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# Towards equal sharing of care? Judicial implementation of EU equal employment and work–life balance policies in Spain

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## ABSTRACT

Discursive factors have not figured prominently in implementation research. This article fills this gap by addressing the material and discursive conflicts articulated around equality at workplace between women and men in multilevel judicial contexts. It studies obstacles to and opportunities for the judicial implementation of EU equal employment policies in Spain by analyzing two cases of parental rights to childcare litigated before Spanish and supranational courts, namely the Court of Justice of the European Union and the European Court of Human Rights. The claimants are working parents who litigate for the recognition of their right to provide childcare. In judicial implementation multiple meanings about women, gender and intersectionality can be articulated and counteracted at different levels. Frame analysis of selected judicial documents and content analysis of legal proceedings and interviews show that simultaneous favorable institutions, framing, and actors are needed for implementing EU equal employment policies in a way that allows overcoming the gendered division of care and paid work. Distinguishing among ‘women’, ‘gender’ and ‘intersectionality’ approaches, we assess the extent to which the result of judicial implementation is the transformation of gender roles towards equal sharing of care.

## KEYWORDS

equal employment policy; care and work-life balance; policy implementation; judicial litigation; European union

## Introduction

Scholarly debates on policy implementation are increasingly advancing our understanding of how and why policies are put into practice. They show that implementation changes the outcome of adopted policies through processes of contestation, resistance and coalition; and that institutions, actors and ideas are key factors to understand the dynamics of policy implementation (Beland, 2016; Howlett, Ramesh, & Perl, 2009; Sabatier & Jenkins-Smith, 1993). Sophisticated theoretical frameworks propose implementation should be understood in relation to the entire policy process, integrating insights from agenda-setting and formulation research (Howlett, 2018, p. 8). Scholars recognise the need to address complex problems that are rooted in multiple causes –such

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as gender inequality– through an analysis of different policy tools (Howlett et al., 2009, p. 165), and signal attention to multilevel governance as one of the promising developments in implementation studies (Hill & Hupe, 2014).

However, gaps in implementation studies still exist. First, the tendency to neglect the role of discourses in policy implementation hinders the possibility of grasping discursive obstacles and opportunities (Beland & Ridde, 2016). Second, although judicial implementation is a growing research field (Cichowski, 2013; Fuchs, 2013; Guth & Elfving, 2018), the still limited attention to specific implementation processes prevents the understanding of differences and similarities of institutional contexts that could provide insights for broader implementation theory (La Barbera & Lombardo, 2019). Third, gender equality policy implementation is still under-researched (Engeli & Mazur, 2018), especially in care, indicating a gap in public policy studies that needs to be addressed. Fourth, despite knowledge on how Europeanization shapes national equal employment policies, few studies on judicial implementation of equality policies exist in Spain (Cruells & La Barbera, 2016; La Barbera & Lombardo, 2019).

This article contributes to fill these gaps in implementation research by studying discursive and material obstacles and opportunities in Spanish judicial implementation of EU policies regulating workers' parental rights to care. Whilst care involves both childcare and long-term (elderly and disable) care, in this article, we focus on parental rights to childcare only. Due to its primary market orientation, the EU tends to frame the problem of people who care for their children and dependent relatives as one of 'equal employment' and 'work–life balance' (Guerrina, 2005; Masselot & Caracciolo Di Torella, 2010). By contrast, we frame the problem as 'equal sharing of care' because, in line with feminist research on care (Ciccia & Bleijenbergh, 2014; Fraser, 1994; Gornick & Meyers, 2009; Lewis, 2001), we consider care a central category for structuring power relations between women and men in all spheres (Plomien in this issue). Since the unequal distribution of care roles between women and men is at the core of gender inequality (Fraser, 1995), its transformation is the main solution proposed in feminist debates. Along this line, we consider that the implementation of EU equal employment policy is transformative when it results in recognition, redistribution and representation of gender roles in care (Ciccia & Verloo, 2012; Fraser, 1994).

Our framework for studying the discursive politics of implementation includes the analysis of legal *institutions*, *framing* and *actors*. Applying 'women', 'gender' and 'intersectionality' approaches in the analysis (Kantola & Lombardo, 2017) allows us to assess the extent to which the outcome of judicial implementation shows transformation of gender roles in care. In the article, we conduct interdisciplinary research based on critical legal studies, discursive analysis of the judicial structures, mechanisms, and proceedings, and attention to collective and individual agency. Discursive politics approaches treat policy concepts – such as equality between women and men, work–life balance, care, equal employment or sex discrimination – as contested categories, and seek for gendering, classing, or racializing outcome of policies that privilege some people and marginalize others (Bacchi, 2017; Verloo, 2007). We argue that the discursive analysis of policy implementation reveals conflicting dynamics and contested interpretations of equality between women and men that lead to divergent outcomes in the implementation of a policy at different governmental levels and judicial stages (La Barbera & Lombardo, 2019). Since implementation is a contested phase in policymaking (Bardach, 1977) and

gender is a contested concept (Butler, 1990), discursive analysis is especially suited to analyze judicial implementation of EU policy.

The research questions this article addresses are: how does the judicial implementation of EU equal employment policies shape childcare? What are the discursive and material obstacles and opportunities for putting equal sharing of childcare into practice in Spain? We analyze national and supranational judicial discourses around equal employment, work–life balance and care in two court case in their different stages before Spanish and supranational instances, namely the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The theoretical and methodological bases of the research are outlined in the following two sections, the analysis of case law that identifies obstacles and opportunities in Spanish judicial implementation comes next, before the conclusions.

## **1. Multilevel judicial implementation and the transformation of gender roles in care: a framework for analysis**

### ***Multilevel judicial implementation of EU equal employment and work–life balance policies***

Scholarly debates have theorised different care models on the basis of the extent of women's and men's engagement in paid work and care, economic autonomy of caregivers, and gender inequalities underpinning them (Ciccia & Bleijenbergh, 2014; Ciccia & Verloo, 2012; Fraser, 1994; Lewis, 2001). Three of these models are particularly interesting for this article. First, the male breadwinner model, which maintains a division of gender roles in which men are responsible for providing economic support working full-time outside the household and women are responsible for care and domestic work within the household, being women economically dependent on their husbands' income or on derived entitlements to benefits due to their role of caregivers. Second, the universal breadwinner model, an employment-centred model which promotes the equal participation of women and men in the labour market, the outsourcing of care and its undervalued status as compared to paid work. Third, the universal caregiver model, whose goal is the transformation of gender roles in care and paid work by promoting equal engagement of women and men in both. The latter model recognises equal rights to care for mothers and fathers by allowing workhour reductions and recognizing the equal value of care and paid work, making the whole family, state, and employers socially responsible for care (Ciccia & Bleijenbergh, 2014; Fraser, 1994; Gornick & Meyers, 2009). The universal caregiver model is a normative stance in feminist debates that propose equal sharing of care as a goal, yet not accomplished in any country (Ciccia & Verloo, 2012).

Indeed, comparative analyses of care models in Europe consider the EU a case of universal breadwinner model, due to its support of women and men as dual earners, the recognition of gender equality in the labour market, though leaving gender inequalities in the gender division of care unchallenged (Ciccia & Verloo, 2012). Besides, the EU puts pressure on member states to shift from male breadwinner to universal breadwinner model. Due to EU pressure, Spain, which has commonly been placed within the male breadwinner model, shifted away from the traditional model, advancing towards

gender equality in the labor market and gradual, slow, inclusion of men in care<sup>1</sup> (Lombardo, 2017).

In the analysis of our selected case-law, we assess what is the outcome of implementation of EU policies in Spain in relation to the abovementioned care models. In particular, we focus on multilevel implementation because understanding policy implementation in Europeanized contexts requires the analysis of intertwined political and legal dynamics between EU and member states. In addition, the implementation of EU equal employment and work–life balance policies in the member states involves different governmental levels (EU, national, subnational) and institutions (legislative, executive, administrative and judicial) that offer actors space for hindering or advancing the transformation of gender roles. Considering that unequal gender distribution of care responsibilities reproduces and maintains inequalities (Plomien in this issue; McGlynn, 2000, p. 29), we explore how national and supranational courts open and close opportunities for transforming traditional gender roles in childcare.

Courts are gendered institutions that, through their formal – codified – and informal norms – which are hidden and often based on unconscious bias but consolidated in practice – can foster or counteract inequalities between women and men (Kenny & Mackay, 2009; McGlynn, 2000). Yet, opaqueness and embeddedness of gender norms create ‘sticky’ legacies that are difficult both to change and research (Waylen, 2017). Informal praxis of ‘doing gender’ and the unconscious gender bias impair transformation of gender roles that EU policies on gender equality declare to aim at (Connell, 1987). Preexistent knowledge, gender blindness, and closure towards challenging institutional norms are relevant for analyzing how actors enact conflicting framings.

A judicial decision is one of the last steps of the implementation process resulting in binding decisions that repeal or confirm previous action or non-action by individuals, employers or institutions. Courts are battlegrounds of norms (Kenny & Mackay, 2009) in which material and discursive opportunities open spaces for contesting or reinforcing existing gender inequalities (Ferree, 2009). Judicial decisions are also defined by material constraints that allow for redistribution of economic resources; legal access (Fuchs, 2013) and network mobilization (Cichowski, 2013). When deciding a case, judges choose among different framings to justify their decision. Yet, neither the full array of available norms and framings is presented explicitly, nor courts give account of all the assumptions underlying their decision (Feteris & Kloosterhuis, 2009). Critical approaches to law analyze precisely such underlying assumptions: subtext, framings and their (un)intentional effects on people (Crenshaw, 1989).

Actors, be they individual or collective, and their alliances and oppositional dynamics, are fueling factors for understanding EU policy implementation through litigation (Guth & Elfving, 2018). Individual actors and institutions construct multiple meanings not only in policy adoption but also in implementation processes, by reinterpreting legal and political texts and producing new meanings through their framing (Ferree, 2009; Verloo, 2007). The plaintiffs’ role is key because they activate the judicial process by placing the demand and persevere in claiming their parental rights

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<sup>1</sup>Decree 6/2019 extended the paternity leave at birth to 8 weeks with a yearly increment to 12 weeks in 2020 and 16 weeks in 2021 with the goal of equiparing fathers to mothers. See *Real Decreto-ley 6/2019, de 1 de marzo, de medidas urgentes para garantía de la igualdad de trato y de oportunidades entre mujeres y hombres en el empleo y la ocupación*.

throughout long trials. Trade unions and other collective organisations provide free material support (economic and legal aid) to the plaintiff. Judges activate the legal framework to either support or resist the transformation of gender roles in care.

A crucial obstacle to transform gender roles in care is the ‘resistance’ opposed to gender equality initiatives, that is inertial conducts that tend to maintain the status quo about gender equality (Verloo, 2018). To identify types of resistance we follow Lombardo and Mergaert (2013), who distinguish among implicit and explicit, gender and not gender-specific forms of resistance. Drawing on all the former, our research aims at understanding how actors relate with existing institutions and articulate framings to promote or hinder gender roles transformation toward equal sharing of care. In our study we include ‘resistance’ within ‘obstacles’, that is institutions and framings that results in implicit opposition, negligence or non-action to maintain the status quo (Lombardo & Mergaert, 2013; Verloo, 2018). We call ‘opportunities’ available institutions, framings that actors intentionally or unintentionally allow by promoting equal sharing of care in practice. Material obstacles and opportunities in this article are related to judicial institutions and praxis, that is legal structures, mechanisms, norms and its consolidated interpretation, i.e. technicality of judgments, pre-established judicial competences, protected grounds, or consolidated jurisprudence. These material factors, together with the discursive ones, affect the way legal actors promote or oppose equal sharing of care through implementation of employment policies.

Discursive obstacles and opportunities are related to framings that are articulated by actors. Our understanding of framing includes explicit interpretations, bias, hidden norms and multiple meanings about women, gender and its intersection with other inequalities. To untangle multilevel dynamics, we studied the whole legal process, from national to supranational courts, to grasp the variety of concepts concerning childcare and equality between women and men at workplace. We map the different meanings put forward, how actors use them in different judicial stages, and which opportunities and constraints emerge.

### ***The transformation of gender roles in care: women, gender and intersectionality approaches***

We employ ‘women’, ‘gender’ and ‘intersectionality’ as analytical approaches to assess how judicial decisions frame the division of gender roles in care and employment. In the women approach the focus is placed on women workers; their unequal position at workplace is visibilized; care is constructed as a women’s primary responsibility (maternalism) and work–life balance is framed as a women’s right. While this approach offers opportunities for granting women’s access in the labor market, it implies an essentialist conceptualization of women as mothers and ignores the relational dynamics that produce the gendered division of work (Kantola & Lombardo, 2017). A gender approach places the focus on parents as workers and caregivers; paid work and care are represented as gendered social structures; and care is constructed as a responsibility of both working parents. This implies an understanding of gender as a relation between women and men in which their roles in care and paid work are equally distributed and parental rights to provide care are recognized to both parents. Yet, this approach is essentialist too because it treats women and men as homogeneous groups disregarding

the differences according to class, race, ethnicity, sexuality, disability, or age (Kantola & Lombardo, 2017). An intersectionality approach places the focus on the intersections of gender with other inequalities; and represents care and paid work as structures of domination in which women and men are privileged or marginalized depending on the way in which gender interacts with other inequalities (Kantola & Lombardo, 2017). This implies that recognising parental rights differently affects workers depending on their specific social positioning.

The goal of this article is to assess the extent to which judicial implementation of EU equal employment policies results in transforming the role of women as caregivers and men as breadwinners towards the equal sharing of care (Ciccia & Bleijenbergh, 2014; Fraser, 1994). Fraser's (1994) concepts of recognition, redistribution, and representation help us to assess the extent to which judicial implementation is indeed transformative of care. We refer to recognition of the value of care and work rights; to redistribution of roles in care and at work, and of material resources and benefits associated to care; and to representation of women at work and men in care. According to Fraser, justice involves the simultaneous presence of the three aforementioned dimensions. We argue that we encounter transformation of gender roles when the approach employed by the Court allows space for recognition, redistribution and representation at the same time.

In this respect, a women approach shares features with the male breadwinner and universal breadwinner care models because women remain the primary responsible for care also when they are employed, and the value of care is not recognised. While it allows women's representation in the workplace, it does not transform the division of care roles. A gender approach shares features with the universal caregiver model because both working parents are responsible for providing care. This approach transforms gender roles in care and work, but since it only focuses on gender, it can reinforce class inequalities (Plomien in this issue). The intersectionality approach shares features with the universal caregiver model too, but it specifies the intersections between gender and other inequalities. If adopted, it can be transformative of care roles, not only in relation to gender but also to class, race, ethnicity, sexuality, disability, and age.

## 2. Methodology

In this interdisciplinary study, we combine legal analysis of relevant legislation, case-law, and judicial proceedings; content analysis of interviews; and frame analysis of a selection of judicial documents. Legal analysis of nine EU<sup>2</sup> and Spanish<sup>3</sup> pieces of legislation and case-law<sup>4</sup> on equal employment and work-life balance allowed us to understand the national and supranational legal framework applicable to our cases. Legal analysis also relied on five judicial documents: two judicial decisions issued by the Constitutional Court, one by the ECtHR, one by the CJEU; and one opinion of the

<sup>2</sup>76/207/EEC Equal Treatment Directive, 34/96/EC Parental Leave Directive, 2006/54/EC Recast Directive.

<sup>3</sup>Ley 39/1999, de 5 de noviembre, para promover la conciliación de la vida familiar y laboral de las personas trabajadoras, BOE-A-1999-21,568; Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres, BOE-A-2007-6115; Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, BOE-A-2015-11,430; Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, BOE-A-1999-21,568.

<sup>4</sup>CJEU, Roca Álvarez v SESA Start España [2010], C-104/09; ECtHR, Konstantin Markin v Russia [2012], GC, 30,078/06.



Advocate General before the CJEU. Due to our interest in multilevel settings we selected our cases starting from the supranational level. Both cases begin before Spanish courts (*Juzgado de lo Social núm. 1 de Madrid*, 25/09/2003; *Juzgado de lo Social n. 1 de Lleida*, 20/04/2005), reach the Spanish Constitutional Court (*Tribunal Constitucional* STC 3/2007 and RTC 1/2009; STC 75/2011), end up in supranational courts (European Court of Human Rights, ECtHR, and Court of Justice of the European Union, CJEU); and refer to EU directives.

We selected for analysis the cases *Betriu Montull v Instituto Nacional de la Seguridad Social, INSS* (CJEU) and *García Mateos v Spain* (ECtHR) with the aim of capturing the multilevel implementation dynamics between national and supranational judicial levels. While judicial litigation on work–life balance is very common in Spain (Interview, 3/3/2017), only these two cases fulfilled our selection criteria because they are brought before the Constitutional Court –and thus involve human rights– and finally reach supranational courts (Calvo & Picontó, 2014). Yet, the two supranational courts differ substantially because, through preliminary rulings, the CJEU decides over the compatibility of national legislation with existing EU law, while the ECtHR provides remedies against human rights violations to individuals living in the territory of the Council of Europe and establishes standards throughout all its member states (*Konstantin Markin v. Russia*, § 89). The comparison of the two cases is particularly interesting because the ECtHR treats the issue as a human rights violation, while the CJEU addresses the case as a market-oriented problem of employment.

Content analysis of interviews allowed us to understand the complex technical issues of the cases, and to clarify obstacles, opportunities, and room for agency of key actors. It enabled us to identify which actors activated framings and institutions favourable to transformative outcomes. It also allowed to understand when an issue that is represented as a material obstacle in the proceedings should rather be understood as a resistance. We conducted seven semi-structured interviews with key informants of the cases, including Spanish judges (one), trade unions (two), lawyers (two) and legal experts (two), from June 2016 to May 2017 in Madrid.

Critical Frame Analysis allowed the identification of policy frames found in documents, by making explicit the framing and the disputed norms (Bacchi, 1999; Ferree, 2009; Lombardo, Meier, & Verloo, 2009; Verloo, 2007) underlying judicial interpretations. It was employed to analyze selected documents and to explore discursive opportunities and obstacles that appear in judicial implementation. We selected the Advocate General opinion in the case of *Betriu Montull* and the Constitutional Court decision in the case of *García Mateos* because they contain the most articulated framings around gender equality and worker's right to provide childcare. We used the following 'sensitizing' questions to guide our analysis (Verloo, 2007)<sup>5</sup>: What is the problem represented to be (diagnosis)?; What is represented as the cause?; What are the solutions proposed?; What are the objectives to be achieved and actions to be taken?; Which mechanisms are used to solve the problem?; Which roles are attributed to actors (who is facing the problem?, who caused it? who should solve it?); To what extent is gender equality, and

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<sup>5</sup>We employ the questions developed in the QUING research project, Quality in Gender Equality Policies, EC Sixth Framework Program, [www.quing.eu](http://www.quing.eu).

its intersections with other inequalities, related to the representation of the problem and its solution?; Which norms underlie the representation of the problem and its solution?

The frame analysis of implementation requires attention both to the diagnosis and solution of a judicial decision. This is because a judicial decision may employ the concept of gender in the representation of the problem, but not provide recognition and/or redistribution of gender roles in care in the solution. We explore the multiple meanings of gender by distinguishing approaches focused on women when documents mention women as the main actors facing the problem and/or the main target of the solution; on gender when both women and men are addressed in the diagnosis and/or solution; and on intersectionality when interactions between structural inequalities are addressed. We associate the multiple meanings of gender found in the frame analysis to recognition, redistribution and representation when such meanings are related to either the recognition of the value of care and worker's rights to provide childcare, the redistribution of care roles and benefits associated to care, or the representation of women in the workplace and men in care. Our analysis allows to map legal framework and institutions, framings and actors, and classifies the type of obstacles and opportunities encountered in judicial implementation.

### 3. Multilevel judicial implementation: discursive and material obstacles and opportunities in Spain

#### 3.1. The cases

The cases analyzed here concern contested interpretations of workers' parental rights to childcare. Parental rights are understood broadly so to include leave afterbirth, lactation leave<sup>6</sup> and workhour reduction. Working parents ask for a leave, care benefits or a reduction of workday to care for their child within an employment regime, such as the Spanish one, characterized by the so-called 'politics of presentism', the longer you stay at office, the better; a labor market that is still gender-segregated; and a society where domestic tasks are unequally shared between women and men: 93% of women dedicate time to household and care compared to men's 70% (INE, 2007).

The first case analyzed is *García Mateos v Spain*, which is decided by the ECtHR in 2013. Raquel García Mateos, who worked as a supermarket cashier, asked her employer to reduce workhour – with the correspondent reduction of her salary – to three afternoons per week, excluding weekends, to take care of her child under six (Article 37.5, Spanish Workers' Statute). The employer rejected her request, offering instead a workhour reduction within the established rotations of mornings and afternoons, including weekends. García Mateos, assisted by a trade union, went to court. The case started in 2003, reached the Spanish Constitutional Court in 2007 and ended in 2013 with a decision of the ECtHR condemning Spain for violation of the right to a fair trial (art. 6.1 ECHR) in conjunction with the violation of the prohibition of discrimination (art. 14 ECHR). The compensation foreseen is of 16.000 euro for non-pecuniary damage.

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<sup>6</sup>We refer to 'lactation' rather than 'breastfeeding' to detach the concept from the biological motherly reference and open it to fatherly practice.



While the Court of First Instance (*Juzgado de lo Social núm. 1 de Madrid*, 25/09/2003) failed in recognizing that denying workhour reduction discriminates against working mothers, the Spanish Constitutional Court recognized the parental right to childcare as a corollary of equality between women and men (STC 3/2007). Yet, the lack of mechanisms to enforce the Constitutional Court decision and the extreme length of the trial made the right impossible to be exercised in practice. Whilst there was recognition of the right, its linkage to the age of the child prevented its implementation. Since the Constitutional Court denied its competency to grant monetary compensations (RTC 1/2009), bringing the case before the ECtHR ultimately was the only way to obtain ‘just satisfaction’ after litigating 10 years.

In our second case, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* which was decided by the CJEU in 2013 as a preliminary ruling (art. 267 TFEU), a father asked the Spanish Social Security Institute the parental benefit granted in the Spanish Workers’ Statute, to compensate (art. 133-bis, General Law on Social Security) the loss of income during the 16-week suspension of employment during parental leave (art. 48.4, Spanish Workers’ Statute). Having been denied his request, in 2004 he went to court (*Juzgado de lo Social n.1 de Lleida n. 710–2004*). The Court of First Instance referred the case to the Constitutional Court asking about the compatibility of such a refusal with the Spanish Constitution (*Juzgado de lo Social n. 1 de Lleida*, 20/04/2005). While the Constitutional Court did not find violation of the principle of equality established in the Constitution (STC 75/2011), the judge persisted posing another preliminary question, this time to the CJEU, asking whether the Spanish provision granting parental benefits to the father only if the mother works under the state social security scheme violates EU directives on equal employment. According to the CJEU decision refusing parental benefits to the father because the mother is not covered by a state social security scheme is compatible with EU law because the mother voluntarily adhered to a private security scheme that does not recognize maternity benefits (art. 120, R.D.1281/2002). The decision shows a gap in EU adopted policies on self-employment: neither provisions for parental rights nor options to transfer the leave to the father exist if the mother is self-employed working under a private social security scheme (Massetot & Caracciolo Di Torella, 2010).

In the analysis that follows we identify the material (read: institutions) and discursive (read: framings) elements that legal actors turn into opportunities for or obstacles to transform care roles toward an equal sharing.

### **3.2. Institutions: material opportunities and obstacles**

The interpretative nature of the judicial system, together with national and EU employment law, are identified as institutions that provide opportunities for judicial implementation. First, the interpretative nature of litigation offers opportunities for redefining contested meanings of gender equality throughout the different judicial stages, enabling actors to advance the guarantee of workers’ parental rights through judicial implementation. Second, Spanish labor law offers opportunities through the absence of judicial fees for labor litigation and free legal assistance of trade union for its affiliates. This made possible claiming parental rights in a ten-year-long trial

(Interviews, 3/3/2017). Both the first and second opportunities are institutional, explicitly expressed, involve recognition and economic redistribution, but are not gender-specific because they concern general labor norms.

Third, the existence of a consolidated Europeanized national legal framework on equal employment is a key opportunity that actors involved in the two cases strategically use (Burri, 2015; Caracciolo, 2014; Masselot & Caracciolo Di Torella, 2010). The EU protects equal treatment in employment through hard and soft law that member states are bound to transpose.<sup>7</sup> The CJEU had a major role in consolidating national equal employment framework. In the previous case *Roca Álvarez v Sesa Start España*, the CJEU states that recognizing fathers the right to parental benefits as dependent on the child's mother 'perpetuates the traditional division of roles into the future and even limits the possibility of employed fathers taking care of their children' (§ 47) and violates the principle of equal treatment. After *Roca Álvarez*, the Spanish Workers' Statute was modified (L. 3/2012) adding that both mother and father can take lactation leave. Yet, its scope is reduced by granting such right only if the mother is employed. Also, the ECtHR establishes that the different treatment of women and men as regards entitlement to parental leave 'has the effect of perpetuating gender stereotypes and is disadvantageous both to women's careers and to men's family life' (*Konstantin Markin v. Russia* § 47). Supranational control is a fourth opportunity that guarantees equality rights when national institutions fail to do so: the ECtHR condemned the Spanish government for the lack of an effective system to ensure the enforcement of judicial decisions and set compensation. Both the third and the fourth opportunities are explicitly expressed and involve recognition; while the third is gender-specific, the fourth is not. In the case of supranational control, the opportunity also involves economic redistribution.

Obstacles include mechanisms of enforcement and procedural rules. In *García Mateos* the lack of procedural norms for enforcing decisions of the Constitutional Court is an institutional obstacle. Disregarding the Constitutional Court verdict is an act of 'judicial rebellion' of the Court of First Instance that shows a systemic lack of control over enforcement. Such indiscipline, which shows resistance towards equal sharing of care, is common in Spain (Interviews, 8/6/2016; 8/2/2017) and is made possible by an institutional gap: the lack of enforcement mechanisms.

The procedural length of the trial is the ultimate obstacle. Spain has half the number of judges than the European average (CGPJ, 2019). This data reveals an important structural problem that makes trials extremely long. The excessive length of the trial is incompatible with life cycles, as parental rights that are linked to a specific child's age showed. In *García Mateos* the child was 13 years old when the ECtHR finally decided the case (Hierro, 2013). In *Betriu Montull* the trial lasted from childbirth until he was 9 years old. All obstacles are institutional, explicit, not gender-specific and are based on lack of recognition, and economic redistribution.

Supranational control can also work as an obstacle, as it happens in *Betriu Montull*. Although the Advocate General followed the decision adopted in the previous case of *Roca Álvarez*, the CJEU eventually resisted a transformative implementation of equality

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<sup>7</sup>Spain transposed the 34/96/EC Parental Leave Directive and other EU equal treatment directives through the Spanish Reconciliation Act, which modified the Worker's Statute introducing the right for parents to reduce workhour to care for children under 6 years old (later modified to extend the age to 12, RD 16/2013).

policy. It did so by declaring that national legislation refusing fathers to receive compensation for the loss of salary of the mother during the 16-week leave, if she is not working under state social security scheme, are compatible with EU law.

### **3.3. Actors' framings: discursive opportunities and obstacles**

Critical Frame Analysis of the Constitutional Court decision in García Mateos and Advocate General's opinion in Betriu Montull allows us to identify framings actors employ to foster transformation toward the equal sharing of care. They are explicitly expressed, gender-specific and involve recognition. In García Mateos, the diagnosis of the Constitutional Court frames the problem of workhour reduction as related to 'structural inequality' that women face at workplace because they bear the whole responsibility of care. Framing the problem in terms of 'equality of outcome' between women and men, the Court builds the argument as 'group-based' rather than individual discrimination. The final verdict dictates that denying workhour reduction is an unjustified obstacle to women workers that makes work and care incompatible for women. Moreover, denying workhour reduction to women is indirect sex discrimination in violation of the constitutionally protected right to equality (La Barbera & Lombardo, 2019). This framing shows a 'women approach' that considers discrimination as structural, recognises women workers the right to provide care, and allows representation of women in the workplace.

A number of actors articulated these opportunities. The first key actor was the 'very active' and expert President (Interviews 8/2/2017; 3/3/2017), a woman professor of labor and social protection law with expertise on equal pay and women discrimination, who interpreted women's rights to childcare as a fundamental right linked to the right to nondiscrimination. Thanks to individual agency and specific labor law knowledge of the President, the Constitutional Court recognized that a violation of the right to nondiscrimination had occurred; revoked the decision of the Court of First Instance; and ordered the latter to issue a new verdict recognizing women workers the constitutionally protected right to childcare (STC 3/2007).

The second key actor is the Constitutional Court dissenting judge, a constitutional law man professor, who adopted a progressive interpretation based on the understanding that transforming existing norms and practices concerning compensation is necessary to achieve equality *de facto*. Importantly, at a later stage the ECtHR followed his arguments to finally grant compensation to Raquel García Mateos.

Last, but not least, trade unions proved to be a key actor by identifying the case as a strategic one and offering Raquel García Mateos economic and legal support for the whole duration of the trial (La Barbera & Lombardo, 2019). Without their support, it would have been impossible to afford the economic and emotional costs of a ten-year-long trial.

In Betriu Montull, the Advocate General argues that 76/207/EEC Equal Treatment Directive must be interpreted as precluding national legislation that treats employed mothers as primary right-holders of childcare leave and fathers as subsidiary right-holders (Roca Álvarez § 36). The Advocate General follows Roca Álvarez in framing employed mothers and fathers as *equal childcare right-holders*. This framing is based on a diagnosis of *childcare as a social construct* that goes beyond biological arguments of

*women as caregivers* by attributing *equal parenting capacity to mothers and fathers*: ‘feeding and devoting time to the child could be carried out just as well by the father and by the mother’ (Roca Álvarez, § 64). ‘Keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties’ (§ 66) perpetuates the ‘traditional allocation’ of gender roles in childcare. Challenging such a traditional allocation of gender roles ‘is laudable and should be encouraged’ (§ 76). The opinion is framed using a ‘gender approach’. Class is alluded to in the framing of employed and non-employed mothers and fathers, but intersectionality is not articulated.

A number of discursive obstacles and resistances appear in both cases. We consider ‘resistances’ those obstacles that are implicitly expressed when actors frame them as ‘technical’ issues. In García Mateos, the Constitutional Court’s framing reproduces a gendered division of care and employment. Framing the problem as group-based indirect discrimination of women makes it impossible to claim parental rights for fathers, preventing the transformation of gender roles towards shared care. The Court aims at protecting women workers’ parental rights but ends up reinforcing women’s role as primary family caregivers, excluding men from the feminized realm of care. Such a ‘women approach’ represents a gender-specific resistance that does not recognise men the right to provide care; does not allow the representation of men in the sphere of care; and does not redistribute care roles among parents.

The alleged impossibility to allocate economic compensation (RTC 1/2009) is an institutional resistance to economic redistribution based on a general conservatism (read: maintaining the status quo) of the Court. Although this is based on an established interpretation of the Constitutional Court that does not allocate compensation (Interview, 8/2/2017), a dissenting judge argued that the Court should award compensation when this is the only mechanism to restore a fundamental right after violation (Interview, 8/2/2017).

In Betriu Montull, the CJEU does not follow the Advocate General opinion and reasserts gendered care roles. The Court uses a ‘non employment’ frame, which establishes different categories of entitlements for ‘employed’ and ‘non-employed’, which includes workers under private security schemes. In contrast with the Advocate General opinion, the decision reasserts the father’s right to leave as a ‘subsidiary’ one: ‘a father of a child who is an employed person is not entitled to take such leave where the mother of his child is not an employed person and is not covered by a State social security scheme’ (p. 14). This is a gender-specific resistance, based on a universal breadwinner model, which is employment-centred and involves the lack of redistribution of care roles between working parents. While the Advocate General opinion based in Roca Álvarez uses a gender approach that considers both employed parents as equal childcare right holders, the CJEU does not recognize the father such a right when the mother works under a private social security scheme, which is considered non-employed.

Two key actors have been identified here. First, the judge of the Court of First Instance who interpreted EU law as aimed at reconciling employment and care rights to be granted to mother or father without distinction. Showing great expertise in EU law, the judge asked preliminary questions to the Spanish Constitutional Court and the CJEU about a possible violation of constitutional rights and EU directives on equal employment. Second, the Advocate General of the CJEU, a man professor of EU law,

with judicial and political experience. His opinion follows the arguments made in Roca Álvarez about shared care and the need to challenge stereotypical gender roles in care.

## Conclusions

This article analyzes how actors navigate through material and discursive obstacles in judicial implementation of EU equal employment policies in Spain and use opportunities to advance workers' parental rights towards equal sharing of care. Scholarly debates have identified different models of care, analysing them especially at the adoption stage or, when studying implementation, they did not address judicial practice. This study of judicial implementation contributes to such debates by showing that, when implementation relies on a 'women' approach rather than a 'gender' approach, it ends up perpetuating more traditional gender roles in care as compared to the roles that adopted EU policies put forward.

Indeed, when policy adoption is considered, the EU is usually classified as an example of 'universal breadwinner' model that is market-oriented but it tends to employ a 'gender' approach. Spain is instead classified as 'male breadwinner' (Ciccia & Verloo, 2012), though recently moving away from it. However, when EU policy reaches the implementation stage, we detect the return of informal norms about traditional gender roles that had been overcome at the adoption stage through the privileging of a 'women' rather than a 'gender' approach. This resistance to change when policies are put into practice renders transformation of gender roles in care particularly difficult to achieve. As our analysis shows, the combination of a 'universal breadwinner' model and a 'women approach' results in the impossibility for the father to obtain the right to care, while the mother is attributed the main caregiving role.

Furthermore, in line with studies that propose situating the analysis of implementation within policy process theory, we found studying the interaction between policy adoption and implementation is key for identifying problems and gaps in both processes. Problems in adopted policies are often visible only when measures are put into practice. For instance, the analysis of Betriu Montull reveals discrimination of self-employed in the EU, who are treated as 'non-employed' and are thus not entitled to parental rights. A discursive approach to judicial implementation shows that EU labor law contradicts in practice the very equal treatment that claims to protect.

Our interdisciplinary approach allows combining the analysis of legal praxis and its outcomes with attention to actors' discursive dynamics and interactions with the broader institutional structure and political processes. Its contributions for theorizing policy implementation include the following. Firstly, institutions comprise multiple meanings that result in contrasting implementation outcomes (e.g. equality as a fundamental right, freedom of the company over the right of the employee, father as subsidiary caregiver, shared parenting). This article argues that implementation research needs to study institutions, framings and actors together so to reveal existing dynamics. This is because actors, through framings, give meaning to institutions. Only once meanings are exposed further analysis is possible. In particular, the study contributes to debates on the role of discourses in multilevel contexts of policy implementation. Since in contestation processes, such as the judiciary, multiple meanings can be

expressed and counteracted, a discursive politics approach allows to understand how different actors in multiple levels create opportunities and obstacles, and how those meanings can be articulated producing different outcomes for the same policy.

Secondly, the article shows the advantage of in-depth qualitative case studies for addressing the complexities of implementation processes. By analyzing specific implementing decisions, our study allows to finetune the understanding of specific material and discursive obstacles in judicial implementation and to classify their features as implicit/explicit, recognition/redistribution/representation, and gender and not gender-specific. This finetuning provides elements for further analysis about the nature of the obstacle and opportunity at stake and the possibility of transformative outcomes. It also showed how actors at the same time open and close opportunities for change, be it intentionally or unintentionally. Therefore, we recommend policy implementation studies to investigate obstacles in relation to opportunities so to capture actors' agency towards social transformation. A clear example of this is the action of the dissenting judge of the Constitutional Court that transformed the technical obstacle not to award economic compensation to García Mateos into an opportunity, by proposing such compensation when it is the only way to restore a fundamental right. In so doing, he provided the ECtHR the argument to support the plaintiff's demand for therecognition of her right to care. Indeed, the guarantee of parental rights to childcare requires the will to transform legal, judicial and social institutions that, although formulated in technical and neutral terms, *de facto* assign women the primary role as caregivers.

Finally, studying implementation offers further insights on the meaning of gender roles' transformation. The judicial implementation of EU equal employment policies in Spain has resulted in limited transformation of unequal roles of women and men in childcare. By unraveling the different framing of 'women', 'gender' and 'intersectionality', our analysis reveals that in none of the analysed cases there is simultaneous presence of recognition (of the value of care and work rights), redistribution (of roles and material resources in care and at work), and representation (of women at work and men in care), which according to Fraser (1994) would lead to transformation of gendered roles in care. When a 'women approach' is used, women's rights are recognized and space for women participation is created but care responsibilities are not redistributed. As a result, gender discrimination for women workers is maintained. A 'gender approach' implies transformation of power relations and could thus transform traditional gender roles towards equal sharing of care among working parents. However, it usually encounters opposition in courts. An 'intersectionality approach' could allow gender roles transformation toward equal sharing of care by considering the intersection of, at least, gender and social position/class. Yet, it tends to be absent in adopted policies and rarely used in implementation, thus limiting the chances of transformation of gendered roles in care. Further studies of policy implementation in the EU multilevel context –in judicial and other institutions– are needed to assess actors' possibilities of transforming the meaning of gender roles towards the equal sharing of care.



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