

AN ASSESSMENT OF THE PREGNANCY AND MATERNITY - RELATED PROVISIONS OF THE LABOR LEGISLATION

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1. Introduction

The Lisbon Treaty was signed by the Member States in December 2007, the obstacles to its ratification were finally removed in November 2009 and it became effective on 1 December 2009. With the removal of the pillar structure, the European Union is now founded on two treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).¹ The European Community is replaced and succeeded by the Union.

The Preamble to the TEU proclaims that the member States draw 'inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'. Article 2 of the TEU emphasizes the centrality of these values by stating that they 'are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. Article 3 of the TEU reiterates aims of the Union and pledges the Union to namely 'combat social exclusion and discrimination' and to 'promote social justice and protection, equality between men and women'. Article 8 of the TFEU states that 'in all its activities, the Union shall aim to eliminate inequalities, and to promote equality between men and women'. According to Article 10 of the TFEU, 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Article 19(1) of the TFEU which provides for the adoption of action by the Council to combat discrimination enlarges the role of the European Parliament: The Council is to act 'unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament'. 'In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure' (TFEU, Article 289[2]).

The former substantive article on sex equality, Article 141 of the Treaty on European Community (TEC), has now become Article 157 of the TFEU. The first two paragraphs that have remained the same read:

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¹ See for a consolidated version of both treaties: OJ C 83 of 30 March 2010.

‘1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job’.

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)² consolidates different bodies of secondary legislation replacing the prior directives on equal pay, equal treatment, occupational social security, and the burden of proof. Directive 2006/54 leaves unamended the Pregnancy and the Parental Leave Directives. There is a Proposal for a Directive of the European Parliament and of the Council of 3 October 2008 amending the Pregnant Workers Directive, i.e. Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.³

Turkey’s legal rules on pregnancy and maternity are found mainly in the Labor Law,⁴ Civil Servants Law,⁵ Social Insurances and General Health Insurance Law.⁶ The Sack Law⁷ introduced new types of leave and made substantial (generous) increases in the duration of the current forms of leave for civil servants and workers with a permanent employment contract in the public sector. This article attempts to assess these rules in the light of the European Union *acquis*.

2. Female employment

The employment guidelines proposed by the Commission and approved by the Council, present common priorities and targets for the national employment policies. They have been in an integrated package with the Broad Economic Policy Guidelines since 2005. On 26 March 2010, in an informal meeting of EU equality ministers, it was decided that the same target rate for the employment of both men and women (75%) should be set. In line with the Europe 2020 strategy,⁸ the European Employment strategy targets at having

² OJ L 204, 26 July 2006, p. 23.

³ COM(2008) 637 final.

⁴ *İş Kanunu*, Official Gazette 10 June 2003, no. 25134.

⁵ *Devlet Memurları Kanunu*, Official Gazette 23 July 1965, no. 12056.

⁶ *Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*, Official Gazette 10 June 2006, no. 26200.

⁷ *Torba Kanun*, Official Gazette 25 February 2011, no. 27857 bis. A law amending quite a number of laws is called a sack [storage bag] law.

⁸ Communication from the Commission, EUROPE 2020, A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, Brussels, 3.3.2010.

75% of people aged 20-64 in work by 2020. Europe's current average employment rate is at 69% for those aged 20-64. Only 63% of women are in work compared to 76% of men.⁹

On 22 May 2012 the European Parliament adopted a resolution on a 2020 Perspective for Women in Turkey.¹⁰ Amongst other things, the European Parliament underlined the very low female participation in the Turkish labor force, which is well below the targets envisioned by the perspective of the EU's 2020 Strategy, and called on the Turkish government to establish a national plan of action in order to ensure the greater participation of women in the labor market.

An important stylized fact about the urban Turkish labor market is the low labor market participation rate of women. There is a large and persistent gap in labor market participation between men and women. Turkey has one of the lowest overall employment rates, particularly for women, in the OECD.¹¹ The target set in the Ninth Development Plan (2007-2013)¹² is the attainment of 29.6% labor force participation rate of women by the end of 2013, against an OECD average of 62% in 2010.

As stated in '*Female Labor Force Participation in Turkey: Trends, Determinants, and Policy Framework*, ' a report prepared jointly by Turkey's State Planning Organization and the World Bank, ¹³ pregnancy and childcare are important constraints to women's employment. Women interviewed in Istanbul stated that they would have to pay between 500 and 600 TL (between approx. 210 and 250 EUR) per month for childcare only if they decided to work, and more for other extra costs of additional household help. These costs would use up most of their additional earnings.

Under the scope of the 'Promoting Gender Equality Project - Strengthening Institutional Capacity Twinning Project', implemented jointly by the General Directorate on the Status of Women and the Directorate of International Affairs of the Ministry of Social Affairs and Employment of the Netherlands, the National Action Plan - Gender Equality 2008-2013 has been prepared with the participation of all parties.¹⁴ The Action Plan cites 'low educational level, low wages for women with low levels of education, migration from rural to urban areas, lack of adequate qualifications, the inadequacy of childcare facilities and/or the need to take care of the elderly and disabled individuals in the family as well as traditional ideas about women's social roles and responsibilities' as reasons for the very low labor force participation of women.¹⁵

⁹ *Ibid.*, p. 7.

¹⁰ European Parliament resolution of 22 May 2012 on a 2020 Perspective for Women in Turkey (2011/2066 (INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0212+0+DOC+XML+V0//EN&language=EN>.

¹¹ OECD Economic Surveys Turkey, July 2012, p. 34.

¹² *Dokuzuncu Kalkınma Planı (2007-2013)*, Official Gazette 01.07.2006, no. 26215 bis.

¹³ <http://www.worldbank.org.tr>; 15 September 2009.

¹⁴ National Action Plan - Gender Equality 2008-2013, General Directorate on the Status of Women publication, Ankara 2008.

¹⁵ See also: European Stability Initiative, *Islamic Calvinists: Change and Conservatism in Central Anatolia*, September 2005. Another must-read report of the European Stability

Another important factor lessening women's entry into workforce is the trade unions' approach to atypical works. Factors such as unemployment, efficient functioning and competitiveness of the undertakings, and the low rate of female labor challenged the logic of existing working-time arrangements and modalities of employment. Atypical types of employment were formulated and provisions on working time became a lot more flexible. But the trade unions stand in the way of decentralization and destandardisation of employment relations in practice by twisting issues of flexibility and labeling such legal arrangements 'rules of slavery'. This raises problems in the adaptation process with the European Commission strategy on female employability including 'flexicurity' criteria, combining flexibility and security.

Low labor market participation rate of women has resulted in government taking action to promote women's employment. Turkey's most recent employment policy initiatives go in this direction. As regards recent gender policy initiatives, major developments that took place in the 2011-February 2013 period, *inter alia*,

1. Passing of the
 - o Sack Law making improvements in leaves for women workers;¹⁶
 - o Law on the Approval of the Ratification of the Council of Europe Declaration on Preventing and Combating Violence against Women and Domestic Violence;¹⁷
 - o The Law on the Protection of the Family and the Prevention of Violence against Women;¹⁸
2. Issuance of Prime Ministerial circular on the deterrence of mobbing (psychological harassment) in workplaces;¹⁹
3. Issuance of Circular on Public Personnel, ²⁰ a follow-up of the Sack Law;
4. Issuance of Communiqué no. 57 by the Capital Markets Board (SPK) according to which having at least one female member in the five-member executive committees has become a general principle for companies listed on the Istanbul Stock Exchange;²¹
5. New Obligations Code becoming effective on 1 July 2012;

Initiative is *Sex and Power in Turkey – Feminism, Islam and the Maturing of Turkish Democracy*, Berlin – Istanbul 2 June 2007. Both reports are available online, <http://www.esiweb.org>.

¹⁶ *TorbaKanun*, Official Gazette 25 February 2011, no. 27894.

¹⁷ *Kadınlara Yönelik Şiddet ve Aile İçi Şiddetin Önlenmesi ve Bunlarla Mücadeleye İlişkin Avrupa Konseyi Sözleşmesinin Onaylanmasının Uygun Bulunduğuna Dair Kanun*, Law no. 6251, Official Gazette 29 November 2011, no. 28127 and Council of Ministers Decision no. 2012/2816, Official Gazette 8 March 2012, no. 28227 bis.

¹⁸ *Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanun*, Official Gazette 20 March 2012, no. 28239.

¹⁹ *İşyerlerinde Psikolojik Tacizin (Mobbing) Önlenmesi Başbakanlık Genelgesi*, Official Gazette 19 March 2011, no. 27879.

²⁰ Official Gazette 15 April 2011, no. 27906.

²¹ *Kurumsal Yönetim İlkelerinin Belirlenmesine ve Uygulanmasına İlişkin Tebliğde (Seri: IV, no: 56) Değişiklik Yapılmasına Dair Tebliğ (Sıra: V, no: 57)*, Official Gazette 11 February 2012, no. 28201.

6. State to provide financial aid for widows in poverty starting from April 2012;
7. National Action Program on Fighting Violence Against Women 2012-2015;²²
8. Issuance of By-law on Establishment and Functioning of Guest Houses;²³
9. Issuance of By-law on Implementation of the Law on the Protection of the Family and the Prevention of Violence against Women.²⁴

The Sack Law extended incentives such as cancelled or lowered premiums for private sector employers to promote the employment of women and young people. These incentives, applicable until 31 December 2015, cover males aged between 18-29 and females above 18 without an upper age limit. The Government is to subsidize employers' social security premiums for newly hired women during up to five years. The Council of Ministers is authorized to extend the period by five more years after 31 December 2015. The temporary measures introduced during the global crisis reduced some of the most penalizing aspects of legal employment, and paid off by boosting formal employment, notably of youth and women.²⁵

3. Legal rules on equality and non-discrimination

Article 10 of the Constitution on equality read, before the amending law: 'Men and women have equal rights. The State shall have the obligation to ensure that this equality exists in practice.' As amended,²⁶ this article received an addendum that allows for positive discrimination: Measures taken with this goal in mind cannot be considered as violations of the principle of equality. Also, by means of an amendment to Article 90 of the Constitution in 2004,²⁷ ratified international agreements on fundamental rights and freedoms, including the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), have been granted priority over national laws.

There is no separate non-discrimination legislation in Turkey. Article 5 of the Labor Law is the most extensive provision on the prohibition of discrimination. This article regulates the principle of equal treatment prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion, philosophical belief, or any such considerations. 'Any such

²² National Action Program on Fighting Violence Against Women 2012-2015 (*Kadına Yönelik Şiddetle Mücadele Ulusal Eylem Planı 2012-2015*) became effective on 10 July 2012 following termination of the former Program covering 2007-2010 period. The new Program was prepared with the participation of the relevant public bodies, NGOs and universities' gender studies centers.

²³ *Kadın Konukevlerinin Açılması ve İşletilmesi Hakkında Yönetmelik*, Official Gazette 5 January 2013, no. 28519.

²⁴ *6284 sayılı Ailenin Korunması ve Kadına Karşı Şiddetin Önlenmesine Dair Kanuna İlişkin Uygulama Yönetmeliği*, Official Gazette 18 January 2013, no. 28532.

²⁵ OECD Economic Surveys Turkey, July 2012, p. 29.

²⁶ Law no. 5982, Official Gazette 13 May 2010, no. 27580. This law was approved through a referendum held on 12 September 2010.

²⁷ Law no. 5170, Official Gazette, 22 May 2004, no. 25469.

considerations' implies that the listing is non-exhaustive. For example, gender reassignment and sexual orientation have not been specified in the article, but if a claim of discrimination on such a basis would possibly be upheld, the judiciary will, most probably, consider the case as falling under 'sex discrimination', 'any such considerations', or the 'right to equal treatment'. Article 5 of the Labor Law does not only prohibit discrimination on the basis of fundamental rights, but also on the basis of part-time or the fixed-term nature of work.

Under Article 5 of the Labor Law, the principle of equal treatment with regard to sex means that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference to sex or pregnancy as regards the conclusion, content, implementation, and termination of labor contracts. Those occupational activities for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor are excluded. In an employment relationship, excluding selection, gender discrimination is a reason to justify a claim for wrongful treatment or unlawful dismissal. The Criminal Law²⁸ criminalizes discrimination at the time of contract conclusion. According to Article 122 of the Criminal Law on discrimination, any person who makes employment or non-employment conditional on discrimination on the basis of language, race, sex, disability, political opinion, philosophical belief, religion, sect and similar grounds shall be sentenced to six months to one year of imprisonment or a fine.

In January 2010, the Government proposed the introduction of an Anti-Discrimination and Equality Board for the long term to create a society where differences are respected. The Board's task is to help people who face discrimination for one or more reasons. The decisions of the Board will be binding and it will also be authorized to impose administrative sanctions, namely fines. The Board is to actively promote equality as well as ensure that individuals have access to justice if they are treated unfairly. In such cases, the decision of the Board will serve as an expert witness report before the court. The Government aims to produce its final plans after more debate.

A Prime Ministerial circular²⁹ on enhancement of female employment and the provision of equality of opportunities envisages gender equality mainstreaming. The circular starts by stating that the principles of enhancement of female employment and the provision of equal wages are essential to strengthen women's socio-economic status, to ensure equality between women and men in society, and to achieve sustainable economic growth and social development. With this objective a Female Employment National Monitoring and Coordination Board³⁰ is to be established to monitor, evaluate, and provide coordination and cooperation of all works undertaken by all stakeholders with the aim of diagnosing and eliminating current problems that hinder women's employment.

²⁸ *Türk Ceza Kanunu*, Official Gazette 12 October 2004, no. 25611.

²⁹ *Başbakanlık Kadın İstihdamının Artırılması ve Fırsat Eşitliğinin Sağlanması Genelgesi*, Official Gazette 25 May 2010, no. 27591.

³⁰ *Kadın İstihdamı Ulusal İzleme ve Koordinasyon Kurulu*.

3. Legal rules on pregnancy and maternity and their assessment

3.1. Ante-natal rights and requirements

The rules on ante-natal rights and requirements are found mainly in the By-law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries,³¹ which is almost completely drawn on Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding (Pregnant Workers Directive).³²

A pregnant worker shall mean a pregnant worker who informs her employer of her condition with a document to be obtained from any health institution; a worker who has recently given birth shall mean a worker who has recently given birth and who informs her employer of her condition; a worker who is breastfeeding shall mean a worker who is breastfeeding her 0-1 year old child (By-Law, Article 4).

Pregnant workers are entitled to time off, without loss of pay, in order to attend ante-natal examinations, if such medical examinations have to take place during working hours (By-Law, Article 12). If the pregnant/recently given birth/breastfeeding worker's physician asks for a position that is less strenuous or hazardous, the employer has to transfer her to another position if there is one or if he can provide one without being unduly burdened, without a reduction in wage. If such a transfer is not possible, then the worker shall be granted a leave without pay upon request for a period necessary for safety and health of the worker (By-Law, Article 8). Also, a pregnant worker, a worker who has recently given birth or a breastfeeding worker cannot perform work beyond 7½ hours a day (Article 10).

There are limitations as regards access to night work. There is the temporary inability of a pregnant worker to perform night work. A pregnant worker cannot be obliged to perform night work during the period starting from the time that her pregnancy is specified in a medical certificate until delivery. Night work may be performed after maternity leave or by a nursing worker, after a six-month period following the maternity leave if she is fit to resume night work. If the worker presents a medical certificate stating that it is necessary for her safety or health that she does not perform night work, she cannot be compelled to do so for the period specified in the medical certificate. The six-month night work prohibition may be extended to one year upon a medical certificate according to the By-Law on Working Conditions for Women Workers in Night Shifts.³³ On the other hand, a female civil servant could not perform night work starting from the 26th week of her pregnancy until one year after the delivery. Now, according to the amendment made by the Sack Law to the Civil Servants Law, a female civil servant can perform night work until the 24th week of her pregnancy unless she presents a medical certificate stating

³¹ *Gebe veya Emziren Kadınların Çalıştırılma Şartlarıyla Emzirme Odaları ve Çocuk Bakım Yurtlarına Dair Yönetmelik*, Official Gazette, 14 July 2004, no. 25522.

³² OJ L 348, 28 November 1992, p. 1.

³³ *Kadın İşçilerin Gece Postalarında Çalıştırılma Koşulları Hakkında Yönetmelik*, Official Gazette 9 August 2004, no. 25548.

otherwise. For the period between the 24th week of pregnancy and one year following the delivery, there is an absolute prohibition of night work.

The Ministry of Health launched GEBLIZ, a healthcare system to monitor pregnant women, in 2008. Under the GEBLIZ system, healthcare providers are to record the identities and contact details of pregnant women in order to monitor their pregnancy, post-partum period and their newborns. The project was introduced to help pregnant women and paramedics were to visit such women in their homes to make periodic controls. This caused problems for some pregnant women, especially unmarried pregnant women, who wanted to keep their pregnancies discreet. The Ministry of Health adopted a privacy policy as part of GEBLIZ, making pregnant women able to select a level of privacy around their pregnancy, including choosing not to have home visits by paramedics.

3.2. Maternity leave

The rules on maternity leave are found mainly in the Labor Law and the Civil Servants Law, both recently amended by the Sack Law. There is a compulsory maternity leave of 16 weeks. The eight-week ante-natal resting period may be reduced to three weeks by request of the worker and the approval of the doctor, and the unused period is added to the eight-week post-natal resting period. If there is multiple pregnancy, two more weeks are to be added to the ante-natal leave. These ante-natal and post-natal resting periods may be increased with a medical report on the basis of the worker's health and the nature of the work to be performed. If there is an early birth as a result of which part of the ante-natal leave is not used, this part can be added to the post-natal rest period.

In Turkey, the total period of maternity leave is compulsory. An employer who requires a woman to work during this period is guilty of an offence. An employer who requires a woman to work during this period is punishable by a fine of TL 1.293 (approx. 560 EUR) in 2013. Maternity leave is considered as worked in the calculation of the annual leave (Labor Law, Article 55b). The Pregnant Workers Directive envisages a maternity leave of at least 14 weeks allocated before and/or after delivery. The maternity leave has to include compulsory maternity leave of at least two weeks allocated before and/or after delivery. The Proposal for a Directive of the European Parliament and of the Council of 3 October 2008 amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding extends the maternity leave from 14 to 18 weeks. This corresponds to 12 non-compulsory weeks that women can choose to take before or after delivery and six compulsory weeks after delivery. If the actual date of delivery differs from the presumed date, the period of leave before the birth can be extended without having an effect on the post-natal period. Moreover, additional leave may be granted in the event of premature childbirth, children hospitalized at birth, the birth of children with disabilities and multiple births. Also, any period of sick leave, up to four weeks before delivery, in the event of illness or complications during pregnancy or childbirth shall not shorten the period of maternity leave in the interest of women's health. Where childbirth occurs after the due date, the prenatal portion of the leave shall be extended to the actual date of birth, without any reduction in the post-natal

portion of the leave. When the Proposal is given effect, Turkey has to reconsider the duration of maternity leave and its compulsory/non-compulsory nature.

3.3. Additional maternity leave

The worker, if she so requests, has to be granted unpaid leave of up to six months following the post-natal period. The two periods, compulsory and additional, run consecutively, to give an entitlement to 16 weeks (18 in the case of a multiple pregnancy) plus 6 months leave. There can be no gap between the two periods. Additional unpaid maternity leave upon request was one year for women civil servants. The Sack Law has extended this one-year period to two years.

Maternity leave and additional maternity leave are limited to women. This reflects the traditional division of responsibility prioritizing the relationship between a woman and her child. In *Hofmann*³⁴ and *Italy*,³⁵ the European Court of Justice (ECJ), under the previous Equal Treatment Directive 76/207,³⁶ ruled that national provisions could legitimately confine additional maternity leave and compulsory adoption leave to mothers.

3.4. Nursing periods

The daily nursing period is 1½ hours during weekdays for women workers until the child is one-year old. This was also true for female civil servants, but now, with the Sack Law, it is 3 hours a day for a period of six months following the termination of maternity leave and 1½ hours a day for the second six-month period.

In practice, nursing periods were used in a way that contradicted its underlying idea: Nursing workers preferred using nursing periods collectively to have one workday off per week. The Circular on Public Personnel,³⁷ a follow-up of the Sack Law, prohibited the collective use of daily nursing periods.

3.5. Paternity leave

The Community Resolution of 29 June 2000 on the balanced participation of women and men in family and working life³⁸ leaves it to the Member States whether or not to grant paternity leave.

Paid or unpaid paternity leave for male workers is left to individual and collective labor agreements. A male civil servant was granted paid paternity leave of three days upon the birth of his child. The Sack Law extends this to ten days. Moreover, it introduces an unpaid paternity leave of 24 months for a male civil servant, upon request.

³⁴ Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.

³⁵ Case 163/82 *Commission v Italy* [1983] ECR 3273.

³⁶ OJ L 39, 14 February 1976, p. 40.

³⁷ Official Gazette 15 April 2011, no. 27906.

³⁸ OJ C 218, 31 July 2000, p. 5.

3.6. Parental leave

Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC³⁹ (Parental Leave Directive) had to be transposed into national law by 8 March 2012. Men and women workers are entitled to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners. The main improvement is that the individual right to parental leave has to be granted for a period of four months, thus one more month more than according to the former Parental Leave Directive. In order to encourage a more equal take-up of leave by both parents, the new Parental Leave Directive emphasizes the non-transferability of at least one of the four months. There is still no obligation to provide totally or partially paid parental leave. At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job. Parents returning from parental leave may request changes to their working hours/or patterns for a set period of time. Employers have to consider and respond to such requests, taking into account both employers' and workers' needs.

In Turkey, in the Labor Law and the Civil Servants Law, there is no leave under the title of 'Parental leave.' A worker may request leave for a valid reason and this may be a family-related reason. In the Civil Servants Law, there are forms of leave entitled 'excuse leave' and 'sickness and patient companionship leave' that may be used for family-related reasons. An 'excuse leave' is a ten-day paid leave to which a second ten-day paid leave may be added in a period of one year. A 'sickness and patient companionship leave' is 3 months' paid leave plus 3 months' paid leave plus 18 months' unpaid leave. An unpaid sabbatical leave of one year to be used altogether or in two parts is granted to civil servants who have completed five (previously ten) years of service. The sabbatical leave can only be taken once throughout the entire period of service. It cannot be used when the civil servant is serving in a region which is subject to martial law, a state of emergency or a disaster. Permanent workers employed in the public sector are entitled to an unpaid patient companionship leave of 6 months plus 6 months. Workers permanently employed in the public sector are also entitled to an unpaid sabbatical leave of 6 months upon the completion of ten years of employment. This sabbatical leave can only be taken once throughout the entire period of employment.

3.7. Adoption leave

Adoption leave has been introduced for the first time for civil servants by the Sack Law. If a child below three years of age is adopted, there will be, upon request, an unpaid adoption leave of up to 24 months. If both spouses are civil servants, then these periods can be taken consecutively. Adoption leave for workers is left to individual and collective labor agreements.

³⁹ OJ L 68, 18 March 2010, p. 13.

3.8. Childcare

The importance of childcare is emphasized in Council Recommendation 92/241/EEC of 31 March 1992,⁴⁰ the Barcelona European Council conclusions of March 2002,⁴¹ and European Commission: Communication on Early Childhood Education and Care of 17 February 2011.⁴² In most EU Member States, compulsory full-time education starts at the age of five or six. For those children who are too young to attend school, there are wide differences in the availability and provision of pre-school education and care services. In 2009, education ministers agreed on a target that 95% of four year-olds should have access to pre-school education. The current EU average is 92.3%, but there are wide variations in the number of hours per week as well as the quality of services.⁴³

Under the By-law on the Working Conditions for Pregnant or Nursing Workers, and Nursing Rooms and Day Nurseries, workplaces employing between 100 and 150 female workers are to establish nursing rooms while those employing more than 150 female workers have to establish day nurseries consisting of a nursing room and a day nursery. The fact that it is not the total number of workers but the number of female workers in the workplace being considered points to the norm that women are mainly responsible for the rearing of children. The children of the working men are to benefit if the mother has died or if parental authority has been given to the father by a court decision. The establishment, conduct, and functioning of such facilities are entirely at the expense of the employers. The employers under the legal obligation of establishing day nurseries were also burdened to establish pre-school classes complying with the programs of the Ministry of Education. These legal burdens were eased by the so-called 'employment package', Law no. 5763, aiming at employment promotion.⁴⁴ The employers are not obliged to establish pre-school classes any longer and outsourcing became possible for childcare services.

3.9. Fighting pregnancy and maternity related discrimination

Article 10 of the Pregnant Workers Directive prohibits dismissal during the period from the beginning of their pregnancy to the end of the maternity leave except under exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, to which the competent national authority gives consent. If the worker is dismissed during the period from the beginning of their pregnancy to the end of

⁴⁰ OJ L 123, 8 May 1992, p. 16.

⁴¹ At the 2002 Barcelona European Council, Member States agreed by 2010 to provide full-day places in formal childcare arrangements to at least 90% of children aged between three and compulsory school age, and to at least 33% of children under three. Progress has been uneven.

⁴² Communication from the Commission, Early Childhood Education and Care: Providing all our children with the best start for the world of tomorrow, COM(2011) 66 final, Brussels, 17.2.2011.

⁴³ <http://www.euractiv.com/socialeurope/brussels-calls-universal-child-c-news-502271>.

⁴⁴ Law Amending the Labor Law and Other Laws (*İş Kanunu ve Bazı Kanunlarda Değişiklik Yapılması Hakkında Kanun*), Official Gazette, 26 May 2008, no. 26887.

the maternity leave, the employer must cite duly substantiated grounds for her dismissal in writing. Under the new proposal, employers would also have to justify, in writing, the dismissal of a worker within six months of the end of her maternity leave.

Under Article 5 of the Labor Law on prohibition of discrimination at work, in an employment relationship, excluding selection, gender discrimination is a reason to justifiably claim wrongful treatment or termination. If the worker proves *prima facie* that there may be discrimination, it is up to the employer to prove the contrary. Proof of discrimination shall suffice, a consequent loss or suffering shall not be sought. A female worker, be it one with regular or increased job security, who considers herself discriminatorily treated on the basis of sex during the course of employment or dismissal may pursue her claims and demand pay amounting to four months' basic wages. This is the so-called 'discrimination pay.' Introduction of a ceiling to the amount of discrimination pay contradicts the *acquis*: the ECJ has ruled that fixing a prior upper limit may preclude effective compensation. The case law of the ECJ is upheld by Directive 2002/73/EC amending Council Directive 76/207/EEC, recast by Directive 2006/54/EC.

In Turkey, (women) civil servants enjoy a comprehensive job security under the Civil Servants Law. On the other hand, the Labor Law restricts the right of an employer to dismiss a pregnant worker. The labor contract is deemed to have been suspended during maternity leave. Therefore, dismissal for any reason during the period of maternity leave is legally impermissible. An exception shall be the automatic expiration of the prescribed period coinciding with the leave in case of a fixed-term labor contract.

Between the employer and the worker there may be a fixed-term or an open-ended labor contract. A fixed-term labor contract cannot be terminated before the expiration of a specified period unless there is a just cause, clearly indicated in Article 25 of the Labor Law, leading to an immediate dismissal.⁴⁵ Needless to say, pregnancy does not constitute a just cause. However, excessive absenteeism for health reasons is a just cause for dismissal. The employer is entitled to terminate the fixed-term or open-ended labor contract for excessive absenteeism. If a woman worker who fails to report to work for reasons of health for more than six weeks beyond the prescribed notice period varying between two to eight weeks⁴⁶ following her confinement leave of 16 weeks (exceeding 24 to 30 weeks of absenteeism), she can be dismissed for excessive

⁴⁵ Immediate dismissal may occur for specified serious offences known as gross misconduct (zero tolerance offences). Examples are résumé fraud (CV fraud), sexual harassment of other workers, verbal or physical abuse directed at the employer or the members of his family, illegal drug usage, willful neglect of duty that is not trivial, and has not been condoned by the employer, abuse of trust such as theft, embezzlement, disclosure of trade secrets, use of employer's equipment (e.g. vehicles and computers) to engage in non-work-related activity. Some workers dismissed for gross misconduct may face additional consequences like criminal prosecution (e.g. bank teller stealing money from the cash drawer) or a civil lawsuit.

⁴⁶ If the length of employment at the workplace concerned is less than six months, the corresponding notice period is two weeks, four weeks for employment between six months to 1½ years, six weeks for employment between 1½ years and three years, and eight weeks for employment of more than three years.

absenteeism (Article 25/1). This conforms to the ECJ's rulings in *Hertz*,⁴⁷ *Larsson*,⁴⁸ and *Brown*.⁴⁹ If the worker is laid off for excessive absenteeism, she shall be entitled to severance pay only if she has been employed in that particular workplace for at least one year.

If a woman worker employed under an open-ended labor contract is dismissed due to her pregnancy, the types of pay (compensation) will differ based on whether she is a worker with regular or with increased (enhanced) job security. Workers employed under open-ended labor contracts either enjoy regular job security or increased job security. The total length of employment of the relevant worker and his/her status are decisive here. Workers with increased job security enjoy greater protection against dismissal on notice. A worker who has been working under an open-ended labor contract for more than six months at a workplace where at least thirty (fifty in agriculture) workers are employed benefits from increased job security if he/she is not in the position of an employer's representative managing the whole business or workplace with authority regarding recruitment and dismissal. Where the employer owns more than one workplace in the same industry, the total number of workers shall be considered (Article 18). The 30-worker threshold is to avoid imposing administrative, financial and legal constraints in a way which would hinder the creation and development of small and medium-sized businesses (SMEs).

Where a worker with regular job security is dismissed due to her pregnancy, this will be deemed an 'abusive dismissal' entitling the worker to so-called 'bad-faith pay', equaling to thrice the amount of pay corresponding to the worker's notice period. The employer has to present the termination in writing but there is no legal obligation for him/her to specify the reason of dismissal clearly and precisely.

Where a worker with increased job security is dismissed, the employer has the legal obligation to specify the reason of dismissal clearly and precisely (Article 18). The worker has to be provided an opportunity to defend himself/herself when the allegations are related to his/her capacity or conduct (Article 19). Where no reason is specified or the reason specified is not valid, the worker can pursue court action to protect his/her rights and can be reinstated by the court (Article 20). If the employer does not reinstate him/her, as is usual due to the fear of retaliation, the worker shall be entitled to job security pay. The minimum amount of this compensation corresponds to the worker's four months' basic wages and the maximum to the worker's eight months' basic wages.

On the basis of the ILO C158,⁵⁰ Article 18 of the Labor Law on increased job security presents a non-exhaustive list of incidents that do not constitute a

⁴⁷ Case C-179/88 *Handels- og Kontorfunktionerernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3941.

⁴⁸ Case C-400/95 *Handels- og Kontorfunktionerernes Forbund i Danmark, acting on behalf of Larsson v Dansk Handel & Services, acting on behalf of Fotex Supermarked A/S* [1997] ECR I-2757.

⁴⁹ Case C-394/96 *Brown v Rentokil Ltd.* [1998] ECR I-4185.

⁵⁰ Convention on the termination of employment relationship at the employer's initiative, 1982.

valid reason for contract termination amongst which are sex, marital status, family obligations, pregnancy, confinement and absenteeism due to maternity leave. If the discriminatorily dismissed worker is one with increased job security, she shall be entitled to reinstatement, and if not reinstated by the employer, to the so-called 'job security pay', equaling to 4-8 months' wages. There shall also be severance pay to be paid to such a worker with regular or increased job security if she has completed at least one year of service at the relevant workplace.

3. Social security related issues

In cases of pregnancy and delivery, there are benefits in kind and benefits in cash. Maternity medical benefits cover medical examination, medication, in vitro fertilization, and hospitalization designed to cover care for the insured woman or the uninsured wife of the working man. Social Insurances and General Health Insurance Law regulates social security related issues (Law no. 5510).⁵¹

Maternity allowance is a short-term incapacity benefit designed to compensate for a worker's loss of earnings through pregnancy and delivery. Directive 92/85/EC provides for a minimum maternity leave period for employees of 14 weeks and for a minimum payment during this leave at the level of sick pay. As regards maternity allowance for women workers, Turkey meets the minimum requirement. Unless there is a provision to the contrary in the individual or collective labor contract, there will be no pay by the employer during maternity leave, the worker will be paid maternity allowance equaling sick pay by the social security organization (Law no. 5510, Article 18). To qualify for maternity allowance, a female worker has to have made at least 90 days' contributions during a period of one year before birth. Full salary is available during the maternity leave for the women civil servants.

In some schemes, the worker can make up for any unpaid leave by way of extra contributions. During a period of unpaid maternity leave, neither the worker nor the employer will be expected to contribute. The worker may, if she chooses, pay contributions for the statutory (compulsory) maternity leave but the employer will not have a duty to contribute. If the worker pays contributions for the statutory maternity leave period, this period counts as pensionable service. Also, where a worker resigns due to pregnancy or delivery, she may, if she chooses, pay contributions for at most the two-year period during which she remains unemployed. This period starts with birth and the worker may benefit from this provision for two separate births (Article 41).

The so-called 'milk money' (nursing allowance) is a lump-sum payment made to a breastfeeding worker or to the uninsured breastfeeding wife of the male worker for each newborn child provided that the child is alive (Article 16). To qualify for the nursing allowance, a female worker or the working husband of the woman has to have paid at least 120 days' contributions within a period of one year before delivery.

If a female worker is the mother of a disabled child in need of constant care, she will be entitled to early retirement: 90 extra pensionable days will be

⁵¹ *Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu*, Official Gazette 16 June 2006, no. 26200.

added to each year of service (Article 28). It is the Social Security Organization Health Board⁵² that determines the child's condition on the basis of the relevant By-Law.⁵³

4. Conclusions

There is a wide gap in the unemployment rates of men and women and this has to be reduced. Family structure has its direct implications on women's entry into the labor market. The pressures of combining paid work and domestic and care responsibilities are evident. Many women leave the labor market because of difficulties in reconciling work and domestic responsibilities. Labor market inequalities make it rational for many women, rather than their male partners, to give up employment to care for children, elderly or others. Longer spells of unemployment to reconcile work and maternity can have negative consequences for experience, skills and motivation for re-entry into the labor market. Reintegration after a long pregnancy-related break is quite difficult. Shortage of affordable childcare prevents women in low-paid and lower-skilled jobs from working. Various social policies need to encourage women's labor force participation, not least by making affordable child and elderly care a priority and more specifically public pre-school education/ programs may help women to find work.

The long-term hindrance of flexibility by trade unions resulted with under-development of atypical types of work. This makes it difficult for women to not only enter the labor market but remain attached to it. These constraints aggravate the traditional values that consider homework as women's domain.

In the National Action Plan – Gender Equality 2008-2013, objectives and strategies for action are developed for the areas of education, economy, poverty, power and decision making, health, media and the environment. In the economic area, strategies to increase women's employment in line with the Ninth Development Plan (2007-2013) include:

1. revising the existing Labor Law in order to incorporate definitions based on gender equality;
2. taking the necessary measures against all kinds of discrimination faced by women with regard to entry into and performance in employment and working life;
3. expanding care services for children and for sick, disabled and elderly people, and enhancing their accessibility;
4. making legal arrangements on parental leave in order to share the childcare responsibilities between mothers and fathers; and
5. providing information to home-based working women about the opportunities to benefit from the social security system.

There is an indisputable impact of EU law on the development of Turkish labor law. The maternity provisions generally either meet, or are more generous than, the minimum requirements of the Pregnant Workers Directive. Protective

⁵² *Sosyal Güvenlik Kurumu Sağlık Kurulu.*

⁵³ Article 15, By-Law on Incapacity for Work and Schemes for Invalidity (*Çalışma Gücü Ve Meslekte Kazanma Gücü Kaybı Oranı Tespit İşlemleri Yönetmeliği*), Official Gazette, 11 October 2008, no. 27021.

measures are essential in pregnancy-related cases but overprotective provisions like long maternity leave, the legal obligation of the employer to grant six months of unpaid additional leave on the worker's request (two years for women civil servants), nursing breaks of 1½ hours a day for one year for women workers (3 hours a day for the first six and 1½ hours a day for the second six-month period for women civil servants) or childcare facilities solely at the expense of employers can backfire, discouraging private sector employers from hiring female workers. Such 'protective measures' may make female labor a lot more costly for the employers when compared with male labor. Barriers for businesses hiring women have to be lifted. A move from 'protection' to 'promotion' is essential. Law no. 5763 of May 2008, the so-called 'employment package', tried to ameliorate the adverse effects of the global crisis on employment and eased some of the unduly burdens on the employers, *inter alia*, lifting of the legal obligation of establishing pre-school classes and providing the option of outsourcing childcare. Incentives such as lifted or lowered premiums for employers to promote employment of youth and women were provided. These incentives cover males aged between 18-29 and females above 18 without an upper age limit. The Government is to subsidize employers' social security contributions for newly hired women during up to five years.

The assessment of the compatibility of Turkey's legal rules on pregnancy and maternity with the EU *acquis* gives us one important conclusion: Turkey is highly responsive to change and it has shown initiative in the adaptation process by developing new legal rules and innovative policies. However, reality at enterprise level points to a second important conclusion: The participation rate by women is very low, and laws and strategies to increase female employment have to be effectively implemented and social partners' adaptability to change has to be increased.