responsibility and the position of fathers following marital breakdown. The link is even more evident in Islanding legislation, where a parent's right to maternity/parental leave is conditional to the fact

III Brave new fathers? a Conceptual Approach

Man for the field and woman for the heart
Man for the sword and for the needle she
Man with head and woman with the heart
Man to command and woman to obey
All else confusion.²⁵

From a theoretical perspective, the position of individuals as caregivers has traditionally been based on and legitimised by the so-called two-sphere dichotomy. This dichotomy has its seeds in ancient Greek thought²⁶ where “female bears and the male begets”²⁷ but it has been reiterated over the years and with the advent of capitalism, it has become firmly embedded in society.²⁸ It implies that life is divided into two spheres: the private/domestic and public spheres. Issues relating to employment have been regulated in the public sphere, while matters concerning the family and its organisation, *inter alia* caring responsibilities, have been confined to the domestic sphere and as such unregulated. Traditionally, the public sphere is the domain of men whilst the domestic sphere is reserved to women.²⁹ In the words of O’Donovan:

“[p]ublic” may be used to denote State activity, the values of the marketplace, work, the male domain or that sphere of activity which is regulated by law. “Private” may denote civil society, the values of family, intimacy, the personal life, home, women’s domain or behaviour unregulated by law”.³⁰

Such a structure steadily contributed to the naturalisation of specific roles as female and male: “although the meaning of “public” and “private” changes (...), the assignment of public space to men and private space to women is continuous in Western history.”³¹ This is not to suggest that women, particularly those of lower

that s/he has custody or joint custody of the child . A non custodial parent has can only be entitled to maternity/paternity leave id s/he has the consent of the custodial parent; see Act on Maternity/Paternity and Parental Leave, n° 95/2000, Art. 8, available at http://eng.velferdarraduneyti.is/media/acrobat-enskar_sidur/Act-on-maternity-paternity-leave-with-subsequent-amendment (as of 15 October 2012).

²⁵ Tennyson, *The Princess*, 1874.

²⁶ S. Blundell, *Women in Ancient Greece* (Cambridge University Press, 1999); J. Swanson, *The Public and the Private in Aristotle’s Political Philosophy* (Cornell University Press, 1992).

²⁷ Plato, *The Republic*, L. Purshouse, translation (Continuum, 2007).

²⁸ S. Fredman, *Women and the Law* (Oxford University Press, 1997).

²⁹ *Inter alia*, F. Olsen, “The Family and the Market: a Study on Ideology and Market Reform”, Harvard Law Review, 96 (1993), at p. 1497; K. O’Donovan, *Sexual Divisions in Law*, (Weidenfeld & Nicolson, 1984); see also M. Barbera, “The Unsolved Conflict: Reshaping Family Work and Market Work in the EU Legal Order” in T. Hervey, J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart Publishing, 2003) at 139-160.

³⁰ K. O’Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1984).

³¹ Z. Eisenstein, *The Radical Future of Liberal Feminism* (Longman, 1981).

social status, have not been involved in paid work, but at the same time they have always carried the main responsibility for the private sphere.³²

Following this arrangement, women's role, especially when they become mothers, was that of caregiver and men's role was that of the main breadwinner. If the dominant traits of motherhood were deemed to be rearing and nurturing,³³ by contrast, a "good father" was traditionally seen as a patriarch and a provider.³⁴ Accordingly, they had separate "tasks":

the fundamental explanation of the *allocation of the roles* between the biological sexes lies in the fact that the bearing and early nursing of children establish a strong presumptive primacy of the relation of the mother to the small child and this in turn establishes a presumption that the man, who is exempted from these biological functions, should specialise in the *alternative instrumental direction*.³⁵

These "alternative directions" meant that, whilst the good mother could "prevent delinquency by staying at home to look after the children,"³⁶ the good father was the one involved in income generating work, even when this included activities that took him away from home.³⁷ This model has shaped the traditional understanding of parental models and is entrenched in relevant legislation.³⁸ As a result, the law has construed the task of caregiver as the mother's only.³⁹

This naturalisation of individual's position in society has considerable socio-economic consequences in terms, for example, of loss of income and pension entitlements,⁴⁰ but also in terms of the impact on the individual's well being.⁴¹

³² See the discussion in C. Pateman, *The Sexual Contract* (Stanford University Press, 1983); O. Hufton, *The Prospect Before Her: a History of Women in Western Europe, Vol.1, 1500-1800* (Harper Collins, 1995); for a more recent

overview see R. Crompton, C. Lyonette, "Work-Life Balance in Europe" *Acta Sociologica* 49 (2006) 379-393.

³³ A. Leira, *Welfare States and Working Mothers* (Cambridge University Press, 1992); J. Bowlby, *Maternal Care and Mental Health* (World Health Organisation, 1951); C. McGlynn, "European Union Family Values: Ideologies of 'Family' and 'Motherhood' in European Union Law" *Social Politics* 8 (2001) 325.

³⁴ V. Seidler, "Fathering Authority and Masculinity", in R. Chapman, J. Rutherford J., (eds), *Male Order: Unwrapping Masculinity* (Lawrence and Wishart, 1988).

³⁵ T. Parson, "The American Family: its Relations to Personality and to the Social Structure", in Parson, Bales (eds.), *Family Socialization and Interaction Process* (Glencoe Illinois: the Free Press, 1955) at 23 (emphasis added); see also R. Collier, "Feminising the Workplace? Law, the 'Good Parent' and the 'Problem of Men'", in A. Morrison, T. O'Donnell, (eds.), *Feminist Perspectives on Employment Law* (Cavendish, 1999) at 161-181.

³⁶ C. Smart, *The Ties that Bind* (Routledge, 1984) at 136.

³⁷ B. Brandth, E. Kvande, "Masculinity and Child Care: the Reconstruction of Fathering" *The Sociological Review* 46(2) (1998) 293-313.

³⁸ R. Crompton, F. Harris, 'Attitude, Women's Employment, and the Changing Domestic Division of Labour: A Cross National Analysis', in R. Crompton, (ed.), *Restructuring Gender Relations and Employment*, (Oxford University Press, 1999) at 105-127; E. Caracciolo di Torella, A. Masselot, *Reconciliation of Work and Family Life in EU Law and Policy* (Palgrave Macmillan, 2010).

³⁹ Indeed in the post-war period it was argued that it would have been wrong to ratify the International Labour Organisation (ILO) provisions on paid maternity leave, as these would usurp the father's responsibility for supporting the family and therefore encourage family disintegration, see J. Jenson, "Gender and Reproduction", *Studies in Political Economy*, 20 (1986) 9-26. See also L. Imray, A. Middleton, "Public and Private, Marking the Boundaries", in E. Gamarnikow; D. Morgan; J. Purvis, *et al.* (eds), *The Public and the Private* (Heinemann, 1983) p. 12-27.

⁴⁰ See Case C-366/99 *Griesmar v. French Republic* [2001] ECR I-9383.

Yet the two-sphere dichotomy – and its consequences – is not inevitable but socially and politically constructed and it can and should be unpacked.⁴² Indeed, feminist socio legal academics have for sometime theorised the deconstruction of the two-sphere structure in order to argue that women, especially when they become mothers, have a right to participate into the public sphere by having *access to paid employment*.⁴³ In order to complete this deconstruction process, it is important to appreciate the impact on fathers which is evident through *access to care*. A discussion on access to paid work for mothers and access to care for fathers would challenge the existing stereotypes that underlie the structure of society and would have the benefit of promoting a new, more equal, way of organising family responsibilities.⁴⁴ This model has been discussed for sometime in the Scandinavian literature,⁴⁵ which has theorised the ‘shared roles model’, where both parents have the same capacity of being both workers and carers. It is articulated in three elements: legal, economic and practical parenting.⁴⁶ Legal parenting refers to the legislative framework regulating the entitlements (both in terms of periods of leave and financial) for parents in order to care for new born and young children; economic parenting indicates the obligation which parents have to provide for their children; finally, practical parenting refers to the daily care of young children.⁴⁷ Similarly, Fineman’s theorisation of the family as a bundle of caring relationships rather than familial ties sees one person assuming the “mothering” role and the other that of the “dependent child.”⁴⁸ It is not crucial to this model that the mothering role is assumed by the mother but it can equally be undertaken by the father. These models are

⁴¹ N. Busby, *A Right to Care?*, (Oxford University Press, 2011), in particular Chapter 2; C. Pateman, “Feminist Critique of the Public /Private Dichotomy” in S. Benn and G. Gaus, (eds) *Public and Private in Social Life* St Martin Press, 1983; T. Hervey, J. Shaw, “Women, Work and Care: Women’s Dual Role and Double Burden in EC Sex Equality Law” *Journal of European Social Policy* 8 (1998) 43-63.

⁴² G. James, *The Legal Regulation of Pregnancy and Maternity in the Labour Market* (Routledge-Cavendish, 2009), at Chapter 1.

⁴³ See *inter alia*, S. Lewis, J. Lewis (eds.), *The Work-Family Challenge - Rethinking Employment*, (Sage, 1996); R. Crompton, *Employment and the Family: the Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press, 2006); R. Crompton, S. Lewis, C. Lyonette (eds.) *Women, Men, Work and Family in Europe*, Palgrave MacMillan, 2007; N. Gilbert, *A Mother’s Work: How Feminism, the Market, and Policy Shape Family Life*, (Yale University Press, 2008); C. Hakim, *Work-Lifesty le Choices in the 21st Century: Preference Theory* (Oxford University Press, 2000); G. James, *The Legal Regulation of Pregnancy and Parenthood* (Cavendish-Routledge, 2009); B. Peper, A. Doorne-Huiskes, L. den Dulk (eds.), *Flexible Working and Organisational Change: The Integration of Working and Personal Life* (Edward Elgar Publishing, 2005); D. Perrons, C. Fagan, L. McDowell, K. Ray and K. Ward, *Gender Division and Working Time in the New Economy: Changing Patterns of Work, Care and Public Policy in Europe and North America* (Edward Elgard Publishing, 2006); J. Williams, *Unbending Gender: Why Family and Work Conflict and What to do About it* (Oxford University Press, 2000).

⁴⁴ OECD, *Gender and Sustainable development: Maximising the Economic, Social and Environmental Role of Women*, 2008.

⁴⁵ See *inter alia*, N. Busby, *A Right To Care* (Oxford University Press, 2011), in particular Chapter 2.

⁴⁶ R. Lilieström, “Sweden”, in Kamerman, Kahan (eds.), *Family Policy: Government and Families in Fourteen Countries* (Columbia University Press, 1978).

⁴⁷ K. Moxnes, *Kjerneprengning i familien?* (Universitesforlaget, 1990).

⁴⁸ H. Kaul, “Who Cares? Gender Inequality and Care Leave in the Nordic Countries”, *Acta Sociologica* 34 (1991) 115.

⁴⁹ M. Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (Routledge, 1995), at p. 235 *et seq.*

inherent in a “transformed society”⁴⁹ which acknowledges the rights and obligations that both mothers and fathers have towards their family.

The distinctive feature of a such society is the degendering of care work and the analysis of the relevant provisions in terms of right-holders as opposed to gender stereotypes. Therefore this model moves away from the two-sphere structure.

This emerging model, although not dominant, is increasingly permeating the caring responsibilities discourse across Europe. As a result we are starting to witness a cultural shift in the perception of fatherhood. A significant (and growing) minority of fathers, despite cultural traditions that continue to purport them as breadwinners,⁵⁰ appear willing to take an active part in the daily upbringing of their children and, more importantly, they appear to value the time spent with them above their work commitments.⁵¹ This emerging “new father” is a man who aims to be “increasingly a “hands-on” carer, an individual who is (or who should be) emotionally engaged and involved in the day-to-day care of his children.”⁵² In other words he is willing to move away from the two-sphere structure and the model of fatherhood that this has created. In certain areas of law and policy, such as family law, this has triggered a debate which, albeit slowly, tends to be acknowledged by the legislator and policy makers.⁵³ For example issues such as fathers and birth registration, acquisition of parental responsibility and the involvement of fathers following the breakdown of the relationship are at the moment a topic on many domestic agendas.⁵⁴

Yet, how far has this been incorporated into the caring discourse, in particular at EU level? In other words, has this been translated into a legislative framework that contemplates fathers as carers?

IV The making of a brave new father in EU law?

In light of this discussion, this section seeks to map how EU policy and legislation, have over the years addressed the position of fathers as caregivers. Broadly, this can

⁴⁹ J. Gornick, M. Meyer, *Families that Work. Policies for Reconciling Parenthood and Employment* (Sage, 2003).

⁵⁰ B. Fowler, F. Wilson, “Women Architects and their Discontents” 2004 *Sociology*, 101-119.

⁵¹ M. Brien, I. Shemilt, “Working Fathers – Earning and Caring”, EOC Research and Discussion Series & Working Papers (2003); C. McGlynn, ‘Work, Family and Parenthood’, in J. Conaghan, K. Rittich (eds), *Labour Law, Work and the Family*, (Oxford University Press, 2005) at 217-236; Equality and Human Right Commission (EHRC), *Fathers, Families and Work: Contemporary Perspectives*, London, 2009; L. Calafà, *Paternalità e Lavoro*, (Il Mulino, 2007); R. Crompton, S. Lewis, C. Lyonette (eds.), *Women, Men, Work and Family in Europe*, (Palgrave, 2007). However, figures of fathers’ involvement vary largely across Europe; see OECD, *Babies and Bosses: Reconciling Work and Family Life*, (Paris: OECD, 2007). See also M. L. Tanturri, L. Mencarini, “Fathers’ Involvement in Daily Childcare Activities in Italy: does a Work-Family Reconciliation Issue Exist?”, *Child* n. 22/2009 available at http://www.child-centre.it/papers/child22_2009.pdf (as of 23 May 2012); V. Miranda, “Cooking, Caring and Volunteering: Unpaid Work Around the World” (2011) OECD Social, Employment and Migration Working Papers, n. 116.

⁵² R. Collier, S. Sheldon, *Fragmenting Fatherhood* (Hart Publishing, 2008), at p. 209.

⁵³ See the work of R. Collier, in particular *Law, Men and Gender: Rethinking the “Man” of Law*, (Routledge, 2009) and “Rethinking Father’s Rights” *Family Law* (2009) 45-50.

⁵⁴ See C. Smart, The Ethic of “Justice Strikes Back: Changing Narratives of Fatherhood”, in A. Diduck and O’Donovan (eds.), *Feminist Perspectives on Family Law* (Routledge-Cavendish, 2006), at 123. S. Harris-Short, “Building a House upon Sand”: Post Separation Parenting, Shared Residence and Equality –Lessons from Sweden”, 2011, 23, *Child and Family Law Quarterly*, 344-369; MoJ/DfE, *The Government Response to the Family Justice Review: a System with Children and Families at Heart*, 2012 at p. 18 *et seq.*

be organised into two phases: the first spans from the origin of the EC to the adoption of the Treaty of Amsterdam and the second from the Treaty of Amsterdam to the most recent measures. This organisation is merely intended to aid our understanding of this area rather than suggesting a strict delineation of approaches. In both phases, in the absence of specific legislation, the position of fathers has been addressed within the framework of the sex equality principle (originally encapsulated in Article 119 EEC, then 141 EC and now Article 157 TFEU) as well as secondary legislation such as the Equal Pay⁵⁵ and the Equal Treatment Directives.⁵⁶

A The first phase: old century and old concepts

The need to include fathers in the relevant legislation was highlighted by the EU Commission as early as in 1986:

the evolution of society is such that in many cases working men, if they are fathers, must share all the tasks previously performed by the wife as regards to the care and the organisation of the family.⁵⁷

Despite these early signs the EU legislator, ignored “the evolution of society” and paid very little if no attention to fathers. In turn this limited the approach of the CoJ. The latter endorsed what McGlynn calls the “traditional ideology of motherhood” which sees the care of young children as the mother’s main and natural task.⁵⁸ Although the Court did not specifically mention fathers, by default it created a “traditional ideology of fatherhood”. Without spelling out what a father should do, it implied that this role is that of the breadwinner. This background explains early decisions such as *Commission v Italy*⁵⁹ where the CoJ held that national legislation granting leave only to the adoptive mother rather than to both parents, was acceptable because of the “special bond” between *mother* and child. It went further and held that the distinction expressed the “legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a new born child in the family during the very delicate initial period.”⁶⁰ In other words, the Court assumed that it was the *mother’s* (rather than the *father’s*) “normal” role to look after a young child.

In the same vein the following year in *Hofmann*⁶¹ a German father failed to obtain a period of leave to care for his newborn child. He challenged this refusal on the basis that, had he been the mother, he would have been entitled to such benefits.⁶² His argument was that the Equal Treatment Directive permitted derogation from the equal treatment principle only in order to protect women before and after childbirth; therefore if the provision of leave goes beyond that function and entail measures for the care of the child in the long term, it should be open to both men and women. He

⁵⁵ European Parliament and Council Directive 75/117 EEC, OJ [1975] L 45.

⁵⁶ European Parliament and Council Directive 76/207/EEC, OJ [1976] L39/40, as amended by Directive 2002/73/EC, OJ [2002] L269/15.

⁵⁷ Case 312/86 *Commission v France* [1988] ECR 6315, at 6322.

⁵⁸ C.McGlynn, ‘Ideologies of Motherhood in European Community Sex Equality Law’, *European Law Journal*, 6 (2000), 29-44.

⁵⁹ Case 163/82 *Commission v Italy* [1983] ECR 3275.

⁶⁰ Case 163/82 *Commission v Italy* [1983] ECR 3275, at para 16.

⁶¹ Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.

⁶² C. Kilpatrick, “How Long is a Piece of String? European Regulation of the Post-birth Period” in *Sex Equality Law in the European Union*, Hervey, O’Keffee (eds.), (Wiley, 1996), p 63.

convincingly argued that the aim of the domestic legislation was to protect the child rather than the mother on biological and medical grounds. Furthermore he also emphasised that fathers could play a role in easing women's double burden:

the protection of the mother against the multiplicity of burdens imposed by motherhood and her employment *could be achieved by non-discriminatory measures*, such as enabling the father to enjoy the leave or creating a period of parental leave, so as to release the mother from the responsibility of caring for the child and thereby allow her to resume employment as soon as the statutory protective period had expired ... [T]he *choice* between the options thereby created should, in conformity with the principle of non-discrimination of the sexes, be left completely to the parents of the child.⁶³

Unsurprisingly, the Court rejected this argument which was in line with neither the societal developments of the time nor the spirit of the then Treaty of Rome, and focused on the exception of the Equal Treatment Directive which allows Member States to introduce more stringent measures to protect women's biological condition during and after pregnancy and the special relations between mother and child.

It was only in 1992 that the first (soft) Community legislation addressing fathers, namely the Childcare Recommendation, was adopted.⁶⁴ It suggested that Member States should introduce measures encouraging men to assume an equal share of family responsibilities and as such it attempted to question the two-sphere structure. Although not binding, it has been described as "the first EC equality measure actively to target male behaviour."⁶⁵

This first timid attempt to include fathers in the caring discourse was, however, offset by the adoption the very same year of the Pregnant Workers Directive,⁶⁶ whose focus on mothers and failure to mention the role of fathers, cemented the two-sphere structure.⁶⁷ I have argued elsewhere that the Directive could have contemplated, as a minimum, a few days leave for fathers to be taken in connection with the birth of the child with the specific intent to help the mother with everyday tasks. It is true that a few days would not have challenged the two-sphere structure and promoted the development of fathers' role as caregivers; a few days are neither sufficient for fathers to properly care for and bond with their children, nor to tilt the gender equality balance when it comes to paid and unpaid work, thus promoting a shift of social attitudes in perceptions on parenting roles. They would, however, have at least sent a message on what the role of fathers could entail.⁶⁸

⁶³ Case 184/83 *Hofmann* [1984] ECR 3047 at para. 11 (emphasis added).

⁶⁴ Council Recommendation on 'Child Care', OJ [1992] L123/16.

⁶⁵ C. Hokyns, *Integrating Gender: Women, Law and Politics in the European Union*, London: Verso, 1996, at p. 52; P. Moss, "Childcare and Equality of Opportunity – Consolidated Report to the European Commission" (CEC V/688, 1988).

⁶⁶ Council Directive 92/85/EEC, OJ [1992] L348/1, now under revision Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, COM(2008) 600/4; D. Muffat-Jandet, 'Protection of Pregnancy and Maternity', *Industrial Law Journal*, 20 (1991) 76-79.

⁶⁷ E. Caracciolo di Torella, "New Labour, New Dads – the Impact of Family Friendly Legislation on Fathers" *Industrial Law Journal*, 36 (2007) 316-326; M. Benn, *Madonna and Child: Towards a New Politics of Motherhood*, (Jonathan Cape, 1998).

⁶⁸ E. Caracciolo di Torella, A. Masselot, *Reconciliation of Work and Family Life in EU Law and Policy* (Palgrave Macmillan, 2010). See also example the European Women's Lobby campaign on

The idea that when it comes to caring for young children both parents should be on equal footing was finally articulated in a binding instrument in the 1996 Parental Leave Directive.⁶⁹ Indeed, *prima facie*, this measure encouraged an equal sharing of unpaid work and of family responsibilities.⁷⁰ Yet in reality, it proved to be more rhetoric than substance - a fact confirmed by its low level of take up amongst fathers.⁷¹ The main problem of the Directive was the lack of remuneration; it therefore failed to attract interest, amongst fathers reluctant to give up the (usually) higher family income.⁷²

The Court of Justice did little to capitalise on and expand the principles underlying these timid legislative attempts and to challenge traditional views on parental roles. Indeed, more than two decades after the decision of *Hofmann*, the Court reiterated the message that caring is mainly mothers' responsibility. In *Hill*⁷³ it obscurely referred to the need to protect "both women and men within family life and in the course of their professional activities." It then went to some lengths to suggest that women's role within the family is the traditional one without actually explaining what the role of men would entail. In doing so, this decision *de facto*, entrenched stereotypes about parenting where women, not men, are necessarily the primary carers of children. Indeed, it appears that the Court distanced itself from its previous decision in *Hofmann* not to settle questions relating to family organisation⁷⁴ and instead sent a clear message regarding who should be children's primary carer. The assumption was further confirmed the following year in *Abdoulaye*.⁷⁵ On this occasion, a group of men were refused the payment of child-related benefits on the grounds that the benefits in question were designed to offset the occupational *disadvantages inherent in maternity leave*. The provision was, albeit unsuccessfully, challenged on the grounds that denial of the payment to fathers was discriminatory. By upholding the national legislation the Court once again, accepted that, within the family, the role of men is that of the traditional breadwinner.

fatherhood, European Women Lobby, EWL calls for paternity leave as a precondition for more work-life balance for both women and men, February 2011, available at <http://www.womenlobby.org/spip.php?article1246> (as of 23 November 2011).

⁶⁹ Council Directive 96/34 EC, OJ [1996] L145/04.

⁷⁰ EU Commission *Green Paper: Confronting Demographic Change: a New Solidarity between Generations* COM(2005) 94 final.

⁷¹ Eurobarometer, 'Europeans' Attitudes to Parental Leave', May 2004.

⁷² The changes incorporated in the recently amended Parental Leave Directive do little to address this point. Although the new Directive grants four, rather than three, months leave to each parent it continues to be unpaid. It follows that, as currently structured, parental leave is a measure which is unlikely to promote and facilitate fathers' involvement in caring responsibilities; at its best it will remain unused and at its worst, it will entrench existing stereotypes on parents' different roles. See Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L68, 18.3.2010, p. 13–20.

⁷³ Case C-243/95 *Hill and Stapleton v. The Revenue Commission and the Department of Finance* [1998] ECR I-3739. See further McGlynn, C. Farrelly, "Equal Pay and the Protection of Women within Family Life" *European Law Review*, 24 (1999) 202–207.

⁷⁴ Case 184/83 *Hofmann* [1984] ECR 3047 at para. 24.

⁷⁵ Case C-218/98 *Abdoulaye* [1999] ECR I-5723.

The only instance where the Court seemed to question its traditional position was in the case of *Griesmar*, where it held that parental leave is for both parents “as the situation of a male civil servant and a female civil servant *may be* comparable as regards the bringing up of children”.⁷⁶ Despite this, however, the following year the message that care is a woman’s responsibility was further reiterated. In *Lommers* the Court considered a Dutch Ministry of Agriculture’s childcare policy providing access to childcare facilities primarily to its female employees whilst granting male employees access to nursery placement only in case of emergencies such as in the case of a single father who was the sole care-giver.⁷⁷ The Ministry had justified its position as the only way:

... to tackle inequalities existing between male and female officials, as regard both the number of women working at the Ministry and their representation across the grades. The creation of subsidised nursery places *is precisely the kind of measure needed to help to eliminate this de facto inequality*⁷⁸

The Court was satisfied that there was no breach of the Equal Treatment Directive because when men were fulfilling a primary caring role, they were not excluded from the policy. It omitted to consider the fact that Mr Lommers’ wife might have experienced difficulties in pursuing her career as a result of this policy and reiterated the message that that *normally* “care work is for women” and men enter the picture only in exceptional circumstances.

At this stage there was no binding legislation addressing the situation of fathers as carers. The Court of Justice used the available legislation, namely non discrimination on grounds of gender, in a limited way: rather than to promote the idea that fathers also can have caring responsibilities, to ensure that women could bridge between the two spheres and continue to care for a family whilst being able to contribute to the economy. As a result, in the first phase – in the name of gender equality - the two-sphere structure was firmly entrenched.⁷⁹

B The second phase: a new century and a new idea of equality

By the end of the 1990s the political climate had changed. The effort towards the achievement of the single market of the previous decade had emphasised the importance of women’s role in employment and this was now matched by a growing awareness of the fundamental rights discourse.⁸⁰ Within this context, the principle of equality as formulated in the Treaty of Amsterdam, was considerably strengthened.⁸¹

⁷⁶ Case C-366/99 *Griesmar v. French Republic* [2001] ECR I-9383, in particular paras. 55 and 56. This position was however somewhat undermined by the statements in Case C-476/99 *Lommers* [2002] ECR I-2891, emphasis added.

⁷⁷ Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891.

⁷⁸ Case C-476/99 *Lommers* [2002] ECR I-2891, at para 21, emphasis added.

⁷⁹ S. Eneteg, “EC Labor Law: Do Men become Fathers?”, 2005 *Columbia Journal of European Law* 413-436.

⁸⁰ Several ECHR cases have given a broad definition of family rights and have included (unmarried) fathers; see eg. *Sporer v Austria* (App. No 35637/03) Judgment of 3 February 2011 [2011] 1 FLR; see also L. Hodson, “A Marriage by Any Other Name?” *Schalk and Kopf v Austria* 2011 *Human Rights Law Review* 170.

⁸¹ The new Article 2 EC required the Community to *promote equality* rather than *prohibit discrimination* and Article 3 EC officially introduced the concept of gender mainstreaming. These

Prima facie, this new improved legislative landscape created the right environment for a new understanding of family responsibilities and care giving. In 2000 the Council Resolution on the Balanced Participation of Women and Men in Family Life was adopted. Although a soft law provision, it specifically questions the two-sphere structure:

[t]he beginning of the twenty-first century is a symbolic moment to give shape to the new social contract on gender, in which *de facto equality of men and women in the public and private domains* will be socially accepted as a condition for democracy, a prerequisite for citizenship and a guarantee of individual autonomy and freedom, and will be reflected in all European policies⁸²

Furthermore, theoretically at least, it places the disadvantages suffered by both parents – mothers *and* fathers - on the same level:

[t]he principle of equality between men and women makes it essential to offset the disadvantage faced by women with regard to conditions for access to and participation in the labour market and the *disadvantage faced by men with regard to participating in family life, arising from social practices which still presuppose that women are chiefly responsible for unpaid work related to looking after a family and men chiefly responsible for paid work derived from an economic activity*.⁸³

It is, however, questionable whether the principles expressed in the Council Resolution are something more than rhetoric. Later that year, a diluted version of this commitment was echoed in the Charter of Fundamental Rights.⁸⁴ Article 33(2) states that:

[t]o reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Although this provision appears to offer a unique possibility for (re)conceptualising the legal position of caring responsibilities as it presents them as a fundamental right, a closer scrutiny reveals its potential gaps. For example it grants a right to “everyone”. Yet, by referring to “paid maternity leave” and “parental” leave, in practice it is addressed to women only.⁸⁵ This is further confirmed by an omission of any explicit

principles are now reiterated in the Treaty of Lisbon, see A. Numhauser-Henning, “EU Sex Equality post-Amsterdam”, in H. Meenan (ed.), *Equality Law in an Enlarged European Union* (Cambridge University Press), 2002, 145-177.

⁸² Resolution of the Council and the Ministers for Employment and Social Policy, meeting within the Council of 29 June 2000 on ‘The balanced participation of women and men in family and working life’, OJ [2000] C218/5 (my emphasis).

⁸³ Resolution of the Council and the Ministers for Employment and Social Policy, recital 2 (my emphasis).

⁸⁴ OJ [2000] C364/1. Although initially not binding, the Charter, after the Treaty of Lisbon, has now value of a Treaty provision; see S. Koukoulis-Spiliotopoulos, ‘The Lisbon Treaty and the Charter of Fundamental Rights: maintaining and developing the *acquis* in gender equality’, *European Gender Equality Law Review*, 1 (2008) 15-24.

⁸⁵ See also the European Commission 2011 Report on the Application of the EU Charter of Fundamental Rights COM (2012) 169 final that states that “developing child care services and fathers’

references to men. Thus *de facto*, depending on its reading, the provision might well reinforce the two-sphere structure and the traditional ideologies. The full potential of Article 33(2) will only be unveiled with the aid of a proactive and dynamic interpretation by the Court. This might offer a realistic chance to clarify and develop important principles: although the Court has not had the opportunity yet to use the Charter to interpret issues concerning the reconciliation of work and family life, it has not hesitated to use it.⁸⁶

Against this background, new legislation in this area which acknowledges fathers as caregivers, was adopted. The Amended Equal Treatment Directive⁸⁷ and Recast Directive⁸⁸ are the first EU measures that expressly acknowledge fathers in their own right. These Directives, however, do not confer on fathers specific rights. Article 2(7) of the Amended Equal Treatment Directive states that “it is (...) without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave.” Article 16 of the Recast Directive on paternity and adoption leave confirms the provisions of the amended Equal Treatment Directive for fathers in approximately the same terms.⁸⁹

Therefore a closer look reveals that these Directives do not grant positive rights to fathers, but they provide that the same level of protection as applies to maternity leave must be extended to paternity and adoption leaves, *if Member States have already introduced such rules into national law*. In other words, the employment rights of workers who take paternity leave are only protected under EU law if the Member States have already introduced paternity leave provisions. This has the effect of construing fathers’ rights as an *option* for Member States to consider, rather than an *individual right*;⁹⁰ it also allows discrepancies in treatment between the Member States.

A further attempt to address the position of fathers as caregivers was made by the Commission in 2008 when it presented the Work-Life Balance Package:⁹¹ a whole

take up of *parental* leave have a positive bearing on the labour supply for main carers, who usually are women” (at p. 7).

⁸⁶ See case C-236/09, *Association Belge des Consommateurs Test-Achat ASLB and others*, nyr. In this case, the Court has been prepared to use the Charter of Fundamental rights, in particular Article 23 and clearly stated that the “principle of equality is a fundamental principle; as discussed in E. Caracciolo di Torella, “On Lies and Statistics: the Relationship between Gender Equality and Insurance”, ERA Forum (2011) 59-70.

⁸⁷ Council Directive 76/207/EEC, OJ [1976] L39/40 as amended by Directive 2002/73/EC, OJ [2002] L269/15.

⁸⁸ Directive 2006/54/EC of the European Parliament and of the Council of 5th 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), OJ [2006] L/204.

⁸⁹ ‘This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.’

⁹⁰ See the Preamble paragraph 13 and Article 2(7) of the Directive 76/207 as amended by Directive 2002/73.

⁹¹ EU Commission, COM(2008) 635, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/603&format=HTML&aged=0&language=EN&guiLanguage=en> (as of 1 October 2012).

new package of measures concerning the reconciliation of work and family life. The Package includes a Communication from the European Commission⁹² explaining the background and context, two legislative proposals to revise existing directives⁹³ and a report monitoring the national progress towards the Barcelona childcare targets.⁹⁴ It aims to explicitly place the issues related to reconciliation of work and family life on the agenda and re-explore them according to the new political climate. When it comes to fathers and caring responsibilities, the Communication is the most progressive part of the package as it expressly mentions paternity leave defined as “a short period of leave for fathers around the time of the birth of a child.”⁹⁵ The suggestion was incorporated by the Parliament in the proposal to amend the Pregnant Workers Directive. The latter has not been adopted yet because of the opposition of the Member States, most notably the UK, in the Council. Furthermore, the Progress report highlighted that had the Directive been amended, there was consensus that paternity leave would have not been included.⁹⁶ This confirms that, to date, the legislator remains unwilling to challenge the traditional family roles. Thus, to date the Work-Life Balance Package remains the most innovative proposal to ‘help women to combine work and family life.’⁹⁷

Yet, at least in terms of soft law, the commitment to reinforce the position of fathers as caregivers has been consistently reiterated in recent years, most notably in the Strategy for Equality between Women and Men (2010-15) the Commission acknowledges the need to address “remaining gaps in entitlement to family-related leave, notably paternity leave ...”.⁹⁸

C Roca Álvarez and the new father

At best, the second phase is proof that the caring responsibilities discourse is now firmly on the policy agenda and that fathers are part of this discourse. At worst, however, this phase brings together a patchwork of half baked good intentions that do little more than reiterate the rhetoric surrounding this area. As a result the changes to

⁹² Communication from the Commission, ‘A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life’, COM(2008) 635.

⁹³ Respectively, Proposal for a Directive amending Council Directive 92/85/EEC 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, COM(2008) 637; Proposal for a Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, COM(2008) 636. At the time of writing, only latter has been agreed.

⁹⁴ European Commission Report, ‘Implementation of the Barcelona Objectives Concerning Facilities for Pre-School-Age Children’ COM (2008) 638.

⁹⁵ Consultation Document SEC (2006) 1245 and SEC (2008) 571 as discussed in the Communication from the Commission, “A Better Work-Life Balance: stronger support for reconciling professional, private and family Life”, COM (2008) 635. See also European Commission, Employment, Social Affairs and Equal Opportunities, “Opinion on New Forms of Leave (Paternity Leave, Adoption Leave and Filial Leave”, 2008.

⁹⁶ The EU Council, Proposal, Progress Report, 2008/0193 (COD) SOC 423/SAN 107/CODEC 875.

⁹⁷ Commission Improves Work-Life Balance for Millions with Longer and Better Maternity Leave,; Brussels 3 October 2008 IP/08/1450. available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1450&format=HTML&aged=> (as of 10 June 2012)

⁹⁸ European Commission, Strategy for Equality between Men and Women 2010-2015 COM (2010) 491 final, at p. 6 See also Council conclusions on the Reconciliation between Work and Family Life in the context of Democratic Change, 17.6.2011.

the legislative framework are minimalistic and overall do little to promote the role of fathers as caregivers. Attitudes in society across Europe are changing, however. In a recent decision, the Court of Justice was willing to capitalise on this change. In the case of *Roca Álvarez*, it was asked to decide on the validity of Spanish legislation that was originally instituted in 1900.⁹⁹ This entitles mothers whose status is that of employee to paid “breastfeeding leave” during the first nine months following the birth of a child. Over the years, the domestic courts have gradually interpreted this right to reflect the changing reality and from a measure originally aimed at protecting the mother, it has developed into a measure devoted to the child. Accordingly “the leave may be taken by the mother or the father without distinction provided that they are both employed.” This means that the employed mother has an automatic entitlement whilst the father has a derived entitlement. This particular part of the legislation was challenged by Mr Roca Álvarez who was denied this leave on the grounds that the mother of the child was not employed but self employed. It is difficult to extrapolate the rationale behind this provision. Perhaps, it aims to protect the special bond between the mother and the child; perhaps the ratio is that, if the mother is unemployed she would not need the support of the father and if she is self-employed, she can more easily organise her work around caring responsibilities and, in both cases the father’s role is perceived as less important. Whichever the rationale was, it did not convince Mr Roca Álvarez who, as a brave new father, *wanted* to take time off to look after his child. He challenged this decision on the basis that it was contrary to the principle of equal treatment as encapsulated in the EU legislation. The national Court referred the case to the Court of Justice and asked about the compatibility of the domestic legislation with EU law.

In her opinion, Advocate General Kokott convincingly argued that the provision is contrary to the principle of equal treatment. In her view the issue was that male and female workers were treated differently, and therefore in breach of EU law, where only the latter have an unconditional right to the leave.¹⁰⁰ She then moved on to consider whether such difference was justified under Article 2(3) of the Equal Treatment Directive. This Article reserves to Member States the right to retain or introduce provisions which are intended to protect women “as regards pregnancy and maternity”. However, the AG noted that, as the emphasis of the right encapsulated into the domestic legislation is on the *child* rather than on the mother, and that the “the necessary love and attention can also be provided by the child’s father,”¹⁰¹ it could not be inferred that it is for the protection of pregnancy and maternity.

In light of this consideration Mrs Kokott concluded that the Spanish legislation “offended against”¹⁰² the principle of equal treatment encapsulated in EU law.

The Court followed the opinion of the Advocate General and acknowledged that to subordinate the use of the right to the employment status of both parents was contrary to EU Law. Indeed, it would create a situation where a self employed mother, as in the case under scrutiny, would actually be in a situation of disadvantage as she could not rely on the child father’s help. Furthermore, the legislation places fathers in a subordinate position: whilst an employed mother is always entitled to leave, the right

⁹⁹ Estatuto de Los Trabajadores, in particular Article 37(4).

¹⁰⁰ Case C-236/09, Opinion of AG Kokott, at para 29.

¹⁰¹ Case C-236/09, Opinion of AG Kokott, at para 42.

¹⁰² Case C-236/09, Opinion of AG Kokott, at para 59.

of an employed father depends on the mother's status.¹⁰³ This reiterates the idea that the mother is the principal carer and the father as a carer is the fall-back option.

The decision in *Roca Álvarez* should be applauded. It is indeed remarkable that the Court reached such a conclusion by relying on the Equal Treatment Directive 76/207. This is the very same Directive on which the Court based its decision in *Hofmann*.¹⁰⁴ The shift from the protection of the mother for biological reasons to the need of the child, however, meant that the Court reached the opposite outcome. In the latter case the Court relied on the exception of the Equal Treatment Directive and thus held that to reserve a period of additional maternity leave to mothers only, was a justified exception to the equal treatment principle. By way of contrast, in *Roca Álvarez* the Court relied on the principle of equal treatment itself and therefore concluded that to reserve a period of leave to feed unweaned children to the mother only, is against the principle of equality. The Court reached its conclusion despite being unable to rely on the (mildly) more progressive measures such as the amended Equal Treatment Directive¹⁰⁵ as it was not in force at the time of the facts, or the Recast Directive, nor the relevant provisions of the Charter, which at least, in principle acknowledge the role of fathers. The decision in *Álvarez* acknowledges the change in men's attitude towards caring responsibilities. It, however, goes further than simply acknowledging this change of climate: it capitalises on it. In doing so it contributes to challenging the two-sphere structure and sets the basis for a new model of fatherhood which moves forward from the default ideology of fatherhood and recognises a father's right to be involved in the care of his children.

A further important point of the decision is that, by focusing on fathers and children rather than on the mere protection of maternity, it gives substance to the claim that reconciliation between work and family life as included in Article 33 of the EU Charter of Fundamental Rights is a fundamental right and as such it is a right for everyone involved and not for mothers only.

V Conclusions

The last decades have seen an unprecedented change in the traditional assumptions regarding the role of individuals as parents and carers. The validity of the two-sphere structure has been questioned and increasingly replaced by a new conceptualisation of parent's rights and responsibilities. Although this new approach has sifted through certain areas of law, when it comes to some specific contexts, such as the organisation of caring responsibilities, progress appears slow.

Arguably, part of the reason for this is that, although the two-sphere structure and the traditional ideology of fatherhood has been challenged, a clear theoretical understanding of what society regards as being a "good father" when it comes to caring responsibilities is still lacking. As Fineman notes:

[w]hat has been missing from policy and reform discussions thus far is a debate about the nature of fatherhood and the transformation of the role of the father in response to changing expectations, norms and practices.

¹⁰³ See also E. Caracciolo di Torella, 'New Labour, New Dads – the Impact of Family Friendly Legislation on Fathers', *Industrial Law Journal*, 36 (2007) 316-326.

¹⁰⁴ Case 184/83 *Hofmann* [1984] ECR 3047 at para. 24.

¹⁰⁵ Council Directive 2002/73 EC, OJ [2002] L 269/15.

How does the desire for gender neutrality and the ideal of egalitarianism play a role in the creation of a new set of norms for fatherhood?¹⁰⁶

In the same vein, it has been pointed out that whilst we know what being a mother entails, in terms of time and commitment, the same does not hold true for fathers.¹⁰⁷

This article has sought to explore the role of the legislation in this emerging debate. In order to do so it has mapped the development of the position of fathers as carers in the EU; it has divided this journey into two main periods respectively finishing and starting with the adoption of the Treaty of Amsterdam in 1999. The main difference between the two phases is that, whilst the first one is firmly anchored in traditional stereotypes, the second attempts to move away from them. To fully understand this journey, the two phases need to be assessed in the light of the different policy and sociological contexts in which they have developed. There are three main differences. Firstly, conceptions of parental roles have changed. Whilst in the first phase they were very much anchored in the two-sphere structure and what this article has described as the “default ideology of fatherhood”, in the second phase a new, more dynamic, concept of equality seem to question these traditional assumptions. Secondly, the two phases are driven by two different policy aims. The policy aim of the first phase was concerned with helping women to enter and remain in the workplace; at this stage encouraging fathers to be carers and to play an active role in the family was not seen as the main goal. This phase was more concerned with formal rather than substantive equality where equality was based on the male role model,¹⁰⁸ namely to help women to perform their role as carer and at the same time to contribute to the economy. In the second phase, although women’s participation in the employment arena remains very important, there is a clear acknowledgment that measures supporting fatherhood are necessary for the development of other areas of EU law and policy. In other words the EU legislator is now acknowledging what Mr Hoffman pointed out in the 1980s, namely that “by obliging the mother to look after the child, despite the possibility that the parents might decide otherwise, the law (...) prevents women from pursuing their careers.”¹⁰⁹

Thirdly, the increasingly prominent role of fundamental rights has recently drastically changed the contours of this area. It was in fact only in the second phase that reconciliation between work and family life start being constructed as a fundamental right¹¹⁰ and this has meant an unprecedented attention to the position of men as

¹⁰⁶ M. Fineman, *The Autonomy Myth* (The New York Press, 2004), at p. 195.

¹⁰⁷ A Phoenix, A. Woollett and E.Lloyd (eds.), *Motherhood – Meaning, Practices and Ideologies*, Sage 1991; see also G. James, “Mothers and Fathers as Parents and Workers; Family Friendly Employment Policies in an Era of Shifting Identities” *Journal of Social Welfare and Family Life* 31 (2009) 271-283.

¹⁰⁸ For an excellent overview on the tension between formal and substantive equality in the 1980s and 1990s see S. Fredman, “European Community Discrimination Law: A Critique” *Industrial Law Journal* (1992) 21(2): 119-134 and J. Sohrab, “Avoiding the Exquisite Trap: a Critical Look at the Equal Treatment/Special Treatment Debate”, (1993) 1 *Feminist Legal Studies*, 141.

¹⁰⁹ Case 184/83 *Hofmann* [1984] ECR 3047 at p 3067. See also the Communication from the Commission “Strategy for Equality between Women and Men 2010-2015”, COM (2010) 491 final.

¹¹⁰ Article 33 EU Charter of Fundamental Rights, see M. Barbera, “The Unsolved Conflict: Reshaping Family, Work and Market Work in the EU Legal Order”, in Hervey, Kenner (eds.), *Economic and Social Rights under the the EU Charter of Fundamental Rights* (Hart publishing, 2003) at 139-160. E. Caracciolo di Torella, “Is There a Fundamental Right to Reconciling Work and Family Life?” in Busby, and James (eds.) *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar, 2011) at 52-65.

fathers. This led to a slow but gradual change in traditional assumptions on men's engagement with their family.

This change by increasingly questioning the validity of the two-sphere structure has led to a "cultural revolution". Yet, to be successful, such revolution needs to be supported by a clear and strong legislative framework: brave new fathers need a brave new world ie. a right-based approach which would, in practice, promote and support their role as carers. At the time of writing, at EU level a comprehensive legislative framework in this area is still lacking. Although the second phase is moving in this direction, measures acknowledging fathers as carers are still primarily a token gesture which at best provides fathers with "just enough time (...) to smoke a pack of cigars, wet the baby's head, be appreciated as a 'good dad' by the in-laws and slip back to work once the novelty of the moment has subsided"¹¹¹ and at worst entrenches stereotypes.

Seen against this background, the decision in *Roca Álvarez* is certainly innovative and confirms the fact that the Court is placed in a unique position to affect change. Whether the Court was proactive or whether it simply felt it could have not done any different in light of the wider change of climate, this decision represents a U turn that is both the zenith of the second phase and the starting point of a new phase where the Court of Justice is taking the first steps to move away from the "default ideology of fatherhood" towards that of "the brave new father".

It remains to be seen, however, how far, especially in light of the current economic climate,¹¹² this decision alone can challenge the traditional dynamic on caring responsibilities. It has been argued that at times of economic crisis women will be the first bear the brunt of austerity measures.¹¹³ If women will find themselves unemployed, it will be easier to fall back into a traditional caring pattern. The discussion carried out in this article has highlighted that, in order to include fathers in the caring discourse, some preconditions are necessary: a change in the traditional understanding of the role of individuals as parents, a strong legislative framework which gives rights to fathers and allows the Court to move forward and the contribution of a proactive Court of Justice. Without these changes, any intervention risks remaining *ad hoc* and merely cosmetic. The importance of the decision in *Roca Álvarez* is that it could have the potential to act as a catalyst bringing all these elements together and to send a clear message.

¹¹¹ G. James, "All That Glitters Is Not Gold: Labour's Latest Family-Friendly Offerings" *Web Journal of Current Legal Issues* 3 (2003).

¹¹² The EU Council, Proposal, Progress Report, 2008/0193 (COD) SOC 423/SAN 107/CODEC 875.

¹¹³ V.M. Moghadam, "Women, Gender, and Economic Crisis Revisited" (2011) *Perspectives on Global Development and Technology* 10 at 33. With specific reference to the UK see K Bennhold "Cuts in UK Raise Risk for Women", *The New York Times* (online ed, New York, 17 April 2012); J Martinson, "Women Paying the Price for Osborne's Austerity Package", *The Guardian* (online ed, London, 30 March 2012); D Sands, *The Impact of Austerity on Women* (Online ed, Fawcett Society, Policy Briefing, March 2012); R Sunderland "This Austerity Budget Acts as a Woman-Seeking Missile", *The Guardian* (online ed, London, 8 August 2010).