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ZNAČAJ PRINCIPA JEDNAKOG TRETMANA MUŠKARACA I ŽENA U PRAVU EVROPSKE UNIJE**

SAŽETAK: Pitanje jednakog tretmana muškaraca i žena predstavlja nepresušnu temu za istraživanje, a kako je problem diskriminacije po osnovu pola usko povezan sa uspostavljanjem jednakog tretmana, to u istraživanje ove teme treba krenuti sa nadnacionalnog nivoa, kakav je sistem prava u Evropskoj uniji. Nastanak i razvoj principa jednakog tretmana u okviru zajednice evropskih država tekao je postepeno, uz ostavljanje prostora za dodatna usavršavanja. Normativni okvir koji je postavljen, ipak, nije bio praćen i praktičnim promenama u pružanju jednakih šansi ženama prilikom zapošljavanja i na radu, te se naučnici i dalje bave fenomenom platnog jaza, segregacijom poslova, staklenog plafona i problemom usklađivanja porodičnog i profesionalnog života, kao posledicom nejednakog položaja muškaraca i žena u društvu.

U radu su proučeni nastanak i razvoj principa jednakog tretmana u okviru Evropske unije, uz početnu hipotezu da ni sadašnji normativni okvir nije u stanju da predupredi posledice diskriminacije po osnovu pola koje postoje u praksi.

Ključne riječi: jednak tretman, rodna ravnopravnost, pravo Evropske unije, zabrana diskriminacije

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UVOD

Uspostavljanje jednakog tretmana muškaraca i žena od važnosti je za funkcionisanje svakog društva, a vrednost ovog načela time je veća što neki od autora, poput Hepla (Hepple), smatraju da se „u srcu pojma dostojanstvenog rada nalazi jednakost“¹. S toga je ovo načelo zauzimalo značajno mesto u normiranju u okviru brojnih organizacija. Jedna od njih svakako je Međunarodna organizacija rada, za čije standarde Valtikos smatra da su značajno doprineli uspostavljanju jednakih mogućnosti i ukidanju nejednakog postupanja.²

Osnove principa rodne ravnopravnosti postavila je Međunarodna organizacija rada, čije temelje čini načelo jednakosti,³ donevši niz značajnih konvencija koje su bile usmerene ka zaštiti posebno osetljivih kategorija. Načelo jednakog postupanja je, kako Kovačević upućuje, ušlo na „mala vrata“, kroz zahtev za obezbeđivanjem jednakog plaćanja muškog i ženskog rada.⁴ Iako su se prve intervencije desile na polju zaštite žena kao slabijeg pola, uobličavanje principa jednake plaćenosti desilo se tek usvajanjem Konvencije br. 100 o jednakoj plaćenosti muškaraca i žena, koja, između ostalog, predstavlja najšire prihvaćen dokument.⁵ Pored pomenute konvencije koja je doneta 1951. godine, podjednaku važnost u uspostavljanju rodno neutralne politike imaju i Konvencija br. 111 koja se odnosi na diskriminaciju u pogledu zapošljavanja i zanimanja, kao i Konvencija br. 156 o jednakim mogućnostima i tretmanu radnika sa porodičnim obavezama. Reljanović ističe važnost standarda definisanih u okviru MOR u oblasti zabrane diskriminacije, od kojih mnoga imaju karakter univerzalnih, te da i Evropska unija poziva na saradnju država u okviru ove organizacije, u cilju većeg broja ratifikovanih konvencija.⁶

¹ Hepple, B. (2001). „Equality and empowerment for decent work“. *International labour review*, vol. 140, no. 1, 5.

² Valtikos, N. (1979). *International Labour Law*. Boston: Cambridge University Press, 104.

³ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Beograd: Pravni fakultet Univerziteta u Beogradu, 1008.

⁴ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Beograd: Pravni fakultet Univerziteta u Beogradu.

⁵ Brković, R., Vučinić, D. (2020). „Equal opportunities and treatment in employment and occupation“. *Zbornik radova Pravnog fakulteta u Nišu*, br. 87/2020, 170.

⁶ Reljanović, M. (2012). „Međunarodna organizacija rada i zabrana diskriminacije pri zapošljavanju“. *Strani pravni život*, br. 3/2012, 93.

RAZVOJ ZABRANE RODNE DISKRIMINACIJE U PRAVU EU

Rodna ravnopravnost predstavlja jednu od najznačajnijih tekovina Evropske unije i princip koji je proklamovan u osnivačkim aktima, a čiji se sadržaj i dalje razvija. Važno je naglasiti da se načelo jednakog tretmana muškaraca i žena u Evropskoj uniji nije razvijalo neposredno kao takvo, već je razvoj teкао poštovanjem principa jednake plaćenosti za jednak rad muškaraca i žena. Razlozi za takvu formulaciju nisu slučajni i bili su uslovljeni ekonomskim interesima, tačnije potrebom pojedinih država da spreče neoljalnu konkurenciju kroz troškove koje mogu imati poslodavci koji poštuju princip jednake zarade za jednak rad.⁷ Pomenuto načelo je svoje mesto našlo u Ugovoru o osnivanju Evropske ekonomske zajednice,⁸ a kasnije i u Ugovoru o funkcionisanju Evropske unije.⁹ Promene nastaju odlukom Evropskog suda pravde u predmetu *Defrenne*,¹⁰ koji je ovom principu dao socijalni značaj, kroz promociju zabrane diskriminacije između muškaraca i žena, zbog čega je ekonomski kontekst ovog načela ostao u drugom planu.

Temelji principa jednakog tretmana postavljeni su samim osnivanjem zajednice, tačnije potpisivanjem Osnivačkog ugovora u Rimu 1957. godine, kojim su se države ugovornice obavezale da obezbede jednaku zaradu za jednak rad, kako je to formulisano čl. 119.¹¹ Potpisivanjem Ugovora u Amsterdamu 1997. godine, ovaj princip proklamovan je kao jedan od ciljeva Evropske unije, uz obavezu da se primenjuje u svim društvenim sferama i na svim nivoima.¹² Pored toga što je čl. 141. razrađen koncept rada jednake vrednosti, ovo načelo je Ugovorom iz Amsterdama postalo obaveza u funkcionisanju svih organa i organizacija u okviru zajednice evropskih država, samim tim i obligatorni princip za države članice. Tako je nastao i termin *gender mainstreaming* (main – glavni, stream – tok), koji doslovno znači uvođenje principa rodne ravnopravnosti u glavne tokove.¹³ Značaj ovog dokumenta još je veći ako imamo na umu da su se tada prvi put iskristalisale mere afir-

⁷ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Beograd: Pravni fakultet Univerziteta u Beogradu, 1019.

⁸ Treaty establishing the European Economic Community, dostupno na <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:11957E/TXT>, čl. 119.

⁹ Consolidated version of the Treaty on the Functioning of the European Union, http://www.azk.me/1/doc/Ugovor_o_funkcionisanju_EU.pdf, čl. 157, st. 1.

¹⁰ *Defrenne v. Sabene*, br. 43/75 od 8. 4. 1976. godine.

¹¹ Prechal, S., Burri, S. (2009). *Pravila EU o rodnoj ravnopravnosti: Kako su ona preneti u nacionalno pravo*. Luksemburg: Evropska komisija, 14.

¹² Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, čl. 2.

¹³ Antonijević, Z. (2011). *Rodna ravnopravnost u Evropskoj uniji, zakonodavstvo i sudska praksa*. Beograd: Udruženje tužilaca i zamenika javnih tužilaca Republike Srbije, 5.

mativne politike, kao nužnost u cilju jednakog uključivanja žena kao manje zastupljenog pola u zapošljavanju i napredovanju. U teoriji prava Evropske unije navodi se čl. 13. kao revolucionarni, jer dozvoljava donošenje akata radi sprečavanja i otklanjanja diskriminacije.¹⁴ Efekti ove odredbe dalekosežni su, jer su na tim temeljima donete direktive koje su odigrale značajnu ulogu na polju antidiskriminacije. Važnost potpisanog ugovora primećuje i Bernard (Catherine Barnard), koja ističe da je proklamacijom u ovom ugovoru princip jednake plaćenosti dobio prošireno shvatanje.¹⁵ Osnivačkim ugovorom princip jednake plaćenosti primenjivao se samo na poslove koji su bili isti, odnosno uporedivi, uz jasno zanemarivanje činjenice da poslovi ne moraju biti formalno isti, ali da proizvode jednaku vrednost za poslodavca, zbog čega zaposleni koji ih obavljaju zaslužuju da budu plaćeni isto. Tako je od potpisivanja Ugovora u Amsterdamu princip jednake zarade obuhvatao i rad jednake vrednosti, što je zahtevalo dublje promišljanje o poslovima koji se upoređuju. To smatramo svojevrsnom evolucijom prava u okviru Evropske unije, čime se pitanje jednakog tretmana proširuje. Matijević i Ćorić ukazuju na posredan značaj Ugovora potpisanog u Mastroihtu 1992. godine, čime je zabrana diskriminacije potvrdila svoj značaj u okviru *acquis communautaire*.¹⁶ Zabrana diskriminacije sastavni je deo i ugovora potpisanog u Lisabonu.¹⁷

ZABRANA RODNE DISKRIMINACIJE KROZ DIREKTIVE EVROPSKE UNIJE I PRAKSU EVROPSKIH SUDOVA

Premda je princip zabrane diskriminacije po osnovu pola definisan u osnivačkim aktima, potreba za konkretizacijom i razradom ovog načela ne prestaje. Bernard smatra da aktuelnosti pitanja jednakog tretmana muškaraca i žena doprinosi nepostojanju jednakih šansi u pristupu tržištu rada, zbog čega je više nezaposlenih žena nego muškaraca, kao i zbog nejednakosti šansi na

¹⁴ „Savet može jednoglasnom odlukom, na osnovu predloga Komisije i nakon konsultovanja Evropskog parlamenta, preduzeti odgovarajuće mere radi borbe protiv diskriminacije zasnovane na razlikama na osnovu pola, rase ili etničkog porekla, veroispovesti ili ubeđenja, invalidnosti, starosti ili seksualne orijentacije. Ove odluke ne mogu uticati na druge odredbe ovog ugovora i moraju poštovati obim nadležnosti sa kojima raspolaže zajednica“, citirano prema: Matijević, M., Ćorić, V. (2007). „Antidiskriminacione mere u okviru Evropske unije“, 50 godina Evropske unije (ur. Jovan Ćirić). Beograd: Institut za uporedno pravo, 102.

¹⁵ Barnard, C. (2012). *EU employment law*. Oxford: Oxford University press, 263.

¹⁶ Matijević, M., Ćorić, V. (2007). *Op. cit.*, 103.

¹⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, čl. 19.

tržištu rada usled čega su žene uglavnom angažovane u okviru atipičnih poslova.¹⁸ To svakako treba povezati sa većom zastupljenošću žena u neplaćenim aktivnostima u kući, sa preuzimanjem glavne uloge u čuvanju dece i članova porodice kojima je potrebna nega, što rezultira prihvatanjem manje plaćenih poslova ili poslova sa nepunim radnim vremenom, te pristajanjem na nižu zaradu, a posledično i na nižu penziju.

Prva konkretizacija načela jednakog postupanja muškaraca i žena nastupila je donošenjem Direktive o jednakoj plaćenosti 75/117/EZ.¹⁹ Proistekla iz Ugovora o Evropskoj zajednici iz 1957. godine, cilj Direktive bio je utvrđivanje principa jednake zarade za rad jednake vrednosti. Sprovedenju tog principa trebalo je da pomogne obaveza klasifikacije radnih mesta, koja bi dovela do klasifikacije zarada. Boljem razmevanju Direktive doprinela je delatnost Evropskog suda pravde i slučaj 43/75 *Defrenne v. Sabena*.²⁰ Ambiciozni ciljevi ove direktive imali su dug put do implementacije, a kao jedan od problema u primeni javilo se široko tumačenje termina zarada.²¹ Odgovori su pronađeni u sudskoj praksi Suda pravde Evropske unije koji je iskristalisao svoj stav da zarada iz radnog odnosa, pored osnovne zarade za izvršeni rad, podrazumeva i dodatke za izvršeni prekovremeni rad, bonuse, dnevnice ostvarene na službenim putovanjima, uključujući i otpremnine. Time se, u stvari, diskriminacija između muškaraca i žena u pogledu zarada proširila i na naknade i bonuse. U vezi sa ostvarivanjem zarade ostale su brojne nedoumice, koje tekst Direktive nije razrešio. U tom smislu, valja ukazati na jedan od značajnijih slučajeva Evropskog suda pravde u vezi sa potrebom da se pojasni da nejednaka zarada zaposlenih koji rade nepuno radno vreme u odnosu na zaradu onih koji rade puno radno vreme ne predstavlja diskriminaciju, što je potvrđeno presudom u

¹⁸ Barnard, C. (2012). *EU employment law*. Oxford: Oxford University press, 253.

¹⁹ Council Directive 75/117/EEC, dostupno na <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975L0117:EN:HTML>, pristupljeno: 30. 9. 2021.

Pomena radi, profesor Jovanović izvore prava u Evropskoj uniji deli na one koji se odnose na jednak tretman muškaraca i žena u procesu zapošljavanja, gde ima na umu Direktive 76/207/EZ i 2000/78/EZ, zatim na one koji se staraju o obezbeđivanju jednakog tretmana dok traje zaposlenost, kao i prilikom prestanka radnog odnosa, u smislu kategorizovanja otkaznih razloga kao nedopuštenih koji se odnose na trudnoću, materinstvo, porodijsko odsustvo, što pronalazimo u Povelji o osnovnim pravima EU; citirano prema: Jovanović, P. (2011). „Aktuelni aspekti principa zaštite zaposlenih“. *Zbornik radova Pravnog fakulteta u Novom Sadu*, br. 3/2011, 146.

²⁰ *Defrenne v. Sabena*, Judgment of the Court of 8 April 1976. Sud je potvrdio princip jednakog plaćanja za rad jednake vrednosti muškaraca i žena, jer je u suprotnom posredi neposredna diskriminacija po osnovu pola. Razlike mogu postojati samo ako je razlog objektivna, te da se temelji na različitim kvalifikacijama, uslovima rada i prirodi posla.

²¹ Antonijević, Z. (2011). *Rodna ravnopravnost u Evropskoj uniji, zakonodavstvo i sudska praksa*. Beograd: Udruženje tužilaca i zamenika javnih tužilaca Republike Srbije, 12.

slučaju *96/80 Jenkins vs. Kingsgate*.²² U skladu sa principom *pro rata temporis*, Sud, doista, nije mogao da pronađe elemente neposredne diskriminacije. Međutim, Sud je napomenuo da o nejednakom tretmanu možemo govoriti ukoliko poslodavac zapošljava žene, koje u većem procentu rade nepuno radno vreme u odnosu na muškarce sa punim radnim vremenom.²³ Na tim temeljima su ustanovljeni koreni za prepoznavanje posredne diskriminacije godinama kasnije, premda ne treba zaboraviti ni presudu u predmetu *Bilka-Kaufhaus*, donetu mnogo ranije, koja je svojevrsni pionir u proklamovanju zabrane diskriminacije.²⁴

Pionirski formulisana, ubrzo je dopunjena već naredne godine donošenjem Direktive 76/207/EEZ o sprovođenju jednakog tretmana za muškarce i žene u pogledu zapošljavanja, stručnog usavršavanja i napredovanja i uslova rada.²⁵ Jedna od novina koju donosi pomenuta Direktiva ogleda se u proširivanju zabranjenih osnova diskriminacije pa je, pored pola, zabranjeno vršiti diskriminaciju po osnovu porodičnog i bračnog stanja. Uz ponovnu proklamaciju jednakog tretmana u svim vrstama profesionalne orijentacije i prekvalifikacije, ova direktiva je samo produbila pitanja rodne diskriminacije i tako stvorila osnov za donošenje nove Direktive 2002/73/EZ.²⁶ Ovim doku-

²² Judgment of the Court of 31 March 1981.

²³ Antonijević, Z. (2011). *Rodna ravnopravnost u Evropskoj uniji, zakonodavstvo i sudska praksa*. Beograd: Udruženje tužilaca i zamenika javnih tužilaca Republike Srbije, 13. Slično je Sud zaključio razmatrajući pitanje dodatnih zarada u predmetu *109/88 Danfoss*. Kako je Sud ustanovio parametre za sticanje dodatne zarade u vidu pokretljivosti tela, obučenosti i dužine staža, našao je da žene mogu biti stavljene u nepovoljan položaj u odnosu na kriterijum pokretljivosti zbog rodnih uloga koje se pripisuju ženi, koja pored poslovne ima i glavnu ulogu u domaćinstvu, što umanjuje njenu mogućnost da se prilagođava mestu i vremenu rada.

²⁴ *Bilka-Kaufhaus GmbH*, Case C-170/84. Predmet se ticao nepovoljnog položaja zaposlenih sa nepunim radnim vremenom, koje su uglavnom činile žene u odnosu na položaj zaposlenih koji su radili na neodređeno vreme, što je rezultiralo nepovoljnim položajem žena prilikom sticanja prava na starosnu penziju.

²⁵ Directive 76/207/EEC on implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, dostupna na <https://op.europa.eu/en/publication-detail/-/publication/701c4ff4-6cb7-4899-b44b-b1eb65fe2953/language-en>

²⁶ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, dostupna na <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002L0073>, pristupljeno: 8. 9. 2022.

Napomenimo još i Direktivu 79/7/EEZ o implementaciji principa jednakog tretmana za muškarce i žene iz domena socijalnog osiguranja, Direktivu 86/613/EEZ o jednakom tretmanu muškaraca i žena u pojedinim oblastima poput poljoprivrede, uz proklamovanje principa jednakosti i u sferi samozaposlenih muškaraca i žena, Direktivu 92/85/EEZ

mentom je posebno naglašeno da se neće smatrati diskriminacijom ukoliko se za obavljanje određenog posla zahteva pol samo onda kada je to određeno prirodom posla, a predviđene su i mere afirmativne politike, jer je povlašćeni tretman proklamovan za trudnice i majke u radnom odnosu. Uz to, predviđen je poseban korpus njihovih prava, pa će trudnice moći da uživaju pravo da odsustvuju sa posla radi prenatalnih pregleda, uz zabranu otpuštanja na početku trudnoće, kao i pošteđu rada noću. Postavljeni ciljevi bili su ambiciozni, ako uzmemo u obzir neke od sudskih odluka donetih pre donošenja ove direktive.²⁷

Sa razvojem komunitarnog prava, razvijao se i princip jednakog tretmana muškaraca i žena, tako što je dobio primenu u drugim, važnim sferama.²⁸ Tako je usledilo preciziranje postojećih direktiva u oblasti rada i zapošljavanja donošenjem nove Direktive 2006/54/EZ.²⁹ Ovo je, u stvari, sveobuhvatna Direktiva, doneta sa ciljem da objedini do tad proklamovane principe jednakog

o poboljšanju položaja zdravlja trudnica, porodilja i dojilja, Direktivu 96/34/EZ o roditeljskom odsustvu uz posebno proklamovano pravo da se roditelj nakon korišćenja porodiljskog odsustva vrati na posao i ima posebnu zaštitu od otkaza. Na kraju, dopuna svih direktiva jeste i Direktiva 97/80/EZ o teretu dokazivanja u slučaju diskriminacije na osnovu pola.

²⁷ Najviše pažnje privukao je slučaj „muških babica“. Sud je u predmetu 165/82 *Commission v. United Kingdom*, Judgment of the Court of 17 October 1995. godine, zauzeo stav da nema mesta diskriminaciji u zapošljavanju samo ženskih osoba na radno mesto babice, s obzirom na visok nivo senzitivnosti potreban za obavljanje tog posla. Da nema suptilnosti sa komunitarnim pravom, Sud je doneo pomenuti zaključak ukazujući na osobeni odnos pacijentkinje i babice, pri čemu je posebnu osećajnost osobe postavio kao ključni činilac za obavljanje posla babice. Time je Sud, vodeći se sopstvenim rezonovanjem rodni uloga, lišio muškarce senzitivnosti za obavljanje ovog posla, premda u istoj životnoj situaciji učestvuje i ginekolog, koji može biti i muškog pola jer priroda njegovog posla nije određena polom. Zbog toga ovakvo rezonovanje stava Suda smatramo prilično upitnim.

Sporno je bilo i zauzimanje stava u predmetu S-450/93 *Kalanke v. Freie Hansestadt Bremen*, Judgment of the Court of 17 October 1995. godine, kada je Sud smatrao da su odredbe propisa u Nemačkoj, koje pružaju prvenstvo u napredovanju na radu manje zastupljenog pola na rukovodećim mestima istih kvalifikacija kao afirmativnu meru, u stvari odstupanje od principa jednakog tretmana. Time je zanemareno prisustvo žena u značajno manjem procentu u odnosu na muškarce. Možemo konstatovati da se ovom odlukom pravo Evropske unije vratilo korak unazad.

²⁸ Potreba da se princip rodne ravnopravnosti proširi i na druge sfere, pored oblasti rada, dovela je do donošenja Direktive 2004/113/EZ radi postizanja rodne jednakosti muškaraca i žena u pružanju dobara i usluga. Preuzimaju se definicije neposredne i posredne diskriminacije, a primena ovog propisa proširena je na oblast socijalnog osiguranja. <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=celex%3A32004L0113>, pristupljeno: 1. 10. 2021.

²⁹ 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), dostupna na <https://eur-lex.europa.eu/eli/dir/2006/54/oj>, pristupljeno: 19. 9. 2022.

tretmana u različitim sferama.³⁰ Tako Nilsen (Ruth Nielsen) ističe da je cilj donošenja ove direktive bio u stvari sistematizacija pitanja koja se tiču rodne ravnopravnosti, kako bi Direktiva bila primenljiva,³¹ dok Bernard smatra da je sveobuhvatna direktiva uvek bolje rešenje zbog urođnjavanja javne politike.³² Važnost ove direktive vidljiva je na polju pomirenja profesionalnih i privatnih obaveza i uspostavljanja jednakosti muškaraca i žena kao roditelja, jer se predviđa poseban vid odsustva radi nege deteta, tzv. roditeljsko odsustvo (engl. *parental leave*) kojim se može koristiti i otac deteta, pored do tada postojećeg prava na porodiljsko odsustvo. Ovim se samo predvidela mogućnost za očeve da se koriste ovim odsustvom, dok će se na posebno očinsko odustvo sačekati nešto više od decenije. Kovačević ukazuje na to da je ova sveobuhvatna direktiva uticala i na progresivno shvatanje Evropskog suda pravde u pogledu načela jednakog tretmana.³³ To se odnosi na shvatanje neposredne diskriminacije na osnovu pola, koje konzumira i neopravdano pravljenje razlike na osnovu kriterijuma koji su vezani za pol radnika, poput trudnoće ili rođenja deteta.³⁴ Takvo rezonovanje Suda dragoceno je bilo u prepoznavanju prava iz korpusa materinstva i njihove međusobne povezanosti sa diskriminacijom po osnovu pola. To je Evropski sud pravde potvrdio u predmetu *Dekker*,³⁵ smatrajući diskriminaciju po osnovu trudnoće diskriminacijom po osnovu pola, s obzirom na to da je jedino ženama, po prirodi stvari, omogućeno da rađaju. Slično je odlučio i u predmetu *Hertz*,³⁶ stvorivši svojevrstan proaktivan pristup

³⁰ Mulder, J. (2018). „Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)“. *International and European Labour Law* (ed. Edoardo Ales, Mark Bell, Olaf Deinert, Sophie Robin-Olivier). Hart Nomos Beck, 549.

³¹ Nielsen, R. „2006/54/EC: Gender equality“. *EU Labour law – a commentary* (ed. Monika Schlachter). Wolters Kluwer, 30.

³² Barnard, C. (2012). *EU employment law*. Oxford: Oxford University press, 259.

³³ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Beograd: Pravni fakultet Univerziteta u Beogradu, 1021.

³⁴ Presuda u predmetu C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen/VJV-Centrum/Plus*, od 8. 11. 1990. godine. Isto tako, Sud je zauzeo isti stav povodom nejednakog tretiranja koji je neposredno ili posredno povezan sa trudnoćom u predmetu Case C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd*, ECJ, od 14. 7. 1994. godine, kao i zbog neobnavljanja ugovora na određeno vreme zbog trudnoće u predmetu Case C-438/99, *Maria Luisa Jimenez Melgar v. Ayuntamiento de Los Barrios*, ECJ, od 4. 10. 2001. godine.

³⁵ C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen/VJV-Centrum/Plus*, od 8. 11. 1990. godine.

³⁶ CJEU, C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening*, 8 November 1990.

kada je posredi diskriminacija po osnovu materinstva.³⁷ Ne treba zaboraviti ni na predmet u praksi Evropskog suda za ljudska prava *Zarb Adami*³⁸ gde je zakonska odredba propisivala mogućnost da osobe sa porodičnim obavezama mogu biti izuzete od obaveze porotništva, što je dovelo do nejednake zastupljenosti polova pri malteškim sudovima, u korist muškaraca. Pored pomenutog, Direktiva prvi put uvodi pravo na odsustvo i za usvajanje dece, te su ovakve odredbe nesumnjivo uticale na izmenu zakonodavstva zemalja članica, dok će praksa pokazati uticaj na zabranu diskriminacije zaposlenih roditelja prilikom vraćanja na posao, što je bila jedna od namera donosioca Direktive. Pomak je uočen i u pitanju definisanja posredne diskriminacije, s obzirom na to da se više ne zahteva da kvantitativan kriterijum bude u vidu određenog procenta osoba koji je doveden u položaj neravnopravnog tretmana zbog, naizgled, neutralne norme, kriterijuma ili prakse.³⁹ Ovakvu definiciju treba smatrati pomakom, imajući u vidu da je olakšano dokazivanje posredne diskriminacije.

Možemo se složiti sa Bernard da je princip jednakog tretmana pokretač promena u pravu EU,⁴⁰ a to potvrđuje i nedavno doneta Direktiva 2019/1158 o pomirenju profesionalnog i porodičnog života roditelja i negovatelja.⁴¹ Uspostavljanje balansa između porodičnog i profesionalnog života smatra se važnim segmentom principa jednakog tretmana, zbog čega je u teoriji formiran izraz *work-life balance*.⁴² Nemogućnost usklađivanja porodičnog i privatnog života se, između ostalog, negativno odražava i na decu koja pate zbog nedovoljnog posvećivanja pažnje.⁴³ Tu su i posledice na ekonomskom planu države s obzirom na to da ekonomisti upozoravaju da je došlo do pada BDP-a po glavi stanovnika u Evropskoj uniji za 10 %, što bi se moglo ublažiti većim uključivanjem muškaraca u sferu neplaćenog rada u cilju smanjenja disproporcije

³⁷ Masselot, A., Caracciolo di torela, E., Burri, S. (2012). *Fighting discrimination on the grounds of pregnancy, maternity and parenthood*. European commission, 6.

³⁸ *Zarb Adami v. Malta*, app. no. 17209/02, od 2. 6. 2006. godine.

³⁹ Nielsen, R. „2006/54/EC: Gender equality“. EU Labour law – a commentary (ed. Monika Schlachter). Wolters Kluwer, 36.

⁴⁰ Barnard, C. (2012). *EU employment law*. Oxford: Oxford University press, 253.

⁴¹ 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1158>, pristupljeno 14. 7. 2022.

⁴² Kirton, G. (2011). „Work-life balance, attitudes and expectations of young black and minority ethnic graduates“. *Equality, inequalities and diversity, contemporary challenges and strategies* (ed. Geraldine Healy, Gill Kirton, Mike Noon). London, 252.

⁴³ Gvero, S. (2019). „Pravo na odsustvo sa rada radi brige o djetetu – neophodnost izmjene normativnog pristupa“. *Pravo i privreda*, br. 1–3, 2019, 142–143.

sa zastupljenošću žena u porodičnim obavezama.⁴⁴ Najznačajniji doprinos ove direktive ogleda se u jasnom formulisanju očinskog odsustva (engl. *paternity leave*), za koje Čiregato (Elisa Chierigato) kaže da je to pravo na čije se utvrđivanje dugo čekalo.⁴⁵ Proklamacije koje sadrži ova direktiva su značajne, od kojih treba promenu 10 plaćenih radnih dana za očeve da bi se starali o detetu, i to pravo koje se daje drugom „ekvivalentnom roditelju“, što upućuje na pionirski normirano pravo roditeljima iz istopolnih zajednica i usvojitelje,⁴⁶ zatim pravo na fleksibilno obavljanje posla dok dete navrší osam godina, kao i zabrana otkaza za vreme korišćenja odsustva. Ne samo da su donošenjem ove direktive očevi izašli iz senke zaposlenih sa porodičnim dužnostima, već se pokušalo razbijanje stereotipa da je uloga majke u odgajanju dece prirodna i neotuđiva. Pomak treba videti i u uočavanju činjenice da postoje članovi porodice koji zahtevaju negu, bez koje ne mogu funkcionisati, te da se podrška u vidu posebnog korpusa prava mora pružiti onim zaposlenima koji se o njima staraju. Ipak, najznačajniji doprinos ove direktive vidimo u podsticaju zaposlenih u državama članicama EU da uspostave ravnotežu između porodičnog i profesionalnog života.

Evropska realnost – raskorak između legislative i prakse

Čini se da prikazani normativni okvir pruža dobru osnovu za postizanje jednakih mogućnosti za muškarce i žene, posebno u sferi rada. Ipak, statistike ukazuju da stanje rodne ravnopravnosti ne odgovara analiziranim politikama i usvojenim propisima. Pre svega, na tržištu rada u zemljama Evropske unije primetna je manja zastupljenost žena u odnosu na muškarce, pri čemu je njihova karijera stabilnija i trajnija.⁴⁷ Nejednaka zastupljenost žena na tržištu rada bila je jedan od razloga za formiranje segregacije poslova. Tako su nastali poslovi u kojima preovladava muška radna snaga i oni u kojima žene

⁴⁴ Udruženje poslodavaca Slovenije (2017). *Pomirenje poslovnih i porodičnih obaveza i rodna ravnopravnost, regionalni pregled i smjernice*. Beograd: Work Family balance, 13.

⁴⁵ Chierigato, E. (2020). „A work-life balance for all? Assessing the inclusiveness of EU Directive 2019/1158“. *International Journal of comparative labour law and industrial relations*, vol. 36, issue I, 8.

⁴⁶ Cafala, L. (2020). „The transposition of Directive 2019/1158 in Italy: unresolved issues and complex solution“. *Revue de droit compare du travail et de la securite sociale*, no. 4/2020, 84.

⁴⁷ Istraživanje se odnosi na žene sa jednim detetom do 12 godina, starosti 25–64 godine koje su manje zastupljene u odnosu na muškarce, čija karijera traje 37,9 godina u odnosu na 29 godina koliko u proseku traje karijera žene; citirano prema: Davaki, K. (2016). *Differences in woman's and man's work, care and leisure time*. European Parliament, 16.

dominiraju. Konsekventno, veća je zastupljenost žena u poslovima koji nisu tipično muški poput posla nastavnika, u oblasti prava, socijalne zaštite i društvenih nauka uopšte, dok oblasti inženjerstva, poljoprivrede, građevinarstva u Evropskoj uniji u stvari predstavljaju svet muškaraca.⁴⁸

Pored manje zastupljenosti žena, nejednakost šansi za muškarce i žene na evropskom tržištu rada uslovile su i primetan rodni jaz u zaradama. Premda se od principa jednakih zarada krenulo u formiranje antidiskriminacijskog zakonodavstva u Evropskoj uniji još Ugovorom o osnivanju, istraživanja ukazuju da žene u pomenutoj zajednici ostvaruju u proseku 16 % manju zaradu od svojih muških kolega za isti posao.⁴⁹ Razloga za ovakvu situaciju je više. Autori na prvom mestu ističu disbalans u raspodeli porodičnih obaveza, u kojima primat ima žena, koja se češće koristi pravom da radi nepuno radno vreme. U želji da na ovakav način pomiri porodične i poslovne obaveze, žene svesno pristaju na manji mesečni prihod, koji će decenijama kasnije rezultirati nižom penzijom. Istraživanja ukazuju na viši procenat majki sa decom starosti 25–64 godina, koje rade skraćeno radno vreme u odnosu na one bez dece, a ovaj procenat je viši i od procenta očeva koji koriste ovaj modalitet radnog vremena kao način da kombinuju posao i porodične dužnosti, kojih je samo 4%.⁵⁰ Zato se ističe da se karijera žena mnogo češće prekida zbog majčinske uloge, nego što je to slučaj sa karijerom muškog roditelja.⁵¹ Nejednakost šansi za muškarce i žene implikuje društvene probleme poput problema usklađivanja porodičnog i privatnog života. Pored toga što uskraćivanje vremena za porodicu na psihološkom planu prouzrokuje stres, depresiju, smanjuje motivaciju za rad i uopšte pogoršava zdravlje i efikasnost zaposlenog,⁵² današnja zakonodavstva, uključujući i nadnacionalno pravo Evropske unije, imaju problem u pronalaženju adekvatnog načina za usklađivanje ovih važnih životnih sfera.

Pod uticajem patrijarhalnih stavova, savremena društva se nisu odrekla majčinske uloge kao glavne, dok se u ocu i dalje vidi jedini izdržavalac porodice (*breadwinner*). Time kontinuirano opstaje diskriminacija po osnovu materinstva, zbog čega se neretko dešava da žene budu isključene od

⁴⁸ Mills, M., Tsang, F., Prag, P., Ruggeri, K., Miani, C., Hoorens, S. (2014). *Gender equality in the workforce: reconciling work, private and family life in Europe*. European Commission, 5.

⁴⁹ International trade union confederation report, *The decent work agenda: a gender perspective*. Brussels, 2009, 15.

⁵⁰ Davaki, K. (2016). *Differences in woman's and man's work, care and leisure time*. European Parliament, 16.

⁵¹ Schulze, E., Gergoric, M. (2015). *Maternity, paternity and parental leave: Data related to duration and compensation rates in the European Union*, Policy Department C: Citizens' Rights and Constitutional Affairs (European Parliament 2015), 72.

⁵² Buddhapriya, S. (2009). „Work-family challenges and their impact on career decisions: a study of Indian woman professionals“. *Vikalpa*, vol. 34, no. 1, 33.

obavljanja određenih obaveza.⁵³ Rođenjem deteta formira se prirodna veza između majke i deteta, zbog čega je tradicionalno uvreženo mišljenje da je jedino na majci da se koristi pravom na odsustvo radi nege deteta. Posledično, svega 2 % očeva u Evropskoj uniji se koristi ovim pravom.⁵⁴ S toga se podrazumeva majčino odsustvo sa posla rođenjem deteta i dolazi do skoro nezaobilaznih prekida u karijeri koji su prethodno pomenuti. Na ovaj način se žena isključuje iz procesa rada, ali i iz usavršavanja, koje utiče na puno ostvarivanje njenih intelektualnih kapaciteta, što pruža osnovu nekim autorima da govore o opravdanosti pravljenja razlike u zaradama muškaraca i žena za rad jednake vrednosti.⁵⁵ Nejednake šanse za muškarce i žene na poslovnom planu reflektuju se i na nejednakost u raspodeli kućnih poslova. Podaci govore u prilog činjenici da žene u Evropskoj uniji provode 18 sati na nedeljnom nivou u kućnim poslovima, dok muškarci provode tri puta manje.⁵⁶ Izlazak žena na tržište rada i doprinos kućnom budžetu nije uticao na smanjenje kućnih obaveza žene, već je, naprotiv, uslovio stvaranje dodatnog tereta obaveza.

Pored pomenutog, autori ističu da razlike nejednakih zarada za rad iste vrednosti između muškaraca i žena može biti pojašnjen i tradicijom u izboru zanimanja muškaraca i žena.⁵⁷ Ovo treba povezati sa segregacijom zanimanja koja formira tzv. „muška“ i „ženska“ zanimanja, te da su ova potonja po prirodi stvari manje plaćena. Tome treba dodati i mogućnost za prekovremeni rad, samim tim i veću zaradu ostvarenu na kraju meseca, koja je ustupljena muškarcima, što se može smatrati posledicom neravnomerne podele porodičnih poslova. U tom smislu, postoje stavovi da su žene zbog ovakvih uloga manje zastupljene u poslovima koji podrazumevaju prekovremeni rad, poput

⁵³ Dobra ilustracija je već pomenuti slučaj *The Zarb Adami Case*, u kome je Evropski sud za ljudska prava utvrdio da je odredba Malteškog zakona diskriminatorna koja podrazumeva mogućnost isključenja od građanske dužnosti sudije porotnika onih osoba koje imaju porodične dužnosti, a koje u većini slučajeva čine žene, citirano prema: Etinski, R. (2013). „Indirektna diskriminacija u sudskoj praksi Evropskog suda za ljudska prava“. *Zbornik radova Pravnog fakulteta u Novom Sadu*, br. 1/2013, 59–60.

⁵⁴ Davaki, K. (2016). *Differences in woman's and man's work, care and leisure time*. European Parliament, 49.

⁵⁵ Wood, G. R., Corcoran, E. M., Courant, N. P. (1993). „Pay Differences among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries“. *Journal of Labor Economics*, 417–441. Pomenuti autori smatraju da žena, nakon porođaja, ima smanjeni intelektualni kapacitet za rad, zbog čega joj, kao posledica, sleduje manje plaćena radna pozicija.

⁵⁶ Mills, M., Tsang, F., Prag, P., Ruggeri, K., Miani, C., Hoorens, S. (2014). *Gender equality in the workforce: reconciling work, private and family life in Europe*. European Commission, 18.

⁵⁷ Prechal, S., Burri, S. (2009). *Pravila EU o rodnoj ravnopravnosti: Kako su ona preneti u nacionalno pravo*. Luksemburg: Evropska komisija, 14.

posla menadžera.⁵⁸ Šta više, ima autora koji smatraju da se sa ovakvih poslova potiskuju žene koje imaju porodične obaveze, jer im one predstavljaju prepreku da učestvuju na sastancima nakon radnog vremena, što se smatra delom radne obaveze.⁵⁹ Tu su i stereotipi da žene nisu za takav posao, zbog nedostatka posvećenosti.⁶⁰ Ovakve teorijske stavove prati statistika koja ukazuje da je na nivou Evropske unije manje od 10 % žena koje su menadžeri, a da je taj procenat još niži kada su u pitanju najviše zarade u korporaciji.⁶¹ S pravom se zaključuje da su visoke pozicije na radnom mestu i zapošljavanje žena u obrnutoj proporciji, te da je udeo žena sve manji kako se na hijerarhiji radnih mesta povećavaju ona koja su više plaćena.⁶²

Sa pomenutim treba povezati efekte nepružanja jednakih šansi za muškarce i žene u radnom odnosu, koji su vidljivi i kroz mogućnost napredovanja. Nepoštovanje rodno jednakih politika udruženo je sa stereotipima da je priroda zaposlenog muškarca liderska i da su oni sposobniji, zbog čega samo jedna žena zauzima jedno od tri najplaćenijih pozicija u kompanijama u državama članicama.⁶³ U vezi sa tim treba pomenuti i teoriju staklenog plafona (*glass ceiling*), u vidu prepreka, nevidljivih i na prvi pogled nepostojećih za žene koje žele da napreduju u svom poslu, ali istovremeno dovoljno čvrstih koje ih sprečavaju u tome. Sa takvom vrstom prepreka suočavaju se samo žene u radnom odnosu onda kada žele svojim radom da napreduju na više pozicije, koje su bolje plaćene, ali im je zbog nejednakosti šansi na radu dozvoljeno napredovanje samo do određenog nivoa.

Da je nejednakost u zaradi muškaraca i žena za isti posao evropska stvarnost, ukazuje i organizovanje „Dana jednake plate“, sa ciljem da se ukaže na borbu žena da dostignu svoje muške kolege obavljajući posao iste vrednosti.⁶⁴

⁵⁸ Kirton, G. (2011). „Work-life balance, attitudes and expectations of young black and minority ethnic graduates“. *Equality, inequalities and diversity, contemporary challenges and strategies* (ed. Geraldine Healy, Gill Kirton, Mike Noon). London, 262.

⁵⁹ De Spiegelaere, S., Piasna, A. (2017). The why and how of working time reduction. European trade union institute, 65.

⁶⁰ *Gender and career development*. European foundation for the improvement of living and working conditions. Dublin, 2007, 25.

⁶¹ Meyerson, E. D., Fletcher, K. J. „A modern Manifesto for shattering the glass ceiling“. *Harvard Business Review*, no. R00107, 127.

⁶² *Gender and career development*, European foundation for the improvement of living and working conditions. Dublin, 2007, 25.

⁶³ Mullally, S. (2003). „Beyond the limits of non-discrimination: promoting gender equality“. *Equality in diversity* (eds. Cathryn Costello, Elis Barry). University of Leicester, 295.

⁶⁴ European Commission, Equal Pay Day: Joint Statement by First Vice-President Timmermans and Commissioners Thyssen and Jourová, https://ec.europa.eu/commission/presscorner/detail/en/statement_19_6192, pristupljeno: 5. 10. 2021.

Pomenuti dan se organizuje svake godine i obeležava se u državama članicama onog dana kada žene zaista uspeju da se izjednače sa zaradom svojih muških kolega obavljajući isti posao, počev od 1. januara. Premda je zakonodavni okvir za pružanje jednakih šansi jasan i implementiran u državama članicama, podaci ukazuju da je „Dan jednakih plata“ u 2019. godini postignut tek 5. novembra na nivou Evropske unije, što su poražavajuće činjenice, koje ukazuju na to da je ženi potrebno gotovo 11 meseci da bi prihodovale isto kao i muškarci na radnom mestu. U obzir treba uzeti progres pojedinih država, pa tako je ovaj dan u Španiji u pomenutoj godini ostvaren 22. februara, tri dana kasnije u Austriji, prema dostupnim podacima Evropske komisije.

URUŠAVANJE RODNIH ODNOSA ZA VREME PANDEMIJE COVID-a 19 Primer nekih zemalja Evropske unije

Istraživanje rodniha odnosa učinjeno je u svetlu preduzetih mera za sprečavanje širenja Covid-a 19 u prvim mesecima pandemije, a na osnovu statističkih podataka određenih zemalja koje čine zajednicu Evropske unije. Zatvaranje vaspitno-obrazovnih ustanova i radnih mesta uz prelazak na rad od kuće dodatno su uticali na već postojeći neravnomerni odnos muškarca i žene. Takva situacija uslovlila je potrebu za drugačijom organizacijom porodica širom sveta. Pored toga, žene su bile više pogođene pandemijom zbog toga što su zastupljenije u sektorima rada u kojima su predstavljale zaposlene u prvoj liniji.⁶⁵ Zbog socijalne izolacije, roditelji u velikom broju zemalja Evropske unije se nisu mogli oslanjati na pomoć starijih u čuvanju dece, te je ovu obavezu trebalo uskladiti sa obavljanjem posla, uz potrebu da bar jedan od roditelja radi od kuće. Prvi rezultati istraživanja dolaze iz Španije i Italije, iz zemalja koje su u prvom talasu pandemije najviše bile pogođene posledicama virusa. Najveći deo kućnih poslova u ovim državama preuzele su žene.⁶⁶ Pre-

⁶⁵ International Labour Organization, *Covid-19 and the world of work: impacts and responses*, Geneva, 2020, 6. O položaju zaposlenih u prvoj liniji pročitati više u: Rajić Čalić, J. (2021). „Pravni položaj zaposlenih u prvoj liniji za vreme vanrednog stanja usled pandemije virusa Kovid 19 u Srbiji“, *Pandemija Kovida 19: pravni izazovi i odgovori*. Beograd: Institut za uporedno pravo, 15–113.

⁶⁶ Del Boca, D., Oggero, N., Profeta, P., Rossi, Maria Cristina, (2020). Women’s and men’s work, housework and childcare, before and during COVID-19. *Review of Economics of the Household*, 2020, 18, 1001–1017. file:///E:/ZA%20RAD/INSTITUT/JRC/rad%20za%20EU/Women’s%20work,%20housework,%20and%20childcare%20before%20and%20during%20COVID-19%20VOX,%20CEPR%20Policy%20Portal.html, pristupljeno: 7. 10. 2021.

zumanjem obaveza u domaćinstvu od strane onog roditelja koji je pristao da radi od kuće, navodi na zaključak da je na taj način produbljena već postojeća rodna neravnopravnost između muškaraca i žena. U pomenutim zemljama, taj dodatni teret preuzele su žene, koje su radile od kuće, starale se o deci i radile kućne poslove. To posebno ističu autori u Italiji, ukazujući na povećanje sati koje su žene provodile obavljajući kućne poslove i u čuvanju dece, u odnosu na period pre „zaključavanja“ (*lockdown*).⁶⁷ Istraživanje je takođe pokazalo da je visok procenat muškaraca koji je nastavio da radi na svom radnom mestu, u odnosu na veći procenat majki koji je pristao da radi od kuće. Posebno zabrinjavaju uporedni podaci van država koje čine EU, u Ujedinjenom Kraljevstvu, SAD, Kini i Japanu, koji pokazuju da su se žene u velikom procentu suočile sa nezaposlenošću, kao posledicom smanjenja tražnje za radnom snagom na tržištu rada i da su imale problem da se reintegrišu na tržište rada.⁶⁸ Promene na tržištu rada i nedostatak radnih mesta mogu se dodatno negativno odraziti na zapošljavanje žena, povećati njeno angažovanje u kućnim poslovima i staranju o deci, te produbiti rodni jaz, zbog čega ne čudi apel Međunarodne organizacije rada da sve mere za sprečavanje širenja virusa moraju biti usklađene sa politikom rodne ravnopravnosti.⁶⁹

ZAKLJUČAK

Možemo zaključiti da je razvoj evropskog zakonodavstva tekao uzlaznom putanjom kada je princip jednakog tretmana u pitanju. Ipak, čini se da normativni okvir nije praćen uspehom prilikom implementacije prava, odnosno, kako Kovačević rezonuje, nije praćen „jednakim kvalitetom radnog angažovanja muškaraca i žena“, zbog čega su pobrojane manifestacije nejednakog tretmana još uvek prisutne.⁷⁰ S pravom se zaključuje da nije moguće

⁶⁷ Del Boca, D., Oggero, N., Profeta, P., Rossi, Maria Cristina, (2020). Women's and men's work, housework and childcare, before and during COVID-19. *Review of Economics of the Household*, 2020, 18, 1001–1017. file:///E:/ZA%20RAD/INSTITUT/JRC/rad%20za%20EU/Women's%20work,%20housework,%20and%20childcare%20before%20and%20during%20COVID-19%20VOX,%20CEPR%20Policy%20Portal.html (Pristupljeno: 7. 10. 2021).

⁶⁸ Belot, M., Choi, S., Tripodi, E., Van den Broek-Altenburg, E., Jamison, C. J., Papageorge, W. N. (2020). *Unequal Consequences of COVID-19 across Age and Income: Representative Evidence from Six Countries*, (IZA Institute for labour economics 2020), 10.

⁶⁹ International Labour Organization, *Covid-19 and the world of work: impacts and responses*. Geneva, 2020, 18.

⁷⁰ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Beograd: Pravni fakultet Univerziteta u Beogradu, 1061.

rešiti probleme u društvu prostim donošenjem zakona, odnosno „legalnim fetišizmom“,⁷¹ što se čini posebno u slučaju zabrane diskriminacije po osnovu pola. Evropski standardi predstavljaju minimalne uslove kojima bi države ugovornice trebalo da se vode u normiranju nacionalnih odredbi. Neke od njih su otišle korak dalje. Tako, uočljiv je pozitivan trend antidiskriminatorskog zakonodavstva u nordijskim zemljama, pa se može ukazati na primer Švedske koja je osnovala specijalizovanog ombudsmana za rodnu ravnopravnost, što treba smatrati korisnim primerom zakonodavne politike koji su sledile Danska i Norveška.⁷² Pored navedenog, u Švedskoj poslodavac ima obavezu sprovođenja aktivne politike rodne ravnopravnosti, pa ako njegov kolektiv broji više od 10 članova u obavezi je da donese „godišnji plan jednakosti“ koji podrazumeva procenu o jednakoj zaradi zaposlenih muškaraca i žena na radnom mestu, uzimajući u obzir sistematizaciju radnih mesta.⁷³ Posebnu podršku u realizaciji ovih planova u zemljama Severne Evrope pružaju sindikati, u kojima se vidi društveni pokretač promena i stožer poštovanja ljudskih prava uopšte, kao i principa jednakosti. Jačanje sindikata, kao socijalnih partnera, može poslužiti kao dobar primer ostalim državama članicama, kroz čiju delatnost je moguće rešiti neke od značajnih problema u društvu.

Ipak, ono što smatramo važnim za uspostavljanje principa jednakog tretmana odnosi se na prepoznavanje potreba koje imaju muškarci prilikom uspostavljanja jednakog tretmana. Premda je, kada govorimo o očuvanju principa rodne ravnopravnosti, sva pažnja usmerena na žene, koje se najčešće i susreću sa diskriminacijom na radu, slažemo se sa onim autorima koji predlažu da je potrebno, pored uvažavanja potreba žena, zavrediti i potrebe muškaraca, pogotovo u svetlu prava očeva na porodiljsko odsustvo, odnosno priznavanja očevima uloge koje imaju u porodičnim dužnostima.⁷⁴ Delimo mišljenje da je za razvoj principa jednakog tretmana, uopšte i u Evropskoj uniji, nužno obratiti pažnju na osobene potrebe muškaraca, umesto da se koncept zaštite žena proširi.⁷⁵

⁷¹ Jašarević, S. (2014). „Antidiskriminaciono pravo Srbije u oblasti rada i standardi Evropske unije“, *Perspektive antidiskriminacijskog prava* (ur. Željko Potočnjak, Ivana Grgurev, Andrea Grgić). Zagreb: Sveučilište u Zagrebu – Pravni fakultet, 50.

⁷² Bell, M. (2002). *Anti-discrimination law and European union*. New York: Oxford University press, 199–200.

⁷³ Jovanović, P. (2011). „Aktuelni aspekti principa zaštite zaposlenih“. *Zbornik radova Pravnog fakulteta u Novom Sadu*, br. 3/2011, 148.

⁷⁴ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Beograd: Pravni fakultet Univerziteta u Beogradu, 1061.

⁷⁵ Grgurev, I. (2014). „Diskriminacija trudnih radnica: Kako uspešno pomiriti trudnoću sa zahtevima tržišta“. *Perspektive antidiskriminacijskog prava* (ur. Željko Potočnjak, Ivana Grgurev, Andrea Grgić). Zagreb: Sveučilište u Zagrebu – Pravni fakultet, 150.

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THE IMPORTANCE OF THE PRINCIPLE OF EQUAL TREATMENT OF MEN AND WOMEN IN EUROPEAN UNION LAW**

ABSTRACT: The issue of equal treatment of men and women represents an inexhaustible topic for research. Since the problem of gender-based discrimination is closely related to the establishment of equal treatment, the investigation of this topic should begin at the supranational level, as is the system of law in the European Union. The origin and development of the principle of equal treatment within the community of European states was gradual, leaving room for further refinements. However, the normative framework that was set was not accompanied by practical changes in providing equal opportunities for women in employment and at work, hence scholars continue to deal with the phenomenon of the gender pay gap, job segregation, the glass ceiling, and the problem of reconciling family and professional life, as a consequence of the unequal position of men and women in society.

This paper examines the origin and development of the principle of equal treatment within the European Union, with the initial hypothesis that even the current normative framework is not capable

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of preventing the consequences of gender-based discrimination that exist in practice.

Keywords: equal treatment, gender equality, European Union law, prohibition of discrimination

INTRODUCTION

The establishment of equal treatment for men and women is important for the functioning of any society, and the value of this principle is even greater considering some authors, like Hepple, believe that “at the heart of the concept of decent work lies equality.”² Therefore, this principle has held a significant place in the standard-setting within numerous organizations. One such organization is the International Labour Organization, whose standards Valticos believes have significantly contributed to the establishment of equal opportunities and the elimination of unequal treatment.³

The foundations of the principle of gender equality were laid by the International Labour Organization, which is based on the principle of equality,⁴ having adopted a series of significant conventions aimed at protecting particularly vulnerable categories. The principle of equal treatment entered through the “back door,” as Kovačević points out, with the demand for ensuring equal pay for work of equal value by men and women.⁵ Although the first interventions occurred in the field of protecting women as the weaker gender, the shaping of the principle of equal remuneration only took place with the adoption of Convention No. 100 on Equal Remuneration for Men and Women, which, among other things, represents the most widely accepted document.⁶ In addition to the aforementioned convention adopted in 1951, Convention No. 111 concerning discrimination in respect of employment and occupation, as well as Convention No. 156 on equal opportunities and treatment of workers with family responsibilities, also play an equally important role in establishing a gender-neutral policy. Reljanović emphasizes the importance of the standards defined within the ILO in the area of discrimination prohibition, many of

² Hepple, B. (2001). „Equality and empowerment for decent work“. *International labour review*, vol. 140, no. 1, 5.

³ Valticos, N. (1979). *International Labour Law*. Boston: Cambridge University Press, 104.

⁴ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Belgrade: Faculty of Law of the University of Belgrade, 1008.

⁵ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Belgrade: Faculty of Law of the University of Belgrade.

⁶ Brković, R., Vučinić, D. (2020). “Equal opportunities and treatment in employment and occupation“. *Zbornik radova Pravnog fakulteta u Nišu*, no. 87/2020, 170.

which have a universal character, and notes that the European Union calls for cooperation among states within this organization, aiming for a greater number of ratified conventions.⁷

Development of the Prohibition of Gender Discrimination in EU Law

Gender equality represents one of the most significant achievements of the European Union and is a principle proclaimed in its founding acts, which continues to evolve. It is important to emphasize that the principle of equal treatment of men and women in the European Union did not develop immediately as such, but evolved through adherence to the principle of equal pay for equal work between men and women. The reasons for such a formulation were not random and were conditioned by economic interests, specifically the need of certain states to prevent unfair competition through the costs that could be incurred by employers who respect the principle of equal pay for equal work.⁸ This principle found its place in the Treaty establishing the European Economic Community⁹ and later in the Treaty on the Functioning of the European Union.¹⁰ Changes occurred with the decision of the European Court of Justice in the case of *Defrenne*¹¹, which gave this principle a social significance, promoting the prohibition of discrimination between men and women, thereby relegating the economic context of this principle to the background.

The foundations of the principle of equal treatment were laid with the establishment of the community, specifically with the signing of the Treaty of Rome in 1957, which committed the contracting states to ensure equal pay for equal work, as formulated in Article 119.¹² With the signing of the Treaty of Amsterdam in 1997, this principle was proclaimed as one of the goals of the European Union, with the obligation to apply it in all societal spheres and at

⁷ Reljanović, M. (2012). „Međunarodna organizacija rada i zabrana diskriminacije pri zapošljavanju“. *Strani pravni život*, no. 3/2012, 93.

⁸ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Belgrade: Faculty of Law of the University of Belgrade, 1019.

⁹ Treaty establishing the European Economic Community, available at <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:11957E/TXT>, article 119.

¹⁰ Consolidated version of the Treaty on the Functioning of the European Union, http://www.azk.me/1/doc/Ugovor_o_funkcionisanju_EU.pdf, article 157, point 1.

¹¹ *Defrenne v. Sabene*, no. 43/75 April 8, 1976.

¹² Prechal, S., Burri, S. (2009). *Pravila o EU rodnoj ravnopravnosti: kako su ona preneti u nacionalno pravo*. Luxembourg: European Commission, 14.

all levels.¹³ Besides the detailed concept of work of equal value in Article 141, the principle by the Treaty of Amsterdam became a mandatory function of all bodies and organizations within the community of European states, and thus a compulsory principle for member states. This led to the creation of the term *gender mainstreaming*, which literally means the integration of the principle of gender equality into the main currents.¹⁴ The significance of this document is even greater considering that it was the first time affirmative action measures were crystallized as necessary to ensure the equal inclusion of women as the less represented gender in employment and advancement. In the theory of European Union law, Article 13 is referred to as revolutionary because it allows the adoption of acts to prevent and combat discrimination.¹⁵ The effects of this provision are far-reaching, as directives that have played a significant role in the field of anti-discrimination have been adopted on these foundations. The importance of the signed Treaty is also noted by Catherine Barnard, who points out that the proclamation in this treaty gave the principle of equal pay an extended understanding.¹⁶ The founding treaty applied the principle of equal pay only to jobs that were the same or comparable, blatantly ignoring the fact that jobs do not have to be formally the same but produce equal value for the employer, and therefore employees performing them deserve to be paid the same. Thus, since the signing of the Treaty of Amsterdam, the principle of equal pay encompassed work of equal value, which required a deeper reflection on the jobs being compared. This is considered a kind of evolution of law within the European Union, thereby expanding the issue of equal treatment. Matijević and Čorić point to the indirect significance of the Treaty signed in Maastricht in 1992, which confirmed the importance of the prohibition of discrimination within the *acquis communautaire*.¹⁷ The prohibition of discrimination is also an integral part of the Treaty of Lisbon.¹⁸

¹³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, article 2.

¹⁴ Antonijević, Z. (2011). *Rodna ravnopravnost u Evropskoj uniji, zakonodavstvo i sudska praksa*. Belgrade: Prosecutors Association of Serbia, 5.

¹⁵ „The Council may, by unanimous decision, on the proposal of the Commission and after consulting the European Parliament, take appropriate measures to combat discrimination based on gender, race or ethnic origin, religion or belief, disability, age or sexual orientation. These decisions must not affect other provisions of this Treaty and must respect the scope of competencies available to the Community.“, quoted according to: Matijević, M., Čorić, V. (2007). „Antidiskriminacione mere u okviru Evropske unije“, 50 godina Evropske unije (ed. Jovan Čirić). Belgrade: Institute of Comparative Law, 102.

¹⁶ Barnard, C. (2012). *EU employment law*. Oxford: Oxford University press, 263.

¹⁷ Matijević, M., Čorić, V. (2007). „Antidiskriminacione mere u okviru Evropske unije“, 50 godina Evropske unije (ed. Jovan Čirić). Belgrade: Institute of Comparative Law, 103.

¹⁸ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, Article 19.

Prohibition of Gender Discrimination through European Union Directives and the Practice of European Courts

Although the principle of non-discrimination based on gender is defined in the founding acts, the need for concretization and elaboration of this principle continues. Barnard believes that the lack of equal opportunities in access to the labor market contributes to the current issues of equal treatment of men and women, resulting in higher unemployment among women than men, as well as inequality of opportunities in the labor market, leading to women generally being engaged in atypical jobs.¹⁹ This is certainly linked to the greater representation of women in unpaid domestic activities, taking on the main role in childcare and care for family members in need, which results in accepting lower-paid jobs or part-time work, and consequently lower earnings and pensions.

The first concretization of the principle of equal treatment of men and women occurred with the adoption of Directive 75/117/EEC on equal pay²⁰. Stemming from the Treaty of the European Community of 1957, the Directive aimed to establish the principle of equal pay for work of equal value. To facilitate the implementation of this principle, it was necessary to classify jobs, which would lead to wage classification. The European Court of Justice's activities and the case 43/75 *Defrenne v. Sabena*²¹ contributed to a better understanding of the Directive. The ambitious goals of this directive had a long path to implementation, and one of the problems in its application was the broad interpretation of the term wages.²² Answers were found in the case law of the Court of Justice of the European Union, which clarified that wages

¹⁹ Barnard, C. (2012). *EU employment law*. Oxford: Oxford University press, 253.

²⁰ Council Directive 75/117/EEC, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975L0117:EN:HTML> (Accessed on September 30, 2021).

For example, Professor Jovanović categorizes the sources of law in the European Union into those that pertain to equal treatment of men and women in the employment process, where he considers Directives 76/207/EEC and 2000/78/EC, and then those that ensure equal treatment during employment, as well as upon termination of employment, in terms of categorizing reasons for dismissal as impermissible that relate to pregnancy, maternity, maternity leave, which is found in the Charter of Fundamental Rights of the EU; cited according to: Jovanović, P. (2011). „Aktuelni aspekti principi zaštite zaposlenih“. *Zbornik radova Pravnog fakulteta u Novom Sadu*, no. 3/2011, 146.

²¹ *Defrenne v. Sabena*, Judgment of the Court of April 8, 1976. The Court affirmed the principle of equal pay for men and women for work of equal value, as otherwise it constitutes direct discrimination based on gender. Differences can only exist if there is an objective reason, and that it is based on different qualifications, working conditions, and the nature of the job.

²² Antonijević, Z. (2011). *Rodna ravnopravnost u Evropskoj uniji, zakonodavstvo i sudska praksa*. Belgrade: Prosecutors Association of Serbia, 12.

from an employment relationship include not only the basic pay for work performed but also allowances for overtime, bonuses, per diems on business trips, including severance payments, thus extending the discrimination between men and women regarding wages to allowances and bonuses. Numerous uncertainties remained regarding earnings that the Directive's text did not resolve. In this regard, the European Court of Justice's significant case regarding the need to clarify that unequal pay for part-time employees in relation to full-time employees does not constitute discrimination, as confirmed in the ruling of case 96/80 *Jenkins vs. Kingsgate*.²³ According to the principle of *pro rata temporis*, the Court indeed could not find elements of direct discrimination. However, the Court noted that unequal treatment could be discussed if the employer employs women, who work part-time to a greater extent than men who work full-time.²⁴ This laid the foundation for recognizing indirect discrimination years later, although the ruling in the *Bilka-Kaufhaus* case, decided much earlier, is a pioneer in proclaiming the prohibition of discrimination.²⁵

Pioneeringly formulated, it was soon complemented the following year by the adoption of Directive 76/207/EEC on the implementation of equal treatment for men and women with regard to employment, vocational training and promotion, and working conditions.²⁶ One of the novelties introduced by this Directive is the expansion of prohibited bases for discrimination, including discrimination based on family and marital status besides gender. With the re-proclamation of equal treatment in all types of professional orientation and retraining, this directive only deepened issues of gender discrimination, thus creating the basis for the adoption of new Directive 2002/73/EC.²⁷ This docu-

²³ Judgment of the Court of March 31, 1981.

²⁴ Antonijević, Z. (2011). *Rodna ravnopravnost u Evropskoj uniji, zakonodavstvo i sudska praksa*. Belgrade: Prosecutors Association of Serbia, 13. Similarly, the Court concluded while considering the issue of additional earnings in case 109/88 *Danfoss*. As the Court established parameters for acquiring additional earnings in the form of physical mobility, training, and experience, it found that women could be placed at a disadvantage in relation to the criterion of mobility due to gender roles assigned to women, who, in addition to their professional role, also have a primary role in the household, which reduces their ability to adapt to the place and time of work.

²⁵ *Bilka-Kaufhaus GmbH*, Case C-170/84. The case concerned the disadvantageous position of part-time employees, who were predominantly women, compared to the position of full-time employees, resulting in a disadvantageous situation for women in acquiring rights to old-age pensions.

²⁶ Directive 76/207/EEC on implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, available at <https://op.europa.eu/en/publication-detail/-/publication/701c4ff4-6cb7-4899-b44b-b1eb65fe2953/language-en>

²⁷ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the

ment emphasized that it would not be considered discrimination if a particular job requires a specific gender only when it is determined by the nature of the job, and it provided for affirmative action measures since privileged treatment was proclaimed for pregnant women and mothers in employment. In addition, a special corpus of their rights was envisioned, allowing pregnant women to enjoy the right to take time off for prenatal exams, with a prohibition of dismissal at the beginning of pregnancy, as well as exemption from night work. The goals set were ambitious, considering some of the judicial decisions made before the adoption of this directive.²⁸

With the development of community law, the principle of equal treatment of men and women also developed, gaining application in other important spheres.²⁹ This led to the specification of existing directives in the field of work

principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002L0073> (Accessed on September 8, 2022).

It is also worth mentioning Directive 79/7/EEC on the implementation of the principle of equal treatment for men and women in the field of social security, Directive 86/613/EEC on equal treatment of men and women in certain areas such as agriculture, with the proclamation of the principle of equality also in the sphere of self-employed men and women, Directive 92/85/EEC on improving the health and safety of pregnant workers, mothers who have recently given birth and women who are breastfeeding, Directive 96/34/EC on parental leave with a specifically proclaimed right for a parent to return to work after its use and special protection from dismissal. Finally, complementing all these directives is Directive 97/80/EC on the burden of proof in cases of gender-based discrimination.

²⁸ The case that attracted the most attention was the 'male midwives' case. In the case 165/82 *Commission v. United Kingdom*, Judgment of the Court of 17 October 1995, the Court took the position that there is no place for discrimination in employing only women for the position of a midwife, considering the high level of sensitivity required for the job. Finding no contradiction with Community law, the Court reached this conclusion by pointing out the unique relationship between the patient and the midwife, where the special sensitivity of the person was set as a key factor for performing the midwife's job. In doing so, the Court, guided by its own reasoning on gender roles, deprived men of the sensitivity required for this job, although a gynecologist, who can also be male, participates in the same life situation, as the nature of his job is not determined by gender. Therefore, we consider the Court's reasoning in this stance to be quite questionable.

The stance taken in the case S-450/93 *Kalanke v. Freie Hansestadt Bremen*, Judgment of the Court of 17 October 1995, was also contentious. The Court considered that the provisions of German law, which give priority in career advancement to the less represented gender in managerial positions of equal qualification as an affirmative action, were actually a deviation from the principle of equal treatment. This ignored the significantly lower percentage of women compared to men in such positions. We can conclude that this decision represented a step backward for European Union law.

²⁹ The need to extend the principle of gender equality to other spheres, beyond the field of work, led to the adoption of Directive 2004/113/EC to achieve gender equality between men and women in the provision of goods and services. Definitions of direct and indirect discrimination are adopted, and the application of this

and employment by adopting the new Directive 2006/54/EC.³⁰ This is, in fact, a comprehensive Directive, adopted with the aim of consolidating the principles of equal treatment proclaimed in different spheres.³¹ Nielsen highlights that the goal of adopting this directive was actually to systematize issues related to gender equality to make the Directive more applicable,³² while Barnard believes that a comprehensive directive is always a better solution due to the incorporation of public policy.³³ The importance of this directive is evident in the field of reconciling professional and private obligations and establishing equality of men and women as parents, as it provides for a special form of leave for child care, so-called parental leave, which can be used by the child's father, in addition to the existing right to maternity leave. This only anticipated the possibility for fathers to use this leave, while special paternity leave would wait a little over a decade. Kovačević indicates that this comprehensive directive also influenced the progressive understanding of the European Court of Justice regarding the principle of equal treatment.³⁴ This relates to the understanding of direct discrimination based on gender, which encompasses unjustifiable differences based on criteria related to the gender of the worker, such as pregnancy or childbirth.³⁵ Such reasoning by the Court was valuable in recognizing rights from the corpus of motherhood and their interconnection with discrimination based on gender. The European Court of Justice confirmed

regulation is extended to the field of social security. <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=celex%3A32004L0113> (Accessed on October 1, 2021).

³⁰ 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), Available at: <https://eur-lex.europa.eu/eli/dir/2006/54/oj> (Accessed on September 19, 2022).

³¹ Mulder, J. (2018). „Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)“. *International and European Labour Law* (ed. Edoardo Ales, Mark Bell, Olaf Deinert, Sophie Robin-Olivier). Hart Nomos Beck, 549.

³² Nielsen, R. „2006/54/EC: Gender equality“. *EU Labour law – a commentary* (ed. Monika Schlachter). Wolters Kluwer, 30.

³³ Barnard, C. (2012). *EU employment law*. Oxford: Oxford University press, 259.

³⁴ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Belgrade: Faculty of law of the University of Belgrade, 1021.

³⁵ Judgment in case C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen/VJV-Centrum/Plus*, of November 8, 1990. Similarly, the Court took the same stance regarding unequal treatment directly or indirectly related to pregnancy in the case of Case C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd*, ECJ, dated 14 July 1994, as well as due to non-renewal of a fixed-term contract because of pregnancy in the case of Case C-438/99, *Maria Luisa Jimenez Melgar v. Ayuntamiento de Los Barrios*, ECJ, dated 4 October 2001.

this in the *Dekker* case³⁶, considering discrimination based on pregnancy as discrimination based on gender, given that only women, by nature, can give birth. Similarly, it decided in the *Hertz* case³⁷, creating a proactive approach when it comes to discrimination based on motherhood.³⁸ The European Court of Human Rights case *Zarb Adami*³⁹ should not be forgotten, where the legal provision allowed people with family obligations to be exempted from jury duty, leading to unequal gender representation at Maltese courts in favor of men. In addition to the above, the Directive first introduced the right to leave for adopting children, and such provisions undoubtedly affected the amendment of the legislation of member states, while practice will show the impact on the prohibition of discrimination against employed parents when returning to work, which was one of the intentions of the Directive's authors. A shift was also observed in the definition of indirect discrimination, as it no longer requires a quantitative criterion in the form of a certain percentage of people who are put at a disadvantage due to an ostensibly neutral norm, criterion, or practice.⁴⁰ Such a definition should be considered a step forward, given that it facilitates the proof of indirect discrimination.

We can agree with Barnard that the principle of equal treatment is a driver of change in EU law,⁴¹ as confirmed by the recently adopted Directive 2019/1158 on reconciling the professional and family lives of parents and caregivers.⁴² Establishing a balance between family and professional life is considered an important segment of the principle of equal treatment, hence the term work-life balance has been formed in theory.⁴³ The inability to reconcile family and private life negatively reflects on children, who suffer from

³⁶ C-177/88, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen/VJV-Centrum/Plus*, November 8, 1990.

³⁷ CJEU, C-179/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening*, November 8, 1990

³⁸ Masselot, A., Caracciolo di Torella, E., Burri, S. (2012). *Fighting discrimination on the grounds of pregnancy, maternity and parenthood*. European commission, 6.

³⁹ *Zarb Adami v. Malta*, app. no. 17209/02, of June 2, 2006.

⁴⁰ Nielsen, R. „2006/54/EC: Gender equality“. *EU Labour law – a commentary* (ed. Monika Schlachter). Wolters Kluwer, 36.

⁴¹ Barnard, C. (2012). *EU employment law*. Oxford: Oxford University press, 253.

⁴² 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1158> (Accessed on July 17, 2022).

⁴³ Kirton, G. (2011). „Work-life balance, attitudes and expectations of young black and minority ethnic graduates“. *Equality, inequalities and diversity, contemporary challenges and strategies* (ed. Geraldine Healy, Gill Kirton, Mike Noon). London, 252.

insufficient attention.⁴⁴ There are also consequences for the state's economic plan, as economists warn that there has been a 10% drop in GDP per capita in the European Union, which could be mitigated by involving men more in the sphere of unpaid work to reduce the disparity with women's representation in family obligations.⁴⁵ The most significant contribution of this directive is the clear formulation of paternity leave, which Chierogato says is a right that has been long awaited.⁴⁶ The proclamations contained in this directive are significant, including 10 paid working days for fathers to care for a child, and the right given to the other "equivalent parent," which refers to the pioneeringly regulated right of parents from same-sex communities and adopters,⁴⁷ then the right to flexible work until the child turns eight, as well as the prohibition of dismissal while using leave. Not only have fathers emerged from the shadow of employees with family duties with the adoption of this directive, but an attempt has been made to break the stereotype that the mother's role in raising children is natural and inalienable. The shift should also be seen in recognizing the fact that there are family members who require care, without which they cannot function, and that support in the form of a special corpus of rights must be provided to those employees who care for them. However, the most significant contribution of this directive is seen in encouraging employees in EU member states to establish a balance between family and professional life.

EUROPEAN REALITY – THE GAP BETWEEN LEGISLATION AND PRACTICE

The normative framework presented appears to provide a solid foundation for achieving equal opportunities for men and women, especially in the realm of work. However, statistics indicate that the state of gender equality does not correspond to the analyzed policies and adopted regulations. Firstly, in the labor market of the countries of the European Union, there is a noticeable

⁴⁴ Gvero, S. (2019). „Pravo na odsustvo sa rada radi brige o djetetu – neophodnost izmjene normativnog pristupa“. *Pravo i privreda*, no. 1–3, 2019, 142–143.

⁴⁵ Employers Association of Slovenia (2017). *Pomirenje poslovnih i porodičnih obaveza i rodna ravnopravnost, regionalni pregled i smjernice*. Belgrade: Work Family balance, 13.

⁴⁶ Chierogato, E. (2020). „A work-life balance for all? Assessing the inclusiveness of EU Directive 2019/1158“. *International Journal of comparative labour law and industrial relations*, vol. 36, issue I, 8.

⁴⁷ Cafala, L. (2020). „The transposition of Directive 2019/1158 in Italy: unresolved issues and complex solution“. *Revue de droit compare du travail et de la securite sociale*, no. 4/2020, 84.

underrepresentation of women compared to men, with women having more stable and enduring careers.⁴⁸ This unequal representation of women in the labor market has been one of the reasons for job segregation. As a result, there are jobs predominantly held by male workers and those dominated by women. Consequently, women are more represented in jobs that are not typically male, such as teaching, law, social protection, and social sciences in general, while fields like engineering, agriculture, and construction in the European Union are essentially a man's world.⁴⁹

Beyond the underrepresentation of women, inequalities in opportunities for men and women in the European labor market have also led to a noticeable gender pay gap. Although the principle of equal pay formed the basis for anti-discrimination legislation in the European Union, starting with the founding Treaty, research indicates that women in this community earn on average 16% less than their male counterparts for the same job.⁵⁰ There are multiple reasons for this situation. Authors primarily point out the imbalance in the distribution of family responsibilities, predominantly borne by women, who more often choose to work part-time to reconcile family and professional obligations. In doing so, women consciously accept lower monthly income, which decades later results in lower pensions. Research shows a higher percentage of mothers aged 25-64 working part-time compared to those without children, and this percentage is also higher than that of fathers who use this working arrangement to combine job and family duties, which is only 4%.⁵¹ Hence, it is emphasized that women's careers are much more frequently interrupted due to motherhood than is the case with the career of a male parent.⁵² The inequality of opportunities for men and women implies social problems such as the challenge of reconciling family and private life. In addition to causing psychological stress, depression, reduced work motivation, and generally

⁴⁸ The research relates to women with one child up to 12 years of age, aged 25–64, who are less represented compared to men, whose careers last 37.9 years compared to the average career duration of 29 years for women; cited according to: Davaki, K. (2016). *Differences in woman's and man's work, care and leisure time*. European Parliament, 16.

⁴⁹ Mills, M., Tsang, F., Prag, P., Ruggeri, K., Miani, C., Hoorens, S. (2014). *Gender equality in the workforce: reconciling work, private and family life in Europe*. European Commission, 5.

⁵⁰ International trade union confederation report, *The decent work agenda: a gender perspective*. Brussels, 2009, 15.

⁵¹ Davaki, K. (2016). *Differences in woman's and man's work, care and leisure time*. European Parliament, 16.

⁵² Schulze, E., Gergoric, M. (2015). *Maternity, paternity and parental leave: Data related to duration and compensation rates in the European Union*, Policy Department C: Citizens' Rights and Constitutional Affairs (European Parliament 2015), 72.

deteriorating health and efficiency of employees,⁵³ today's legislations, including supranational European Union law, struggle to find an adequate way to balance these important life spheres.

Influenced by patriarchal attitudes, modern societies have not abandoned the role of motherhood as the primary one, while the father is still seen as the sole breadwinner. This perpetuates discrimination based on motherhood, often resulting in women being excluded from performing certain tasks.⁵⁴ The birth of a child naturally forms a bond between mother and child, which is why it is traditionally believed that it is solely the mother's responsibility to take leave for child care. Consequently, only 2% of fathers in the European Union make use of this right.⁵⁵ Therefore, maternal absence from work upon the birth of a child leads to almost unavoidable career interruptions as mentioned earlier. This way, women are excluded not only from the labor process but also from further education, affecting the full realization of their intellectual capacities, providing some authors the basis to argue the justification of making a difference in the wages of men and women for work of equal value.⁵⁶ The unequal chances for men and women on a professional level are also reflected in the inequality in the distribution of household chores. Data supports the fact that women in the European Union spend 18 hours per week on domestic chores, while men spend three times less.⁵⁷ Women entering the labor market and contributing to the household budget has not reduced their domestic responsibilities but has, on the contrary, created an additional burden of obligations.

Additionally, authors highlight that the differences in unequal pay for work of equal value between men and women can also be explained by

⁵³ Buddhapriya, S. (2009). „Work-family challenges and their impact on career decisions: a study of Indian woman professionals“. *Vikalpa*, vol. 34, no. 1, 33.

⁵⁴ A good illustration is the already mentioned case of *Zarb Adami*, in which the European Court of Human Rights determined that a provision of Maltese law is discriminatory, allowing for the exclusion from the civic duty of jury service of those persons who have family responsibilities, which in most cases are women; cited according to: Etinski, R. (2013). „Indirektna diskriminacija u sudskoj praksi Evropskog suda za ljudska prava“. *Zbornik radova Pravnog fakulteta u Novom Sadu*, no. 1/2013, 59-60.

⁵⁵ Davaki, K. (2016). *Differences in woman's and man's work, care and leisure time*. European Parliament, 49.

⁵⁶ Wood, G. R., Corcoran, E. M., Courant, N. P. (1993). „Pay Differences among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries“. *Journal of Labor Economics*, 417–441. The mentioned authors believe that a woman, after giving birth, has a reduced intellectual capacity for work, which results in her being assigned a lower-paying job position.

⁵⁷ Mills, M., Tsang, F., Prag, P., Ruggeri, K., Miani, C., Hoorens, S. (2014). *Gender equality in the workforce: reconciling work, private and family life in Europe*. European Commission, 18.

traditions in the occupational choices of men and women.⁵⁸ This is connected to job segregation that creates so-called “male” and “female” occupations, with the latter naturally being less paid. This is further compounded by the opportunity for overtime work, and consequently higher earnings at the end of the month, which is more available to men, a situation that can be considered a result of the uneven distribution of family chores. In this context, there are views that women, due to such roles, are less represented in jobs that involve overtime work, such as managerial positions.⁵⁹ Furthermore, some authors believe that women with family responsibilities are pushed out of such jobs because these responsibilities prevent them from participating in after-hours meetings, which are considered part of the job.⁶⁰ There are also stereotypes that women are not suited for such jobs due to a lack of commitment.⁶¹ These theoretical positions are supported by statistics showing that less than 10% of managers in the European Union are women, and this percentage is even lower when it comes to the highest earnings in corporations.⁶² It is rightly concluded that high positions in the workplace and the employment of women are inversely proportional, with the share of women decreasing as one moves up the hierarchy to higher-paid positions.⁶³

The effects of not providing equal chances for men and women in employment, which are also visible through the possibility of advancement, should be connected to the aforementioned issues. The disregard for gender-equal policies, combined with stereotypes that the nature of employed men is leadership-oriented and that they are more capable, results in only one woman occupying one of the three highest-paid positions in companies in member states.⁶⁴ In this regard, the theory of the glass ceiling should be mentioned, representing barriers that are invisible and seemingly non-existent to women

⁵⁸ Prechal, S., Burri, S. (2009). *Pravila o EU rodnoj ravnopravnosti: kako su ona preneti u nacionalno pravo*. Luxembourg: European Commission, 14.

⁵⁹ Kirton, G. (2011). „Work-life balance, attitudes and expectations of young black and minority ethnic graduates“. *Equality, inequalities and diversity, contemporary challenges and strategies* (ed. Geraldine Healy, Gill Kirton, Mike Noon). London, 262.

⁶⁰ De Spiegelaere, S., Piasna, A. (2017). The why and how of working time reduction. European trade union institute, 65.

⁶¹ *Gender and career development*. European foundation for the improvement of living and working conditions. Dublin, 2007, 25.

⁶² Meyerson, E. D., Fletcher, K. J. „A modern Manifesto for shattering the glass ceiling“. *Harvard Business Review*, no. R00107, 127.

⁶³ *Gender and career development*, European foundation for the improvement of living and working conditions. Dublin, 2007, 25.

⁶⁴ Mullally, S. (2003). „Beyond the limits of non-discrimination: promoting gender equality“. *Equality in diversity* (eds. Cathryn Costello, Elis Barry). University of Leicester, 295.

who want to advance in their jobs but are simultaneously solid enough to prevent them from doing so. Women in employment face such barriers when they seek to advance to higher positions, which are better paid, but due to inequality of opportunities at work, they are only allowed to advance up to a certain level. The organization of “Equal Pay Day” indicates the reality of wage inequality between men and women for the same job in Europe, aiming to highlight the struggle of women to catch up to their male colleagues by performing work of equal value.⁶⁵ This day is organized annually and is marked in the member states on the day when women finally manage to equal the earnings of their male colleagues for the same job, starting from January 1st. Although the legislative framework for providing equal opportunities is clear and implemented in member states, data indicates that “Equal Pay Day” in 2019 was only reached on November 5th at the European Union level, which are disheartening facts that show a woman needs almost 11 months to earn the same as men in the workplace. The progress of certain countries should be taken into account; for instance, in Spain, this day was achieved on February 22nd of the mentioned year, and three days later in Austria, according to data available from the European Commission.

THE EROSION OF GENDER RELATIONS DURING THE CORONAVIRUS PANDEMIC – EXAMPLES FROM SOME EU COUNTRIES

Gender relations were examined in light of measures taken to prevent the spread of the coronavirus in the first months of the pandemic, based on statistical data from certain countries of the European Union. The closing of educational institutions and workplaces, along with the shift to working from home, further influenced the already unequal relationship between men and women. This situation necessitated a different organization of families worldwide. Additionally, women were more affected by the pandemic because they were overrepresented in front-line job sectors.⁶⁶ Due to social isolation, parents in many EU countries could not rely on older family members for

⁶⁵ European Commission, Equal Pay Day: Joint Statement by First Vice-President Timmermans and Commissioners Thyssen and Jourová, https://ec.europa.eu/commission/presscorner/detail/en/statement_19_6192 (Accessed on October 5, 2021).

⁶⁶ International Labour Organization, *Covid-19 and the world of work: impacts and responses*, Geneva, 2020, 6. For more about the position of frontline employees, see: Rajić Čalić, J. (2021). „Pravni položaj zaposlenih u prvoj liniji za vreme vanrednog stanja usled pandemije virusa Kovid 19 u Srbiji“, *Pandemija Kovida 19: pravni izazovi i odgovori*. Belgrade: Institute of Comparative Law, 15–113.

childcare, necessitating a balance between work duties and at least one parent working from home. Initial research results come from Spain and Italy, countries that were most affected by the virus in the first wave of the pandemic. In these states, women took on the bulk of domestic responsibilities.⁶⁷ The assumption of household duties by the parent who agreed to work from home suggests that this situation deepened the existing gender inequality between men and women. In these countries, women, working from home, caring for children, and doing housework, bore this additional burden. This is especially emphasized by authors in Italy, noting the increase in hours women spent on household chores and childcare compared to the period before the lockdown.⁶⁸ The research also showed that a high percentage of men continued to work at their workplace, compared to a higher percentage of mothers who agreed to work from home. Particularly concerning are comparative data outside the EU states, in the United Kingdom, the USA, China, and Japan, which show that women faced unemployment to a large extent, as a result of reduced labor market demand, and they had difficulty reintegrating into the labor market.⁶⁹ Changes in the labor market and the lack of jobs could further negatively affect women's employment, increase their involvement in household chores and childcare, and deepen the gender gap, which is why the International Labour Organization's call for all measures to prevent the virus from spreading must be aligned with gender equality policies is unsurprising.⁷⁰

CONCLUSION

We can conclude that the development of European legislation has been on an upward trajectory concerning the principle of equal treatment. However, it seems that the normative framework has not been followed by success in implementing rights, or, as Kovačević reasons, it has not been accompanied by

⁶⁷ Del Boca, D., Oggero, N., Profeta, P., Rossi, Maria Cristina, (2020). Women's and men's work, housework and childcare, before and during COVID-19. *Review of Economics of the Household*, 2020, 18, 1001–1017. file:///E:/ZA%20RAD/INSTITUT/JRC/rad%20za%20EU/Women's%20work,%20housework,%20and%20childcare%20before%20and%20during%20COVID-19%20VOX,%20CEPR%20Policy%20Portal.html (Accessed on October 7, 2021).

⁶⁸ *Ibid.*

⁶⁹ Belot, M., Choi, S., Tripodi, E., Van den Broek-Altenburg, E., Jamison, C. J., Papageorge, W. N. (2020). *Unequal Consequences of COVID-19 across Age and Income: Representative Evidence from Six Countries*, (IZA Institute for labour economics 2020), 10.

⁷⁰ International Labour Organization, *Covid-19 and the world of work: impacts and responses*. Geneva, 2020, 18.

“equal quality of men and women’s work engagement,” which is why the listed manifestations of unequal treatment are still present.⁷¹ It is rightly concluded that societal problems cannot be solved merely by enacting laws, or by “legal fetishism”,⁷² which seems particularly the case with the prohibition of discrimination based on gender. European standards represent minimal conditions that contracting states should follow in standardizing national provisions. Some have gone further. For instance, a positive trend in anti-discrimination legislation is noticeable in Nordic countries, such as Sweden, which has established a specialized ombudsman for gender equality, a useful example of legislative policy followed by Denmark and Norway.⁷³ In Sweden, an employer with a collective of more than ten members is obliged to adopt an “annual equality plan,” which involves assessing equal pay for male and female employees at the workplace, considering the systematization of job positions.⁷⁴ Unions in Northern European countries provide special support in the implementation of these plans, seen as a social catalyst for change and a cornerstone of respect for human rights and equality principles. Strengthening unions, as social partners, can serve as a good example for other member states, whose activities can solve some significant societal problems.

Nevertheless, what we consider important for establishing the principle of equal treatment relates to recognizing the needs men have when establishing equal treatment. Although when discussing the preservation of the principle of gender equality, attention is mainly focused on women, who most often encounter discrimination at work, we agree with those authors who propose that in addition to valuing women’s needs, men’s needs should also be considered, especially in light of fathers’ rights to parental leave, recognizing the role they have in family duties.⁷⁵ We share the opinion that for the development of the principle of equal treatment, in general and in the European Union, it is necessary to pay attention to the specific needs of men, instead of expanding the concept of protecting women.⁷⁶

⁷¹ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Belgrade: Faculty of Law of the University of Belgrade, 1061.

⁷² Jašarević, S. (2014). „Antidiskriminaciono pravo Srbije u oblasti rada i standardi Evropske unije”, *Perspektive antidiskriminacijskog prava* (ed. Željko Potočnjak, Ivana Grgurev, Andrea Grgić). Zagreb: University of Zagreb – Faculty of Law, 50.

⁷³ Bell, M. (2002). *Anti-discrimination law and European union*. New York: Oxford University press, 199–200.

⁷⁴ Jovanović, P. (2011). „Aktuelni aspekti principi zaštite zaposlenih“. *Zbornik radova Pravnog fakulteta u Novom Sadu*, no. 3/2011, 148.

⁷⁵ Kovačević, Lj. (2021). *Zasnivanje radnog odnosa*. Belgrade: Faculty of Law of the University of Belgrade, 1061.

⁷⁶ Grgurev, I. (2014). „Diskriminacija trudnih radnica: Kako uspješno pomiriti trudnoću sa zahtevima tržišta“. *Perspektive antidiskriminacijskog prava* (ed. Željko

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