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Discrimination of men as a legal phenomenon

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Summary

This paper aims to demonstrate that discrimination against men is an actual legal phenomenon which ought to attract more attention than it currently does. It suggests that the current laws and societal perceptions of gender inequality seem to be gyno-centric, i.e. focusing on the issues faced by women, thereby marginalising the experiences of men.

The research begins with the outline of the human rights position on the notions of gender equality and discrimination on the grounds of sex. It then continues to present two possible causes of discrimination against men – radical feminist ideologies and prevalent gender stereotypes, both of which portray men in a negative light from the perspective of gender equality. Afterwards, an overview of three areas – sexual violence, private and family life, and employment – is presented in order to demonstrate how the unjustified differential treatment of men can manifest itself. It is argued that within these areas men are either deprived of the safeguards available to women in analogous situations or that negative gender stereotypes affect certain laws and policies which, in consequence, places men in a disadvantaged position.

Even though this thesis does not offer any concrete solutions to the issue of discrimination against men, it does propose that reconceptualising the notion of equality could prove helpful in eradicating the problem. Different theories of equality are presented, including Brian Barry's idea of 'equal diversity' which is seen as the most beneficial in the context at hand.

Abbreviations

CEDAW – Convention on the Elimination of all Forms of Discrimination Against Women

CJEU – Court of Justice of the European Union

CRC – Convention on the Rights of the Child

CSW – Commission on the Status of Women

EA – Equality Act

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

FBI – Federal Bureau of Investigation

FGM – female genital mutilation

ICTY – International Criminal Tribunal for the Former Yugoslavia

ICTR – International Criminal Tribunal for Rwanda

ILO – International Labour Organization

PACE – Parliamentary Assembly of the Council of Europe

SOA – Sexual Offences Act

SRO – Sexual Risk Order

WHO – World Health Organization

UN – United Nations

US C.A. – United States Court of Appeals

US S.C. – United States Supreme Court

1. Introduction

“Everybody has heard the women’s stories. But nobody has heard the men’s.”¹

1.1. Research question

Throughout history, men have occupied positions of power, whether in the public or in the private sphere, and their status as the privileged sex has not changed much in recent years.² It has invariably been women who have had to fight for acknowledgment of their rights. The suffragettes and the feminists are merely two groups which were, and in many countries still are, striving for the empowerment of women. Their battle is not an easy one in a society where patriarchy is still prominent and where strictly confined social roles are assigned to both men and women.³ Gender inequality continues to be a serious problem and even the most developed countries, such as Denmark, the United Kingdom or Germany, still struggle with a gender pay gap of more than 15%.⁴ Gender-based violence affects a disproportionately larger number of women than men, with nearly 70,000 women raped between 2009 and 2012 in England and Wales alone.⁵

These numbers could indicate that even though it has improved over the last century, the situation of women still leaves much to be desired. To remedy this, laws and policies dealing with gender equality and sex discrimination have been enacted.⁶ However, as this paper intends to highlight, these could be seen as gyno-centric, i.e. they focus solely on women, while the issues faced by men are almost never brought to light.⁷

Considering how the human rights regime defines both discrimination and gender equality,⁸ the hypothesis of this research is that men can in certain circumstances be treated disadvantageously because of their sex. Women in analogous situations are sometimes accorded legal protection or privileges, while men are either vilified or have no recourse to

¹ J. N. Clark, ‘A Crime of Identity: Rape and Its Neglected Victims’, *13 Journal of Human Rights* (2014) p.153.

² R. W. Connell, ‘Change among the Gatekeepers: Men, Masculinities, and Gender Equality in the Global Arena’, *30 Signs* (2005) p. 1808.

³ See, for example: R. Rowland and R. Klein, ‘Radical Feminism: History, Politics, Action’ in D. Bell and R. Klein (eds.), *Radically Speaking: Feminism Reclaimed* (Spinifex Press Pty Ltd, North Melbourne, 1996) pp. 11-2.

⁴ Eurostat, ‘Gender Pay Gap Statistics’, 14 March 2016 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/File:The_unadjusted_gender_pay_gap_2014_\(%C2%B9\)_difference_between_average_gross_hourly_earnings_of_male_and_female_employees_as_%25_of_male_gross_earnings_new.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:The_unadjusted_gender_pay_gap_2014_(%C2%B9)_difference_between_average_gross_hourly_earnings_of_male_and_female_employees_as_%25_of_male_gross_earnings_new.png)> visited on 1 April 2016.

⁵ J. Burn-Murdoch, ‘69,000 female, 9,000 male rape victims per year: get the full data’, *The Guardian*, 11 January 2013 <<http://www.theguardian.com/news/datablog/2013/jan/11/male-female-rape-statistics-graphic>> visited on 26 January 2016.

⁶ See, for instance, EA 2010 or CEDAW.

⁷ P. Nathanson and K.K. Young, *Legalizing misandry: from public shame to systematic discrimination against men* (McGill-Queen’s University Press, Québec, 2006) p. ix.

⁸ See subsection 1.2. *infra*.

those remedies available to their female counterparts. Notwithstanding, discrimination against men on the grounds of their sex is not recognised as a legal phenomenon. This thesis will attempt to signal that discrimination of men does indeed occur and should thus attract more attention than it currently does.

1.2. Preliminary legal questions

In order to develop the argument of this thesis, the notions of gender equality and discrimination on the grounds of sex ought to be defined from the perspective of the human rights regime.

The Preamble of the Charter of the United Nations emphasises that men and women should be awarded equal rights. The UN's Entity for Gender Equality and the Empowerment of Women defines gender equality as equality of "rights, responsibilities and opportunities of women and men and girls and boys". This concept entails due consideration paid to the needs and interests of both genders, which also contributes to the acknowledgment of the existence of different groups of men and women (and thus accommodates for protection against intersectional discrimination). According to this definition, gender equality is not equivalent to women's rights, as the concept encompasses the rights of men to the same extent.⁹ The idea of gender equality has been promoted by means of gender mainstreaming, the plan of action established during the Fourth United Nations Conference on Women in Beijing in 1995. It is a strategy which involves an assessment of the consequences of all processes and programmes, including legislative ones, for men and women, wherein gender equality is the ultimate goal to be achieved.¹⁰

Discrimination, according to the definition endorsed by the Council of Europe, is "treating people in analogous situations differently, or people in different situations alike, without objective and reasonable justification".¹¹ Discrimination can be direct, i.e. a law or a policy may directly place a particular group at a disadvantage, or it can be indirect in that a seemingly neutral and general policy may yield different results for different groups.¹² Notwithstanding, not every instance of differential treatment will constitute discrimination –

⁹ United Nations Entity for Gender Equality and the Empowerment of Women, 'Concepts and definitions' <<http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>> visited on 4 April 2016.

¹⁰ Office of the Special Advisor on Gender Issues and Advancement of Women, 'Gender Mainstreaming; An Overview', *United Nations*, 2002 <<http://www.un.org/womenwatch/osagi/pdf/e65237.pdf>> visited on 4 April 2016, p. v.

¹¹ Council of Europe, 'Prohibition of Discrimination' <<http://www.coe.int/en/web/echr-toolkit/linterdiction-de-la-discrimination>> visited on 4 April 2016.

¹² See, for example, ECtHR, *Thlimmenos v Greece*, Application No. 34369/97, Judgment on 6 April 2000, para. 44.

there is a scope for exceptions such as reasonable accommodation for disabled persons or affirmative action.¹³ Anti-discrimination provisions can be either constitutional or statutory. An example of the former is Article 14 of the European Convention on Human Rights which states that

“[the] enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

This provision can be relied upon whenever a right enshrined in the ECHR is involved,¹⁴ which could indicate that the idea of equal treatment underlies the entirety of human rights law. Statutory anti-discrimination law can be found for instance in the European Union’s Recast Equal Treatment Directive¹⁵ or in national legal instruments such as the Equality Act 2010 in the United Kingdom. It can be distinguished from constitutional anti-discrimination law in that it concerns specific areas, such as employment or education, and does not limit itself to general principles.

Discrimination can occur on a number of grounds. For instance, the EA lists 8 so-called ‘prohibited grounds’: age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion/belief, sexual orientation, and sex. The latter, broadly speaking, refers to unlawful differential treatment which is grounded in an individual being either a man or a woman.¹⁶ A landmark case depicting what sex discrimination consists in is a decision of the European Court of Justice (now known as the Court of Justice of the European Union) in *Defrenne III*¹⁷ in which the applicant complained that even though her employment duties were identical to those of her male counterparts, she was paid less. A number of regional and international documents aim to eradicate discrimination on the grounds of sex, whether in general, such as Article 21 of the Charter of the Fundamental Rights of the European Union, or focusing on women, as in the case of the Convention on the Elimination of All Forms of Discrimination Against Women, or targeting a specific field, for example the above-mentioned Recast Equal Treatment Directive. Even though, in theory, discrimination

¹³ See for instance Articles 5 and 7 of Employment Equality Directive, Council Directive 2000/78/EC of 27 November 2000.

¹⁴ A self-standing provision of the same wording was added later on in the form of Protocol 12 which has not yet been ratified by all Member States.

¹⁵ Recast Equal Treatment Directive, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006.

¹⁶ European Union Agency for Human Rights, ‘Handbook on European discrimination law’, 2011 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802eb0fb#search=discriminaiton> > visited on 5 April 2016, p. 90.

¹⁷ CJEU, *Defrenne v Sabena (Defrenne III)* (Case 149/77) [1978] ECR 1365.

on the grounds of sex can be perpetrated against both women and men,¹⁸ there are no legal instruments concerning men as the victims.

1.3. Methodology and empirical material

As was stated *supra*, this thesis intends to signal that discrimination of men is an actual legal phenomenon, even though the current discussion of gender within the context of human rights concentrates nearly in its entirety on women.¹⁹ This argument will be expanded firstly by defining the roots of negative perception of men in Western society. This perception could be seen as a factor influencing the laws and policies which lead to unfavourable treatment of men. Afterwards, examples of discrimination against men in three areas of law will be analysed in turn. These areas are: sexual violence, private and family life, and employment. The thesis will conclude with an examination of different notions of equality and how these could contribute to the eradication of unjustified unfavourable treatment of men.

As far as methodology is concerned, a few issues should be explained at the outset. Firstly, as the definitions presented *supra* demonstrate,²⁰ not every instance of differential treatment will amount to discrimination. What is essential in establishing unlawful discrimination is a lack of objective and reasonable justification.²¹ It is submitted that the examples presented in this thesis are devoid of such justification, since the reasons for divergent attitudes towards men and women are either obsolete and based on detrimental gender stereotypes (which could be observed for example in relation to paternity leave discussed *infra* in the chapter on employment),²² or they are completely absent (as is the case with provisions on rape which define such as penetration with a penis).²³ Moreover, in certain cases the reasons that were found to be insufficient to justify a certain action in relation to women were deemed either irrelevant or satisfactory when men were subjected to analogous treatment.²⁴ In consequence, the examples presented in this paper are believed to be a manifestation of discrimination on the grounds of sex.

¹⁸ European Union Agency for Human Rights, *supra* note 7, p. 90.

¹⁹ R. W. Connell, *supra* note 2, p. 1805.

²⁰ See *supra* notes 11 and 13.

²¹ See *supra* note 11.

²² A. Z. Melamed, 'DADDY WARRIORS: The Battle To Equalize Paternity Leave In The United States By Breaking Gender Stereotypes: A Fourteenth Amendment Equal Protection Analysis', 21(1) *UCLA Women's Law Journal* (2014) p. 81.

²³ See, for example, SOA s.1.

²⁴ See, for example, J. S. Svoboda, 'Circumcision of male infants as a human rights violation', 39 *Journal of Medical Ethics* (2013) p. 472.

Another aspect that requires explanation is why radical feminist theories were chosen as the main points of criticism. One of the reasons is that these ideologies tend to picture men as the main cause of women's disadvantaged position in the society.²⁵ Moreover, they fostered the concept of gender oppositionality, dividing the world into two distinct groups of men and women which are placed in a confined hierarchy in relation to each other.²⁶ Not only could this lead to a perpetuation of gender stereotypes but it also contributes to the creation of the perception of a man as the wrong-doer and a woman as his victim.²⁷ The fact that such social positioning of men against women can be observed in certain laws and policies, such as the rules governing affirmative action which portray women as the group placed at a disadvantage because of male supremacy,²⁸ could be an indication that the legislators and policy-makers might be influenced by the same ideas as those promulgated by radical feminists.

As far as the choice of the examples illustrating discrimination against men is concerned, all three areas – sexual violence, private and family life, and employment – are closely connected to the discourse of male dominance and patriarchy.²⁹ Moreover, the major human rights instruments such as CEDAW pay great attention to the situation of women vis-à-vis men in all these fields, which allows for an assumption that these could offer valuable examples for the discussion of discrimination on the grounds of sex. Last but not least, the availability of a vast range of sources on these topics facilitated the author to conduct comprehensive and balanced research.

1.3.1. Limitations

Due to the variety of different approaches to gender equality and grave differences between the legal systems of particular countries, the geographical scope of this thesis had to be limited to the 'Western world' (Europe and North America). The legal and societal approaches to the issues of gender equality and discrimination on the grounds of sex, as well as the perception of masculinities and femininities, are to a significant extent very similar on both continents. This allows consistency to be maintained and a coherent argument to be developed within the length confines of this thesis. Notwithstanding, due to a limited number

²⁵ R. Rowland and R. Klein, *supra* note 3.

²⁶ P. Nathanson and K.K. Young, *supra* note 7, p. 123.

²⁷ R. Rowland and R. Klein, *supra* note 3.

²⁸ J. E. Kellough, *Understanding Affirmative Action; Politics, Discrimination and the Search for Justice* (Georgetown University Press, Washington D.C., 2006) p. 88.

²⁹ See, for example, G. Mosse, *The Image of Man: The Creation of Modern Masculinity* (Oxford University Press, Oxford, 1996) or P. Nathanson and K.K. Young, *supra* note 7.

of available sources relating to the topic of male rape developed in the chapter on sexual violence, some examples pertaining thereto concern the African countries.

Furthermore, this paper is not intended to be an in-depth study of any particular legal notion or specific area of law. It is supposed to signal the existence of the phenomenon of discrimination against men and is thus an overview of a number of relevant issues, such as equality, feminism, or affirmative action. Therefore, the discussion is not limited to, for instance, analysing the coherence of the case law of a particular court, but rather a variety of different sources are presented to illustrate how the problem at hand manifests itself.

Moreover, even though the author acknowledges that the terms ‘sex’ and ‘gender’ denote different notions, for the purpose of this paper, and in line with the everyday meaning of these terms, they will be used interchangeably.

1.3.2. Empirical material

The sources used in this thesis are, in line with the limitations presented *supra*, limited to material relating to the Western world with the exception of those pertaining to the topic of male rape. As far as the primary sources are concerned, national, regional and international legislation will be used both to delimit the legal framework within which the argument will be constructed, and to illustrate how discrimination against men can manifest itself. Moreover, the case law from regional courts and tribunals, such as the ECtHR or ICTY, will be used to support the author’s reasoning. The secondary sources will include academic articles and books relating to the topics covered in this thesis. These will not be confined to legal sources – socio-political and medical material will also be exploited to indicate the deficiencies in law as it stands today.

2. The Roots of Discrimination of Men

Patriarchy is a notion which has permeated both the private and public spheres of life.¹ It can be defined as a system formed and controlled by men in order to sustain their dominance to the detriment of women and others who do not conform to the stereotypical vision of a man in power.² Notwithstanding the societal changes that have occurred in the last decades, the patriarchal dominance of men over women which has lasted for millennia has not been significantly affected.³ In some parts of ancient Greece, the social roles of women were completely dictated by the needs of men – they were used for recreation, as concubines or as child-bearing and housekeeping wives.⁴ Roman Law created the concept of *pater familias* ('father of the family') who was the property owner and the figure of authority who controlled the lives of his dependants.⁵ Chapter IX of the Roman Civil Code states that the whole family unit, including all the descendants, were under the absolute rule of the head of the family.⁶ Even though women were freed relatively early from this absolute authority⁷ and their role as the household's *dominas* became acknowledged,⁸ the fixed idea that women belonged at home persisted. It was only men who had political rights and who could participate in government.⁹ As such they possessed more power.

Even though nowadays Western jurisdictions have laws aimed at achieving gender equality, substantive equality, i.e. the recognition of the difference between individuals while at the same time allowing them to have equal opportunities,¹⁰ between men and women has not yet been fully accomplished. Men continue to be perceived as the privileged sex/gender, while women are still faced with unfavourable differential treatment.¹¹ This might, however, also prove to have negative consequences for men, since their omnipotence frequently

¹ R. Rowland and R. Klein, 'Radical Feminism: History, Politics, Action' in D. Bell and R. Klein (eds.), *Radically Speaking: Feminism Reclaimed* (Spinifex Press Pty Ltd, North Melbourne, 1996) pp. 11-2.

² *Ibid.*, p. 15.

³ R. W. Connell, 'Change among the Gatekeepers: Men, Masculinities, and Gender Equality in the Global Arena', 30 *Signs* (2005) p. 1808.

⁴ F. Schulz, *Principles of Roman Law* (Clarendon Press, Oxford, 1936) p. 195.

⁵ USLegal, *Pater Familias & Legal Definition* < <http://definitions.uslegal.com/p/pater-familias/>> visited on 16 February 2016.

⁶ S.P. Scott (trans.), *The Civil Law*, (Cincinnati: The Central Trust, 1932), reprinted in Richard M. Golden and Thomas Kuehn, eds., *Western Societies: Primary Sources in Social History, Vol I*, (New York: St. Martin's Press, 1993) p. 13.

⁷ F. Schulz, *supra* note 4, p. 168.

⁸ *Ibid.*, p. 194.

⁹ *Ibid.*, p. 208.

¹⁰ 'CEDAW Quick & Concise: Explaining the Principle of Substantive Equality', *UN Women* < <http://www.unwomen.org/en/digital-library/videos?videoid=LtkH1s5CtjL>> visited on 27 April 2016.

¹¹ See *supra* note 4 in section 1.1.

deprives them of the status of a victim, and the fact that they may suffer from, for instance, discrimination may be overlooked.¹² It is believed that the laws currently in place in the Western world may reflect this and can thus be seen as gyno-centric, i.e. focused on those problems faced by women, and not providing sufficient safeguards for men.¹³ Owing to this, the proponents of this view claim that discrimination of men, even though not legally recognised, has been institutionalised to such an extent that it has become systemic in Western legal systems.¹⁴ Even when the concept of gender equality is mentioned, it is still predominantly meant as the amelioration of the situation of women without taking into account the consequences certain actions or rules may have on men.¹⁵

All of the above is not intended to mean that the problems of women are exaggerated and should not be emphasised. It is predominantly women who are victims of domestic violence, discrimination or harmful cultural practices.¹⁶ This paper aims not to undermine their experiences, but rather to signal that there is a lacuna in the law as far as the issues faced by men are concerned. The way human rights institutions would like gender equality to be perceived, i.e. covering both women and men,¹⁷ is not always adopted as far as some laws and policies are concerned. Men have become the “official victims of institutionalized double standards”¹⁸ and while the examples thereof are many (some of them will be discussed in greater detail in the following chapters), the roots of discrimination of men can be considered connected to radical feminist ideologies and the ways masculinity and femininity are formed and maintained.

2.1. Feminism and men

Once again the author would like to stress that it is not her intention to belittle the gravity of those problems women have been struggling with for centuries. The purpose of this thesis is to demonstrate a different perspective, according to which men are not viewed as villains but rather as women’s equals. As such they can also be victims of, for instance, discrimination in the workplace or sexual violence.¹⁹ It is possible that one of the reasons why

¹² P. Nathanson and K.K. Young, *Legalizing misandry: from public shame to systematic discrimination against men* (McGill-Queen’s University Press, Québec, 2006) pp. 265-6.

¹³ *Ibid.*, p. ix.

¹⁴ *Ibid.*, p. xi.

¹⁵ R. W. Connell, *supra* note 3, p. 1805.

¹⁶ See *supra* notes 4 and 5 in section 1.1.

¹⁷ United Nations Entity for Gender Equality and the Empowerment of Women, ‘Concepts and definitions’ <<http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>> visited on 4 April 2016.

¹⁸ P. Nathanson and K.K. Young, *supra* note 12, p. 118.

¹⁹ See chapters 3 and 4 *infra*.

such a depiction of men is controversial is the particular manner in which ideological feminist movements portray men.

Feminism is by no means a homogenous movement. There are many forms thereof and it goes beyond the scope of this paper to describe them all in detail. Therefore, the focus in this chapter will be placed on how radical feminism and the ideologically milder forms of feminism depict men. The last chapter, on the other hand, will focus on those factions which perceive men in a more positive light.²⁰

2.1.1. Radical feminism and men

It is proffered that radical feminist doctrine could be seen as vilifying men and creating a binary opposition between men and women.²¹ Radical feminists' standpoint is that all women form a socially-constructed²² group based on sex which as such is oppressed by men (who are also treated as a social group).²³ Patriarchal structures are held to allow men to dominate women both in private and public spheres by imposing on them specific conceptions of marriage, compulsory heterosexuality, or motherhood amongst others.²⁴ Men also supposedly control language in order to reinforce women's subordinate position.²⁵ As such, according to radical feminists, men are the prime enemies and women should be separated from them in order to gain the empowerment necessary to create women's own identity.²⁶

These radical feminist propositions could be seen as indicating that all men tend to subdue women and share patriarchal mentality. However, men as a group are not homogenous²⁷ and neither are women, which also seems to be denied by radical feminists.²⁸ The apparent advantage of their ideology is that it was created by women for all women which places all women on the same footing notwithstanding their views, social position, other potential grounds for discrimination, and so forth. This assumption of female commonality is what the critics of radical feminism called "false universalism".²⁹ It could be seen as detrimental to the movement's cause as it is believed that it could lead to

²⁰ See chapter 6.

²¹ P. Nathanson and K.K. Young, *supra* note 12, p. xi.

²² *Ibid.*, p. 74.

²³ The feature of radical feminism which likens sexes to social classes is what distinguishes the movement from traditional forms of feminism (R. Rowland and R. Klein, *supra* note 1, p. 12).

²⁴ *Ibid.*, pp. 11-2.

²⁵ *Ibid.*, p. 16.

²⁶ *Ibid.*, p. 32.

²⁷ R. Wiegman, 'Unmaking: Men and Masculinity in Feminist Theory' in J. Gardiner (ed.), *Masculinity Studies & Feminist Theory: New Directions* (Columbia University Press, New York, 2002) p. 35.

²⁸ R. Rowland and R. Klein, *supra* note 1, p. 10.

²⁹ *Ibid.*, p. 17.

marginalisation of the experiences and opinions of those who do not conform to the stereotype of an oppressed woman created by radical feminists. Moreover, the statement that men manipulate language to women's detriment could be reversed – radical feminist expression could be seen as pejorative towards men.³⁰ Last but not least, if one realised the proposition of separating women from men, then this would create a situation, in which the differences between genders and their experiences would only become more entrenched. Radical feminists themselves seem to be aware of this problem and acknowledge that insisting on invariable differences between the sexes could make any positive developments unfeasible.³¹

Another notion fostered by radical feminists is that of essentialism, i.e. assigning men and women certain characteristics due to the biological differences between them.³² Thus, men are seen as aggressive and strong and are, accordingly, designed to be oppressors, while women are nurturing and submissive, which is supposed to automatically make them victims.³³ Paradoxically enough, the essentialist view of men and women has been adopted by some anti-feminists who claimed that the inherent differences between the sexes can be used as a justification for oppressing women.³⁴ The flexibility of this argument could indicate that one should approach it with an appropriate amount of scepticism. Moreover, holding that immutable traits predestine what our social role is and cause us to develop certain patterns of behaviour would mean that change would never be possible.³⁵ In fact, it is believed that the fact that feminists actually managed to open the eyes of the public to the problems faced by women could indicate that change is feasible.

An essentialist view promoted by radical feminists provides a rather one-sided vision of the relationship between the sexes – there should be none because only when we separate them can women flourish.³⁶ However, there are many ways of understanding the connection between men and women. Professor Jean Bethke Elshtain claimed that, in the context of human rights entitlements, there are three possible approaches: sex polarity, sex unity, and sex complementarity.³⁷ While all of them acknowledge that men and women are different, only

³⁰ See, for example, R. Rowland and R. Klein, *supra* note 1, p. 11, where it is stated that “[p]atriarchy is the oppressing structure of male domination.”

³¹ *Ibid.*, pp. 33-4.

³² *Ibid.*, p. 32.

³³ *Ibid.*, p. 34.

³⁴ T. Digby, ‘Do Feminists Hate Men?: Feminism, Antifeminism, and Gender Oppositionality’, *Journal of Social Philosophy* (1998) p. 23.

³⁵ R. Rowland and R. Klein, *supra* note 1, p. 10.

³⁶ *Ibid.*, p. 112.

³⁷ P. Nathanson and K.K. Young, *supra* note 12, pp. 121-122.

the first of these, that embraced by radical feminists, results in dividing the world into ‘us’ and ‘them’ and creates artificial hierarchies.³⁸ The other two concepts, on the contrary, could be seen as engaging the sexes in a dialogue, whether by completely discarding the differences between them, or by treating them as interdependent.

Furthermore, the essentialist conception of sexes and the rather negative stereotype of men which it creates might potentially have another downside. By presuming that men are predisposed to committing acts of violence and domination, they could be automatically held guilty, unless proven otherwise.³⁹ Even though this statement is mostly relevant in the discussion of ‘moral guilt’ and social stigma, it will be suggested in the following chapters that this sometimes applies in the field of law, especially in the context of sexual violence.⁴⁰ Because men are more likely to be seen as wrong-doers, while it is conceptually difficult to imagine that a woman could be a villain,⁴¹ men might find themselves in a situation where, at least on the moral level, they may not be able to rely on presumption of innocence to protect them.

2.1.2. Move away from radicalism

A departure from radicalism came with liberal feminism which discards the idea of the complete separation of the sexes as the only remedy for women.⁴² Notwithstanding, even though men and women are considered to be inherently the same and the differences between the two are irrelevant, the patriarchal society led by ‘oppressive men’ is seen as preventing women from developing their innate reason. This innate reason is shared by both sexes but it is only men who face no obstacles in developing it.⁴³ Therefore, even though men and women have been brought conceptually closer together, it is still assumed that women cannot flourish because men are limiting their range of opportunities. As such they could once again be seen to be in opposition to women, rather than in partnership with them.

Other forms of modern feminism could be perceived as being moderately more sympathetic to men. Post-culturalist feminists embrace the differences between the sexes and claim that these differences form our identities. Hence, men are no longer seen as hampering women’s quest for establishing their ‘selves’ because the traits that distinguish the two groups

³⁸ *Ibid.*, p. 123.

³⁹ *Ibid.*, p. 313.

⁴⁰ *Ibid.*, p. 260.

⁴¹ M. Pittaro, ‘Demystifying Female Perpetrated Sex Crimes Against Children’, 19 *Sexual Assault Report* (2015) p. 1.

⁴² T. Ebert, “The “Difference” of Postmodern Feminism”, 53 *College English* (1991) pp. 889-890.

⁴³ *Ibid.*

are constitutive of their identities in themselves.⁴⁴ However, such a stance could indicate that men and women are still not treated as each other's equals. Highlighting gender oppositionality and emphasising that one has to have either a female or a male identity might be conceived as a subversion of gender equality in the human rights sense of the term.⁴⁵ Quite to the contrary, it may lead to perpetuating the notions of hetero-normativity and patriarchy which are so heavily criticised by the radical feminists.⁴⁶

What could change the situation would be to stop defining our position in relation to our gender and to focus on how to cooperate in order to achieve an egalitarian and pluralistic society. This could be achieved through embracing the values and ideas promoted by post-modern feminism and post-feminism, both discussed in the last chapter.⁴⁷ Notwithstanding, such an approach could only be taken if both men and women were eager to take active part in the process of change. As for now, even though men and women are increasingly seen as partners (at least formally so), women seem to prefer to continue to adopt the role of victims.⁴⁸ An example of such a preference is the fact that some feminists choose to focus on anti-discrimination theory and criminal law practice over embracing political power.⁴⁹ Law is used as a tool, by means of which women can protect themselves from men, which seems understandable, considering that women still constitute a vast majority of victims of gender-based crimes and offences.⁵⁰ Notwithstanding, relying only on this reactionary approach might not prove effective in eradicating the roots of the problem, i.e. the unequal division of power and fostering a traditional mentality in which men are perceived as oppressors of women. A takeover of political power by women and the promotion of gender equality as opposed to an embracing of radical anti-men ideas could potentially prove to be a more effective way of modernising our perception of both genders, and might end the vilification of men.⁵¹

⁴⁴ T. Ebert, *supra* note 42, p. 891.

⁴⁵ United Nations Entity for Gender Equality and the Empowerment of Women, 'Concepts and definitions' <<http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>> visited on 4 April 2016.

⁴⁶ R. Rowland and R. Klein, *supra* note 1, p. 11-2.

⁴⁷ See chapter 6.

⁴⁸ D. Rosenblum, 'Beyond victimisation and misandry', 6(1) *International Journal of Law in Context* (2010) p. 114.

⁴⁹ *Ibid.*, p. 115.

⁵⁰ See *supra* note 5 in section 1.1.

⁵¹ D. Rosenblum, *supra* note 48, p. 115.

2.2. Creating gender stereotypes

The discussion above indicates that the manner in which ideological feminists portray men is rather negative, in that it shows men as being dominant over women.⁵² However, radical feminists should not be seen as the sole reason for the negative perception of men. Gender oppositionality and gender discrimination mentioned *supra* could be understood as reflections of the deeply rooted notions of masculinity and femininity. And even though it is true that they have been mostly detrimental to women,⁵³ it is believed that their impact on men should not be ignored. Considering the traditionally disadvantaged position of women, contemporary men have less to prove than their female counterparts. Nonetheless, their struggle to meet the demands and reach the ideals imposed on them takes a significant toll on them.⁵⁴

The sections below analyse the concepts of femininity and masculinity in order to demonstrate how they can carry negative implications not only for women but also for men.

2.2.1. Femininity

Before departing on a quest of the meaning of femininity and masculinity, it should be noted that the differences between the sexes, the biological ones aside, are predominantly not caused by nature. As early as the nineteenth century, the Scottish poet and essayist Robert Louis Stevenson ascribed the disparities between men and women to external factors, such as upbringing and education.⁵⁵ This view stands in opposition to the essentialism favoured by radical feminists and as such also indicates that, since they are socially constructed, the differences between the sexes are not immutable.⁵⁶ A man does not have to be tough, just as a woman does not have to be meek.

The term ‘becoming woman’, coined by Simone de Beauvoir, a French writer and philosopher, reflects the view that women are not born with all the qualities that have been traditionally ascribed to them. Acquiring these traits is part of a process of becoming a stereotypical woman.⁵⁷ According to de Beauvoir and second-wave feminists, sex and gender were to be conceptually disconnected and it is factors such as childhood experiences, sexual initiation, and marital life which prepare women to fit into a rigid social mould which forces

⁵² R. Rowland and R. Klein, *supra* note 1, p. 11-2.

⁵³ See *supra* notes 4 and 5 in section 1.1.

⁵⁴ See, for example, P. Nathanson and K.K. Young, *supra* note 12, p. 266

⁵⁵ T. Digby, ‘Do Feminists Hate Men?: Feminism, Antifeminism, and Gender Oppositionality’, *Journal of Social Philosophy* (1998) p. 20.

⁵⁶ See *supra* notes 32 and 33.

⁵⁷ S. Krus, ‘Becoming Woman’ in L. Code (ed.), *Encyclopedia of Feminist Theories* (Routledge, London, 2000) p. 40 after S. de Beauvoir, *The Second Sex* (Vintage Books, New York, 2010).

them to accept their position of inferiority. Sometimes, women are complicit in establishing their own oppression because they are aware that being feminine acts in their favour and resisting the conventional notions may be too costly.⁵⁸ Femininity can thus often be seen as a performance and a process interaction,⁵⁹ in which women are groomed to be men's passive counterparts. It could be inferred from these arguments that women are supposed to be what men are not and are expected to fulfil those roles that men are not designed to take. Standardised images of femininity seen in tales of princesses or in beauty magazines⁶⁰ suggest that women are there to please with their physique, and to passively stand by the side of men. Women who do not conform to this vision and who actually want to be an active actor in society are perceived as a threat and as such are either vilified by others or opt for "excessive femininity" to conceal their inclinations.⁶¹

It is proffered that the processes described above could be interpreted as being detrimental to women's cause of being treated as men's equal participants in everyday life. Nonetheless, the manner in which the stereotype of femininity is constructed could also be seen as deleterious to men since the standards that women should conform to are established in relation to equally strict confines of masculinity.⁶² Such a situation could be interpreted as creating a vicious circle in which one unfavourable idea is formed based on another, and it thus seems extremely difficult to escape this web of harmful stereotypes.

2.2.2. Masculinity

Just as femininity is a social construct, so is masculinity.⁶³ In the simplest terms, traditional masculinity could be described as the opposite of femininity.⁶⁴ However, what the two seem to have in common is that they are both rigid and impose a lot of pressure on those who 'ought to' conform to them.

Masculinity is by no means a one-dimensional notion – it encompasses a whole range of attributes which reflect social realities and the hope for the future.⁶⁵ Men are seen as "a symbol of personal and national regeneration" and as a safeguard of the existing order.⁶⁶ The

⁵⁸ S. Kruks, *supra* note 57.

⁵⁹ S. Holland, *Alternative Femininities: Body, Age and Identity* (Berg, Oxford, 2004) p. 8.

⁶⁰ *Ibid.*, p. 10.

⁶¹ *Ibid.*, p. 13.

⁶² G. Mosse, *The Image of Man: The Creation of Modern Masculinity* (Oxford University Press, Oxford, 1996) p. 8.

⁶³ See *supra* note 23.

⁶⁴ See *supra* note 62.

⁶⁵ G. Mosse, *supra* note 62, p. 15.

⁶⁶ *Ibid.*, p. 3.

most typical attributes ascribed to a masculine man (which have remained essentially unchanged since the mid-eighteenth century) are those of will-power, self-restraint, bravery, and honour. These are supposed to determine the normative patterns of behaviour and morality.⁶⁷ All of these characteristics relate to power and order. Considering that femininity is a conceptual opposite of masculinity,⁶⁸ it could be understood that whatever is not masculine, including women, will automatically be seen as less powerful and less orderly. Therefore, men's struggle to guard their masculinity is not only personal – they are expected to fulfil so many social roles that their maleness becomes a public issue.⁶⁹ They are under a lot of external pressure to fulfil the burdens and duties that they owe to society at large. Moreover, because of the multiplicity of those functions ascribed to men, the stereotype of masculinity is extremely difficult to change, since any alteration would carry the risk of subverting the social order.⁷⁰

Traditional masculinity was formed, amongst others, by politics and wars. Modernity cherished virtue and so it became an attribute of manhood⁷¹ while the Vietnam War shaped the perception of masculinity by glorifying the image of a tough soldier fighting in brutal battle.⁷² Moreover, as was discussed *supra*, the more radical feminist movements further entrenched the stereotype of a strong and dominant man.⁷³ And even though masculinity was eroded in the second half of the twentieth century by, for instance, popular music which encouraged men to express themselves through their bodies, which went against male “respectability”,⁷⁴ the ideal of a traditional ‘manly man’ still held strong. Despite the fact that androgeneity with its gender-bending and blurring of the differences between men and women⁷⁵ became prominent, or that the social acceptance of homosexuality increased, the self-confidence of “normal men”⁷⁶ was only reinforced. What is more, even those movements that were and still are contesting the masculine stereotype contribute to the upholding thereof. For instance, twentieth-century German gay literature portrayed gay men with the masculine attributes they otherwise seemed to oppose.⁷⁷

⁶⁷ G. Mosse, *supra* note 62, p. 4.

⁶⁸ *Ibid.*, p. 8.

⁶⁹ *Ibid.*, p. 14.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 5.

⁷² R. Wiegman, *supra* note 27, p. 41.

⁷³ See *supra* note 33.

⁷⁴ G. Mosse, *supra* note 62, pp. 184-5.

⁷⁵ *Ibid.*, p. 186.

⁷⁶ *Ibid.*, p. 188.

⁷⁷ *Ibid.*, p. 190.

It could be understood that perpetuating the stereotype of masculinity has led to a homogenisation of men, as they lost their individuality and became perceived as types which have to conform to the ideal imposed on them. If they do not comply, they will be discriminated against⁷⁸ as countertypes. Such countertypes include Jews, gays, vagrants, non-Caucasians, and so forth. What is intriguing is that the list also includes non-feminine women, who defy social norms and should as such be perceived as men's allies. Notwithstanding, their abandonment of femininity and consequent empowerment in fact poses a risk to masculinity as it threatens men's firmly established identity.⁷⁹

The arguments above could be interpreted as an indication that acknowledging that not all men are the same, just as not all women are the same, could result in an acknowledgement of the experiences of those men who are oppressed, whether by women or by other men. Not all men "share equal masculine rights and privileges" and the prevalent presumptions about power are not always entirely correct.⁸⁰ If it were accepted that masculinity can be conceptualised across a range of bodies, practices and identities,⁸¹ men would cease to be perceived as villains and the issues faced by them would acquire the recognition they deserve.

2.3. Conclusions

It could be inferred from the discussion of the feminist theories and of the concepts of femininity and masculinity presented *supra* that, notwithstanding the on-going contestation of prejudicial gender stereotypes, men continue to be presented in a negative light. The ensuing discussion of specific areas of law in which discrimination against men is believed to occur relates back to the notions analysed in this chapter, suggesting that these could be perceived as a factor that at least partially contributed to the current situation. Given the human rights framework to which this thesis is confined, the traditional perception of the sexes and the power relations between them upheld by, amongst others, radical feminists, might be seen as *contra* to the idea of gender equality. This is because gender, from the human rights perspective, is to be construed as a matter concerning both sexes as equal partners, deserving the same opportunities and safeguards.⁸² It is proffered that highlighting the oppositionality of genders does not contribute to the cause of achieving gender equality.

⁷⁸ G. Mosse, *supra* note 62, p. 5.

⁷⁹ *Ibid.*, pp. 12-3.

⁸⁰ R. Wiegman, *supra* note 27, p. 35.

⁸¹ *Ibid.*, p. 49.

⁸² United Nations Entity for Gender Equality and the Empowerment of Women, 'Concepts and definitions' <<http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>> visited on 4 April 2016.

The next chapter focuses on the portrayal of men in laws on sexual offences, which is believed to be an illustrative example of how discrimination against men can manifest itself in practice.

3. Sexual Violence

The previous chapter set out the ideological background for a discussion on the substantial legal issues faced by men in the field of sexual violence. The gender stereotypes perpetuated by either the radical feminists or the patriarchal society at large create an image of a dominant man who oppresses a submissive woman.¹ Moreover, the prevalent perception of masculinity does not allow a man to take on the role of a victim, as that would subvert the very core of what it means to be traditionally masculine.²

Considering that the law of sexual violence is an area where men are predominantly seen as aggressors and rarely as the injured parties,³ it could potentially be inferred that the rather negative conception of males is reflected therein. The author would like to stress that she acknowledges that women constitute the vast majority of victims of sexual violence and that their persecutors are mostly men.⁴ However, what the author would like to do in this chapter is to raise awareness on the shortcomings in laws on sexual violence which could potentially be seen as amounting to unfavourable treatment without objective and reasonable justification.

Both the idea of a man as a sufferer and of a woman as a villain will be discussed within the framework of two categories of sexual offences: rape and paedophilia. It is believed that these two areas offer a valuable illustration of how men can be placed at a disadvantage because of the sex they were born into.

3.1. Rape

3.1.1. Definition

When one thinks about rape, they most probably imagine a man as the perpetrator and a woman as his victim.⁵ Certain legal definitions of the crime perpetuate this image while others offer a broader interpretation which negates the gender stereotypes discussed in the previous chapter.

¹ R. Rowland and R. Klein, 'Radical Feminism: History, Politics, Action' in D. Bell and R. Klein (eds.), *Radically Speaking: Feminism Reclaimed* (Spinifex Press Pty Ltd, North Melbourne, 1996) pp. 11-2.

² P. Nathanson and K.K. Young, *Legalizing misandry: from public shame to systematic discrimination against men* (McGill-Queen's University Press, Québec, 2006) pp. 265-6.

³ J. N. Clark, 'A Crime of Identity: Rape and Its Neglected Victims', *13 Journal of Human Rights* (2014) p.152.

⁴ See, for example, J. Burn-Murdoch, '69,000 female, 9,000 male rape victims per year: get the full data', *The Guardian*, 11 January 2013 <<http://www.theguardian.com/news/datablog/2013/jan/11/male-female-rape-statistics-graphic>> visited on 26 January 2016.

⁵ M. Pittaro, 'Demystifying Female Perpetrated Sex Crimes Against Children', *19 Sexual Assault Report* (2015) p. 1.

The case law of the International Criminal Tribunal for the Former Yugoslavia and that of the International Criminal Tribunal for Rwanda considers the *actus reus* of rape to be the vaginal, anal or oral penetration by the penis or any other object.⁶ Such a definition is thus gender-neutral, allowing for men to be seen as victims, and women to be treated as perpetrators. It also acknowledges the possibility of same-sex rape, such as in *Ranko Cesic*, in which rape was established when two Muslim brothers were forced to perform fellatio on each other in the presence of others.⁷ The same approach was taken by the FBI when it redefined the definition of rape from “the carnal knowledge of a female, forcibly and against her will” to “[the] penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”⁸

Notwithstanding, some jurisdictions view rape in narrower terms. Section 1(a) of the English Sexual Offences Act 2003 limits the crime of rape to penile penetration of “the vagina, anus or mouth of another person.” If the penetration is performed with another object, including a different body part, the crime is categorised as “assault by penetration”.⁹ This conception of rape acknowledges that men can be the victims of rape,¹⁰ however, it does not encompass women in the category of perpetrators. Even though both rape and assault by penetration carry the same punishment – imprisonment for life¹¹ – it is submitted that confining rape to penetration by penis diminishes the social and moral implications of non-consensual penetration committed with another object.¹² Since rape is a violation of personal dignity inflicted for the purposes of, amongst others, intimidating, humiliating, or controlling the victim,¹³ its gravitas should not rest on what it was committed with.¹⁴ It seems unlikely that the physical or psychological harm inflicted upon the victim would differ depending on whether he or she was violated with a penis or a truncheon and thus it is believed that “[the] stigma of rape”¹⁵ should not be attached to men only. The state of the law in England could be seen as associating the ramifications of being dubbed a rapist with men only, consequently

⁶ UN Commission on Human Rights, ‘Working paper by Françoise Hampson on the criminalization, investigation and prosecution of acts of serious sexual violence’, E/CN.4/Sub.2/2004/12 (2004) p. 4.

⁷ ICTY, *Ranko Cesic* (IT-95-10/1), “Brcko”, Trial Chamber I, Sentencing judgement of 11 March 2004.

⁸ The United States Department of Justice, ‘An Updated Definition of Rape’, 6 January 2012 <<https://www.justice.gov/opa/blog/updated-definition-rape>> visited on 4 March 2016.

⁹ S. 2(1)(a) SOA 2003.

¹⁰ However, this only became the law in 1994 when anal penetration was included in the definition of rape – before that, only women could be raped. (J. N. Clark, *supra* note 3, p.152).

¹¹ Ss. 1(4) and 2(4) SOA 2003.

¹² UN Commission on Human Rights, *supra* note 6, p. 4.

¹³ *Ibid.*, pp. 5-6.

¹⁴ *Ibid.*, p. 4.

¹⁵ *Ibid.*, p. 6.

exonerating women from the moral blame accorded to male offenders. This approach could be perceived as mirroring the notion of essentialism heralded by radical feminists whereby biological differences between the sexes are used to define their respective entitlements and responsibilities.¹⁶ If this theory is applied in the context of rape, it is proffered that it could lead to perpetuating negative gender stereotypes basing on immutable characteristics of men. It is believed that including non-penile penetration in the definition of rape could lead to the acknowledgement of the severity of other acts involving penetration regardless of who commits these. Moreover, it would emphasise that the protection of personal dignity, as crucial as it is to the human rights cause,¹⁷ should apply to everyone equally. The supporters of the British approach claim that broadening the term rape to cover less grievous offences may lead to ‘inflating’ it, so that its severity is diminished and it no longer carries a special stigma.¹⁸ It is proffered that when delimiting what constitutes rape, one should be careful not to be over-inclusive, as the offence should continue to be perceived as particularly heinous. Nonetheless, especially in light of the fact that for instance ICTY sees rape as a crime which is not gender-specific,¹⁹ it is believed that the acts that cause the same harm and that only differ by the tool applied should not be placed in a separate category.

It is submitted, following the jurisprudence of the ICTY, that the notion of consent should be seen as the key element of rape,²⁰ as this approach could help to draw the attention to the core of rape, i.e. the violation of the victim’s personal dignity without making any gender-based differentiations.

3.1.2. Gender stereotypes and rape

Rape and gender stereotypes are intertwined. Throughout history, attitudes to rape reflected and strengthened women’s subordinate social position.²¹ Since the traditional patriarchal ideas on heterosexuality reinforce the view of women as passive and submissive to the will of sexually dominant men, sexual encounters resembling rape might seem to be authorised or at least commonly accepted.²² Women are supposed to acquiesce to the sexual demands of men and there seems to be no room for objecting (and when a woman does

¹⁶ R. Rowland and R. Klein, *supra* note 1, p. 32.

¹⁷ See, for example, the Preamble to Protocol 13 to the ECHR.

¹⁸ P. Nathanson and K.K. Young, *supra* note 2, p. 249.

¹⁹ See *supra* note 6.

²⁰ UN Commission on Human Rights, *supra* note 1, p. 7.

²¹ H. Reece, ‘Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?’, *Oxford Journal of Legal Studies* (2013) p. 2.

²² *Ibid.*, p. 21.

object, her ‘no’ is frequently not treated as genuine).²³ Such perceptions of male and female sexualities are socially constructed in line with the patriarchal vision of gender roles.²⁴

Such a view is shared by radical feminists who define rape as “the universal crime of men against women”.²⁵ This could be interpreted as a suggestion that men as a group are homogenous and thus all men are misconstrued as rapists. Moreover, this statement seems to indicate that rape can only be committed by a man on a woman. As was discussed *supra*, such an approach could lead to discrediting the experiences of male victims and female perpetrators of rape. What is more, radical feminists claim that, irrespective of the intentions of an individual man, all men contribute to upholding a rape culture in which women live in constant fear of being raped.²⁶ Even when a woman voluntarily submits to a man, she can still be perceived as a victim since her will is understood by radical feminists as being steered by the culture of socially construed femininity.²⁷ It is submitted that this stance, apart from depicting men in a bad light, could also be understood as going against the goal of feminists, i.e. empowering women, as it seems to portray them as incapable of making independent decisions.

Andrea Dworkin, also a radical feminist thinker, agreed with this position and claimed that all rapists, johns, wife-beaters, etc. represent the interests of all men, including the ones who do not abuse women in any way.²⁸ Such a statement not only reinforces the idea that all men are the same, but also demonstrates that men are always seen as guilty.²⁹ In analogy to what was suggested in the previous chapter,³⁰ automatically perceiving men as offenders solely because of their sex leads to a situation in which their right to be presumed innocent may be subverted.³¹

It is believed that Sexual Risk Orders issued in the United Kingdom could be seen as constituting an illustration of how this ‘presumption of male guilt’ works in practice. An SRO is a civil order issued by the magistrate at the request of police against an individual believed to pose a risk of harm. The order lasts for a minimum of two years and can be applied to any

²³ H. Reece, *supra* note 21, p. 19.

²⁴ See *supra* note 1.

²⁵ P. Nathanson and K.K. Young, *supra* note 2, p. 248.

²⁶ *Ibid.*

²⁷ *Ibid.*, pp. 250-1.

²⁸ *Ibid.*, pp. 259-260.

²⁹ *Ibid.*, p. 260.

³⁰ See section 2.1.1.

³¹ P. Nathanson and K.K. Young, *supra* note 2, p. 260 and 313.

individual above the age of criminal responsibility, i.e. 10 years of age.³² Two features of SROs are particularly relevant to the discussion of the presumption of guilt. Firstly, the act in itself does not have to be sexual in nature as long as it provides a reason to hold that the suspected offender will resort to sexual violence at some point. Secondly, no previous conviction is required in order to seek such an order.³³ What this denotes is that an innocent (at least in the eyes of the law) person can have a civil order issued against him without actual proof that he has committed a sexual offence within the meaning of the SOA. One could argue that the presumption of innocence applies to criminal proceedings³⁴ and that the SRO is a civil law measure, thus the relevant safeguards should not apply as stringently. Moreover, the rationale for these orders is the necessity to protect the public in the UK (including vulnerable adults and children) from harm from potential offenders.³⁵ Notwithstanding, it is submitted that this public interest should be carefully balanced against the interests of the individual who is to be affected by a measure as restrictive as the SRO. Considering that an SRO can go so far as to require a person to notify the police of a planned sexual encounter 24 hours before the act is to take place,³⁶ the right to private life, as understood under the ECHR,³⁷ of said individual could potentially be severely jeopardised. It is beyond the scope of this paper to conduct a full balancing exercise. Nonetheless, the author would like to signify that SROs could be seen as posing a risk of possible human rights infringements. Furthermore, considering that men as a group are more likely to be presumed to be sexual aggressors,³⁸ there exists a danger that decisions to issue SROs may disproportionately affect males. If no prior conviction is required and purely a reason to believe that a person may cause harm is sufficient,³⁹ then this reason could hypothetically be taken to be on some level dictated by prevalent gender stereotypes. If this were the case, then men could potentially be more at risk of receiving an SRO.

³² Home Office, 'Guidance on Part 2 of the Sexual Offences Act 2003', March 2015 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/442151/2015-07-03_FINAL_Guidance_Part_2_SOA_2003.pdf> visited on 10 March 2016, p. 42.

³³ Home Office, *supra* note 31, p. 42.

³⁴ See, for example, Art. 6(2) ECHR.

³⁵ See *supra* note 33.

³⁶ 'Man ordered to tell police if he plans to have sex', *BBC News*, 22 January 2016 <<http://www.bbc.com/news/uk-england-york-north-yorkshire-35385227>> visited on 9 March 2016.

³⁷ U. Kil Kelly, 'The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights', *Council of Europe*, 2001.

³⁸ A. Brenner, 'Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape', 36 *Harvard Journal of Law & Gender* (2013) p. 518.

³⁹ See *supra* note 31.

3.1.3. Men as victims

The discussion above could be understood as an indication that men are more likely to be perceived as sexual offenders than women are. However, despite the fact that women constitute a vast majority of victims of rape,⁴⁰ this crime can also be committed against men. Taking the United States as an example, between 1995 and 2010, 9% of rape and sexual assault victims were men. 3% of all American men have experienced a completed or attempted rape.⁴¹ Even though these numbers are significantly smaller than for women, they still do indicate that there are many male casualties. Male rape, however, as is the case with other forms of gender-based treatment, is rarely acknowledged.⁴²

One reason is that male rape as a phenomenon is not treated as an issue of a severity comparable to that of female rape.⁴³ For instance, it was only given legal recognition in the United Kingdom in 1994 when anal penetration was added to the definition of rape. Hitherto, the approach to anal penetration with a penis depended on the sex of the victim, so that non-consensual buggery of a female resulted in a maximum sentence of 25 years of prison, while the same act performed on a male carried a maximum sentence of 10 years. Such a difference could be seen as indicative of according male personal integrity a lesser value than that of a woman⁴⁴ and might point to a discriminatory treatment of men within the system of criminal law of the United Kingdom.

Another reason is that the stigma attached to male rape is much greater, since the crime strikes at the very core of the victim's masculine self.⁴⁵ As such, male rape may be dubbed a crime of identity, in that it strips men of their status as a male. It not only violates a man's body, it also perverts the societal assumptions of what being a man denotes. The traditional perception of manhood and the notion of rape are rendered mutually exclusive to a point where the idea of male rape is barely ever publicly mentioned.⁴⁶ Gender norms tell us that a 'real man' is the protector of the society. When he is raped, he is rendered unfit for that role, since he is unable to protect himself, not to mention others.⁴⁷ In order to prevent them from being exposed to public ridicule and to losing their societal position, men are taught to ignore their suffering and to be 'tough'. They should minimise the effect that rape has on

⁴⁰ See *supra* note 4.

⁴¹ 'Who are the victims?', *RAINN* <<https://rainn.org/get-information/statistics/sexual-assault-victims>> visited on 26 January 2016.

⁴² P. Nathanson and K.K. Young, *supra* note 2, pp. 265-6.

⁴³ J. N. Clark, *supra* note 3, p.152.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 153.

⁴⁶ *Ibid.*, pp. 150-1.

⁴⁷ *Ibid.*, p. 156.

them and never complain. In the best case scenario, this may result in a loss of sense of self-worth,⁴⁸ and, in the worst, death as a result of physical trauma or suicide.⁴⁹ Consequently, it could be understood that discrediting the experiences of male victims of rape on the one hand reinforces the prejudicial gender stereotypes and, on the other, deprives men of the seemingly innate right to be and feel hurt.

Male rape is particularly widespread in the context of war. The conflicts in Bosnia and Herzegovina, Rwanda or Congo in the last decade of the 20th century drew public attention to the use of rape as a weapon of war.⁵⁰ The ICTY stated in 1993 that, when committed during an armed conflict and against a civilian population, rape constitutes a crime against humanity.⁵¹ As such, it was mostly perceived as a crime committed against women.⁵² Even the United Nations Security Council, when discussing sexual violence in armed conflict, focused exclusively on female victims, barely acknowledging that men can also be victimised.⁵³ It is believed that this approach could be seen as not only downgrading the experiences of those men affected, but also as dismissive of the actual extent of sexual aggression against men. Research conducted in eastern Congo in the first decade of the 21st century shows that 23.6% of men surveyed have experienced sexual violence.⁵⁴ What they are presented with is truly horrific: they are forced to perform oral sex on a number of soldiers; they must drag rocks tied to their genitals; and they are repeatedly raped in their anuses, mouths, or even ears. They are also frequently compelled to carry out sexual acts on their relatives in the presence of soldiers or to watch their loved ones being raped.⁵⁵

It is believed that such heinous violations of a human person should not go unnoticed. Nonetheless, the reason why they often do is the stigma connected to rape, which is even more acute in the context of war. Being stripped of their masculinity by means of rape makes men no longer suitable to fulfil their role of guardians of their people.⁵⁶ As was stated above, if they are unable to protect themselves, it seems likely that they will not be able to defend others. What is more, where patriarchy and hetero-normativity still hold strong, men who are

⁴⁸ P. Nathanson and K.K. Young, *supra* note 2, p. 266.

⁴⁹ J. N. Clark, *supra* note 3, p.156.

⁵⁰ *Ibid.*, p. 146.

⁵¹ 'Background Information on Sexual Violence used as a Tool of War', *United Nations*

<<http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml>> visited on 17 March 2016.

⁵² See, for example, *supra* note 51, in which the sole emphasis is placed on rape of women, while nothing is said about male victims.

⁵³ J. N. Clark, *supra* note 3, p.152.

⁵⁴ *Ibid.*, pp.151-2.

⁵⁵ W. Storr, 'The rape of men: the darkest secret of war', *The Guardian*, 17 July 2011

<<http://www.theguardian.com/society/2011/jul/17/the-rape-of-men>> visited on 26 January 2016.

⁵⁶ J. N. Clark, *supra* note 3, p.151.

raped by other men may interpret their experiences as homosexual encounters, casting doubts on their own sexual identity.⁵⁷ Especially if the victim had an erection or ejaculated, he may start questioning his sexual preferences, which in countries like Uganda, where same-sex sexual acts are legally banned, may prove particularly problematic. Questions like “were you aroused?” may be posed to male victims (which would never happen to female victims), to revert the blame from the perpetrator to the victim.⁵⁸ Thus, if a man admits to having been raped by another man, not only is his masculinity shattered, but he also risks being charged with a criminal offence. Moreover, there are no special places where they can seek the help they need. While, for instance, Congo has centres which offer medical care for female rape survivors,⁵⁹ no equivalents for men exist. In fact, there is only one centre in the world which helps male victims of rape only, located in Sweden.⁶⁰

The discussion above aims to indicate that the approach to rape may be interpreted as placing men in a disadvantageous position, either because they are more likely to be perceived as perpetrators, or because their victimhood may be denied, for example. It is believed that such a situation could be seen as a manifestation of discrimination of men, in that it would seem that there is no objective or reasonable justification for the treatment men are subjected to other than their sex. It is proffered that raising awareness on different forms of rape could constitute a step towards ameliorating the situation of men in this area. Moreover, accepting male rape as an actual phenomenon could potentially push forward the move towards actual gender equality, as being a woman would cease to be equated with being a victim or with being weak.⁶¹

3.2. Paedophilia

Much of what was discussed above in relation to rape could also be applied to sexual offences committed against children. The gender norms underlying our society perpetuate the view that child abuse is perpetrated almost exclusively by men, while women are not capable of harming a child.⁶² This view could be interpreted as reinforcing the negative perception of men discussed *supra* and might potentially lead to their differential treatment.

⁵⁷ J. N. Clark, *supra* note 3, p.150.

⁵⁸ S. LeTrent, ‘Against his will: Female-on-male rape’, *CNN*, 9 October 2013

<<http://edition.cnn.com/2013/10/09/living/chris-brown-female-on-male-rape/>> visited on 26 January 2016.

⁵⁹ J. N. Clark, *supra* note 3, p.148.

⁶⁰ M. Savage, ‘Sweden opens world’s first male rape centre’, *The Local*, 15 October 2015

<<http://www.thelocal.se/20151015/sweden-opens-worlds-first-male-rape-centre>> visited on 26 January 2016.

⁶¹ W. Storr, *supra* note 34.

⁶² M. Pittaro, *supra* note 5, p. 1.

Scientifically speaking, paedophilia is a feature of a person in which they feel sexual attraction to prepubescent, pubescent and adolescent people.⁶³ It encompasses a range of behaviours from exhibitionism to acts involving penetration.⁶⁴ Some view paedophilia as a form of addiction similar to alcoholism, in which paedophiles are unable to contain their sexuality in a manner analogous to how people without paedophilic proclivities can abstain from having sex with other adults.⁶⁵

There is no legal definition of paedophilia and as such it does not constitute a legal term. Moreover, it is not illegal to be sexually attracted to children as such – what is criminalised is acting upon one’s inclinations and thus committing one of the “child sex offences”.⁶⁶ Taking the United Kingdom’s criminal law as an example, these offences can include sexual grooming, causing a child to witness a sexual act, or engaging in a sexual activity with a child.⁶⁷ These can be committed by both men and women (if penetration occurs, it can be performed with a penis or any other object), however, a separate offence of “rape of a child under 13” is, similar to a rape perpetrated on a person above the age of consent, limited to penetration with a penis.⁶⁸ This could, once again, be seen as creating a situation in which the highest stigma can only be attached to men solely because of their physiology.

Whether this approach to rape of a minor reflects the prevalent gender norms or whether it corresponds to evidence that most paedophiles are actually male, it might nonetheless be understood as detrimental to men. Conceptualisation of a single man at a playground as a child sex abuser constitutes one of the generalisations that the author believes are commonly made. The public has developed instincts by which they perceive men as sex offenders even when they engage in genuinely innocent activities. Therefore, a father photographing his own child in the park may be viewed as dubious if other children can be captured in the frame.⁶⁹ For those men who are truly innocent, this creates a constant fear of being branded a paedophile, which may result in withdrawing from certain activities so as not

⁶³ D. Hawitt, ‘Paedophilia Prevention and the Law’ in K. Moss and M. Stephens (eds.), *Crime Reduction and the Law* (Routledge, London, 2006) p. 114.

⁶⁴ P. Dunaigre, ‘Paedophilia’, *UNESCO*, 19 January 1999 <<http://unesdoc.unesco.org/images/0011/001147/114746Eo.pdf>> visited on 7 March 2016, p. 4.

⁶⁵ D. Hawitt, *supra* note 41, pp. 115 and 117.

⁶⁶ *Ibid.*, p. 114.

⁶⁷ Ss. 9-15 SOA 2003.

⁶⁸ S. 5 SOA 2003.

⁶⁹ M. Daubney, ‘No, men are not all potential paedophiles’, *The Telegraph*, 5 March 2014 <<http://www.telegraph.co.uk/men/thinking-man/10669864/No-men-are-not-all-potential-paedophiles.html>> visited on 4 March 2016.

to raise suspicions.⁷⁰ What is more, according to researchers from the University of Nottingham and University of Bedfordshire, the rates of employment of women are still significantly higher in certain professions due to the ubiquitous image of a male paedophile.⁷¹

It is assumed that the previously mentioned SROs could be perceived as an illustration of how men may hypothetically be placed in a disadvantaged position, this time in the context of paedophilia. Considering that an SRO can be used to protect children irrespective of whether any of the offences under the SOA have been established, the decisions about who should be targeted by these lie at the discretion of law enforcement bodies.⁷² If it is accepted that prejudicial gender stereotypes may to some extent influence the decisions to issue an SRO, then this could theoretically result in less scrutiny when instituting an order against a man than against a woman. It could be speculated that the starting point for men would be the assumption of their guilt, while women would be held innocent until proven otherwise.

3.2.1. Female abusers

Contrary to the common view,⁷³ women can sexually abuse both adults and children. Women commit many of the same acts that men do, and present their victims with analogous patterns of abuse to which a male counterpart would subject them. What is more, significant numbers of female perpetrators are found amongst teachers and babysitters,⁷⁴ i.e. the professions dominated by them, paradoxically because of the fear of allowing male paedophiles easy access to children.⁷⁵

Overall, female offenders constitute 1%-5% of known sexual perpetrators.⁷⁶ However, these numbers may in reality be much higher because of the lack of acknowledgement of these offences taking place. Gender stereotypes portraying women as sexually passive, nurturing and caring, make it conceptually difficult to conceive them as sexual predators, especially as such which target children.⁷⁷ This stereotypical outlook on femininity results in a trend to revert at least some of the blame from women (and often to transfer it onto men). A commonplace way of thinking about female sexual offenders is that either they were coerced by men,⁷⁸ or that they only do such because they were victims themselves.⁷⁹ Even though this

⁷⁰ M. Daubney, *supra* note 69.

⁷¹ *Ibid.*

⁷² Home Office, *supra* note 20, p. 44.

⁷³ M. Pittaro, *supra* note 5.

⁷⁴ P. Nathanson and K.K. Young, *supra* note 2, p. 257.

⁷⁵ M. Daubney, *supra* note 69.

⁷⁶ M. Pittaro, *supra* note 5.

⁷⁷ *Ibid.*, pp. 10-11.

⁷⁸ *Ibid.*, p. 1.

stance holds true in a number of instances, it is submitted that it ought not be taken for granted, as this may lead to the exoneration of women, to the detriment of men.⁸⁰ The same argument applies to perceiving sexual offences against children committed by women as less emotionally traumatic and dangerous to the victims.⁸¹ Quite to the contrary, if a woman perpetrates such acts, it may be even more deleterious for her victims, since she is supposed to be their emotionally supportive defender.⁸² Since a male perpetrator is not perceived as such, it may be less surprising that he would commit the offence. Moreover, considering that women are ‘inherently submissive and good-natured’, they are more likely to be treated more leniently in courts. They are viewed as more amenable to treatment and thus their sentences do not have to be as long or as severe as those imposed on men.⁸³ Once again, such stereotyping could be understood as categorising all men and all women as the same,⁸⁴ which might be interpreted as constituting a subversion of gender equality and a cause of unfavourable treatment of men and women alike.

3.3. Conclusions

The discussion above could indicate that focusing on the gender of the perpetrator or the victim may subvert the human rights notion of equality, in that one gender may be viewed differently to the other in the eyes of the law. It is believed that all sexual offences are heinous, no matter whether committed by a man or by a woman, and that presuming that men are more likely to offend may in some circumstances prove arbitrary.

The next chapter will make reference to the notions developed hitherto in order to illustrate the differences in treatment between men and women in the context of private and family life.

⁷⁹ M. Pittaro, *supra* note 5, p. 2.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, p. 1.

⁸² *Ibid.*, p. 9.

⁸³ *Ibid.*, p. 10.

⁸⁴ G. Mosse, *The Image of Man: The Creation of Modern Masculinity* (Oxford University Press, Oxford, 1996) p. 6.

4. Private and Family Life

The concept of private and family life covers a vast array of issues and areas connected to a person's life. According to the European Court of Human Rights, the notion of private life, as protected under Article 8 ECHR, cannot be defined in an exhaustive manner and concerns an area in which an individual can freely fulfil and develop his personality. As such, it is not only limited to the notion of privacy.¹ Family life, on the other hand, encompasses a wide range of relationships in which the parties are bound by close personal ties.²

In relation to the topic of this paper, the field of private and family life can be seen as covering numerous instances in which men find themselves at a disadvantage in relation to their female counterparts. From the preferential treatment of mothers in custody disputes³ to allocating educational subsidies to children of female employees only,⁴ it is believed that men could be seen as discriminated on the grounds of their sex. It goes beyond the scope of this thesis to enumerate and analyse all the examples of this unfavourable treatment. Therefore, the focus will be placed on two issues: family planning and raising children, and male circumcision.

4.1. Family planning and raising children

The ECtHR has frequently emphasised that certain aspects of an individual's life or identity are so crucial as to require protection under Article 8 ECHR.⁵ One such aspect is the decision to become or not to become a parent (whether genetic or otherwise).⁶ Moreover, whenever an issue of such gravitas is concerned, the margin of appreciation accorded to a state will be restricted.⁷ What this denotes is that one should be able to freely and without any interference resolve that he or she wants or, to the contrary, does not want to have a child. It is believed that both resolutions have a significant impact on the individual's life – they may affect, amongst others, one's budget, employment, leisure, or personal relations. Bearing this

¹ U. Kilkelly, 'The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights', *Council of Europe*, 2001.
<[http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01\(2003\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01(2003).pdf)> visited on 12 April 2016, p. 13.

² *Ibid.*, p. 18.

³ P. Nathanson and K.K. Young, *Legalizing misandry: from public shame to systematic discrimination against men* (McGill-Queen's University Press, Québec, 2006), p. 126.

⁴ See CJEU, *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* (Case C-476/99) [2002] ECR I-2891.

⁵ ECtHR, *Dickson v United Kingdom*, Application No. 44362/04, Judgment on 4 December 2007, para. 78.

⁶ ECtHR, *Evans v United Kingdom*, Application No. 6339/05, Judgment on 10 April 2007, paras 71-72.

⁷ See *supra* note 5.

in mind, it would seem all the more pressing that such decisions are not imposed or in any way externally influenced.

The case law of the ECtHR on the decisions to become a parent relate to both men and women.⁸ However, certain issues which are intrinsically connected to the subject of family planning, such as abortion, seem to be perceived as concerning women only. Before the discussion of the topic is presented, the author would like to clarify that her attitude towards abortion entirely conforms to that adopted by international and regional human rights organisations in that the decision to abort is vested solely in the woman. It is her human right and she cannot be pressured by anyone while exercising it.⁹ There are, however, certain movements, such as The Choice for Men, that call for inclusion of men in the abortion process.¹⁰ According to them, men should not be able to coerce women into undergoing abortions, as that would be both legally and morally reproachful, but the law should provide them with a possibility to renounce their commitments towards a child they do not want. This should be attainable within a confined period after conception and would be equivocal with surrendering any parental rights to said child.¹¹ The proponents of increasing the scope of men's reproductive rights claim that such a legal possibility would be a solution to a range of moral issues stemming from excluding men from abortion decisions. Being a father carries with it a range of duties which should not be imposed on anyone against their will.¹² Philosopher John Hardwig stresses the importance of a man's informed consent to become a father and alleges that if men became more involved in abortions, it would actually decrease their overall number.¹³ The reason for this would be that acknowledging the role of men would lead to a more open discussion about family planning and a more responsible approach thereto. Both men and women would become more receptive to their respective views and feelings connected to parenthood. This, according to Hardwig, would make the role of a father more meaningful and, by disposing of the perception that raising children is woman's work, would contribute to eliminating patriarchy.¹⁴

The view presented above could be perceived as rather radical from the perspective of human rights. Notwithstanding, it can be seen to shed light on the fact that men are omitted from the discussion of abortion, even though the Parliamentary Assembly of the Council of

⁸ For instance, both *Evans* and *Dickson* consider the issues faced by both the prospective father and the mother.

⁹ See the Parliamentary Assembly of the Council of Europe Resolution 1607 (2008) on "Access to safe and legal abortion in Europe".

¹⁰ J. Hardwig, 'Men and abortion decisions', *Hastings Center Report* (2015) p. 44.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, p. 42.

¹⁴ *Ibid.*, pp. 44-45.

Europe stressed that the matters of reproductive health ought no longer to be seen solely as “women’s issues”.¹⁵ Increased communication between partners is encouraged in order to build a stable family unit within which the child can happily grow up.¹⁶ It is believed that, while abortion rights should remain vested in women, it is possible that putting an emphasis on the significance of fatherhood could potentially further the promotion of gender equality as defined at the beginning of this paper.¹⁷ Given that being a parent has traditionally not been considered an essential facet of the masculine gender role and yearning for offspring has been associated predominantly with women,¹⁸ inviting men to actively participate in family planning and in the consequent upbringing of children could prove helpful in erasing the long-standing gender stereotypes. Moreover, the Preamble of the Convention on the Rights of the Child states that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment”.¹⁹ This assertion, or for that matter the rest of the convention, does not emphasise the role of the mother as superior to that of the father – what is important is that a child can feel loved and understood. This could be interpreted as an indication that men can be as capable of providing a child with such emotional support as women are and thus, in line with the premise of the CRC, the best interest of the child should take precedence over any uncertainties surrounding gender roles.

Notwithstanding, state agencies appear to be focusing their attention on the problems of mothers, seeing them as their primary concern, while fathers are often vilified and seen as “forced suppliers”.²⁰ Such an approach could be understood as reinforcing the generalised view, according to which fathers play a marginal role within the family unit and their contribution to the upbringing of their children is limited to the provision of financial security. It is believed that certain laws on custody could potentially be seen as reflecting this stance. Before the Industrial Revolution took place, judges in the UK were to award custody of children under 7 to mothers and of children above that age to fathers, according to the ‘tender years doctrine’.²¹ This principle was based on the idea that women, being more nurturing and sensitive, could provide children with the emotional support they needed when they were very young. Once they got older, they required more discipline and firmness, which were seen as

¹⁵ Parliamentary Assembly of the Council of Europe Resolution 1394 (2004) on “The involvement of men, especially young men, in reproductive health”, para. 3.

¹⁶ PACE Resolution 1394, *supra* note 10, para. 6.

¹⁷ See section 1.2.

¹⁸ A.J. Rijken and E. Merz, ‘Double Standards: Differences in Norms on Voluntary Childlessness for Men and Women’, 30 *European Sociological Review* (2014) p. 472.

¹⁹ Convention on the Rights of the Child 1989.

²⁰ P. Nathanson and K.K. Young, *supra* note 3, p. 125.

²¹ *Ibid.*, p. 126.

the domains of the father. A possible interpretation of the implications of the ‘tender years doctrine’ is that a man’s presence during the first years of a child’s life may be less crucial than that of a woman. The subsequent developments in family law may appear to further reinforce this view, giving preference to mothers not only at the earliest stages of life but throughout the whole childhood of their offspring.²² Even though there is now a move towards joint or shared custody, men still seem to be perceived as less able to provide their children with adequate care.²³ The opponents of awarding men custody claim that men have no actual interest in children but want to use them in order to control their ex-spouses. These men can also be perceived as prone to violence and perversion.²⁴

It is believed that there are men who do not possess paternal instincts, just like there are women with no maternal instinct. However, generalising and stereotyping could lead to undesirable results. Gender expectations and the prevailing conceptions of masculinity can in fact make the experiences associated with divorce and the consequent battle for custody more difficult for men.²⁵ As was discussed *supra*, men are supposed to be strong²⁶ which may create an expectation that they should not show their weaknesses. As a result, men might be forced to suffer in silence, which could in turn lead to mental health issues.²⁷

4.2. Male circumcision

Another aspect within the area of private and family life which could be seen as a demonstration of how men are subject to discrimination is male circumcision. However, before we begin to analyse this phenomenon, some light will be shed on a similar procedure carried out on women – female genital mutilation.

4.2.1. Female genital mutilation

Female genital mutilation was formerly referred to as ‘female circumcision’. This term was departed from in order to emphasise the gravity of the injuries inflicted upon the girls subjected to it.²⁸ Notwithstanding, for the purposes of this paper, a parallel shall be drawn

²² P. Nathanson and K.K. Young, *supra* note 3, p. 126.

²³ A. Z. Melamed, ‘DADDY WARRIORS: The Battle To Equalize Paternity Leave In The United States By Breaking Gender Stereotypes: A Fourteenth Amendment Equal Protection Analysis’, 21(1) *UCLA Women’s Law Journal* (2014) p. 55.

²⁴ P. Nathanson and K.K. Young, *supra* note 3, p. 127.

²⁵ *Ibid.*, p. 134.

²⁶ See, for example, G. Mosse, *The Image of Man: The Creation of Modern Masculinity* (Oxford University Press, Oxford, 1996) p. 4.

²⁷ P. Nathanson and K.K. Young, *supra* note 3, p. 134.

²⁸ P. D. Mitchum, ‘Slapping the hand of cultural relativism: female genital mutilation, male dominance, and health as a human rights framework’, 19 *William & Mary Journal of Women and the Law* (2013) p. 597.

between FGM and male circumcision in order to illustrate the differences in perception of the two by the law and by society at large. It is believed that even though the severity of the consequences of FGM is usually greater than that of male circumcision, the latter might also be potentially seen as a violation of human rights.

FGM is an umbrella term covering a range of surgical procedures involving “partial or total removal of the female external genitalia, including the clitoris, labia, mons pubis (the fatty tissue over the pubic bone), and the urethral and vaginal openings.”²⁹ The World Health Organisation recognised 4 types of FGM, differing from one another in the extent of mutilation. The first type, clitoridectomy, is the closest equivalent to male circumcision in that its mildest form consists in the removal of the prepuce only.³⁰ The practice has been treated by certain communities as a rite of passage into adulthood,³¹ as a religious precept (even though none of the religious books, including the Koran, make any mention of this whatsoever),³² or even as a psychosexual instrument used to curb women’s libido so that it would match that of their husbands when they get older.³³

FGM is often performed in unhygienic conditions, using the same tools for a number of surgeries. Therefore, the procedure can cause a range of complications, such as maternal deaths, contraction of HIV, grave infections, or sexual health problems, to name but a few. Moreover, it results in serious mental health issues, some of which may never be fully resolved.³⁴ As such, FGM is treated as a deprivation of bodily integrity, the right to which is often portrayed as one of the oldest fundamental human rights.³⁵ It has been condemned as a harmful practice by the CRC and CEDAW Committees³⁶ and has been criminalised in a number of countries, including the United States, where the crime carries a punishment of a fine and/or imprisonment for up to 5 years.³⁷

The discussion on FGM has not remained confined to the legal and political spheres. The topic has been raised in popular culture for instance by means of films such as *Desert*

²⁹ P. D. Mitchum, *supra* note 19, p. 590.

³⁰ *Ibid.*, p. 591.

³¹ *Ibid.*, p. 590.

³² *Ibid.*, p. 593.

³³ *Ibid.*, p. 595.

³⁴ *Ibid.*, p. 592.

³⁵ *Ibid.*, p. 586.

³⁶ Committee on the Elimination of Discrimination against Women and Committee on The Rights of the Child, ‘Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 on harmful practices’, 14 November 2014 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FGC%2F31%2FCRC%2FC%2FGC%2F18&Lang=en> visited on 7 April 2016, pp. 6-7.

³⁷ P. D. Mitchum, *supra* note 19, p. 590.

*Flower*³⁸ which told the story of a model-turned-human rights activist Waris Dirie who was subjected to FGM as a young girl.

Such publicity and express prohibition of the practice in national legislations could be perceived as reinforcing the negative view of FGM. Moreover, it could indicate that even though the custom is still widespread, there is a strong pressure to eradicate it. The arguments presented *infra* may, on the other hand, suggest that such pressure is negligible as far as male circumcision is concerned.

4.2.2. Male circumcision

In 2010, the ECtHR hinted that male circumcision could be harmful to the well-being of Muslim and Jewish believers.³⁹ This has hitherto been the only express indication made by this Court that the practice may constitute a human rights violation. Albeit only an *obiter dictum*, this suggestion could be interpreted as a sign that the international community is open to changing their opinion on the practice.

“Male circumcision is removal of part or all of the penile prepuce (foreskin).”⁴⁰ It can be performed to treat or prevent certain medical conditions, for aesthetic reasons and as a religious precept⁴¹ (this section will focus solely on the latter form of male circumcision). The proponents of the practice stress that it is seen by those communities which perform it as a form of psychosocial indication, i.e. “a positive and allegedly indispensable function for the child’s initiation into a certain religious community”.⁴² As such, it could be seen as playing the same role as FGM does for girls.⁴³ Moreover, male circumcision is a religious rule in Islam, where it forms part of the source of Islamic law, Sunna, and is treated as a confirmation of religious affiliation (it does not, however, create it). In Judaism, male circumcision is conceived as a ritual indispensable for establishing one’s membership in the community and has its origins in the Torah itself.⁴⁴

Given the importance of male circumcision to the religions mentioned above, a discussion of whether it should be deemed a human rights violation has to be balanced against

³⁸ S. Hormann, *Desert Flower*, 2009.

³⁹ ECtHR, *Jehovah’s Witnesses of Moscow and Others v Russia*, Application No. 302/02, Judgment on 18 August 2010, para 144.

⁴⁰ A. J. Jacobs and K. S. Arora, ‘Ritual male infant circumcision and Human Rights’, 15(2) *The American Journal of Bioethics* (2015) p. 30.

⁴¹ *Ibid.*

⁴² R. Merkel and H. Putzke, ‘After Cologne: male circumcision and the law. Parental right, religious liberty or criminal assault?’, 39 *Journal of Medical Ethics* (2013) p. 445.

⁴³ See *supra* note 31.

⁴⁴ R. Merkel and H. Putzke, *supra* note 42, p. 446.

the cultural and traditional value which it carries for those practising it. As such, and in analogy to FGM,⁴⁵ male circumcision can be seen as a manifestation of the conflict between cultural relativism and the universality of human rights. It is within each community's rights to decide for themselves which denomination they wish to profess and which rites they choose to engage in. However, male circumcision performed on infant boys carries with it consequences that can make it more than just a religious rite.⁴⁶ Those opposing male infant circumcision claim that the procedure causes significant bodily harm which leaves an irreversible mark on the child's body. Especially in Judaism, circumcision is often performed without effective anaesthesia⁴⁷ and is thus very painful. Moreover, it may lead to impairment of urinary, sexual, or reproductive function⁴⁸ and may deprive the person of genital sensitivity.⁴⁹ Consequently, many medical organisations, such as the American Medical Association or the Finnish Union of Medical Doctors have expressed their disapproval of performing the procedure in the absence of medical necessity.⁵⁰

Apart from the physical consequences of non-medical circumcision of infants, its critics also hold that it constitutes a breach of human rights. A German court stated in 2012 that this procedure violates "a child's fundamental right to bodily integrity"⁵¹ and thus goes against the rights enshrined in international and regional human rights instruments. One of such instruments is the CRC, which prescribes in Article 24(3) that traditional practices which are detrimental to a child's health should be abolished. Given the negative repercussions of the procedure and the fact that FGM, even in its mildest forms which could be treated as analogous to male circumcision, is considered to be a harmful practice, it is proffered that male infant circumcision could potentially also be seen as such. Furthermore, the CRC stipulates that the child should be able to enjoy his freedom of expression (Article 12) and freedom of religion (Article 14). As such, he should in principle be able to decide by himself which religion he wants to be affiliated with and which customs he wishes to perpetuate. It is true that it is commonly accepted that the parents are entitled to raise their children in accordance with the religion they profess,⁵² notwithstanding, a procedure which is irrevocable

⁴⁵ P. D. Mitchum, *supra* note 19, p. 587.

⁴⁶ R. Merkel and H. Putzke, *supra* note 32, p. 447.

⁴⁷ *Ibid.*, p. 445.

⁴⁸ A. J. Jacobs and K. S. Arora, *supra* note 40, p. 30.

⁴⁹ R. Merkel and H. Putzke, *supra* note 32, p. 445.

⁵⁰ J. S. Svoboda, 'Circumcision of male infants as a human rights violation', 39 *Journal of Medical Ethics* (2013) p. 469.

⁵¹ A. J. Jacobs and K. S. Arora, *supra* note 40, p. 33.

⁵² R. Merkel and H. Putzke, *supra* note 32, p. 446.

and which leaves a permanent mark on one's body can be seen as foreclosing the future choices of the child.⁵³

This brings us back to the clash between cultural relativism and the universalism of human rights. The possibility to perform a rite that has been practiced for centuries and is of the utmost importance to certain communities is weighed against, amongst others, a child's right to bodily integrity and to make free choices regarding his religious affiliation. Darby suggests that there is a way in which these two competing interests can be reconciled. Instead of conducting the procedure on an infant, it could be delayed until adulthood or until such time as free and informed consent can be given by the person affected.⁵⁴ Such a solution could be perceived as protecting the child's human rights and would not require any of the parents' own basic rights to be renounced.⁵⁵ Moreover, this approach could prove helpful in avoiding any assessment of the value of the custom, i.e. no determination would have to be made regarding whether it is morally or ethically right or wrong. It is believed that as such this approach could be seen as showing respect towards religion, while at the same time allowing for individual rights to be protected.

If Darby's proposal is not followed and cultural relativism takes precedence over the universality of human rights, this could potentially lead to a situation in which men are subject to discrimination. All forms of FGM, even the least invasive ones, are deemed to constitute breaches of human rights and those subjected to it can often rely on criminal law in order to obtain justice and compensation. At the same time, a comparable practice carried out on infant boys is widely tolerated and even encouraged.⁵⁶ Analysis of the arguments in favour of FGM and male circumcision could suggest that they are predominantly the same or at least very similar. What can be seen as different, however, is the way in which these have been discarded in relation to FGM but are still accepted as far as male circumcision is concerned. It is submitted that this may be interpreted as an example of how, through giving legal protection solely to women, men in an analogous situation are discriminated against on the grounds of their sex.

4.3. Conclusions

The discussion above aims to indicate that men can suffer discrimination in the context of family and private life. While the negative gender stereotypes may influence the

⁵³ A. J. Jacobs and K. S. Arora, *supra* note 40, p. 34.

⁵⁴ *Ibid.*, p. 34.

⁵⁵ R. Merkel and H. Putzke, *supra* note 32, p. 444.

⁵⁶ J. S. Svoboda, *supra* note 39, pp. 471-2.

perception of men as fathers, certain laws and practices protective of women are not available for men, which could be seen as leaving them more vulnerable than their female counterparts.

The next chapter explores how the law may be interpreted as favouring women in the context of employment.

5. Employment

As the previous chapters tried to suggest, men can suffer discrimination on the grounds of their sex in a similar way to their female counterparts. It could very often be the case that the reason why men are treated unfavourably is because of the prevalent gender stereotypes. Their existence is inevitable since stereotyping forms a part of normal cognitive processes and allows people to save resources by creating easily recognisable categories.¹ Notwithstanding, it is believed that basing one's outlook on stereotypes which are too deeply rooted may yield detrimental outcomes. They could be seen as one of the reasons why women have for centuries been assigned the roles of subdued housewives, while men, with their dominant traits, have traditionally been the power-yielding breadwinners.² This could be perceived as the reason for a situation in which, on the one hand, women have been under-represented in the workforce,³ while, on the other hand, fatherhood has become inconsequential as far as male identity is concerned.⁴

Affirmative action and paternity leave will be analysed below in light of the societal conceptions of men and women presented above and in the previous chapters. The discussion of these two notions will serve as examples of how discrimination of men can manifest itself in the field of employment.

5.1. Affirmative action

The concept of gender, as was explained *supra*, is a broad one which encompasses, amongst others, both women and men.⁵ Notwithstanding, in the legal discourse on gender, the concept has predominantly been used in relation to females and has thus become largely gyno-centric.⁶ A fitting illustration thereof is so-called 'gender sensitivity' seminars offered by the National Justice Institute in Canada for future judges which focus entirely on problems

¹ M. Bursell, 'The Multiple Burdens of Foreign-Named Men: Evidence from a Field Experiment on Ethnic Gendered Hiring Discrimination in Sweden', 30 *European Sociological Review* (2014) p. 400.

² See, for example, *supra* notes 21-26 in section 2.1.1.

³ See, for example, J. E. Kellough, *Understanding Affirmative Action; Politics, Discrimination and the Search for Justice* (Georgetown University Press, Washington D.C., 2006) p. 76.

⁴ A.J. Rijken and E. Merz, 'Double Standards: Differences in Norms on Voluntary Childlessness for Men and Women', 30 *European Sociological Review* (2014) p. 472.

⁵ See *supra* note 9 in section 1.2.

⁶ P. Nathanson and K.K. Young, *Legalizing misandry: from public shame to systematic discrimination against men* (McGill-Queen's University Press, Québec, 2006) p. 413.

faced by women.⁷ It is believed that affirmative action could be perceived as another instance of gyno-centrism.

Broadly speaking, affirmative action is a range of efforts aimed at benefitting members of groups, mostly ethnic and racial minorities as well as women, who “have been historically disadvantaged because of discrimination”.⁸ It covers determining objectives for the selection of persons from underrepresented groups alongside recruitment and outreach endeavours.⁹ The EA 2010, mentioned *supra* as an example of national anti-discrimination legislation, dubs such efforts as ‘positive action’ and prescribes that actions aimed at overcoming or minimising disadvantages faced by people possessing certain ‘protected characteristics’ shall be allowed as long as they are not prohibited by any other part of that statute.¹⁰

Given that affirmative action encompasses actions that could in other circumstances be categorised as discriminatory, strict legal limits were imposed on the practice to make sure that it does not go beyond what is reasonable and proportionate.¹¹ First of all, affirmative action requires a careful determination of whether the need to rectify the disadvantaged position of the under-represented group outweighs the unfairness caused by said action to others (for instance, if affirmative action targets women, the ones that are negatively affected by it would be men which will be elaborated upon *infra*). The national authorities are considered to be the best suited to carrying out this balancing exercise¹² basing their judgment on a set of criteria which may differ depending on the jurisdiction. In the US, any measure introduced as a part of affirmative action that constitutes a plan which is moderate and flexible and takes a gradual, case-by-case approach towards the improvement of representation of minorities is permitted. This is qualified by the fact that there can be no ‘blind hiring’, i.e. altogether overlooking qualifications of the candidates thus putting the non-minority candidates at a disadvantage.¹³ In addition, and in line with Article 4 of CEDAW, the measures aimed at eradicating differences between men and women should be discontinued as soon as their aim is achieved.¹⁴ Moreover, no quotas can be introduced and the protected characteristic such as sex can only be treated as a ‘plus factor’.¹⁵ In Europe, the

⁷ P. Nathanson and K.K. Young, *supra* note 6, p. 116.

⁸ J. E. Kellough, *supra* note 3, p. 75.

⁹ *Ibid.*

¹⁰ S. 158 EA 2010.

¹¹ See *infra* note 16.

¹² ECtHR, *Andrle v the Czech Republic*, Application No. 6268/08, Judgment on 17 February 2011.

¹³ US S.C., *Johnson v Transportation Agency of Santa Clara County*, 480 U.S. 616 (1987).

¹⁴ Article 4 of CEDAW thus makes a distinction between ‘gender’ and ‘sex’ in that the measures pertaining to the former have to be limited in time, while the ones relating to the latter (such as pregnancy and maternity) may be remedied by means of permanent solutions.

¹⁵ US S.C., *Grutter v Bollinger*, 539 U.S. 306 (2003).

approach is stricter and the emphasis is placed on ensuring that no absolute and unconditional priority is given to the members of the disadvantaged group.¹⁶ A non-automatic priority can be given only in the circumstances where the qualifications of the candidates are equal and an objective assessment of the specific personal situation of all the applicants is carried out.¹⁷ Otherwise, the measure at hand will be perceived as a manifestation of discrimination and will be held unlawful.¹⁸

Considering the purpose of affirmative action, i.e. overcoming historical patterns of injustice,¹⁹ a number of arguments can be found to support it. Apart from the compensatory grounds according to which justice requires amendments to be made for past and current inequities,²⁰ the proponents of affirmative action emphasise how it increases diversity in the workplace. If people from different backgrounds and sexes cooperate, they bring into the discussion a multitude of perspectives based on their respective experiences, leading to greater productivity and organisational benefits.²¹ Moreover, empirical studies show that the interests of minorities are more likely to be heard in policy processes when said minorities are represented in the organisations involved.²² What is more, affirmative action shifts the burden of initiating action away from the members of the disadvantaged groups. As victims of discriminatory behaviour they may not be willing to come forward in fear that their efforts will be futile. However, if a more proactive approach is taken and opportunities to ameliorate their situation are provided to them, they are more likely to act.²³ Besides, affirmative action can be effective in overcoming the negative effects of stereotyping. In the female-dominated occupations, ‘female’ traits are seen as essential for success and vice versa – in male-dominated professions, typically male attributes are desired. Because of this confined view, it may be difficult for the members of the under-represented sex to join the workforce via the ordinary route. Notwithstanding, if affirmative action is applied, they are granted an opportunity to prove suitable for the position irrespective of their gender.²⁴

Affirmative action can thus be seen as an effective tool which allows for relatively quick amelioration of the situation of those who have historically suffered disadvantage.²⁵

¹⁶ CJEU, *Marschall v Land Nordrhein Westfalen* (Case C-409/95) [1997] ECR I-6363.

¹⁷ CJEU, *Abrahamsson v Fogelqvist* (Case C-407/98) [2000] ECR I-5539.

¹⁸ CJEU, *Kalanke v Freie Hansestadt Bremen* (Case C-450/93) [1995] IRLR 660.

¹⁹ J. E. Kellough, *supra* note 3, p. 76.

²⁰ *Ibid.*, p. 77.

²¹ *Ibid.*, pp. 78-9.

²² *Ibid.*, p. 81.

²³ *Ibid.*

²⁴ M. Bursell, *supra* note 1, p. 401.

²⁵ J. E. Kellough, *supra* note 3, p. 82.

Notwithstanding, several arguments against the practice can also be found. One of them is connected to the fact that rules or policies specifically target one group to the relative detriment of another. In relation to affirmative action aimed at women, for it to be potent, the collective rights of women are prioritised over the individual rights of men, thus institutionalising discrimination against that gender.²⁶ It can be particularly detrimental to those men who are commonly regarded as the most privileged ones, namely white men.²⁷ According to the opponents of affirmative action, the cost of past and/or present discrimination against women can be placed on people who have never committed a discriminatory act themselves. Such a scenario could amount to reverse discrimination in which a non-minority group, i.e. white men, are placed at a disadvantage in relation to those who are accorded preferential consideration.²⁸ This could be defended by reference to the redistributive nature of affirmative action, which calls for reducing the number of positions held by white men in order to achieve justice.²⁹ Notwithstanding, considering that the human rights movement strives for the achievement of substantive equality, reliance on numerical objectives may not mirror the reality of equality of opportunity and of participation, i.e. having the chance to achieve the same goals/participate in an endeavour without hindrances.³⁰ The focus should be placed on the individual and he should not become the victim of legislation due to his membership to a particular social group.³¹ Moreover, in line with the American Supreme Court's jurisprudence relating to affirmative action in dismissal cases, the onus for distributing new opportunities should not be placed in its entirety on an innocent individual.³² This argument served as one of the reasons for introducing constitutional prohibitions of preferential affirmative action in the states of California and Washington.³³

Another proposition raised by the opponents of affirmative action, which further suggests that it may be unfair on men, is that a smaller number of women in a particular profession or company may not necessarily be caused by discrimination. They may make a conscious decision not to join the workforce, whether in order to take care of their children or otherwise.³⁴ If analysed in-depth, this argument may not always be valid, for, as was stated

²⁶ P. Nathanson and K.K. Young, *supra* note 6, p. 104.

²⁷ J. E. Kellough, *supra* note 3, p. 88.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ 'The Concept of Equality of Opportunity', *Stanford University* < <https://edeq.stanford.edu/sections/concept-equality-opportunity> > visited on 6 June 2016; P. Nathanson and K.K. Young, *supra* note 6, p. 412.

³¹ J. E. Kellough, *supra* note 3, pp. 83-4.

³² US S.C., *Taxman v Board of Education of Piscataway*, 91 F.3d 1547 (3d Cir. 1996).

³³ J. E. Kellough, *supra* note 3, p. 149.

³⁴ P. Nathanson and K.K. Young, *supra* note 6, p. 100.

supra in the discussion on feminist ideologies, women may be conditioned into making such seemingly free choices by a patriarchal society.³⁵ However, irrespective of its actual validity, this hypothesis importantly points out that affirmative action may not always be necessary.³⁶ If it is accepted that women are not a homogenous group, not every individual female is in fact disadvantaged.³⁷ Well-educated women with beyond-average qualifications may actually find themselves in a situation in which they will start doubting their capabilities when chosen for a certain position due to affirmative action. Even though, when correctly applied, it should not lead to hiring people with objectively lower competences, for some, affirmative action carries a stigma.³⁸ Taking this argument further, it could be suggested that the stigma may also negatively affect men, in that the realisation that others are given priority over them may decrease their efforts in seeking competitive jobs. Furthermore, according one group with preferential treatment may result in a 'spill-over effect', i.e. other groups which are under-represented in the workforce may demand affirmative action to apply to them as well.³⁹ Once again, the group that would be negatively affected by that would be white men, who would be forced to compete with an even greater number of people having an advantage over them due to their membership to a particular group.⁴⁰

It is thus submitted that affirmative action may be seen as a form of reverse discrimination of men on the grounds of their sex. It could potentially be seen as defying not only the idea of substantive equality but also that of formal equality, which calls for the laws to apply equally to all, notwithstanding the differences between them. It is believed that this could deprive men of a chance to compete for a job on a level-playing field and, what is more, could also be detrimental to women. As such, it is possible that it might not be in line with gender equality.

5.2. Paternity leave

Another example of how gender can be seen as a factor contributing to according differential treatment to men and women is the notion of paternity leave. It is important to note at the beginning that the following discussion will focus predominantly on the public laws and policies regarding paternal leave, since private employers offer their employees a

³⁵ See, for example, *supra* notes 57-9 in section 2.2.1.

³⁶ J. E. Kellough, *supra* note 3, p. 89.

³⁷ J. E. Kellough, *supra* note 3, p. 85.

³⁸ *Ibid.*, p. 89.

³⁹ P. Nathanson and K.K. Young, *supra* note 6, p. 411.

⁴⁰ See *supra* note 28.

plethora of different options in that sphere. It would be next to impossible in the confines of this paper to try to give an overview of them all.

While the vast majority of states in the world guarantee paid maternity leave,⁴¹ the US is one of only two countries in the world which do not offer paid parental leave to new parents.⁴² Even though this situation formally affects both men and women to the same extent, the proponents of introducing a federal paid parental leave scheme claim that the language of provisions governing this sphere may result in gender discrimination.⁴³ This is because the interpretation of said rules is often based on gender stereotypes prevalent in the Western world, according to which fathers are not fit for carrying out care-giving duties.⁴⁴ It is commonly expected that it is the mother who will take time off (either as a part of the unpaid federal or individual state leave programme, or a scheme offered by a private employer⁴⁵), which is detrimental to both genders. For women, it may be an indication that they are not perceived as suitable for joining the workforce and/or may be treated unfavourably during hiring and promotion processes.⁴⁶

For men, the consequences have a bearing not only on their employment status but also on their position within the family. By not being seen as capable of childcare, they are ultimately deprived of the opportunity to bond with their children to the same extent mothers do.⁴⁷ Even though the International Labour Organization does not mandate paternity leave,⁴⁸ it suggests the possibility of the provision thereof in its recommendations.⁴⁹ Moreover, the US Supreme Court stated on several occasions that the current norms and practices regarding parental leave may result in discrimination against men on the grounds of their sex.⁵⁰ The assumption that fathers are meant to be at work instead of taking care of their children was seen as a reflection of broad generalisations on the varying capabilities and inclinations of men and women.⁵¹ Sex as a characteristic was also contrasted with other traits such as

⁴¹ As of 2015, there were only 2 states not offering it: the US and Papua New Guinea (M. Porter, 'Combating Gender Inequality at Home and at Work: Why the International Labour Organization Should Provide for Mandatory Paid Paternity Leave', 48 *The George Washington International Law Review* (2015) p. 218).

⁴² A. Z. Melamed, 'DADDY WARRIORS: The Battle To Equalize Paternity Leave In The United States By Breaking Gender Stereotypes: A Fourteenth Amendment Equal Protection Analysis', 21(1) *UCLA Women's Law Journal* (2014) p. 53.

⁴³ *Ibid.*, p. 54.

⁴⁴ A. Z. Melamed, *supra* note 42, pp. 54-5.

⁴⁵ *Ibid.*, pp. 53-4.

⁴⁶ *Ibid.*, p. 55.

⁴⁷ *Ibid.*, p. 54.

⁴⁸ M. Porter, *supra* note 41, p. 205.

⁴⁹ See the ILO Maternity Protection Recommendation and the ILO Workers with Family Responsibilities Recommendation.

⁵⁰ A. Z. Melamed, *supra* note 42, p. 77.

⁵¹ US S.C., *United States v Virginia*, 518 U.S. 515 (1996) para 533.

physical ability to emphasise that the former usually does not influence one's aptitude for contributing to society or for performing certain roles.⁵² Furthermore, the American Court of Appeals decided in *Knusman v Maryland*⁵³ that according the status of primary caregivers solely to mothers merely because of their biological ability to breastfeed constitutes discrimination under the Equal Protection Clause, since a seemingly neutral law was applied differentially based on a gender stereotype.⁵⁴

The situation in some other jurisdictions could also raise concerns as to whether men are placed at a disadvantage without valid justification. While countries such as Sweden guarantee a year or more of paid leave for new fathers through combining parental and paternity leave⁵⁵ which leads to 90% of fathers actually taking this leave, legislation in, for instance, the UK might be seen as leaving a lot to be desired. Paid paternity leave is limited to maximum two weeks, where a week means the number of days one actually works in a calendar week.⁵⁶ The recent developments in the area have led to a creation of shared parental leave which in theory would allow parents to take up to 50 weeks of leave (37 of which would be paid). It is up to the parents how they divide the time between themselves. The scheme applies equally to all couples, whether same-sex, adopting or co-habiting.⁵⁷ In theory, such an alternative seems ideal, as it allows fathers to actively participate in family life without suffering substantial financial losses (a parent on leave gets £139.58 a week or 90% of their average wage).⁵⁸ However, the new rules do not constitute a reform of paternity leave laws – they only replace the “additional paternity leave”.⁵⁹ What is more, since some mothers receive full pay during maternity leave, there is a risk that the pay offered during shared parental leave to fathers would amount to discrimination against them.⁶⁰ Last but not least as much as 40% of working fathers may not be eligible for the shared leave, mostly because of their partners' being unemployed. This number is significantly lower for working mothers, which could once again indicate that men are treated unfavourably.⁶¹

Another potential problem associated with the systems like the one in place in the UK is that it is voluntary. Paternity leave is voluntary in 75 out of 78 ILO states which offer such

⁵² US S.C., *Frontiero v Richardson*, 411 U.S. 677 (1973) para 686.

⁵³ US C.A., *Knussman v Maryland* 272 F.3d 625 (2001).

⁵⁴ *Ibid.*, para. 636.

⁵⁵ A. Z. Melamed, *supra* note 42, p. 61.

⁵⁶ ‘Paternity pay and leave’, *Gov.uk* <<https://www.gov.uk/paternity-pay-leave/leave>> visited on 22 April 2016.

⁵⁷ K. Peachey, ‘How the UK’s new rules on parental leave work’, *BBC* <<http://www.bbc.co.uk/news/business-32130481>> visited on 22 April 2016.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

leave in general.⁶² For a variety of reasons, some of which may be connected to gender stereotypes, while others may be purely economic, most fathers do not take this leave if it is not mandatory. This creates a situation in which fathers themselves contribute to gender inequality in the sphere of parental rights and deprive their families and economies of the benefits associated with paternity leave.⁶³

If paid paternity leave became mandatory, it could yield numerous positive results.⁶⁴ The proponents of such a development stress the importance of parental bonding in the first months of a child's life.⁶⁵ Apart from creating a father-child bond through positive physical contact,⁶⁶ allowing fathers to take paternity leave without negative implications for their careers would make the experience more enriching for them. They would start seeing it as an integral part of their lives (both personal and professional) leading to fatherhood becoming an integral part of masculine identities.⁶⁷ As such it could possibly break the rather strict confines of the masculine stereotype and could thus allow men who do not conform to it to expand their options without threat of being castigated.

What is more, the proponents of granting paternity leave stress that it would not only be beneficial for men but that it would also contribute to the cause of achieving gender equality.⁶⁸ The positive effects would not remain limited to the home environment but would also affect the working conditions of men and women alike. Once employers become used to fathers taking leave to take care of their children, they will change their perception of women with family responsibilities. The prejudices against them would fade together with the traditional division of gender roles⁶⁹ and discrimination against women employed outside of the home would diminish.⁷⁰ As such, according parental benefits to men could be understood as being in line with the feminist cause of female empowerment. It could also lead to an improvement in economies and business, since the current lack of adequate policies may act as a factor dissuading people with family responsibilities from taking up employment. This in turn would result in a reduced potential economic output, as a significant number of qualified actors may effectively be excluded from the workforce.⁷¹

⁶² M. Porter, *supra* note 41, p. 219.

⁶³ *Ibid.*, pp. 220-1.

⁶⁴ *Ibid.*, p. 205.

⁶⁵ A. Z. Melamed, *supra* note 42, p. 56.

⁶⁶ *Ibid.*, p. 57.

⁶⁷ *Ibid.*, pp. 58-9.

⁶⁸ M. Porter, *supra* note 41, p. 204.

⁶⁹ *Ibid.*, pp 207-8.

⁷⁰ *Ibid.*, p. 209.

⁷¹ *Ibid.*, pp. 208-9.

5.3. Conclusions

The examples discussed above indicate that gender plays an important part in shaping the laws governing the sphere of employment. Even though not all forms of differential treatment necessarily amount to discrimination, it is submitted that the way the legislation on affirmative action and paternity leave is interpreted and applied could be seen as amounting to unlawful discriminatory treatment of men.⁷²

The following chapter will constitute an attempt to find an approach to gender and discrimination which could reduce discrimination against men.

⁷² See, for example, *supra* notes 26 and 54.

6. Equality

The discussion in the previous chapters focused firstly on some of the causes of discrimination of men, followed by examples thereof in three areas of law. The analysis of these areas – sexual offences, family and private life, and employment – is believed to indicate that the unfavourable treatment of men can manifest itself not only in different contexts, but also in a number of ways.

This chapter does not aim to offer a concrete solution on how to solve the problem of discrimination against men. This would be too ambitious, if not completely impossible, in the confines of this paper. However, considering that the objective of this research is to signal that discrimination of men is an actual issue that should not be ignored, the following pages will explore a few theoretical notions which could be used in relation to men and their disadvantageous situation.

6.1. Departure from radical feminism

When analysing the possible causes of discrimination against men, radical feminist ideology was described as one of the possible reasons why men tend to be depicted in a negative light in certain contexts.¹ Radical feminists portray men as a distinct social group which dominates women in all spheres of life.² Notwithstanding, radical feminism is only one strand of feminism – some of the others, such as post-modern feminism outlined *infra*, are less antagonistic towards men and could potentially be used as an ideological ground for changing the attitude towards males.

Post-modern feminism aimed at changing feminism from activist to more theoretical. As such, it began denying what had previously existed.³ One of the notions it rejected was gender oppositionality which was departed from through a cessation of categorising women altogether. Judith Butler stated that identity categories such as men or women should be seen as “instruments of regulatory regimes”⁴ implying that the concept of a woman was constructed based on patriarchal ideals. This abandoning of labels was accompanied by an

¹ See chapter 2.

² See *supra* notes 22-3 in section 2.1.1.

³ C. Tung, Encyclopedia of Gender and Society, *Postmodern Feminism* <<http://sk.sagepub.com.ludwig.lub.lu.se/reference/gender/n334.xml?term=postmodern%20fefemini>> visited on 18 February 2016.

⁴ *Ibid.*

embracing of the post-modern concepts of fluidity and hybridity,⁵ which in turn opened the discourse on gender equality to the experiences of people who do not conform to the strictly confined categories of men and women. Moreover, it also led to the eradication of the radical perception of women as a homogenous group – since genders became fluid, there was no universal woman who feminists could speak for.⁶

The example of more ‘men-friendly’ post-modern feminism could be seen as an indication that feminism as a movement does not have to vilify men. Notwithstanding, some thinkers, such as Christina Hoff Sommers, oppose all forms of feminism and accuse it of promoting and causing injustice towards men.⁷ It is submitted that this is a strong claim, which may be seen as an overly broad generalisation about feminism. However, it can also be interpreted as pointing to the fact that those who are in a less advantaged position within society should not be perceived as “epistemically privileged”.⁸ In the context of feminism this would denote that women are not entirely objective and righteous solely because of the detriment they suffer. They are prone to being biased, hyperbolise their problems, and place the blame for such on the wrong people.⁹

Despite the fact that reaching true objectivity in the quest for gender equality may prove to be unfeasible, since, after all, it is a strive to ameliorate the situation of certain groups in relation to others, post-feminism could be seen as offering a solution to ‘man-blaming’. Instead of focusing solely on women, the movement pays attention to people in general and strives to be pro-women without falling in the trap of being anti-men.¹⁰ It is supposed to represent pluralism and difference within the groups that constitute any given society¹¹ and sees the essentialist conception of women promulgated by radical feminists as obsolete and under-inclusive.¹² Moreover, post-feminism claims that the goals of the earlier waves of feminism have been achieved and that being an empowered individual is every woman’s birth right.¹³

⁵ P. Waugh, ‘Postmodernism and Feminism’ in S. Jackson and J. Jones (eds.), *Contemporary Feminist Theories* (Edinburgh University Press, Edinburgh, 1998) p. 178.

⁶ P. Waugh, *supra* note 5, p. 179.

⁷ R. W. Connell, ‘Change among the Gatekeepers: Men, Masculinities, and Gender Equality in the Global Arena’, 30 *Signs* (2005) p. 1806.

⁸ I.M. Young, *Inclusion and Democracy* (Oxford University Press, New York, 2000) p. 117.

⁹ *Ibid.*

¹⁰ S. Genz and B. A. Brabon, *Postfeminism: Cultural Texts and Theories* (Edinburgh University Press, Edinburgh, 2009) p. 10.

¹¹ *Ibid.*, p. 27.

¹² *Ibid.*, p. 28.

¹³ *Ibid.*, pp. 13-14.

Post-feminism seems to adopt the idea promoted by post-modern feminists that there is no female paradigm which activists could speak for.¹⁴ As a movement, post-feminism is thus post-revolutionary and opposes collective mobilisation so typical of the previous waves of feminism.¹⁵ This approach is more individualistic and stresses the importance of achieving self-determination on the part every woman in any way she feels is right for her. She is also encouraged to embrace her sexuality as an expression of her womanhood and not for the gratification of men.¹⁶ Focusing on female self-satisfaction and fulfilment could be seen as a move away from stereotypical, heteronormative social roles and could also be beneficial in the strive to eradicate the perception of men as sexual predators. As such it could potentially be advantageous not only for women but also for men and could in consequence reduce discrimination against both sexes.

Those who do not agree with post-feminist ideology claim that it is a theory based on patriarchal ideals, which uses feminist interpretations of agency and equality to support non-feminist objectives.¹⁷ What this could denote is that through rejecting the stark division between the sexes, women may risk compromising the ideals they have been standing by for decades. On the other hand, post-feminism promotes gender equality and as such provides both men and women with equal opportunities, whether in the field of employment or with regard to family and private life. What is also of significance is that through aiming attention at people instead of a particular group thereof, differential treatment amounting to unlawful discrimination could potentially be reduced in relation to both women and men.

6.2. Theories of equality

Exploring different versions of feminism is merely one way in which men may cease to be seen and treated in a discriminatory manner. Another way could be rethinking the notion of equality as such. The ensuing discussion offers several conceptions thereof, all of which could be applied in the context of discrimination against men on the grounds of their sex.

6.2.1. Politics of difference

Every society consists not only of individuals but also of a variety of groups. Each of them is distinctive and thus has different interests to promote and protect. Therefore, the

¹⁴ See *supra* note 6.

¹⁵ S. Genz and B. A. Brabon, *supra* note 10, p. 11.

¹⁶ *Ibid.*, p. 12.

¹⁷ *Ibid.*, p. 15.

rights and notions of justice that they seek may vary substantially.¹⁸ Politics of difference attends to such differences between social groups and sees this practice as a resource of democratic communication which helps to achieve justice.¹⁹ According to Iris Marion Young, it is only through focusing on the differences and accommodating for them that the groups' claims for equity can be fulfilled. Appeals to common good are inadequate in achieving this goal²⁰ as they ignore the value that diversity, and communication of experiences and knowledge between the groups have in a democratic society.²¹

The opponents of Young's social differentiation claim that it is exactly this communication of divergent needs and demands that makes the theory questionable.²² According to Professor Elshtain and David Miller, focusing on differences sabotages the quest for common good and makes dialogue between groups impossible. Having the possibility of achieving their separatist claims could dissuade the groups from achieving solidarity with others.²³ Young defends her view by saying that her theory does not equate social difference with identity politics, which consists of interpreting typical behaviours of group members based on stereotypes applicable to them.²⁴ Social differentiation is chiefly concerned with stressing the differences not only between groups but also within them, as no group is homogenous and treating them as such would marginalise the experiences of some of their members.²⁵ Openly talking about what makes us unique is seen by Young as an integral part of inclusive democratic communication, which in turn produces objectivity.²⁶

Now, considering that gender difference can be seen as structural difference,²⁷ we could say that men and women are structural groups²⁸ which, according to Young, should be able to voice their separative claims in an open democratic debate. The distinct interests of both genders would be accommodated for through laws and policies specifically targeting them. In this way, they would not be placed at a disadvantageous position, since their needs would be fulfilled and they would be accorded legal protection. Notwithstanding, a proposition that men and women could be seen as equal but at the same time completely different, seems to subvert the idea of gender equality within the human rights sense of the

¹⁸ I.M. Young, *supra* note 8, p. 81.

¹⁹ *Ibid.*, p. 82.

²⁰ *Ibid.*, p. 81.

²¹ *Ibid.*, p. 82.

²² *Ibid.*, p. 85.

²³ *Ibid.*, pp. 84-5.

²⁴ *Ibid.*, p. 103.

²⁵ *Ibid.*, pp. 88-9.

²⁶ *Ibid.*, p. 114.

²⁷ *Ibid.*, p. 93.

²⁸ For the definition of a structural group see I.M. Young, *supra* note 8, pp. 97-8.

term.²⁹ There are certain spheres of life such as pregnancy which apply only to one gender and not the other. Nonetheless, human rights promotes the idea of men and women being substantively equal.³⁰ If such substantive equality is achieved, discrimination on the grounds of sex could be reduced if not eradicated, which would ameliorate not only the situation of women but also that of men.

6.2.2. Equal diversity

A conception of equality that seems to be more in line with the one promulgated by human rights institutions is that of ‘equal diversity’ (as opposed to ‘diverse equality’ – a name that could be used in relation to the politics of social differentiation described *supra*).

Pursuant to the opinion of Brian Barry, equality and justice would be achieved if, instead of allowing for exceptions for groups within society, a more lenient form of general law was introduced. Such law would apply equally to everyone, at the same time meeting the needs of specific groups.³¹ Such an approach to equality could potentially prove useful in relation to cultural practices which affect women and men, such as FGM and male circumcision described *supra*. This is because Barry claims that the provision of exemptions for cultural minorities is not a requirement of egalitarian liberal justice.³² Moreover, even if the law has an unequal impact on different social groups, it does not necessary amount to injustice³³ (just as not all forms of differential treatment automatically amount to unlawful discrimination), also because the law, by applying indiscriminately to all, does not attach an equal value to all actions and practices. Irrespective of a subjective opinion on the meaningfulness of certain aspects of a group’s existence, the law offers the same objective protection to all.³⁴ Moreover, Barry’s take on equality offers a valuable solution to the problem of differentiation within the groups. By not establishing specific group rights, one avoids categorising people and thus places everyone’s experiences and interests on the same level.³⁵

It is submitted that Barry’s equal diversity could be seen as beneficial in the strive for achieving gender equality and could contribute to reducing discrimination on the grounds of

²⁹ See *supra* notes 9-10 in section 1.2.

³⁰ ‘CEDAW Quick & Concise: Explaining the Principle of Substantive Equality’, *UN Women* <<http://www.unwomen.org/en/digital-library/videos?videoid=LtkH1s5CtjI>> visited on 27 April 2016.

³¹ B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, Cambridge MA, 2001) p. 39.

³² *Ibid.*, p. 33.

³³ *Ibid.*, p. 34.

³⁴ *Ibid.*, p. 278.

³⁵ *Ibid.*, ch. 4.1.

sex. If laws were reformulated so as not to divide men and women into separate categories (for instance, instruments such as CEDAW would focus not on discrimination against women but ‘gender discrimination’), neither gender would be accorded differential treatment, whether preferential or disadvantageous.

What is more, Barry’s conception of equality emphasises the importance of choice and adaptability for change,³⁶ both of which are vital in the discussion on harmful practices such as circumcision. He claims that while one cannot be expected to choose or easily change their beliefs, especially religious ones,³⁷ one can still make choices within the confines of one’s faith.³⁸ The example that he uses, and the reasoning of which could be used in relation to male circumcision, is that some Jews and Muslims eat humanely slaughtered animals. In countries such as Sweden or Switzerland, religious leaders have accepted legislation prohibiting/restricting ritual slaughter and have changed the long-standing religious precepts accordingly.³⁹ The fact that this change was introduced could be seen as indicating that other practices could also be modified. Indeed, according to Kwame Anthony Appiah, it is commonplace for cultures to change.⁴⁰ Moreover, he argues that culture is a primary good such as oxygen which does not generate any special rights.⁴¹ If that is so, then, in line with Barry’s equal diversity, no one should be accorded special legal protection just because of their membership to a given cultural group. Law, in particular human rights law, could be seen as an outside force which influences and modifies all cultures equally, so as to ensure that everyone is accorded the same protection and has access to the same opportunities.⁴² The mere fact that a tradition or custom has been in place for centuries would not amount to valid justification for granting exceptions.⁴³ What is more, discontinuing a certain practice does not mean that a group has lost its identity,⁴⁴ since group identities, analogously to individual identities, are constructed through interactions with other groups.⁴⁵ Hence, if this line of thought were applied to the discourse on discrimination of men in the context of male circumcision, it could be said that modifying the approach to the practice would not affect the

³⁶ Barry, *supra* note 31, pp. 35-7.

³⁷ *Ibid.*, p. 36.

³⁸ *Ibid.*, p. 37.

³⁹ *Ibid.*, p. 35.

⁴⁰ K. A. Appiah, *The Ethics of Identity* (Princeton University Press, New Jersey, 2005), p. 124.

⁴¹ *Ibid.*

⁴² *Ibid.*, pp. 132 and 151.

⁴³ Barry, *supra* note 31, p. 253.

⁴⁴ K. A. Appiah, *supra* note 40, p. 137.

⁴⁵ A. Fuentes, ‘Cultural diversity and indigenous peoples’ land claims. Argumentative dynamics and jurisprudential approach in the Americas’, *Unitn.eprints.PhD*, 16 May 2012 <<http://eprints-phd.biblio.unitn.it/767/>> visited on 3 February 2016, p. 26.

identity of the groups endorsing it. On the other hand, it could lead to a better safeguarding of the human rights of boys who are subjected to such, and could contribute to gender equality in that boys would be accorded the same protection as girls do as far as FGM is concerned.

6.2.3. Parité

Another understanding of equality that could be applied in the context of discrimination against men and gender equality in general is that of *parité*, i.e. “a general fifty per cent criterion”.⁴⁶ This notion could be seen as particularly relevant in the field of employment where, according to its proponents, it could be used as a substitute for quotas or other numerical targets.⁴⁷ Instead of practising affirmative action, employers would have to have an equal number of men and women working for them. Advocates of this system claim that, since simply setting a certain number is not equivocal with according a group a meaningful presence within an institution, requiring that women constitute exactly half of a workforce would make their input more visible.⁴⁸ It could be said that this approach would result in formal equality between men and women but, at the same time, it could lead to discrimination on the grounds of sex against those who do not identify as either men or women. Furthermore, it may become problematic if the genuine interest in a certain profession is shared predominantly by one gender only.

6.3. Conclusions

As was stated at the beginning of this chapter, it would go beyond the scope of this paper to attempt to find workable solutions to the issue of discrimination of men. Notwithstanding, the theories of equality and the perspectives on feminism outlined *supra* could prove to be useful tools in ameliorating the situation of not only men but also women, so that gender equality could be achieved. What should be borne in mind, no matter which understanding of equality one adopts, is that men should be included in the strive for gender equality, since the inequalities between them and women are a part of complex relationships between the two and are visible in all areas of life.⁴⁹ Even though the overall privileged position of men has not changed much,⁵⁰ they should not be excluded from the quest for gender equality. As was said *supra*, gender encompasses both women and men, even though

⁴⁶ N. Urbinati, ‘Why *parité* is a better goal than quotas’, *Oxford University Press and New York University School of Law* (2012) p. 476.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, p. 474.

⁴⁹ R. W. Connell, *supra* note 7, p. 1801.

⁵⁰ *Ibid.*, p. 1808.

most policy and legal discussions on gender revolve solely around women's issues.⁵¹ Men can, however, also be victims of gender-based violence⁵² and they have relational interests in gender equality.⁵³ The egalitarian approach to gender adopted in the Nordic countries is proof of this and shows that men are inclined to fight gender stereotypes if they are presented with an opportunity to do so.⁵⁴

⁵¹ R. W. Connell, *supra* note 7, p. 1805.

⁵² UN CSW, 'The Role of Man and Boys in Achieving Gender Equality; CSW48 Agreed Conclusions', E/2004/27.

⁵³ R. W. Connell, *supra* note 7, p. 1813.

⁵⁴ *Ibid.*, p. 1812.

7. Conclusions

As was stated at the beginning, this thesis attempts to demonstrate that discrimination against men actually occurs and should thus attract more attention than it currently does. By analysing how radical feminist ideologies and prevalent gender stereotypes may influence the perception of men and how this can impact the content and application of laws and policies, the author meant to signal that men can be subject to unfavourable treatment in a similar way as their female counterparts can.

What is more, this paper intends to indicate that one may be hampered from recognising that discrimination against men is an actual phenomenon due to the commonly held gyno-centric view of gender equality. Even though the most prominent human rights bodies stress that the concept covers not only women but also men,¹ it is believed that in practice it is often seen as predominantly focusing on the issues faced by females.² The examples discussed in this paper aim to illustrate this by suggesting that men can sometimes either be vilified or deprived of certain safeguards due to their gender and the stereotypes associated with it.

Considering that the objective of the author is to highlight the existence of the problem of discrimination against men, no concrete solutions thereto are presented. Notwithstanding, it is proffered that redefining the prevailing understanding of equality could potentially help to reduce the extent of discrimination not only of men but also of women. Even though several different conceptions of equality are presented *supra*, it is believed that the notion of ‘equal diversity’ advocated by Brian Barry³ could prove most beneficial to the cause of achieving gender equality. If we accept that the differences between men and women do exist but at the same time realise that law should apply equally to everyone, we could become more open to dialogue and cooperation. Otherwise, we could be presented with a situation where the strive to protect competing and sometimes irreconcilable interests of different groups could distract us from achieving all-embracing equality.

¹ United Nations Entity for Gender Equality and the Empowerment of Women, ‘Concepts and definitions’ <<http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>> visited on 4 April 2016.

² R. W. Connell, ‘Change among the Gatekeepers: Men, Masculinities, and Gender Equality in the Global Arena’, 30 *Signs* (2005) p. 1808.

³ See, for example, B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, Cambridge MA, 2001) p. 39.

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