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What Choice of Equality for Workers with Family Responsibilities?

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International Human Rights Law and International Labour Rights
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*'[...] everything has changed and nothing has changed.'*¹

¹ Rosalynd C Barnett, 'A New Work-Life Model for the Twenty-First Century' (1999) 562
Annals of the American Academy of Political and Social Science 143, 150.

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ABSTRACT

Gone are the days when women were exclusively confined to care work in the private sphere and men dominated in the public sphere. Still, the increase in the number of women in gainful employment has not engendered a more equitable division of family responsibilities inside the family unit. In fact, the birth of a child often entails in itself a 're-traditionalisation' of working and family patterns, notwithstanding the education or work history of the mother or the gender equal ideals of the partners: the breadwinner position of employed men increases, while women who have otherwise left their traditional carer roles return to it once the children are born. Still, many women decide to remain active or return to the labour market after a prolonged leave. Because of perceptions about their capabilities as carers and not as workers, the struggle to reconcile work and family life is more pronounced in the case of women workers. It is the central tenet of this thesis that the effective equality of workers with family responsibilities can be realised by employing the transformative equality concept, meaning that the structural disadvantage against women workers can be overcome only when there is a change in the traditional gender roles of men and women. At the same time, the right design of work-family reconciliation measures has tremendous potential to contribute to this change. For instance, measures aimed at reconciling the work-family conflict have to address both men and women in order to overcome past inequalities produced by the biological difference and/or socially constructed gender roles. Additionally, social partners have a crucial role in expanding the bargaining power of the worker and facilitating the reconciliation of the work-family conflict.

ABBREVIATIONS

ACHR	American Convention of Human Rights
BPfA	Beijing Platform for Action
C111	ILO Discrimination (Employment and Occupation) Convention
C156	ILO Workers with Family Responsibilities Convention
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFEU	Charter on the Fundamental Rights of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIGE	European Institute for Gender Equality
ESC	European Social Charter
EU	European Union
FRD	Family Responsibilities Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
R165	ILO Workers with Family Responsibilities Recommendation
RESC	Revised European Social Charter
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

I INTRODUCTION

The ‘quest for equality’ can be seen as one of the major struggles of human rights law, the more so that equality is considered a necessary component of justice.² The plea for equality shines through from all the international human rights treaties concluded after WWII, regardless of the area of regulation and it is prevalent in most of the national constitutions.³ The principle is claimed to be ‘the most dominant and recurring theme of international human rights law’⁴ that together with liberty act as ‘the most important principle imbuing and inspiring the concept of human rights.’⁵

Notwithstanding that the original Constitution of the International Labour Organisation (ILO), as rendered in the Treaty of Versailles, did not contain an explicit reference to the equality of workers, it invited States to guarantee ‘the equitable economic treatment of all workers lawfully resident therein.’⁶ The Declaration of Philadelphia, adopted in 1944 and annexed to the Constitution, gave ILO already a human rights mandate. The Declaration states that ‘all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity’.⁷ Furthermore, the plea for equality shines through from the stipulation that ‘the principles set forth in this Declaration are applicable to all peoples everywhere.’⁸ Moreover, the amended Constitution came to include a reference to the ‘recognition of the principle of equal remuneration for work of equal value’.⁹

Since the redefinition of its mandate, the ILO has adopted a number of international labour standards to advance the equality of workers, the most important being the Equal Remuneration Convention (C100),¹⁰ adopted in 1951, and the Discrimination (Employment and Occupation) Convention (C111),¹¹ adopted in 1958. The fundamental contribution of the C111 was not only that it provided a definition for the term ‘discrimination’ but also

² Ilmar Tammelo, *Justice and Doubt: An Essay on the Fundamentals of Justice* (Springer-Verlag Wien GmbH 1959), 333.

³ Non-discrimination clauses are not confined to the human rights discourse but are also present in other international treaties, for example, in trade agreements, treaties on consular relations, outer space exploration. – EW Vierdag, *The Concept of Discrimination in International Law: With Special Reference to Human Rights* (Martinus Nijhoff 1973), 1.

⁴ Anne F Bayefsky, ‘The Principle of Equality or Non-Discrimination in International Law’ (1990) 11 Human Rights Law Journal 1, 2.

⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition, NP Engel Publisher), 598.

⁶ Article 427 Treaty of Versailles, available at: <http://www.firstworldwar.com/source/versailles400-427.htm> [accessed 21 May 2014].

⁷ Section II Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia). Annex to the Constitution of the ILO, 10 May 1944.

⁸ Section V Declaration of Philadelphia.

⁹ Constitution of the International Labour Organisation, 1 April 1919.

¹⁰ ILO, *Equal Remuneration Convention (C100)*, 29 June 1951.

¹¹ ILO, *Discrimination (Employment and Occupation) Convention (C111)*, 25 June 1958.

that it acknowledged that the promotion of equality of opportunity and equality of treatment is necessary to eliminate discrimination in law and in practice.¹² As such, the C111 allowed exceptions to the then-prevalent equal treatment paradigm: in addition to the negative obligation to abstain from actions that have adverse impact on individuals, it recognised the need for positive and proactive measures to remedy exclusion and historical disadvantage.¹³ While both instruments predate the adoption of human rights treaties by other international organisations, they have served as an important reference point for the drafters of the later standards.¹⁴

The fact that the elimination of discrimination in respect of employment and occupation is enshrined among the four core labour standards in the Declaration on Fundamental Principles and Rights at Work means that the principle binds all Member States, notwithstanding the ratification status of the relevant instruments (C100 and C111).¹⁵ As such, it includes also the promotion of equality of opportunity and treatment. Alston, nevertheless, notes that this does not mean that the requirements of the conventions can be automatically read into the core labour standards.¹⁶ Furthermore, considering that the ILO's initiative of 'decent work' is concerned with all workers, whether in the formal or informal economy, and that the notion of 'decent work' itself is founded on the equal opportunities of all of those who are engaged or wish to engage in labour, it can be asserted that the equality principle extends beyond the formal employment relationship.¹⁷

1.1. Purpose of thesis

It is evident from the foregoing that part of the mandate of the ILO is the establishment of employment equality between workers.¹⁸ Because family responsibilities tend to have negative implications on workers' equality, the ILO has addressed also the relationship between work and family. In 1981, the ILO adopted the Workers with Family Responsibilities Convention (C156),¹⁹ which stipulates that work-family reconciliation should be undertaken 'with a view to creating effective equality of opportunity and treatment for men and women workers'.²⁰ In a survey on the

¹² Article 2 C111.

¹³ Colleen Sheppard, 'Mapping anti-discrimination law onto inequality at work: Expanding the meaning of equality in international labour law' (2012) 151 *International Labour Review* 1, 11.

¹⁴ Gerry Rodgers *et al*, *The International Labour Organisation and the quest for social justice, 1919–2009* (ILO 2009), 54.

¹⁵ Article 2(d) ILO *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998.

¹⁶ Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Regime' (2004) 15 *European Journal of International Law* 457, 491.

¹⁷ Colleen Sheppard, 13.

¹⁸ Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports on the Workers with Family Responsibilities Convention (No 156) and Recommendation (No 165)*, 1981, International Labour Conference, 80th Session, 1993, § 2. (Hereafter: Committee of Experts *General Survey* 1993)

¹⁹ ILO, *Workers with Family Responsibilities Convention* (C156), 23 June 1981.

²⁰ Article 3(1) C156.

implementation of the C156, the Committee of Experts on the Application of Conventions and Recommendations underscored that because the family is the concern of each individual, man and woman, society must enable all persons with dependants both to exercise their responsibilities and to participate fully in the labour force.²¹ Yet, for many workers ‘equality at work’ has remained illusory.

It is the premise of the thesis that workers with dependants should have the possibility both to fulfil their family commitments and to participate fully in the labour force. While the theoretical legal discourse provides the necessary framework to approach the equality principle, the thesis asks which equality concept is the most adequate to address the needs of workers with family commitments. Because the domestic division of family responsibilities has remained a source of gender inequality at the workplace, the viable concept has to address also the structural disadvantage against women workers. As such, the thesis explores how to design work-family reconciliation measures in a way to would help to bring about transformative change in the traditional gender roles of men and women.

1.2. Outline of structure

The thesis is divided into six chapters. Each chapter begins with a short introduction and ends with a brief conclusion of the relevant points made. The introductory chapter follows the development of the principle of equality within the ILO system and underlines that equality of opportunity and treatment is to be guaranteed also for workers with family responsibilities. It further states the research purpose and provides an outline of the structure with an overview of the materials used. The introductory chapter goes on to detail the limitations of the thesis and introduce the relevant terminology.

The second chapter seeks to deconstruct the idea of equality in light of international labour law. As such, it introduces the reader the relevant equality concepts that are employed later in the thesis. The chapter takes the traditional equality dichotomy of formal and substantive equality as its starting point. As such it follows the classical Aristotelian maxim that ‘likes should be treated alike and unlikes unlike to the proportion of their unlikeness’. By using the reports of the ILO and scholarly materials, the chapter concludes that international labour law does not only require equality in law (formal equality) but also equality in fact (substantive equality). The latter concept may in turn require the State to institute special measures. While States are left with considerable room to determine, which measures are best suitable for national conditions and practices, the national policies have to be ‘real’ and cover all the objectives of the C111.

The third chapter addresses the notion of workers with family responsibilities while drawing on the structure of the C156. Also other

²¹ Committee of Experts *General Survey* 1993, § 90.

relevant international instruments are looked into. The chapter provides a definition for family responsibilities discrimination (FRD) and details the recipients of these responsibilities. It further explores the gender dimension of FRD and examines the stereotypes that are associated with workers with family commitments. The chapter concludes by underlining the importance of State action to ensure the effective equality of workers with family responsibilities. While the General Survey on the implementation of the C156 has provided guidance on mapping the definitions of FRD and the agents and recipients of family responsibilities, secondary legal sources are used to deconstruct the gender dimension of FRD and to underline the need of State intervention in this regard.

The fourth chapter asks which equality concept is the most adequate to address the needs of workers with family responsibilities. As such, it draws on the equality concepts explored earlier in the thesis. Because the division of family responsibilities at home has remained a source of gender inequality at the workplace, the chapter explores how the design of work-family reconciliation measures could help women workers overcome the structural discrimination and achieve equal opportunities in the labour market with other workers.²² The chapter concludes by highlighting the role of social partners in the ‘quest for equality’. Again, the reports of the ILO and scholarly materials have provided important reference points for the analysis.

The fifth chapter exemplifies how the design of a concrete work-family reconciliation measure – parental leave – can disadvantage women in the labour market. Because leave policies are part of States’ social policies and the latter does not develop in a vacuum, the chapter starts off by looking at the socio-political context in which the current Estonian leave system has its origins. The chapter goes on to address the legal development of the principle of gender equality in (re-independent) Estonia and proceeds with a look at the current labour market situation and social perceptions regarding family life. The chapter concludes with an analysis of the current parental leave system. The statistical data is provided both by the Estonian Statistics database and the reports of the European Commission. Because Estonia has not ratified the C156, references are drawn from the EU law. The sixth and final chapter draws conclusions from the research presented and makes recommendations for future research.

²² Report of the ILO Director-General, *Time for Equality at Work. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 91st Session 2003, Report I(B), § 241. (Hereafter: ILO *Global Report* 2003)

1.3. Delimitations

The objective of the thesis is to seek which equality concept States should embrace in order to ensure the effective equality of workers with family responsibilities. While the ILO's initiative of Decent Work expands the idea of equality beyond the mere formal employment relationship, the author acknowledges the difficulty of implementing work-family reconciliation outside the formal economy. Therefore, the thesis uses the formal employment relationship as its reference point. Also the C156 refers to 'employment' and 'occupation'. Furthermore, the author acknowledges that all major human rights treaties include references to the principle of equality. Yet, the space and time constraints do not allow the author to discuss how other international organisations have addressed the idea of equality. Sources beyond the ILO system are referred to in so far as they relate to international labour law.

Furthermore, it has to be noted that the term 'workers with family responsibilities' is a generalisation. The author recognises that workers have different education levels, belong to different nationalities etc. Their experience may necessitate different measures. Because the human experience is unlimited in theory, the thesis addresses workers with family responsibilities as a generalisation without analysing the interplay of multiple identities. Furthermore, the thesis presumes that family responsibilities affect individual job performance. The division of labour inside the family unit has had significant impact on the gender equality of women at work. While acknowledging that the concept of family includes also same-sex couples, the thesis does not explore the division of labour within same-sex families.

Recently it has been suggested to broaden the work-family debate to work-life reconciliation or balance. This is done to recognise that also workers who do not have family responsibilities are concerned about the possibility to develop their lives outside work. While taking note of this trend, the thesis uses the vocabulary of 'work-family' because the work-family reconciliation intends to engender a more gender equal workplace. The search for flexibility or balance in work-life does not necessarily coincide with the plea for gender equality.

1.4. Terminology

The thesis is based on the premise that equality is a viable legal principle.²³ While the C111 uses the language of 'equality of opportunity and treatment', the C156 refers to the 'effective equality of opportunity and treatment'. The thesis uses the terms interchangeably. At the same time, the author has referred to concepts, such as 'full equality', 'effective equality'.

²³ An author who has thought otherwise is, for instance, Peter Westen, 'Empty Idea of Equality' (1982) 95 Harvard Law Review 537.

‘equality in fact’ and ‘*de facto* equality’. These terms refer to substantive equality in results.

The work-family conflict refers to simultaneous pressures from the domestic and work spheres that are often incompatible in that the demands of one domain make it hard to meet the demands of the other sphere.²⁴ At the same time, the reconciliation, harmonisation and balancing of the work-family conflict refer to measures aimed at alleviating this conflict. The thesis uses the terms interchangeably. Because the language of the C156 uses the term ‘workers’ instead of ‘employees’, the author has used the former terminology.

1.5. Concluding remarks

The introductory chapter provided an overview of the development of the principle of equality within the ILO system. It went on to state the research purpose and outlined the structure of the thesis while giving an overview of the materials used. It further set the scope of the thesis and introduced the necessary terminology for the reader to orientate himself/herself in the following thesis. The next chapter will deconstruct the traditional equality dichotomy of formal equality and substantive equality in light of international labour law.

²⁴ Catherine Hein, *Reconciling Work and Family Responsibilities: Practical Ideas from Global Experience* (ILO 2005), 3.

II PRINCIPLE OF EQUALITY IN THE CONTEXT OF INTERNATIONAL LABOUR LAW

Discrimination at work is not only a violation of human rights, but also a waste of human talents that can ultimately curb economic growth and create poverty. At the same time, there is consensus that the promotion of equality of opportunity and treatment is essential to eliminate discrimination in law and in practice.²⁵ Because the purpose of this thesis is to identify the most adequate equality paradigm addressing the needs of workers with family responsibilities, it is important to clarify what the notion of ‘equality at work’ entails in the first place. The chapter deconstructs the idea of equality in light of international labour law.

2.1. The concept of equality

The Western understanding of equality rests heavily on the works of Aristotle who believed in a form of distributive justice: equality meant giving equal things to equals and unequal things to unequals.²⁶ Still, this classical maxim does not instruct us who in fact, are equals, what constitutes equal treatment and who qualify for different treatment. While drawing on the works of Aristotle, international legal literature differentiates between two equality concepts: the formal and the substantive concept.²⁷ While the former concerns the application of the law, regardless of its content, the latter requires the content of the law to take into account also the fair division of benefits and burdens.²⁸ In law, formal equality forms the basis for non-discrimination provisions and a central argument against direct discrimination. The substantive equality framework provides in turn justifications for the adoption of special measures, including affirmative action, and the prohibition of indirect discrimination.²⁹

²⁵ Report of the ILO Director-General, *Equality at Work: Tackling the Challenges. Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 96th Session, 2007, Report I(B), § 22. (Hereafter: ILO *Global Report* 2007)

²⁶ Warwick McKean, *Equality and Discrimination in International Law* (OUP 1983), 2.

²⁷ Petra Foubert, *The Legal Protection of the Pregnant Worker in the European Community* (Kluwer Law International 2002), 20.

²⁸ Oddny Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2003), 18.

²⁹ Daniel Moeckli, ‘Equality and Non-Discrimination’ in D Moeckli, S Shah, S Sivakumaran (eds), *International Human Rights Law* (1st edition, OUP 2010), 192.

2.1.1. Formal equality

Formal equality is based on the premise that fairness requires consistent treatment – only similarly situated individuals are to be treated alike on the basis of their abilities and merit – and that States should not arbitrarily differentiate between individuals.³⁰ International labour law embraces formal equality through the prohibition of direct discrimination in Article 1(1)(a) C111.³¹

Because formal equality requires the abolition of exclusionary laws, it eliminates manifest discriminatory behaviour.³² As such, it has a role in eliminating personal prejudice.³³ The pure formalistic view of equality raises, nevertheless, a series of concerns. Firstly, in the case of formal equality, the ‘likeness’ of the cases raises doubts since not every distinction is discriminatory.³⁴ The authorities tend to classify people into groups on the basis of a particular feature, meaning that the legislature itself creates legal equalities and inequalities.³⁵ Formal equality does not *per se* tell which difference in treatment is legitimate and which not.³⁶ Secondly, because formal equality does not require a particular outcome, the employer does not have to treat likes equally well. When two individuals are treated equally badly, in essence, the requirement of formal equality is fulfilled. For instance, it has been deemed legitimate to raise the pensionable age for women, instead of lowering men’s pensionable age.³⁷

A claimant can prove inconsistent treatment only when she was treated less favourably than a similarly situated individual – a comparator – the main difference between the two being the ‘protected ground’ (e.g. sex, race, colour, political opinion, social origin). Fredman notes that because the disregarded grounds still largely determine the economic, social, and political situation of the claimant, the comparator becomes in fact an individual of dominant gender, culture, religion, ethnicity, or sexuality.³⁸ Should the claimant fail to demonstrate that she confirms the dominant norm (‘the male norm’), she will not be able to prove the comparability of the situations. As such, formal equality creates ‘powerful conformist pressures.’³⁹

³⁰ Sandra Fredman, *Discrimination Law* (2nd edition, OUP 2011), 8.

³¹ The C111 defines discrimination as ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’. Article 1(2) C111 adds that any distinction, exclusion or preference based on the inherent requirements of the job is not considered discriminatory.

³² Sandra Fredman, 8.

³³ *Ibid*, 14.

³⁴ *Ibid*, 8.

³⁵ EW Vierdag, 11.

³⁶ Sandra Fredman, 9.

³⁷ Bob Hepple, ‘Equality and Empowerment for Decent Work’ (2001) 140 *International Labour Review* 5, 6–7.

³⁸ Sandra Fredman, 11.

³⁹ *Ibid*, 11–13.

Furthermore, the right choice of comparators may be determinative to the claim of equal treatment.⁴⁰ For instance, in a case before the European Court of Justice (ECJ), the claimant, a same-sex partner of a female employee of a railway company, argued that she was discriminated on the ground of her sex because she was denied travel concessions, which were generally available to employees' opposite sex partners. Because the Court compared the claimant's situation to the situation of a same-sex partner of a male employee and not to the situation of a heterosexual partner of an employee, it concluded that there had been no direct discrimination.⁴¹

2.1.2. Substantive equality

The limited scope of formal equality has led States and international organisations to reconsider their equality laws. Also the second Global Report on discrimination under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work underlined that equality at work is not only about prohibiting discrimination, but also about 'changing the status quo and transforming the workplace to make it more inclusive.'⁴² Rather than ensuring procedural fairness, the substantive equality model is concerned with the mitigation of effects-based inequality.⁴³ At the same time, Nowak observes that the legislature is able to enforce substantive equality only in States that possess 'a hierarchical system of legal norms with judicial review of legislative authority.'⁴⁴

The substantive equality model can be understood in three senses: equality of results, equality of opportunity and equality of dignity.⁴⁵ While the latter can be seen as the underlying reason behind equality rights, the choice between equality of results and equality of opportunity determines the form of social justice society endeavours to implement.⁴⁶

2.1.2.1. Equality of results

The notion of equality of results acknowledges that consistent treatment fails to bring about equality in fact. Its aim is to reduce inequality through the fairer distribution of social services, goods and power. As such, it assumes that skills and talent are distributed uniformly among the members of society.⁴⁷ Hepple observes that inequality of results itself can be

⁴⁰ Bob Hepple, 'Equality and Empowerment for Decent Work', 7.

⁴¹ Case C-249/96, *Grant v South West Trains*, ECR I-636. The law of the European Union contains provisions similar to the C100 on the equal pay between men and women. The principle emanates from Article 157 TFEU.

⁴² ILO *Global Report 2007*, § 39.

⁴³ Colleen Sheppard, 1.

⁴⁴ Manfred Nowak, 598.

⁴⁵ Bob Hepple, 'Equality and Empowerment for Decent Work', 7–9.

⁴⁶ Economic and Social Council, *The concept and practice of affirmative action. Final report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5*, 17 June 2002, E/CN4/Sub2/2002/21, § 31. (Hereafter: Economic and Social Council *The Concept and practice of affirmative action 2002*)

⁴⁷ *Ibid*, § 35.

approached in three senses. The first centres on the impact of seemingly equal treatment on the individual. The second focuses on the impact of the equal treatment on the group the individual belongs to, and the third requires equal outcomes, for instance, the equal representation of men and women in managerial boards.⁴⁸ The legal construct of this model targets indirect discrimination.⁴⁹

An individual is indirectly discriminated against when a practice or rule appears neutral at first glance but in reality has adverse impact on a group the individual belongs to. Indirect discrimination is thus results-oriented in two senses: it does not only have detrimental impact on a concrete individual, but also disadvantages the group the individual is a member of.⁵⁰ Take for instance a case where the police introduce a rule according to which everyone has to wear helmets while on duty. While it would mean that an individual Sikh police officer has to remove his head covering, the seemingly neutral rule would disadvantage also other Sikh men. The prohibition of indirect discrimination does not, however, bring about the greater representation of the disadvantaged group.⁵¹ Should there be an objective justification for the rule, there is no violation.⁵² When the violation is found, the removal of the rule only remedies the individual wrong.⁵³ For instance, in the previous case, the removal of the rule means that only the needs of this concrete Sikh man will be accommodated. The abolishment of the rule does not *per se* guarantee that more Sikh men will come to work for the police.

The origins of indirect discrimination lie in Article 1 C111, which covers ‘any distinction, exclusion or preference’, which has the ‘effect’ of impairing individual’s equality of opportunity or treatment.⁵⁴ What immediately follows, is an exception to the general principle ‘any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.’⁵⁵

An approach that would more likely have greater redistributive potential, would be to define equality of results in terms of ‘fair participation’ of groups in employment, and provide fair access to training and education. The goal of improving the participation of underrepresented and disadvantaged groups in the workforce may require in turn the adoption of special measures.⁵⁶ The C111 was the first international instrument that explicitly deemed the adoption of special measures permissible. The instrument allows to take special measures that are aimed at the

⁴⁸ Bob Hepple, ‘Equality and Empowerment for Decent Work’, 7.

⁴⁹ Manuela Tomei, ‘Discrimination and Equality at Work: A Review of the Concepts’ (2003) 142 International Labour Review 401, 412.

⁵⁰ Bob Hepple, ‘Equality and Empowerment for Decent Work’, 7.

⁵¹ *Ibid.*

⁵² *Ibid.*, 8.

⁵³ Sandra Fredman, 14–15.

⁵⁴ Bob Hepple, ‘Equality and Empowerment for Decent Work’, 7.

⁵⁵ Article 1(2) C111.

⁵⁶ Manuela Tomei, 412.

accommodation of the needs of persons who are generally recognised as requiring special protection or assistance for reasons such as race, sex, age, disability, family responsibilities or social or cultural ties.⁵⁷ As such, it may require preferential treatment of certain underrepresented groups, for example, by issuing quotas for the managerial boards. Quotas may, however, hinder the advancement of other vulnerable groups that have similar claims to equality, and fail to take into account individual choice.⁵⁸ Bossuyt observes that when the socio-economic status of the target group is not taken into account, quotas will in fact advantage members of the underprivileged group who are already better off.⁵⁹ At the same time, Sheppard notes that here the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Elimination of Racial Discrimination (CERD) can be of great guidance since both instruments encourage the adoption of special measures and temporary special measures (affirmative action).⁶⁰

The excessive focus on outcomes does not necessarily bring about the re-examination of societal structures that in fact perpetuate disadvantages. For instance, the increase in the number of women in male-dominated employment sectors may instead mean that women conform to men's working patterns. Moreover, the increase of underrepresented groups in managerial positions may coincide with a decrease in wages.⁶¹

2.1.2.2. Equality of opportunity

The second way to approach substantive equality is in terms of equal opportunities. The concept asserts that true equality cannot be achieved when people have different starting points.⁶² While quotas subdue individual choice to the utilitarian aim of equal outcomes, equality of opportunity fights institutional discrimination by emphasising individual merit once the equal starting point has been achieved.⁶³ As such, equality of opportunity recognises that skills and talent are not uniformly distributed among individuals. At the same time, it allows social mobility.⁶⁴ While the C111 has adopted this concept, Hepple observes that the conventional obligation 'to promote equality of opportunity' does not in itself specify whether it is a narrow procedural obligation or whether it requires substantive action.⁶⁵

The procedural view of equality of opportunity requires the removal of barriers and obstacles in respect of disadvantaged groups, for instance, by abolishing word of mouth recruitment. The emphasis on individual merit

⁵⁷ Article 5 C111.

⁵⁸ Economic and Social Council, *The concept and practice of affirmative action* 2002, § 36.

⁵⁹ *Ibid*, § 15.

⁶⁰ Colleen Sheppard, 11.

⁶¹ Sandra Fredman, 16.

⁶² *Ibid*, 18.

⁶³ *Ibid*.

⁶⁴ Economic and Social Council, *The concept and practice of affirmative action* 2002, § 33.

⁶⁵ Bob Hepple, 'Equality and Empowerment for Decent Work', 9.

does not, however, guarantee that the removal of initial barriers will result in the use of those opportunities by vulnerable groups and consequently in equal distribution.⁶⁶ For instance, it is likely that in the recruitment process, a candidate with previous work experience will be selected, instead of a candidate without such experience. Should the latter belong to a minority group, inequality perpetuates. As such, equality of opportunity is a form of ‘imperfect procedural justice’ aimed at a noble outcome without the actual guarantee that the procedure will promote equal outcomes.⁶⁷ A more substantive approach to equality of opportunity on the other hand, necessitates the adoption of measures ensuring that the disadvantaged groups actually have the chance to satisfy the criteria to qualify for a particular social good. This in turn requires the institution of positive measures.⁶⁸ The stipulation that the principle of equal treatment and opportunities requires in addition to consistent treatment also the institution of special measures and the accommodation of differences, in the second Global report on discrimination,⁶⁹ would suggest that the ILO has adopted the substantive approach towards equality of opportunity.

2.1.2.3. Equality of human dignity

A third approach to substantive equality concentrates on the inviolability of human dignity. References to the ‘equal worth’ of human beings as a trigger to equality rights are to be found everywhere: in national constitutions and international human rights treaties.⁷⁰ Since its inception, also the ILO has been guided by this fundamental principle. The Constitution of the ILO, as rendered in the Treaty of Versailles, stipulated already in 1919 that ‘labour should not be regarded merely as a commodity or article of commerce.’⁷¹ Furthermore, the Declaration of Philadelphia refers to individual development free from discrimination ‘in conditions of freedom and dignity, of economic security and equal opportunity’.⁷²

At the same time, Fredman observes that the principle of human dignity allows institutions to expand the list of protected grounds for discrimination in a principled manner.⁷³ For instance, the grounds of discrimination are listed exhaustively in the C111, covering race, colour, sex, religion, political opinion, national extraction and social origin.⁷⁴ Still, Member States can expand the list provided it is done after consulting the relevant employers’ and workers’ organisations.⁷⁵ For instance, many States have included

⁶⁶ Sandra Fredman, 18.

⁶⁷ Bob Hepple, ‘Discrimination and Equality of Opportunity – Northern Irish Lessons’ (1990) 10 Oxford Journal of Legal Studies 408, 412.

⁶⁸ Sandra Fredman, 18–19.

⁶⁹ ILO *Global Report 2007*, § 36.

⁷⁰ Sandra Fredman, 19.

⁷¹ Article 427 Treaty of Versailles.

⁷² Section II Declaration of Philadelphia.

⁷³ Sandra Fredman, 22.

⁷⁴ Article 1(1)(a) C111.

⁷⁵ Article 1(1)(a)(b) C111.

disability, age, state of health, trade union membership and family status, among the protected grounds.⁷⁶

2.2. Methods appropriate to national conditions and practice

It is evident from the foregoing that the meaning of ‘equality at work’ extends beyond the mere formal equality concept and includes also the substantive equality model. At the same time, States are left considerable room for deciding, which practices are appropriate to promote equality of opportunity and treatment. Article 2 C111 enshrines explicitly that Member States undertake to pursue national policies, designed to promote equality of opportunity and treatment by ‘methods appropriate to national conditions and practice’. This ‘freedom’ may relate to the nature of the methods, time scale, timeliness etc. Nevertheless, the national policies have to be ‘real’ and cover all the objectives of the C111.⁷⁷

2.3. Concluding remarks

Equality at work is desirable not only from the perspective of the individual but can also benefit the State as it contributes to economic growth and helps to reduce poverty. At the same time, legal regulations reflect different approaches to equality. While formal equality is the basis for anti-discrimination laws, substantive equality provides justifications for remedying effects-based inequality. States are, nevertheless, accorded considerable room for deciding which measures best correspond to their national conditions when promoting equality at the workplace.

The next chapter will look into the specifics of workers with family responsibilities. It will give an overview of the legal sources that have regulated the employment situation of such workers, and detail the exact definitions. The chapter will conclude by discussing why the domestic division of family responsibilities is a source of gender inequality at the workplace and underline the importance of State action in this regard.

⁷⁶ ILO *Global Report 2007*, § 25.

⁷⁷ Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No 111) and Recommendation (No 111)*, 1958, International Labour Conference, 75th Session, 1988, § 160.

III WORKERS WITH FAMILY RESPONSIBILITIES

The right to work is a fundamental human right, and as such it has found written expression in multiple human rights instruments.⁷⁸ Because employment helps to secure a worker and his/her family a decent living, work is inseparable from living in dignity.⁷⁹ The free choice of employment is in turn a means for self-realisation and the development of human personality. It also contributes to individual's recognition and inclusion in the community.⁸⁰ At the same time, family is the fundamental group unit of society and the natural environment for the growth and well-being of all its members and particularly children.⁸¹ As such, it is entitled to protection by society and the State.⁸²

While work is indispensable for the sustenance of the worker and for his/her family, the fact that workers have responsibilities in respect of their dependants may make them require more flexibility in terms of work conditions. The employers may, however, perceive it economically undesirable to hire or keep a worker whose participation in employment may become restricted or interrupted due to family obligations. Should the employer treat a worker differently in preparing for, entering, participating in or advancing in economic activity because of assumptions about his/her capabilities as a carer rather than on the basis of his/her individual performance as a worker, the employer engages FRD.⁸³

Although care work is gender-neutral *prima facie*, the fact that it is most often women who bear care responsibilities in respect of dependent family members, gives FRD a gender dimension.⁸⁴ The unequal division of

⁷⁸ On universal level the right to work is enumerated in Article 8(3)(a) ICCPR, Article 5(e)(i) ICERD, Article 11(1)(a) CEDAW, Article 32 CRC and in Articles 11, 25, 26, 40, 52 and 54 CMW. It is also enshrined in regional instruments, including the ESC (1961), the RESC (1996), African Charter on Human and Peoples' Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

⁷⁹ UN Committee on Economic, Social and Cultural Rights, *General Comment No 18: Right to Work (Article 6 of the ICESCR)*, 24 November 2005, E/C12/GC/18, § 1.

⁸⁰ Krzysztof Drzewicki, 'The Right to Work and Rights in Work' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights* (2nd edition, Martinus Nijhoff Publishers 2001), 223.

⁸¹ Preamble § 5 CRC, UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3.

⁸² The right to respect for family and private life has found written expression in multiple human rights instruments. It is enshrined in Article 16 UDHR, Article 23 ICCPR, Article 10 and Article 11 ICESCR. Regional treaties include Article 8 ECHR; Article 7, Article 9 and Article 33 CFEU, Article 17 ACHR, Article 18 African Charter on Human and Peoples' Rights, Article 33 Arab Charter on Human Rights.

⁸³ Joan C Williams and Stephanie Bornstein, 'Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination' (2006) 41 *University of San Francisco Law Review* 171, 171.

⁸⁴ Eurofound, *Working time and work-life balance in a life course perspective*, (Eurofound 2012), 2.

responsibilities within the family unit (e.g. child-rearing and household chores) is in turn powered by societal expectations towards these responsibilities. The perceived gender roles expect women to care for the children and the elderly in the private sphere, while men are expected to provide the family with financial security through exposure to the public sphere.

This chapter explores how international organisations have approached FRD, and analyse why the domestic division of family responsibilities is a source of gender inequality at the workplace. The chapter also highlights why State intervention is desirable and in the interest of the whole society.

3.1. Workers with family responsibilities and international labour standards

Part of the mandate of the ILO is the establishment of employment equality between workers.⁸⁵ The concern about the reconciliation of work demands and family life has been on the ILO's agenda since its inception.⁸⁶ Moreover, the term 'family responsibilities' is present in several ILO documents.⁸⁷ Still, it was not until the 1960s when women started to move into paid employment that family responsibilities became a specific equality concern.⁸⁸

Recognising that general measures promoting equality fell short of the needs of women workers who bore the double burden of work and family obligations, in 1965, the ILO adopted the Employment (Women with Family Responsibilities) Recommendation (R123).⁸⁹ Because the language of the Employment Recommendation treated the harmonisation of work and family life as a women's issue rather than as a workers' issue, it soon became apparent that the Recommendation was counterproductive to women's aspirations.⁹⁰

⁸⁵ Committee of Experts *General Survey* 1993, § 2.

⁸⁶ In fact, it was addressed already in one of the very first conventions on maternity protection: ILO, *Maternity Protection Convention* (C003), 29 November 1919.

⁸⁷ Although the C111 does not explicitly prohibit discrimination on the ground of family responsibilities, Member States can include any other distinction, preference or exclusion among the protected grounds (race, colour, sex, religion, political opinion, national extraction and social origin) provided it is done after consultation with the representative workers' and employers' organisations, where such exist, and other appropriate bodies (Article 1(b)). Additionally, the C111 allows States to adopt special measures to meet the needs of workers with family responsibilities because the latter group of workers is generally recognised as requiring special protection or assistance (Article 5 C111).

⁸⁸ ILO, *Work and Family: Towards New Forms of Reconciliation with Social Co-responsibility* (2009), 21. (Hereafter: *ILO Towards New Forms of Reconciliation*)

⁸⁹ ILO, *Employment (Women with Family Responsibilities) Recommendation* (R123), 22 June 1965.

⁹⁰ Catherine Hein, 2.

3.1.1. Convention No 156 and Recommendation No 165

Coinciding with the surge for women's rights on international level,⁹¹ the ILO acknowledged that the R123 did not properly address the role of women in the contemporary society and called for the recognition of the role of men in the family.⁹² A need for a more inclusive approach towards employment equality led the ILO to adopt the C156 in 1981. The C156 was accompanied with Workers with Family Responsibilities Recommendation (R165),⁹³ which despite its non-binding character, serves as an important guideline for governments in the implementation of the C156. The central tenet of the C156 reads as follows:

With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.⁹⁴

The fact that both, the C156 and the R165 apply to workers with responsibilities in relation to their dependants marks an institutional shift in the approach towards traditional gender roles, and indicates an emerging understanding that family and work are interrelated. The instruments seek to establish employment equality between workers and offer measures to reconcile work and family responsibilities through the provision of institutionalised care services, flexible working arrangements, gender-sensitive awareness-raising, education etc.

As of today, the C156 has been ratified by 43 countries. States, which have not ratified the Convention and are thus not bound by it, may be requested to submit an account of the law and practice in relation to the Convention's subject, and explain why the ratification of the instrument has been prevented or delayed.⁹⁵ Today work-family reconciliation is seen as one of the key factors to achieve equality between men and women workers at the workplace.

⁹¹ The UN General Assembly adopted the CEDAW in 1979.

⁹² ILO, *Declaration on Equality of Opportunity and Treatment for Women Workers; resolution concerning a plan of action with a view to promoting equality of opportunity and treatment for women workers*, 25 June 1975.

⁹³ ILO, *Workers with Family Responsibilities Recommendation (R165)*, 23 June 1981.

⁹⁴ Article 3(1) C156.

⁹⁵ Article 19(5)(e) Constitution of the International Labour Organisation.

3.1.2. Other international organisations: United Nations, Council of Europe and European Union

In addition to the C156, a number of other international instruments require Member States to take appropriate measures to ensure the equality of workers with family responsibilities.

3.1.2.1. United Nations

The CEDAW recognises that the upbringing of children is the common responsibility of parents (Article 5(b)) and encourages Member States to establish necessary social facilities that would enable parents to better combine family responsibilities with work duties (Article 11(2)(c)). Furthermore, the preamble refers to the awareness of the fact that full equality between men and women can be achieved only when there is a change in the traditional gender roles of men and women. Additionally, the Beijing Platform for Action (BPfA), adopted by the UN Fourth World Conference on Women in 1995, listed the harmonisation of work and family life as one of its strategic objectives to achieve gender equality.⁹⁶

In light of Article 7(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on fair wages and equal remuneration for work of equal value, the Committee on Economic, Social and Cultural Rights called on States to reduce the constraints that men and women face when trying to reconcile professional and family responsibilities by way of promoting adequate policies for childcare and care for dependent family members.⁹⁷

3.1.2.2. Council of Europe

The Revised European Social Charter (RESC) provides workers with family responsibilities protection against discrimination and encourages Member States to adopt measures accommodating family responsibilities, for instance, through the provision of day care and parental leave.⁹⁸ Furthermore, in 2009, Member States' ministers responsible for family affairs reaffirmed that gender equality was a prerequisite for a sustainable family policy and it was to be achieved *inter alia* by eradicating discrimination against working mothers. Moreover, the Conference called for the creation of favourable conditions for parents to reconcile work and

⁹⁶ UN Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, 15 September 1995, A/CONF177/20 (1995) and A/CONF177/20/Add1 (1995), § 15 and Strategic Objective F6.

⁹⁷ UN Committee on Economic, Social and Cultural Rights, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the ICESCR)*, 11 August 2005, E/C12/2005/4, § 24.

⁹⁸ Article 27, Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163.

family life, in particular by providing accessible childcare and promoting family friendly work culture.⁹⁹

3.1.2.3. European Union

In the European Union (EU), the reconciliation of work, family and private life has been recognised as a priority for achieving gender equality. Favourable policies are also considered key factors to increase women's participation in the labour market and promote the sharing of care responsibilities in the family.¹⁰⁰

The Equal Treatment Directive provided already in 1976 that the principle of equal treatment means that there is no direct or indirect discrimination on the ground of sex by reference to marital or family status.¹⁰¹ Furthermore, in 1989 the Member States adopted the Community Charter on the Fundamental Social Rights of Workers, which called for the development of measures enabling men and women to reconcile their occupational and family obligations.¹⁰² In 1995, the European Council affirmed the EU's commitment to the BPfA.¹⁰³ Moreover, the Parental Leave Directive, adopted in 2010, promotes the sharing of family and occupational responsibilities between parents and gives working parents the right to take time off from work for domestic reasons.¹⁰⁴

The reconciliation of work and life is also one of the key elements in the Europe 2020 strategy to increase the employment rate of men and women between the ages of 20 and 64.¹⁰⁵ Furthermore, the Commission's Strategy for Equality between Women and Men 2010–2015 stresses that the economic independence of men and women is fundamental to develop their lives, and underscores that reconciliation measures are among the key factors to achieve gender equality. Furthermore, the strategy holds that 'gender equality needs the active contribution, support and participation of men.'¹⁰⁶ Additionally, the European Pact for Gender Equality (2011–

⁹⁹ Council of Europe Conference of Ministers responsible for Family Affairs, *Final Communiqué*, 29th Session, 16–17th June, II and III.

¹⁰⁰ European Institute for Gender Equality, *Review of the Implementation of the Beijing Platform for Action: Women and the Economy. Reconciliation of Work and Family Life as a Condition of Equal Participation in the Labour Market* (2013), 7. (Hereafter: EIGE *Review of the Implementation of the BPfA*).

¹⁰¹ Article 2, *Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions* (Directive 76/207/EEC), Official Journal L039, 14 February 1976, P 0040 0042.

¹⁰² § 16 Community Charter of Fundamental Social Rights of Workers, 9 December 1989.

¹⁰³ EIGE *Review of the Implementation of the BPfA*, 3.

¹⁰⁴ *Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC* (Parental Leave Directive), Official Journal L 68/13, 18th March 2010.

¹⁰⁵ EIGE *Review of the Implementation of the BPfA*, 7

¹⁰⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 21 September 2010 – Strategy for equality between women and men 2010–2015.

2020)¹⁰⁷ emphasises that the reconciliation of work-life helps to enhance equality between women and men. Furthermore, the Charter on the Fundamental Rights of the European Union (CFEU) provides in Article 33 the family with legal, economic and social protection and guarantees protection against unfair dismissal for reasons of maternity, paid maternity leave and parental leave enabling men and women workers to reconcile their family responsibilities and professional life.¹⁰⁸ At the same time, the Union is more conscious about the issue of responsibilities in respect of children and less about care for elderly parents.¹⁰⁹

3.2. What is family responsibilities discrimination?

Essentially, FRD is employment discrimination based on worker's care-giving responsibilities. Within the context of the C156, discrimination against workers with family responsibilities can be defined as:

[a]ny distinction, exclusion or preference made on the ground of responsibilities a worker has in relation to his/her dependent children or other members of his/her immediate family, which has the effect of nullifying or impairing his/her equality of opportunity or treatment in employment or occupation.¹¹⁰

Examples of FRD include cases where the employer does not hire a worker of a small child because he/she sees the worker as less committed to work due to these responsibilities, or a refusal to promote an employee because the latter has taken time off from work to care for his elderly relatives. Family responsibilities can also be the reason why the employer decides to terminate worker's employment contract or result in a change in working conditions, often meaning the demotion of a worker to a less desirable job.¹¹¹

At the same time, any preference or exclusion based on the inherent requirements of the job will not constitute discrimination. For instance, the employer may contend that the dismissal of a worker who refused to do overtime work due to family responsibilities was justified because over-time work is necessary for the employer to conduct its business. Furthermore, special measures taken during a transitional period and aimed at achieving effective equality between men and women workers should not be deemed discriminatory.¹¹²

¹⁰⁷ The Council for Employment, Social Policy, Health and Consumer Protection, *European Pact for Gender Equality 2011–2020*, 7th March 2011.

¹⁰⁸ Article 33 CFEU.

¹⁰⁹ Catherine Barnard, *EU Employment Law* (4th edition, OUP 2012), 424.

¹¹⁰ Article 3(2) C156 and Article 7 R165. The recommendation also refers to measures that prevent direct and indirect discrimination on the basis of marital status or family responsibilities.

¹¹¹ Joan C Williams and Stephanie Bornstein, 182.

¹¹² Article 8(2) R165.

3.3. What are family responsibilities?

C156 refers to family responsibilities as responsibilities a worker has in relation to his/her dependent children and other members of the immediate family who clearly need their care. The question then arises about the circle of people who are considered to be the agents and recipients of these responsibilities, i.e. about the concept of family, and the content of these responsibilities.

3.3.1. Recipients of family responsibilities

While everyone has an understanding of the concept of family, the exact meaning of it is not that clear. The circle of people a family includes depends on time and culture and can differ even between regions within a State.¹¹³ Family may be constructed along the lines of genetic ties, focusing on the blood-tie; social ties, emphasising the functions carried out by the family members in relation to each other; psychological ties, measuring the emotional dependence between individuals; legal ties, defining the family for the purposes of legal rights and obligations; or ideological ties, favouring a certain form of family as the desirable norm.¹¹⁴ Although blood-ties have traditionally been important to describe family life, emotional and economic support is enough to establish the existence of family life. Also the European Court of Human Rights (ECtHR) bases its understanding of family life on *de facto* circumstances.¹¹⁵ In her report on the reconciliation of work and family responsibilities, Hein notes that the C156 clearly includes dependent sick or elderly and children.¹¹⁶

3.3.1.1. Dependent children

According to Article 1(1), the Convention applies to men and women workers who have responsibilities in respect of their dependent children. Unlike other provisions in the Convention, this provision cannot be subjected to progressive realisation.¹¹⁷ At the same time, it is up to each Member State to define the term ‘dependent child’ by means enumerated in Article 9, i.e. by laws or regulations, collective agreements, works rules, arbitration awards, court decisions or a combination of these methods, or in any other manner consistent with national practice which may be appropriate, account being taken of national conditions.¹¹⁸ While the definitional factors to be taken into account include the child’s age, his/her legal relationship to the worker and residence, the term ‘dependence’ implies the ‘reliance on the worker for support and sustenance, and mental

¹¹³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No 21: Equality in Marriage and Family Relations*, 1994, § 13.

¹¹⁴ Jo Bridgeman and Heather Keating, ‘Introduction: Conceptualising Family Responsibility’ in Jo Bridgeman, Heather Keating and Craig Lind (Ashgate 2008), 2.

¹¹⁵ *Elsholz v Germany* App no 25735/94 (ECtHR, 13 July 2000), § 44.

¹¹⁶ Catherine Hein, 3.

¹¹⁷ Committee of Experts *General Survey* 1993, § 37.

¹¹⁸ Article 9 C156.

and physical well-being’,¹¹⁹ thus covering in addition to economic dependence also psychological support.

Most of the Member States have confined dependence with the age of majority as defined in Article 1 CRC, i.e. a child is every human being below the age of eighteen. Variations include the end of obligatory schooling, engagement in full-time studies, apprenticeship or training. Furthermore, in cases of severe illness or disability there may be no upper age limit on the child’s dependence.¹²⁰

As regards the relationship of the child to the worker, practice includes children born both, in and out of wedlock, adopted children, grandchildren if parents are unable to care for them and children born to one of the spouses from previous relationships.¹²¹ At the same time, the CRC mentions parents, and where applicable, members of the extended family or community, legal guardians or other persons legally responsible for the child, as people having responsibilities, rights and duties in respect of the child.¹²² Considering that the CRC is almost universally ratified and thus can be seen as reflecting worldwide consensus, the circle of people having responsibilities in relation to the child can be extended outside the mere scope of blood-ties.

Furthermore, in the case of *X and Others v Austria*, which concerned a claim to recognise the parental rights of the applicant in relation to the child of her same-sex partner, the ECtHR found a violation of the right to respect for family and private life taken in conjunction with Article 14 of the Convention.¹²³ While the second-parent adoption was allowed for different-sex unmarried couples, the authorities’ failure to allow second-parent adoption for unmarried same-sex couples constituted a violation of the European Convention on Human Rights (ECHR). Consequently, the term dependent child would also include the child of a worker’s same-sex partner at least in States where same-sex partnership is recognised and where unmarried heterosexual couples have the right to adopt children.

3.3.1.2. Other members of the immediate family clearly needing care or support

The Convention also applies to workers with responsibilities in relation to other members of their immediate family in need of care or assistance.¹²⁴ As with the definition of dependent children, it is up to the Member States to determine the scope of the notion ‘other member of the immediate family who clearly needs support or care’.¹²⁵ The factors to be taken into account

¹¹⁹ Committee of Experts *General Survey* 1993, § 38.

¹²⁰ *Ibid.*, § 39.

¹²¹ *Ibid.*, § 40.

¹²² Article 5 CRC.

¹²³ *X and Others v Austria* App no 19010/07 (ECtHR, 19 February 2013), § 94.

¹²⁴ Article 1(2) C156.

¹²⁵ Article 1(3) C156.

include the definition of the family relationships covered and the nature of the support required.¹²⁶ Given the concern of extending the coverage to a category of dependants to which a common understanding could not be conceded, in the drafting process, it was agreed that States may subject this provision to progressive realisation.¹²⁷

While the formal family status of workers differs depending on whether the worker is married or unmarried, lives in a *de facto* relationship, is divorced or widowed, the practice of the Member States indicates that most frequently the scope of coverage includes spouses, parents, parents-in-law, grandparents, as well as grandparents-in-law. In the case of *Marckx*, the ECtHR held that within the meaning of Article 8 ECHR, family life includes at least ties between near relatives, for example, relations between grandparents and grandchildren since such relatives may play a considerable role in family life.¹²⁸ The Court went on to acknowledge that in the case of *Marckx* such relations were between the aunt and the child.¹²⁹ Furthermore, some States cover siblings and siblings-in-law, especially when the latter is a minor, disabled or otherwise unable to support himself/herself. Cousins, uncles, aunts and relatives of the spouse are covered less frequently, unless they form a coherent family unit with the worker, often meaning living in the same household, and when they have no other relatives to take care of them.¹³⁰ It appears that the common household and strong familial bond with the worker becomes important when the family relationship is not based on formal legal ties (blood ties).¹³¹ Given the variety of family situations, many States have included marital status and family situation along with family responsibilities as a form of discrimination forbidden under national legislation.¹³²

3.3.2. Content of family responsibilities

The responsibilities parents have in respect of their children include financial responsibilities, care, nurturing, protection, guiding and fostering the ability to live independently.¹³³ Taking care of the elderly includes responsibilities on account of the person's illness, general old age, inability to look after oneself or disability. At the same time, care tasks can be defined as personal care (dressing, washing), physical help (walking), helping with paperwork or financial matters; domestic help (housework, laundry); company, talking, visiting.¹³⁴ In addition to care responsibilities, also domestic work in the household, for instance, laundry washing,

¹²⁶ Committee of Experts *General Survey* 1993, § 43.

¹²⁷ *Ibid.*, § 42.

¹²⁸ *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979), § 45.

¹²⁹ *Ibid.*, § 46.

¹³⁰ Committee of Experts *General Survey* 1993, § 43.

¹³¹ *Ibid.*, § 44.

¹³² *Ibid.*, § 33.

¹³³ Jo Bridgeman and Heather Keating, 13.

¹³⁴ European Commission, *Reconciliation between Work, Private and Family Life in the European Union* (Office for Official Publications of the European Communities 2009), 79.

cooking, grocery shopping, home improvements, constitutes part of family responsibilities.¹³⁵ Because the concept of family and family responsibilities depend largely on the community context and societal attitudes, it is up to each Member State to the Convention to determine who and what are covered by these terms.¹³⁶

At the same time, the most common difficulties workers with family responsibilities face at the workplace include the organisation of work-family schedules, coping with emergency situations and prolonged leaves from work.¹³⁷ For instance, it may be difficult for workers with family responsibilities to organise family schedules so that the schedules would fit normal working hours because the opening hours of kindergartens and schools may not coincide with working hours. Additionally, the length of the working day may be long especially when considering travelling from home to work and back, and school holidays are more frequent and longer than the workers' annual leave. Furthermore, not many individuals work in job settings that allow the necessary flexibility to respond adequately to the 'predictable unpredictability' of childrearing.¹³⁸ Emergency situations like childminder's absence or the need to take a family member to the doctor during working hours can lead to absenteeism and lateness which can in turn result in loss of pay or even dismissal. Moreover, prolonged absences, such as maternity leave, parental leave or leave to take care of elderly parents make it difficult for the workers to continue their employment.¹³⁹

3.4. Gender dimension of family responsibilities discrimination

The construction of a worker with family responsibilities is gender-neutral *prima facie*. While childbearing and breast-feeding are biologically confined with sex – at least for the time being –, both male and female workers can raise children and/or care for other family members, meaning that work demands that come into conflict with family obligations may have a disadvantageous effect on all workers, regardless of the sex of the worker. Furthermore, the fact that the number of women working in gainful employment has increased and that the financial responsibilities in the family have often been redistributed, would suggest, at least in theory, that the labour market disadvantage stemming from family responsibilities affects men and women to the same extent. Indeed, today only a relatively low number of families fit in the traditional picture of a wage-earning father and a stay-at-home mother caring for children.¹⁴⁰

In reality, however, the demographic change has not brought about a change in family relations. A disproportionately high number of women still bears

¹³⁵ Catherine Hein, 3.

¹³⁶ Article 1(3) C156.

¹³⁷ Catherine Hein, 9–10.

¹³⁸ Peggie R Smith, 'Parental-Status Employment Discrimination: A Wrong in Need of a Right?' (2002) 35 University of Michigan Journal of Law Reform 569, 569.

¹³⁹ Catherine Hein, 10.

¹⁴⁰ *Ibid*, 6; Committee of Experts *General Survey* 1993, § 68.

or is expected to bear the burden of family responsibilities and household duties.¹⁴¹ For instance, the 5th European Working Conditions Survey in 2010 revealed that, on average, women spend 26 hours per week on caring activities, compared to just 9 hours spent by men.¹⁴² Moreover, the birth of a child often entails in itself a ‘re-traditionalisation’ of working and family patterns, notwithstanding the education or work history of the mother or the gender equal ideals of the partners. The breadwinner position of employed men increases, while women who have otherwise left their traditional carer roles return to it once the children are born. The fact that it is more often women than men who adapt their work lives to accommodate family obligations (for instance, by means of part-time work, self-employment or home work) makes the domestic division of family responsibilities a source of gender inequality.¹⁴³

At the same time, feminist critique argues that the norm of the ‘ideal worker’ is by its nature framed around the traditional life patterns of men, i.e. the norm of the ‘ideal worker’ is already gendered and masculine. An ideal worker is someone who is engaged in full-time work without any career interruptions and with no domestic or care responsibilities.¹⁴⁴ Because the employment market presumes the constant availability of workers without any career breaks, or parental duties, the private needs of the ideal worker – preparing food, cleaning and the upbringing of children – have to be met by someone else (usually the woman).¹⁴⁵ Career breaks tend to have negative repercussions on women’s future job opportunities and earnings because the idealised norm marks a reference point for social protection and wages.¹⁴⁶

3.5. Role of stereotypes in FRD

The structural disadvantage stemming from family responsibilities can be explained *inter alia* by stereotypical assumptions about men’s and women’s gender roles in the public and private spheres. The groups of workers that are most often stereotyped on the ground of family responsibilities are women workers, pregnant workers, woman workers with disabled children, and women, who in the eyes of the employer are likely to become mothers.¹⁴⁷ Other vulnerable groups include part-time workers, and workers caring for the elderly, disabled or ill family members.¹⁴⁸

¹⁴¹ Catherine Hein, 11.

¹⁴² The survey covered 34 European countries and some 44 000 workers. – Eurofound (2013), *Women, men and working conditions in Europe*, Publications Office of the European Union, Luxembourg, 42.

¹⁴³ Catherine Hein, 11.

¹⁴⁴ Julie C Suk, ‘Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict’ (2010) 110 *Columbia Law Review* 1, 13–14.

¹⁴⁵ Susan B Boyd, ‘Can Law Challenge the Public/Private Divide? Women, Work and Family’ (1996) 15 *Windsor Yearbook of Access to Justice* 161, 165–166.

¹⁴⁶ Catherine Hein, 11.

¹⁴⁷ In the US, discrimination based on care-giving responsibilities is also termed as ‘motherhood penalty.’ – Rangita de Silva de Alwis, ‘Examining Gender Stereotypes in

3.5.1. Understanding (gender) stereotyping

Stereotyping is a process where an individual is assigned particular talents or lack of talents, attitudes, or certain roles, by the virtue of his/her membership in a specific group, for instance, on the account of his/her race, sex, or religion, and irrespective of his/her individual capabilities.¹⁴⁹ All aspects that make an individual unique are viewed through the lens of preconception of the group to which the individual belongs.¹⁵⁰

At the same time, stereotyping simplifies the experience of certain groups with other groups, and selects a few (negative) traits, and attributes these traits to the whole group. While stereotyping helps people to simplify the world around them, and as such, it is necessary to make information processing manageable, it limits individuals' right to construct and make decisions about their life plans.¹⁵¹ Considering that stereotypes are influenced by history, economic and social situations, political regimes and States' cultural background, they are subject to evolution and change, spearheaded by social movements and public institutions.¹⁵²

According to Timmer, gender stereotypes are deeply rooted in our subconscious. Because we are not aware that we base our decisions on gender stereotypes, for us gender patterns seem self-evident. At the same time, gender stereotyping confines men and women to a particular identity, and as such, serves to maintain the existing power relationships.¹⁵³ In addition to social subordination (misrecognition as equal individuals), gender stereotyping makes women suffer from socio-economic injustice. Cook and Cusack observe that on the basis of gender stereotypes women can be either denied a benefit, or burdened with a responsibility.¹⁵⁴ For instance, in the case of *Leyla Şahin v Turkey*,¹⁵⁵ the ECtHR held that because the Islamic headscarf appeared to be imposed on women by a religious precept, it was hard to reconcile it with the principle of gender equality. Consequently, in the eyes of the Court, the ban on the wearing of the Islamic headscarf was justified. The fact that in the case of *Petrovic v Austria*¹⁵⁶ parental leave allowance was only available to women, made child-rearing solely a women's responsibility. Moreover, gender stereotyping can impose psychological harm on people who belong to groups that are stereotyped. These individuals tend to report higher distress, unhappiness, and depression levels. Furthermore, the pressure not to

New Work / Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation' (2011) 18 *Duke Journal of Gender, Law & Policy* 305, 309.

¹⁴⁸ *Ibid*, 312.

¹⁴⁹ ILO *Global Report* 2003, § 56.

¹⁵⁰ Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010), 9.

¹⁵¹ *Ibid*, 11.

¹⁵² ILO *Global Report* 2003, § 20.

¹⁵³ Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 *Human Rights Law Review* 707, 715.

¹⁵⁴ Rebecca J Cook and Simone Cusack, 59–68.

¹⁵⁵ *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005)

¹⁵⁶ *Petrovic v Austria* App no 20458/92 (ECtHR, 27 March 1998).

conform to a negative stereotype linked with the social group the individual belongs to for fear of being judged in the light of this negative stereotype makes people underperform.¹⁵⁷

3.5.2. Gender stereotypes associated with workers with family responsibilities

Stereotypical assumptions about the capabilities of men and women workers with family responsibilities most often relate to the historical subordination of women, men's domination in the public sphere and women's confinement to the private sphere.¹⁵⁸ The separate-sphere theory predicts the 'true nature' of men and women. While a typical man is seen as someone who is independent, ambitious and competitive, a typical woman is seen as someone who is nurturing, expressive and responsive to the needs of others. These characteristics make men 'naturally suited' to market work and the breadwinner role, and women to homemaking.¹⁵⁹

Indeed, motherhood triggers the most prejudice towards women workers. Williams even suggests that the bias against mothers is stronger than 'glass ceiling' bias towards women in general.¹⁶⁰ Many see maternity as a woman's natural role: a working mother is considered both, a bad employee and a neglectful mother. Because working mothers are thought to be exhausted and highly vulnerable to stress-related problems, the double burden of family and professional responsibilities is seen as threatening the unity and well-being of the whole family.¹⁶¹ At the same time, the 'natural role of a woman as a mother' presupposes that all women want to become mothers irrespective of their reproductive health capacity, individual aspirations or emotional circumstances.¹⁶² Furthermore, the stereotype presumes that the mother-child bond is something special. It is not only employers who have been paralysed by this kind of thinking. For instance, in the case of *Konstantin Markin v Russia*, the Russian Constitutional Court contended that women have a special social role associated with motherhood.¹⁶³ Also the ECJ held in the case of *Hofmann* that the provisions intended to protect women in connection to pregnancy and maternity include the need to protect the special relationship between a woman and her child.¹⁶⁴ This kind of thinking implies that men do not have the necessary characteristics (e.g. nurturing, affection) to bear the carer role.

¹⁵⁷ Alexandra Timmer, 716.

¹⁵⁸ Rangita de Silva de Alwis, 306.

¹⁵⁹ Joan C Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter?* (Harvard University Press 2010), 78.

¹⁶⁰ *Ibid*, 92. The 'glass-ceiling' is a set of values that prevents certain groups on account of a characteristic, e.g. sex or race, to attain more powerful placements in the labour market.

¹⁶¹ Rosalynd C Barnett, 146.

¹⁶² Rebecca J Cook and Simone Cusack, 11.

¹⁶³ *Konstantin Markin v Russia* App No 30078/06 (ECtHR, 7 October 2010), § 19.

¹⁶⁴ Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 03047, § 27.

The traits of a ‘good mother’ – someone who is always available to her kids – run in turn contrary to the traits one needs in order to be successful in the workplace (e.g. independence, competitiveness, dominance).¹⁶⁵ Working mothers are viewed as less dependable, and less competent than working fathers. Instead of treating working mothers equally, they are viewed on a par with the ‘elderly, blind, “retarded”, and disabled’.¹⁶⁶ Moreover, working mothers are subjected to stricter performance reviews: they are expected to work longer hours, perform highly and be punctual.¹⁶⁷ In contrast, working fathers are held to lower hours, lower performance and punctuality standards.¹⁶⁸ This also means that mothers need to comply with higher standards to prove their competence. Furthermore, in the case of women, giving birth leads to a substantial decrease in salary. In contrast, men are valued more for their parental role.¹⁶⁹

Considering that society expects men to value career over family, men are pressurised to conform to the male breadwinner role, thus, creating stereotypes also for men workers. Fathers who violate the traditional gender role are perceived as less committed and may lose promotion. Furthermore, a nurturing father may be regarded as a ‘wuss’ or a ‘wimp’ by co-workers and bosses.¹⁷⁰ Moreover, there is ‘an absolute terror in individual men of coming across as gay, and female, and so on’.¹⁷¹ In order to avoid this bias, men stop taking leave. This, however, forces women to take even more leave, creating a vicious circle. Consequently, society denies fathers the opportunity to participate in child-rearing to the disadvantage of both, the fathers and their children.¹⁷²

3.6. Why is it important to intervene?

The difficulty to reconcile work and family responsibilities has many socio-economic implications. Instead of doing a job the worker is qualified for, family responsibilities may force the worker to take up a job that offers more flexibility but less job security. While the worker might not be able to fulfil his/her potential to the maximum of his/her capabilities, also the investment into his/her education and training will not be utilised effectively. Furthermore, the economy may lose potential labour supply and tax-payers. Moreover, worker’s quality of life may suffer and the exclusion of workers may eventually drain States’ social security system. The integration of all workers is desirable, especially in light of the ageing population and the future shortage of labour supply. The ageing population

¹⁶⁵ Kathleen Fuegen *et al*, ‘Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence’ (2004) 60 *Journal of Social Issues* 737, 740.

¹⁶⁶ Joan C Williams and Stephanie Bornstein, 179.

¹⁶⁷ *Ibid*, 178.

¹⁶⁸ *Ibid*.

¹⁶⁹ Rangita de Silva de Alwis, 309.

¹⁷⁰ Joan C Williams, 80.

¹⁷¹ Sandy Ruxton and Nikki van der Gaag, ‘Men's involvement in gender equality – European perspectives’ (2013) 21 *Gender & Development* 161, 169.

¹⁷² Rangita de Silva de Alwis, 309.

would also suggest that more and more workers will find themselves caring for the elderly or disabled parents or other relatives in the future.¹⁷³

The harmonisation of work-family conflict may have positive repercussions also at the workplace: it has been noted that family-friendly policies help in work effectiveness because the pool of potential workers increases, workers' morale improves, workers are less absent, and the employer gets favourable publicity.¹⁷⁴ Moreover, low productivity that is caused by family-related concerns means millions of lost workdays every year. In contrast, the difficulty to harmonise work and family responsibilities may lead to a number of long-term strategic costs, for instance, in the case where the most qualified worker may turn down a project because of his/her family commitments.¹⁷⁵ Furthermore, workers who have difficulties with balancing work with other commitments, are inclined to be less satisfied with work and less committed to the organisation.¹⁷⁶ Higher staff turnover means in turn extra costs for the employer. Thus, it is also in the interests of the employer to keep the workplace family-friendly.¹⁷⁷

Considering that it is most often women who adapt their work lives to accommodate family responsibilities, for instance, by means of part-time work, self-employment or home work, means that is also predominantly women who will later suffer from disadvantages in the social security systems and pensions due to career breaks. Furthermore, caregiving women who are engaged in economic activity bear the double burden of care responsibilities: first, the unpaid care work in the domestic sphere and then paid professional responsibilities at work. While multiple social roles may be rewarding and energising, the lack of men's participation in the private sphere may cause stress and dissatisfaction with family life for both, men and women.¹⁷⁸ For instance, studies show that men who do less childcare than their wives experience higher stress levels. At the same time, their wives feel less satisfied with the marriage.¹⁷⁹ In addition to the economic losses that the industry sustains due the exclusion of qualified workers, the work-family conflict also means financial costs related to health care, family dysfunction and the need for increased social services.¹⁸⁰

Additionally, when the 'stereotype threat' is rife, women may decide to modify their working patterns, postpone the founding of the family, prefer

¹⁷³ Committee of Experts *General Survey* 1993, § 69.

¹⁷⁴ *Ibid.*, § 72.

¹⁷⁵ *Ibid.*

¹⁷⁶ Catherine Hein, 25.

¹⁷⁷ This is especially the case in high-skilled industries where the replacement costs are high. Enterprises with less-skilled workers might not be interested in accommodating the needs of workers with family responsibilities because it is cheap to replace them. – Catherine Hein, 27–28.

¹⁷⁸ Rosalynd C Barnett, 147.

¹⁷⁹ *Ibid.*, 149.

¹⁸⁰ Committee of Experts *General Survey* 1993, § 74.

to have less children, or choose not to have children altogether.¹⁸¹ It is true that low fertility rates are caused by diverse factors, but an environment that celebrates diversity and parenthood may have positive effects also on fertility.¹⁸²

3.7. Concluding remarks

Many of the world's workers struggle to reconcile work and family responsibilities. While work helps to ensure a worker and his/her dependants a decent living, care responsibilities in relation to children and other family members require commitment and time, often resulting in the worker's absenteeism, lateness, lower productivity or difficulty to cope with long working hours. At the same time, many workers labour under constant stress because they are worried that the 'time famine' compromises the care of their dependants. Because the employer may perceive family responsibilities as an obstacle to fulfil work duties, family responsibilities tend to have negative implications on the equality of workers. Moreover, the disadvantage is more pronounced in the case of women workers as the latter still bears the bulk of family responsibilities. At the same time, the international community has pledged commitment to the principle of equality in nearly all human rights instruments and this principle also applies to the relationship between work and family.

The next chapter will explore which equality concept is the most adequate to address the needs of workers with family responsibilities. Additionally, it will analyse how the design of work-family reconciliation measures could contribute to the achievement of effective equality between men and women workers.

¹⁸¹ European Commission, *Reconciliation between Work, Private and Family Life in the European Union*, 28.

¹⁸² Catherine Hein, 23–24.

IV EFFECTIVE EQUALITY OF WORKERS WITH FAMILY RESPONSIBILITIES: TRANSFORMATIVE EQUALITY IN THE WORK-FAMILY RECONCILIATION DISCOURSE

Part of the broad mandate of the ILO is the establishment of employment equality between workers. Because family responsibilities tend to have negative implications on workers' equality, there is a need to adopt measures that would eliminate discrimination on the ground of family responsibilities (formal equality) and seek strategies that would help workers reconcile professional and care work (substantive equality). At the same time, the fact that in the eyes of many employers an ideal worker is someone who works full-time without any career interruptions, and that child-rearing and elder care force many women to interrupt their professional careers, makes the division of family responsibilities inside the family unit a source of gender inequality at the workplace. Women are disadvantaged and excluded on the basis of their biological function (sex), or/and the societal construction of sex (gender). The presumed gender roles impede in turn men's opportunities to develop (family) life outside work.

At the same time, family relations concern the construct of the family and as such relate to the organisation of society. Because the fairer division of family responsibilities inherently questions the relations between the State, family, and the market – *national identity* –, it is not a surprise that States have been reluctant to interfere with the regulation of the division of family responsibilities between spouses/partners. For instance, in 1984, in the case of *Hofmann*, the ECJ held explicitly that the EU law is not to settle questions related to the organisation of the family or to alter the division of responsibilities between parents.¹⁸³ Yet, law is an important mean to ensure the effective equality of workers with family responsibilities. Because law helps to dismantle negative stereotypes, it is the first step to bring about a change in transforming the social value of care work and conventional gender roles. As much as gender is socially constructed and shaped by power relations that define the accepted conduct of the sexes, these gendered roles can be redefined by the law.¹⁸⁴ Combatting wrongful gender stereotypes is in turn fundamental to the elimination of all forms of discrimination against women.¹⁸⁵

This chapter asks which equality concept is the most adequate to address the needs of workers with family responsibilities. Because the domestic division of family responsibilities is a source of gender inequality at the workplace,

¹⁸³ Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse*, § 24.

¹⁸⁴ Rangita de Silva de Alwis, 308.

¹⁸⁵ Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No 25: Temporary Special Measures (Article 4(1) CEDAW)*, 2004, UN Doc HRI/GEN/1/Rev7, § 6–7.

it also explores how the design of work-family reconciliation measures could help women workers overcome structural discrimination and achieve equal opportunities in the labour market with other workers.¹⁸⁶ The chapter concludes by highlighting the role of social partners in the ‘quest for equality’.

4.1. In search for a viable equality concept for workers with family responsibilities

In its General Survey on the implementation of the C156 and the R165, the Committee of Experts held that because family is the concern of each individual, man and woman, society must enable all persons with dependants both to exercise their responsibilities and to participate fully in the labour force.¹⁸⁷ The different concepts of equality – formal and substantive – provide reference points to combat FRD and offer ways to reconcile the work-family conflict.

4.1.1. Why formal equality alone is not enough?

The formal approach to equality (equality of treatment / procedural equality)¹⁸⁸ aims at eliminating discriminatory laws and behaviour by requiring that likes be treated alike. The strength of this approach lies in the fact that it assumes that people are equal and should therefore be treated similarly, regardless of any characteristic they possess. Because procedural equality requires States to repeal discriminatory laws and prohibit discriminatory behaviour, i.e. act neutrally, it removes manifest discriminatory conduct. As such, it has a role in changing society’s attitudes and behaviour at least in the public space. Also the C156 and the R165 call on States to make it an aim of national policy to enable workers with family responsibilities to exercise their right to work without being subjected to discrimination on the ground of such responsibilities.¹⁸⁹

Still, formal equality does not always produce *de facto* equality because it does not take into account past inequality. Furthermore, anti-discrimination legislation requires employers to turn a blind eye to the needs of workers with care responsibilities.¹⁹⁰ As such, the formal equality concept does not intend to reconcile the work-family conflict, for instance through the provision of institutional care facilities or by fostering workplace flexibility. This approach also fails to promote a strong and healthy parent-child relationship that would benefit the life experience of the family and the community.¹⁹¹

¹⁸⁶ ILO *Global Report* 2003, § 241.

¹⁸⁷ Committee of Experts *General Survey* 1993, § 90.

¹⁸⁸ More on formal equality at 2.1.1.

¹⁸⁹ Article 3(1) and Article 3(2) C156 and Article 6 and Article 8(1) R165.

¹⁹⁰ According to Article 5 C111, the latter group is, nevertheless, recognised as requiring special protection or assistance.

¹⁹¹ Peggie R Smith, 599.

The limited nature of procedural equality is especially evident in the case of women workers because formal equality does not pursue to promote the sharing of care responsibilities nor remove harmful gender stereotypes associated with working mothers. Because it is women who usually bear the bulk of family responsibilities, the denial of the social and economic differences leaves women without adequate redress for workplace discrimination.¹⁹² Furthermore, considering that formal equality requires that women be treated the same way as men, in reality women have to comply with masculine working patterns. Also the feminist critique argues that formal equality centres around the norm of the ideal worker, i.e. the 'male worker norm'. Because the idealised norm ignores the socio-economic disparities between men and women and fails to consider the actual division of domestic and care responsibilities at home, it fails to provide women with effective equality.¹⁹³

Considering that formal equality requires employers not to make decisions based on workers' caregiving responsibilities, this model has the potential of advancing the interests of all workers with care obligations. After all, it promotes a gender-neutral understanding of care work.¹⁹⁴ Still, because formal equality fails to take into account past inequalities, and *per se* prohibits preferential treatment and the enactment of gender-specific legislation, it is ultimately limited to accommodate the needs of workers with family responsibilities and challenge the division of care work as a source of gender inequality at the workplace.

4.1.2. Substantive equality model within the context of workers with family responsibilities

Unlike formal equality, the substantive equality model recognises that neutral treatment can in fact perpetuate inequalities. The substantive model is concerned with the effects of the law and depending on the political choice of the State, it either aims at correcting the maldistribution of opportunities (equality of opportunities)¹⁹⁵, or unequal results in outcomes (equality of results).¹⁹⁶ In the context of workers with family responsibilities, substantive equality implies the adoption of measures providing workers with the possibility to reconcile employment and family commitments.¹⁹⁷ Also in its General Survey on the implementation of the C156 and the R165, the Committee of Experts highlighted that 'measures to allow men and women to harmonise their work and family commitments are a natural extension of the well-accepted principles on equality.'¹⁹⁸ In

¹⁹² Peggie R Smith, 572.

¹⁹³ Giuseppe Federico Mancini and Siofra O'Leary, 'The New Frontiers of Sex Equality Law in the European Union' (1999) 24 *European Law Review* 331, 337.

¹⁹⁴ Peggie R Smith, 572.

¹⁹⁵ More on equality of opportunity at 2.1.2.2.

¹⁹⁶ More on equality of results at 2.1.2.1.

¹⁹⁷ Article 3(1) C156.

¹⁹⁸ Committee of Experts *General Survey* 1993, § 266.

essence, these measures seek to make the workplace more responsive to the needs of workers with family responsibilities.

Measures that help workers reconcile work and family life most often relate to the removal of obstacles on the entrance and re-entrance to the labour market, training, flexibility in terms and conditions of employment, provision of childcare and family care services and facilities, social security and fiscal measures.¹⁹⁹ These minimum standards are set by the C156 and guidelines for the implementation of these provisions can be found in the R165. At the same time, States have considerable discretion in deciding which measures are best suitable for national conditions and possibilities.²⁰⁰ Moreover, the variety of employment relationships and workplace arrangements – a result of the private autonomy of the worker and the employer – can in principle provide an unlimited number of accommodation measures. Still, special measures should not openly privilege this group of workers because it would run counter to the principle of non-discrimination.

By providing workers with flexible work arrangements and access to care services, the substantive equality model has the potential of offering workers with family responsibilities the necessary framework to overcome disadvantages they otherwise face in the labour market. Because this approach tends to promote social acceptance towards traditional gender identities, it, nevertheless, fails to address the underlying discriminative structures causing unfair outcomes in social arrangements.²⁰¹ After all, the domestic division of care responsibilities has remained a source of gender inequality at the workplace. For instance, in Europe women between the ages of 25–44 spend three times more time on childcare per day than men.²⁰² Moreover, the employment rate for women with children under the age of twelve drops significantly while the same rate for men increases.²⁰³

The thesis proposes that the conventional dichotomy of formal and substantive equality is not in it itself enough to achieve substantive fairness in outcomes, unless it is accompanied with a transformative approach combatting women's historical and social subordination. Consequently, the thesis advocates for a more radical equality concept – transformative equality –, which intends to transform traditional gender roles for the sake of overcoming gender-specific outcomes.²⁰⁴

¹⁹⁹ C156 and R165.

²⁰⁰ Both the C156 and the R165 refer to 'measures compatible with national conditions and possibilities.'

²⁰¹ Manfred Auer and Heike Welte, 'Work- family reconciliation policies without equal opportunities? The case of Austria' (2009) 12 Community, Work & Family 389, 393.

²⁰² EIGE *Review of the Implementation of the BpFA*, 3.

²⁰³ For women, it dropped by 12%, while for men it increased by 9,1%. – EIGE *Review of the Implementation of the BpFA*, 8.

²⁰⁴ While some authors differentiate equality as transformation from the conventional dichotomy of formal equality and substantive equality (for a list of authors, look at Timmer, footnote 24), others treat it as a necessary limb of substantive equality. The present thesis refers to transformative equality as a separate equality concept because it corresponds better to the current policy goals of the ILO. For instance, the second Global

4.1.3. Transformative equality / equality as transformation within the work-family reconciliation discourse

Transformative equality or equality as transformation aims at achieving substantive fairness in outcomes.²⁰⁵ As such, it necessitates a re-examination of structures that perpetuate inequality on legal, cultural and community levels. Without reconfiguring traditional gender roles, the efforts result in an ‘incomplete or stalled gender revolution’.²⁰⁶ Also the C156 and the R165, inspired in turn by the CEDAW, remind States that ‘a change in traditional roles as well as the role of women in society and in the family is needed to achieve full equality between men and women.’²⁰⁷ Furthermore, the Committee on Economic, Social and Cultural Rights held that ‘gender stereotypes and fixed parental gender roles stand in the way of the fulfilment of all of women’s human rights.’²⁰⁸

The view of equality as transformation does not intend to create a gender-neutral world but a world in which gender differences are duly taken into account. The objective of establishing a non-male-defined society requires the recognition of the equal social status of women and the redistribution of power. In addition to the removal of barriers, it mandates the institution of positive measures.²⁰⁹ In the context of work-family reconciliation, policies aimed at achieving gender equality should not only aim at redistributing paid and unpaid care obligations but also embrace care work as a common responsibility of parents, society, the market and the State.²¹⁰

Because the transformative aspect mandates fundamental change at the legal, institutional, and individual levels, it is ‘an ambitious project’.²¹¹ Yet, the mix of redistribution and recognition measures makes it possible to achieve substantial change.²¹² At the same time, equality is a multidimensional concept. While treating parents as a protected class lacks transformative power and the emphasis on the effects of policies and laws fails to address the societal structures persisting inequalities, these concepts

Report on discrimination underlined that equality at work is not only about prohibiting discrimination, but also about ‘changing the status quo and transforming the workplace to make it more inclusive.’ Furthermore, the report added that while flexibility is an important goal, what ultimately count are the results achieved in practice. – ILO *Global Report 2007*, § 39 and § 41.

²⁰⁵ The term is coined by Sandra Fredman in Sandra Fredman, ‘Beyond the Dichotomy of Formal and Substantive Equality: Towards a new Definition of equal Rights’ in Ineke Boerefijn *et al*, *Temporary Special Measures: Accelerating de Facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination against Women* (Intersentia 2003), 112–118.

²⁰⁶ ILO, *Maternity and Paternity at Work: Law and Practice in the World* (International Labour Office 2014), 3. (Hereafter: ILO *Maternity and Paternity at Work*)

²⁰⁷ Preamble C156, Preamble 165 and Preamble CEDAW.

²⁰⁸ Committee on Economic, Social and Cultural Rights, *ICESCR General Comment No 16*, § 14.

²⁰⁹ Sandra Fredman, ‘Beyond the Dichotomy of Formal and Substantive Equality: Towards a new Definition of equal Rights’, 115.

²¹⁰ Manfred Auer and Heike Welte, 393.

²¹¹ Alexandra Timmer, 712.

²¹² Manfred Auer and Heike Welte, 393.

must coexist together with the transformative concept in order to ultimately overcome discrimination against women (workers). The objective of full equality necessitates a holistic approach towards equality.²¹³ Also the Committee of Experts has underlined that equality of opportunity and treatment in employment and occupation can be effective only a general context of equality which respects the rule of law and where a climate of tolerance is facilitated.²¹⁴

4.1.4. Transformative equality in action: the design of work-family policies as a means of achieving gender equality at the workplace

The persistence of the woman-carer model indicates that the model of an ideal worker (the ‘male worker norm’), i.e. someone who works full-time without any career interruptions, is at least as persistent. Consequently, policies that challenge the ideal worker norm are likely to combat harmful gender stereotypes against women workers. The link between the disproportionate share of family responsibilities and the consequent subordination of women in the workplace necessitates that the workplace policies facilitate greater male participation in the domestic sphere. Work rules that support fathers’ right to parenthood and the equal participation of men and women in the family are fundamental to the achievement of gender equality at home and in the workplace. Moreover, inclusive caregiving policies will help to transform the social value of care work.²¹⁵ When the achievement of effective gender equality at the workplace is made an explicit objective, the design of work–family measures has tremendous potential to transform traditional gender roles.²¹⁶

4.1.4.1. Creating a Supportive Workplace Culture

Because the workplace culture expects men to value their careers more than their families, men are reluctant to take up parental leave or stay at home with a sick child. It is neither helpful that the managers may be more willing to let a woman get a sick child from school than a man.²¹⁷ Fear of negative consequences on career progression and retaliation decreases men’s willingness to share family responsibilities. The dismantling of the prevailing organisational attitudes provides thus a starting point for a fairer division of family responsibilities between men and women. Instead of assuming that the ideal worker has no family responsibilities beyond the workplace, the norm should presume significant family commitments and accommodate workplace responsibilities accordingly.²¹⁸ When employers recognise shared care work as a ‘normal fact of business life’, it reduces the

²¹³ Alexandra Timmer, 714.

²¹⁴ Committee of Experts *General Survey* 1996, § 6.

²¹⁵ Rangita de Silva de Alwis, 315.

²¹⁶ ILO *Maternity and Paternity at Work*, 52.

²¹⁷ ILO, *Addressing gender equality through work-family measures. Information Sheet*, (International Labour Office 2004), 2.

²¹⁸ Colleen Sheppard, 10.

penalty associated with family responsibilities.²¹⁹ Furthermore, the discouragement of excessive working hours (i.e. compliance also with ‘normal’ working hours) and flexible working time and place arrangements would provide men workers with a chance to stay at home with their families.

4.1.4.2. Measures aimed at promoting the sharing of family responsibilities: leave system

Measures aimed at reconciling work-family conflict intend to protect the family role of all workers, both women and men. Still, not all measures are designed the way that would promote the sharing of care responsibilities and help women overcome harmful gender stereotypes associated with care work. Because some of the measures are often premised on the traditional gender roles in the family, instead of removing gender inequality, they reinforce the woman’s homemaker model. As was noted by the ILO in 2003: ‘There is a danger that work/family policies, which are often aimed implicitly or explicitly at women in particular, may end up reinforcing the image of women as “secondary earners” and accruing to the double burden of working women.’²²⁰ For instance, legislation that links the employer’s obligation to set up childcare facilities to the number of women working in his/her establishment (e.g. in Brazil, Chile and Egypt), assumes that only women have responsibilities in respect of their children.²²¹ Excluding fathers from accessing childcare makes the stereotype of a woman-carer persist. Furthermore, when the obligation to set up of childcare facilities falls on the employer, the latter has an interest to deliberately refrain from hiring women.²²² Social insurance and public funds help to alleviate potential discrimination against women workers and encourage fathers to take up leave.²²³

Maternity leave is instituted to neutralise the disadvantages women face in the labour market due to childbirth, guarantee their attachment to the labour force and to protect the health of women and their children. Notwithstanding that there is no international standard explicitly mandating paternity protection,²²⁴ many States have introduced paternity leave to be taken up by the father right after the birth of the child. While an encouraging initiative, it is effective only in so far as it is paid, and when fathers taking this leave do not have to be afraid of losing their jobs or receiving unfavourable treatment after the leave. Furthermore, when paternity leave is linked to the family status of the father, it excludes non-typical family models (e.g. common law marriage, same-sex couples if same-sex marriage is not allowed) and consequently also many women from the enjoyment of equal opportunity. For instance, in Lithuania, the non-

²¹⁹ ILO *Maternity and Paternity at Work*, 118.

²²⁰ ILO *Global Report 2003*, § 241.

²²¹ Catherine Hein, 58.

²²² *Ibid.*

²²³ ILO *Maternity and Paternity at Work*, 51.

²²⁴ *Ibid.*, 52.

transferable fully-paid paternity leave only applies to men who are married to the mother.²²⁵ At the same time, research suggests that fathers who take leave, especially fathers who take leave two weeks or more right after the childbirth, are more likely to be involved with their young children. Furthermore, fathers' early interaction with the child is said to have positive implications on the child's development.²²⁶ Moreover, the statutory right to paternity leave would indicate that society as a whole values the care work of both women and men.²²⁷

In addition to maternity and paternity leave, parental leave offers workers possibilities to reconcile work and family life. While parental leave is usually longer than maternity and paternity leave, it has tremendous gender-transformative potential. Still, when parental leave is only available to mothers, men are again deprived of the carer role (as is the case in Guinea, Jordan, Kuwait).²²⁸ Furthermore, when it is employers who have to bear the costs of parental leave, there is no incentive for them to hire women workers.

Still, the guarantee of a shared parental leave does not *per se* ensure that men's participation in care work increases. In fact, transferable leave may reinforce gender hierarchies, because the leave is often transferred to the parent who earns less, who is in turn likely to be a woman. Initiatives to encourage men to take up parental leave and achieve equal outcomes include the institution of non-transferable leaves. 'Fatherhood by gentle force'²²⁹ has proved to be a successful model to increase fathers' participation in childrearing. For instance, in Iceland where men have 3-months of non-transferable parental leave, the percentage of men taking the leave was 90,9% in 2008.²³⁰ While non-transferable leave may increase fathers' participation in the family, it does not mean that a more equal division of care responsibilities remains permanent. Only when incentives to alter workplace and family structures accompany parental leave, will fathers' share in parental leave increase. The higher take-up rate of leave by fathers has in turn potential to improve employers' expectations regarding women's career breaks and thus improve the treatment of women as a group.²³¹ While men and women tend to time the taking of the leave differently (women tend to prefer continuous leave and men more flexible leave), the availability of flexible leave arrangements can incentivise men's participation.²³²

²²⁵ European Commission, *The Role of Men in Gender Equality – European Strategies & Insights. Study on the Role of Men in Gender Equality Contract* (Publications Office of the European Union 2013), 86. (Hereafter: European Commission *The Role of Men in Gender Equality*)

²²⁶ ILO *Maternity and Paternity at Work*, 52.

²²⁷ *Ibid.*, 60.

²²⁸ *Ibid.*, 62.

²²⁹ Rangita de Silva de Alwis, 326.

²³⁰ European Commission *The Role of Men in Gender*, 90.

²³¹ ILO *Maternity and Paternity at Work*, 118.

²³² *Ibid.*, 67.

Parental leave policies have to be thus constructed carefully with a gender aspect in mind. Namely, the longer is the allowed parental leave, the more women suffer from the real or perceived loss of work skills. The more so that upon return women are likely to be subjected to higher performance reviews than men.²³³ Furthermore, Evans and Pupo argue that parental leave may put more pressure on women to take extra-time off. Additionally, the policy emphasises that parental care is superior to other care forms (e.g. public childcare), i.e. the best care is provided at home. Moreover, parental leave presumes a traditional family model where one of the partners will have the possibility to take time off from work. At the same time, it disregards the importance of collective considerations of the child, as it is usually only one parent at a time who can take the leave.²³⁴

Furthermore, for a more egalitarian division of family responsibilities, the social value of care-work has to be challenged. While the recognition of the role of both parents in childbearing and child-rearing is crucial to transform the division of family responsibilities inside the family unit, care work is not only the responsibility of parents but also the market and the State. The availability of adequate and affordable childcare or eldercare is often the key consideration for women to return to work. For instance, an EU-wide survey revealed that 25% of women who do not work or work part-time claim that it is due to the lack of availability of childcare services; 53% because childcare is too expensive and only 4% due to childcare being of insufficient quality.²³⁵

While protective legislation may be detrimental to women's interests, special measures and affirmative action create role models inspiring other women. The same applies to men: men taking care of their children in the public space would make it seem natural. Furthermore, it is important to reduce homophobic attitudes towards men who do not conform to the norm of a 'typical man', i.e. gay men and transgender men. Additionally, gender-sensitive education at schools fosters the understanding of gender equality and helps to destabilise traditional gender roles.

4.2. Importance of social partners: representative employers' and workers' organisations

Governments have a key role in determining the course of the policy and creating a social climate conducive to the improvement of the work-family conflict.²³⁶ While governments create the legislative and social security context, the private autonomy of employers and workers determines the nature of the employment contract. It is true that the (individual) employment contract has to include certain clauses and guarantees (e.g. pay,

²³³ Joan C Williams and Stephanie Bornstein, 178.

²³⁴ Patricia Evans and Norene Pupo, 'Parental Leave: Assessing Women's Interests' (1993) 6 *Canadian Journal of Women & the Law* 402, 416–417.

²³⁵ European Commission, *Gender Equality in the Workforce: Reconciling Work, Private and Family Life in Europe* (Rand 2014), xiv.

²³⁶ Catherine Hein, 3.

working time, annual leave, work duties) but the terms and conditions of employment (e.g. working place, start of working time, content of the duties) largely depend on the agreement between the parties. The ‘quest for flexibility’ in working arrangements thus suggests an increase in the bargaining power of the worker.²³⁷ Because workers may be afraid of retaliatory action or victimisation on behalf of the employer, they may be afraid to ask for more flexible job packages.

The very purpose of labour organisations is to improve workers’ economic and social conditions through collective action. Because trade unions have more power to implement the reconciliation measures, they have an important role in facilitating the work-family conflict. Furthermore, collective bargaining provides a tool to move beyond the guarantees and rights already set by law.²³⁸ The ‘regulated flexibility’ may prove to be beneficial also from the standpoint of the employer because the latter does not have to respond to individual requests for flexible job packages. This makes the process less complex, less costly and more satisfactory. Furthermore, collective bargaining provides a fair procedure for facilitating trade-off between, for instance, overtime work and additional leaves.²³⁹

In developing countries where the legislative provisions are often very limited, trade unions play a considerable role by way of negotiation agreements, which go beyond minimum standards set in legislation or lobby for the implementation of existing entitlements.²⁴⁰ Hein adds that in countries where there are problems of enforcement of existing rights, reproducing them in collective agreements can provide an important safeguard.²⁴¹

At the same time, employers’ and workers’ organisations are known to protect the standard norm of a full-time (ideal) worker.²⁴² Still, the changing nature of employment relationships has made them accept that the male breadwinner model does not represent all the concerns of the workforce anymore. In fact, their survival may be hindered if they do not consider the needs of the changing workforce, i.e. part-time workers, women and working parents.²⁴³ The steep decline in collective agreements, nevertheless, poses a challenge to the possibility of a conducive social dialogue.

²³⁷ Hugh Collins, ‘The Right to Flexibility’ in Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work and Family* (OUP 2005), 117.

²³⁸ ILO and United Nations Development Programme (UNDP), *Work and Family: Towards New Forms of Reconciliation with Social Co-responsibility* (2009) Geneva and New York: ILO and UNDP, 33–34.

²³⁹ Hugh Collins, 118.

²⁴⁰ Catherine Hein, 32.

²⁴¹ *Ibid.*, 41.

²⁴² *Ibid.*

²⁴³ Committee of Experts *General Survey* 1993, § 73.

4.3. Concluding remarks

The effective equality of opportunity and treatment for men and women workers with family responsibilities does not only imply the absence of discrimination in respect of recruitment, terms and conditions of employment and dismissal (formal equality), but also suggests the implementation of measures designed to accommodate parenthood and care work (substantive equality). Considering that the conventional equality dichotomy has failed to produce substantive fairness in outcomes, for the achievement of full equality, traditional gender roles have to be dismantled. The transformative equality concept mandates a cognitive and redistributive change in the public sphere, private sphere and the minds of individuals.

Work-family policies have enormous potential to bring about gender-transformative change. Gender inequality at home and in the workplace can be combatted by workplace policies that embrace men's participation in the family as caregivers, and revalue care work as a social good. At the same time, not all efforts to achieve work-family reconciliation have the desired effect in reality. For instance, when reconciliation measures target only female workers, the social construct of a woman as the primary carer will be reinforced. Consequently, gender-impact assessment has to be present in all policies regarding work and family. Also the BPfA called on governments 'to mainstream a gender perspective into all policies and programmes, so that, before decisions are taken, an analysis is made of the effects on women and men respectively.'

The example of Estonia will illustrate why it is so important to include a transformative dimension in the work-family reconciliation discourse. While Estonia has not ratified the C156, it has ratified the C111 and it is a Member State of the EU. The country has also ratified the CEDAW, which embraces the transformative equality concept.

V PARENTAL LEAVE IN ESTONIA: A MISSED OPPORTUNITY FOR TRANSFORMATIVE CHANGE

Parental leave is a work-family reconciliation measure adopted within the substantive equality framework. It provides parents with the possibility to care for their child over a longer period of time without relinquishing employment.²⁴⁴ Usually parental leave becomes collectible once maternity (and paternity) leave has ended. Unlike with maternity leave, there is no international standard requiring Member States to institute parental leave. Still, both the R165 and ILO Recommendation No 191 on Maternity Protection call on States to adopt measures to allow parents to take a leave of absence following the expiry of maternity leave.²⁴⁵ Furthermore, the CFEU identifies legal protection against dismissal for reasons connected to parental leave following the birth of a child as a necessary measure to reconcile work and family life.²⁴⁶ Moreover, the Parental Leave Directive requires the Member States of the EU to provide parents with at least four months of parental leave, of which one month is non-transferable.²⁴⁷

Despite the fact that in most countries, the leave is available to both mothers and fathers,²⁴⁸ it is still mostly women who take the leave. As such, the leave does not only reinforce the woman-carer model but also contributes to women's disadvantage in the labour market because women are expected to lose workplace competence more often (and quicker) than men. Theoretically, the increase in the number of fathers taking parental leave would improve gender equality at home and in the labour market. While the institution of non-transferable leave seems thus reasonable, it does not necessarily mean that the division of care responsibilities remains equal. It is only when the organisational culture and family structures support fathers to take up parental leave, that effective equality can be achieved.

In Estonia, parents²⁴⁹ are entitled to three years of parental leave of which 62 weeks (or 465 days) are fully compensated on the basis of the parent's last year's earnings (there is a cap of three national average monthly salaries). A parent who has not worked or whose earnings are lower than the national minimum wage, will receive a sum equivalent to the minimum

²⁴⁴ Parental leave is available in at least 66 countries. – ILO *Maternity and Paternity at Work*, 64.

²⁴⁵ Article 22(1) R165; Article 10(3) ILO, *Recommendation concerning the revision of the Maternity Protection Recommendation* (R191) 15 June 2000.

²⁴⁶ Article 33(2) CFEU.

²⁴⁷ Clause 2(2) Parental Leave Directive.

²⁴⁸ Parental leave is only available to mothers in Guinea, Jordan and Kuwait. – ILO *Maternity and Paternity at Work*, 62.

²⁴⁹ The right to parental leave also extends to guardians and persons with whom a foster care agreement has been concluded. – Article 62 Töölepingu seadus (Employment Contracts Act) – RT I 2009, 5, 35 ... RT I, 22.12.2012, 15. Because maternity leave is compulsory, fathers can collect the parental benefit, once the child is 70 days old, i.e. once maternity leave has ended, unless the mother/guardian has deceased. – Article 2(2) Vanemahüvitise seadus (Parental Benefit Act) – RT I 2003, 82, 549 ... 04.07.2014.

wage.²⁵⁰ After the expiry of the initial 62 weeks, parents are entitled to a flat-rate benefit (childcare allowance), which is considerably lower.²⁵¹ Parental leave can be used in one part or in several parts by one parent at a time until the child reaches the age of three.²⁵² Despite the fact that both men and women can take up the leave, i.e. the leave is transferable, at present men's share stands at 5,4%.²⁵³

The remainder of the thesis exemplifies why the current leave system in Estonia is not adequate to contribute to the achievement of effective equality between men and women workers. Leave policies are part of States' social policies. Because the latter does not develop in a vacuum, the chapter starts off by looking at the socio-political context in which the current leave system has its origins. In order to signify the importance of gender impact assessment in the design of leave policies later in the thesis, the chapter will also address the legal development of the principle of gender equality in (re-independent) Estonia and proceed with a look at the current labour market situation and social perceptions regarding family life. The chapter concludes with an analysis of the current parental leave system.

5.1. Socio-political context

For around 50 years, the Estonian social policy followed the Communist doctrine.²⁵⁴ The totalitarian model provided men and women, at least in theory, with equal rights in all areas of life, be it political, cultural, social or economic. While women's employment rate was indeed high, it was not achieved by fostering greater men's participation in childcare or the household. On the contrary, parenthood was equalled with motherhood and only mothers had access to financial benefits and childcare.²⁵⁵ At the same time, the socialist regime forcefully removed the male breadwinner model that had its roots in the second half of the 1930s when Estonia was independent, yet ruled by an authoritarian regime. Because nothing national or political happened in the public space during that period (1934–1940) – also called the Era of Silence –, women became confined to the kitchen, nursery, charity work and garden. The change that the Soviet era brought

²⁵⁰ § 3 Parental Benefit Act. In 2014, the national minimum wage stands at 355 euros. In 2015, the rate will rise to 390 euros.

²⁵¹ In 2014, the rate of the childcare allowance is 38,35 euros per month. In 2015, the allowance will be 45 euros.

²⁵² Article 62(2) ECA.

²⁵³ European Commission *The Role of Men in Gender Equality*, 86.

²⁵⁴ Estonia gained independence from Russia in 1918. The two countries fought a War of Independence (1918–1920) after which Russia recognised Estonia as an independent country. The Molotov-Ribbentrop Pact left Estonia under the sphere of influence of the Soviet Union, which in turn annexed the country in 1940. The Nazi Germany started a war against the Soviet Union in 1941 and it occupied Estonia until 1944. In 1944 the country was reconquered by the Soviet Union. The second Soviet occupation lasted until 1991.

²⁵⁵ Marre Karu and Katre Pall, 'Estonia: halfway from the Soviet Union to the Nordic countries' in Sheila B Kamerman and Peter Moss (eds), *The politics of parental leave policies: Children, parenting, gender and the labour market* (The Policy Press 2009), 71–72.

was thus in sharp contrast with the previous decade. Women had to work three times as hard as before: in addition to having responsibilities in respect of their children and the household, they had to be engaged in paid employment.²⁵⁶

As a response to the complete disregard of the free will of the individual, in the end of the 1980s women started to advocate for the traditional breadwinner model and gender roles ('refamilialisation'). It was also at that time that parental leave was extended to three years.²⁵⁷ The trend did not last for long as economic necessity left women with no choice but to return to work.²⁵⁸ Despite the change in political regimes, the length of the maximum leave has remained the same until today. Yet, fathers gained the right to parental leave in 1991. It can be discerned that while during the transition period parental leave served the purpose of preserving social peace, the 2000s saw work-family policies as a tool to guarantee population growth.²⁵⁹ The Soviet type of 'forced emancipation' has had significant impact on the way the public perceives gender (in)equality even today. While some regard equality and feminism with hostility,²⁶⁰ others see it as a Western myth bringing more damage than good to both men and women.²⁶¹

5.2. (Gender) equality context

Equality before the law (on the ground of sex) is enshrined in the Constitution of Estonia.²⁶² In addition to including the formal equality guarantee, the principle comprises the idea about substantive equality.²⁶³ Furthermore, in order to correct inequalities originating from legal equality, the State can and is often obliged to implement affirmative action measures.²⁶⁴ The principle of gender equality emanates from the international treaties that the country ratified shortly after regaining independence from the Soviet Union in 1991 (e.g. ECHR, ICCPR, ICESCR, CEDAW). Notwithstanding that the treaties required the State to promote gender equality, for years since their ratification, the principle was not adequately addressed, neither legally nor conceptually. It was only after Estonia adopted the BPfA that the country committed itself to assessing its

²⁵⁶ Katrin Laur, 'Pätsi aja peremudel' ('Family Model during the Silent Era') Eesti Päevaleht, 25 October 2013, available at: <http://epl.delfi.ee/news/arvamus/katrin-laur-patsi-aja-peremudel.d?id=66971690> [accessed 27 May 2014].

²⁵⁷ Marre Karu and Katre Pall, 75.

²⁵⁸ Marre Karu and Kairi Kasearu, 'Slow Steps Towards Dual Earner/Dual Carer Family Model: Why Fathers do not Take Parental Leave' (2011) 3 *Studies of Transition States and Societies* 24, 26.

²⁵⁹ Marre Karu and Katre Pall, 77.

²⁶⁰ Marre Karu and Kairi Kasearu, 26.

²⁶¹ European Commission *The Role of Men in Gender Equality*, 86.

²⁶² Article 12 Eesti Vabariigi Põhiseadus (The Constitution of the Republic of Estonia) – RT 1992, 26, 349 ... RT I, 27.04.2011, 1.

²⁶³ RKPJKo 3-4-1-2-02, § 17.

²⁶⁴ RKKHo 3-3-1-42-08, § 27.

policies from the gender perspective.²⁶⁵ Furthermore, the accession negotiations with the EU provided gender equality issues an opportunity to reach a wider public forum and provoke a more fervent discussion. Estonia became a member of the EU in 2004 and on the day of accession, the Gender Equality Act (GEA) entered into force.²⁶⁶ The GEA created the institution of the Gender Equality and Equal Treatment Commissioner who *inter alia* monitors the implementation of the requirements set by the GEA. Although the opinions of the Commissioner are non-binding, they are, nevertheless, authoritative.

5.2.1. Gender equality act

The purpose of the GEA is to provide men and women with a formal equality guarantee as enshrined in the Constitution and to promote the equality of men and women in all areas of social life.²⁶⁷ The second limb of the equality guarantee – the promotion of equality between men and women – acknowledges that the prohibition of discrimination on the ground of sex is not in itself enough to achieve effective equality.²⁶⁸ In order to overcome factual inequalities, public and private actors are under an obligation to promote gender equality. For instance, the State and local governments are required to promote gender equality systematically and purposefully.²⁶⁹ As such, the Act includes a legal basis for gender impact assessment. In the event of planning strategies, policies and action plans the State and local governments must ‘take into account the different needs and social status of men and women and consider how the measures applied and to be applied will affect the situation of men and women in society.’²⁷⁰ While educational institutions and institutions engaged in training must ensure the equal treatment of men and women in education and training, study materials and the curricula at schools have to facilitate understanding about gender equality.²⁷¹ Additionally, the Act provides for the application of temporary special measures that promote gender equality and advantage the under-represented sex.²⁷²

The text of the GEA reveals that the legislature has put particular emphasis on the achievement of effective equality of men and women in the labour market. In addition to specifying the definition of the prohibition of

²⁶⁵ Martin Jaigma, *Issue Histories Estonia: Series of Timelines of Policy Debates*, QUING Project, Vienna: Institute for Human Sciences (IWM), available online: http://www.quing.eu/files/results/ih_estonia.pdf [accessed 23 May 2014], 3–4.

²⁶⁶ Soolise võrdõiguslikkuse seadus (Gender Equality Act) – RT I 2004, 27, 181 ... RT I, 26.04.2013, 2.

²⁶⁷ The guarantee does not extend to registered religious communities and to private and family life. – Article 2(2) GEA.

²⁶⁸ Mari-Liis Sepper ‘Paragrahv 1’ (Article 1) in Kristiina Albi *et al*, *Soolise võrdõiguslikkuse seadus: kommenteeritud väljaanne* (Gender Equality Act: a Commentary) (Juura 2010), § 4.1.

²⁶⁹ Article 9(1) GEA.

²⁷⁰ Article 9(2) GEA.

²⁷¹ Article 10 GEA.

²⁷² Article 5(2)(5) GEA.

discrimination in the labour market, the Act requires employers to promote gender equality. The employers have *inter alia* an obligation to create working conditions that are suitable for both women and men and facilitate the reconciliation of work and family life.²⁷³ These measures can include conditions regarding working time (time flexibility), place (place flexibility), and work duties (functional flexibility).²⁷⁴ Also the Employment Contracts Act (ECA) refers to the GEA by requiring that the employers ensure the protection of workers against discrimination, and follow the principle of equal treatment and promote equality in accordance with the GEA.²⁷⁵

5.2.2. Labour market: employment behaviour and attitudes

From the equality perspective, Estonian labour market stands out in two aspects. While the gender employment gap is relatively low, other labour market indicators (job segregation, gender wage gap) suggest great inequality.²⁷⁶ Currently, the employment rate for women stands at 58,7% and for men at 65,8%.²⁷⁷ Only six per cent of Estonian women would quit working if their husbands or partners earned enough so that there would be no need for them to work.²⁷⁸ Because the employment rate for women is relatively high, many people do not even agree that gender inequality exists in Estonia. In fact, a 2009 Eurobarometer survey reveals that 58% Estonians believe that gender inequality is 'rare'.²⁷⁹ At the same time, labour market participation of women with small children drops significantly. The gap is the largest for women with children under the age of three: only 30,6% of these women work, while 90% of men do. Although the employment gap decreases when the children become older, for instance, it is 15,5% for women with children aged 3–6 and 7,4% for those with children aged 7–14, it continues to be high.²⁸⁰ This in turn suggests that women remain financially independent on men.

At the same time, the Estonian labour market is highly segregated, both horizontally and vertically, meaning that women and men are concentrated

²⁷³ Article 11(1)(3) GEA.

²⁷⁴ Marre Karu, 'Töö ja pereelu ühitamisest' (On the Reconciliation of Work and Family Life) in *Töö ja Pere: Paindlik Töökorraldus ja Tööhõive* (Work and Family: Work Flexibility and Employment) (Eesti Töandjate Keskliit 2007), 10. (Hereafter: *Work and Family*).

²⁷⁵ Article 3 ECA.

²⁷⁶ European Commission, *Exchange of Good Practices on Gender Equality: Equal Pay Days, Estonia, 18–19 June 2013*, 4. (Hereafter: European Commission *Exchange of Good Practices on Gender Equality*)

²⁷⁷ Statistics Estonia, Labour market gaps: Males' and Females' Employment rate and Employment Gap by Age Group (WQL01).

²⁷⁸ Liina Järviste, *Sooline võrdõiguslikkus ja ebavõrdsus: hoiakud ja olukord Eestis 2009. aastal* (Gender Equality and Inequality: Attitudes and Situation in 2009) (Sotsiaalministeerium 2009), 13.

²⁷⁹ European Commission, *Eurobarometer Report on Gender Equality in the EU in 2009*, 10.

²⁸⁰ European Commission *Exchange of Good Practices on Gender Equality*, 4.

in the different sectors of the economy.²⁸¹ Because more women are concentrated in low-paid jobs (for instance, in health and social services, retail, education, public administration, and tourism), their income is markedly lower. In fact, in Estonia, the gender pay gap is the highest in the EU, standing at 30% while the European average is set at 16,4%.²⁸² This in turn affects women's future pensions, suggesting that women have lower incomes throughout their life cycles. Furthermore, women are underrepresented on managerial positions. This is especially remarkable when considering that the number of women with tertiary education is significantly higher (48,4% of women have tertiary education in comparison to 29,8% of men).²⁸³ While 40% of Estonians think that women are less interested in managerial positions,²⁸⁴ almost one third believes that women lack the necessary qualities and skills to fill positions of responsibility.²⁸⁵

5.2.3. Societal expectations regarding the family

Notwithstanding that the 'traditional family' consisting of a husband, wife and children is experiencing significant changes – the number of marriages and births is decreasing while 'non-traditional' family forms are emerging – the division of family responsibilities has remained unchallenged. In fact, in Estonia, on average women spend 1,6 times more time on unpaid care work than men.²⁸⁶ There are multiple reasons why women bear the majority of family responsibilities. In addition to the gender pay gap, societal expectations perceive women as primary carers for their dependants. Although the Soviet ideal of a dual-earner family model has persisted, the fact that the same ideal did not value fathers' role in the family and childcare, i.e. the dual-carer model, has contributed to the unequal share of family responsibilities inside the family unit. In its concluding observations on Estonia's fourth periodic report, also the CEDAW Committee signified that the 'persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and in society' is 'reflected in women's educational choices, their situation in the labour market and their underrepresentation in political and public life and decision-making positions.'²⁸⁷

²⁸¹ European Commission *Exchange of Good Practices on Gender Equality*, 4.

²⁸² European Commission, *Tackling the Gender Pay Gap in the European Union* (Publications Office of the European Union 2014), 10–11.

²⁸³ Statistics Estonia, Educational level and knowledge of languages: Share of the Educational Level of Population Aged 15–74 by Labour status, Educational level, Sex and Year (ML110).

²⁸⁴ European Commission, *Eurobarometer Report on Gender Equality in the EU in 2009*, 70.

²⁸⁵ *Ibid.*, 74.

²⁸⁶ Statistics Estonia, Time use: Average Time Use in a Day by Period, Primary activity and Sex (TI011).

²⁸⁷ Committee on the Elimination of Discrimination against Women, *CEDAW Concluding comments of the Committee on the Elimination of Discrimination against Women: Estonia*, 10 August 2007, CEDAW/C/EST/CO/4, § 12.

Because women are seen as principal carers, an early return to work from parental leave is often condemned and seen as harming the special relationship between the mother and the child. Moreover, many Estonians consider maternal care desirable for the positive development of children. Some also blame ‘neglectful’ mothers for different social problems, e.g. drug abuse.²⁸⁸ Deviations from traditional gender roles and the image of a ‘real man’ create negative assumptions also for men. A father who decides to take parental leave, spend time with his family or otherwise do ‘feminine’ things (e.g. child-rearing, appreciate family values) may be perceived as a ‘pehmo’ (a softy) or gay. Because homophobic attitudes are widespread and visible in the media, it can be asserted that there is ‘absolute fear’ of coming across as ‘gay’ or ‘feminine’. Furthermore, fathers who take parental leave are thought to earn less than their wives and not strive for workplace success.²⁸⁹ A prominent journalist adds that the appreciation of ‘soft values’ leads to the creation of a ‘ball-less society’ that could in the end have catastrophic impact on State security, and thus also the continuity of the Estonian people.²⁹⁰

5.3. Evaluation of the parental leave system in Estonia: a missed opportunity for transformative change

In theory, parental leave can boost women’s position in the labour market in two ways. In addition to offering mothers the possibility to remain attached to paid employment, fathers’ take up represents a prospect for a more equitable division of family responsibilities inside the family unit.²⁹¹ Because equality at home and work are inextricably linked, parental leave has enormous potential to transform traditional gender roles and contribute to the achievement of effective equality between men and women workers.

The parental leave system in Estonia is very generous in that the parent who is taking the leave is entitled to a benefit equivalent to his/her average earnings for one and a half years once the maternity leave has ended (140 days), and that in total the job-secured leave can last until the child reaches the age of three. Because leave benefits (e.g. maternity and parental leave) are income-related, the policy encourages women to engage in employment before giving birth.²⁹²

Although the extended leave has allowed many parents to take an active part in their child’s upbringing, in reality it has had negative repercussions on

²⁸⁸ Marion Pajumets, ‘Miks emme läheb tööle? Naiste subjektiivsed ootused ja tööle antavad tähendused’ (Why does Mummy go to Work? Women’s subjective Expectations and the Meaning Women give to Labour) in *Work and Family*, 35.

²⁸⁹ Marre Karu and Kairi Kasearu, 31.

²⁹⁰ Priit Pullerits, ‘Ohtlik Pehmus’ (‘Tenderness is Dangerous’) Postimees, 11 November 2014, available at: <http://arvamus.postimees.ee/2987501/priit-pullerits-ohulik-pehmus> [accessed 28 December 2014].

²⁹¹ Patricia Evans and Norene Pupo, 412.

²⁹² Marre Karu, *Fathers and parental leave: slow steps towards dual earner/dual carer family model in Estonia* (PhD thesis) (Tartu University Press 2011), 18.

the gender equality of workers. Because it is mostly women who take parental leave (only 5,4% of leave-takers are fathers), the woman-carer model has persisted. Statistics also reveal that notwithstanding the low rate of the flat-rate benefit after the initial 62 weeks, 62,7% of parents take out more than 1,5 years of leave.²⁹³ The length of the (maximum) leave curtails women's career opportunities because women are expected to lose workplace competence once they become mothers.²⁹⁴ For instance, in a case before the Gender Equality and Equal Treatment Commissioner the employer reduced the salary of the returning worker because he alleged that the worker's skills had eroded and her work capacity had decreased. This was also the case when the mother had continued her studies and actually earned a higher qualification. Furthermore, no one even bothered to examine the alleged decrease in her work capacity. At the same time, no training was provided.²⁹⁵

Because the benefit policy encourages consecutive births – if another child is born within 2,5 years from the birth of the first child, should the parent so decide, the benefits will be based on his/her previous income level²⁹⁶ –, many women decide to have more children during the parental leave. As such, the duration of the parental leave can extend even more. For instance, in another case before the Gender Equality and Equal Treatment Commissioner, the petitioner had been on parental leave for 4,5 years. Upon expressing the wish to return, she was told that 4,5 years of leave had had catastrophic effect on her work skills.²⁹⁷ Considering that the leave system favours consecutive births, work-family reconciliation appears to be addressed as an issue of family policy rather than a concern of the labour market. As such, it can be asserted that the present leave system is instituted to secure population growth rather than gender equality. Karu and Kasearu even suggest that the current leave policy has been introduced with no gender equality aspect in mind.²⁹⁸

Theoretically, if more fathers took up parental leave, the effects would not be so pronounced for women. Studies demonstrate that the institution of non-transferable parental leave has increased men's take up rate.²⁹⁹ In order to promote equal opportunities and equal treatment of men and women, also the Parental Leave Directive encourages States to grant part of the parental leave on a non-transferable basis.³⁰⁰ At present, it is up to the parents to decide who will take the leave. This decision depends, nevertheless, on a wide array of circumstances, for instance, on the parents' income level, and

²⁹³ Statistics Estonia, Parents on Parental leave: Year, Indicator, Duration (TTP10).

²⁹⁴ Joan C Williams and Stephanie Bornstein, 178.

²⁹⁵ Anonymous Communication to the Gender Equality and Equal Treatment Commissioner (18 September 2008).

²⁹⁶ Helen Biin *et al*, Eesti vanemapuhkuste süsteemi analüüs (The Analysis of the Estonian Parental Leave System) (Poliitikauuringute Keskus Praxis 2013), 61.

²⁹⁷ Communication to the Gender Equality and Equal Treatment Commissioner (26 November 2011).

²⁹⁸ Marre Karu and Kairi Kasearu, 26.

²⁹⁹ ILO *Maternity and Paternity at Work*, 61.

³⁰⁰ Clause 2(2) Parental Leave Directive.

the perceptions about traditional gender roles. Because women tend to earn less and are perceived as primary carers, it is not surprising that the take up rate for fathers is only 5,4%. As such, the present leave system fails to encourage fathers to take up parental leave.

Parents' but especially women's labour market disadvantage is also powered by the lack of adequate and affordable infant care. In fact, most child-care centres do not even accept children below the age of 12 months. Only 20,2% of children up to 2 years of age are taken to kindergartens.³⁰¹ Thus it is not surprising, that 62,7% of parents stay away longer than the initial paid leave. This in turn reinforces the primacy of parental but more importantly maternal care. Furthermore, the extended leave decreases pressure for the State to establish infant care systems. While it is true that the provision of institutional care requires extensive funding from the government, the costs of intervention have to be compared to the costs of inaction.

Gender-neutral parental leave policies provide both mothers and fathers the possibility to care for their children. The fact that the decision to take leave is to be determined by parents themselves and these decisions are not done in a vacuum³⁰² as they often depend on the parents' income level and organisational attitudes, has in reality had negative impact on the gender equality of workers. In so far the achievement of effective gender equality at work and in the household is an objective the State strives for, authorities have to include the gender aspect in the debate on the leave system.

5.4. Concluding remarks

The analysis demonstrated that although in Estonia, parental leave provides parents with a job-secured extended leave (a maximum of three years of which the first half is fully compensated on the basis of the parent's average salary), the fact that it is mostly women who take the leave, makes the model of a woman-carer persist. Furthermore, because the leave system does not intend to promote the sharing of care responsibilities inside the family unit, it fails to bring about transformative change in the social status of women. On the contrary, the extended leave makes the historical gender hierarchies persist and contributes to women's subordination in the labour market. Because the strategies at place fail to challenge the division of care work and there is a lack of early childhood care, the leave also reinforces the belief that maternal care is superior to other forms of care. As such, the current leave system is a missed opportunity to bring about transformative change.

³⁰¹ Statistics Estonia, Children aged less than 7 by Year, Indicator, Age group and Childcare service (MLP01).

³⁰² Patricia Evans and Norene Pupo, 417.

VI CONCLUSION

It was the central premise of this thesis that workers with dependants should have the possibility both to exercise their family responsibilities and to participate fully in the labour force. As such, the thesis embarked on a search for the most adequate equality concept addressing the needs of workers with family responsibilities. It also demonstrated how the equality concept can be employed to overcome structural discrimination against women workers.

The idea about equality is appealing. Nor is it just an idea. It is one of the most often claimed principles of international human rights law. International legal literature differentiates between two equality concepts: the formal and the substantive concept. While the former concerns mainly the application of the law – treating likes alike/consistently –, regardless of the content, the latter requires the content of the law to take into account also the fair division of benefits and burdens. The substantive equality concept itself can be understood in free senses: equality of results, equality of opportunity and equality of dignity. The international labour law discourse has used the language of ‘equality of opportunity and treatment’, which in practice has translated into the prohibition of direct and indirect discrimination in the C111. At the same time, the meaning of ‘equality at work’ extends beyond the mere formal equality concept and includes also the substantive equality model. Furthermore, in order to ensure equality in fact, States are encouraged to adopt special measures. While States are left considerable ‘freedom’ to decide which measures are the most appropriate to their national conditions and practices, all the objectives of the C111 have to be covered.

While work is indispensable for the worker to ensure livelihood for himself/herself and his/her family, it also offers him/her a means for self-realisation. But not everyone has the same opportunities to participate in the labour market. The equal opportunities and treatment of workers with family responsibilities are hindered because of assumptions about their capabilities as carers and not as workers. Because their work may be interrupted due to the performance of family responsibilities, employers may consider it economically undesirable to hire or keep a worker with such responsibilities in the first place. Should the employer treat a worker differently in preparing for, entering, participating in or advancing in economic activity because of assumptions about his/her capabilities as a carer rather than on the basis of his/her individual performance as a worker, the employer engages FRD.

Parenting appears gender-neutral at first glance. Still, the fact that it is most often women who take care or are expected to take care of dependent family members, both children and the elderly, gives FRD a gender dimension. The unequal division of responsibilities within the family unit is in turn powered by the societal expectations towards these responsibilities. While these perceptions hinder women’s aspirations to succeed in the public sphere,

men's opportunities to develop lives outside work, i.e. to realise themselves in the private sphere, may become limited.

At the same time, FRD has many socio-economic implications. In addition to the waste of human talent, it can decrease the labour supply. As such, the number of tax payers may decline. The exclusion of workers may also drain States' social security systems. Furthermore, when reconciliation between work and family is difficult, women may decide to modify their working patterns, postpone the founding of the family, prefer to have less children, or choose not to have children altogether. The elimination of discrimination on the basis of family responsibilities and the harmonisation of working life and family life are crucial to secure the labour market participation of all workers. Work-family reconciliation not only increases the quality of life for men and women workers but also helps to reduce gender inequality.

Because family responsibilities tend to have negative implications on the equality of workers, there is a need to adopt measures that would eliminate discrimination on the ground of family responsibilities and seek strategies that would help workers reconcile professional and care work. The traditional dichotomy of formal and substantive equality provides reference points to combat FRD and reconcile the work-family conflict. While treating parents as a protected class has the potential to transform the social value of care work, it ultimately lacks transformative power. The emphasis on the effects of policies and laws fails to address the societal structures persisting inequalities. Because the traditional equality dichotomy does not *per se* facilitate change in the traditional roles of men and women, a more far-reaching and comprehensive equality strategy is needed. The inclusion of a transformative dimension in the work-family reconciliation discourse could fight structural discrimination against women workers. Still, the concept has to coexist together with the formal and substantive concept in order to contribute to the elimination of discrimination against women workers. The objective of full equality necessitates a holistic approach towards equality.

While work-family reconciliation measures have tremendous potential to transform the domestic division of care work, not all efforts to achieve gender equality have the desired effect in reality. For instance, when reconciliation measures target only female workers, the social construct of a woman as a primary carer is reinforced. Gender discrimination in the home and workplace can be best combatted by workplace policies that facilitate men's participation in the family as caregivers. This requires the dismantling of the 'ideal worker norm' and may include measures of 'fatherhood by gentle force'. Moreover, gender-impact assessment has to be present in all policies regarding work and family.

The parental leave system in Estonia provides parents with a job-secured extended leave of which 62 weeks are fully compensated on the basis of the parent's average salary. Despite the fact that both parents can take the leave, it is still mostly women who stay at home to care for the child. This makes

the model of a woman-carer persist. At the same time, the leave system does not intend to promote the sharing of care responsibilities inside the family unit. Because the commitment to gender equality in Estonia is weak, both by society and public institutions, the potential of the parental leave to bring about transformative change in the social status of women has not been utilised effectively.

The present thesis illustrates the fact that work and family are inextricably linked and overlapping: what happens in the domestic sphere will influence the workplace and vice versa, inequalities in the private sphere will naturally persist at the workplace. The unequal division of family responsibilities is not only powered by the assumptions about men's and women's traditional gender roles but depends also on the general support for gender equality in society. Because women tend to earn less than men, it is more beneficial for the family unit to have the person with a lower salary bear the family responsibilities. Thus the rights of workers can be guaranteed fully only when there is general societal commitment to equality. At the same time, it is likely that the economic crisis will hinder the progress achieved thus far in relation to equality of men and women workers with family responsibilities. States have taken many retrogressive measures, for instance, there have been cuts in the parental leave benefits to sustain States' budgets. Still, the economic crisis offers an opportunity to re-evaluate the systems already in place and look for more effective solutions.

The division of care work inside the family unit has remained a source of gender inequality at the workplace. The author's future research suggestion would be to analyse whether the division of the care responsibilities has provided any moral weight in family law, i.e. child custody cases and divorce proceedings.

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