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PROTECTION OF PREGNANT WOMEN AGAINST DISMISSAL: WITH REGARD TO THE HUNGARIAN JURISPRUDENCE

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Summary

In this article, the main logic and basic provisions of the mainstream legislations at international, EU and national (Hungarian) level as well as the case law on pregnant women's protection against dismissal were introduced.

In Hungary Act I of 2012 on the new Hungarian Labour Code concluded that pregnant women need to notify the employer of their pregnancy prior to receiving the termination letter in order to get protection against dismissal. Then the Hungarian Constiutional Court annuled the prior notice requirement. The Constiutional Court Decision stated that if pregnant women did not inform the employer, they would also be granted the protection against dismissal. The HCC's decision basically returned back to the provision of the previous Labour Code (Act XXII of 1992): the protection against dismissal exists even if pregnant woman did not inform the employer about her pregnancy status. Hence, according to the HCC's decision the previous Labour Code (1992) provision replaced the new Labour Code's (2012) restrictive provision. The final conclusion what we would like to highlight is that pregnant women could get a wide range of protection against dismissal, but the scope of the protection should be more extended (e.g. IVF and proportional protection of the fetus, etc.).

Key words: *protection against dismissal, pregnant women, human rights, labor law.*

Introduction

This study will examine the legislation and the nature of protections regarding pregnant women against dismissal.[1]Dismissal on grounds related to maternity is still

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[1]While discussing this topic, the obligation to provide information in proper time to the employer is one of the crucial issues. The proper timing has important legal effects on both parties. Besides the timing,

a reality throughout the world. Although there is a critical lack of systematic research on the frequency of maternity-related dismissal, several countries do collect[2] and report[3] such data.[4]

In addition, attention will alsobe paid to the rule of protection and what kind of effect the cooperation between employee and employer will have. The aim of the article is to highlight the relevant international (ILO, EU) legislations and court cases.The paper also gives the analysis of the relevant measures of the Hungarian Labour Code[5] and one important decision of the Hungarian Constitutional Court.[6]

The authors would like to emphasize that pregnant women have many human rights equal to many other human beings, but sometimes the same human rights have a different legal interpretation in case of pregnant women, just because theyare pregnant.[7] For example, the right to life is a fundamental human right for everyone, but in case of pregnant woman it should have a wider connotation or in other words double protection.[8]First, this right protects the fetus' right to life (narrowly: the right to be born in good mental and physical condition). Secondly, it protects the pregnant women's life, physical and mental health during the pregnancy. Through the national laws, the governmentsmust ensure that pregnant women get a proper protection at their workplace.

The other fundamental human right of the pregnant employee is the right of equal treatment and non-discrimination. This article intends to describe some cases where the employer's behaviour was discriminative towards the pregnant woman because of her pregnancy. According to the statistics and court case law, pregnant

there are some further issues which are relevant in an employment relationship: e.g. a) how to inform the employer (written or oral form), b) whether she works under a fixed-term contract or not, c) whether she is under a probation period or not, etc.

[2] In the United Kingdom a report released by the Equality and Human Rights Commission (EHRC) in 2005 stated that around seven per cent of pregnant women (i.e. approximately 30,000 per year) lose their jobs due to pregnancy. Many more (i.e. approximately 45 per cent) suffer some sort of financial loss or are pressured to quit their jobs. (Equality and Human Rights Commission (EHRC): Greater Expectations, Summary Final Report, (Manchester, 2005).)

[3] In France a national research project mandated by the French Government in 1998 concluded that every year four per cent of pregnant women in France (i.e. 29,500) lose their jobs due to their pregnancy. While only 126 cases of pregnancy-based discrimination were reported to the French Equal Opportunities and Anti-Discrimination Commission (HALDE) in 2008 (i.e. two per cent of total cases), 615 such cases were reported in 2010 (five per cent of the total). According to HALDE, discrimination based on pregnancy, gender and family responsibilities affected 12 per cent of working women in 2010. *[Haute Autorité de Lutte contre les Discriminations et pour l'Égalité (HALDE): Rapport Annuel 2010 (Paris, 2010)]*

[4] http://mprp.itcilo.org/allegati/en/m9.pdf(12.07.2017)

[5] Act I of 2012 on the new Hungarian Labour Code.

[6] NB. The reasoning of Decision No. 17/2014.(V.30.) AB of the Constitutional Court on prohibition of dismissal of pregnant women attests to the continued applicability of the Supreme Court's jurisprudence.

[7] She is responsible for two lives and health: hers and her fetus'.

[8] However, the concept of a right to life arises in debates on issues of capital punishment, abortion, euthanasia, etc. We are not dealing with these issues.

women quite often are dismissed by their employer because of their pregnancy. This article will show the principle that employers are not allowed to discriminate pregnant employees just because of economic advantage. We article will focus on the labour law aspects including protection against dismissal.

1. PREGNANCY AND SOME BASIC HUMAN RIGHTS

Often when a working woman shares good news (about her pregnancy) with coworkers, discrimination[9] might be the last thing on her mind. But the truth is that many women are treated unfairly - or even fired- after revealing the news of their pregnancy.[10]

When we talk about pregnant women, a multi-dimensional legal protection must be provided. First, we have to divide the protection to pregnant woman and fetus.[11] Second, a multidimensional protection of pregnant woman isa) employment protection (protection against dismissal) and b) non-discrimination in relation to maternity before/or at work.The most important rights of the multidimensional protection of pregnant women are shown in Table 1. Due to the length of this paper we shall discuss only two of them (right to life and right to equal treatment/non-discrimination).

Table 1. Basic human rights dimensions to protect pregnant women

Protected rights	Pregnant woman	Fetus/embryo
Right to life	+	+
Right to health (means: health care + occupational and public health)	+	+ (only proper health care)
Right to work	+ - access to work (recruitment) - promotion/training - wage and condition of work - work adaptation to pregnant woman[12](in case of removal another position) - protection against dismissal - the right to return (same position or equivalent)	-

[9]As long as a pregnant woman is able to perform the major functions of her job, not hiring or firing her because she is pregnant is against the law. It is against the law to dock her pay or demote her to a lesser position because of pregnancy. It is also against the law to hold back benefits for pregnancy because a woman is not married. All are forms of pregnancy discrimination, and all are illegal.

[10]https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/know-your-pregnancy-rights(15.07.2017)

[11] In case of the fetus, they usually enjoy derived human rights.

[12] Reasonable accommodation may be required for pregnant women. Pregnant women should not be involved in activities that create substantial health risks to them or their babies.

	- protection of employment-related entitlements	
Right to equal treatment and non-discrimination *(in relation to maternity before/or at work)*	+ - in access to employment - during employment - at termination of employment	-
Right to privacy	+ - prohibition of pregnancy test[13] - reportingpregnancy to employer	

Source: The authors' own source.

1.1. The right to life from the point of view of a fetus

Here we are focusing only on two aspects: the right to life of the fetus and non-discrimination against a pregnant woman, in case of the termination of her employent relationship.

The right to life is a fundamental human right, central to the enjoyment of all other human rights. International human rights law recognizes this basic right as accruing at birth, and international and regional human rights bodies, as well as courts worldwide, have clearly established that any prenatal protections must be consistent with women's human rights.

An emerging trend to extend the right to life before birth, and in particular from conception, poses a significant threat to women's human rights, in theory and in practice. These efforts, often rooted in ideological and religious motivations, are part of a deliberate attempt to deny women the full range of reproductive health services that are essential to safeguarding women's fundamental rights to life, health, dignity, equality, and autonomy, among others.These attempts to grant a right to life before birth - and therefore recognize prenatal legal personhood - seek to bestow rights on a zygote, embryo, or fetus that would be equal or superior to the rights of women. In many cases, these measures aim to outlaw any procedure that terminates a pregnancy. In other cases, these attempts have sought to justify restrictions on access to in vitrofertilization and contraception. These strategies attempt to deny women the ability to make autonomous decisions regarding their fertility with complete disregard for women's basic human rights.[14]

The strategy of promoting the recognition of a right to life before birth has emerged in the context of constitutional reform processes, legislative initiatives, and court challenges that seek to extend constitutional protections of the right to life prenatally. Some countries have adopted various legal frameworks for protecting life before birth. For example, a) Explicit recognition of a constitutional right to life

[13] Job applicants or workers should not be asked about or to undertake health or pregnancy tests, except as strictly required by health and safety laws.

[14] http://mprp.itcilo.org/allegati/en/m9.pdf (12.07.2017)

before birth, as in the national constitutions of Guatemala and Chile.[15] b) Constitutional protections that confer equal protection for the life of both the pregnant woman and the "unborn," as in the national constitutions of Ireland and the Philippines. c) Legislation establishing that the right to life is subject to protection prenatally, as Poland has done.[16]

Further examples, the Dominican Republic adopted a new constitution in 2010, which recognized a right to life from conception, or in 2008 and 2010, the USA's state of Colorado, and in 2011, Mississippi rejected[17] initiatives to amend the constitutions of these states to recognize that „life begins at conception" and that from the moment of fertilization, zygotes, embryos, and fetuses are people with all the rights guaranteed to persons under their state constitutions. Since 2008, at least 16 Mexican states have amended their constitutions to protect the right to life from either fertilization or conception.

In 2007, members of the Slovak Parliament challenged the constitutionality of the country's abortion law, arguing that the constitution protects the right to life before birth. However, the Slovak Constitutional Court found that granting the right to life to a fetus would directly contradict women's constitutional rights to health and privacy and upheld the constitutionality of the abortion law.[18]

The ECJ Hertzcase[19] established the concept of a "protected period" running from the inception of pregnancy to the end of a woman's statutory maternity leave.

In the Mayr[20] case[21]the ECJ confirmed, in the context of IVF, that the protected period begins with the transplantation of the fertilised ova into the woman's uterus and ends when the pregnancy fails.The ECJ was required to consider whether or not she could claim the protection of the Pregnant Workers Directive (PWD), and whether or not the prohibition on the dismissal of pregnant workers would extend to a woman undergoing IVF, in a case where the eggs have been fertilised in vitro, but have not yet been transferred to her uterus at the point of dismissal. The ECJ found that it does not stretch this far. The purpose of the directive is to protect the special condition of pregnancy, and until that condition exists, the protection does not come into play. She was not therefore protected under the PWD.

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[15] Constitutión Política de la República de Guatemala [C.P.] tit. II, cap. I, art. 3 (2002) (Guat.); Constitución Política de la Públicade Chile [C.P.] art. 19, § 1 (1980)(Chile).

[16]http://mprp.itcilo.org/allegati/en/m9.pdf (12.07.2017)

[17]Katharine Q. Seelye, Mississippi Voters Reject Anti-Abortion Measure, N.Y.Times, Nov. 8, 2011 Denise Grady, *Medical Nuances Drove 'No' Vote in Mississippi*, N.Y. Times, Nov 8, 2011.

[18]http://mprp.itcilo.org/allegati/en/m9.pdf (12.07.2017)

[19]Handelsog Kontorfunktionaerernes Forbund i Danmark (acting on behalf of Birthe Vibeke Hertz)v Dansk Arbejdsgiverforening. Reference for a preliminary ruling: Højesteret - Denmark. Equal treatment for men and women - Conditions governing dismissal - Absence due to illness attributable to pregnancy or confinement. Case C-179/88.

[20]In the Mayr case the claimant was employed as a waitress and was going through In Vitro Fertilisation ("IVF"). The treatment lasted about one and a half months, and there were complications. She was certified off sick by her medical practitioner, and whilst off sick was dismissed by her employer.

[21]Sabine Mayr v Backerei und Konditorei Gerhard Flockner OHG (C-506/06) [2008] 2 CMLR 27.

However, the ECJ also pointed out that to dismiss a woman because she is undergoing IVF, which is essentially something that affects onlywomen, would be direct sex discrimination. She is protected by the Equal Treatment Directive (the Recast Directive 2006/54). The Equal Treatment Directive [and by analogy the Recast Directive 2006/54] covers women who are "

at an advanced stage" of IVF (between the follicular puncture and the immediate transfer of the fertilised ova into the uterus).[22]

There are a number of steps that States can and should take to promote a legitimate interest in prenatal life – from the point of view of social and income security which links strongly to gainful and paid employment or other work relationship - while respecting women's fundamental rights.

According to our opinion, in case of pregnant working women the right to life should be split proportionally and interdependently between the pregnant woman and the fetus. A distinction should be made between living life (pregnant woman) and future (expected) life (fetus). The living life should have in many cases priorty (mother's life in in danger, abortion, etc.), but intentionally and peremptorily cannot harm the life of the fetus. Hence, they are inseparably living together and they must respect each other's rights and interest.

From the social law aspect, pregnancy- and later maternity-related dismissal directly impacts the economic security and health of victims of discrimination as well as that of their fetus and later children. Lower income due to job loss means less revenue with which to take care of a fetus and later raise a newborn. Lack of access to affordable healthcare of sufficient quality is also a risk for dismissedpregnant women, which can in turn increase otherwise preventable incidences of maternal and infant mortality.

With regard to employment opportunities and prospects, dismissal on grounds of pregnancy must be prohibited because it deteriorates the chance for a woman to find a new job during her pregnancy and later her chance to return to the labour market. Such delays have been shown to have adverse effects on women's salaries, as well as access to certain benefits (e.g. seniority and promotions).[23]

1.2. EQUAL TREATMENT AND PROHIBITION OF DISCRIMINATION OF PREGNANT EMPLOYEE

The right to equal treatment requires that all persons be treated equally before the law, without discrimination. The principle of equality and non-discrimination guarantees that those in equal circumstances are dealt with equally in law and practice. However, it is important to stress that not every distinction or difference in treatment will amount to discrimination. In general international law, a violation of the principle of non-discrimination arises if: a) equal cases are treated

[22]http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/2011-111DV16-Russell%20EN.pdf(16.07.2017).
[23]http://mprp.itcilo.org/allegati/en/m9.pdf(12.07.2017).

in a different manner; b) a difference in treatment does not have an objective and reasonable justification; or c) if there is no proportionality between the aim sought and the means employed. These requirements have been expressly set out by international human rights supervisory bodies, including the European Court of Human Rights,[24] the Inter-American Court[25] and the Human Rights Committee.[26,27]

To discriminate against someone means to single out or make a distinction about that person. Discrimination becomes unlawful in the workplace when an employer treats an applicant or employee unfavorably because of characteristics covered by equal-employment opportunity laws. Discrimination involves treating people differently on the basis of a personal characteristic that is unrelated to their ability to do the job. Discrimination may be direct or indirect and does not have to be intentional. Practices which appear neutral but result in the unequal treatment of people with certain characteristics are called indirect discrimination. For example, indirect discrimination may arise if part-time workers are targeted for retrenchment, where women are more likely to be concentrated in this category than men.

Maternity often constitutes a source of discrimination in employment, in relation to access to employment, equal opportunities, treatment at work and termination of employment.[28]This part of the article focuses on employment protection and non-discrimination in relation to protection against dismissal on grounds related to pregnancy.

Both international and national legislations relating to employment protectionrefer to the right of a female worker to not being discriminated, concretely not to lose her job duringpregnancy or maternity leave as well as during a period following her return to work, theduration of which is specified by national laws or regulations. Employment protection has been a fundamental element of maternity protectionsince the very first ILO Convention on the issue in 1919 and remains a key provision of themost recent ILO Convention on Maternity Protection, 2000 (No. 183).[29]

[24]See, e.g., ECHR Marckx v. Belgium (13 June 1979).
[25]See, e.g,. Advisory Opinion No. 4, para. 57.
[26] See, e.g., General Comment 18, para. 13 and Jacobs v. Belgium.
[27]http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality-and-non-discrimination (14.07.2017)
[28] Maternity Protection Resource Package, From Aspiration to Reality for All, Part II. Modul 9: Employment protection and non-discrimination, Geneva: ILO, 2012 p. 1.
[29] C183 - Maternity Protection Convention, 2000 (No. 183) Convention concerning the revision of the Maternity Protection Convention (Revised), 1952 (Entry into force: 07 Feb 2002)

Within the sphere of EC law, this principle of equality precludes comparable situations from being treated differently, and different situations from being treated in the same way,[30]unless the treatment is objectively justified.[31]

It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 in PWD or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.[32] This is an important provision, since the decision to dismiss rests with the employer and proving evidence of the employer's intention would be extremely difficult for an individual worker.

This provisionoffers additional protection to women against discriminatory dismissal. Given that the'real' rationale for dismissal is generally known only to the employer, it is pragmaticallyvery difficult for workers to show that the dismissal was in reality maternity-baseddiscrimination. Thus, transferring the burden of proof to the employer strengthens theworker's protection and enforces the principle of equal treatment.[33]

2. INTERNATIONAL NORMS

2.1. RELATED CONVENTIONS OF THE INTERNATIONAL LABOUR ORGANISATION

ILO Conventions have become increasingly comprehensive in terms of the extent to whichmaternity protection should be provided. In earlier maternity protection Conventions (Nos.3[34] and 103[35]), protection against dismissal was limited to the period of absence for reasonsrelated to maternity, whereas the protected period was increased in Convention No. 183 toalso cover pregnancy and a period following the return to work, usually corresponding tothe period during

[30] Case 106/83 Sermide SpA v Cassa Conguaglio Zucchero [1984] ECR 4209 at [28]. See also, Opinion of AG Van Gerven, Case C-146/91 Koinopraxia Enoseon Georgikon Synetairismon Diacheir iseos Enchorion Proionton Syn. PE (KYDEP) v Commission [1994] ECR I-4199.

[31] See, e.g., Case C-189/01 Jippes v Minister van Landbouw, Natuurbeheer en Visserij [2001] ECR I-5689 at [129] and Case C-149/96 Portugal v Council [1999] ECR I-8395 at [91]; Case C-411/98 Angelo Ferlini v Centre Hospitalier de Luxembourg [2000] ECR I-08081.

[32] Convention No. 183, Article 8(1)

[33]Maternity Protection Resource Package, From Aspiration to Reality for All, Part II. Modul 9: Employment protection and non-discrimination, Geneva: ILO, 2012 p. 1.

[34] C003 - Maternity Protection Convention, 1919 (No. 3) Convention concerning the Employment of Women before and after Childbirth (Entry into force: 13 Jun 1921)

[35] C103 - Maternity Protection Convention (Revised), 1952 (No. 103) Convention concerning Maternity Protection (Revised 1952) (Entry into force: 07 Sep 1955)

which national legislation provides for breastfeeding arrangements.Dismissals during this period may only be made on grounds unrelated to maternity.[36]

The prohibitions of the termination of the employment contract during pregnancy are more or less flexible, depending on the country. In some, dismissalis prohibited with no exceptions (in accordance with ILO Conventions Nos. 3 and 103); inothers, it is prohibited on the grounds of maternity, but allowed for reasons regarded aslegitimate and unconnected with maternity (in accordance with ILO Convention No. 183),such as misconduct or failure on the part of the worker to honour obligations under theemployment contract, cessation of activity by the enterprise,force majeure,normal expiryof the employment contract or completion of the work for which the worker was recruited.[37]

According to the ILO Convention on Maternity Protection (No. 183),the following are common examples of grounds for dismissal: a) serious fault, b) gross negligence or violation of work discipline on the part of the employee; c) valid reasons stipulated in common and labour law or by the Ministry of Labour; d) the undertaking has ceased to exist; e) expiry of fixed-term contracts or the end of the work for which a woman was engaged; f) imprisonment of the worker; g) the cause of dismissal pre-dates pregnancy; h) work for another undertaking while on leave; i) failure to resume work on the expiry of the unpaid leave granted to her.

In several countries, the employer is obliged to ask for judicial or administrative authorization before giving notice of dismissal. This can provide additional safeguards to ensure that dismissal is unrelated to maternity.[38]

Labour courts are crucial in ensuring that statutory provisions are respected and inassessing the validity of reasons given by employers and their possible connection withmaternity, but they are a last resort. Examples of sanctions include reinstatement of theemployee, as well as financial compensation.

Compensation in case of dismissal. Despite existing protective measures, discriminatory dismissal does occur in practice. Inmany countries, when employers do not comply with the ban on dismissal, legal action canbe taken and compensation paid. However, although Convention No. 183 explicitlyprohibits dismissal, it does not deal expressly with the issue of how the prohibition shouldbe enforced, leaving this matter to the discretion of the ratifying countries, subject to theexamination of national law and practice in this regard by the ILO supervisory bodies. Countries in which compensation is provided include Albania, Argentina and Ecuador,[39]

[36]http://mprp.itcilo.org/allegati/en/m9.pdf(12.07.2017)
[37]http://mprp.itcilo.org/allegati/en/m9.pdf (12.07.2017)
[38]http://mprp.itcilo.org/allegati/en/m9.pdf (12.07.2017)
[39]Equal to one year's remuneration.

Denmark,[40] Belgium,[41] Colombia and Honduras,[42] Tunisia, Zambia, andthe Lao People's Democratic Republic[43].[44]

Since dismissal may have implications in terms of whether or not a woman receives thecash benefits she would have earned during maternity leave, it is important to note thedistinction between the situation of a woman who meets the maternity benefits eligibilitycriteria under a social security or insurance scheme and that of a woman who is not eligibleor not covered by such a scheme. In the first case, dismissal will normally have no effect onthe payment of benefits which the worker will receive during her leave. The secondsituation is more precarious: when the employer is directly responsible for leave benefits,dismissal from work can also mean the non-payment of these benefits. Provisions exist insome countries to ensure that the worker's wages continue to be paid.[45]

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has on many occasions stressed the importance of granting cash benefits during the period of leave even in the case of dismissal intervening during the protected period. When provisions related to dismissal protection prove ineffective, it becomes the state's responsibility to impose sanctions that not only serve as a disincentive for employers, but also provide means for the victims to withstand any economic pressure caused by the loss of their employment. This involves having an effective complaints mechanism, including a competent authority to deal with these cases.[46]

2.2. EUROPEAN UNION NORMS AND CASE LAW

The dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, contrary to Article 5(1) of Directive 76/207.[47]It was also in view of the risk that a possible dismissal may pose for the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, including the particularly serious risk that they may be encouraged to have abortions, that the Community legislature, in Article 10 of Directive 92/85, laid down special protection for those workers by prohibiting dismissal during the period from the start of pregnancy to the end of maternity leave.

During that protected period, Article 10 of Directive 92/85 does not provide for any exception to, or derogation from, the prohibition of dismissing pregnant

[40]Between 39 and 72 weeks of compensationdepending on the job.
[41]Six monthsof gross remuneration.
[42]60 days of wages.
[43]Unspecified damages as well as reinstatement.
[44]http://mprp.itcilo.org/allegati/en/m9.pdf(12.07.2017)
[45] As an exotic example, in Botswana, forexample, legislation specifies that dismissal of an employee without good cause withinthree months of the birth of her child, does not affect the employer's obligation to paymaternity benefits (i.e. the employer has to continue paying benefits).
[46]http://mprp.itcilo.org/allegati/en/m9.pdf(12.07.2017)
[47]The ECJ has consequently held this opinion in several decisions.

workers, save in exceptional cases not connected with their condition where the employer justifies the dismissal in writing. The ECJ has held, moreover, that a refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave, and that the same conclusion must be drawn as regards the financial loss caused by the fact that the woman appointed cannot be employed in the post concerned for the duration of her pregnancy. Theeffect of a woman's pregnancy on a business is irrelevant.Financial considerations do not justify sex discrimination.[48]

Regional legal instruments also address discrimination based on sex, including maternity.In the EU, the principle of equality and non-discrimination between men and women isenshrined in the Treaty on the Functioning of the European Union. Article 8 of the Treatystates that the EU shall in all its activities aim to eliminate inequalities and promoteequality between men and women.

There are two relatedDirectivesin the EU: the Pregnant Workers Directive (92/85/EEC) and the Recast Directive: 2006/54/EC).

a) The purpose of the *Pregnant Workers Directive* (92/85/EEC) is expressed in its long title: that is to introduce "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". In other words, the ambit of the Pregnant Workers Directive applies to other situations than dismissal, such as working conditions.[49]

b) The purpose of the *Recast Directive* (2006/54/EC), set out in the long title, is to implement "the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation".[50]

As regards the field of employment, the principle of gender equality is further developed inDirective 2006/54/EC of 5 July 2006 on the implementation of the principle of equalopportunities and equal treatment of men and women in matters of employment andoccupation.

Article 10 of the PWD prohibits dismissal during pregnancy or maternity leave[51] because of the harmful effects which the risk of dismissal may have on the

[48]http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/2011-111DV16-Russell%20EN.pdf(15.07.2017)

[49]http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/2011-111DV16-Russell%20EN.pdf (15.07.2017)

[50]http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/2011-111DV16-Russell%20EN.pdf(16.07.2017)

[51]Article 10 of PWD (Prohibition of dismissal) states:"In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy. The only exception is where there are 'exceptional' cases not connected with her condition, provided the employer gives substantiated grounds for the dismissal.

The Recast Directive provides similar protection. In the Paquay case[52]the CJEU held that where the decision to dismiss on grounds of pregnancy/maternity was taken during maternity leave, or preparatory steps for such a decision were taken, but the dismissal decision was notified to the worker after leave, it was still prohibited by the Directive.[53]

The protection from dismissal has been considered by the CJEU in many cases and has broadly established that:

a) The protection from dismissal applies to both employment contracts for an indefinite period and fixed-terms contracts. In the Melgar case[54] the CJEU held that where non-renewal of a fixed term contract is motivated by the worker's pregnancy, this constitutes direct discrimination contrary to the Equal Treatment Directive (now the Recast Directive).

b)A woman is not obliged to inform her employer, or potential employer, that she is pregnant. In the Busch case[55] the Court ruled that a woman was entitled to return early from maternity leave while pregnant and in order to have maternity leave in relation to the second pregnancy and was not obliged to tell her employer that she was pregnant. The fact that she was unable to carry out all her job functions on her return or that she returned only to qualify for an enhanced payment did not exclude her from protection.

c) Protection applies to women undergoing IVF treatment. In the Mayr case[56] a woman was certified sick for one week during which the fertilised ova was to be transferred to her uterus. She was dismissed during the week she was off, but before the transfer of the fertilised ova took place. The CJEU held that this treatment only applied to women and the dismissal of a female worker because she was undergoing that important stage of in vitro fertilisation treatment was direct discrimination on grounds of sex.

d)A pregnant worker cannot be dismissed because of pregnancy related sickness absences, even if another worker could fairly be dismissed for sickness in similar circumstances.[57] Dismissal of a woman at any time during her pregnancy for

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2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;
3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1."

[52] Paquay v Societe d'architectes Hoet + Minne SPRL ([2007] CJEU C-460 (11.10.07)

[53]http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/2011_11_Palmer_EN.pdf (17.07.2017)

[54]Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios; Cases C-438/99.

[55]Case C-320/01 Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs KG

[56]Mayr v Backerei Und Konditorei Gerhard Flockner Ohg Case C-506/06 [2008] IRLR 387

[57]Brown v Rentokil Ltd Case, C-394/96

absences dueto incapacity for work caused by an illness resulting from that pregnancy is direct discrimination on grounds of sex.[58]

In addition, in the Habermann-Beltermann case, the ECJ held, "It is clear that the termination of an employment contract on account of the employee's pregnancy, whether by annulment or avoidance, concerns women alone and constitutes, therefore, direct discrimination on grounds of sex."As far as the purpose of Article 2(3) of the directive is concerned, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with "pregnancy and maternity", that article recognises the legitimacy, in terms of the principle of equal treatment, of protecting, first, a woman's biological condition during and after pregnancy, and secondly, the special relationship between a woman and her child over the period which follows pregnancy and childbirth (Case 184/83, Hofmann v. Barmer Ersatzkasse.)[59],[60]

Furher ECJ cases:

a) The removal of a Board Member on account of her pregnancy was direct discrimination.[61]

b)The provision of a 15-day limitation period in which to lodge an action for dismissal protection was incompatible with Articles 10 and 12 of PWD if the duration of that period fails to respect the principle of effective legal protection and the principles of equivalence and effectiveness.[62]

A woman does not necessarily have to be available to enjoy the protection from dismissal:

a) In Webb[63] v Emo Air Cargo (U.K.) Ltd[1994] ICR 770 the claimant was engaged by the employer to cover for another employee taking maternity leave. However, the claimant herself then became pregnant.

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[58]http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/2011_11_Palmer_EN.pdf(16.07.2017)

[59]"As the Court has held (in the Hofmann decision) the directive leaves Member States with a discretion as to thesocial measures which must be adopted in order to guarantee, within the framework laid down by the directive, the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment." „Accordingly, the termination of a contract without a fixed term on account of the woman's pregnancy, whether by annulment or avoidance, cannot be justified on the ground that a statutory prohibition, imposed because of pregnancy, temporarily prevents the employee from performing night-time work.

[60]http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/2011-111DV16-Russell%20EN.pdf (17.07.2017)

[61]Dita Danosa v LKB Lzings SIA (Case C-232/09)

[62]Virginie Pontin v T-Comailux SA (Case C-63/08)

[63]There is an important statement, as Mrs Webb rightly argues, pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex. Moreover, in Hertz, cited above, the Court drew a clear distinction between pregnancy and illness, even where the illness is attributable to pregnancy but manifests itself after the maternity leave. As the Court pointed out, there is no reason to distinguish such an illness from any other illness.

b)The ECJ ruled that the protection afforded by European Law to a woman during pregnancy and after childbirth cannot be dependent upon whether her presence during maternity leave is essential to the proper functioning of the undertaking which employs her. Any contrary interpretation would render the provisions of the Equal Treatment Directive (now the Recast Directive 2006/54) ineffective.

c) Fixed-term contract. Protection given to women during pregnancy and after childbirth regardless of the employer's need for her presence in the workplace extend to fixed term contracts. In reference see the ECJ's decision in Tele Danmark[64] and Jimenez Melgar.[65]

In Tele Danmark,[66] a woman was recruited to perform a six-month contract. At the time she was recruited, she knew she was pregnant but kept this information from her employer until she was in post. She was entitled to maternity leave half way through the term of the contract. When she told her employer about the pregnancy, she was dismissed. The employer argued that, by concealing the pregnancy, she acted in bad faith.

In the Jimenez Melgarcase the Court held that Article 10 of the Pregnant Workers Directive (which prohibits dismissal during pregnancy and maternity leave) applies to women on fixed term contracts. Accordingly, the non-renewal of a fixed term contract is sex discrimination.[67]

3. GENERAL ISSUES ON NATIONAL LEVEL

It is the state's responsibility to set out the legal grounds and enforcement mechanismsregarding maternity-related employment protection and non-discrimination and, whensuch provisions have proven ineffective, to push sanctions that serve as a disincentive foremployers to discriminate while providing a means for victims to withstand economicinsecurity caused by the loss of their employment. In particular, governments can considerthe following measures:

a) Review and strengthen legislation on employment protection and non-discriminationon the basis of pregnancy and maternity.

b) Collect and publish data on maternity-based discrimination, including breakdowns bytype of discrimination (termination, access to employment, right to return, loss ofentitlements, etc.) and by demographic characteristics, industry,

[64]A/S v Handels-og Kontorfuntionaerernes Forbund i Danmark (HK), [acting on behalf of Brandt-Nielsen] (C-109/00) [2002] 1 CMLR 5(ECJ)

[65]Jimenez Melgar v Ayuntamiento de Los Barrios (C-438/99) [2003] 3 CMLR 4.

[66] In Tele Danmark, the employee was unable to complete a substantial part of the six-month contract on which she had been engaged. The ECJ said that the dismissal of a worker on theground of pregnancy constitutes direct sex discrimination whatever the nature and extent of the economic loss incurred by the employer as a result of her absence.

[67]http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/2011-111DV16-Russell%20EN.pdf (17.07.2017)

occupation, locationand size of enterprise, in order to identify trends, key issues, and targeted strategies.

c) Establish, fund, staff and train an independent complaints body and mechanism towhich employees and employers can have access without workers risking the lossof their employment.

d) Strengthen the labour inspectorate to understand, identify and provide informationon maternity-based employment discrimination.

e) Undertake communication and information campaigns with employers and workerson maternity protection rights, including clear guidance on the provisions formaternity-related employment protection and non-discrimination.Incorporate training on employment protection and non-discrimination ingovernment-provided training to businesses.

f) Target education and enforcement strategies to selected industries, occupations,or geographic locations where data and analyses show particular problems.[68]

A number of countries have developed effective complaints mechanisms, includingcompetent authorities to deal with these cases.

4. THE HUNGARIAN LEGAL SITUATION

4.1. FORMER LABOUR CODE (ACT XXII OF 1992)

This part describes the main features of the termination of employment and the protection of pregnant women under Act XXII of 1992 on the former LC.

The employment relationship may be terminated by the mutual consent of the employer and the employee by ordinary dismissal, by extraordinary dismissal or by immediate effect during the trial period.[69] By ordinary dismissal an employee may be dismissed only for reasons in connection with his/her ability, his/her behaviour in relation to the employment relationship or with the employer's operations.

Employers shall not terminate an employment relationship by ordinary dismissal during the periods specified below:

a) incapacity to work due to illness, but not to exceed one year following expiration of the sick leave period, futhermore, for the entire duration of eligibility for sick pay on the grounds of incapacity as a result of an accident at work or occupational disease,
b) for the period of sick leave for the purpose of caring for a sick child,
c) leave of absence without pay for nursing or caring for a close relative
d) during pregnancy, for three months after giving birth, or during maternity leave
e) leave of absence without pay for the purpose of nursing or caring for children

[68] http://mprp.itcilo.org/allegati/en/m9.pdf (12.07.2017)
[69] Act XXII of 1992 on the Labour Code, Section 87.

f) during regular or reserve army service, from the date of receiving the enlistment orders or the notice for the performance of civil service.[70]

Based on Act XXII of 1992 on the Labour Code, the pregnant employee has an objective protection against dismissal, this means the legal protection is provided even if she or the employer is not aware of the pregnancy. Pregnant women get protection even if they do not inform the employer about their pregnancy.[71]

4.2. NEW LABOUR CODE (ACT I OF 2012)

In 2012 Hungary modified its Labor Code in order to make employment more flexible, cheaper and in accordance with the labor market and with the EU Directives. Relating to the 1992 Labour Code, judical protection by the Hungarian Constitutional Court has significantly changed the new Labour Code (2012), accordingly, a pregnant employee was only entitled to protection against dismissal if she had informed her employer of her pregnancy before the dismissal.According to the Labour Code[72] in force, termination of employment[73] is usually based on mutual agreement of the parties or an unilateral notice given by one of the parties. Note that the employer is required to provide a reason for the termination of the employee's contract and that the reason must be realistic and rational. Employees may terminate their employment by notice without the obligation to provide a reason. In case of termination with immediate effect, both the employer and the employee are required to provide a substantial and verified reason.[74]However, the employer may not terminate the employment relationship by notice in the following cases:

a) during pregnancy
b) during maternity leave
c) during a leave of absence taken without pay for caring for a child
d) during any period of actual reserve military service, and
e) in the case of women, while receiving treatment related to a human reproduction procedure, for up to six months from the beginning of such treatment.[75]

From the time of the announcement of pregnancy to the employer, the expectant employee is entitled to "extra" protection under labour law.[76] There is no doubt that the most important protection for pregnant women and mothers under the Hungarian labour law is the prohibition of labour contract termination. Based on

[70]Act XXII of 1992 on the Labour Code Section 90.
[71]József Hajdú: Labour Law in Hungary, Wolters Kluwer, 2011. p. 182.
[72] In brief: an employment relationship may be terminated by a) mutual consent; b) notice and c) immediately without notice in Hungary.
[73] Act I of 2012 on the new Labour Code Section 64 (1)
[74]http://eugo.gov.hu/doing-business-hungary/labour-law (20. 03. 2017.)
[75] Act I of 2012 on the new Labour Code Section 65 (3)
[76] In accordance with Subsection 65 (3) of the Labour Code, pregnant employees are protected against dismissal.

the Labour Code, the employer cannot terminate the employment relationship with ordinary notice during the pregnancy and the period of the maternity leave and even during the non-paid parental leave.[77] In practice that means that female workforce cannot be dismissed until the child reaches the age of three (3).[78] It is important to mention that the employee is only entitled to the above protection if she announced the pregnancy to the employer. However, the non-respect of the above prohibition makes the contract termination unlawful with serious financial impact for the employer. Since June 2016, after the delivery of the termination notice, if the employer is notified about the pregnancy or IVF treatment, the company is allowed to unilaterally withdraw the termination letter. In addition, in case of fixed-term employees, termination is only permitted if the employer is undergoing a bankruptcy proceeding, or because of the employee's ability, or *force majeure*.[79]The Hungarian Labour Code states that in the following cases the employer is not allowed to dismiss an employee: 1.) in case of pregnant women sick during pregnancy; and 2.) in case of fertilization treatments, pregnancy, three months after having a child, or during maternity leave.[80]Based on Act I of 2012 on the Hungarian Labour Code, the employer may not terminate the employment relationship by notice during pregnancy.[81]The employer is prohibited from dismissing a pregnant woman from the date that she notifies the employer of her pregnancy. The same legal protection covers IVF-treated women from the notification of the employer of the treatment, for the duration of the treatment with a maximum of six months."[82]Pregnant employees are protected against dismissal from the beginning of their pregnancy. If they want to get protection, they have to inform the employer thereof before the notice was given.[83] The Labour Code did not contain information about which was the latest date when pregnancy could still be

[77]http://smartlegal.hu/publication/employing-female-workforce-in-hungary (10. 07. 2017.)
[78]http://www.krs.hu/sites/default/files/tudastar/a_gyermekvallalas_munkajogi_vedelme_e.pdf (17. 07. 2017.)
[79]https://iclg.com/practice-areas/employment-and-labour-law/employment-and-labour-law-2017/hungary#chaptercontent6(08. 07. 2017.)
[80]Employersare not allowed to dismiss an employee in the following cases: In case of illness and for the next year following the end of the sick leave, during the sick leave an employer has no right to dismiss an employee if the illness is due to a work accident or occupational disease, in case of non-paid leave for taking care of a relative, in case of non-paid leave for taking care of a relative, in case of non-paid leave for women taking care of children under three, in case of providing army duties, in case of a disabled person through the entire period he or she receives rehabilitation support.http://www.lawyershungary.com/dismissal-of-hungarian-employees (15. 07. 2017.)
[81] Act I of 2012 on the Labour Code 65 (3)
[82]Annick Masselot, Eugenia Caracciolo DiTorella Susanne Burri: Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood. The application of EU and national law in practice in 33 European p. 127. http://ec.europa.eu/justice/genderequality/files/your_rights/discrimination__pregnancy_maternity_parenthood_final_en.pdf (08. 07. 2017.)
[83] Act I of 2012 on the Labour Code 65 (5)

communicated.[84] It was the case until the Hungarian Constiutional Court made that decision on 31 May, 2014. The Labour Code – in line with the HCC Decision (2014) - has been amended so that if the employee informs the employer of her pregnancy following the dismissal, then the employer may choose to withdraw the termination within 15 days of the date of notification.[85] The amendment does not, however, state when the employee must inform the employer of her pregnancy following the date of dismissal. It is therefore recommended that if an employer wishes to dismiss an employee, he or she asks the employee whether there are any grounds which the employee can rely on to "exclude" the termination (i.e. based on her pregnancy).

4.3. DECISION OF THE HUNGARIAN CONSTIUTIONAL COURT 17/2014. (V. 30.)

The fundamental issue of the Hungarian Constitutional Court was to reinstate the former (1992) Labour Code's provision: pregnant women are protected against termination of employment even if they do not have knowledge of their pregnancy when the termination notice is served. A core issue of the provision of the new Labour Code (2012) is that the pregnant employee may invoke the protection against termination only if she notified the employer of her pregnancy before the disclosure of the termination. The Commissioner for Fundamental Rights petitioned to the Constitutional Court which then underlined that the obligation of preliminary notification violates pregnant women's human dignity and their right to privacy.[86]Until 2014 an employee was entitled to invoke her right of protection against unlawful dismissal based on pregnancy only if she had previously informed the employer about her condition. The Constiutional Court recognised thisin its decision no. 17/ 2014. (V. 30.) AB annulling as of 31 may 2014 the phrase that pregnant employees or those involved in reproductive procedure are required to notify the employer of their condition before the termination notice is communicated."[87]The Hungarian Constiutional Court ruled that the provision of 65 (3) of Act I of 2012 on the Hungarian Labour Code that required women to inform their employers of their pregnancy to enjoy protection against termination was unconstiutional. The Labour Code was not appropriate and contrary to the employee's right. Due to the prior notice requirement, the employees were pressured to inform the employer of their pregnancy. „A complainant asked the Commissioner to initiate the constiutional review of the provision because according

[84]http://www.krs.hu/sites/default/files/tudastar/a_gyermekvallalas_munkajogi_vedelme_e.pdf Kéri Ádám: Protection for pregnant employees – Pregnancy and human reproductive procedure (08. 07. 2017.)

[85]https://www.taylorvinters.com/news/hungary-enhanced-protection-pregnant-employees-changes-hungarian-labour-code/ (13. 07. 2017.)

[86]http://www.ajbh.hu/en/web/ajbh-en/-/the-ombudsman-s-petition-to-the-constitutional-court-for-the-protection-of-labour-legislation-of-pregnant-women? (12. 07. 2017.)

[87] Ádám Kéri: Protection for pregnant employees – Pregnancy and human reproductive procedure http://www.krs.hu/sites/default/files/tudastar/a_gyermekvallalas_munkajogi_vedelme_e.pdf(21. 07. 2017.)

to him, pregnant women are sanctioned by the rule stating that a woman who has not notified her employer of her pregnancy may be dismissed without legal restriction by ordinary termination. The Ombudsman[88] found the complaint well-founded based on the case-law of the Constiutional Court and the international case-law, and he asked the Constiutional Court to annul the constested provision."[89]

The HCC balanced the employee's interest to share this sensitive data with the employer only when it is suitable for her and in thethe employer's interest to be informed of the employees' status. The employer has an interest in being informed thereof in order to be able to apply protective rules on health and safety, working time and working conditions too, not only to be aware of the protective measures against termination.[90]The HCC stated that an employee is free to decide if she wishes to use the benefits and protections to which she is entitled as a result of her status. „The protection against the termination is a potential protection that becomes active only if the employer intends to terminate the employment relationship. The protection against termination applies even in the absence of prior notification by the employee. Therefore, it is sufficient to notify the employer of the pregnancy when the termination is communicated to the employee."[91] While the decision of the Constitutional Court (discussed above) returned the original provision of the previous LC, a new problematic issue opened up: even though the HCC deleted the prior notice requirement from the Labour Code (2012), the employee must still inform the employer of her status to be protected. No time limit remained in the relevant provision, so it may occur that the employee becomes aware of her pregnancy only after her employment relationship has been terminated. In this case, the question may arise whether the employee is entitled to refer to the protection against a valid termination. It is up to courts to clarify the time limit of the protection,

[88]According to the arguments of the Ombudsman, the entitlements granted by law, such as the working time benefits, are obviously bound to the notification of pregnancy, but the use of the benefits depends on the employee's free decision in this case. The protection against termination is not such a legal institution. It does not require a special measure from the employer. The ombudsman pointed out that it is "activated" only then if the employer intends to dismiss a pregnant employee. Furthermore, the regulation creates a decision making dilemma for a pregnant woman, offending her dignity. The ombudsman considers that the notification is not suitable for the prevention of eventual abuses, either. It lacks a rational justification as well as a legitimate objective.

[89]http://www.ajbh.hu/en/web/ajbh-en/press-releases/-/content/14315/16/the-ombudsman%E2%80%99s-petition-to-the-constitutional-court-for-the-protection-of-labour-legislation-of-pregnant-women;jsessionid (06. 07. 2017.)

[90]Kinga Hetényi, Anikó Nagy: Decision of the Hungarian Constiutional Court onthe Protection of Pregnant women against terminationhttp://roadmap2015.schoenherr.eu/decision-hungarian-constitutional-court-protection-pregnant-women-termination/ (05. 07. 2017.)

[91]Kinga Hetényi, Anikó Nagy: Decision of the Hungarian Constiutional Court on the Protection of Pregnant women against terminationhttp://roadmap2015.schoenherr.eu/decision-hungarian-constitutional-court-protection-pregnant-women-termination/ (05. 07. 2017.)

giving special attention to adverse effects on the employment protection of women who plan to have a family.[92]

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