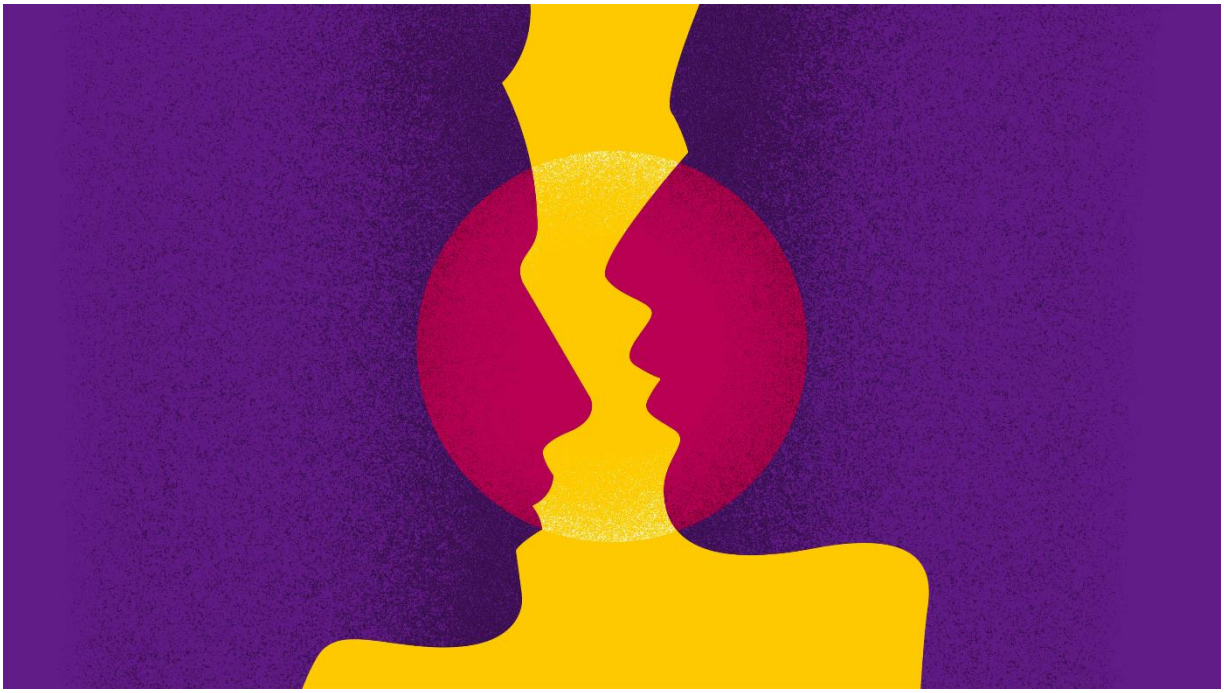
# A Commentary on the Request for an Advisory Opinion to the Inter-American Court of Human Rights

Utrecht Centre for European Research into Family Law (UCERF)



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# A. Introduction

The Utrecht Centre for European Research into Family Law (UCERF)[1] greatly welcomes the request of the Republic of Argentina for an Advisory Opinion to the Inter-American Court of Human Rights (hereafter: I/A Court HR) on the content and scope of care as a human right. The subject of care is central to our legal research, which focuses not only on family law, but also on human rights law, elderly law, labour law and social security law. Drawing on this research, as well our membership of the Europan Commission's European network of legal experts in gender equality and non-discrimination[2], UCERF is very pleased to contribute to the Advisory Opinion by sharing insights from a Dutch and European legal context. We are no experts of the American Human Rights System, and we cannot give precise answers to the abundance of questions that are posed, but we nevertheless believe that our commentary will be of value.

In this commentary, we will highlight several issues that we believe should receive more attention when discussing the right to care. We do so with a focus on national and European legislation and case law and policy documents (e.g. the Dutch Work and Care Act, the EU directive on Work-Life Balance, the European Convention on Human Rights and the European Care Strategy), as well as academic and policy discussions. The commentary is structured on the basis of the questions put forward to the I/A Court. It adresses a number of the questions: care as an autonomous right (first question), gender equality and care (second question), care and the right to work and social security (fourth question) and right to health (fourth question).

# B. The first question: care as an autonomous right

### *a. Is care an autonomous human right enshrined in Article 26 of the American Convention on Human Rights?*

## 1. Care as an autonomous right

The first sub-question asks whether care can be considered an autonomous, that is independent, social and economic right. Considering the previous recognition of autonomous rights under the American Convention of Human Rights (such as the right to truth and the right to a healthy environment), care can logically be considered an autonomous right. It is of fundamental, even existential, importance for both societies and individuals (as the Request indicates on page 1 – 'all people require care for their well-being and development'). Care as an autonomous right could be grounded in the right not to be burdened disproportionally by providing care, as this infringes upon free and equal chances that every person is entitled to.

Furthermore, it cannot be subsumed under one human right only, as is illustrated in the Request. The Request highlights its many relations to other rights, which rights – according to the UCERF authors – play a role in the area of equality law, health law, family life, labour and social security.

## 2. An example of a fundamental right to care

It could be interesting for the I/A Court H.R. to know that a constitutional provision on care has already been unofficially proposed by the Dutch Emancipation Council of the National Government. The unofficial proposal for the constitutional change consisted of three provisions:

[1] UCERF is a research institute of the Utrecht University School of Law.
[2] https://www.equalitylaw.eu.

one specific and separate provision on the right to care (see below: 1) and two additional paragraphs to existing provisions 19 (on the right to work) and 20 (on the right to social security) (see below: 2b and 3b). They were formulated as follows:[3]

1a. The authorities stimulate that the intrinsic worth of non-professional care is expressed in law and becomes a guiding legal principle.
1b. The authorities take measures and create conditions for giving and receiving care.
1c. The legal status of non-professional carers shall be laid down by Act of Parliament.

2a. It shall be the concern of the authorities to promote the provision of sufficient employment.
2b. Rules concerning the legal status and protection of professionally working persons, whether or not combining this with non-professional caring responsibilities and concerning co-determination shall be laid down by Act of Parliament.
2c. (…)

3a. It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.
3b. Rules concerning entitlements to social security for professionally working persons and/or non-professionally carers or others that do no fall into the former categories shall be laid down by Act of Parliament.
3c. (…)

This proposal was motivated as follows: 1. care as a constitutional right may contribute to the recognition of the (societal) value of care, 2. care as a constitutional right may express that the state has an obligation with regard to care, as care concerns a condition for the social, economic and cultural development of citizens that is of general interest, and 3. care as a constitutional right may break through the dominance of paid labour as source of rights.[4]

*b. If so, how does the Court understand the right of people to provide and receive care and to exercise self-care?*

## 3. Pay attention to all three dimensions of the right to care

The Request identifies three dimensions of care: the right to provide care, the right to receive care and the right to self-care. The focus seems to be on the right to provide care. The right to receive care and the right to self-care appear to be discussed to a lesser extent, although these rights are highly relevant for particular groups of people. To mention the most salient: minor orphans, minor single refugees and children of single-headed households, all of whom may face a lack of care, or even abandonment out of necessity, in situations of poor care infrastructures. Furthermore, for older people and persons with mental or physical disabilities the right to receive care and self-care is of utmost importance. The focus in the Request on the right to provide care could of course enhance the right to receive care, in the sense that conditions that support the provision of care will result in more opportunities to receive care. Nonetheless, the latter has its own normative dimensions, such as accessibility, affordability, acceptability and quality of receiving care. The same goes for self-care, for which also other aspects are relevant, such as agency and freedom of

[3] L. Lousberg & F. van Vliet, 'Zorg in de Grondwet, in het familierecht en in het arbeidsrecht', in: M. van den Brink c.s. (eds.), *Een stuk zeep in de badkuip. Hoe zorg tot haar recht komt.* Deventer: W.E.J. Tjeenk Willink 1997, p. 24.
[4] Y. Visser, *Met recht een emancipatoire zorg. Een beschrijving van het onderzoek naar zorg, mede met het oog op de juridische toepasbaarheid ervan*, Den Haag: Emancipatieraad 1994, p. 38-39.

choice for the type of care or even to refuse care. We will come back to this so-called 'AAAQ-Framework' later, when we discuss the interrelationship between the right to care and the right to health. The right to refuse care is discussed under the next heading.

## 4. The right to refuse care

Guardianship laws for older people and persons with disabilities have long been characterized by paternalistic and over-protective regulations.[5] These assumptions about guardianship laws have been challenged by the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Article 12 CRPD introduced a new paradigm of 'universal legal capacity' for all persons, irrespective of disability.[6] The CRPD Committee interpreted Article 12 in General Comment no. 1, urging States Parties to abolish 'substitute decision-making regimes', in which guardians can be appointed against the will of the persons concerned to make decisions that are believed to be in their objective 'best interest'.[7] Instead, persons with disabilities should be provided with 'supported decision-making regimes', in which support persons respect the autonomy, will and preferences of this group.[8] The interpretation of Article 12 CRPD by the CRPD Committee has sparked many debates in the literature about the possibilities and limits of state intervention in the context of guardianship and decision-making support.[9] In addressing the right to care, it is deemed relevant for the I/A Court H.R. to consider the extent to which the right to care encompasses a right of in particular older people and persons with disabilities to refuse care, specifically in the form of guardianship measures and/or decision-making support.

## 5. The extent of care as a moral value

Care is considered a necessity, a job and a right: but care is also a moral value, with intrinsic worth. So care is not only instrumental, but is valuable on its own and/or could be valued also in terms of the quality of life. Care policies should be effective, but should at the same time respect the intrinsic value and quality of care.

The concept of care as a moral value is for example relevant when care is provided by underpaid and overburdened caregivers, but also when individuals receive impersonalised/dehumanized technical care (by using robotics e.g., infringing the privacy of the person cared for). Recognizing care as a value is highlighted in the theory of ethics of care, which considers human interdependence as a fact of life (maybe expressed in care as necessity), which entails embodiment, vulnerability, finitude of human capabilities and existence, and recognition of the plurality of human beings, which requires attentiveness for the uniqueness of each human being.[10]

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[5] P.A. Hommel, L. Wang & J.A. Bergman, 'Trends in Guardianship Reform: Implications for the Medical and Legal Professions', *Law Med Health Care* (18) 1990, No. 3, p. 213.

[6] Convention on the Rights of Persons with Disabilities, Article 12(2).

[7] Committee on the Rights of Persons with Disabilities, *General Comment No. 1 – Article 12: Equal Recognition,* United Nations 2014, p. 6 & 12.

[8] Committee on the Rights of Persons with Disabilities, *General Comment No. 1 – Article 12: Equal Recognition,* United Nations 2014, p. 1.

[9] See, for example: C. de Bhailís & E. Flynn, 'Recognising legal capacity: Commentary and analysis of Article 12 CRPD', *International Journal of Law in Context* (13) 2017, No. 1, p. 6;
P. Harpur, 'Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities', *Disability & Society* (27) 2012, No. 1; W. Martin e a., *The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Article 12 in Capacity/Incapacity Legislation across the UK,* Essex: Essex Autonomy Project 2016.

[10] S. Sevenhuijsen, 'Justice, Moral Reasoning and the Politics of Child Custody', in: E. Meehan and S. Sevenhuijsen (eds.), *Equality, Politics and Gender* Sage Publications London 1991.

Care as a moral value also has a broader meaning of carefulness, which goes beyond the right to care, but is at the same time relevant for the right to care. This meaning of care requires a responsive government, that acknowledges and takes into account individual circumstances. This idea of carefulness or responsiveness can be recognized in the general moral principle regarding state action as indicated by Dworkin, namely paying everyone equal concern and respect.[11] This broad moral value of carefulness or responsiveness of the state could be translated in a more specific legal value of care that might be relevant in designing and interpreting the law. This legal value of care ought to be taken into account by the state, in order to prevent disadvantages for people who care or who are in need of care. In this sense care gets two additional meanings: firstly carefulness or responsiveness of the state, and secondly care as a legal principle, which could be relevant in designing and interpreting law by recognizing the moral practice of care. Both additional meanings will be illustrated with two examples where care as a moral practice played a signifant role.

The first additional meaning of care as governmental carefulness concerns the Child Care Benefit Scandal in the Netherlands, in which the Dutch government was so focused on combatting fraud in the name of solidarity, that it lost sight of the legal protection of economically vulnerable citizens who needed child care benefits for a decent standard of living. The child care benefit system was a system of advance payments by the tax authorities that could be reimbursed completely, even when minor data in the original – complex - application were omitted or not evidenced. This system did not know a hardship clause. The tax authorities claimed enormous amounts of money, without carefully researching the evidence and seriousness of fraud. Although there were civil servants who voiced their concerns, the policy did not change. The citizens who had to pay back large amounts of received benefits (that had often already been spent), were faced with an unresponsive organization and a lack of transparency.

When reflecting upon this scandal and the extensive public and academic debate it resulted in, care as a moral value and obligation for the state towards its citizens has received attention.[12] This duty of the state to be careful and responsive towards its inhabitants would be an extension of the right to care as indicated by the request.

The following example of the second additional meaning of care as a legal principle for legal interpretation is derived from a discussion among gender and law experts in the Netherlands about the EU Court of Justice Decision (1994) on the different treatment between part-time workers and full time workers with regard to overtime allowances. The EU Court of Justice considered the restriction of overtime allowance to full time workers justifiable, because of the additional burden for workers. Critics argued that the EU Court of Justice denied that parttime workers could have caring obligations that would make additional working hours burdensome as well. If the European Court had used care as relevant for the interpretation of 'additional burden' in relation to overtime allowances, the decision could have turned out differently. Care could also play a role in legal concepts such as 'acting as a good employer', e.g. in cases in which an employer has the discretion to (dis)allowing short term carer's leave.

Care as a legal value is especially of relevance when specific legislative rights and obligations with regard to care are underdeveloped or lacking. An example is the European Pillar on Social Rights

[11] R. Dworkin, *Taking Rights Seriously*, Harvard: Harvard University Press 1977.

[12] Compare the inaugural lecture of I. Leijten, *Grondrechten, grondvertrouwen en de relationele constitutie* (inaugural lecture Tilburg University 2023), Tilburg: Tilburg University 2023. She refers regularly to J. Nedelsky, *Law's Relations. A Relational Theory of Self, Autonomy, and Law*, Oxford: Oxford University Press 2011. Leijten cites (p. 33) Nedelsky (2011, p. 35) as follows: "I see a close link between the failure to take dependency and care seriously and the traditional 'subject' of legal and political thought who is abstracted away from its embodied state."

(EPSR), which will be introduced and discussed later in this commentary.[13] This policy document contains highly relevant principles regarding work-life balance and childcare, support and long-term care, which are not directly enforceable.[14] Its influence on secondary legislation is not fully clear yet; on the one hand, the European Commission uses the EPSR as a basis for taking social policy initiatives. On the other hand, the national courts and tribunals and in particular the Court of Justice of the EU can use the EPSR to interpret other provisions of EU law.[15]

## 6. Unpaid or informal care

In section II on the Considerations motivating the request, care policies are restricted to 'those public policies that allocate resources to recognizing, reducing and redistributing unpaid care in the form of money, services and time'. The authors of the Comment would like to invite The Inter-American Court not to restrict the interpretation of care and care policies to unpaid care only. Care is not only unpaid, but if it is paid, it is often underpaid and provided in insecure working conditions. Simply consider domestic workers, who generally have a low income and a very poor legal position. Care policies should take both unpaid and underpaid caring jobs into account. This comment is of relevance for the first question about the understanding of care and the scope of State obligations: we consider it better to indicate care as informal care, which is broader than unpaid care, and the scope of a State's obligation should not only consider money, services and time, but also the legal position of carers. Admittedly, in the fourth question, low status paid care work is thematised, also in connection with the right to work (III.d.1), but it should be included in care policies as well.

*c. What obligations do States have in relation to this human right from a gender, intersectional and intercultural perspective and what is its scope? What are the minimum essential contents of the right that the State must guarantee, the budgetary resources that can be considered sufficient and the progress indicators that allow monitoring the effective fulfilment of this right? What public policies must States implement in the area of care to ensure the effective enjoyment of this right and what role do comprehensive care systems specifically play in it?*

## 7. Positive and negative State obligations

The first question posed to the Inter-American Court of Human Rights concerns the status of care as an autonomous human right enshrined in Article 26 of the American Convention on Human Rights. This question seems to assume that care should be qualified as a social and economic human right, which requires positive State action. This assumption is plausible, considering the social and economic dimensions of care, and the links with several social, economic, cultural and environmental rights. Several of these links are indicated in the Request in section III.d. The qualification of care as a social and economic right, brings to the forefront State measures.

At this place, attention is also asked for negative obligations of the State to refrain from undue interference in the right to give care by parents to their children. Two cases of the European Court of Human Rights on the right to respect for private and family life may serve as illustrations of the relevance and interplay of negative and positive state obligations regarding parental care. The first case illustrates that the negative obligation of the State is not met when an interference in

[13] See for a brief introduction of those principles: Section A.10 and for a more extensive discussion: Section D 4.1.
[14] https://commission.europa.eu/system/files/2018-11/european_pillar_of_social_rights.pdf.
[15] S.B. Lahuerta & A. Zbyszewska, 'EU Equality Law After a Decade of Austerity: On the Social Pillar and its Transformative Potential', *International Journal of Discrimination and the Law* (18) 2018, No. 2-3, p. 180-181.

family life is not based on a careful decision. The second case illustrates that the negative obligation of the State is not met when an interference in family life is based on shortcomings of social policies by the State itself.

The lack of a careful decision, amounting to discrimination, played a role is the first case, the Cînţa v. Romania decision of the European Court of Human Rights (18 February 2020; application no. 3891/19). The Court held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention and a violation of Article 14 (prohibition of discrimination) of the Convention in conjunction with Article 8. The ECHR considered that the national courts had failed to carry out any meaningful assessment to explain why the mental health of the father should be a reason to curtail his contact rights even though there had been no evidence to show he could not take care of his daughter. Nor had the courts properly examined allegations that the child would be unsafe in his care; shown in what way they had taken account of the child's best interests; or considered alternative contact arrangements. The Court further considered that the mental illness of the father could not in itself justify treating him differently from other parents seeking contact with their children. In this case the father had made out a prima facie case of discrimination, which the respondent State had not been able to rebut (ECHR Fact sheet - Parental Rights 2022).

The second case illustrates the interplay of negative and positive obligations of the State. Both the lack of careful decision making and of not carrying out positive State obligations play a role in Saviny v. Ukraine, 18 December 2008 (Application no. 39948/06). According to the Factsheet - Parental Rights (2022) of the ECHR:

> "This case concerned the placement of children in public care on ground that their parents, who have both been blind since childhood, had failed to provide them with adequate care and housing. The domestic authorities based their decision on a finding that the applicants' lack of financial means and personal qualities endangered their children's life, health and moral upbringing.
>
> The Court held that there had been a violation of Article 8 (right to respect of private and family life) of the Convention, doubting the adequacy of the evidence on which the authorities had based their finding that the children's living conditions had in fact been dangerous to their life and health. It observed in particular that the judicial authorities had only examined those difficulties which could have been overcome by targeted financial and social assistance and effective counselling and had not apparently analysed in any depth the extent to which the applicants' irremediable incapacity to provide requisite care had been responsible for the inadequacies of their children's upbringing."

## 8. The principle of special protection: decision-making support

It is requested that the I/A Court H.R. takes special notice of the international human rights law principle of special protection, whereby in particular the situation of older persons and people with disabilities must be taken into account with a differentiated approach, since care as a human right is of vital importance for these groups.

One way in which older persons and people with disabilities receive care is by means of decision-making support and guardianship measures. The Request refers to several international commitments in this area, including the right of all persons to equality before the law,[16] the right of older persons to support in the exercise of legal capacity,[17] and the obligation of States to

[16] American Convention on Human Rights, Article 26.
[17] Inter-American Convention on Protecting the Human Rights of Older Persons, Article 30.

provide for comprehensive services to ensure an optimal independence and quality of life of persons with disabilities.[18]

According to the Request, care as a human right arises - among others - from the duty of States to design training programs and support measures for families and caregivers, ensuring that families and caregivers can guarantee quality care and exercise their social rights and right to self-care when performing the work of care.[19] These training programs and support measures are particularly significant for guardians, representatives and others providing decision-making support to older people and/or persons with disabilities. Numerous studies show that providing this decision-making support can be difficult, complex, stressful and burdensome.[20] As the Request notes, excessive work by caregivers can undermine the quality of care and lead to situations of impatience, irritation, or rejection of the demands of the elderly, the disabled and the sick.[21]

Family members and other persons from their social network provide significant decision-making support to older people and persons with disabilities.[22] However, family members often operate in a 'legal vacuum' in which their decision-making support functions are not always legally recognised.[23] As a result, the work of family members is easily overlooked in terms of recognition, renumeration and supervision. States should therefore adopt specific measures to ensure that family members providing decision-making support can enjoy their right to provide and receive care and to exercise self-care.

## 9. Family law and labour and social security law

The former comment highlights the parental right to provide care to children themselves, unless the best interests of the child indicate differently. This right does not only follow from Article 8 ECHR, but is also laid down in Article 18 of the UN Convention on Children's Rights. These rights can be considered 'social rights' and play a role in family law, including child protection law. Care also has an economic dimension, which is extensively indicated in Argentina's Request to the I/A Court H.R. and is recognized in this comment as well. The writers of this commentary consider it

[18] Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, Article III.

[19] Request for an Advisory Opinion to the Inter-American Court of Human Rights, p. 5.
referencing Inter-American Convention on the Protection of the Human Rights of Older Persons, Article 12.
S.G. Muñoz, *V Annual Report of the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA),* Inter-American Commission on Human Rights 2021, para. 1641.
J. Bango & P. Cossani, *Towards the construction of comprehensive care systems in Latin America and the Caribbean: Elements for their implementation*, UN Women & ECLAC 2021, p. 23.

[20] C. Bigby, M. Whiteside & J. Douglas, 'Providing support for decision making to adults with intellectual disabilities: Perspectives of family members and workers in disability support services', *Journal of Intellectual and Developmental Disabilities* (44) 2019, No. 4, p. 396–409, doi:10.3109/13668250.2017.1378873; L. Knox, J.M. Douglas & C. Bigby, '"I won't be around forever": understanding the decision-making experiences of adults with severe TBI and their parents.' *Neuropsychological Rehabilitation* (26) 2016, No. 2, p. 236–260, doi:10.1080/09602011.2015.1019519 25; K. Samsi & J. Manthorpe. 'Everyday decision-making in dementia: findings from a longitudinal interview study of people with dementia and family carers', *International psychogeriatrics* (25) 2013, No. 6, p. 949-961.; S.J. Cresp, S.F. Lee & C. Moss, 'Substitute decision makers' experiences of making decisions at end of life for older persons with dementia: A systematic review and qualitative meta-synthesis', *Dementia (London)* (19) 2020, No. 5, p. 1532-1559, doi: 10.1177/1471301218802127.

[21] Request for an Advisory Opinion to the Inter-American Court of Human Rights, p. 15.

[22] European Union, Agency for Fundamental Rights, *Legal capacity of persons with intellectual disabilities and persons with mental health problems*. Publications Office of the European Union, 2013, p. 54.

[23] Council of Europe, *Explanatory Memorandum, Recommendation No. R (99) 4 by the Committee of Ministers on principles concerning legal protection of incapable adults,* 23 February 1999, para 34.

of high importance to take caring responsibilities into account in relation to fair working conditions and social security. They also wish to indicate the relevance of state measures in the field of family law, which stimulate sharing care responsibilities (such as, for example, a mandatory parental plan after divorce on the division of care between parents) or which compensate for an unequal division of care between partners. The effectiveness of the obligation of spouses to care for each other, also financially, even after divorce, could be enhanced by state measures, such as accessible procedures to enforce these obligations. Mandatory pension schemes that give former spouses an equal share in pension allowances built up during marriage, irrespective of the division of care and work, is another an example. This comment will pay attention to these areas of law, that is: to family law and labour and social security law, through the lens of gender equality.

## 10. Some policy principles

The first question regards the minimum essential contents of the right that the State must guarantee and the public policies States must implement in the area of care to ensure the effective enjoyment of this right. The UCERF researchers have indicated already that a careful, non-discriminatory decision making process is important. In the same line gender stereotypes should not play a role in care policies. Interestingly, according to Dutch case law, awarding a higher amount of social assistance to second-degree relatives who share a household because of the care needs of one of them constitutes discrimination on the basis of Article 26 ICCPR against other unmarried persons who live together because of the care needs of one of them.[24] So care policies, including legislation, should be aware of possible discrimination on other grounds than gender. Furthermore, the giving and receiving of care, as well as self-care should not be practiced below the minimum standard of living.

For policy principles that go beyond the minimum contents, European policy principles could be inspiring. Firstly, the policy document European Pillar of Social Rights (EPSR), adopted by the EU in 2017, contains twenty principles and serves as a guide for potential actions of the Member States and the European Commission.[25] Interestingly, the EPSR mentions not only principles related to existing EU legislation, such as gender equality (Principle 2), equal opportunities and work-life balance (Principle 9) but also to newer areas as childcare and support to children (Principle 11), health care (Principle 16) and long-term care (Principle 18). In 2022, the European Commission adopted the European Care Strategy, which addresses multiple care issues such as long-term care, working conditions in the care sector, high quality and affordable care services.[26] Worth mentioning regarding childcare and support to children are the revised so-called Barcelona targets to be realised in 2030: at least 45% of children below the age of three and at least 96% of children between the age of three and the starting age for compulsory primary education should

[24] Supreme Court 8 December 2017, ECLI:NL:HR:2017:3081.

[25] European Parliament, Council, European Commission, 'Interinstitutional Proclamation 2017 on the European Pillar of Social Rights', *Official Journal of the European Union* 2017, C 428/10.
See: The European Commission, 'The European Pillar of Social Rights Action Plan', https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/, 2021.
See further, for example:
M. Bell 'The Principle of Equal Treatment and the European Pillar of Social Rights', *Giornale di Diritto del Lavoro e di Relazioni Industrial* 2018, No. 160, p. 783-810;
S.B. Lahuerta & A. Zbyszewska, 'EU equality law after a decade of austerity: On the Social Pillar and its transformative potential' (2018) 18 (2-3) International Journal of Discrimination and the Law, 180-181.

[26] European Commission, 'A European Care Strategy for caregivers and care receivers', https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=10382#navItem-1, 7 September 2022.

participate in early childhood education and care.[27] In addition, a Council Recommendation on access to affordable high-quality long-term care has been adopted.[28] The European Care Strategy draws a broader perspective on care issues than existing EU law, as it aims to improve the situation for both care receivers and the people caring for them, professionally or informally. More dimensions of care are thus acknowledged and some specifically addressed in this policy instrument. In our view, this thus constitutes a step, even if still quite modest, towards a stronger recognition of care as a value and a fundamental human right.[29] A conceptualisation of care as a human right in the jurisprudence of the Inter-American Court of Human Rights could provide a source of inspiration for the EU institutions and positively influence EU care policies.

# C. The second question: gender inequality and care

*What are the obligations of States in the area of care (giving care, receiving care and self-care) in terms of gender inequality in light of the right to equality before the law and the principle of non-discrimination enshrined in Articles 24 and 1.1 of the American Convention on Human Rights ? What are the obligations of States, in light of these articles, considering the intersection of vulnerability factors, especially socioeconomic status, disability, age, migratory status, sexual orientation, gender identity, among others?*

*What measures should States adopt to address the unequal distribution of care responsibilities based on gender stereotypes in accordance with Article 17 of the ACHR?*

*What obligations do States have in relation to care in light of Article 8.b of the Belém Do Pará Convention regarding the modification of socio-cultural patterns of behavior of men and women?*

*What equality criteria should be taken into account when adopting domestic law provisions on care in light of Art. 2 of the ACHR?*

The comment of UCERF on the second question on the right to care in terms of gender inequality, will consist of two main parts. The first part (1) will highlight the potential of concepts of equality and non-discrimination in European Union Law in relation to care issues. The second part (2) will address policy options for states to address gender inequality in relation to care. This part contends that an all-inclusive care policy should take into account the known effects of care policies and should entail measures in different areas of law.

## 1. The potential of concepts of equality and non-discrimination

### 1.1. Introduction

The development of EU gender equality law[30] since the 1970s offers rich insights in the potential of the conceptualization of equality and non-discrimination in relation to care issues. Ever since,

[27] Council of the European Union, 'Council Recommendation on early childhood education and care: the Barcelona targets for 2023,' https://data.consilium.europa.eu/doc/document/ST-14785-2022-INIT/en/pdf , 22 November 2022.
[28] Council of the European Union, 'Council Recommendation on access to affordable high-quality long-term care', https://data.consilium.europa.eu/doc/document/ST-13948-2022-INIT/en/pdf, 25 November 2022.
[29] See further, for example: J. Herring, *Caring and the Law*, Oxford: Hart Publishing 2013. (Hart Publishing 2013); E.C. di Torella and A. Masselot, *Caring responsibilities in European law and policies. Who cares?*, Oxfordshire: Routledge, Taylor and Francis group 2020.
[30] See for an overview:
S. Burri, *EU Gender Equality Law – update 2018*, Luxembourg: Publications Office of the European Union 2018, https://op.europa.eu/en/publication-detail/-/publication/dd711757-033f-11e9-adde-01aa75ed71a1/language-en.

facilitating the 'reconciliation of work, private and family life' has been part of the social agenda of the EU, which aims at a greater participation of women in paid employment. The Charter of Fundamental Rights of the EU recognises the 'reconciliation of family and professional life' as a fundamental social right in Article 33(2).[31] EU policies and law in this area are mainly limited to care of children and ill relatives by workers and aim at reducing gender gaps in pay, employment and care, as well as related pension gaps which are persistent in the EU.[32]

The 27 EU Member States are required to implement into their national law the minimum requirements of the applicable EU legislation (mainly directives in this field of law) as interpreted by the Court of Justice of the EU (CJEU or Court).

The focus in this part is on EU gender equality law and diverse prohibitions of sex discrimination. EU gender equality law covers equality between men and women in employment, occupational and statutory social security. The development of the prohibition of direct sex discrimination and its application to pregnancy and maternity can be a source of inspiration for other jurisdictions. This is even more relevant where it concerns the conceptualisation and application of the prohibition of indirect sex discrimination particularly in relation to care responsibilities, parental leave and part-time work. Given the unequal gender division of care, the fact that leave is primarly taken by women and their overrepresentation in part-time work, a sex-neutral provision or practice linked to care, leave or part-time work might disadvantage many more women than men. Such an indirect discriminatory effect on the ground of sex comes within the concept of indirect discrimination, which has been extensively developed by the Court and is now codified in EU gender equality directives.

In addition to gender equality directives, the steady development of care policies and law has culminated in the adoption of the Work-Life Balance Directive (WLB) in 2019,[33] which had to be implemented into national law by 2 August 2022.[34] Alongside the Pregnancy Directive 92/85,[35] workers of the Member States are now entitled to paid maternity, paternity, parental and unpaid

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All relevant documents can be found at Eur-Lex: https://eur-lex.europa.eu/homepage.html?locale=en; see for case law of the CJEU: <https://curia.europa.eu/jcms/jcms/j_6/en/>.

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

[32] See: European Commission, *2021 Report on gender equality in the EU*, Luxembourg: Publications Office of the European Union 2022, https://op.europa.eu/en/publication-detail/-/publication/11d9cab1-fa52-11eb-b520-01aa75ed71a1/language-en>.

[33] 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, *Official Journal of the European Union* 2019, L 188/79.

[34] See for a discussion for example:
Á. Oliveira, M. De la Corte-Rodríguez & F. Lütz, 'The new Directive on Work-Life Balance: towards a new paradigm of family care and equality?', *European Law Review* (45) 2020, No. 3, p. 295-323, p. 295;
E.C. di Torella, 'One more step along the way: the 2019 Work Life Balance Directive', *Revue de droit comparé du travail et de la sécurité sociale* 2020, No. 4, p. 70-81;
M. Bell, L. Waddington, 'Similar yet different: the Work-Life Balance Directive and the expanding frontiers of EU non-discrimination law', *Common Market Law Review* (58) 2021, No. 5, p. 1401-1432;
M. Weldon-Johns, 'EU work-family policies revisited: Finally changing caring roles?' *European Labour law Journal* (12) 2021, No. 3, p. 301-321.

[35] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), *Official Journal of the European Union* 1992, L 348/1.
See further, for example: S. Burri, 'Protection and rights related to pregnancy and maternity in EU law' *Revue de Droit Comparé du Travail et de la Sécurité Sociale* 2019, No. 4, 16-25.

carer's leave as well as time off for force majeure.[36] These directives contain specific prohibitions of discrimination and employment rights. The rich case law of the CJEU has often offered extensive protection against discrimination to workers. This part discusses briefly the most relevant issues of equality and non-discrimination in relation to care in EU law, illustrated with some case law. Section 1.2 offers a concise analysis of the prohibition of direct sex discrimination in relation to pregnancy and maternity. In Section 1.3, the potential of the application of the concept of indirect sex discrimination to care issues is discussed. The prohibitions of (sexual) harassment will be left out, but victimisation and specific protection related to leaves for care reasons is briefly outlined in Section 1.4. By providing basic information on the state of EU law on equality and care, this very concise discussion of the potential of EU law towards an increased recognition of the value of care shall hopefully inspire jurisdictions outside the EU. The sources mentioned provide reliable and hopefully inspiring additional information.

## 1.2 Protection against direct sex discrimination: pregnancy and maternity leave

The most important EU legislation on employment issues currently in force is the so-called Recast Directive 2006/54 on 'the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'.[37] It applies to access to employment and promotion, vocational training, employment and working conditions and dismissal. The Court considered in the Thibault case that this directive is intended to achieve substantive, rather than formal equality.[38]

The definition of direct sex discrimination Article 2(1)(a) of the Recast Directive reads: 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'.[39] In addition, the Directive specifies that discrimination includes 'any less favourable treatment of a woman related to pregnancy or maternity leave'.[40] In cases of discrimination for reasons of pregnancy, a comparison is not required, according to the CJEU. In the early 1990s, the Court decided in the famous Dekker case that the refusal to appoint a woman because she is pregnant amounts to direct sex discrimination, which is prohibited. The fact that there are no male candidates is not relevant if the reason for not appointing the woman is linked to her pregnancy. The Court did not accept additional justifications to the three written exceptions in the directive that might justify direct sex discrimination.[41] Financial consequences for the employer do thus not provide a justification for pregnancy discrimination.[42] Depriving a woman of the right to an assessment of her performance and consequently the possibility of qualifying for promotion because she was absent from the undertaking on account of maternity

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[36] See further: E.C. di Torella & A. Masselot, *Reconciling Work and Family Life in EU Law and Policy*, London: Palgrave Macmillan 2010.

[37] 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), *Official Journal of the European Union* 2006, L 204/23. This Directive brought together older directives which are repealed.

[38] In this case Directive 76/207 was at stake, which has been repealed by the Recast Directive: CJEU 30 April 1998, C-136/95, ECLI:EU:C:1998:178 (*Thibault*), para 26. See on the relation of the principle of equality and the reconciliation of work and family life: CJEU 2 October 1997, C-1/95, ECLI:EU:C:1997:452 (*Gerster)*, para 38 and CJEU 17 June 1998, C-243/95, ECLI:EU:C:1998:298 (*Hill and Stapleton*), para 42.

[39] Other non-discrimination directives contain roughly the same definition.

[40] As defined in the Pregnancy Directive 92/85, see Article 2(c). The minimum paid maternity leave in EU law is 14 weeks (Article 8).

[41] CJEU 8 November 1990, C-177/88, ECLI:EU:C:1990:383 (*Dekker*), paras 15-18. In the Recast Directive 2006/54, which repealed Directive 76/207, the three exceptions can be found in Article 14(2) on occupational requirements for which sex is a determining factor; Article 28(1) on the protection of women, particularly as regards pregnancy and maternity and Article 3 on positive action.

[42] CJEU 8 November 1990, C-177/88, ECLI:EU:C:1990:383 (*Dekker*), paras 19-26.

leave amounts to direct sex discrimination and is unlawful.[43] The CJEU also decided that although pregnancy is not in any way comparable to a pathological condition, the fact remains that pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to complete rest for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risks inherent in pregnancy and less favourable treatment on that ground, or perhaps even dismissal, amounts to direct discrimination as well.[44] Article 10 of the Pregnancy Directive 92/85 now prohibits dismissal from the beginning of the pregnancy until the end of the maternity leave and also applies to fixed-term contracts.[45] The non-renewal of such a contract due to pregnancy constitutes direct sex discrimination.[46] In Busch the Court clarified that a worker is not obliged to inform her employer that she is pregnant when she wishes to return to work before the end of her parental leave, even if she cannot carry out all her duties due to legislative prohibitions in case of pregnancy.[47] These few examples of the application of the prohibition of direct sex discrimination show the strong protection women enjoy in EU law in relation to pregnancy and maternity. The Court has also applied the prohibition of direct discrimination due to unfavourable treatment and harassment of a worker, who was the primary carer of her disabled child. She was not herself disabled but suffered disability discrimination by association.[48] Such approach addresses in an indirect way disadvantages due to care responsibilities.

### 1.3 Indirect sex discrimination related to care

Any disadvantage relating to care responsibilities or care related leave might amount to indirect sex discrimination, when many more women than men take up such responsibilities and/or leaves, which is mostly the case. The concept of indirect sex discrimination was developed by the Court in relation to unfavourable treatment of part-time workers and is now codified in EU non-discrimination directives. Indirect sex discrimination is defined in Article 2(1)(b) of Directive 2006/54 as follows: '[…] where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.' This is a test in two steps: first, a prima facie presumption of indirect discrimination must be established. For example, the fact that an exclusion of part-timers from a pension scheme paid by the employer affects much more women than men, which was at stake in the landmark case on indirect sex discrimination Bilka.[49] The burden of proof then shifts to the author of the discriminatory measure,[50] for example the

[43] CJEU 30 April 1998, C-136/95, ECLI:EU:C:1998:178 (*Thibault*).
[44] CJEU 30 June 1998, C-394/96, ECLI:EU:C:1998:331 (*Brown*), para 22.
[45] This Article has direct effect, which means that in the absence of transposition measures taken by a Member State within the period prescribed by that directive, it confers on individuals rights on which they may rely before a national court against the authorities of that State: CJEU 4 October 2001, C-438/99 ECLI:EU:C:2001:509 (*Melgar*), paras 31-34.
[46] CJEU 4 October 2001, C-438/99 ECLI:EU:C:2001:509 (*Melgar*), paras 34 & 44.
[47] CJEU 27 February 2003, C- 320/01, ECLI:EU:C:2003:114 (*Busch*).
[48] See CJEU 17 July 2008, C-303/06 (*Coleman*), ECLI:EU:C:2008:415. Directive 2000/78 applied to case, which prohibits discrimination on the ground of disability. The same prohibitions on discrimination and (sexual) harassment apply as in the Recast Directive.
[49] CJEU 13 May 1986, C-170/84, ELCI:EU:C:1986:204 (*Bilka*).
[50] The burden of proof in discrimination cases is now codified, see Article 19(1) of the Recast Directive on the burden of proof which reads: "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

employer or the Member State. The indirect sex discrimination is only justified if the aim of the measure is legitimate, and the means to reach that aim are appropriate and necessary. In the Bilka case, the employer had to show that the means chosen – the exclusion of part-timers from the pension scheme – met a real need of the undertaking – to employ as few part-timers as possible - were appropriate with a view to achieving that objective and were necessary to that end.[51] If other not or less discriminatory means are available, there is no objective justification. The indirectly discriminatory provision, policy, measure, or practice is then unlawful. The Court clarified that budgetary considerations do not provide in themselves an objective justification for indirect sex discrimination.[52] Similarly, mere generalisations, concerning for example the capacity of a specific measure to encourage recruitment, do not provide an objective justification either.[53]

The concept of indirect sex discrimination can apply to numerous situations related to care, such as unfavourable treatment due to the taking of parental leave,[54] or flexibility requirements of the employer, or working hours that impede care responsibilities.[55] The Court recognised for example in the Danfoss case back in 1989 that if the criterion of mobility was understood to include 'the employee's adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly'.[56] The employer can justify recourse to the criterion of mobility if it is understood as referring to adaptability to variable hours and varying places of work, by showing that such adaptability is of importance for the performance of the specific tasks which are entrusted to the employee. The Court thus accepts an objective justification for the application of a mobility criterion only for certain specific tasks. In relation to flexible working arrangements (FWA), the Work-Life Balance Directive now provides specific rights for caring purposes in Article 9.

More recently, the Court considered in a Spanish case that the exclusion of domestic workers – almost exclusively women – from unemployment benefits amounts to indirect sex discrimination.[57] The potential of the concept of indirect discrimination is thus significant.

### 1.4 Victimisation and specific protection in relation to leave

Employees must be protected against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment (Article 24 of the Recast Directive). In addition, the Member States must take the necessary measures to prohibit less favourable treatment of workers on the ground that they have applied for, or have taken, leave provided for in the Work-Life Balance Directive: paternity, parental or carer's leave, or that they have exercised the FWA rights (Article 11 WLB).[58] Dismissal and all preparations for dismissal of workers on the grounds that they have applied for or have taken such leaves or exercised the FWA rights is prohibited (Article 12(1) WLB). The burden of proof applicable to cases of sex discrimination also applies to these situations (Article 12(3) WLB). This is an example of case law of the Court which has been

[51] CJEU 13 May 1986, C-170/84, ELCI:EU:C:1986:204 (*Bilka*), paras 36-37.
[52] See, for example: CJEU 24 February 1994, C-343/92, ECLI:EU:C:1994:71 (*De Weerd*), para 35; CJEU 6 April 2000, C-226/98, ECLI:EU:C:2000:191 (*Jørgensen*), para 42.
[53] CJEU 9 February 1999, C-167/97, ECLI:EU:C:1999:60 (*Seymour*), para 76.
[54] CJEU 20 June 2023, C-7/12, ECLI:EU:C:2013:410 (*Riežniece*).
[55] See, for example: CJEU 18 September 2019, C-366/18, ECLI:EU:C:2019:757 (*Mesonero*). Unfortunately, the Court did in this case not accept that a man could rely on the prohibition of indirect sex discrimination in relation to care responsibilities.
[56] CJEU 17 October 1989, C-109/88, ECLI:EU:C:1989:383 (*Danfoss*), para 25.
[57] CJEU 24 February 2022, C-389/20, ECLI:EU:C:2022:120.
[58] The protection against discrimination regarding pregnancy and maternity leave is regulated in the Recast Directive 2006/54. See 1.2. of this section (C) on of the UCERF Commentary.

codified not only in EU non-discrimination law, but also in relation to care issues such as leave to care for children or relatives and illustrates the powerful role the Court can play. The protection of workers with care responsibilities against unfavourable treatment is steadily expanding in EU law, as we have indicated in comment 10 on the first question.

## 2. Policy measures to address gender inequality regarding giving care

### 2.1. Introduction

Following this legal conceptualisation on equality and non-discrimination with regard to care, we will shift our focus to potential policy measures aimed at enhancing equality by compensating for care and facilitating care and work, taking into account the reality of care and the effectiveness of these policies.

We will start with the reality that families are the place where most care is provided. This is true in the case of care for children, partners and ageing parents. Having regard to the ageing of societies in many countries worldwide, the need for care within families will increase. Caregiving within the family has a strong gender dimension, because women take upon most of these unpaid caregiving responsibilities. Even though it might seem that work and care are more balanced nowadays, the gender imbalance is persistent. The so-called child penalty is illustrative. For numerous countries there is a large drop in earnings for mothers at the birth of children, and virtually no effect for fathers.[59] Research suggests that this is a pervasive trend in several countries.[60]

States have several options to deal with gender inequality and care. Three types of aims might be identified: 1. policy/regulations to combat persisting gender norms on care; 2. policy/regulations to compensate women for the disadvantages of having provided care; 3. policy/regulations to facilitate work and care for men and women. Hereafter options 2 (compensation for care) and 3 (facilitation of care and work) will be considered. Regarding marriage-related measures under 1 and 2, States Parties have these obligations in the light of Article 17 para 4 ACHR to take appropriate steps to ensure the equality of rights and the adequate responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. For all obligations Article 5a and b of the CEDAW are relevant. These obligations aim to promote gender equality and eliminate all forms of discrimination against women by addressing the cultural, social, and attitudinal factors that contribute to gender-based discrimination. It is based on the idea that discrimination against women is not solely a legal issue but is also deeply rooted in societal norms and cultural practices. Therefore, it calls for comprehensive efforts to change these patterns and attitudes in order to advance gender equality.

### 2.2. Compensation for disadvantages of giving care

If states would accept the social reality that women are still the primary caregivers, they should consider compensation mechanisms for the disadvantages experienced by carers. These compensation mechanisms should be gender neutral, in the sense that all carers, irrespective of gender, may profit from these mechanisms. It is crucial in developing policy that States take a broad perspective to identify which compensation mechanisms are available. These range from social security law, to tax law and family law. In tax law there might be a reduction from income

[59] H.J. Kleven e.a., 'Child Penalties Across Countries: Evidence and Explanations', *AEA Papers and Proceedings* 2019, No. 109, p. 122–126; S. Rabat & S. Rellstab, *The Child Penalty in the Netherlands and its Determinants*, The Hague: Netherlands Bureau for Economic Policy Analysis 2021.
[60] H.J. Kleven e.a., 'Child Penalties Across Countries: Evidence and Explanations', *AEA Papers and Proceedings* 2019, No. 109, p. 122–126; S. Rabat & S. Rellstab, *The Child Penalty in the Netherlands and its Determinants*, The Hague: Netherlands Bureau for Economic Policy Analysis 2021, table 1.

tax for carers, while state pension law could take into account work spent on care. The option to receive payment for care through a state-provided care budget could be considered as well. For example, in the Netherlands, there is a 'personal budget' which the person in need of care may use to pay for care provided by relatives and others. In the past, it was also possible in the Netherlands for caregivers to receive a discount on the inheritance tax as compensation for unpaid care.

There are different ways in which care within families is compensated for by family law: by the matrimonial property system, rules on maintenance between ex-spouses and pension rights at divorce. This concerns married and registered partnerships.

To start with matrimonial property law, many jurisdictions provide for a compensation system. In many countries, the default matrimonial property law system provides both spouses with an equal share in the assets and money which have been acquired by each of them during the marriage. At the time of the divorce, the joint property and money is divided by two, regardless of spouses did generate the same income. This means that care for children or elderly relatives is equally valued to paid labour.

There is, however, an important limitation of the option to compensate for care by an equal share in the assets. In many jurisdictions, spouses have the contractual freedom to opt for another system, which is often detrimental for caring spouses, who are often women. Whereas in some countries, many couples make use of this freedom, in other countries only very little couples do. The contractual freedom is something to be taken into account when assessing the significance of matrimonial property as a means of compensation for unpaid care. If many married couples opt out of the compensation system, this negatively affects the legal position of spouses who have cared.

The second family law compensation mechanism regards maintenance rights for ex spouses. In many countries, an ex-spouse has the duty to pay spousal maintenance to the other ex spouse at divorce, if this ex spouse is not able to financially care for herself. It mostly regards women who receive maintenance because of their larger share in informal care, resulting in a lower income. In Europe, there are substantial difference regarding the amount to be paid, the duration of spousal maintenance and the conditions.

The third compensation mechanism concerns the splitting of pensions. In a number of countries legal rules provide for the default option to split second pillar pension rights at divorce. What has been accrued during marriage by each spouse must be divided equally. For example, in the Netherlands spouses have a right to an equal share in each other's pension rights. This regards large amounts during many years.

The equal division of matrimonial property, spousal maintenance and the equal share of during marriage accumulated pension rights are instruments to address inequalities as a result of the work and care imbalance between the spouses at the end of their marriage. With these three instruments family law offers protection against the choices couples make regarding paid work and care.

However, there is a tendency that more couples do not opt for marriage, but instead informally cohabit. In some countries there is some regulation offering compensation, but in many countries there is not. This implies that the compensation mechanisms put in place for spouses are not

applicable. This is an issue to reflect upon in the context of care, since it reduces effective remedies to compensate for unpaid care.[61]

Apart from family law itself, states could raise awareness for the options that exist under private law regarding compensation for care within families. Care contracts could be used when the family member in need of care has sufficient money or assets. The caring relative and the person in need of care conclude a care contract, in which they agree that the carer will provide care in return for money or assets. The transfer of money or assets may also take place after the death of the person in need of care. States could also introduce instruments in inheritance law, as exist in some countries already, to compensate for unpaid care. In the Netherlands, for example, there is a provision in inheritance law which enables care-taking family members to claim a lump sum for care that has not been financially rewarded, after the relative in need for this care has died. The lump sum should result in a fair compensation. Under Austrian and German inheritance law, there is a statutory claim compensating close relatives having taken care of a decedent.[62] In other jurisdictions, other mechanisms are proposed, such as of 'successional priority', which would give a person who takes care of a relative a prioritised right of provision from that relative's estate.[63] Other research shows possibilities to compensate for care with private law instruments, such as proprietary estoppel and unjust enrichment.[64]

## 2.3. Options to facilitate care and work

The gendered division of labour and care often leads to women facing disadvantages in terms of career opportunities, income and economic independence, rights, benefits and pension, and overall well-being. Another policy measure concerns leaves and child care facilities. All high-income industrialized countries have put in place paid maternity leave rights (with the exception of the United States where this is unpaid), and provide some support, in cash or kind, for child care.[65] However, there is no clear consensus on the labour market impact of parental leave rights and benefits from the empirical literature.[66] Even in Sweden, a country with long parental leave and good child care facilities, there is a substantial gender pay gap due to child care by mothers.[67] In-work benefits, such as the UK Working Family Tax Credit, seems to have resulted in an increase of the employment rate of single mothers. These policy measures make it easier to be a working mother, which may matter more than the length of leave or the payments that new parents receive while out of the labour force.[68] We will elaborate on the issue of paid and unpaid leaves and the

[61] W.M. Schrama & J. Tigchelaar, 'Aims Of Family Law Tested Against Dutch Family Law, What's Love got to do with it?', in: J. Scherpe & S. Gilmore (eds.), *Family Matters, Essays in Honour of John Eekelaar*, Cambridge: Intersentia 2022, p. 329-347.
[62] U.C. Schreiner & C. Dorfmayr, 'The Recognition of Care Services in Austrian Inheritance Law', in: E. Alofs & W. Schrama, *Elderly Care and Upwards solidarity, Historical, Sociological and Legal Perspectives*, Antwerpen: Intersentia 2020, p. 83-95.
[63] M.P.C. Oldham, 'Financial Obligations within the Family – Aspects of Intergenerational Maintenance and Succession in England and France', *The Cambridge Law Journal* (60) 2001, No. 1, p. 128-177.
[64] B. Sloan, 'The Recognition Of Informal Care In English Private Law', in: E. Alofs & W. Schrama, *Elderly Care and Upwards solidarity, Historical, Sociological and Legal Perspectives*, Antwerpen: Intersentia 2020, p. 46-65.
[65] C. Olivetti, & B. Petrongolo, 'The Economic Consequences of Family Policies: Lessons from a Century of Legislation in High-Income Countries', *Journal of Economic Perspectives* (31) 2017, No. 1, p. 205-230.
[66] C. Olivetti, & B. Petrongolo, 'The Economic Consequences of Family Policies: Lessons from a Century of Legislation in High-Income Countries', *Journal of Economic Perspectives* (31) 2017, No. 1, p. 205-230.
[67] N. Angelov, P. Johansson & E Lindahl, 'Parenthood and the Gender Gap in Pay', *Journal of Labor Economics* (34) 2016, No. 3, p. 545–579.
[68] C. Olivetti, & B. Petrongolo, 'The Economic Consequences of Family Policies: Lessons from a Century of Legislation in High-Income Countries', *Journal of Economic Perspectives* (31) 2017, No. 1, p. 205-230.

length of those leaves in the section on the fourth question, regarding care and the right to work and social security (introduced in the Request III.d.1.).

In the same vein lie those policies which facilitate part-time work. When States (re)think their obligation under Articles 24 and 1.1 of the American Convention on Human Rights, they should be careful to facilitate parttime working, when, according to the prevailing gender norms, care falls primarily upon women. Today, the part-time work culture is seen as a hinderance for further reduction of the gender gap.[69] Moreover, social policies should consider broader family units, since also grandparents may experience a child penalty, which appears to be more substantial for grandmothers than grandfathers.[70] As carers can be found outside kinship relations, policy measures in the area of leaves and social security, should facilitate these 'careships' as well.[71] A careship does not limit the right to care to the legal relational status between care giver and care receiver, but takes the caring function as the point of departure for any rights to be had.

In terms of State obligations related to care and its gender dimension, it is important to develop an integrated, all inclusive approach of policy aims and regulations to address this inequality. It seems likely that a combination of measures from the three categories identified above is desirable. Where governments promote care within families, while at the same time stimulating formal gender equality, pre-existing notions on who is supposed to care might be reinforced. It is expected that the call for more unpaid care within the family – having regard to ageing societies - will be taken up mostly by women. State policy and law should address the gender dimension of paid work and unpaid care. Care policy has barely addressed the fact that promoting unpaid caregiving within the family will primarily affect women. In many countries the policy on care and inequality is fragmented, developed ad hoc each time from within the specific area of law, without considering the full picture of tools in the toolbox. There is no coordinated, integrated approach on care and gender equality. On the one hand, states advocate that care should come first from within the family, while state supported care has been reduced. On the other hand, states expects women to fully participate in the labour market, but without providing for an adequate support policy on care and its consequences for women.

## D. The fourth question: care and the right to work and social security

### *a. Is unpaid care work, work in the light of art. 26 of the ACHR and arts. 6 and 7 of the Protocol of San Salvador?*

A first answer from a Dutch and European background to this interesting question is: no, unpaid care as such is not work, in the sense of employment or participation on the labour market. A second answer is that unpaid care work is highly relevant for the equal opportunities of men and women to the right to (paid) work, for just, equitable and satisfactory working conditions and for a modern social security system.

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[69] D. Fernandez-Kranz & N. Rodriguez-Planas, *Too family friendly? The consequences of parent part-time working rights*, Bonn: Institute of Labor Economics 2021;
S. Karademir, J.W. Laliberté & S. Staubli, *The Multigenerational Impact of Children and Childcare Policies*, Bonn: Institute of Labor Economics 2023.

[70] S. Karademir, J.W. Laliberté & S. Staubli, *The Multigenerational Impact of Children and Childcare Policies*, Bonn: Institute of Labor Economics 2023.

[71] Compare: V. Vanderhulst, who coined the notion of *careship* in her presentation at the ISFL World Conference in Antwerp 2023. See the detailed programme p. 146-147 on https://isfl2023.org/

In the Netherlands, statutory care leave is considered a modern social security tool to support employees providing unpaid informal care. The starting point here is the economically independent citizen (male and female) who, in principle, provides for himself, but is then confronted with life events that influence the labour market position and thus the income. Traditionally social security focuses primarily on protecting employees against so-called 'external' risks such as illness, disability and unemployment. Modern social security goes a step further and also focuses on responsibilities that are (partly) the result of one's own choice, such as (informal) care or events that temporarily make working impossible, such as having a child. During leave, the employee does not quit the labour market, but rather intends to continue working in the labour market on a (more or less) unchanged basis. So, although unpaid care work is not work in the traditional sense, it cannot be ignored in a modern labour market and social security system.

*b. What rights do people who perform unpaid care work have in the light of these regulations and what are the State's obligations towards them in relation to the right to work? How should unpaid care work be considered in social security benefits in the light of art. 26 of the ACHR and art. 9 of the Protocol of San Salvador?*

*What measures should States take in light of Article 26 of the ACHR and Articles 6, 7 and 15 of the Protocol of San Salvador to guarantee the right to work of those who must provide unpaid care, including maternity and paternity leave and care infrastructure?*

## 1. Introduction

We will highlight in our comment on the above questions, how unpaid care work (or informal care) plays a role in the right to work and social security in the Netherlands and Europe. We will take the questions together, for care arrangements can be a working condition, but can also have a social security aspect and sometimes both aspects overlap. We will first discuss the various types of leave arrangements for employees with care responsibilities in the Netherlands and critically analyse the complexity of some leave schemes, the need for a generous leave in case of seriously ill children, followed by a brief indication of the time arrangements of flexible working and working hours pattern. Then we will move to European instruments that can be seen as a breakthrough in the recognition of informal care: the European Pillar of Social Rights, EPSR, the Work-Life Balance Directive and the European Care Strategy.

## 2. Leave arrangements in the Netherlands

In the Netherlands, the Work and Care Act (Wet Arbeid en Zorg, Wazo) is the main Act that regulates various types of leaves for employees with care responsibilities. In this Act, employees are granted time for care in the form of a leave, whether on full pay or not. Some regulations only grant a right to a certain amount of time off (with a guaranteed return to the 'old' job), while other regulations also grant a right to money, thus limiting or compensating for the loss of income caused by working less hours temporarily or by not working at all.

We will discuss the forms of leave that have the explicit aim of enabling the employee to provide care to others and are of particular relevance to the performing of informal care: the emergency leave, the short-term care leave, the long-term care leave and the parental leave.

The right to an emergency leave exists for short-term, special situations in which the employee is unable to work, due to unforeseen circumstances or situations that do not permit any delay. Some examples in the informal care sphere are caring for a sick loved one on the first day of sickness or accompanying a loved one on a visit to a doctor or a hospital. The parties entitled to this leave are employees. The length of the emergency leave is limited, ranging from a couple of hours to a

maximum of several days. Essential is the time required to take emergency measures. The Act refers to a 'period to be determined equitably'. The employer is under an obligation to continue paying wages. However, it is possible to make other arrangements.[72]

Care leaves can be distinguished into a short-term care leave not exceeding two weeks and a long-term care leave not exceeding six weeks in each period of twelve months. The short-term care leave offers the possibility to care for a sick loved one. The long-term care leave is possible for persons with a life-threatening illness as well as for persons who are sick or in need of help. For both types of leaves it is required that care by the employee is necessary. During the short-term care leave the employee is entitled to 70 per cent of his/her salary (maximum daily pay) which must amount to at least the statutory minimum pay or the statutory minimum youth wage. The long-term care leave is unpaid. Collective labour agreements may contain different arrangements for both types of leaves. Furthermore, the right to both the short-term and the long-term care leave is conditional, i.e. leave may be refused due to serious business reasons that reasonably prevail over the interests of the employee.

The personal scope of the right of leave (who can invoke the right of leave, for which person, in need of care) has expanded over time. Besides for relatives in the first degree, these forms of leave can now be taken for relatives in the second degree (a brother or sister, grandparents, and grandchildren), other household members than children or a partner (a live-in aunt) and others with whom the employee has a social relationship (a friend, a neighbour). The government deemed this necessary as, due to the increased mobility and the rising female labour market participation, there is a growing group who cannot rely on direct relatives or household members for their necessary care.[73]

Despite the existence of leave options, it turns out that little use is made of the leave arrangements; the long-term care leave in particular is not taken at all or hardly ever taken. A mere two per cent of the employees takes a long-term care leave. Possible explanations for this are: a lack of awareness of the arrangement, the organisational culture, or the existence of informal and tailor-made arrangements. Another reason for the limited use may be its statutory unpaid character, more so as collective labour agreements also contain relatively few arrangements on continued payment of wages in case of a long-term care leave.[74]

Complicated leaves systems: parental leaves

The expanding leave entitlements turn out to be complicated: who exactly is entitled to what and under what conditions? What are the responsibilities of the individual, the government and the employer? When drawing up a leave policy, it is desirable to systematically ensure coherent policy objectives. If these are not the basis of the policy, a patchwork of conditions, rights, obligations, financing and funding will arise.

A good (or bad?) example of such a patchwork in the Netherlands is leave after the birth of a child. In the child's first year of life, there are three forms of paid leave for fathers (partners)[75], including a one week's birth leave which is paid in full by the employer; an additional birth leave of five

[72] With the so-called 'two thirds' or 'five eighths' compulsory law the legislator wanted to stress in the Work and Care Act that statutory law is standard setting, i.e. it is the point of departure. Employees therefore have a right, unless other arrangements were made in a collective agreement or between the employer and the works council or the employee's representatives. See Parliamentary Proceedings: *Parliamentary Papers II* 2001/2, 28467, no.3, p. 5 and 12.

[73] *Parliamentary Papers II* 2013/14, 32855, no. 17.

[74] S. Heeger & I. Koopmans, 'De facilitering en toerusting van de werkende mantelzorger in Nederland en Duitsland, in: F. Pennings & J. Plantenga (eds.), *Nieuwe vormen van arbeidsrelaties en sociale bescherming,* Zutphen: Uitgeverij Paris 2018, p. 143-163.

[75] See Work and Care Act.

weeks that is paid through a benefit from the Employee Insurance Agency (hereafter: UWV) and amounts 70% of the maximum daily pay, and a third form, namely parental leave that lasts 9 weeks and is paid through the UWV (70% of the daily wage).

For mothers, the first 6 weeks are part of maternity leave. These weeks are fully paid by the employer who is reimbursed by the UWV (Employee Insurance Agency). The next 9 weeks are part of the parental leave, which means that a benefit must be applied for via the UWV and this benefit drops to 70% of the daily wage.

The legislator regards the payment of 70% as a substantial contribution to the costs that arise because the partner opts for additional paternity or parental leave.[76] Nevertheless, it is acknowledged that the financial consequences can play a role in the choice whether or not to take (full) additional parental leave. Because the benefit is based on the maximum daily wage, the personal contribution will be higher whenever the wage exceeds this maximum daily wage. At the same time, employees belonging to the lower income groups have less room to save for a period of reduced income during the additional parental leave.

It is striking that the Netherlands does not have any care leave schemes specifically aimed at caring for (seriously) ill children. The legislator chose to serve a broader group of people in need of care. The long-term care leave scheme in the Work and Care Act is intended to facilitate care for (life-threateningly) ill persons. By treating different groups of people in need of care in the same way, the special position of minor children is ignored. Article 18 paragraph 1 of the UN Convention on the Rights of the Child stipulates that both parents bear joint responsibility for the upbringing and development of the child and that the best interests of the child must be the primary concern of parents. This applies to healthy children, and especially to children who are ill. In light of Article 18, facilitating optimal care for the seriously ill child should be the main objective of an adequate care leave arrangement (and promoting the labour participation of the parents could only be a secondary objective here). Article 15 of the Protocol of San Salvador could here be relevant as well. An adequate scheme should contain specific arrangements with continued payment of wages (up to a certain maximum daily wage) and other forms of financial compensation. In Norway, for example, there is a right to leave as long as a minor child needs constant care; employees in Belgium receive up to twelve months' leave with financial compensation for the care of a seriously ill child, and French employees receive 310 days of leave over three years.[77]

## 3. Flexible working and working hours pattern in the Netherlands

Besides the different leave arrangements, flexible working also contributes to the combination of work and informal care. The Flexible Working Act aims to stimulate flexible working by giving employees more possibilities to work at home and to adjust the number of working hours or to work at hours more favorable to them. The statute regulates the right to apply for a permission to work at home. Furthermore the employer may turn down the request to adjust the number of working hours or the working hours due to serious business reasons. Working less is a way that gives the caring employee time to care, but at the same time goes hand in hand with a reduction in income. This loss of income is entirely at the expense of the employee.

The Dutch Working Hours Act (ATW) also explicitly recognizes the employee's control over his or her working hours and the pattern thereof. In determining these, the employee's personal

[76] *Parliamentary Papers II* 2017/18, 34967, no. 3, p. 9.
[77] M.S. Houwerzijl, 'Naar een doeltreffender zorgverlofregeling voor ouders van kinderen met kanker', *Tijdschrift Recht en Arbeid* 2019, No. 65.

circumstances outside work should be taken into account to the extent that this is reasonably possible. Personal circumstances explicitly also include care tasks for dependent family members, relatives, and loved ones.

The problem in the Netherlands is that part-time work is mainly chosen by women; this has a long socio-cultural tradition in the Netherlands, which has meant that these women are economically dependent and may negatively affect their income after retirement age. What is more, working part-time does not give women with full possibilities to develop their career. Even though flexible work schedules and control over working hours are very useful for obtaining work-care balance, it is not enough to compensate for the greater involvement in care.[78]

## 4. EU Instruments

### 4.1. European Pillar of Social Rights

The European Pillar of Social Rights (EPSR) is a political document adopted by the Commission as a Recommendation[79] and later by the European Parliament, the Council and the Commission as an 'Interinstitutional Proclamation'.[80] It contains twenty principles spread over three chapters. Important for the topic of this paper are principle 2 on gender equality, principle 9 on work-life balance and principle 18 on long-term care. Principle 2, belonging to Chapter I 'Equal opportunities and access to the labour market' reads:

Equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including participation in the labour market, terms and conditions of employment and career progression. Women and men have the right to equal pay for work of equal value.

Principle 9 is a part of Chapter II on 'Fair working conditions'. It specifically addresses the work-life balance of working families and highlights the right of parents and people with caring responsibilities to 'suitable leave, flexible arrangements and access to care services'. This principle emphasizes and encourages the strengthening of men's roles as carers by adding the sentence that 'women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way'.

Leave and flexible arrangements are further emphasised in the Work-Life Balance Directive (which will be discussed in Section 4.2). The right to access care services for working carers – including long-term care – is interesting in light of a better work-life balance as it recognizes that access to such services contributes to the improvement of employment opportunities for the care provider and thereby to the reduction of inequalities, social and labour market exclusion and healthcare needs for informal carers. Principle 18, belonging to Chapter III on 'Social Protection and Inclusion' reads as follows: 'Everyone has the right to affordable long-term care services of good quality, in particular home-care and community- based services'. The legislative power of the EPSR regarding this right is limited. The EU can only support and complement the activities of Member States with regard to social security and social protection of workers, but it is Member States that define the fundamental rules of the their security systems. Having that in mind, the

[78] F. van der Woude, K. de Vaan & M. Blommesteijn, *ESPN Thematic Report on work-life balance measures for persons of working age with dependent relatives*. *The Netherlands,* Brussels: European Commission 2016, p. 19-21.

[79] European Commission, *Commission Recommendation (EU) 2017/761 on the European Pillar of Social Rights of 26 April 2017 C/2017/2600*, Official Journal of the European Union 2017, L 113/56.

[80] European Parliament, Council, European Commission, 'Interinstitutional Proclamation 2017 on the European Pillar of Social Rights', *Official Journal of the European Union* 2017, C 428/10.

potential of the EPSR (principle 18) in facilitating fair working conditions for informal carers is still high as it emphasises, at the EU level, the right to long-term care for those in need of care.

The EPSR is a recommendation. That is why it is not possible to derive rights directly from the EPSR's principles.[81] Its influence on secondary legislation is not yet clear; on the one hand, the European Commission uses the EPSR as a basis for taking social policy initiatives. On the other hand, the national courts and tribunals and in particular the Court of Justice of the EU can use the EPSR to interpret other provisions of EU law.[82] The Action Plan for the European Pillar of Social Rights translates the principles into concrete actions for citizens.[83] In March 2021, the Action Plan for the European Pillar of Social Rights announced, among other things, a long-term care initiative that aims to create a framework for policy reform in EU countries to promote the right to affordable, high-quality long-term care. The action plan is part of an initiative that takes a comprehensive approach to care, from childcare to long-term care for the elderly. In the Commission's efforts to build an European Union of equality, the Commission considers it necessary that adequate work-life balance policies facilitate the conciliation of work and private life and that, in particular, the provision of paid leave can have a positive effect on the employment rate, especially for women.[84]

### 4.2. EU Work-Life Balance Directive

The Work-Life Balance Directive for parents and carers dates from June 2019 and is one of the initiatives to implement some of the principles of the EPSR.[85] Its legal basis is Article 153(1)(i) TFEU, which allows the EU to support and complement the activities of the Member States in the field of equality between men and women with regard to labour market opportunities and treatment at work. The Directive's objective is to facilitate the reconciliation of work and family life by promoting equal sharing of caring responsibilities between men and women.[86]

The Directive contains two forms of leave for parents in order to encourage a more equal sharing of caring responsibilities between women and men, and to allow for the early creation of a bond between fathers and children.[87] These are the 'paternity leave' which means leave from work for fathers or, where and insofar as recognised by national law, for equivalent second parents, on the occasion of the birth of a child for the purposes of providing care[88] and 'parental leave' which means leave from work for parents on the grounds of the birth or adoption of a child to take care of that child.[89] Both types of leave are paid, but whereas the amount of payment for the ten-day paternity leave must be the same as the amount that an employee receives in the event of illness,

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[81] Treaty on the Functioning of the European Union, Article 288.
[82] S.B. Lahuerta & A. Zbyszewska, 'EU equality law after a decade of austerity: On the Social Pillar and its transformative potential' (2018) 18 (2-3) International Journal of Discrimination and the Law, 180-181.
[83] The European Commission, 'The European Pillar of Social Rights Action Plan', https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/, 2021.
[84] European Commission, 'The European Pillar of Social Rights Action Plan' (European Commission, 2021), p. 25 <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/>.
[85] 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 [2019] OJ L188/79. As the relaunch of the Directive was linked to the EU's social policy laid down in the EPSR, the European Pillar of Social Rights provided a crucial political boost to the proposal for the Work-Life Balance Directive.
[86] 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, *Official Journal of the European* Union 2019, L 188/79, at 6.
87 WLB Directive, at 19.
88 Article 3(1)(a).
89 Article 3(1)(b).

the payment or allowance during parental leave of of four months must be in such a way that it facilitates the take-up of parental leave by both parents.[90]

For informal carers, the Directive contains a number of measures to improve their ability to combine work and care. The term 'carer' is defined as 'a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker and who is in need of care or support for a serious medical reason, as defined by each Member State'.[91] The definition of 'relative' includes a worker's son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership.[92]

Thus the Work-Life Balance Directive only extends to the domestic sphere rendering the supportive and fair working conditions not accessible to informal carers who take care of, for example, neighbours and friends.

The measures constitute minimum requirements related to leave schemes for carers and possibilities to attune the obligations of the work – if the work permits – to tasks in the context of informal care. These include absenteeism due to force majeure,[93] flexible working arrangements,[94] and legal protection measures.[95] Of course, the Directive gives Member States the option to introduce or maintain more generous schemes for workers.[96]

The leave scheme of five working days per year,[97] as introduced by the Directive, can be taken in order to provide personal care or support to a relative, or to a person who lives in the same household as the worker and who is in need of significant care or support for a medical reason. What this means is to be determined by each Member State. The leave is unpaid, thus without entitlement to payment or benefits.[98] Member States are, however, encouraged to introduce a payment or an allowance in order to guarantee the effective take-up of the right by carers, in particular by men.[99] Care leave can be taken for relatives as defined in the Directive. Member States are, however, encouraged to extend the range of persons for whom care leave can be taken to include more relatives.[100]

Workers have the right to take time off from work on the grounds of force majeure for urgent and unexpected family reasons; this time off is unpaid.[101] Such urgent reasons are illness or an accident that requires the immediate presence of the worker. This time off is without loss of employment rights that have already been acquired or that are in the process of being acquired.[102]

With the measures that ensure that informal carers can request flexible working arrangements for care purposes, the Directive aims to encourage informal carers to continue participation in the labour market even if they have substantial care responsibilities in addition to their work. 'Flexible working arrangements' means the possibility for carers to adjust their working patterns to their personal needs and preferences, including through the use of remote working

90 Article 8(2)(3).
91 Article 3(1)(d).
92 Article 3(1)(e).
93 Article 7.
94 Article 9.
95 Articles 10-12 & 14.
96 Article 46 & 16.
97 Articles 3(1)(c)-3(1)(e), 3(2) & 6.
98 Articles 6, 8(1) and 8(2). The time-off from work on grounds of force majeure already existed under the Parental Leave Directive 2010/18/EU and is maintained in the Work-Life Balance Directive.
99 Directive (EU) 2019/1158 (n **Fout! Bladwijzer niet gedefinieerd.**) at 32.
100 Directive (EU) 2019/1158, at 27.
101 In the Netherlands this is fully paid time off.
102 Article 7.

arrangements, flexible working schedules, or reduced working hours.[103] This can be requested from all kinds of employers without further conditions.

Finally, the Directive contains a number of provisions to protect the worker against disadvantages if he or she makes use of the rights conferred on him or her by the Directive or submits an application for such rights. First, rights which the employee has already acquired or which are to be acquired are retained during the leave period.[104] Second, there is a right to return to the same or an equivalent position after the leave has expired.[105] Third, people are entitled to a possible improvement in working conditions that they would have enjoyed if they had not taken leave.[106] Fourth, taking or applying for leave or the right to flexible working arrangements can not be a reason for a valid dismissal.[107] Finally, an employee may not be treated adversely by the employer after having made a complaint or entered into legal proceedings in order to enforce the rights of the Directive.[108]

### 4.3. EU Care Strategy

The European Care Strategy was announced in September 2021 by the Commission President, Ursula von der Leyen, in her State of the Union address, to support women and men in finding the best possible care and work-life balance.[109] According to the Commission work programme 2022, the strategy will set a framework for policy reforms to guide the development of sustainable long-term care that ensures better and more affordable access to quality services for all.[110] The European Care Strategy is the follow-up to the debate launched in the context of the Green Paper on Ageing and the Gender Equality Strategy.

The way in which legislation in the Netherlands and EU instruments support employees with informal care tasks, shows that 'care' is assigned next to paid labour. Care is a responsibility/activity that is not only a private responsibility of the employee who is confronted with caring responsibilities. Rather, employers will increasingly have to take informal care activities into account. The standard employee is no longer the full-time working (male) employee, but the employee (male/female) who must/wants to combine work with informal care tasks. There are several legal regulations that provide opportunities to free up time for care and support informal carers in other ways. However, there are costs associated with informal care, which must be paid in any case - no satisfactory solution has yet been proposed for this.

## E. The fourth question: right to health

*What are the obligations of States regarding the right to health in relation to caregivers, care recipients and self-care in light of Art. 26 of the ACHR, Arts. 10, 16, 17 and 18 of the Protocol of San Salvador, Arts. 12 and 19 of the Inter-American Convention on the Protection of the Human Rights of Older Persons and Art. III of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities?*

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[103] Article 3(1)(f).
[104] Article 10(1).
[105] Article 10(2).
[106] Article 10(2).
[107] Article 12.
[108] Article 14.
[109] European Commission, '2021 State of the Union Address by President von der Leyen', https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_4701 15 September 2021).
[110] European Commission '*Making Europe stronger*' (Communication) COM(2021) 645 final 8, 19 October 2021. https://eur-lex.europa.eu/resource.html?uri=cellar%3A9fb5131e-30e9-11ec-bd8e-01aa75ed71a1.0001.02/DOC_1&format=PDF ?

A highly relevant progress indicator for monitoring the right to care can be found in the context of the right to health. Section III.d.2., discusses the interrelationship between the right to care and the right to health, as highlighted by the Inter-American Commission on Human Rights.[111] In addition, Section III.d.5 raises the question: what are the obligations of States regarding the right to health in relation to caregivers, care recipients and self-care in light of Article 26 of the ACHR, Articles 10, 16, 17 and 18 of the Protocol of San Salvador, Artsicles 12 and 19 of the Inter-American Convention on the Protection of the Human Rights of Older Persons and Article III of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities?

According to the UN Committee on Economic, Social and Cultural Rights (CESCR), realizing the right to health is contingent upon the realization of the 'AAAQ Framework'. This framework monitors the 'availability, accessibility, acceptability and quality' of health facilities, goods and services.[112] In the view of the CESCR, functioning public health and health-care facilities, goods and services, as well as programmes, must first of all be available in sufficient quantity within countries. Second, health facilities, goods and services have to be accessible to everyone without discrimination. This element has four interrelated components: non-discrimination, physical accessibility, economic accessibility and information accessibility. Third, all health facilities, goods and services must be acceptable, meaning that they are respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned. Finally, as well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.[113]

Using the AAAQ Framework, numerous barriers can be identified which impede the right to care. Examples mentioned in the Request include the working conditions in which care is provided which influence the quality of care and the lack of knowledge and awareness of gender diversity which impacts the accessibility of care of trans people. Taken together, it is deemed relevant for the I/A Court H.R. to consider the value of the AAAQ Framework for monitoring and identifying problem areas in the effective fulfilment of the right to care.

## F. Conclusion

In short, it is deemed relevant for the Inter-American Court of Human Rights to consider to:

- Pay attention to all dimensions of care as a human right.
- Care should be seen as having inherent moral value.
- The concept of care should also include underpaid care, not only unpaid care.
- The (decision-making) support for older persons and individuals with disabilities provided by family members should not be overlooked in terms of recognition, remuneration and supervision.
- A careful, non-discriminatory decision making process concerning care policy is required of States.

[111] Request for an Advisory Opinion to the Inter-American Court of Human Rights, p. 15, referencing I/A Court H.R., Op. cit. 44, time 4:19:00.
[112] Office of the High Commissioner for Human Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12),* United Nations 2000.
[113] Office of the High Commissioner for Human Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12),* United Nations 2000.

- This policy should take an integrative approach including all relevant branches of law such as: health law, pension law, labour and social security law, tax law and family law
- Policy and regulation should be based on the notion that families are the place where most care is provided, but not only there. The need for care within and outside families will increase. Caregiving has a strong gender dimension, because the gender imbalance in work and unpaid care is persistent. In the Netherlands, for example, necessary actions to be taken would be related to gender equality and working conditions of informal carers who mainly work part-time.
- Developments at the European Union level aim to improve the situation for both care receivers and the people caring for them, professionally or informally. This constitutes a step towards a stronger recognition of care as a value and a fundamental human right.
- EU gender equality law may be a source for inspiration. It covers equality between men and women in employment, occupational and statutory social security. It also includes the prohibition of indirect sex discrimination particularly in relation to care responsibilities, parental leave and part-time work. This has been extensively developed by the Court of Justice of the EU and is now codified in EU gender equality directives.
- Three types of aims regarding gender inquality and care might be identified: 1. to combat persisting gender norms on care; 2. policy/regulations to compensate women for the disadvantages of having provided care; 3. policy/regulations to facilitate work and care for men and women. It is important to develop an integrated, all inclusive approach of policy aims and regulations to address this inequality. A combination of measures from the three categories identified above seems desirable.
- It is crucial in developing policy that States take a broad perspective to identify which compensation mechanisms for care giving are available. These range from social security law, to tax law and family law. In tax law there might be a reduction from income tax for carers, while state pension law could take into account work spent on care.
- An all-inclusive care and equality policy should also take family law, inheritance law and private law into consideration. When the state itself has not sufficient means to provide compensation for care, there are also instruments in the field of private law which can distribute the risk at family level. Spousal maintenance, the equal division of matrimonial property law and an pension splitting of during the marriage accumulated pension rights are instruments to address inequalities as a result of the work and care balance between the spouses at the end of their marriage. The contractual freedom is something to be taken into account when assessing the significance of matrimonial property as a means of compensation for unpaid care. Also in inheritance law, some states have options to compensate for care within families.
- The overview of the Dutch system of leaves in the employment context provides input for what (not) to do. There is a quite complicated system of various types of leave arrangements for employees with care responsibilities in the Netherlands and these are critically discussed. At Dutch and EU level care is a responsibility/activity that is not only a private responsibility of the employee who is confronted with caring responsibilities. Rather, employers will increasingly have to take informal care activities into account.
- A part-time working culture is seen as a hinderance for further reduction of the gender gap in terms of employment, income, social security. Even though flexible work schedules and control over working hours are very useful for obtaining work-care balance, it is not enough to compensate for the greater involvement in un(der)paid care.
- The value of the 'AAAQ Framework' should be considered for monitoring and identifying problem areas in the effective fulfilment of the right to care. According to the UN Committee on Economic, Social and Cultural Rights (CESCR), realizing the right to health

[redacted]

is contingent upon the realization of this framework, which monitors the 'availability, accessibility, acceptability and quality' of health facilities, goods and services.

We sincerely hope that our contribution supports the I/A Court H.R. in deciding on this complex and fundamental question.

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