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## Forging a Feminist Labour Law

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Workers on a tea plantation in Bangladesh. Credit: Solidarity Center / Gayatree Arun

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# THE INDISTINGUISHABLE HISTORY OF GENDER AND LABOUR LAW: FROM SPECIAL MEASURES TO STRUCTURAL REFORM

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**The Indistinguishable History of Gender and Labour Law: From Special Measures to Structural Reform**

The predominantly gender-neutral approach to labour law is succinctly encapsulated in an ILO statement from as late as 1964, that "in general the problems of women workers are indistinguishable from those of men", but that additional measures were required because of their "manifold responsibilities, particularly relating to maternity and motherhood."[1] Fifty-nine years later, in 2023, Professor Claudia Goldin became the first solo woman to win a Nobel prize in economics for her work attributing the continued gender pay gap, and more broadly, a "parental gender gap" to inequitable caregiving responsibilities at home.[2] This, according to Goldin, has been the most significant barrier to American women's success at work over the past century. In other words, limited "special measures" have not made a dent on the systematic disadvantage at work wrought by motherhood.

The problem of not adequately taking gendered realities into account has also been thoroughly critiqued by feminist labour scholars,[3] who made three critical recommendations: (1) foreground a feminist approach to legal analyses (2) place social reproduction and care work fully within the boundaries of labour law and expose the ways in which labour and social security laws remain premised on a masculine (rather than neutral) model of work which does not take into account care responsibilities, and (3) articulate the ways in which feminist critique is not confined to gender, but could more broadly revitalise post-industrial labour law.

The 8 articles and 2 interviews in this ILAW Journal provide insight into the current state of feminist labour law. The developments they describe are not always linear; some are landmarks, others are partial, while others still are regressive. The analytic approaches of the authors, and the developments they describe, indicate the issue of care work has moved from the periphery to the centre of the discourse on decent work; and should be viewed alongside other recent, critical judgments and significant developments.

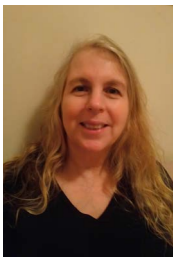
The issue of redistributing unequal parental leave was addressed in 2023 by the Johannesburg High Court in South Africa, in *Van Wyk v. Minister of Employment and Labour*.[4] Here, the Court declared provisions of the Basic Conditions of Employment Act, which provide four consecutive months of maternity leave exclusively for mothers, to unconstitutionally discriminate against fathers as well as children born from adoption or surrogacy. The judge found the provision of a paltry ten days of paternity leave marginalises the role of fathers and is offensive to their constitutional dignity; at the same time as it places the burden of childcare exclusively on mothers. The judge rejected the argument of the Minister of Labour that the legislature should not seek to engineer social and cultural changes in the family, finding

[1] Int'l Lab. Org. (ILO), Women Workers in a Changing World Report VI(1) 2 (Geneva, 1964).

[2] Claudia Goldin, Career & Family, Women's Century - Long Journey Towards Equity (Princeton Uni. Press, 2021)

[3] Joanne Conaghan, *Labour Law and Feminist Method*, Int'l J. of Compar. Lab. Law and Indus. Rel. 33(1) (2017).

[4] Van Wyk and Others v. Minister of Employment and Labour, South Gauteng High Court, Johannesburg (S. Afr.) Case No. 2022-01784 (25 October 2023), https://www.saflii.org/za/cases/ZAGPJHC/2023/1213.html.



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instead that "the subordination of women as family-servants and commodities, however widespread such attitudes may be among inhabitants of this country, is in no degrees consistent with the norms of the Constitution…which requires social equality between men and women and is uncompromising in actualizing that status quo for everyone."[5]

Another positive example of the recognition of unpaid care work comes from the Committee of the International Covenant of Economic, Social and Cultural Rights (Committee), in the 2018 case of *Maria Cecilia Trujillo Calero v Ecuador.* In this case, Ms. Trujillo, an unpaid family care worker who had been at home taking care of her children, had made 29 years of retirement contributions but was denied a pension by Ecuador because there had been gaps in her contributions which she retroactively remediated.[6] Here the Committee found that Ecuador, by denying Ms. Trujillo's pension had violated her right to non-discrimination, social security, and gender equality under the ICESCR. The Committee noted that women comprise nearly the full population of unpaid care workers who could face discrimination from purportedly neutral retirement programs not designed with them in mind. Further, voluntary contributors like Ms. Trujillo were at a disadvantage, because they were expected to pay both their own share and their employer's share even in the absence of an employer. In this context, Ecuador had not shown that the conditions it set for voluntary affiliation were reasonable and proportional and not indirectly discriminatory against women who performed unpaid care work. The Committee ordered Ecuador to formulate a plan for a comprehensive non-contributory pension scheme, to the maximum of its available resources.

Indeed, Latin America and the Caribbean are leading the way in recognition of care as a human right. In 2023, the Republic of Argentina requested an Advisory Opinion from the Inter-American Court of Human Rights on the content and scope of care as a human right, and its interrelationship with other rights.[7] The application argues that the right to care is inextricably linked to the right to work without discrimination and social security. This is because the unequal burden of care responsibilities limits opportunities to generate income and/or imposes a double workday on women. It further asks the court to address what state obligations are under this right, and what measures states should adopt to address unequal distribution of care responsibilities. The ILAW Network and the International Trade Union Confederation (ITUC) filed an amicus brief urging that the right to care be expressly recognized as an autonomously enshrined human right which must be respected, protected and guaranteed by States Parties to the Inter American Convention on Human Rights.[8] The ILO too has made an about turn from the "special measures" approach to care work and is poised for a discussion in June 2024 on Decent Work and the Care Economy, which could lead to the adoption of comprehensive norms on care work.[9]

## Adopting a Feminist Lens in Adjudication and Bargaining and the Perils of Neutrality

The first set of articles in this journal can be seen to engage with the first imperative, to adopt a methodology that views gender "as analytically central."[10] Articles 1 and 2 focus on gendering interpretation in adjudication in both Brazil and Chile through a "top-down" mechanism, designed to disrupt an ostensibly neutral, but effectively "masculine," judicial culture. A third article

[5] *Id*. at 40.

[6] Marcia Cecilia Trujillo Calero v. Ecuador, United Nations Comm. on Econ. Soc. and Cultural Rts., UN Doc. E/C.12/63/D/10/2015 (26 March 2018), https://www.escr-net.org/caselaw/2018/marcia-cecilia-trujillo-calero-v-ecuador-cescr-communication-102015-un-doc

[7] Republic of Argentina, Request for an Advisory Opinion to the Interamerican Court of Human Rts.: *The content and scope of care as a human right, and its interrelationship with other rights*, (January 9, 2023), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231203_18528_na.pdf

[8] Int'l Lawyers Assisting Workers and Int'l Trade Union Confederation, *Observaciones a la solicitud de opinión consultiva presentada por la República Argentina a la Corte Interamericana de Derechos Humanos sobre el contenido y alcance del derecho al cuidado* (November 7 2023) https://www.ilawnetwork.com/wp-content/uploads/2024/01/Amicus-Opinion-Consultiva-sobre-derecho-al-cuidado.-CSI-ILAW-signed.pdf

[9] ILO, Agenda of the 112th Session (2024) of the Int. Lab. Conference *Item VI: Decent work and the care economy (general discussion)* https://www.ilo.org/ilc/ILCSessions/112/WCMS_861933/lang--en/index.htm.

[10] Conaghan, *supra* note 3, at 6.

describes the adoption of a feminist lens through a bottom-up approach to collective bargaining in the United States, while a fourth piece illustrates the hazards (literally) of an ostensibly gender-neutral approach to occupational health in Argentina.

**Ingrid Sora and Juliana Alice Fernandes Gonçalves's** article recounts that in 2021, the Brazilian National Council of Justice issued a Protocol for Judgments with Gender Perspective (Protocol), which was part of an institutional response to structural gender inequalities that permeate the judiciary. The Protocol aimed to guarantee substantive equality in access to justice and was designed to guide courts in "recognizing and redressing the effects of gender discrimination in the performance, interpretation, application, and production of the law as well as other forms of intersecting discrimination based on social identities." This Protocol was informed by feminist theories and movements as well as judgments of the Inter-American Court of Human Rights.

Part 3.4 of the Protocol focuses on labour justice, including glass ceilings, wage inequality, unpaid care work generating a second shift, submission of women to male standards at work, sexist stereotypes, tolerance for moral and sexual harassment, and feminized jobs focused on social reproduction. At the outset, it recognizes that the protection of employees alone is the product of the historic marginalisation of women workers, largely left outside of labour protection.

Although the Protocol for Judgements was passed in 2021 and only came into operation in 2023, it has already been applied in a few labour cases, and had impacts that are both cultural and structural, including finding a misogynistic joke constituted a sexist affront to particular employees and all women, which should not be normalised; and a reversal of the dismissal of a pregnant sub-contracted employee, to overcome historical inequalities and gender discrimination. The Protocol was also applied by the Labour Court to a breastfeeding mother exposed to unhealthy agents in the hospital who was granted leave from work for two years.

The essay by **Sergio Gamonal C.** explores a similar approach to incorporating feminist perspectives in adjudication in Chile. Since 2017, the Chilean Supreme Court has put in place a Technical Secretariat for Gender Equality and Non-Discrimination, to promote the development of policies and actions aimed at guaranteeing equality and non-discrimination for all people in their access to justice. In one case, involving the dismissal of a pregnant worker, who was a short-term contractor (her short-term contract had been renewed 30 times) courts reversed earlier precedent, by applying a gender perspective, which it viewed as a critical tool in identifying and exposing the context of oppression, which it described as "those institutions, rules and legal practices that create, legitimise and perpetuate discrimination."

The adoption of a feminist lens is not only relevant to adjudication but also to collective bargaining. **Ana Avendaño** describes the ways in which the masculinized union culture in the United States, shaped largely by the struggles of white men, has become embedded in labour law doctrines such as the "realities of industrial life" doctrine where racist and sexist language are normalised as "shop talk", if they are not so "flagrant, violent or extreme as to refer the individual unfit for further service." She remarks, that as a result, the NLRB jurisprudence reflects a high degree of tolerance for hyper-masculine misogyny and what it determines to be horseplay, which heightens women at risk of bullying and harassment. This masculinist lens is also evident in the predominance of grievances defending union members who are accused of harassment, while unions send the survivor to human resources, which disincentives reporting and undermines solidarity.

However, the value of a feminist lens or viewpoint is not limited to top-down measures, and Avendaño describes how women in the United States Workers West Union, which represents janitors, replaced a misogynistic lens with a feminist one. They did this through education; and through incorporating harassment into a member survey of priorities, resulting in a union-initiated campaign against sexual harassment entitled "Ya Basta" ("enough is enough"). As evidence of structural reform, the union quietly bargained for language that required the employer to investigate harassment upon receiving notice, which the union would support if the investigation was fair.

The "bottom-up" disruption of masculine norms through adopting a feminist lens is also addressed in the interview with **Itumeleng Moerane**, who describes the impacts in Lesotho of the 2019 landmark agreements to prevent gender-based violence and harassment in garment factories.

These agreements were signed by three apparel brands and a coalition of labour rights organisations and made use of concepts found in ILO Convention 190 on Violence and Harassment in the World of Work, even though Lesotho had not yet ratified it. According to Moerane, the impact of the agreement has been a reduction of violence and harassment in the factories, but perhaps surprisingly, also ending the use of temporary contacts in the factories. Itumeleng explains the linkage – that those employed under temporary contracts will endure rather than complain about harassment. However, one serious shortcoming in the approach has been that people who were dismissed for committing gender-based violence and harassment under the agreement had their dismissals reversed by the court because the agreement had not been formally incorporated into the actual policies of the factories.

A fourth piece by **María Paula Lozano** illustrates the perils of an ostensibly neutral approach to occupational health and safety, through an Argentine case study. She argues that labour regulations in Argentina were based on the need to preserve women's bodies for social reproduction but does not address the multiplicity of risks to women which are rendered invisible, primarily because women are thought to be engaged in light work, with low risks. Lozano describes risks to women at work which relate to the organisation of work and ergonomics, which involve continuous, monotonous, repetitive movement as well as musculoskeletal disorders, often unrecognised in Argentina's closed list of occupational diseases. Indeed, according to Lozano gendered risks are only addressed through a blanket ban of women from arduous, dangerous, or unhealthy work, while prevention of risk to pregnant bodies is understudied, as is violence and harassment at work, including psychosocial harm, job segregation and/or women's precarity which generates exposure to various occupational risk. A feminist approach would as a starting point make visible the specific occupational hazards experienced by female bodies.

**Still Searching for a Labour Law that takes Social Reproduction Seriously**

The second set of articles focus on social reproduction and seeks to expose the ways in which laws are premised on a masculine model of work which do not consider care responsibilities. The feminist labour approach has advocated for the inclusion of paid and unpaid domestic and care work fully within the boundaries of labour law.

In this vein, **Sylvia Borelli** describes Italy's transformation from a patriarchal welfare system, premised on the male breadwinner and the female homemaker, which has been disrupted by the growing entry of women into the paid workforce. As a result, a "Do-it-yourself (DIY)" welfare model has come to replace the patriarchal/family-centred model. The traditional, patriarchal model placed the burden of care work on women, freeing the state from responsibility for reproduction costs. Under the DIY model, families must find private solutions to fill their care needs, which have come to be filled by paid domestic workers, predominantly from foreign countries, undocumented, and operating in the context of exclusion of critical labour protection, widely tolerated labour violations, and the absence of inspection. This has been called the "migrant-in-the-family" model of care work, which maintains gendered divisions of care within the family and permits the exploitation of female migrant domestic workers.

Borelli notes a positive development in 2020, in which the Care Collective proposed to develop a "Care Welfare State," to replace the DIY model, which would ensure "high-quality, cost-free care for anyone in need, in all stages of life", and would aim to redistribute unpaid and paid care work between genders, strengthen public welfare and protect the rights of migrant women. The proposals require recognition and valuing of care work, and in particular support in creating a "counter-discourse", which politicises and values care work.

In the context of Switzerland, **Céline Moreau and Valerie Debernardie** note that women remain under-represented in paid employment, and while women are increasingly more likely to work part-time to combine work and child care, fathers continue to work full-time. They argue that the legal framework partially protects and partially reinforces existing gendered care divisions. In contrast to the feminist approach to adjudication imposed in Chile and Brazil, the authors describe a formalistic approach to adjudication, including that discrimination on the basis family situation constitutes discrimination only when it is concurrent with sex discrimination. Further, maternity protection under the Federal Labour Law excludes women in domestic or agricultural work, who are the most precarious workers,

many of whom are employed by their husbands. Furthermore, under the Code of Obligations, workers who become pregnant during their probation or who are on fixed-term contracts are not entitled to protection from dismissal.

There are some recent positive developments, such as the passage of the Federal Act on Improving the Balance between Work and Caregiving which came into force in January 2021, introducing limited paternity leave for fathers. The provisions are criticised for providing unequal leave and therefore reinforces gender stereotypes; it further contains no measures aimed at reconciling work and family life. They conclude that this continues to expose parents, and mothers to unjustifiable inequality and financial insecurity.

Indeed, in the interview with **Chidi King**, she observes that our current world of work tends to assume that productivity depends on long working hours with little work-life balance, and the absence of parental leave can reinforce gendered dynamics; the partner who is earning less will take leave. She also reminds us that progress is not linear and that there is political and economic expediency to discrimination; the fact that women are paid below the real cost of their labour is often expedient for those who benefit from this. Further, social norms are not static; periods of progress are followed by backlashes, and in her view currently progress has stalled.

The article by **Mariana Laura Amartino and Verónica Nuguer** describes how technological changes, together with the Coronavirus, increased the hours that people work at home and exacerbated a care crisis. In 2020, as a result of the Coronavirus, a telework law was passed in Argentina. In recognition of the blurring of boundaries between paid work and unpaid work, which disproportionately impacts women workers, the law provides for a "right to disconnect." It sets out that workers who are responsible for the care of a person under 13, or a person with disabilities or an elder requiring specific assistance, shall be entitled to schedules compatible with care tasks and/or to interrupt the workday. Any reprisal or hindrance is presumptively discriminatory.

The provision is one of the first in national law recognizing care work, outside of parental leave, and makes no distinction between the gender of the caregiver. Yet, according to Amartino and Nuguer, the law has significant limitations: it only applies to workers under the Labour Contract law, it conflicts with the Convention on the Rights of the Child, which protects children under 18 (not 13) and leaves out those who are caregivers for people who do not cohabit with them. Further, the law defers to the family to resolve care schedules and interruptions, which does not re-distribute care within the family or impose obligations on the employer.

In 2021, regulations were then issued which require the worker who exercises the right to interrupt a task for care must communicate virtually and precisely the time when the inactivity begins and when it ends. Further, employers must ensure the equitable use of these measures, in terms of gender, and promote the participation of men in caregiving tasks. The authors view these regulative requirements as regressive since caregiving is often unforeseeable or unpredictable. In the view of the authors, while the obligation to ensure equitable use is welcome, it amounts to no more than a declaration of principles, as there are no sanctions for non-compliance; hence it does not address the need for structural change or reduce the burden of gendered care work.

Changing gear, but describing similar motifs, **Sabrina D'Andrea** notes that equal pensions should be a major feminist issue. She describes how pension systems developed in modern welfare states in the 19th century, which were premised on the male breadwinner / female caregiver division of labour, with the protection given to men based on their contributions, and the assumption that as heads of family, they would support dependents, including spouses.

D'Andrea notes that this premise continues to underpin pension systems, which reward predominantly male patterns of work, which are full-time, uninterrupted, and formal. As a result, women, who engage in different working patterns in order to accommodate care work are often entirely disqualified or have insufficient entitlements to social protection, since part-time work and domestic work do not offer the same level of protection, and women make up 60% of the part-time workers and 75% of workers globally. This leaves them either dependent on male partners or impoverished in their old age.

D'Andrea acknowledges that formal equality in the form of the same pension age for men and women would not be sufficient to accommodate female working patterns, and provides welcome

examples of positive state practices in the form of systems of non-contributory pension entitlements and universal social pensions (Bolivia and Namibia), and the introduction of care-related credits in calculating pensions (France), which could reduce gender inequality, prioritising public pension systems, and improving pension protection for part-time work, in which women predominate.

**From Special Measures to a Right to Care**

The articles in this volume make clear that these three feminist insights are inter-related: the introduction of a feminist approach to adjudication in the form of the Brazilian Protocol and the Chilean Secretary for Gender Equality required courts to go beyond a formal equality approach and to consider gendered assumptions embedded in ostensibly neutral laws, in order to identify systematic gender discrimination. This gender lens has resulted in critical judgements including significantly protecting from dismissal a pregnant subcontracted worker, as a measure to overcome historic inequality and gender discrimination. This has implications for protecting precarious and subcontracted workers more broadly and is evidence of feminist labour law revitalising labour law. Indeed, several of the articles in this journal have described, in contexts ranging from Brazil to Chile to Lesotho, how the feminist lens has resulted in broader structural reforms, including wider protection for contract workers and non-employees.

However, the Italian case study by Borelli and the Swiss study by Moreau and Debernarie make clear the extent to which the move to a dual-earner model has occurred unevenly in different countries, and the challenges of placing social reproduction and care work fully within the boundaries of labour law. On the other hand, more promising developments are described in D'Andrea's piece on the pension pay gap, where she provides a number of critical ways in which countries are reforming pension systems to be less androcentric, by introducing practices such as non-contributory pension schemes, care-related credits, and strengthening public pension schemes.

These developments and their critiques demonstrate the ways in which care work has moved from the periphery to the centre of the discourse on decent work.

Several of the authors and interviewees in this Journal remind us that there are both practical reasons and vested interests that underpin the retention of the gendered status quo. The traditional model of placing the burden of care work on women, and the exclusion of domestic work from labour law standards, has freed the state (and in the latter case, families) from bearing the full cost of social reproduction, and there are many who benefit for the non-recognition of the economic value of care work. Indeed, according to the "DIY" model of care work described by Borelli, it is the migrant domestic worker herself who absorbs the cost of non-recognition.

Yet, recent developments suggest that a new deal for care work might be on the horizon. While we are not yet at the victory lap, there has been unmistakable progress, not least of which is that centering care work has revealed the contours of the problem, including inflexible working conditions, unpaid or poorly paid leave, workplaces that are not child friendly and the absence of measures to encourage men to take greater care of care responsibilities. It has also brought less visible issues, such as pension equity, gendered views of occupational health, and the right to disconnect, to the fore.

A broader critique of work underpinning the quest for a feminist labour law, also described by Chidi King, is that the current state of the world of work is premised on the notion that productivity depends on long working hours with little work-life balance. Claudia Goldin terms this phenomenon "greedy work," which requires employees to be on call, and which turns out to be incompatible with a similar requirement to be on-call for care responsibilities.[11] This results in couple equity "being thrown out the window" with primary childcare being allotted to mothers.[12] In this context, "the right to disconnect" might come to represent a right *not to work*, which is a more fundamental challenge to dominant discourses on work, and the culture of "greedy work."[13] This right could take further a discussion on reduction

[11] Goldin, *supra* note 2, at 10.

[12] *Id*.

[13] In the United States, support for shorter hours peaked in the 1930's, where it was hailed as increasing productivity, reducing unemployment, driving up wages and strengthening the family. This resulted in a depression-era bill limiting the work week to 30 hours. Kathi Weeks writes that the demand for shorter hours was side-lined, leaving post-war labour feminists "with a politics of time designed primarily with men in mind" Kathi Weeks, The Problem with Work: Feminism, Marxism, Anti-Work Politics and Post War Imaginaries 154 (2011) (quoting Dorothy Sue Cobble)

of work hours without reduction in pay,[14] and in so doing be impactful on decent work in general, beyond discussions about the gendered workplace.

[14] *Id.*

# BRAZIL AND THE APPLICATION OF THE PROTOCOL FOR JUDGING WITH A GENDER PERSPECTIVE IN LABOUR JUSTICE: BRIEF HISTORY AND CASE STUDIES

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*Brazil | Originally written in English*

## History of the creation of the Protocol

In 2021, the Brazilian National Council of Justice[3] (CNJ) issued the Protocol for Judging with a Gender Perspective. This Protocol is part of an institutional response to structural gender inequalities that permeate the Brazilian judiciary. Its aim is to collaborate with the implementation of national policies established by CNJ resolutions related to violence against women by the judiciary and increasing the participation of women in the judiciary.[4]

The CNJ's Protocol for Judging with a Gender Perspective[5] (hereinafter the Protocol) aims to guarantee substantive equality with respect to access to justice.[6] It is designed to guide court officials in recognizing and redressing the effects of gender discrimination in the performance, interpretation, application and production of the law, as well as other forms of intersecting discrimination based on other social identities.[7] Specifically, in the case of Brazil, the Protocol is aimed at judges so that they can exercise their functions from a gender perspective. The instrument can be adopted by all bodies of the country's judiciary and can be used by other legal professionals as a legal basis in possible court cases. It can also serve as a teaching tool for other professionals and institutions.

The Protocol drew inspiration from the Protocolo para Juzgar con Perspectiva de Género,[8] promulgated by the government of Mexico following a ruling by the Inter-American Court of

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[3] A public institution that aims to improve the work of the Brazilian judiciary, especially with regard to administrative and procedural control and transparency.

[4] Resolução No. 254, de 4 de Setembro de 2018, Diário da Justiça eletrônico (D.J.E.) (Braz.), https://atos.cnj.jus.br/atos/detalhar/2669.

[5] Conselho Nacional de Justiça [CNJ] [National Council of Justice], Protocolo para Julgamento com Perspectiva de Gênero [Protocol for Judging with a Gender Perspective] (2021) (Braz.), https://www.cnj.jus.br/wp-content/uploads/2021/10/Protocolo-18-10-2021-final.pdf.

[6] Deise Brião Ferraz & Marli Marlene Moraes da Costa, *O Protocolo de Julgamento com Perspectiva de Gênero como resposta institucional à pretensa universalização do feminino, amparada nos esforços internacionais de eliminação de todas as formas de discriminação contra as mulheres*, 20 Revista de Direito Internacional, 114 (2023), https://doi.org/10.5102/rdi.v20i1.9070, https://www.publicacoesacademicas.uniceub.br/rdi/article/view/9070.

[7] *Id*.

[8] Suprema Corte de Justicia de la Nación [SCJN], Protocolo para Juzgar con Perspectiva de Género (2020) (Mex.), https://www.scjn.gob.mx/derechos-humanos/sites/default/files/protocolos/archivos/2020-11/Protocolo%20para%20juzgar%20con%20perspectiva%20de%20g%C3%A9nero%20%28191120%29.pdf.

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Human Rights, as well as similar documents published by Chile, Bolivia, Colombia and Uruguay.[9] It was also influenced by the decisions of regional and international human rights courts, which highlight the importance and necessity of adopting official protocols for eliminating the use of gender stereotypes and biases in judicial decision-making,[10] so that cases involving women's rights can be adjudicated fairly.

It is worth highlighting the Inter-American Court of Human Rights case of *González v. Mexico,* better known as *Campo Algodonero*, which deals with the femicide of three women in the 1990s, in Ciudad Juárez, Chihuahua. When analysing the country's context, the Inter-American Court found that the "culture of discrimination" that permeated Ciudad Juárez had a clear relationship with violence against women and, therefore, with the femicides against the victims. Sociocultural patterns generated inaction by state officials and institutions, which reproduced violence against the victims and their families. This environment of impunity gave rise to the possible repetition of violent acts against women, as well as generating distrust in the impartiality of the justice system.[11]

In Brazil, the Protocol is the result of studies carried out by a working group made up of twenty-one representatives from different courts, judicial organisations and academia. The Protocol was designed to achieve gender equality, as well Sustainable Development Goal 5 of the UN 2030 Agenda,[12] to which the Brazilian Supreme Court and its National Council of Justice have committed themselves.

> *"The Protocol provides theoretical considerations on equality and a guide for judges in various areas of the law to apply the right to equality and non-discrimination to all people, in order to counteract the influence of historical, social, cultural and political inequalities to which women have been subjected throughout history, including in the production and application of legal norms."*

The Protocol is divided into three parts: a guide, concepts and specific gender issues by judicial branch. It has been applied, albeit modestly, by the judiciary in a wide variety of cases.

In 2022, the CNJ published Recommendation No. 128 (hereinafter the Recommendation),[13] which suggested that the judiciary adopt the Protocol. The Federal Council of the OAB (*Ordem dos Advogados do Brasil*), the body that represents lawyers throughout the country, asked the CNJ to send let-

[9] The document itself is a research tool that delves into various topics and looks at international documents on the subject, including similar documents from other countries, such as those mentioned above.

[10] For example, the case of *Favela Nova Brasília v. Brazil*, which deals with the international responsibility of the Brazilian state for the violation of the right to life and personal integrity of the victims – 26 men victims of homicide and three women victims of sexual violence – during police operations carried out in the Favela Nova Brasília, Complexo do Alemão, in Rio de Janeiro, in two raids on October 18, 1994 and May 8, 1995. Inter-Am. Ct. H.R. (ser. C) No. 3333 (2017), https://www.corteidh.or.cr/docs/casos/articulos/seriec_333_por.pdf. Additionally, the case of *Barbosa de Souza et al. v. Brasil*, which concerns impunity in the crime against the life of Márcia Barbosa de Souza, committed in June 1998 by a then state deputy, Aércio Pereira de Lima. Inter-Am. Ct. H.R. (ser. C) No. 435 (2021), https://www.corteidh.or.cr/docs/casos/articulos/seriec_435_por.pdf. The murder of Mrs. Barbosa de Souza – feminicide was not in force at the time – was probably committed for gender reasons. It is also important to consider that she was a black woman and a member of a family with scarce economic resources. The facts directly linked to the suppression of the victim's life were not judged by the Inter-American Court, since it does not have jurisdiction to examine facts prior to December 10, 1998, the date on which Brazil submitted to the jurisdiction of the Inter-American Court. Therefore, the judgment in question was limited to assessing the actions and omissions of the Brazilian state, which took place during the investigations and criminal proceedings, after December 10, 1998, both in relation to the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, and in relation to article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994. 27 U.S.T. 3301, 1438 U.N.T.S. 63 (better know as Convention of Belém do Pará), https://www.corteidh.or.cr/docs/casos/articulos/seriec_435_por.pdf.

[11] González v. México, Inter-Am. Ct. H.R. (ser. C) No. 205 (2009), https://www.corteidh.or.cr/docs/casos/articulos/seriec_205_esp.pdf.

[12] G.A. Res. 70/1, at 14 (Oct. 21, 2015), https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

[13] Conselho Nacional de Justiça [CNJ], Recomendação no. 128, de 15 de fevereiro de 2022, Diário da Justiça eletrônico (D.J.E.) de 17.02.2022 (Braz.), https://atos.cnj.jus.br/files/original18063702202176 20e8ead8fae2.pdf.

ters to the courts with the aim of reinforcing the content of the Recommendation. The CNJ actively responded to this request in September 2022. Specifically, the CNJ, by means of CNJ Normative Act 0001071-61.2023.2.00.0000,[14] generated CNJ Resolution 492,[15] which mandated that magistrates be trained to apply the document. Application of the Protocol became mandatory from March 2023 onward.

With the aim of ensuring that the courts do not perpetuate gender stereotypes, the Protocol states that:

> the National Council of Justice, by issuing this document, advances in the direction of recognizing that the influence of patriarchy, machismo, sexism, racism and homophobia effects all areas of law, not restricted to domestic violence, and effects their interpretation and application, including in the areas of criminal law, labour law, tax law, civil law, social security law, etc.[16]

Based on the Protocol and Recommendation 128, cross-cutting issues inherent to all spheres of justice are addressed, not only issues that directly involve women and gender issues, but also LGBTI and indigenous populations. It includes areas as harassment, prisons, custody hearings, social security law, women's rural work, obstetric violence and current issues such as stalking and revenge porn. The Protocol also includes a conceptual section on sex, gender, gender identity and sexuality. The document presents a proposal to identify gender inequality on various fronts in society.

## Paradigmatic perspectives of the document

The Protocol is not only part of an effort to combat violence against women, it also serves as an incentive for female participation in the Brazilian judiciary. The Protocol states: "Gender inequality can permeate the most diverse areas and controversies and, therefore, it is recommended that the judge pay attention to the concrete situation, even if cases appear to be 'gender neutral.'"[17]

It's worth noting that the Protocol is the result of several fronts, including feminist theories and movements, origins that should not be usurped and ignored. The Protocol questions the supposed neutrality of a formal equality based on universalizing the experience of women and their social roles, that is, it discusses the implications of a rationality that aims to divide binarily and universalize the meaning of the feminine, which consequently reproduces "gender stereotypes, social roles and the very institutional violence that is built on these foundations."[18]

## Application of the Protocol in the Labour Courts

Chapter four of part three of the Protocol deals with its application in the context of specialised labour justice. The Protocol highlights its application in the face of challenges based on the sexual division of labour, including: barriers which make it difficult for women to climb the career ladder ("the glass ceiling"); wage inequality; the burden of unpaid care work which falls disproportionately on women generating the "second shift"[19] or the "delegation model;"[20] submission of women to "male standards" in the job market; maintaining sexist stereotypes that portray women as too fragile to take on certain roles, such as leadership positions; widespread tolerance of moral[21] and sexual harassment

[14] Conselho Nacional de Justiça [CNJ], Ato Normativo No. 0001071-61.2023.2.00.0000, 14 de março de 2023 (Braz.), https://www.cnj.jus.br/InfojurisI2/Jurisprudencia.seam?jurisprudencialdJuris=54186&indiceListaJurisprudencia=1&firstResult=10250&tipoPesquisa=BANCO.

[15] Conselho Nacional de Justiça [CNJ]. Resolução no. 492, 17 de março de 2023, Diário da Justiça eletrônico (D.J.E.) de 20.03.2023 (Braz.), https://atos.cnj.jus.br/files/original144414202303206418713e177b3.pdf.

[16] Protocol, *supra* note 5, at 8.

[17] *Id*. at 45.

[18] Brião Ferraz & Moraes da Costa, *supra* note 6.

[19] In addition to the hours of domestic care or reproductive work (unpaid), there are the hours of formal or informal paid work.

[20] Sociologists Helena Hirata and Daniele Kergoat call it the "delegation model," whereby "in order for women to rise to senior and executive positions, their domestic and care activities are delegated to other women, keeping the number of women in these undervalued" and often precarious and unpaid activities high. Helena Hirata & Danièle Kergoat, *Novas configurações da divisão sexual do trabalho*, 37 Cadernos de Pesquisa 595, (2007), https://doi.org/10.1590/s0100-15742007000300005.

[21] Moral harassment is the exposure of people to humiliating and embarrassing situations in the workplace, in a repetitive and prolonged manner, in the course of their activities. It is conduct that damages the dignity and integrity of the individual, putting their health at risk and damaging the work environment. Moral harassment is conceptualised by experts as any and all abusive conduct, manifested by behaviour, words, acts, gestures or writings that may cause damage to the personality, dignity or psychological integrity of a person, endangering their job or degrading the work environment. Tribunal Superior do Trabalho (TST) & Conselho Superior da Justiça do Trabalho (CSJT), Cartilha Prevenção ao Assédio

A Brazilian woman working in a street market. Credit: Fabio Tirado / Shutterstock.com

practices without effective punishments or preventive measures to curb such conduct and a concentration of female labour in occupations derived from social reproduction functions.

The Protocol highlights that the standard adopted in Occupational Health and Safety rules considers the "average man" – that is, an androcentric bias – when calculating risks. This lens particularly impacts pregnant and breastfeeding women. As the Protocol mentions:

> There are, however, many issues already scientifically recognized that have not yet had normative treatment. The [International Labour Organization][22], for example, points to other risks, recommending the prohibition of: any heavy work involving lifting, pulling or pushing weights, or requiring physical effort, including standing for prolonged periods; work requiring special balance; work with vibrating machines. Exposure of pregnant workers to continuous noise above 115 dB, or noise peaks above 155 dB, can cause hearing loss in the fetus, even if they use effective PPE (hearing protection). Neutralizing the risk to the mother would not require changing jobs, but it would not protect the fetus.[23]

Also noteworthy is the criticism of precarious work in the document:

> The legislative options aimed at protecting certain groups to the detriment of others that have been historically marginalized become clear when the legislator itself chooses to formally protect only workers who are employees, leaving aside all those who do not fit into formal production processes.[24]

This excerpt shows that Brazilian legislation fails to protect women workers in vulnerable forms of work, either because there is no specific legislation or because the legislation aimed at them does not effectively protect them.

Brazilian courts understand that both the traditional analysis of equality from both a formal and a material point of view have been insufficient to address systemic discrimination.[25] This insufficiency does not mean that the category or principle is inadequate for the analysis and development of jurisprudence, but that it should be improved or better developed. There is certainly debate in Brazilian institutions on the subject, and there is scholarship in the academic theoretical field. To deepen the discussion, Adilson Moreira proposes what he calls an Anti-Discrimination Law Treaty, a field whose main objective is to regulate and operationalize the protective system present in a country's legal system.[26]

As for the political dimension of the principle of equality, "it binds the action and operation of public institutions," as well as emphasising "the role that equality plays in shaping the public morality of a democratic society."[27] According to Moreira, anti-discrimination law is a subsystem of constitutional law with legal, political and philosophical purposes.[28] This subsystem can be used as an instrument in the search for equality in Brazilian law and seems complementary with the Protocol's objective for judgments with a gender perspective.

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Moral: Pare e Repare – Por um Ambiente de Trabalho Mais Positivo (2019), https://www.tst.jus.br/documents/10157/55951/Cartilha+ass%C3%A9dio+moral/573490e3-a2dd-a598-d2a7-6d492e4b2457.

[22] *See*, *e.g.*, ABC of women workers' rights and gender equality 2, (2000), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf

[23] Protocol, *supra* note 5, at 117.

[24] *Id*. at 103.

[25] Adilson José Moreira, Tratado de Direito Antidiscriminatório 40 (2020).

[26] Adilson José Moreira, Tratado de Direito Antidiscriminatório (2020).

[27] *Id*. at 130.

[28] *Id*. at 54-60.

**Cases of Application of the Protocol**

The Protocol's recommendations can be applied in a wide variety of ways in the cases analysed in the Labour Courts.[29] To demonstrate this wide application, we cite examples of Brazilian labour judgments which use the document's guidelines. First, in case 0000280-49.2021.5.09.0651, a worker sought to have his dismissal for cause reversed. The evidence produced showed that the plaintiff offered his female subordinates dog food as a "gift" for International Women's Day. The Regional Labour Court of the 9th Region applied the Protocol to maintain the dismissal for just cause, finding that the Protocol:

> defines gender discrimination as violence against women that occurs when women are diminished by society or groups of individuals, including in the workplace. In this sense, an effectively impartial trial presupposes the search for decisions that take into account historical differences and inequalities. This is a fundamental approach to eradicating all forms of discrimination. Above all, it is important to ensure that the justice system takes into account the "issue of credibility and the weight given to the voices, arguments and testimonies of women, as parties and witnesses." In this case, the evidence produced confirms that the plaintiff, a manager in the organization, offered dog food as a "gift" for International Women's Day to a group of female subordinates. The victims understood the act as an insinuation that they were "bitches." The employer's reaction, in turn, was immediate and legitimate, applying just cause. The complainant's conduct was sexist and misogynistic, constituting a serious affront and disrespect to all women and, specifically, to his female subordinates. It is conduct that cannot be normalized as a mere joke. The seriousness of this conduct means that the just cause should be upheld, and the lower court ruling should be ratified.[30]

In case 1001484-23.2021.5.02.0032, the Protocol was applied by the Regional Labour Court of the Second Region in the case of a worker who was sexually harassed. The company was ordered to pay compensation in the amount of R$30,000.00. The Court held that:

> Violence at work is a category that includes several types, including moral, psychological, communicational and sexual harassment. It can be vertical, ascending or descending, horizontal or transversal. According to research carried out by the Patrícia Galvão Institute, women suffer more harassment at work, with 40% having been harassed at work compared to 13% of men. According to the data obtained, "women suffer more situations of embarrassment and harassment in the workplace than men." Recommendation 128/2022 of the National Council of Justice recommends that the bodies of the judiciary adopt the Protocol for Judging with a Gender Perspective – 2021.

*"This document states that 'the silencing of voices within the organization can lead to a situation in which repeated violations make the victim feel powerless to react or seek any kind of help. Thus, the victim's lack of immediate reaction or delay in reporting the violence or harassment should not be interpreted as acceptance or agreement with the situation. The very intersection of class and gender, which is frequent in situations of violence or harassment in working relationships, points to greater vulnerability on the part of the victim, who may perceive any insurgency on their part as a reason to lose their job. In addition, the stereotyping of women as a kind of 'suspect category,' based on the beliefs that women exaggerate or lie and that they use the law for revenge or to gain an undue advantage, can be accentuated when it comes to women workers."*

> In view of this serious situation, everyone is urged to act to extinguish the harassment that rages in our society and to make people aware of its harmful effects, because it violates freedom, dignity and equality among all – constitutionally guaranteed rights – and because of the human

[29] The Labour Court mediates and judges lawsuits between workers and employers and other disputes arising from the employment relationship, as well as claims arising from the enforcement of its own sentences, including collective ones. The bodies of the Labour Court are the Superior Labour Court (TST), the Regional Labour Courts (TRTs) and the Labour Judges. The Labour Judges work in the Labour Courts and form the first instance of Labour Justice. The 24 Regional Labour Courts are made up of judges and represent the second instance of labour justice. The Superior Labour Court (TST), headquartered in Brasília-DF and with jurisdiction throughout the country, is the apex body of the Labour Court, whose primary function is to standardise Brazilian labour jurisprudence.

[30] TRT-9, Acórdão No. 0000280-49.2021.5.09.0651, Relator: Des. Célio Horst Waldraff, 17.11.2022, Tribunal Superior do Trabalho Jurisprudência [T.S.T.J.] (emphasis added) (Braz.), https://pje.trt9.jus.br/consultaprocessual/detalhe-processo/0000280-49.2021.5.09.0651/2#4f182c8.

> and moral values that we must have in order to achieve a fair and supportive society. Therefore, if the conduct in this case amounts to sexual harassment, it is clear that the defendant is liable and that the plaintiff's personality rights have been offended."[31]

The Protocol has also been applied in lawsuits involving the recognition of a pregnant woman's right to paid maternity leave. Case 0021229-14.2022.5.04.0000, from the Regional Labour Court of the Fourth Region, surrounds a pregnant employee at a university hospital, which provides services to the municipality of Canoas, in the state of Rio Grande do Sul. This pregnant employee took gestational leave, since a hospital is an environment understood to be unhealthy, and there was no place for the worker to provide services without the risk of harm to her pregnancy and the unborn child. However, the employee was dismissed without receiving her wages, as the company that provided services to the municipality no longer made the payments due and her contract with the municipality was terminated. The court issued a preliminary injunction under the terms of the Protocol and held the municipality responsible for the pregnant woman's case and ordered it to pay her past and future salaries due, reasoning:

> The CNJ recommends that magistrates follow the Protocol for Judgments with a Gender Perspective, a document that promotes an active stance to deconstruct and overcome historical inequalities and gender discrimination. The guarantee of stability in this case comes about because it is presumed that the child's mother will have no other source of support during this very complex period, full of the demands of pregnancy and care work (unpaid work) to which the worker will be subjected while on leave. It is inhumane to consider any hypothesis that would remove the right of these 120 female employees who urgently need to provide for themselves and cannot count on another workload. This judge also believes that there is a possibility of joint and several liability, since the obligations referred to here were assumed directly by the Municipality and the labour provided served the Municipal Executive Branch's own purpose of providing health services.[32]

The Protocol was also applied by the same regional court when analysing a claim involving the work of a breastfeeding employee with a six-month-old newborn. The employee, a nurse, stated that she was exposed to unhealthy agents in the hospital where she worked, and the Regional Labour Court of the Fourth Region granted her leave from work for a period of up to two years:[33]

> the law can be interpreted and applied in a non-abstract manner and attentive to reality, with the aim of identifying and dismantling structural inequalities, considering, in this case, the gender of the worker. The need to breastfeed and be healthy during this period is the woman's, in this case, and is non-transferable and, for this reason, without creating a stereotype, but in the face of the irrefutable need for comprehensive protection for mother and baby, the injunction granted in a writ of mandamus is urgent and irrevocable.[34]

Thus, as can be seen, the regional labour courts, which are the second instance bodies of labour justice in Brazil, are applying the Protocol in a wide variety of matters that impact women's work.

## Conclusion

In adopting the Protocol for Judging with a Gender Perspective, Brazil is both meeting its international commitments and following progressive global trends, which were first proposed and developed in the field of feminist studies. The country decided to replicate what has already been practised by other countries in the region, which shows that it is possible to learn from other experiences and apply them in your own territory, taking into account its particularities.

The importance of the document is due, among other things, to its comprehensive scope and the way in which it can have a direct impact on the lives of women who have recourse to the justice system. The Protocol serves as an instrument

[31] TRT-2, Decisão No. 1001484-23.2021.5.02.0032, 23.06.2023, Tribunal Superior do Trabalho Jurisprudência [T.S.T.J.] (Braz.) (emphasis added), https://pje.trt2.jus.br/consultaprocessual/detalhe-processo/1001484-23.2021.5.02.0032/2#c219370.

[32] TRT-4, Decisão No. 0021229-14.2022.5.04.0000, 25.01.2023, Tribunal Superior do Trabalho Jurisprudência [T.S.T.J.] (Braz.) (emphasis added), https://pje.trt4.jus.br/consultaprocessual/detalhe-processo/0021229-14.2022.5.04.0000/2#1e6deda.

[33] The lactation period is expected to last up to two years.

[34] TRT-4, Decisão No. 0022748-58.2021.5.04.0000, 21.02.2022, Tribunal Superior do Trabalho Jurisprudência [T.S.T.J.] (Braz.) (emphasis added), https://pje.trt4.jus.br/consultaprocessual/detalhe-processo/0022748-58.2021.5.04.0000/2.

whose exercise can educate everyone involved: judges, civil servants, lawyers and the parties to the case. To this end, this pedagogical character must be taken seriously through the continuous training of magistrates on the gender perspective. The need for continuous training and application means that this topic must continue to be studied and improved.

From an academic point of view, research into the application of the Protocol is still scarce, especially given that the document was adopted in 2021 and only became mandatory in 2023. From the point of view of legal professionals, especially lawyers, the application of the Protocol has beneficial effects, generating deeper discussions, better analysis of evidence, protection of women workers and results that effectively aim to protect women and diversity, as a whole. Similarly, trade unions can benefit from applying the Protocol in the same way, including in collective claims.

In other words, institutionally and discursively, the institutions involved in the development and application of the Protocol have shown that they welcome the document. This eagerness is seen in the case of the OAB in the state of Rio de Janeiro. In Brazil, there are bar associations at national, state and municipal levels. There are general rules and specific rules for each region. In the case of the Rio de Janeiro Bar Association, they had already prepared a booklet on the subject for 2022.[35] The courts must promote initial and continuing training courses which must include content related to human rights, gender, race and ethnicity, in accordance with the guidelines established in the Protocol.

As this is a relatively recent document, its implementation and application are still underway and/or just beginning. As it is a document aimed at the professional work of magistrates, the debate can sometimes become heated. Nevertheless, academically this discussion or the beginnings of it have been going on for some time. The initial analysis of the instrument seems promising, as demonstrated in the article recently published by Costa and Ferraz.[36] The judgments are now beginning to be studied critically. Therefore, critical and in-depth research will no doubt be carried out in the near future.

However, with regard to knowledge of the terms and form of application of the Protocol and its recent creation and application, which is still very limited to specific cases, many professionals and trade unions still do not have a wide knowledge of the document and the possibilities for its use in legal actions and collective negotiations and the creation of collective standards, which ends up resulting in people not requesting the application of the Protocol because they are unaware of it, as well as because there is little implementation and dissemination of the document among workers and the general public.

Regarding the possible cultural changes involving the application of the Protocol, the Brazilian figures still stand out: there were 1,437 cases of femicide registered in Brazil, compared to 2021 – when there were 1,347 cases, an increase of 6.1%. Homicides of women increased by 1.2% from one year to the next,[37] and more than 18 million women suffered violence in 2022, of which 4.7% reported that the violence occurred in the workplace. So that of the 26.3 million women who received disrespectful comments, 11.9 million reported that it happened at work.[38] This disparity shows that the application of the Protocol is still not mitigating the gender-based violence suffered.

It is hoped that, as a forecast for the continuation and successful evolution of the feminist approaches applied by the Brazilian courts, especially in the labour courts, the Protocol will be increasingly applied, which can be done by training magistrates and lawyers, in particular, and by the CNJ's effective monitoring of cases in which the document has been used as a basis for decisions. In addition, it is of the utmost importance that the trade union movement delves deeper into the application of the Protocol and it's underlying values, taking ownership of the Protocol and seeking its effective implementation

[35] Felipe Benjamin, *CNJ aprova obrigatoriedade de diretrizes do Protocolo para Julgamento com Perspectiva de Gênero*, OABRJ (Mar. 23, 2023), https://oabrj.org.br/noticias/cnj-aprova-obrigatoriedade-diretrizes-protocolo-julgamento-perspectiva-genero#:~:text=Tema%20foi%20levantado%20pela%20OABRJ%20em%20cartilha%20lan%C3%A7ada%20em%202022&text=A%20fim%20de%20evitar%20preconceitos,G%C3%AAnero%20pelo%20Poder%20Judici%C3%A1rio%20nacional.

[36] Brião Ferraz & Moraes da Costa, *supra* note 6.

[37] Deslange Paiva, Arthur Stabile & Gustavo Honório, *Casos de violência contra mulher, criança e adolescente crescem no Brasil em 2022, mostra Anuário*, G1 (July 20, 2023), https://g1.globo.com/sp/sao-paulo/noticia/2023/07/20/casos-de-violencia-contra-mulher-crianca-e-adolescente-crescem-no-brasil-em-2022-mostra-anuario.ghtml.

[38] Ludmilla Souza, *Mais de 18 milhões de mulheres sofreram violência em 2022*, Agência Brasil (Mar. 2, 2023), https://agenciabrasil.ebc.com.br/direitos-humanos/noticia/2023-03/mais-de-18-milhoes-de-mulheres-sofreram-violencia-em-2022.

# NARRATIVES, FEMINIST GENDER PERSPECTIVE AND LABOUR LAW

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## Introduction

In this essay we will focus on two central themes: (1) the importance of narratives in constructing a gender perspective and (2) the changes that these narratives can generate in the courts.

What are narratives?[2] Broadly, this term refers to any oral or written presentation. However, the study of narratives can focus on the process of creating a story, the cognitive scheme of the story or the final result of this process, that is, the stories as such.[3] Narratives can take different forms, focusing on common themes, hypothetical situations or focusing on specific themes.[4]

Many times, stories convey a message that gives meaning to our existence,[5] explaining how the world works.[6] A good example of this function is found in the great stories about the meaning of life, with heroes and villains, conflicts and resolutions, culminating moments and happy endings.[7] Religious stories, cosmic stories and ideologies of all kinds, whether circular or linear, explain reality to us and our role in it, which integrates us into something larger that gives meaning to our experiences and choices.[8] Stories are the way we explain the world to ourselves, and they reflect the way we want the world to be.[9] Narratives also shape reality by giving things a label[10]

> *"In law, narratives contextualise judges' readings of norms, their application and interpretation of the law, the integration of gaps, and the resolution of difficult cases. These narratives are usually implicit and can be replaced over time by different – sometimes even completely different – narratives."*[11]

Narratives can be informal and sometimes unconscious. For example, MacKinnon denounced anti-discrimination laws that focus on supposedly neutral measures of equality and difference as concealing "the substantive way in which man has become the measure of all things."[12] She argues, women are both measured according to their similarity with men and judged according to their lack of similarity with men.[13] In this way, anti-discrimination laws resting on an idea of neu-

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[2] Catherine Kohler Riessman, Narrative Analysis 17 (1993).

[3] Donald E. Polkinghorne, Narrative Knowing and the Human Sciences 13 (2017).

[4] Riessman, *supra* note 2, at 18.

[5] Eric Selbin, El Poder Del Relato 13 (Alejandro Droznes trans., Interzona 2010).

[6] *Id*. at 16.

[7] Yuval Noah Harari, 21 Lecciones para el Siglo XXI 295 (Joandoménec Ros trans., Debate 2018).

[8] *Id*.

[9] Selbin, *supra* note 5, at 17.

[10] Maria Teresa Sanza, Le narrazioni della legge 7 (2013).

[11] Sergio Gamonal C., *Narrativa laboral y principios del derecho del trabajo chileno*, 273 Revista de la Facultad de Derecho de México 65, 69 (2019).

[12] Catharine MacKinnon, *Diferencia y dominación: sobre la discriminación sexual*, *in* Feminismo Inmodificado: Discursos sobre la Vida y el Derecho 57, 58 (Teresa Beatriz Arijón trans., Siglo XXI 2014).

[13] *Id*. at 59-60.

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trality conceal and reinforce a narrative of male domination and supremacy.[14]

Stories are not indifferent to power and hierarchies and are often performative, since they tend to naturalise an approach and constitute a founding fable of positions of power.[15] Narratives can generate blindness in jurists, especially if they operate unconsciously, when in Ortega y Gasset's words they operate as "beliefs" instead of "ideas."[16] Beliefs "are not ideas we have, but ideas we are."[17] Precisely because narratives are beliefs, they are confused by us with reality itself, therefore, they lose the character of ideas, of our thoughts that could very well not have occurred to us.[18] Beliefs already operate in our background when we start thinking about something.[19]

It is obvious that narratives about gender are a very important element in discrimination against women. Next, we will refer to the influence of the traditional, sexist and misogynist gender perspective in labour law, and then review how the change of narrative, one that incorporates the perspective of women, is creating changes in the judiciary. Therefore, we believe that talking about a gender perspective without further specifications is misleading, given that the law has always operated with a gender perspective: that of men. Moreover, recent changes imply a new balance considering the female perspective, so we think that we should speak of "feminist gender perspective."

*"Criticisms of the 'feminist' gender perspective that are based on the alleged loss of impartiality of judges or the increase in judicial discretion are based on the myth of the impartiality of judges, as if misogynistic narratives and stories do not operate unconsciously and sometimes explicitly in their decisions."*

## The traditional gender perspective

Patriarchy has generated its own misogynistic narratives, considering a subordinate role for women, excluding them from political debate, confined to the private sphere of the home and infant care. For example, in the Old Testament (Genesis 19:8), Lot offers his two virgin daughters to a mob that threatened to sexually abuse two male guests staying at his home in Sodom. These guests were angels disguised as men, and Lot had just met them. Due to this "virtuous" deed, God saves him and his family. There is no reproach in the text for this monstrous father who prefers to give his daughters to the mob rather than the strangers he has just met. As Eisler has pointed out, for biblical morality, women were to be sexually enslaved to men.[20]

Similarly, in Greek mythology, Pandora, the first woman, is represented as a gift and a curse, as an object and as a fatality.[21] Pandora was created by order of Zeus as punishment for the human race to whom Prometheus had just given fire. Once on earth, Pandora opened, out of curiosity, the box that contained all the evils of the world. Due to this imprudence, calamities spread throughout the human race, and only hope, which had remained at the bottom, could not escape, as Pandora managed to close the box.[22] As García Gual says, Pandora "is a kind evil, a misfortune that men become fond of, an ambiguous gift."[23]

We know that when it comes to sexual harassment, women are often the victims. But the biblical and mythological accounts tell us otherwise, as with "Potiphar" (Genesis 39:7-20). As López Salvá points out, these stories generally focus on a married woman, who expresses her loving feelings to a younger man who is usually of lower social rank, linked by some bond of loyalty, family or affection with the husband. The harassed man rejects the advances of the woman which generates her revenge out of spite.[24]

[14] *Id.*

[15] Judith Butler, El Género en Disputa 48 (María Antonia Muñoz trans., Paidós 2018).

[16] José Ortega y Gasset, *Ideas y Creencias*, *in* Obras Completas Tomo V 1932-1940 661 (Taurus 2017).

[17] *Id*. at 662.

[18] *Id*.

[19] *Id*. at 663.

[20] Riane Eisler Riane, El Cáliz y la Espada. Nuestra Historia, Nuestro Futuro 113 (2000).

[21] Carlos García Gual, Diccionario de Mitos 261-62 (1997).

[22] Pierre Grimal, Diccionario de mitologia griega y romana 405 (1981).

[23] García Gual, *supra* note 21, at 262.

[24] Mercedes López Salvá, *El tema de Putifar en la*

Similar accounts are numerous, for example, in Greek mythology, Bellerophon,[25] among others,[26] and in ancient Egyptian literature in the "Tale of the Two Brothers."[27]

There is no doubt that we could continue with misogynistic narratives to this day, which have reinforced patriarchal culture and which, in what concerns us, have influenced the "beliefs" of judges when ruling. As Woolf points out, women are the most discussed animal in the universe by men and their writings about them.[28] If from the ancient, mythological and biblical texts the woman is referred to as treacherous, lying, disloyal, sinful and impudent, it would be difficult for this misogynistic narrative *not* to permeate judicial work.

Let's now look at two examples of how these narratives influence judges, briefly commenting on two labour cases from the United States of America. A famous case from 1908, *Muller v. Oregon*,[29] examined legislation that limited the working day of women labouring in laundries to ten hours.[30] It was widely believed that the Supreme Court would declare this law unconstitutional, especially because of the precedent set in a previous case*, Lochner v*. *New York*, in 1905, where the Court struck down a New York law that limited the working day in bakeries to no more than ten hours a day.[31] However, in this case, the Court adopted a different approach based on the traditional gender perspective. The


Credit: Bangladesh Independent Garment Workers Union Federation (BIGUF)

Court took it upon itself to specify that, "women are not full subjects (sic) and contractual freedom is applicable only to subjects capable of managing their own affairs."[32] Consequently, the Court took into account the health and inferior legal status of women to justify the protective rule.[33]

More than a hundred years later, in another case, we find ourselves again with the traditional gender perspective. In *Prospect Airport Service,*[34] the plaintiff, Rudolpho Lamas, complained about sexual harassment he suffered at the hands of a female co-worker for months. Despite his complaints, his employer did nothing to prevent the harassment. Management of the company commented that instead of complaining he should be "dancing and singing."

The lower court, in rejecting the lawsuit, justified its decision by noting that even the plaintiff's lawyer "admits that most men in his circumstances would have 'welcomed' [the female co-worker's] advances."[35] The U.S. Ninth Circuit Court of Appeals ultimately reversed the decision, calling the lower court out for its incredulous attitude towards a male plaintiff based on a subjective stereotype.[36]

*literatura arcaica y clásica griega en su relación con el Próximo Oriente*, 1 Cuadernos de Filología Clásica: Estudios Griegos e Indoeuropeos [CFC (G): Est. Grieg. e Indoeurop] 77, 78 (1994).

[25] García Gual, *supra* note 21, at 94.

[26] López Salvá, *supra* note 24.

[27] *The Tale of Two Brothers*, *in* The Literature of Ancient Egypt: An Anthology of Stories, Instructions, Stelae, Autobiographies, and Poetry 80, 80-85 (William Kelly Simpson ed., Robert K. Ritner et al. trans., 3d. ed. Yale University Press 2003).

[28] Virginia Woolf, Un cuarto propio 32 (Emundo Moure & Marisol Moreno trans., 3d ed. Editorial Cuarto Propio 2010).

[29] 208 U.S. 412 (1908).

[30] Paul Kens, Lochner v. New York Economic Regulation on Trial 170-71 (1998).

[31] 198 U.S. 45 (1905). In the so-called *Lochner Era*, from 1905 to 1937, the U.S. Supreme Court declared hundreds of laws protecting workers unconstitutional. This thesis has had many critics and some defenders. In finding the law unconstitutional, the Court embraced "a social Darwinist view that it is futile and wrong for the government to interfere in the processes of natural selection through with the strong will succeed and the weak must perish." Allan Ides, Christopher N. May & Simona Grossi, Examples & Explanations: Constitutional Law: Individual Rights 68-69 (2022). *See also, e.g.* Davis E. Bernstein, Rehabilitating Lochner: Defending Individual Rights against Progressive Reform (2011)

[32] Kens, *supra* note 30, at 171.

[33] *Id*.

[34] *E.E.O.C. v. Prospect Airport Servs., Inc.*, 621 F.3d 991 (9th Cir. 2010).

[35] Ann McGinley, *Reasonable Men?* 45 Conn. L. Rev. 1, 6 n.22 (2012)(quoting *Prospect Airport Servs., Inc.*, 621 F.3d at 997).

[36] *Id*. at 6.

These cases from 1907 and 2010 show us how stereotypes, biases and unconscious narratives operate in the judiciary.

*"For this reason, I emphasise that the 'feminist' gender perspective, based on the perspective of women, does not create "partial" justice. Rather, it seeks to consider all perspectives adequately, including the idea that women as actors are as important as men and have the same rights."*

In the following paragraphs, we will see some examples of the "feminist" gender perspective in Chilean labour law.

**The feminist gender perspective**

The feminist gender perspective allows judges to see, perhaps for the first time, the perspective of women and other marginalised gender identities, in issues such as femicide, domestic violence, child custody, sexual harassment, mobbing or workplace bullying, among others. We will look at some Chilean labour cases to illustrate this point.

Since 2017, the Chilean Supreme Court has a Technical Secretariat for Gender Equality and Non-Discrimination,[37] to promote equal work spaces for members of the judiciary, which are free of violence and discrimination, as well as to promote the development of policies and actions aimed at guaranteeing equality and non-discrimination for all people in their access to justice.[38] Among other activities, the Secretariat has a repository of outstanding Chilean judgments and holds an annual contest awarding a prize to the best judgments with a gender perspective.

In the case of *Cordero v. Ministry of the Environment*,[39] three female employees had been harassed at work, through workplace bullying, by their direct supervisor, in addition to being sexually harassed.[40] The lower court, in order to consider the sexual harassment and mobbing conduct carried out by the direct superior of the three plaintiffs, references Chilean norms that prohibit and punish sexual and moral harassment in the Labour Code,[41] along with provisions of various international treaties signed by Chile – such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in article 5(a), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará), in its article 2(b) – concluding that sexual harassment behaviours may consist of, among other things, in those listed below, which may occur both inside and outside the workplace:

a. Lewd gestures and compliments.
b. Telephone calls, emails, messages, letters and/or any other means of communication, with sexual intentions.
c. Pressure to accept gifts and/or invitations to go out.
d. Unnecessary physical approaches or contact.
e. Both physical and mental pressures to have intimate contact.
f. Display of pornography.
g. Requesting information regarding activities of a sexual nature. [42]

Actions of workplace harassment originated or derived from sexual harassment are also included. Regarding the sexual harassment, the court explained that the superior's conduct reflected the use of his position of power vis-à-vis the complainants, denoting a dominant and patriarchal conduct, which underestimated the complainants, for example, when he alluded to the sexual life of the complainants and made comments of a sexual nature about their bodies, without respect for the limits imposed by the dignity of the employees, and the safeguarding of their right to mental integrity.[43]

In the case of *Linares Base Hospital v Leiva*,[44] the

[37] Corte Suprema de Chile [Supreme Court of Chile], Propuesta de Estructura Permanenta, Resolución AD-566-2016 (July 8, 2016), https://secretariadegenero.pjud.cl/images/documentos/3.-AD-566-2016-julio_2016_aprueba.pdf.

[38] Secretaría Técnica de Igualidad Género, https://secretariadegenero.pjud.cl/ (last visited Sept 25, 2023).

[39] Juzgado de Letras del Trabajo de La Serena [J.L.T. Serena] [Labour Court of Serena], 3 junio 2022, RIT T-109-2019 (Chile). This sentence is of term, that is, the party that lost was satisfied with the decision or, if it filed an appeal for annulment in the Court of Appeals, it was rejected.

[40] On the judicial protection of fundamental workers' rights in Chile, see Sergio Gamonal C., Derecho Individual del Trabajo: Doctrina, materiales y casos 249-78 (2021).

[41] On sexual harassment and mobbing (workplace bullying) in Chile, see Gamonal C., *supra* note 40, at 279-324.

[42] J.L.T. Serena, 3 junio 2022, RIT T-109-2019, 20th recital.

[43] *Id*. at 21st recital.

[44] Juzgado de Letras del Trabajo de Linares (J.L.T. Linares), 4 marzo 2022, "Hospital Base de Linares c. Leiva, Carolina," RIT O-53-2021, desafuero maternal (Chile), https://www.pjud.cl/prensa-y-comunicaciones/getRulingNew/13208. This decision

employer requested the removal of a worker's immunity from dismissal. This worker was a few weeks pregnant. Pregnant workers may not be terminated in Chile, unless previously authorised by a judge (stripping of the immunity) on disciplinary grounds.[45] But this protection against dismissal operates when the work contract is permanent. If, on the other hand, it is temporary work contract, for a fixed term, for example, judicial authorization (stripping of the immunity) may be requested to dismiss or not renew the contract before the end of the term.

*"In this case, the worker had continuously had numerous short-term contracts (more than thirty replacing other workers), and only when she notified her employer of the pregnancy did he decide to request judicial authorization not to renew the contract once again. Previously, in Chile, authorization was usually given to terminate the contract in these cases. However, applying a feminist gender perspective has changed the decisions of judges. The court in this case considered that these temporary contracts discriminate against women. In this case, the dismissal was rejected, and the worker kept her job."*

The judgement cites the International Covenant on Economic, Social and Cultural Rights, in its article 10, no. 2, in force in Chile and, in addition, the court cites books and academic articles pointing out that the best way to weigh the subjective elements in conflict, is through the critical analysis of the gender perspective, which can be defined as a tool to identify, reveal and correct the different situations and contexts of oppression and discrimination against women, which in turn makes those institutions, rules and legal practices that create, legitimise and perpetuate discrimination visible, with the purpose of repealing them, transforming them and/or replacing them with others. The ruling adds that, in the judicial sphere, this perspective makes it possible to implement legal techniques that facilitate the achievement of the objective of the effective equality of women in the use and enjoyment of rights and freedoms.[46]

The sentence is conclusive in stating that: "In this way, we may see that the gender perspective is not only a tool applicable in cases of gender violence, as one might think. On the contrary, the gender perspective as a critical theory, seeks to examine all institutions, legislation, judicial practices, social customs and any other situations or contexts that may generate discrimination against women, in order to make these arbitrary distinctions clear and correct them."[47]

In a third case *Grandón v. Hospital Clínico Regional Doctor Guillermo Grant Benavente*,[48] an administrative officer of a hospital sued his employer after suffering psychological harassment and acts of discrimination when he manifested his gender identity, which was not consistent with his sex assigned at birth. Although the plaintiff requested to be addressed by the male name "Nicolás" or the diminutive "Nico," some colleagues addressed him as "Nicole," a female name.

The court accepted the lawsuit noting that there had been repeated conduct of employment discrimination based on gender identity, by not wanting to recognise the plaintiff's name Nicolás, who continued to be called "Nicole" by his colleagues, which has affected his gender identity, and has also resulted in a hostile work environment.[49] The ruling calls out the employer for not having adopted rational, adequate or proportional measures against this type of labour discrimination, that any of its employees could have suffered in the realm of sexual orientation or gender identity. Measures which, had they existed, would have generated an inclusive work environment and respect and understanding regarding the conditions of other workers who manifested a gender identity which is different from their sex assigned at birth.[50]

Finally, the court not only orders compensation for moral damages, but also establishes

was final, meaning that the party that lost was satisfied with the decision or, if an appeal was filed in the Court of Appeals, it was rejected.

[45] Código del Trabajo [Cód. Trab.] art. 174. On maternity protection, see Gamonal C., *supra* note 40, at 324-353.

[46] J.L.T. Linares, 4 marzo 2022, RIT O-53-2021, 14th recital.

[47] *Id*.

[48] Juzgado de Letras del Trabajo de Concepción (J.L.T. Concepción), 14 julio 2021, RIT T-378-2020. This decision was final, meaning that the party that lost was satisfied with the decision or, if an appeal was filed in the Court of Appeals, it was rejected.

[49] J.L.T. Concepción, 14 julio 2021, RIT T-378-2020, 19th recital.

[50] J.L.T. Concepción, 14 julio 2021, RIT T-378-2020, 25th recital.

several measures of reparation, including a letter of apology to the plaintiff by the director of the hospital, in which he commits to adopting measures to prevent discriminatory conduct. This letter must be published on the defendant's website and sent to both the leadership and the officials where the complainant works. In addition, it mandates that both the director of the hospital and the department where the plaintiff works must undergo training of at least eight hours in fundamental rights.

Finally, we examine *Hermosilla v. Public Assistance*,[51] a case of workplace harassment and violation of the rights to physical and mental integrity, and dignity. The worker is a dentist in a public hospital. The plaintiff was a temporary boss for one year, and one of her male subordinates did not obtain the best grade for his work. This male colleague then became her boss the following year and decided to harass her in revenge for the previous rating when the plaintiff was acting boss. In WhatsApp conversations, the defendant and his coworker use language that is particularly offensive and sexist towards the victim. The court condemns the damage to the plaintiff's physical and mental integrity. The decision says that women suffer atypical problems, such as being harassed even while in positions of power, as in this case. A woman in a decision-making position is rare within an organisation, so it is doubly disturbing to gender stereotypes. For example, that women should not work for pay, and much less should they be in decision-making positions, which traditionally belong to males. In this case, the pejorative treatment received by the complainant, being called a *cow* and a *disgusting bitch*, has to do with the combination of gender stereotypes and with her position of power. The defendant lashes out against her and not against other male bosses.[52]

The ruling adds, on the other hand, that the gender perspective applied to labour law allows us to see that the employment relationship, the paradigm of an asymmetrical power structure, is accentuated when the person who works is a woman, since it is a space that was designed and built for men. This fact means that women at work are exposed to conditions of greater oppression than their male counterparts. This exposure can be seen in feminised occupational risks such as sexual harassment, as well as unequal and humiliating treatment motivated by gender. This special form of persecution is called sexist, unlawful harassment and has been explained as any behaviour carried out on the basis of a person's sex, with the purpose or effect of violating their dignity and creating an intimidating, degrading or offensive environment.[53]

The four lower court rulings that we have mentioned, on sexual harassment, mobbing, maternity discrimination and gender identity deal with situations that have always occurred in Chile and in the world, but that only in recent years have been remedied. What has changed? Undoubtedly, the judicial perspective, which includes new, more conscious narratives that incorporate the feminist gender perspective in these decisions.

**Conclusions**

The feminist gender perspective has been essential in rebalancing the masculine gender perspective, which makes women invisible and emphasises patriarchy. The traditional perspective has been reinforced again and again from time immemorial, as the biblical and mythological stories mentioned in this essay illustrate.

We must not neglect the importance of narratives, especially in these times of populism and post-truth. The feminist gender perspective constitutes an essential counter-narrative so that judges can sentence in a balanced way and see realities that have been hidden. The labour rulings we have cited illustrate these changes that must be maintained and reinforced.

[51] Segundo Juzgado de Letras del Trabajo de Santiago (2do J.L.T. Santiago), 16 mayo 2019, RIT T-1061-2018. This decision was final, meaning that the party that lost was satisfied with the decision or, if an appeal was filed in the Court of Appeals, it was rejected.

[52] 2do J.L.T. Santiago, 16 mayo 2019, RIT T-1061-2018, 9th recital.

[53] *Id*.

# CHALLENGING NORMS: A FEMINIST RECONSTRUCTION OF LABOUR LAW

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*United States | Originally written in English*

> *"[M]ale dominance is perhaps the most pervasive and tenacious system of power in history…it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, and its control as the definition of legitimacy."*[2]

Feminist scholars have long articulated a distinctively feminist approach to labour, which extends the boundaries of the field beyond paid work to unpaid caring and domestic labour.[3] Feminist scholars have also critiqued the economistic nature of labour law, which operates within a patriarchal conception of power that limits workers' ability to use collective bargaining to advance dignitary and communitarian interests.[4] This essay offers a complementary analysis, uncovering the deeply rooted gender biases that have shaped labour law and union practices in the United States. It then provides examples of how some unions are moving toward a more inclusive construct of labour law and concludes with reflections on what unions can do short of legislative changes to ensure that the law is, in an overriding sense, fairer.

Labour law and unions have a symbiotic relationship: law shapes how unions function, while union practices and advocacy shape how the law develops. Traditionally in the United States, union growth strategies, allocation of resources, priorities, collective bargain agendas, etc., have been tethered to what the National Labor Relations Act[5] allows. In turn, unions, with the assistance of the National Labor Relations Board (NLRB) and the courts, have shaped the law to reflect the hypermasculinist norms that define the U.S. labour movement.

Union culture has historically been rooted in struggle and conflict, primarily shaped by white men.[6] "Incubated in bars and taverns and permeated with language such as 'brothers' and 'brotherhood,' male labour did not construct unionism as either accessible or comfortable for women."[7] Traditions, customs, iconography, and physical spaces of many unions continue to reflect periods when unions openly practised sexism and racism. "Buildings, scholarships, and awards are named after the male heroes. It is the faces of male unionists which line the walls."[8] Unions have staunchly defended this culture, especially in male-dominated industries like mining, construction, and manufacturing.[9] For

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[2] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 638 (1983).

[3] *See, e.g.,* Judy Fudge, *From Women and Labour Law to Putting Gender and Law to Work*, *in* A Research Companion to Feminist Legal Theory, 321 (Margaret Davies & Vanessa Munro eds., 2013).

[4] *See, e.g.* Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction,* 33 B.C. L. Rev. 481 (1992).

[5] 29 U.S.C. §§ 151-169.

[6] By culture, I refer to the invisible norms that dictate who is valued, what matters, and how resources are allocated. As in any organisation, union culture does not exist in isolation: it shapes how unions function, set priorities, and respond to issues that challenge established norms.

[7] Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and the United Front Ideology*, 84 Cornell L. Rev. 1542 (1998-1999).

[8] Ruth Needleman, *Comments*, *in* Women and Unions: Forging a Partnership 406, 409 (Dorothy D. Cobble ed., 1993).

[9] *See*, Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 U. Tex. J. Women & L. 9 (1995).

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example, in defending the discharge of a miner who, over the course of 2 1/2 years, called his female co-worker "a lazy bitch" and "*vieja pinche puta*,"[10] swung his clenched fists at her as if to strike her, repeatedly made obscene gestures toward her, and stalked her, the union "emphasised that a workplace such as a mine/mill is not a parlour room," and that "it is commonplace for the rougher edges of humanity to be revealed in such a site."[11]

This hypermasculine culture is also embedded in labour law. For example, the NLRB's "realities of industrial life" doctrine is based on a 1950s version of the workplace where vulgarity, profanity, and sexist and racist language are normal, accepted, everyday occurrences otherwise known as "shop talk." The NLRB has explained that "tempers may run high in this emotional field, that the language of the shop is not the language of 'polite society,' and that tolerance of some deviation from that which might be the most desirable behaviour is required."[12] Thus, only activities that are "so flagrant, violent, or extreme as to render the individual unfit for further service" will be deemed unprotected.[13]

Under this reasoning, a union defended a man discharged after he constantly referred to a female co-worker as "bitch" or as "fat ass"; frequently grabbed at her breasts; often greeted her with "Do you want to fuck?"; often asked her "Who'd you fuck last night?"; made remarks on sex positions; sometimes grabbed his crotch, shook it at her, and asked, "Hungry?"; and pulled off her shirt to look at her breasts. The union's position was that this conduct was "nothing more than shop talk," and that "the grievant's use of the word 'bitch' [was] his ordinary means of addressing females, including his wife."[14] While disputes between labour and capital might (and do) provoke "high tempers," the jurisprudence has developed to provide an excuse for expressions of misogyny.

Unions also rely on the doctrine of "horseplay" as a means to avoid accountability for the harm caused by hypermasculine and racist behaviour on the job. Professor Marion Crain has catalogued cases where unions – sometimes with the approval of an arbitrator – defend misogynistic behaviour as horseplay.[15] Unions' versions of horseplay include locking a woman in a supply closet, wrestling her down to a couch, and trying to remove her clothes – a near rape – as well as an incident where three male employees grabbed a female employee from behind, held her off the floor, and pulled at her clothing while one grievant said to the other two, "Let's get her, guys."[16] Unions have not abandoned this doctrine: in a fairly recent case involving a white union member who tied a noose and dropped it in the toolbox of the only Black worker at the facility, the union defended the behaviour as nothing more than "horseplay."[17]

Similarly, labour law treats strikes as manifestations of masculinity. The NLRB analyses conduct on the picket line through an overly masculine lens, which draws a line between "animal exuberance" (permissible conduct) and conduct that "is so violent or of such serious character as to render the employee unfit for further service."[18] Thus, the NLRB has held that a striker calling a non-striker a "whore" and a "prostitute" and adding that she was "having sex with [the employer's] president" was not "serious misconduct" and thus was not sanctionable.[19] That same striker repeatedly called a second female employee "a 'whore' and told [her] she could earn more money by selling her daughter, another non-striker, at the flea market," which the board also deemed within the bounds of the law.[20] The board has further deemed it acceptable for a striker to yell at female non-strikers to

[10] "Old fucking whore"

[11] Anaconda Copper Co., 78 BNA LA 690 (1982) (Cohen, Arb.).

[12] Dreis & Krump Mfg., 221 N.L.R.B. 309, 315 (1975), *enforced,* 544 F.2d 320 (7th Cir. 1976).

[13] *Id.*

[14] Cante Ind., 90 BNA LA 1230 (1988) (Shearer, Arb.).

[15] Crain, *supra* note 9 at fn. 138.

[16] *Id.*

[17] The arbitrator rejected the defence, but nonetheless reduced the penalty from discharge to a 10-day suspension without pay. International Brotherhood of Teamsters, 2022 BNA LA 237 (Viani, Arb.)

[18] *Advance Indus. Div. Overhead Door Corp. v. N.L.R.B.*, 540 F.2d 878, 882 (7th Cir. 1976)

[19] Calliope Designs, 297 N.L.R.B. 510 (1989)

[20] *Id.*

"come see a real man" and then to "pull down his pants and expose himself"; it also ordered the reinstatement of a striker who "made crude and obscene remarks and suggestions regarding sex, including an invitation to 'make some extra money at his apartment that night'" to a female employee.[21] Unions continue to advance this doctrine today. For example, a union recently argued that a member who shouted "fucking dyke!" at two female non-striking employees while holding his fingers in a "V" shape and sticking his tongue between his fingers was engaged in protected conduct, not subject to discipline.[22]

*"Implicit in the 'realities of industrial life,' 'shop talk,' 'horseplay,' and 'animal exuberance' doctrines is the notion that 'boys will be boys.' Importantly, these hypermasculine doctrines and the practices that flow from them put women workers at risk, which is the opposite of what labour law is meant to do."*[23]

The ubiquitous nature of sexual harassment on the job provides a robust example of the danger of hypermasculine constructs in labour law and practices. According to the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency charged with prosecuting cases of workplace sexual harassment, anywhere from 25% to 85% of women report having experienced sexual harassment at work.[24] As the EEOC and scholars have found, "workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment."[25] Cultures that are inclusive, diverse, and communitarian and do not tolerate bullying and harassment offer the most protection against sexual harassment.[26] Indeed, the International Labour Organization's recently adopted Convention 190 recognizes that assessments of gender, culture, and social norms are essential elements of eradicating sexual harassment in the workplace.[27]

Hypermasculinist cultures have shaped the way unions respond to claims of co-worker sexual harassment, which is the most common type of sexual harassment.[28] Typically, when one union member accuses another of sexual harassment, the following scenario unfolds: a woman reports sexual harassment by a co-worker to the union representative. Instead of filing a formal grievance on the victim's behalf, the representative refers her to the human resources department – an unnecessary and often further traumatising step for the survivor.[29] The employer conducts the investigation and disciplines the accused when finding actionable harassment. The union then defends the harasser by filing a grievance and invoking the protections in the collective bargaining agreement, effectively making the victim a witness for the employer and pitting her against the union. In some cases, the union actively discourages the victim from filing a grievance.[30] A recent academic review of labour arbitration awards involving sexual harassment found no grievances filed by victims of sexual harassment; in other words, all the grievances challenged the punishment inflicted on union members accused of harassment.[31]

Unions justify this dynamic by citing an exaggerated interpretation of their duty to represent all members fairly.[32] "The law requires

[21] Gloversville Embossing Corp., 297 N.L.R.B. (1989).

[22] Hood River Distillers, Inc., 372 N.L.R.B. No. 126 (2023).

[23] Of course, these doctrines and practices also harm any worker who is not a cis white male.

[24] U.S. Equal Emp. Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace. The wide range is the result of varying methods of surveying working women, and how the questions are asked.

[25] *Id*.

[26] John Coleman, *Six Components of a Great Corporate Culture*, Harv. Bus. Rev., May 6, 2013, https://hbr.org/2013/05/six-components-of-culture; Nat'l Acad. Sci., Eng'g & Med., Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine (2018), https://nap.nationalacademies.org/catalog/24994/sexual-harassment-of-women-climate-culture-and-consequences-in-academic.

[27] Shauna Olney, *ILO Convention on Violence and Harassment: Five Key Questions,* ILO (2019), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_711891/lang--en/index.htm.

[28] Nat'l Acad., *supra* note 25.

[29] Crain & Matheny, *supra* note 7; Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions,* 2 U. Pa. J. Lab. & Emp. L. 1 (1999).

[30] Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford,* N.Y. Times, Dec. 19, 2017, https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html.

[31] Stacy A. Hickox & Michelle Kaminski, *Measuring Arbitration's Effectiveness in Addressing Workplace Harassment*, 36 Hofstra Lab. & Emp. L.J. 293 (2019), https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1653&context=hlelj.

[32] This duty is a legal obligation derived from the structure of labour law, which is based on a system of majority rule and exclusive representation. In 1944, the U.S. Supreme Court imposed on unions an obligation to represent all members of the bargaining unit, even if some members might disagree

that I fight the harasser's discipline" is a common – but incorrect – explanation. The law grants unions significant leeway in deciding whether to process a grievance; a study found that members who sue their unions are successful in only 5% of cases.[33] To successfully sue a union for breaching its duty of fair representation, an employee must prove arbitrary or bad faith conduct by the union in processing their grievance. The standard "gives the union room to make discretionary decisions and choices even if those judgments are ultimately wrong."[34] Assuming the union conducts a good-faith investigation and notifies members, it can decide what to do next, including not processing a grievance.

Unions often face competing claims from members; for example, disputes over promotions are not uncommon, with senior and junior bidders claiming superior skill or ability. Courts have consistently held that a union "may take a position in favour of one…employee only on the basis of an informed, reasoned judgement regarding the merits of the claim"[35] Therefore, a union that conducts a fair investigation and concludes harassment occurred "has no duty to represent members for discipline they incurred for engaging in sexually or racially harassing conduct."[36] Yet citing their fair representation duty is exactly how unions justify defending harassers.

*"Defending harassers while sending the survivor to the human resources department harms both the victim and the union, as it marginalises a member when they are most vulnerable and negatively impacts morale and solidarity. Importantly, it creates a disincentive for reporting – union women who observe the consequences of reporting harassment understandably choose not to undergo the same process."*

This is particularly concerning given that over 75% of sexual harassment victims do not report the harassment.[37]

The aspects of labour law and practice discussed above do not reflect the kinds of cultures that provide protection against sexual harassment. In 2019, unions had an opportunity to influence how labour law could help shift workplace culture away from the "rough-and-tumble" masculinist dynamics that current law and practice encourage and move toward a more feminist approach. That year, the NLRB invited answers to the question, "Under what circumstances should sexually or racially offensive speech lose the protection of the Act?"[38] Unions universally defended such speech by promoting the same masculinist norms where flaring tempers, profanity, and racist language are considered acceptable at all costs. The AFL-CIO's brief argued that unions "'need licence to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point' … Unfortunately, this sometimes includes the use of racially and sexually derogatory and charged language."[39]

The hypermasculine culture within labour also infiltrates arbitration processes, even in cases where the arbitrator upholds the discipline of a harasser. For example, many arbitrators apply a heightened standard of proof in cases involving sexual harassment due to concerns about the reputational damage that such accusations can cause the accused.[40] Even well-meaning arbitrators may perpetuate sexist frames. As explained in a highly regarded arbitration reference book, an appropriate way to describe workplace conduct is as follows: "It is friendly to tell a coworker that she looks particularly pretty this morning. It is unacceptable to tell a coworker who is not a personal friend that you are attracted to her. It is unavoidable and healthy that one's eyes

with the union's positions. *Steele v. Louisville & Nashville Ry. Co*., 323 U.S. 192 (1944).

[33] Crain & Matheny, *supra* note 7.

[34] *Marquez v. Screen Actors Guild,* 525 U.S. 33 (1998).

[35] *Smith v. Hussmann Refrigerator Co*., 619 F.2d 1229 (8th Cir. 1980), *cert. denied*, 449 U.S. 839 (1980).

[36] *EEOC v. General Motors Corp*., 11 F. Supp. 2d 1077 (E.D. Mo. 1998).

[37] U.S. Equal Emp. Opportunity Comm'n, *supra* note 24.

[38] General Motors, LLC, N.L.R.B. Cases Nos. 14-CA-197985 (2019) & Charles Robinson, case No. 14-CA-208242 (2019). Those cases involved the use of profanity and racist language in the workplace during the exercise of conduct otherwise protected by the National Labor Relations Act.

[39] Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae,* General Motors, LLC, and Charles Robinson, NLRB Case Nos. 14-CA-197985 and 14-CA-208242 (Nov. 12, 2019) (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1974)).

[40] *See e.g.,* Equistar Chemicals, 126 BNA LA 1480 (2009) (Goldstein, Arb.) (applying higher clear and convincing standard to claim of sexual harassment); Sally Barker & Loretta Haggard, *Labor Union's Duties and Potential Liabilities Arising out of Coworker Complaints of Sexual Harassment*, 11 St. Louis Univ. Pub. L. Rev. 135 (1992).


Credit: Vitalii Karas / Shutterstock.com

should be drawn to a sexually attractive person. It is unacceptable to deliberately stare to the point where the other person feels uncomfortable."[41]

Notably, despite these significant challenges, at least one union is addressing the issue of sexual harassment within a feminist frame that affirmatively rejects the patriarchy, prioritizes the well-being of all its members, and advances a broad and inclusive vision of workplace justice.

The United Service Workers West (USWW) chapter of the Service Employees International Union represents janitors in California. The union's membership predominantly consists of immigrant women working in vulnerable conditions, in isolation, and at night, increasing the risk of assault or harassment. The industry hierarchy remains predominantly male, presenting yet another risk factor.[42]

The women of USWW began organizing around the issue of sexual harassment in 2015 when they screened a documentary, "Rape on the Nightshift," which exposed the sexual violence women janitors routinely faced on the job. Workers shared their own stories, prompting leaders to address harassment as a union issue and to utilise various tools in the union toolbox.[43] They incorporated harassment into a member survey on union priorities as they prepared to

*"In 2016, the union initiated a broad-based, worker-led, survivor-centred campaign against sexual harassment titled 'Ya Basta' – Spanish for "enough is enough!"*

bargain a new contract. The issue ranked second in the members' priorities, only behind wages, which surprised leadership and spurred them to tackle the issue more comprehensively.[44]
The campaign operates on multiple levels: advocating for legislation to protect janitors against sexual harassment, providing member education, and using the union's power at the bargaining table.

The education piece encourages janitors to explore their own roles as workers, mothers, grandmothers, and more. A janitor reported that she had to unlearn and relearn basic things in her life: she stopped ironing her grandson's clothes and instead taught him how to do it, she stopped making everyone's dinner on schedules that benefitted everyone but her, and she became comfortable with sharing the story of her rape without shame.[45]

As evidence of structural change, the union quietly altered the way it processes grievances regarding sexual harassment. It bargained language that breaks the harmful practice of sending survivors to human resources while the union defends the harasser. The new collectively bargained process states that upon receiving notice of sexual harassment, the employer will conduct an investigation, and "[t]he union will support the [e]mployer's decision in this regard consistent with the duty of fair representation."[46] In other words, if the union believes the investigation to be fair, it will not take up a harasser's grievance.

The janitors and their union reflect a feminist approach that holds promise for all unions. Centering those most affected, building an inclusive and collaborative culture, and devoting resources to eradicating patriarchal structures and cultures is a recipe for success.

Unions have a variety of avenues to shift practices and culture toward a more inclusive, feminist vision of workplace justice. For example:

[41] Elkouri & Elkouri: How Arbitration Works (Patrick M. Sanders & Wesley G. Kennedy eds., 8th ed. 2020).

[42] Sanjay Pinto, Zoe West, & KC Wagner, *Healing into Power: An Approach for Confronting Workplace Sexual Violence,* 30 New Lab. Forum 42 (2021).

[43] Bernice Yeung, *A Group of Janitors Started a Movement to Stop Sexual Abuse*, Revealnews.org, Jan. 16, 2018, https://www.revealnews.org/article/a-group-of-janitors-started-a-movement-to-stop-sexual-abuse.

[44] Pinto, West & Wagner, *supra* note 42.

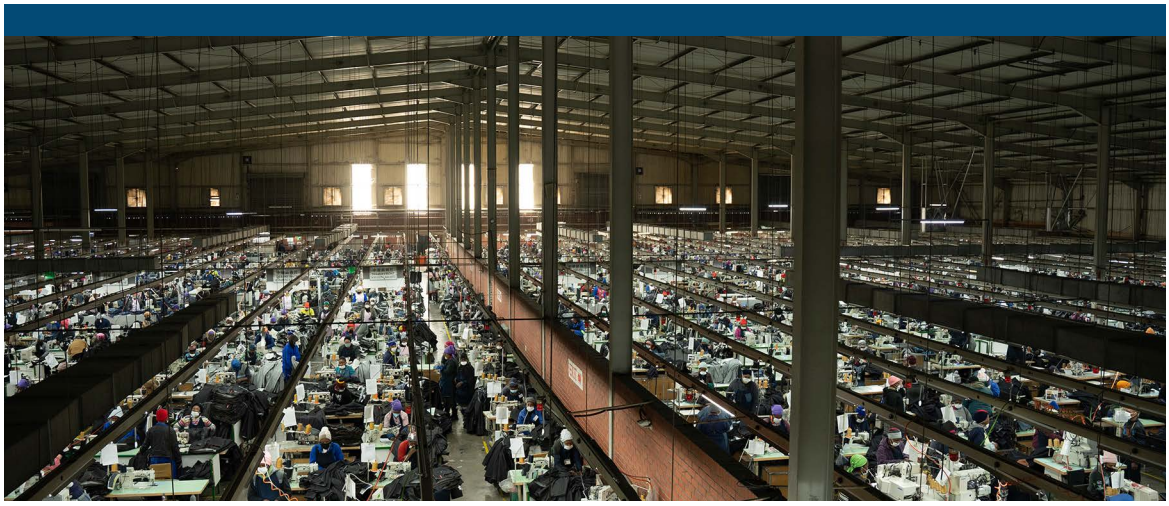
[45] Interview with Anabela (last name withheld), Janitor, Los Angeles, California (June 2020).

[46] Collective Bargaining Agreement, USWW NC MCA (2012).

1. Unions should develop a broad and inclusive agenda for collective bargaining that moves beyond the law's narrow construct of terms and conditions of employment and instead focuses on what matters most to members as workers, citizens, members of their communities, and whatever other identities they hold. The Kalmanovitz Initiative for Labor and the Working Poor's *Bargaining for the Common Good* project has collected concrete examples of how unions are moving beyond bread-and-butter issues at the bargaining table in order to achieve structural change in communities across the United States.[47]
2. Unions should explore restorative justice practices in grievance handling and workplace conflict resolution, especially with regard to sexual harassment complaints. Those practices reject punishment as a desired outcome and instead focus on addressing collective harms through a process that centres the person harmed and holds the harm-doer accountable. These practices would much better meet the desires of workers who are not interested in filing complaints but simply want harassment and other harmful conduct to stop.
3. Unions have a unique ability to influence workplace culture as employers and as collective bargaining representatives – and thus effectuate structural change. National centres should bring their affiliates together to identify harmful patriarchal practices that exist within the various institutions within the labour movement and in the workplaces they represent.

In conclusion, while change is difficult – especially for institutions like the labour movement that are deeply steeped in tradition – it is not impossible. An intentional, well-resourced plan of action can help unions move toward structures and practices that will make them more resilient and attractive to women and young people, i.e., the workforce of the future.

[47] *See* Bargaining for the Common Good, https://www.bargainingforthecommongood.org (last visited Feb. 9, 2024).



A garment factory in Lesotho. Credit: Solidarity Center / Institute for Content Engineering

# ADDRESSING GENDER-BASED VIOLENCE AND HARASSMENT THROUGH ENFORCEABLE BRAND AGREEMENTS IN LESOTHO

## A Conversation With Itumeleng Moerane

### Itumeleng Moerane

*Itumeleng Moerane is an admitted advocate of the Courts of Lesotho. She holds a master's in law from the University of Stellenbosch and a certificate in foundations of project management from the University of Cape Town. She has been a project manager on projects related to women's rights for the past 5 years, including project design, overseeing project implementation, risk analysis, advocacy, facilitation, developing training manuals, monitoring and evaluation, budget tracking and financial reporting. She managed a Nokaneng flagship under the program partnerships for prevention of violence against women and girls as a sub-grantee of Lesotho Council of Non-governmental Organisation, funded by Deutsche Gesellschaft für internationale Zusammenarbeit (GIZ). She was the information line manager for the Anti-Gender Based Violence Program at Nien Hsing factories from 2018 - 2024. The focus of her work was on victim support, the primary and secondary prevention of GBVH, supporting norms change, implementation of policies and laws for deterring GBVH, capacity building of stakeholders and justice service delivery. She also represents victims of GBVH in the Lesotho court system.*

In 2019, landmark agreements[1] were signed to prevent and address gender-based violence and harassment (GBVH) in garment factories in Lesotho. The agreements were signed by Nien Hsing, a major supplier of denim; three large apparel brands that source from Nien Hsing (Levi Strauss & Co., The Children's Place and Kontoor Brands); and a coalition of Lesotho labour unions, women's rights organisations and international workers' rights NGO partners. In the agreements, Nien Hsing committed to a robust Program to Eliminate GBVH in Lesotho (Program). The Program created an independent mechanism to investigate worker complaints and ensure remedies at its factories in Lesotho. All workers, including managers, had to be trained on what GBVH in the world of work was, and the Program to address it. The Program established Workers Rights Watch, which was empowered to investigate cases and order remedial measures. Nien Hsing agreed to implement remedies, and the apparel brands were obligated to use their economic power to ensure compliance. These Lesotho Agreements represent the first instance in which brands and a supplier have entered into enforceable agreements with worker representatives to stop GBVH and protect workers.

***Cassandra Waters:*** *Can you reflect on the history of the agreements at Nien Hsing factories in Lesotho, and your role in the enforcement process?*

**Itumeleng Moerane:** I am the information line manager. It's one of the components of the Program, and a part of the complaints mechanism. When I first started working here, research done by the Worker Rights Consortium and other partners discovered a lot of GBVH occurring in garment factories, particularly in the biggest group of factories, which at the time was Nien Hsing. The result was to design a program to address GBVH in these factories. I was part of the initial planning, after the research. I was part of developing the training manuals for the facilitators, developing the information line protocols and manuals, and forming Workers Rights Watch. This was a hallmark agreement, it brought something new into combating GBVH, by attempting to do something that has never been done before.

***CW****: Can you describe the impacts the agreements have had?*

**IM:** Whenever I'm asked about the impact of the Program, what I usually mention is the reduction of harassment in the workplace, the sector becoming more professional, the issue of temporary contracts, and awareness of the labour rights violations that occur in the workplace. I think it's important to note that the scope of GBVH covered in the agreement was narrow, it excludes other forms of harassment, which are also very prevalent in the factories. But these other forms of harassment have also been reduced. Second, the use of temporary contracts ended and that was a big win for the Program. Third, the Program brought awareness to some of the challenges that factory workers faced.

Before COVID, the Nien Hsing group owned five factories, making them the largest factory owners in the country. The factories were very unprofessional: blatant harassment, name-calling, belittling, throwing things at people. Punishing people by not equally providing overtime, and using short-term contracts as leverage - I think that's also a form of violence, as much as it's not physical. People were summarily dismissed because they wouldn't date their supervisor or refused to give their number to a security guard. Those are some of the things that were happening prior to the program.

[1] *Agreements to Eliminate Gender-Based Violence and Harassment in Lesotho 2021–2022 Report*, Solidarity Center, February 7, 2023 https://www.solidaritycenter.org/wp-content/uploads/2023/03/Lesotho-FINAL-2.7.23.pdf.

***CW:*** *One of the successes of the agreement was that it required Nien Hsing to hire workers on indefinite contracts, rather than the previously prevalent practice of using successive short-term contracts. Can you reflect on the link between GBVH at work and precarity?*

**IM:** With the decline in the economy, the factories closing, the already poor wages, the short-term contracts made workers even more vulnerable. They had to endure whatever came to them to secure their jobs. Beyond that, with a short-term contract, you can't get a loan, you can't get financing. So people are living hand to mouth and cannot plan for the future. This meant that any form of harassment was just endured.. It meant getting into relationships they didn't want and then getting fired when the relationships ended; it meant putting up with being slapped on the butt, having garments thrown in your face, and giving your number to a manager even if you didn't want them to have your number.

The sad part is this is not just in the factories. Short-term contracts are very prevalent in this country. This means people are more vulnerable and more dependent on being nice to supervisors, being nice to the security guards - they call them 'small men' - and being nice to whoever is in power so that they can get their jobs and continue to live. If you don't comply with whatever heinous thing somebody in power wants, you won't get your contract renewed. With the high unemployment rate, there's always somebody ready to step into your place.

***CW:*** *Can you reflect on the lessons learned from the enforcement of the agreement that you think reflect a feminist vision of labour law, and how we might go about reforming labour law so it adequately protects women and other marginalised workers?*

**IM:** For us, it has mainly been protecting victims of GBVH. Mostly the victims are women, people with disabilities, and LGBTQ+ communities. What the Program did was try to explain to people what GBVH is, because not all forms of violence or harassment are gender-based, hence, the need for training. It was really important for people to understand that if you are uncomfortable, and somebody's doing something that is uncomfortable to you, you don't have to just take it and keep it inside. You can complain, you can put it forward. One of the major pillars of the information line I manage is confidentiality and discretion to try and convince a person it's okay, we'll protect you if you bring it forward, because the main issue with harassment and sexual violence is people feeling that they can't speak up, feeling that they'll be judged. Harassment is a personal issue. If you have to talk about it it's as if you're reliving the experience again, and most of the time it's very awful. The biggest lesson was confidentiality and respecting people's choices including knowing that sometimes a person does not want to bring an action, and it's sad, but it's okay.

Developing mechanisms that make it okay and safe for people to report. I want to call it justice service delivery in a way: processes that don't drag on, and that don't seem litigious. Processes that make a person feel comfortable reporting by providing a conducive environment for a person to speak about their experiences. Because we had been through the Program, we discovered other labour rights violations in the factories, because the environment was there, it was safe.

One challenge was that our Program had a very narrow scope. And you find that people are not getting paid enough. People work overtime and don't receive their wages, which makes them again vulnerable to being harassed, trying to get favours for them to get what is rightfully due to them. Or somebody not being given overtime in the first place. Overtime is a very high commodity in the factory because the minimum wage is very low. The only way to supplement it is to get overtime and the managers that had the discretion to give overtime were using it to take advantage of vul-

nerable workers. So, those are some of the issues that came out through the program. There are more violations that do not fall squarely within our program. We found that if you provide a safe environment where workers can report, you will discover a lot of issues.

The biggest challenge is getting Nien Hsing to operationalize the Program. The Code of Conduct that details violations and the complaint mechanisms were not immediately incorporated into Nien Hsing's internal policies. So some people who had been dismissed or sanctioned for perpetrating GBVH appealed through the labour courts, especially those that were dismissed. And they were able to go back to work because the courts concluded that they had been unfairly dismissed, because the operationalizing of the program had not been incorporated into the actual policies. It was treated as if it was a good-faith agreement between Nien Hsing and the partners.

***CW:*** *So because the agreement wasn't in the worker's contract or anywhere in the internal policies of Nien Hsing, they were able to argue that they were unfairly dismissed?*

**IM:** Yes. So one of the challenges was getting Nien Hsing to actually operationalize the commitments.

***CW:*** *I find that surprising. I would assume that the labour courts would consider sexual harassment a reasonable ground for dismissal. But here, the Courts are saying that you need to have a policy. Can you explain this interaction between the legal system and the program at Nien Hsing factories?*

**IM:** The Courts held that the complaints mechanism and the way it's designed including the dismissal processes did not follow procedures, per our labour laws. Our labour code was developed during military rule. So it is a very archaic piece of legislation that needs amending. Section 200 is the only place in the law that mentions harassment, sexual harassment. It doesn't talk about gender-based violence, it doesn't talk about violence, it doesn't talk about other violations. Sexual harassment is classified under unfair labour practices and the definition is very narrow.[2] The beautiful thing about the Program is that it provides a wider definition of GBVH. If you look at the Code of Conduct, and the way it's written, it is aligned with ILO Convention 190 (C190),[3] which the country has recently ratified. Ratification I also attribute to the Program. But the problem with ratifying it is that it has to be domesticated to be enforced in the country. We are not there yet.

[2] Sexual harassment is defined as "Any person who offers employment or who threatens dismissal or who threatens the imposition of any other penalty against another person in the course of employment as a means of obtaining sexual favours or who harasses workers sexually shall commit an unfair labour practice." Labour Code Order No. 24, Nov. 12, 1992 Art. 200 (Les.) https://www.ilo.org/dyn/travail/docs/2089/Labour%20code.pdf.

[3] Article 1 defines gender-based violence as "a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm ... directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment." Int'l Lab. Org. (ILO), Convention no. 190, *Violence and Harassment in the World of Work* (2019), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190.

***CW:*** *C190 ratification is a great opportunity to incorporate these learnings. Do you have thoughts about priorities for national legislative reform regarding violence and harassment?*

**IM**: Basically, just to see C190 into national law. The main priority for me is defining who is an employee, who is a worker, and what constitutes violence and harassment in the workplace, the way we have defined it in the Code of Conduct. At Nien Hsing, some of the main perpetrators of harassment were the security guards at the gate. Those security guards are not Nien Hsing workers, they're hired by a company hired by Nien Hsing. In the past Nien Hsing would argue this is not an employee. But the agreement covered workers hired through subcontractors. So expanding the scope of coverage and protecting workers.

***CW:*** *You mentioned the importance of creating a safe space for workers to bring complaints. Most labour dispute processes are not designed to be victim-centric or trauma-informed. Are there learnings from the enforcement of the Nien Hsing agreements that could inform legislative changes to make processes safer and better for workers?*

**IM:** Yes. The two main principles of the information line are agency and confidentiality. We understand that sometimes a person just needs someone to talk to, they don't need it to be an interrogation. The information line phones are manned by professional counsellors, not lawyers. So it's a counselling session and getting you to arrive at the decision on your own on how you want to proceed. When a person decides to lodge a complaint, they give consent. The minute you get to Workers Rights Watch, they ask again whether the person consents to the process, and there is follow up to ensure they want to go forward.  So it has to be you, you have to be comfortable.

***CW:*** *C190 calls on governments to look at work arrangements that facilitate violence and harassment, in tripartite dialogue with workers and employers. That includes looking at how employers are structuring their workplaces. Do you have thoughts on how that process might be used to address precarity?*

**IM:** Precarious contracts should be outlawed unless the work by its nature is precarious. Specifically, laws that state that you cannot have a person in a long-term job being given six months or yearly renewed contracts. Because that facilitates GBVH. I think it should be a step up from not just dialogue between all the stakeholders, but should actually say that we assess the nature of the job and decide what type of a contract should be granted. For long-term contracts, you can put in a probation period to check whether the person can actually do the job. If somebody is not performing there can be terms and conditions of what happens if somebody's not performing. With a long-term contract, you can actually plan your life rather than just living from hand to mouth.

***CW:*** *You talked earlier about the normalisation of violence and harassment. That's such a deep and important issue in addressing GBVH but I think one of the harder ones to get at through legal reform. What could be done through law and policy to address culture change?*

**IM:** I think it's twofold. One, the government can put that issue within the companies to say you should have mandatory trainings to change the gender norms which exacerbate GBVH. People know when they're uncomfortable, it's just that they can't speak up. One of the things which the Program did is instil fear, that if you don't behave right, you will lose your job. And if somebody makes you uncomfortable there is somewhere you can report it. The minute you enter the Nien Hsing factories, you find the Code of Conduct and posters vehemently against GBVH. It didn't take long for the behaviour to change. Professionalism in the factories changed a lot because people feared losing their jobs. The trainings attempted to train managers, each and every Nien Hsing worker, even Mandarin speaking interpreters were hired. It was making everybody aware and not just threatening them, but telling them how to behave at work in a professional setting. It does show that if you are found guilty, you leave the place. But it was a concerted effort, because of the general nature of people having accepted this, we are taking them on this journey of training them on GBVH. When you're making a person uncomfortable, when you are uncomfortable, so that they know and understand how they should behave.

Just putting it into law, because we have a problem with implementation in this country, so it might take longer. But we found that behaviour changed really quickly once the trainings began. Part of it is the information. It's not just about reporting, it's calling and asking for information. We had to explain that this is not just a hotline for you to call if you're having problems, you can literally call and ask about the trainings, the program, what constitutes GBVH, how you can report, and what you can do if you feel you've been violated. So for me, it's about putting it in actual workplace policies where enforcement is easier than when it is in the national law.

***CW:*** *Do you have thoughts on ways to obligate employers to provide not just training, but effective training?*

**IM:** One of the good things about the training was that it was only 25 people. That made it more expensive and time consuming, and we had to have multiple facilitators. But the minute you're talking about GBVH and you have 50 people in a room, you're just ticking a box. The trade unions had facilitators, who were trained, so you could have concurrent trainings running at once. The main issue was localising the training, ensuring that we made the training Lesotho-based. Using our language, personalising it. Instead of just talking to people, we were getting them involved. Because you find that people have the answers. They have more knowledge of what is happening in the factories than the trainers, so listen to them. You facilitate the discussion and then build and explain the concepts and the technicalities, your job is to tie a pretty bow around what they already know. Having a proper assessment of the workshop, checking in on the training, and having oversight bodies is key. Another way in which the trainings were done in a more sustainable way was having certain topics discussed during extended lunch hour breaks at the factories.

*CW: Zooming out to the broad scope, I wondered if you wanted to reflect a little bit on whether current labour laws adequately protect women and other workers with marginalised identities, and what in your opinion would need to change to realise a feminist world of work?*

**IM:** Our Labor Code does not adequately protect workers. You only have mention of sexual harassment in three lines under the heading unfair labor practices. So it meant that other forms of violence and harassment, seem not to be covered in our Labor Code. Our labour code is a very old law, for example, in the definition sections, domestic workers are referred to as servants. We still have issues with maternity leave, working hours, and enforcement of some of the laws that might actually protect workers. So for me, it says there is a need for an overhaul of our entire Labor Code. In our context, it is expanding and mentioning GBVH in the Labour Code, addressing the issue of overtime, and addressing issues related to maternity. Gender is a very broad issue. There is no mention of people who identify otherwise, there's no mention of our LGBTQI+ communities, and they're some of the most vulnerable workers in the factories. So our Labor Code is not responsive to our challenges, to be honest. Not just workers in the factories, but in the civil and private sectors, our labour code is not responsive to our needs. Our justice service delivery is slow. People will tell you, that while you're busy fighting for your rights, you'll be out of a job. Cases take almost 10 years to complete, and whatever I get is going to go back to paying legal fees. So generally, it's protecting people's wages by providing them with proper contracts, by providing a safe working environment, by ensuring that issues of their rights are addressed quickly and sufficiently. Those are the three major issues that would need to be dealt with.

Even health and safety, working in spaces where there's no air con, in summer it's very hot, in winters it is extremely cold. Our labour organisations need some fire lit under their feet. Some say it's nonexistent because those are things that we know have been happening, but we've been quiet. With our Program, there's a loudspeaker, an amplifier to step up to the challenges that workers have demonstrated, that all workers always face.

I think another issue that is not being talked about is the wage gap, the wage gap between people doing the same job, the wage gap between a manager and a supervisor. You find that men are still preferred over women in managerial positions. We celebrate when women are elevated to a position of power, we celebrated having our first deputy prime minister, but representation is still lacking. So we still have men deciding women's issues, and you still have marginalised groups not being represented. When we discuss issues of LGBTQI+, people with disabilities, or people who are not nationals here, we find that even the language that is used is offensive. People are still comfortable in their archaic, traditional norms that still perpetuate how we treat women, how we treat all these other marginalised groups. When they're not represented in decision-making bodies and there's no concerted effort to ensure that they're represented, you have union leaders who do not understand issues of women, issues of maternity, issues of LGBTQIs. Even in union structures, people are not being represented, so it's just men doing what they've been known to do for so many years. The advocacy around labour issues in this country needs revitalising to fight for women and for a feminist agenda. You need more women heading up unions, you need more women being present in union structures. You need union structures that have clear rules, laws, and policies in order to protect workers. So we really have a long way to go if we want to pursue the feminist agenda. We need an active labour movement that is representative of the people in the workplace. We need existing laws to be enforced. We need a wage by which a person can live. We need workers to know their rights, and the environment being safe and conducive to enforcing their rights.

# OCCUPATIONAL HAZARDS FROM A FEMINIST APPROACH

**MARÍA PAULA LOZANO**[1]

*Argentina | Originally written in Spanish*

From a feminist point of view, labour law, as it was originally conceived, has certain limitations to meet the needs of women workers, and these limitations are structural. The main limitations relate to care: the invisibility of care and reproductive work, its historic maldistribution between genders and that it has been designated as an obligation for women. This has affected the social organisation of the world of work and is reflected in various dimensions of labour law, including laws regarding occupational safety and health.[2]

Social law as a special branch was born with the intention of compensating for the inequalities of the capitalist system of production, of the "capital-labour" relationship. It recognises that despite the formal proclamation of equality in modernity, in fact we are not all equal since we face deep structural inequalities, an unequal material reality and, fundamentally, an asymmetry of power.

At the end of the nineteenth century, the so-called "sexual division of labour was consolidated based on gender stereotypes: men would do productive work, with access to a decent and sufficient salary for themselves and their families, and women would be engaged in reproductive work, invisible and unpaid, dependent on men's salaries. "Reproductive work" refers to all tasks related to the reproduction of the labour force, including pregnancy; breastfeeding; caring for infants, children, adults, or the elderly; cleaning; household management; cooking; laundry; and emotional support and affection, among others.

As the result of significant workers' struggles, "the worker" was recognised as a rightsholder to be protected under labour law, but under certain assumptions: the worker was male, cis,[3] the provider of the household, working in public for a wage and entitled to certain rights. According to this conception, the working woman was a "special case," whose labour rights had to be guaranteed only so that paid work would not prevent her from "fulfilling" her role as biological mother and caregiver. This is the underlying gendered perspective that persists today, for example, in Argentina's Labour Contract Law 20.744.[4] Labour regulations regarding occupational safety and health were based on the need to preserve women's bodies for pregnancy, maternity and care work, in other words, "social reproduction." However, there are a multiplicity of occupational risks faced by women workers, and the LGBTQI+ community, which are invisible. These risks are linked to gender differences - biological but mainly socio-cultural - as well as intersecting forms of identity and discrimination that affect women disproportionately.

## The Hegemonic Construction of Occupational Medicine and the Invisibility of Women

Because women were expelled from the production of scientific knowledge, often by

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[2] In writing this paper, I took as a basis some ideas developed in the article: María Paula Lozano, *Salud Laboral Mujeres Trabajadoras y Disidencias*, in Derecho Laboral Feminista (María Paula Lozano, María M. Terragno & Luciana Censi eds., 2022).

[3] "Cisgender" refers to a person whose gender identity corresponds to that assigned at birth.

4 Law No. 20744, Sept. 5, 1974, B.O 23003, Sept. 27, 1974 (Arg.) [hereinafter LCT 20.744], https://www.argentina.gob.ar/normativa/nacional/ley-20744-25552.

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means of witch hunts, and were continuously marginalised over time, the male gaze has permeated medicine as a general science,[5] and occupational medicine in particular. Occupational risks were constructed in the light of the ideology of the "male industrial worker" whose main attribute was the deployment of a certain type of physical strength.[6] The occupational risks symbolically associated with this model are what are recognised as risks. The rest are rendered invisible.

Likewise, hegemonic occupational medicine arises from a business vision of risk, not a worker vision, oblivious to the real risks suffered by those directly in contact with the production process. From this paradigm, prevention is linked more to individual actions that each worker should carry out in the workplace to avoid an accident and not to the responsibilities of those who hold the power to manage and organise the work process. Thus, occupational risks and injuries are approached from a biased gender perspective and, with some exceptions, from an employer's perspective. According to the medical endocrinologist Carme Valls Llobet, it was considered "impossible for women to suffer from diseases related to working conditions, since women were usually engaged in professions with low risk or "light" tasks, while men, who worked in construction or mining, were exposed to very high risks, as demonstrated by the high mortality rate in these professions."[7] Valls Llobet presents several reasons to address health with a gender focus: women work in feminized professions, mostly services, with lower pay and precarious work conditions. Specific knowledge of the effects of exposure to occupational hazards on women does not exist, including on the physiology of pregnancy and breastfeeding. Women bear a double burden, that of employment and that of domestic and family responsibilities.

Occupational health from a gender-based perspective has been an understudied topic. However, it is a central aspect in terms of the working conditions of women and gender and sexual dissidents[8], since it put their bodies and lives at risk.

## Occupational Hazards that Particularly Affect Women and Gender and Sexual Dissidents

There are a series of occupational risks that particularly affect women workers and dissidents, linked to social, cultural and biological factors:

*a) Risks related to the organisation of work and ergonomics*

The jobs traditionally performed by women, such as cleaning, sorting, collecting, manufacturing and assembly, are generally repetitive, involving continuous but moderate effort and forced, monotonous, uncreative, boring postures, far from the centre of decision making. Often these activities generate more fatigue than performing a specific and intense effort,[9]

[5] Carme Valls Llobet asks:

> Why are women's chronic problems still considered inferior or unimportant? Why are women still not systematically included in clinical trials? Why are natural processes such as pregnancy, childbirth, and menopause systematically medicalized? Why are the problems they actually suffer from not studied and instead new problems are created when pain and discomfort are treated with psychotropic drugs, without finding out the causes or underlying pathologies? How have gender stereotypes been constructed and introduced into the unconscious of medical professionals who believe that everything about women is inferior, malignant, should be hidden or should be concealed because it is not relevant?

Mujeres, Salud y Poder 21 (8th ed. 2009).

[6] The term "labour force" is used to refer to workers.

[7] Carme Valls Llobet, Mujeres Invisibles para la Medicina: Desvelando Nuestra Salud (2020).

[8] *Translator's note: the term "gender and sexual dissidents" is used in Spanish to refer to the LGBTQI+ community. While this is not a term commonly used in English, it is retained in this article because it has a political nature and refers to a specific type of political agency of members of the community in relation to society. This term is abbreviated to "dissidents" elsewhere in the text.*

[9] According to Laurent Vogel:

> Musculoskeletal disorders constitute one of the main health hazards of today's workers.... Strategies for the prevention of musculoskeletal disorders are largely conditioned by the sexual division of labor. In general, the physical burdens associated with women's work are characterized more by the repetitive nature of the efforts, while men's physical burdens are often linked to the manual handling of heavy loads. On the other hand, caring for people is a task generally performed by women. It is a job that involves numerous physical loads to which it is difficult to apply preventive solutions that were designed for moving inert objects. Holding, lifting, or moving a living human body involves work that

but they are not adequately recognised. Repetition and monotony can lead to carelessness and greater exposure to injuries. In addition to the physical efforts involved in caring for and assisting people – such as holding, cradling, lifting, transporting and moving a body – care work also involves an extra emotional burden, an emotional commitment and sometimes anxiety and distress. These risks are not well studied and are not made visible.

Musculoskeletal disorders constitute one of the major health hazards for workers today. However, these conditions are not adequately recognised and are often left out of prevention policies. Indeed, the system on occupational diseases in force in Argentina,[10] built around a "closed list,"[11] systematically fails to recognise the main occupational diseases suffered by workers in general, especially women and dissidents.

Of all the existing systems to identify occupational diseases in accordance with International Labour Organization (ILO) Convention 121,[12] Argentina has adopted one of the most restrictive. This system excludes coverage of ailments caused by work, which are not on the list. Other ailments, therefore, cannot be "remedied" within the system, and because they cannot be "remedied"


Credit: Mamunur Rashid / Shutterstock.com

without the filing of a lawsuit, prevention is neglected. The system clashes with the standards expressed by the ILO in the list of occupational diseases that was revised in 2010,[13] as well as ILO Convention 155[14] and the 2002 Protocol Concerning Occupational Safety and Health.[15] All these instruments have been approved as a supra-legal standard in Argentina. It also clashes with the provisions of Convention 190, on the Elimination of Violence and Harassment in the World of Work.[16]

*b) Risks related to the "second shift"*

The process that forced women to confine themselves to the domestic sphere and to work for free, in conditions of semi-slavery, was not peaceful.[17] It entailed very high levels of violence and serious health consequences. Nor is it innocuous that women sacrifice their bodies, self-care and psychological and physical health, because they must "reconcile" daily paid and unpaid labour rather than access a system of co-responsibility of care. The disproportionate

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is not reduced to the mere physical exertion of the load. Community Directive 90/269/EEC136 adopted a limited approach that implicitly favors the male activity of moving heavy loads and does not recognize the female activity, characterized by the repetition of tasks and by the harmful consequences of certain postures.

Laurent Vogel, La Salud de la Mujer Trabajadora en Europa: Desigualdades No Reconocidas (Paco Rodríguez & Sergio trans., 2003).

[10] Integrated system of labour risks structured as from Law No. 24557, Oct. 3, 1995, B.O. 28242, Oct. 4, 1995 (Arg.) [hereinafter L.R.T. 24.557], Decree 658/1996, June 24, 1996, B.O. 28424, June 27, 1996 (Arg.) and Decree 659/1996, June 24, 1996, B.O. 28424, June 27, 1996 (Arg.), among other regulatory and amending standards.

[11] LRT 24.557, art. 6, § 2(a) states:

> Occupational diseases are considered to be those included in the list to be drawn up and reviewed by the Executive Branch, in accordance with the procedure of article 40 paragraph 3 of this law. The list shall identify the risk agent, clinical pictures, exposure, and activities capable of determining the occupational disease. The diseases not included in the list, as well as their consequences, will not be considered compensable...

The exceptions mentioned above have had practically no recognition in practice.

[12] Int'l Lab. Org. (ILO), Convention no. 121, *Benefits in the Case of Employment Injury Convention,* art. 8 (1964) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C121

[13] ILO, Recommendation no. 194, *List of Occupational Diseases Recommendation* (2002) (Rev. 2010) [R194], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R194.

[14] ILO, Convention no. 155, *Occupational Safety and Health and the Working Environment Convention* (1981) https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800dbe0a.

[15] ILO, *Protocol to the Occupational Safety and Health Convention* (2002) https://treaties.un.org/doc/Publication/UNTS/Volume%202308/v2308.pdf.

[16] ILO, Convention no. 190, *Violence and Harassment in the World of Work* (2019), [hereinafter C190], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190.

[17] *See* Silvia Federici, Caliban and the Witch: Women, the Body and Primitive Accumulation (2004).

burden of unpaid work that falls to women results in daily exhaustion and "time poverty," meaning less free time and fewer possibilities for leisure and enjoyment.

The total reproductive burden encompasses work aimed at meeting the care needs of people that change over the course of their lives. From tasks related to the maintenance of the domestic infrastructure – cleaning, washing clothes, shopping, cooking, taking family members to the doctor, etc. – to the instrumental and emotional work involved in attending to the needs of children and other dependent family members.

The current system of occupational safety and health in Argentina rejects conditions that are not "monocausal" in relation to work. The law requires that the condition be the "direct and immediate result of the performance of work, without the influence of factors attributable to the worker or unrelated to work."[18]

The "second shift" has a negative impact on the bodies of women and dissidents, who are exposed to occupational diseases and then exposed to additional, often similar or identical psychological and physical diseases resulting from unpaid reproductive labour. These conditions are then not recognised as occupational injuries. Reproductive work also entails an accumulation of mental, cognitive and emotional activities and skills necessary to manage the day-to-day reproduction of households. The overexertion and mental saturation involved in managing a household with children and caring for family members is a constant in the life experiences of working women, which is also unrecognised.

Because work must be the "only cause" of the disease – and any factor that can be attributed "to the worker" results in the disease not being considered "occupational" – the impact of factors that arise outside the productive workday make many occupational conditions suffered by working women invisible. Therefore, in addition to being restrictive, the "list of diseases" has a clear patriarchal bias.[19]

*c) Biological differences and unhealthy work conditions*

Women and feminized bodies go through hormonal cycles, menstruation and the possibility of pregnancy, childbirth and breastfeeding, which places them in a position of special vulnerability to certain risks. These risks are deprioritised and understudied. In the classic protectionist paradigm, these risks are dealt with by simply prohibiting women from engaging in certain work. This creates discrimination and labour segregation and undermines full equality in the enjoyment of rights.

For example, Argentine labour legislation[20] expressly prohibits the employment of women in arduous, dangerous or unhealthy work. This blanket ban leads to discrimination in access to certain jobs, especially in some sectors and activities. It also implies that it is acceptable for at least some workers to perform unhealthy work. Rather than adopting patriarchal protections, and implicitly accepting high risk work without the possibility of mitigation in some instances, occupational safety and health law should create robust employer obligations linked to the duty of information, prevention and risk assessment, with union participation in the workplace and temporary and circumstantial prohibitions, without this simplistic and discriminatory segregation of the labour market.

*d) Risks related to maternity*

Recognising the implications of hormonal cycles, menstrual health and the needs of pregnant women who work – with adequate guarantees and without restriction of the enjoyment of any right, condition or labour benefit – is an unresolved issue in the construction of a feminist labour law. The system should be reformed to provide ample, shared and obligatory leaves of absence and guarantee absolute stability for pregnant and non-pregnant parents, which is necessary to promote co-responsibility in care. Additionally, more research is needed on the existence and prevention of specific risks to pregnant bodies and those who wish to become pregnant, which is currently understudied. This scholarship would support the establishment of comprehensive regulations.

*e) Violence and harassment in the workplace*

Women and dissidents are most exposed to violence and harassment at work, which causes physical and psychological harm. The sexual division of labour and the assignment of roles according to stereotypes itself entails a degree of violence.

[18] Decree 49/2014, Jan. 14, 2014, B.O. 32809, Jan. 20, 2014, https://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=225309.

[19] LRT 24.557, art. 6, and regulations. LCT 20.744, art. 176.

[20] LCT 20.744, art. 176.

The preamble of ILO Convention 190 (C190) enshrines the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment. C190 also recognises that violence and harassment in the world of work affects people's psychological, physical and sexual health, their dignity and their family and social environment; that gender-based violence and harassment disproportionately affect women and girls and that an inclusive and integrated gender-sensitive approach should be adopted to address the underlying causes and risk factors, including gender stereotypes, multiple and intersectional forms of discrimination and the abuse of gender-based power relations.[21] C190 recognises workplace violence and harassment as a psychosocial risk. Countries that have not yet ratified it should be encouraged to do so, and those that have, should be encouraged to bring their domestic legislation into line with its standards.[22]

*f) Gaps and precariousness*

Women and dissidents suffer discrimination in access to employment. They face invisible barriers to entering certain occupations (for example, in certain industrial sectors) and accessing better wages and working conditions. According to an ILO report,[23] women workers remain concentrated in a limited group of occupations and professions, performing jobs that in some cases do not require qualifications or are symbolically related to care-related functions. When women gain access to jobs in industrial activities, it is often in outsourced jobs such as cleaning and administration, with lower salaries and working conditions than industrial workers.[24]

Precariousness – including gaps in income, discrimination in access to employment, the "sticky floor" or the "glass ceiling" – together with violence and harassment in the world of work, generates a greater risk of suffering accidents and occupational diseases. Temporary employment brings with it a lack of security, including often lack of training and information about workplace risks. Insecure employment and low wages make workers particularly unlikely to report occupational risks and hazards for fear of losing one's job, and piecework creates incentives to move quickly and disregard safety standards. Moreover, employers often fill high-risk jobs with temporary, rather than permanent workers.[25]

Women are also overrepresented in part-time jobs.[26] This overrepresentation can appear to be a voluntary decision, but in reality, it is often due to the absence of co-responsibility in care work. In addition to deepening the income gap and reaffirming the inequitable distribution of domestic work, it contributes to concealing work as a cause of psychological or physical injury. It also causes a disadvantage when financial compensation for workplace disabilities is calculated because such calculations are made according to current salary, which is lower when work hours are shorter.

Precariousness generates greater exposure to various occupational risks, including psychological and physical disorders and accidents at work.[27] An illustrative example of a case of extreme precariousness, where the right to psychological and physical integrity and to life of women workers was undermined due to multiple conditions of vulnerability, is the explosion of a fireworks factory in the municipality of Santo Antônio de Jesus, Bahiaque state, Brazil, in 1998.

[21] C190, *supra* note 16.

[22] Argentina has begun to implement some actions within the framework of the obligations established by ILO Convention 190. However, this work is incipient. *Entra en vigencia el Convenio 190 de la OIT*, Argentina.gob.ar, https://www.argentina.gob.ar/noticias/entra-en-vigencia-el-convenio-190-de-la-oit (last visited Mar. 27, 2024).

[23] ILO, Mujeres en el Mundo del Trabajo: Retos Pendientes Hacia una Efectiva Equidad en América Latina y el Caribe [Women in the World of Work: Pending Challenges for Achieving Effective Equality in Latin America and the Caribbean] (2019), https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_715183.pdf.

[24] For more information on labour outsourcing and its effects, see La Tercerización Laboral, Orígenes, Impacto y Claves para su Análisis en América Latina (Basualdo Victoria & Morales Diego eds., 2014).

[25] Mujeres en el Mundo del Trabajo, *supra* note 23.

[26] *Id*. The ILO report states: "the unfavourable conditions of women in the labour markets are not restricted to wages: female labour participation is little more than two thirds of the male rate, the female unemployment rate exceeds the male rate, and cultural barriers persist in the entry of men and women into important segments of the predominantly female (domestic service) and predominantly male (mining) labour markets. In recent decades, women have achieved greater presence in labour markets, but they are doing so, to a greater extent, in the flexible segments of these markets: part-time work, informality, sporadic employment (only a few months of the year) and self-employment."

[27] Employees of the Fireworks Factory of Santo Antônio de Jesus v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 407 (July 15, 2020), https://www.corteidh.or.cr/docs/casos/articulos/seriec_407_ing.pdf. It is surprising that it is called " *Caso Empleados*", using the Spanish term for "male workers" when almost all the affected persons were women.

As a result of the event, fifty-nine women, some pregnant, and one child died. Most workers in the factory were women of African descent who lived in poverty and had little schooling. They were hired informally and paid very low wages. They were not offered personal protective equipment, nor were they provided with training or education about their work. In addition, there were several children working in the factory, even though the Brazilian Constitution and infra-constitutional regulations prohibited the employment of children in this type of activity. Furthermore, although the factory was authorised to operate, it had never been inspected or monitored. This tragic incident gave rise to the judgment of the Inter-American Court of Human Rights in the "Fire Factory Employees" case, which declared the international responsibility of the Federative Republic of Brazil for violations of various rights.

**The Need for a Feminist Labour Law to Guarantee the Right to Health for Working Women**

Gender stereotypes and dualisms have made the risks at work that affect women workers invisible and hidden. For all the above reasons, we need to build a model of occupational health with a feminist approach. The occupational diseases and risk experienced by women and dissidents can be made visible through union intervention, as well as through joint health and safety committees. This work must include surfacing what causes workers injuries and illnesses, the reasons for work absences, and their needs, wishes and aspirations for a better life.

It is essential for women and gender and sexual dissident workers to generate their own knowledge, training and research on the injuries they suffer and their health needs, with a gender-based approach. On the other hand, it is also necessary to establish strategies to address risks to health and safety in the workplace, including the prevention and punishment of violence and harassment at work, from a counter-power perspective.

Collective bargaining is a key tool to move forward, with the condition that women must participate in negotiating committees. Quotas regarding women's participation must be met where they exist and, where they do not, they should be established. There must be a gender-based approach to negotiations.[28] Unions must include gender clauses in collective bargaining agreements, especially to promote norms in accordance with the standards of protection set forth in ILO Convention 155 on workers' health and safety, the 2002 Protocol and ILO Convention 190 on violence and harassment at work and Recommendation 206, which go beyond the reductionist economic perspective that prevails in many occupational risk systems.

In the judicial sphere, legal officials must apply a gender-based perspective in addressing and resolving cases of occupational hazards, in accordance with international human rights standards on health, equality and non-discrimination.

As Dr. Valls Llobet states, "Gender conditioning must be made visible and denounced, health risks must be prevented and not medicalised, and discrimination must be changed."[29] These transformations face obstacles and resistance, but they are essential to safeguarding the right to health of all working people, especially women and the LGBTQI+ community.

[28] The Inter-American Court of Human Rights held:

> The Court concurs with this analysis and with the need for the states to set quotas and reserved positions for women in decision-making roles in unions, as a measure to overcome obstacles to leadership for women and allow them to enjoy greater and better representation of their interests, on a proportional basis, and tending toward gender equality on the boards of trade unions and in collective bargaining.

Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to Other Rights, with a Gender Perspective, Advisory Opinion OC-27/21, Inter-Am. Ct. H.R. (ser. A) No. 27, ¶ 197 (May 5, 2021), https://www.corteidh.or.cr/docs/opiniones/seriea_27_ing.pdf.

[29] Carme Valls-Llobet, *supra* note 5, at 416.

# FROM A PATRIARCHAL WELFARE TO A DIY WELFARE, A SHORT HISTORY OF CARE WORKERS IN ITALY

**SILVIA BORELLI**

*Italy | Originally written in English*

The recent pandemic crisis clearly demonstrated the poor working conditions and the many forms of labour exploitation suffered by care workers. To understand why the sector is so undervalued and exploited, it is necessary to clarify how the national welfare system was set up and how it works. In Italy as well as in other states, care workers' conditions deeply depend on how the welfare system is structured.

The paper presents why and how, in Italy, the traditional *patriarchal welfare* system has been transformed into a *DIY welfare system*, and the effects of this transformation on care workers. The analysis adopts an intersectional feminist perspective that examines simultaneously gender, racial, and class domination.[1] Adopting this intersectional feminist perspective is of paramount importance to examine global care chains, exploited to solve care needs in richer countries – including Italy – at the expense of poorer countries.[2] The massive engagement of female migrants as exploitable and vulnerable care workers has been considered a "good" solution to increasing care needs. Good from the perspective of the wealthy Italian families that can pay for care work and of the Italian government that can displace care responsibilities onto migrants and reduce public expenditure; extremely bad for the poorer countries where migrants come from that suffer from a care crisis and for the workers themselves.[3]

This paper focuses mainly on paid care workers. However, it largely considers the interconnection between paid and unpaid care.[4] First, the need for paid care depends on the unavailability of unpaid care. Currently the need for paid care has increased due to women's entry into the labour market and the changing structure of families. Unpaid care is also negatively affected by work time regulation and employment flexibility. In fact, unpaid care is diminished both by the broad power of employers to vary the timing of work performance and by on-demand contracts.[5]

[1] As clarified by Dahl, "it is not possible to analyse gender and gendering without including elements of race and class as these dimensions intersect and form the way gender is performed." Hanne Marlene Dahl, *Strangers in Care: Using Literature to Re-Theorise Care for the Oldest Old*, 5(4) Int'l J Care & Caring, 7 (2021). *See also* bell hooks, Il Femminismo è Per Tutti: Una Politica Appassionata (Tamu Edizioni, 2021).

[2] On global care chains see: Barbara Ehrenreich & Arlie Russell Hochschild, Global Woman: Nannies, Maids and Sex Workers in the New Economy (Granta Books, 2003); Arlie Russell Hochschild, *Global Care Chains and Emotional Surplus Value*, in On the Edge: Living with Global Capitalism 130-146 (Anthony Gidden & Will Hutton eds., 2000); Eleonore Kofma & Parvati Raghuram, Gendered Migrations and Global Social Reproduction (Springer, 2015).

[3] Therefore, "'costs of care' are not just a question of the changing relationship between the state, market, family and community, but of geopolitical inequalities between states affecting individuals in gendered and racialised ways." Fiona Williams, *In and Beyond New Labour: Towards a New Political Ethics of Care*, 21 Critical Soc. Pol'y 470 (2001). See also Fiona Williams, *Care: Intersections of Scales, Inequalities and Crises*, 66(4) Current Soc. 547-561 (2018); Marlene Spanger, Hanne Marlene Dahl, & Elin Peterson, *Rethinking Global Care Chains Through the Perspective of Heterogeneous States, Discursive Framings and Multi-Level Governance*, 7(4) Nordic J. Migration Res. 251-259 (2017).

[4] According to the ILO, paid care refers to any care provided by a service provider or a worker for a salary or a fee; unpaid care refers instead to care provided by family members, close relatives, friends, neighbours or volunteers. Laura Addati, Umberto Cattaneo, Valeria Esquivel, & Isabel Valarino, Care Work and Care Jobs for the Future of Decent Work (Geneva, 2018), https://www.ilo.org/global/publications/books/WCMS_633135/lang--en/index.htm.

[5] According to the ILO, "on-call work negatively affects work-life balance due to the unpredictability of the work schedules that are often associated with this working-time arrangement. Poor work-life balance is associated with workers having unpredictable schedules and lacking control over their working hours." Int'l Lab. Org., Working Time and

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The precariousness of many types of employment, as well as related in-work poverty, has threatened the male breadwinner family model and has forced the shift toward a dual-earner family model, further decreasing the amount of available unpaid care.

Therefore, a *care-job insecurity trap* is generated: the dissemination of precarious jobs, as well as the unpredictability of work schedules, increase paid care needs that must be supported by the state and/or by families. However, due to poor salaries, wage stagnation, and inflation, families often cannot afford to pay much to satisfy their care needs and look for low-cost solutions. States struggle to face the costs entailed by increased care needs. According to the European Commission, between 2019 and 2070 the costs of ensuring care to an aging population is expected to rise to 1.9% of European Union GDP.[6]

Moreover, the costs of a public care system should be covered by taxation. In Italy, as well as in other European countries, the tax burden falls mainly on workers; in fact, free movement of capital has accompanied the progressive decrease of taxes on capital.[7] In this context, public care services risk promoting a redistribution of capital from poor to rich: while the latter can benefit from job precariousness and the global movement of capital, the former have to pay higher taxes for financing public services and needed social treatments.

## The main features of the patriarchal welfare system

Turning now to the analysis of the types of welfare state and their impact on care workers' conditions, note that Italy belongs to the *familistic welfare model*.[8] In Italy, welfare was developed to support and preserve male breadwinners facing events that prevented them from working.[9] Social insurance was conceived as a tool to deal with economic insecurity generated by men being unable to earn an income from the labour market. Therefore, monetary transfers have been much more important than in-kind services, and solidarity has been understood mainly as redistribution of economic resources.[10]
Since the traditional gender-role division is very present in Italy, women have been and are mainly responsible for care. The Italian legislature has widely supported the male breadwinner/female caregiver family model and has intervened on care services only occasionally, upon pressure from feminist movements sometimes supported by trade

> *"A main feature of the familistic welfare model is the separation between private and public spheres. Care was generally delegated to families, where it was mostly performed as 'unpaid and invisible labour' by women.[11] Social services were underdeveloped and underfinanced, and the state's intervention was limited to cases where families 'failed' to fulfil their role as social safety net.[12] Consequently, care became invisible, marginalised, and devalued in terms of the practices it encompasses, the people who perform it, and the value it represents.[13]"*

Work-Life Balance Around the World 61 (Geneva, 2023), https://www.ilo.org/global/publications/books/WCMS_864222/lang--en/index.htm.

[6] Eur. Comm'n, The 2021 Ageing Report: Economic and Budgetary Projections for the EU Member States (2019-2070) (May 2021), https://economy-finance.ec.europa.eu/system/files/2021-10/ip148_en.pdf.

[7] Thomas Piketty, Une brève histoire de l'égalité 245 (Points, 2023).

[8] Chiara Saraceno, Mutamenti della famiglia e politiche sociali in Italia (Il Mulino, 2003).

[9] Maurizio Ferrera, Il welfare State in Italia. Sviluppo e crisi in prospettiva comparata 23 (Il Mulino, 1984).

[10] Gian Guido Balandi & Stefania Buoso, *Solidarity. Different Issues in a Community Perspective*, *in* Inscribing Solidarity. Debates in Labour Law and Beyond 63 (Julia López López ed., CUP, 2023). According to the Italian Statistical Office, in 2020 monetary transfers represented the 77.3% of the expenditure for social protection, far above the European average (66%). ISTAT, In emergenza sanitaria cambia la spesa sociale dei comuni: picco per il contrasto alla povertà, La spesa dei comuni per I servizi sociali, Anno 2020 (April 6, 2023), https://www.istat.it/it/files//2023/04/report-spesa-sociale-comuni-2020.pdf (hereinafter ISTAT picco per il contrasto alla povertà).

[11] Beatrice Müller, *The Careless Society—Dependency and Care Work in Capitalist Societies*, 3(44) Frontiers in Socio. 1 (2019).

[12] Chiara Giorgi & Ilaria Pavan, Storia dello Stato sociale in Italia 13 (Il Mulino 2021).

[13] Joan Tronto, Caring Democracy: Markets, Equality, and Justice 144 (New York University Press, 2013).

unions.[14]

In line with the neoliberal way to conceive human beings, individuals are considered autonomous, independent, and self-sufficient entities responsible for their own development and in competition with each other.[15] Care is concealed and care needs denied.

The separation of the public and private sphere and the naturalisation of caring has boosted the idea that care work is not "work like any other."[16] The exoneration gained through this strategy of separation and naturalisation of care work has freed men's energies for other activities, without them feeling the need to recognise their dependence on care or the care work on which their existence depends.[17] Therefore, "women's responsibilities for care and unpaid domestic labour underpin gender hierarchies and women's unequal inclusion in politics and markets."[18]

For the above mentioned reasons, the familistic welfare model has also been called patriarchal welfare.[19] Patriarchal welfare has a huge advantage for the state because it lays the burden of care mainly on families (i.e., on women) and liberates the state from this responsibility. However, its stability depends on women's oppression. The patriarchal welfare also generates a huge advantage for capital since it lowers reproduction costs (i.e., the costs necessary to reproduce the workforce that must be covered by wages).[20] The unpaid reproductive work carried out by women has allowed employers and owners to maintain low salaries for productive work and thus increased the surplus value for capital. However, care is also threatened by capitalism because its drive to unlimited accumulation tends to destabilize the very processes of social reproduction on which it relies.[21]

**From patriarchal welfare to DIY welfare**

The patriarchal welfare model has been strongly affected by the growing entrance of women into the labour market, as well as by an ageing population, low fertility rates, changing family structures, higher youth mobility, and greater job insecurity. These elements have both reduced the care capacity of families and boosted care needs, especially for elders.[22]

Due to high public debt and the rigid constraints imposed by European economic governance, Italian public administrations can hardly maintain the few existing public services. Costs caused by population ageing are assessed in the evaluation on debt sustainability and recommendations on the reduction of these costs are constantly addressed to member states in the European Semester.[23] Therefore, a DIY welfare model has progressively replaced the traditional patriarchal welfare model. In the DIY welfare model, families must find a solution to their care needs in the private market.

This type of welfare has been fuelled by several factors. On one side, the movement for women's emancipation, corresponding with

[14] For example, the 1971 law 1044 on kindergartens. L. n. 1044/1971 (It.).

[15] Martha Fineman, *The Vulnerable Subject and the Responsive State*, 60 Emory L. J. 151-275 (2010).

[16] Brunella Casalini, *Politicizzare la cura. Per andare oltre l'«irresponsabilità dei privilegiati»*, 35 Machina: Rivista online (2020).

[17] As pointed out by Brunella Casalini, "those who are privileged do not need to know and can thus overlook the costs that others bear to let them have their privileges. To maintain their privileged position they sometimes even need actively not to know, to hide and ignore, in order not to think of the oppression and injustice on which their privileges may be based." Brunella Casalini, *Care and injustice*, 4(1) Int'l J. Care & Caring 61 (2020).

[18] Ann Shola Orloff & Marie Laperrière, *Gender*, *in* The Oxford Handbook of the Welfare State 351 (Daniel Béland, Kimberly J. Morgan, Herbert Obinger, & Christopher Pierson eds., Oxford University Press, 2022).

[19] Ugo Ascoli, *Le caratteristiche fondamentali del Welfare State italiano*, *in* Cittadinanza, diritti sociali, collettività nella storia contemporanea: Istituto Poligrafico e Zecca della Stato 215 (Carlotta Sorba ed., 2002). Feminist theories recognise patriarchy as a social system in which positions of dominance and privilege are primarily held by men, and criticise it as a primary cause of women's oppression (Lorna Finlayson, An Introduction to Feminism 6 (CUP, 2016); *see also* Angela Saini, The Patriarchs: The origins of inequality (Penguin Random House, 2023)).

[20] Alisa Del Re, *Il lavoro di riproduzione e il mercato*, *in* Separate in casa: Lavoratrici domestiche, femministe e sindacaliste: una mancata alleanza 38. (Beatrice Busi ed., Ediesse, 2020). *See also* Silvia Federici, Genere e Capitale. Per una lettura femminista di Marx (DeriveApprodi, 2020).

[21] According to Nancy Fraser, "social reproduction is an indispensable background condition for the possibility of economic production in a capitalist society." Nancy Fraser, *Contradictions of Capital and Care*, 100 New Left Rev. 102 (2016).

[22] Italy has the oldest population in Europe (*Population by age group*, Eurostat, https://ec.europa.eu/eurostat/web/products-datasets/-/tps00010 (last updated Dec., 22 2023). In 2050, 34.3% of the Italian population will be older than 65 years.

[23] The European Semester is the European Union's framework for the coordination and surveillance of economic and social policies. For further information, see *The European Semester*, Eur. Comm'n, https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester_en (last visited Jan. 15, 2014).

women's mass entry in labour market, caused a deresponsibilisation from care, whose burden has been externalised. Due to the lack of public services and the very low availability of men to provide unpaid care (for cultural, economic, and legal reasons[24]), care has been displaced onto care workers and care services available on the market (so-called *care marketization*).[25]
The cost of paid care strongly affects caretaking choices. Families can opt only for care arrangements that are affordable for them.

*"The DIY welfare model presents a problem of reverse redistribution. Instead of playing the redistributive role that state welfare should play, this system increases the differences between the rich who can afford high-quality care services, and the poor who have to accept low-cost solutions for their care needs."*

Therefore, in order to satisfy care needs, DIY welfare must provide families *low-cost solutions*.[26] In Italy, the cheapest caretaking option is domestic care work.

Finally, in the DIY welfare model, the costs of paid care have to be lower than wages received by unpaid carers whose participation in the labour market would otherwise be severely affected. Therefore, wage stagnation and inflation have a further negative impact on wages received by care workers.

## The many forms of legal and illegal exploitation of domestic care workers

In Italy, long-term care is mainly provided by domestic workers (called *badanti*).[27] The large majority of these workers are women from foreign countries.[28] Many migrants accept live-in care work so they can receive accommodation and food. They are not exposed to oversight since labour inspections are much more difficult to conduct in private houses.[29] In Italy, a person can be employed as a domestic worker without any qualifications. In fact, the debate on care quality has never been developed in this sector since care has been (and often is) considered an activity performed naturally and free of charge by women within the family. Domestic work "mirrors tasks traditionally performed by female household members without pay," so it "is perceived as unskilled and lacking in value."[30]

Exploiting the low societal recognition for care work and being aware of the paramount role of domestic workers to face increasing care needs of families, the government has deliberately developed methods to reduce the cost of domestic work. Labour violations in the sector are widely tolerated and inspections are rarely performed.[31] Therefore, domestic workers suffer many forms of legal and illegal exploitation to keep their cost very low.[32]

The first form of legal exploitation concerns immigration law. In Italy, the procedure for obtaining a work permit is so complex that, in practice, foreign workers find it almost impossible

[24] Paternal leave has been introduced in Italy only recently *see* Mariagrazia Militello, Conciliare vita e lavoro: Strategie e tecniche di regolazione (Giappichelli, 2020) *and* Maria Luisa Vallauri, Genitorialità e lavoro (Giappichelli, 2020).

[25] "Marketization broadly describes policies, which use markets and market mechanisms in the provision of welfare services." Markets "can be understood as practices that construct care as a commodity and the individual in need as a consumer." Viola Burau, Minna Zechner, Hanne Marlene Dahl, & Costanzo Ranci, *The Political Construction of Elder Care Markets: Comparing Denmark, Finland and Italy*, 51(7) Soc. Pol'y & Admin. 1023 (2017).

[26] Silvia Borelli, Who cares? Il lavoro nell'ambito dei servizi di cura alla persona 24 (Jovene editore, 2020).

[27] In the past, the word *badante* was used to refer to a person that looks after animals (*Badante*, Parlare Civile, https://www.parlarecivile.it/argomenti/immigrazione/badante.aspx (last visited Jan. 15, 2024). The use of the word *badante* reflects the weak value given to care work and is linked to negative stereotypes of what is still perceived as a female task, and of immigrants that are relegated to what are considered "second-class" occupations.

[28] According to Domina (the main employers' association in the sector), 69.5% of domestic workers are foreign and 86.4% are women (Osservatorio Nazionale Domina, IV Rapporto annuale sul lavoro domestico (2022), https://www.osservatoriolavorodomestico.it/rapporto-annuale-lavoro-domestico-2022).

[29] Maurizio Ambrosini, Immigrazione irregolare e welfare invisibile: Il lavoro di cura attraverso le frontiere (Il Mulino, 2013).

[30] ILO, Effective Protection for Domestic Workers: A Guide to Designing Labour Laws 73 (Geneva, 2012), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_173365.pdf.

[31] According to ISTAT, 52.3% of domestic work is irregular (ISTAT, Piano nazionale per la lotta al lavoro sommerso 2023-2025 10 (2022), https://www.integrazionemigranti.gov.it/AnteprimaPDF.aspx?id=3684). It should also be underlined that due to the bad perception of controls and sanctions in DIY welfare, families are obliged to find a solution to their care needs on their own.

[32] Silvia Borelli, *Le diverse forme dello sfruttamento nel lavoro domestico di cura*, 2 Lavoro e diritto 281 (2021).

to enter the country legally.[33] An irregular migrant who turns to the authorities to ask that her rights be respected risks being punished for the offence and deported.[34] A domestic worker who dares to protest her working conditions risks being dismissed, as domestic work is excluded from the just-case protections extended to other forms of work, and a notice period is sufficient to dismiss. Live-in workers risk also losing accommodation. Moreover, the dismissed worker could hardly find a new job, given the impact of bad references in the sector. And without a job, the migrant may lose her residence permit. Therefore, foreign workers are more hesitant to enforce their employment-related rights that are thus "more symbolic than real."[35]

Noting the widespread presence of migrants in the sector, Bettio and others[36] have referred to a move from a family model of care to a migrant-in-the-family model of care. Other have talked about "distorted emancipation" that fails to produce a more equal division of caring time inside the family and maintains traditional gender hierarchies related to care work.[37] The legal exploitation of domestic workers is also facilitated by maintaining a special regime created in 1958.[38] While the functions of domestic workers have changed and their number has significantly increased in response to growing demand for elder care,[39] Italy has not adapted the legislation to guarantee equal treatment or to protect workers from the risks entailed by homecare. Not even on the occasion of the ratification of the

A domestic worker in South Africa. Credit: Kate Holt / Solidarity Center

ILO Convention No. 189,[40] which Italy did before any other EU country, was there any change to the 1958 legislation, which, as a result, remains, in several respects, noncompliant with the provisions of the Convention. In fact, the special regime for domestic workers consists of excluding them from the ordinary labour legislation with regard to working hours, wages, health and safety at work, maternity, paternity and parental leave, dismissal, work accident, social contribution, and other protections.[41] Consequently, this special regime clearly infringes one of the main pillar of the ILO Convention: recognising domestic work as "work like any other."[42]

Due to the weak legislative framework, domestic work in Italy is regulated mainly by national collective agreements. There are several national collective agreements for domestic work, many of which are signed by employer associations and trade unions whose representativeness is unknown in order to lower labour costs established by the main national sectoral collective agreement.[43] Moreover, collective agreements for domestic workers are sometimes applied by

[33] William Chiaromonte, *L'ingresso per lavoro: l'irrazionalità del sistema e le sue conseguenze al tempo delle fake news e della retorica nazionalista*, *in* Ius migrandi. Trent'anni di politiche e legislazione sull'immigrazione in Italia 241 (Monia Giovannetti & Nazarena Zorzella eds., FrancoAngeli, 2020), https://series.francoangeli.it/index.php/oa/catalog/book/553.

[34] D.Legs. 25 luglio 1998, n. 286, Art. 10-bis (It.).

[35] Judy Fudge, Global Care Chains: Transnational Migrant Care Workers (2010), https://www.ialsnet.org/wp-content/uploads/2015/08/FudgeCanada.pdf.

[36] Francesca Bettio, Annamaria Simonazzi, & Paola Villa, *Change in Care Regimes and Female Migration: The "Care Drain" in the Mediterranean*, 16 (3) J. Eur. Soc. Pol'y 271-285 (2006).

[37] Petra Ezzeddine, *Vital Yet Vulnerable: Europe's Intra-EU Migrant Caregivers*, 1 Care4Care Pol'y Brief Series 3 (2021), https://feps-europe.eu/publication/815-vital-yet-vulnerable-europes-intra-eu-migrant-caregivers/.

[38] The law of 1958 is a result of the battles of feminists to recognise domestic work as a work (*supra* note 20, at 37).

[39] Raffaella Sarti, *"Badante": una nuova professione? Luci e ombre di una trasformazione in atto*, *in* Viaggio nel lavoro di cura: Chi sono, cosa fanno e come vivono le badanti che lavorano nelle famiglie italiane 201, (Raffaella Maioni & Gianfranco Zucca eds., Ediesse, 2016).

[40] Int'l Lab. Org., Convention no. 189, *Domestic Workers Convention* (2011), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189.

[41] Claudio de Martino, *Chi bada alle badanti? La specialità del lavoro domestico alla prova del Covid*, 1 Giornale di diritto del lavoro e delle relazioni industriali 57 (2021).

[42] Adele Blackett, Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labour Law (ILR Press, Cornell University Press, 2019).

[43] In Italy, collective agreements do not have an *erga omnes* effect: a service provider has to apply the agreement signed by the employers' association to which it is affiliated; if it is not affiliated to any association, it can freely decide to apply or not a collective agreement and which collective agreement to apply.

companies or associations that provide them to families. This practice is highly questionable as it is not clear why a special discipline for domestic work, dictated to meet the needs of a particular employer (the family), should be applied to an entity providing services in the market.

Abuses to which domestic workers recruited or placed by private employment agencies are often exposed[44] are denounced by ILO Convention No. 189.[45] Notwithstanding the many risks that this practice can entail, private employment agencies providing domestic workers are increasingly present in Italy since they free families from the burden of managing domestic work. The way in which domestic work is provided depends both on the economic convenience and on the controls carried out by the labour inspectorate. In other words, employment agencies adapt the legal form of their operations to be competitive and evade controls. Some agencies provide domestic workers hired in foreign countries, exploiting the comparative advantage from the regulation on transnational posting of workers in terms of lower labour costs and less risk of being controlled by public authorities.[46]

Cash-for-care payments are another tool to provide low-cost solutions to care needs. These schemes have "not only affirmed a conception of care as a commodity that care-seekers turned consumers can freely purchase on the market" (*commodification of care*),[47] they have also contributed to worsening domestic worker conditions because their use is very often unlinked to the regular engagement of the latter. In the main cash-for-care scheme for elderly and disabled people (the *indennità di accompagnamento*), for example, the state provides an amount (€527.16 per month in 2023) that does not cover the cost of a full-time regular domestic worker. It is therefore no surprise that families often use this allowance to pay undeclared or under-declared care workers.[48]

## The outsourcing of care services

Other methods elaborated by Italian legislators to provide low-cost solutions to care needs concern outsourced care services. As already pointed out, in Italy public care services – in particular, elder care – have been and are underdeveloped. Facing the decreasing availability of unpaid carers and rigid public expenditure constraints that prevent hiring new staff, public administrations have extensively contracted out care services. This has several consequences. First, monetary transfers have increased: Instead of developing public care services, the legislator has introduced monetary contributions to cover the cost of private care services. Second, regional disparities already in existence have increased. Care services largely depend on public funds, and in particular on municipal funds.[49] Therefore, the availability and quality of care services are more related to the wealth produced in a certain territory than to care needs. In other words, care services are fewest where poverty and vulnerability are higher. Inequalities in access to care services thus contribute to reproducing and aggravating inequalities between Italian regions.[50]

Due to the absence of national legislation that clearly defines the minimum levels of services that must be guaranteed throughout the territory (*livelli essenziali delle prestazioni sociali,* or LEPS), each region offers different services. Consequently, it is difficult to collect data on care services because they are different from region to region and the services themselves are named differently in each region.[51]

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[44] Lucia Amorosi, *Lo sfruttamento lavorativo nel lavoro domestico: un approccio empirico*, *in* Donne gravemente sfruttate. Il diritto di essere protagoniste 78 (Maria Grazia Giammarinaro, Francesca Cocchi, Chiara Lavanna, Francesco Carchedi, & Pino Gulia eds., Associazione Slaves No More, 2022).

[45] C189, *supra* note 40, art. 15.

[46] In fact, controls on transnational posting of workers require the collaboration among different national public authorities. Italian labour inspections have recently discovered severe forms of labour exploitation caused by some cases of transnational posting of domestic workers (Osservatorio Domina, Rapporto annuale 2022 90 (2022), https://www.osservatoriolavorodomestico.it/rapporto-annuale-lavoro-domestico-2022).

[47] Sara Farris & Sabrina Marchetti, *From the Commodification to the Corporatization of Care: European Perspectives and Debates,* 24(2) Soc. Pol. 112 (2017).

[48] Barbara Da Roit & Blanche Le Bihan, *Cash for Long-Term Care: Policy Debates, Visions, and Designs on the Move*, 53(4) Soc. & Pol'y Admin. 519 (2019).

[49] In 2020, municipalities covered 57.4% of the costs for social services (ISTAT picco per il contrasto alla povertà, *supra* note 10).

[50] Flavia Martinelli, *I divari Nord-Sud nei servizi sociali in Italia. Un regime di cittadinanza differenziato e un freno allo sviluppo del Paese,* 1 Rivista economica del Mezzogiorno 45 (2019).

[51] On problems related to data collection see: Matteo Bocchino & Emanuele Padovani, I servizi sociali territoriali: Analisi delle variazioni 2015-2019 e confronti fra i singoli Comuni (CNEL – Osservatorio Nazionale Servizi Sociali Territoriali, 2023), https://www.cnel.it/Portals/0/CNEL/ComposizioneConsiglio/ONSST/CNEL_Rapporto%20SERVIZI%20SOCIALI2023_30marzo2023.pdf?ver=2023-03-31-053030-657; Network Non Autosufficienza, L'assistenza agli anziani non autosufficienti in Italia, 7° Rapporto 2020/2021, Punto di non ritorno (Maggioli editore, 2020), https://www.luoghicura.

In 2017, the legislature created a Social Protection and Inclusion Network to coordinate social interventions and services.[52] However, due to huge regional differences, the annual plans adopted so far by this Network have not been able to define the LEPS to be guaranteed throughout the country. The Network has emphasised that LEPS cannot be achieved without stable, adequate funding, which is currently not available. In fact, public funding for care services has been extremely fragmented and discontinuous. This problem has been further accentuated by the National Recovery and Resilience Facility (NRRF) that expires in 2026 and, consequently, it cannot be used for structural costs, such as staff cost.[53] Currently, the NRRF has been used to build infrastructure such as kindergartens, small hospitals, and care centres; however, the public administration can barely cover the cost for the personnel who will work in these facilities and it is highly probable that their management will be outsourced.

In 2023, the legislature intervened to harmonise the rules on authorisation and accreditation of care services.[54] Currently, these rules are defined by each region, further amplifying the territorial disparities. In many cases, the authorisation and accreditation schemes do not list fair working conditions and qualification requirements among the elements that must be respected to provide care services.

Furthermore, some regions (such as Lombardia) have implemented open authorisation and accreditation schemes (i.e., minimum criteria that have to be fulfilled by private care service providers). This strongly reflects a *consumer-oriented approach* aimed at satisfying the needs of users that, according to these regions, can freely select care services that better fit their needs.[55] However, in many cases users' free choice exists only "on paper" because users can hardly assess their care needs, and the services that can be chosen depend both on the services available (that vary widely between regions) and the costs that the user can bear.

The open authorisation and accreditation schemes present a huge advantage for DIY welfare: they are not regulated by public procurement law. Therefore, the many rules established for public procurement procedures to protect workers' rights do not apply in these cases.

Public procurement law also does not apply to care services outsourced to nonprofit entities. In fact, public administration may enter into agreements with nonprofit care service providers according to specific rules aimed at promoting their role in the sector. This generates a paradox: Care workers in for-profit care services are protected by regulations on working conditions in public procurement law, while working conditions for workers at nonprofit entities are unregulated.

Moreover, in Italy several national collective agreements exist for nonprofit actors, some of which are signed by predator employer associations and unrepresentative trade unions[56] in order to lower labour costs. In addition, due to the ultra-fragmentation of the employers' associations in the field of social services, the main trade unions (Italian General Confederation of Labour (CGIL), Italian Confederation of Workers' Trade Unions (CISL), and Italian Labour Union (UIL)) have signed several national

it/wp-content/uploads/2020/12/NNA_2020_7%C2%B0_Rapporto.pdf; Giovanni Fosti, Elisabetta Notaricola, & Eleonora Perobelli, Le prospettive per il settore socio-sanitario oltre la pandemia, 3° Rapporto Osservatorio Long Term Care (Egea, 2021), https://cergas.unibocconi.eu/sites/default/files/media/attach/2019-2020%20report%20Le%20prospettive%20per%20il%20sistema%20socio-sanitario%20oltre%20la%20pandemia.%20Terzo%20rapporto%20Osservatorio%20-Long%20Term%20Care%2C%20Egea%2C%202021.pdf; Annalisa Turchini, Sergio Ferri, & Cristiana Ranieri, *I servizi sociali nella pandemia: evoluzione di un settore strategico per il welfare* (INAPP, Working Paper no. 82, 2022), https://oa.inapp.org/handle/20.500.12916/3462

[52] Borelli, *supra* note 20, at 13.

[53] Silvia Borelli, *L'interregno dei servizi di assistenza per le persone non autosufficienti,: Spunti di riflessione nella prospettiva giuslavoristica*, in 1 Rivista del diritto della sicurezza sociale 25 (2023).

[54] "Authorisation" lays down the minimum requirements that all operators wishing to provide a care service must comply with, while "accreditation" is required to provide services on behalf of the public service (i.e., the cost of these services is partially reimbursed by the region) (Alessandra Albanese, Diritto all'assistenza e servizi sociali: Intervento pubblico e attività dei private 208 (Giuffrè, 2007)).

[55] It should be noted that, while in the European Nordic countries, "a representative of the municipality provides an assessment of the needs and the recipient can then choose between care provided by the municipality or a private company chosen among the certified companies," a care need evaluation by a public authority is still missing in Italy (Hanne Marlene Dahl, Leena Eskelinen, & Eigil Boll Hansen, *Coexisting principles and logics of elder care: Help to self-help and consumer oriented service?* 24 Int'l J. Soc. Welfare 288 (2015). The care service reform outlined in the National Reform and Resilience Plan aims at setting up a single access point where a personal care need evaluation is performed by an interdisciplinary team.

[56] In Italy, several trade unions exist. Each trade union can freely decides which sector to represent and can sign collective agreements. Therefore, there are several collective agreements for a sector and each collective agreement can have a different scope.

collective agreements applicable to nonprofit care providers. National collective agreements for nonprofit entities usually provide lower wages and fewer benefits than ones for the public sector and, sometimes, cheaper than ones for for-profit actors.

Nonprofit entities can also employ volunteers. Legislative Decree n. 117/2017 restricts the use of volunteers in for-profit enterprises, but volunteers play an important role in nonprofit actors providing care services,[57] and this produces a further competitive advantage for them.

Therefore, in Italy the role of nonprofit actors is still very relevant in the care service sector and corporatization of care – i.e., the growing presence of for-profit companies and their business rationalities in the care sector – is still underdeveloped compared with other countries.[58]

**Looking for a care state model**

The short description of the DIY welfare model clearly points out that it has allowed the emancipation of wealthy Italian women by legally and illegally exploiting female migrants as domestic care workers or personnel employed in care services provided by private actors. Instead of decreasing inequalities, the DIY welfare model increases the differences among wealthy families that can afford high-quality care services and poor families that have to look for low-cost solutions. Solutions available vary from region to region, and these territorial disparities risk to be further increased if the proposal presented by the Meloni government aimed at enhancing regional competences and reducing solidarity mechanisms among regions is approved.

In a pamphlet published in 2020, the Care Collective proposed to develop a *care state*, one that "ensures versatile, high-quality and cost-free care for anyone in need, at all stages of life."[59] The interconnection between paid and unpaid care – as well as the analysis of how the type of welfare impacts care workers' conditions – proves that, in order to make this idea concrete, a holistic approach that encompass recognition of care as a "background condition of possibility" of our social order[60] is needed. This includes the need to redistribute unpaid and paid care work among genders, to strengthen public welfare, and to ensure respect for the rights of migrant workers. Working time should be reduced and on-demand contracts forbidden.[61] Unpaid caregivers should be supported and men's participation in care work should be mandated through full paid parental leave and compulsory leave for men. Public welfare policies should expand into areas where welfare states have historically provided limited support, such as long-term care.[62] Fiscal systems should be reconceived to limit capital movement, increase taxation on activities to be discouraged (e.g., on financial transactions), and restore progressive taxation.[63] Migration law should be reformed in order to reduce migrants' vulnerability.

Care workers must be recognised as essential workers, and decent care worker conditions should be considered a key element of quality care.

> *"More than anything else, voices of both paid and unpaid caregivers and care receivers should be supported in order to develop 'a counter-discourse on care that challenges the dominant discourse that has historically devalued care and considered it as irrelevant as a political issue.'[64]"*

Therefore, the role of trade unions defending care workers' rights should be strengthened, while also exploiting the recognition of social services as a field of the European sectoral social dialogue. As pointed out by the social movement developed alongside the approval of ILO Convention No. 189, the unionisation of care

[57] INAPP, Gabriella Natoli, & Annalisa Turchini, L'offerta di servizi sociali del terzo settore: IV Indagine sui servizi sociali realizzati dal non profit, Rep. no. 34, 30 (INAPP, 2023), https://oa.inapp.org/xmlui/handle/20.500.12916/3924.

[58] Farris & Marchetti, *supra* note 47, at 109.

[59] Care Collective, The Care Manifesto: The Politics of Interdependence 74 (Verso Books, 2020).

[60] Nancy Fraser, Cannibal Capitalism (Verso Books, 2022).

[61] *See* Jennifer Nedelsky & Tom Malleson, Part time for all: A Care Manifesto (Oxford University Press, 2023).

[62] Daniel Engster, Justice, Care, and the Welfare State 29 (Oxford University Press, 2015).

[63] On this point see: European Commission High-Level Group on the Future of Social Protection and of the Welfare State in the EU, The Future of Social Protection and of the Welfare State in the EU 86, available at https://ec.europa.eu/social/main.jsp?catId=88&eventsId=2057&furtherEvents=yes&langId=en

[64] Casalini, *supra* note 17, at 69.

workers has been traditionally low. On one side, this is a consequence of the under-evaluation of care, of it not being considered real work by many (male) trade unionists. On the other side, many care workers are migrants not aware of their rights, often not trusting on trade unionism and scared of losing their job and their residence permit. Besides, the nature of the workplace (often, private house) of these workers prevents them from meeting and socialising.

It is therefore important to remember that "we live inside the successes of past struggles"[65]: many rights we currently benefit from, such as public health care and public schools, have resulted from long-harsh battles fought by women, workers, and trade unions in the past.[66] Without these battles, transformation of the DIY welfare model toward a care welfare model would just be a good intention.

[65] Sam Wallman, Our Members Be Unlimited 13 (Scribe, 2022).

[66] On the role of labour movement in the development of the welfare state, see Stein Kuhle & Anne Sander, *The Emergence of the Western Welfare State*, *in* The Oxford Handbook of the Welfare State 75 (Daniel Béland, Kimberly J. Morgan, Herbert Obinger, & Christopher Pierson eds., Oxford University Press, 2022).

**ILAW NETWORK** The Global Labour Rights Reporter

# PARENTAL RESPONSIBILITIES AND WORK IN SWITZERLAND: A LEGAL FRAMEWORK THAT REINFORCES GENDER STEREOTYPES

**CÉLINE MOREAU AND VALERIE DEBERNARDI[1]**

*Switzerland | Originally written in French*

A 2018 state-commissioned study in Switzerland revealed that more than one in ten women[2] who had a job before giving birth no longer had one upon completing maternity leave.[3] If professional interruptions due to health complications or lack of childcare options are included, this figure rises to 15%.[4] Thus, the challenge of continuing to work, or developing a career, in the event of maternity is still quite relevant, reflecting the patriarchal division of family responsibilities that continues to prevail in the country.

While mothers are increasingly more likely to work part-time to look after their children, fathers continue to work full-time. According to a study conducted by the Swiss Federal Statistical Office published on May 11, 2021, 49% of families with children under the age of four have a "father working full-time, mother working part-time" model. For families with children under twenty-five, only 10% have both parents working part-time, while 78% of working mothers work part-time.[5]

Women's under-representation in paid employment is rooted in a historical legacy that for a long time simply excluded them from the political and professional sphere. For example, a woman's right to vote was only recognised by all Swiss cantons in 1991, maternity leave was not introduced nationwide until 2004 and paternity leave was only finally recognised nationwide in 2021.

To this day, women still earn less than their male colleagues. In 2020, the wage gap between men and women in the private and public sectors was estimated at 10.8%.[6]

These considerable delays in equality at work reflect a legislative system that perpetuates patriarchal stereotypes when it comes to reconciling family responsibilities with professional life. This article (1) outlines Switzerland's main legislative instruments in this field, (2) highlights their shortcomings in combating discrimination against parents in the workplace, (3) describes the repeated calls from international bodies for a system that better protects women's interests, and (4) makes specific recommendations for a feminist vision regarding access to work for people who have family responsibilities.

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[2] For the purposes of this article, and due to an unfortunately not very inclusive legislative and statistical framework, the term "women" here refers essentially to cisgender women, i.e. women whose gender corresponds to the female sex assigned to them at birth. The authors regret, however, that the legislative framework and available statistical data do not take better account of gender diversity within families.

[3] Melania Rudin, *Congé de maternité: interruptions de travail avant et après l'accouchement*, Sécurité Sociale (*CHSS)* (Sept. 7, 2018), https://sozialesicherheit.ch/fr/conge-de-maternite-interruptions-de-travail-avant-et-apres-laccouchement/#:~:text=La%20majeure%20partie%20des%20interruptions,derniers%20jours%20avant%20l'accouchement.

[4] *Id*.

[5] Press release, Office Fédéral de la Statistique, Les familles en Suisse - Rapport statistique 2021 (May 11, 2021), https://www.bfs.admin.ch/news/fr/2021-0228.

[6] *Ecart salarial* [*Wage Gap*], Confédéracion Suisse Office Fédéral de la Statistique, https://www.bfs.admin.ch/bfs/fr/home/statistiques/travail-remuneration/salaires-revenus-cout-travail/niveau-salaires-suisse/ecart-salarial.html (last visited on Oct. 13, 2023).

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## A Minimalist Legislative Framework Based on Gender Stereotypes

The Swiss legislative framework for reconciling family and work life focuses on gender discrimination and maternity protection.

*Federal Act on Equality between Women and Men (FAE)*

Discrimination in the workplace is defined by the Federal Act on Equality between Women and Men of March 24, 1995 (FAE).[7] This law prohibits discrimination against employees on the basis of sex, whether directly or indirectly, including on the basis of marital status, family situation or, in the case of women, pregnancy.[8]

The law prohibits discrimination based on "sex" rather than "gender." Moreover, the concept of "sex" has been interpreted narrowly, which limits its application. For example, the Federal Court held in 2021 that discrimination on the basis of sexual orientation is not covered by the protection afforded by the FAE.[9] The Court has not yet ruled on whether the law applies to homophobic and transphobic harassment, or to discrimination on the grounds of gender identity.[10] The law continues to be rooted in a binary approach to the concept of gender, which reinforces stereotypes.

The recognition of discrimination based on family situations may also be limited, if the reasoning of the Federal Court in rejecting the recognition of discrimination based on sexual orientation is extended to other areas. Discrimination based on gender identity or on forms of parenthood, such as adoption, might not be covered. Moreover, discrimination based on family situation would be regarded as discrimination, only if it is concurrent with sex discrimination. Thus, for example, a man with family responsibilities that is treated differently from another man without family responsibilities might not be protected. Such restrictions convey the outdated idea that only women have parental responsibilities that interfere with their employment.

There is also an article in the FAE devoted to sexual harassment, which is defined as any harassing behaviour of a sexual nature or other behaviour related to the person's sex that adversely affects the dignity of women or men in the workplace, in particular threats, the promise of advantages, the use of coercion and the exertion of pressure in order to obtain favours of a sexual nature.[11] Once again, sex is the criterion used to characterise sexual harassment, which does not cover all cases of gender-based harassment. This distinction means that all forms of gender-based discrimination are not punishable under the current legislative and case law framework.

Furthermore, the FAE does not uniformly cover all sectors. For example, cantonal and municipal civil servants do not benefit from the FAE's provisions on protection against discriminatory dismissal. In such cases, the applicable provisions will depend on local personnel regulations, and the protection against discrimination provided for therein will depend directly on the potentially patriarchal views of the political representatives in power in these constituencies.

*Maternity Protection (Law on Labour)*

Maternity protection is governed by the Federal Law on Labour in Industry, Trade and Commerce of March 13, 1964 (Law on Labour) [12] and its ordinances. These provisions concern the protection of female workers' health during pregnancy and immediately after childbirth, and lay down

[7] Loi fédérale sur l'égalité entre femmes et hommes [LEg] [Federal Act on Equality between Women and Men] [FAE] Mar. 24, 1995, https://www.fedlex.admin.ch/eli/cc/1996/1498_1498_1498/fr.

[8] *Id*. at art. 3.

[9] Tribunal fédérale [TF] [Federal Supreme Court] Apr. 5, 2019, 8C_594/2018, ATF 145 II 153, c. 4, https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?lang=fr&type=show_document&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=&rank=0&highlight_docid=atf%3A%2F%2F145-II-153%3Afr&number_of_ranks=0&azaclir=clir.

[10] Karine Lempen & Roxane Sheybani, La Loi Fédérale sur L'égalité (LEg) Devant les Tribunaux: Guide (2020), http://www.leg.ch/documents/EJL0012_Guide_LEg_web_final_2.pdf.

[11] FAE, art. 4.

[12] Loi fédérale sur le travail dans l'industrie, l'artisanat et le commerce [LRr] [Law on Labour in industry, trade and commerce] March 13, 1964, RS 822.11, https://www.fedlex.admin.ch/eli/cc/1966/57_57_57/fr.

the conditions under which pregnant women may be employed. The protection provided by this legislative framework focuses on reducing working hours, prohibiting women from working in arduous conditions during pregnancy, and allowing time for breast-feeding.

Many workers are excluded from the maternity protection system provided by the Law on Labour.

*"Women working in the agricultural sector or in domestic service do not benefit from the Law on Labour's protective provisions for pregnant or breast-feeding women. These workers are often among the most precarious in Switzerland. Furthermore, most female agricultural workers work on farms owned by their husbands,[13] so the legislative decision to exclude them from this protection scheme reflects a patriarchal vision of this sector, which remains under the control of the husband-employer."*

*Other Provisions*

Under the Code of Obligations,[14] mothers are protected against dismissal for the duration of pregnancy and the sixteen weeks following childbirth.[15] However, women who become pregnant during their probationary period or who are on fixed-term contracts are not entitled to any protection against dismissal.

Pregnancy-related incapacity for work is not treated as a separate issue from incapacity due to illness or accident. Thus, as in the case of these other types of incapacity, entitlement to salary payment is still calculated on the basis of the number of years worked, and it is therefore possible that a pregnancy-related incapacity may, depending on the length of the employment relationship, result in a loss of earnings which, in some cases, may be a full loss of earnings for the employee.[16] Pregnant unemployed women are considered unfit for job placement in the event of incapacity. Their entitlement to unemployment benefits is therefore limited to 30 daily allowances, equivalent to one month's salary.

Thus, the legislative system does not protect against the risks of job or income loss in the event of pregnancy-related medical complications. This lack of protection often exacerbates pre-existing situations of financial insecurity for women who have recently been hired or who are unemployed.

*Other relevant standards*

On January 1, 2021, the Federal Act on Improving the Balance between Work and Caregiving came into force. This act has made it possible to adopt a number of articles in the Swiss Code of Obligations. These provisions are applicable to labour relations in the private sector.

Paternity leave was introduced in article 329g of the Code of Obligations. According to this article, in the event of paternity, the employee is entitled to two weeks leave if he is the legal father at the time of the child's birth, or if he becomes the child's legal father within the following six months.

Thus, the Swiss legislature decided in favour of paternity leave rather than parental leave, thereby significantly limiting the positive impact of this provision, both in terms of the duration of this leave compared to maternity leave, and in terms of inclusiveness. First, unequal leave reinforces gender stereotypes regarding the distribution of childcare. Moreover, a person on maternity leave is still more likely to be dismissed when she returns to work than someone who has only been on leave for two weeks. With regard to inclusiveness, this leave is limited to the condition of being the *legal father*. A female couple will therefore not be able to benefit from it.

[13] AGRIDEA, Les Femmes dans l'Agriculture Suisse (2020), https://www.paysannes.ch/engagees/femmes-dans-agriculture.

[14] Loi fédérale complétant le Code civil suisse [Federal Act Supplementing the Swiss Civil Code] March 30, 1911, RO 27 321, https://www.fedlex.admin.ch/eli/cc/27/317_321_377/fr.

[15] Code des obligations [CO] art. 336, https://www.fedlex.admin.ch/eli/cc/27/317_321_377/fr#art_36.

[16] Rudin, *supra* note 3.

*"Article 329h of the Swiss Code of Obligations introduces 'caregiver leave.' This provision stipulates that the employee is entitled to paid leave to care for a family member or partner whose health is impaired. The leave is limited to the time required for the care, but may not exceed three days per case and ten days per year in total. In this respect, it is welcome that the term 'partner' has been introduced, as it seems to be aimed at more inclusive notions of families or couples."*

Finally, article 329i of the Code of Obligations now provides for "caregiver leave to care for a child whose health has been seriously affected by illness or accident." The maximum duration of this leave is fourteen weeks. If both parents work, each is entitled to up to seven weeks' caregiver leave. The fact that such a condition has been added and clarified, with regard to the possibility of both parents sharing the duration of the leave, reflects the constant presence of gender stereotypes in the design of these – albeit very recent – provisions.

With regard to adoption cases, since January 1, 2023, people who take in a child under the age of four for the purposes of adoption are entitled to two weeks paid adoption leave.[17] However, a parent who adopts their spouse's or partner's child is excluded from the scope of application and is therefore not entitled to paid leave.[18] In 2018, new legislation was introduced to allow a person to adopt the biological or adoptive child of a partner, if the second biological parent is unknown, deceased or agrees to give up his or her rights and duties. This legislation was a major step forwards for LGBTQI+ families.[19] However, exclusion from the scope of adoption leave will likely have a disproportionate impact on LGBTQI+ families. Once again, legislators have chosen not to abolish existing discrimination in the workplace, nor to legislate in an intersectional manner.

Finally, there is no binding provision in the private sector for parents to benefit from part-time work or telework after the birth or adoption of a child. This lack of regulation contributes to reinforcing stereotyped roles within the family, since the law does not provide gender-neutral support for new parents wishing to take advantage of such arrangements. Statistics show that the proportion of mothers working part-time is much higher than that of fathers, without this necessarily reflecting a real desire to do so, since they continue to be the first to be affected socially by the inadequacy of childcare solutions. Protective, gender-neutral legislation would promote a more balanced distribution of parental roles.

However, in the public sector, regional rules may apply, and more inclusive provisions may be in force. These provisions vary from canton to canton. In particular, we note that since February 2020, civil servants in the canton of Geneva are entitled to parental leave extended to same-sex couples, as well as birth leave in the event of surrogate motherhood. However, these advances are limited to a more inclusive cantonal political context and therefore do not apply to most people working in Switzerland.

**Ineffective Protection in Practice**

The main legislative tool for protection against gender discrimination in employment is the FAE. However, in addition to its limited scope, in practice, the mechanism it provides for is simply not appropriate – and even dissuasive.

There are practical obstacles to access justice. The FAE is in line with the Swiss legal tradition with regard to liability, according to which damages can only be compensatory and not punitive. This legal tradition means that victims of discrimination or harassment can only claim limited compensation. In cases of discriminatory dismissal, compensation is limited to a maximum of six months salary. In cases of sexual harassment, the maximum compensation is equivalent to six months of the average salary in Switzerland. In the case of refusal to recruit, compensation may not exceed three months of the expected salary.[20]

The law also provides for the possibility of reinstatement.[21] In practice, this is seldom applied, since out of 190 rulings recorded

[17] Loi fédérale sur les allocations pour perte de gain [LAPG] [Federal Law on Allowances for Loss of Earnings] Sept. 25, 192, RO 1952 1046, art. 16t-16x, https://www.fedlex.admin.ch/eli/cc/1952/1021_1046_1050/fr.

[18] *Id*. at art. 16t, § 5.

[19] *Adoption enfant du/de la partenaire*, ASSOCIATION 360, https://association360.ch/homoparents/adoption-enfant-dude-la-partenaire/ (last visited Jan. 24, 2024).

[20] LEg, art. 5, §§ 3-4.

[21] FAE, art. 10.


Women participate in a protest in Zurich, Switzerland.
Credit: elizabethdalessandro / Shutterstock.com

between 2004 and 2015, only two resulted in the dismissed employee's reinstatement.[22]

In the event of proceedings, it is up to the plaintiff to demonstrate that he or she has suffered a prejudice that would justify the payment of such compensation. Employees must therefore prove not only the employer's presumably discriminatory behaviour, but also the major negative impact this behaviour has had on their lives. As a result, victims are compelled to undergo psychological counselling and to disclose their private mental health information in order to justify their compensation claims. Their troubles might be attributed to recent motherhood, especially if they have expressed doubts about working in an environment that is inimical to their family situation.

Furthermore, employees are often afraid of being dismissed if they blow the whistle, and when it comes to challenging discriminatory dismissals, their insecure financial situation strongly constrains their ability to incur legal costs. Compensation is limited to six months salary in the event of discriminatory dismissal, which is often barely sufficient to cover the lawyer's fees incurred in the proceedings.

This limit is quite problematic, since it mathematically assigns a lower value to the discrimination suffered by the lowest-paid employees. In view of the national wage gap, estimated at 10.8%,[23] this system for determining compensation also reinforces gender inequality.

[22] Lempen & Volder, *supra* note 10.

[23] *Wage Gap*, *supra* note 6.

Since the FAE came into force almost thirty years ago, experts can only note its inadequacies and the low rate of convictions arising from it. According to an analysis of cantonal case law relating to the FAE published in 2017, of all the rulings analysed between 2004 and 2015, 62.5% were predominantly or entirely unfavourable to the employee party alleging discrimination. The overwhelming majority, if not virtually all, of the claims for retaliatory leave (91.6%) and sexual harassment (82.8%) were dismissed.[24]

**Shortcomings of the System with Regard to International Law**

As a country with a liberal political tradition, Switzerland has decided to remain aloof from certain benchmark social protection standards designed to promote gender equality in the workplace.

In addition to the fact that the European Union's standards do not apply (which sets it apart from its neighbours), Switzerland is not a party to the main relevant International Labour Organization (ILO) instruments. For example, it has ratified neither Convention 156 on Workers with Family Responsibilities, nor Convention 190 on Violence and Harassment in the World of Work. Switzerland has also failed to ratify the Council of Europe's European Social Charter, which provides for equal employment opportunities and maternity protection.[25]

However, the government remains bound by its human rights commitments, which are based on the principle of equality and non-discrimination, including in the workplace. At the forefront of these instruments are the two International Covenants on Human Rights,[26] which require state parties to ensure the equal right of men and women to enjoy, inter alia, economic and social rights, including the right to just and favourable conditions of work,[27] and the right of mothers to

[24] Lempen & Volder, *supra* note 10.

[25] European Social Charter (Revised), Council of Europe 7 (May 3, 1996), arts 8 & 20. https://rm.coe.int/168007cf93.

[26] Int'l. Covenant on Civil and Political Rights, Dec.19, 1966, 999 U.N.T.S. 171; Int'l. Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1966) (hereinafter CESCR).

[27] Comm. on Econ., Soc. & Cultural Rts., General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C. 12/GC/23 (2016), https://www.refworld.org/docid/5550a0b14.html.

special protection during maternity, including the right to leave during this period.[28]

Switzerland is also subject to the obligations set out in the Convention on the Elimination of All Forms of Discrimination against Women, notably the right to the same employment opportunities as men, the right to free choice of profession and employment, the right to promotion, the right to job security, and the right to equal remuneration for work of equal value.[29] With regard to the ILO, Switzerland is a party to the fundamental Conventions No. 111 on equality and non-discrimination in employment and occupation and No. 100 on equal remuneration for men and women.

For many years now, the international monitoring bodies for these instruments have been warning of the inadequacies of political and legislative measures in the field of gender equality at work.

With regard to the distribution of tasks, in 2019, the Committee on Economic, Social and Cultural Rights (CESCR) noted with concern that the majority of women work part-time. [30] In 2022, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) deplored the high cost of childcare, which sometimes represents almost all of a woman's remuneration.[31] This situation is bound to have a negative impact on the wage gap, which is not narrowing.[32]

*"CEDAW also regretted that the compulsory status of maternity insurance is still not fully understood by society, and that the allowance is capped at a lower ceiling than that for benefits received by men during compulsory military service.[33] On this subject, the committee was perplexed by the absence of maternity leave regulations in the National Council and the Council of States,[34] an anomaly which again reflects a biased view that women of childbearing age are unlikely to hold political office."[35]*

For over twenty years, the ILO's Committee of Experts (CEACR) has been pointing out that the FAE does not protect against discrimination in hiring, and has unsuccessfully called on Switzerland to expressly prohibit discrimination in the workplace based on, at the very least, colour, race, religion, political opinion, national origin and social origin.[36] For its part, the CESCR also points to the lack of consideration given to intersectionality in texts, deploring the absence of adequate protection against multiple forms of discrimination.[37] In 2022, CEDAW also highlighted its concern about forms of cross-discrimination against minority and migrant women.[38]

Finally, international bodies have long been concerned about the poor application in practice of the sanctions provided for by law. In 2019, for example, the CESCR was concerned about the persistence of cases of unfair dismissal during pregnancy, and the fact that existing mechanisms do not guarantee effective protection against

[28] CESCR, art. 10, ¶ 2.

[29] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 11, 1249 U.N.T.S. 13.

[30] Comm. on Econ., Soc. & Cultural Rts., Concluding Observations on the Fourth Periodic Report of Switzerland, U.N. Doc. E/C.12/CHE/CO/4, § 22 (Nov. 18, 2019) [hereinafter CESCR Report], https://www.ohchr.org/en/documents/concluding-observations/ec12checo4-committee-economic-social-and-cultural-rights.

[31] Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Sixth Periodic Report of Switzerland, U.N. Doc. CEDAW/C/CHE/CO/6, §59 (2022) [hereinafter CEDAW report], https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FCHE%2FCO%2F6&Lang=en.

[32] CESCR Report, *supra* note 30.

[33] CEDAW Report, *supra* note 31, at § 59.

[34] *Id*. at §47.

[35] In 2022, CEDAW expressed concern about the persistence of obstacles to women's access to decision-making positions and positions of responsibility. Concluding Observations on the Sixth Periodic Report of Switzerland, *supra* note 30. Unfortunately, this dismal situation is exacerbated by the weakness of the provisions of the FAE, including the very definition of the concept of discrimination at work, which does not cover access to employment. CESCR Report, *supra* note 30.

[36] Comm. of Experts on the Application of Conventions and Recommendations, Int'l Lab. Org (ILO), Discrimination (Employment and Occupation) Convention, 1958 (No. 111): General Observation (2019) [hereinafter ILO CEACR Report] , https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_717510.pdf.

[37] CESCR Report, *supra* note 30, at § 20.

[38] CESCR Report, *supra* note 30, at §37.

such acts.[39] It had called on Switzerland to take all necessary measures, including using labour inspectorates, to prohibit employers from dismissing or refusing to hire women, or not renewing their fixed-term employment contracts, on the grounds of pregnancy, childbirth and maternity leave.[40]

Finally, the lack of data on effective access to justice was also criticised. CEDAW deplored the lack of statistical information on the number of women who receive free legal aid, and noted that women were less likely than men to be parties to proceedings before the Federal Court.[41] In its latest commentary, the ILO's CEACR also asked the government for detailed information on access to justice in practice and the sanctions and remedies obtained, in order to assess the effectiveness of the anti-discrimination system.[42]

**The Call for a Feminist Approach to Employment and Occupation**

Despite a landscape that lacks equality overall, there have been some recent positive developments.

*"In response to the 2018 revision of the FAE, which provided no sanctions for failure to comply with equal pay, a national feminist strike took place on June 14, 2019. The strike movement called for equal pay, recognition of domestic work and an end to domestic violence and sexual violence. An estimated 500,000 people took part in the strike. Since 2019, the movement has continued, and mobilisations and strikes have taken place in subsequent years, under the slogan 'respect, time, money'[43]"*

There has been modest progress made with the entry into force of the 2021 Federal Act on Improving the Balance between Work and Caregiving, and the recent ratification of ILO Maternity Protection Convention No. 183 is surely a welcome step forwards. The ILO's CEACR was due to examine Switzerland's first report on the subject in 2023 with a publication of its comments by March 2024, which could lead Switzerland to finally strengthen its legal provisions against dismissals related to pregnancy or return to work.[44]

Switzerland has also committed to adopting a number of measures as part of its Equality Strategy 2030 of April 2021, including raising awareness of gender equality in schools, developing tools for equal pay analysis, and tax incentives for women's access to employment. Regrettably, Strategy 2030 contains no legislative measures to address the reconciliation of work and family life beyond the adoption of the Federal Act on Improving the Balance between Work and Caregiving.

Yet it is imperative to strengthen legislation on parenthood and work, not only because the definition of discrimination in the world of work cannot continue to be rooted in a binary conception of identity and interpersonal relationships, but also because it is urgent to remedy the ineffectiveness of the systems that are already in place. As the law stands, parents – and mothers in particular – continue to be exposed to unjustifiable inequalities in employment and occupation, and to financial insecurity.

When it comes to improving its system, Switzerland should draw on relevant international standards to adopt strong legislation at the federal level. This legislative reform should include a more inclusive notion of "discrimination" in the workplace, as well as non-gendered protective standards for parenthood in the workplace, enabling better work-life balance. These reference sources will make it possible to disseminate a feminist approach to employment and occupation, and to standardise anti-discrimination instruments across different sectors and cantons.

Switzerland must not be content to merely take part in international debates on discrimination in the world of work, but must also incorporate the resulting normative developments into its own legislation, especially considering its federal and highly liberal system, which tends to favour dominant groups. Improving the balance between work and caregiving is part of the fight against discrimination and necessary to the realisation of a feminist labour law.

[39] CEDAW Report, *supra* note 31, at § 34.

[40] *Id*. at § 34.

[41] *Id*. at §23.

[42] ILO CEACR Report, *supra* note 36.

[43] *Grève féministe : Du respect, du temps, de l'argent!*, Union Syndicale Suisse (USS), https://www.14juin.ch/ (last visited Oct. 13, 2023).

[44] While Switzerland welcomed the ILO's adoption of Convention 190 on violence and harassment in the world of work, there is unfortunately no indication that it will ratify this convention in the near future.


Credit: Solidarity Center / Andre Garcia

# A FEMINIST READING OF INTERNATIONAL LABOUR STANDARDS

## A Conversation with Chidi King

**Chidi King**

*Chidi King is Chief of the Gender, Equality, Diversity and Inclusion Branch, part of the Conditions of Work and Equality Department of the International Labour Organization. The Branch strives for the elimination of discrimination, including based on gender, race, ethnicity, indigenous status, disability and HIV status, utilizing an integrated and intersectional approach. She has previously worked for a number of trade union organisations at national and global levels, including the International Trade Union Confederation (ITUC), Public Services International (PSI) and the UK Trades Union Congress.*

***Jeffrey Vogt:*** *We know that gender, as it has been socially constructed, has shaped the development of labour law at the national level around the world – usually to the detriment of women and LGBTQI+ persons. How has this manifested itself in international labour standards (ILS) in the past, and how does it continue to inform ILS?*

**Chidi King:** Perhaps it's fair to say that ILO standards have tended to reflect prevailing social and cultural norms, as they relate to gender. For example, the first ever ILO convention limiting working hours took what would, today, be seen as a rather paternalistic approach, prohibiting women from engaging in nightwork for their own safety, rather than making nightwork safe for all.

Our current world of work tends to assume that productivity depends on long working hours, with little work-life balance. And that it is women who need to adapt to this situation by either finding a way to balance work with caring responsibilities, or lose out in terms of opportunities, treatment, and outcomes. Sometimes, this may mean dropping out of the labour market altogether. There needs to be a shift away from the way we organise our working time so that the world of work is adapted to workers with family responsibilities. We know that the role of reproduction and caregiving explains, in part, the gender pay gap. It's not the only reason, but it plays a pretty strong role. ILO conventions set maximum working hours. But if you are looking at a male breadwinner model and assuming that women will be primarily responsible for child rearing and caregiving, you're never going to be able to close that gender pay gap. Some countries are making progress on adopting parental leave which supports both parents to have paid time away from work to look after newborns - something which is not mandated by ILO conventions. Where that leave is non-compulsory for fathers and not properly compensated, i.e. the replacement income for the leave is low or non-existent, it can reinforce gendered dynamics: it is almost always going to be the person who is earning the least who is going to take leave to care. We have a stubborn and large global gender gap, with women earning on average 20 per cent less than men.

***JV:*** *You look back at Convention 156 (C156),[1] which was passed in the early 80s, it has a ratification of somewhere in the low 40s. Have you seen that convention having an appreciable change in the way that governments think about these questions, given that we're still struggling to get governments to recognize that there are serious inequalities?*

**CK**: C156 is a convention that goes that step further by saying that workers with family responsibilities are not just women and should not be discriminated against because of those family responsibilities. In fact, C156 and its Recommendation 165 (R165)[2] replaced an earlier recommendation on *women* with family responsibilities.[3] At the time of its adoption in 1965, this earlier recommendation probably seemed revolutionary, recognizing the right of women with children to equal opportunities and equal treatment at work, and the measures needed to advance this. By 1981, C156 and R165 acknowledged the flaw in that thinking and promoted more equitable sharing of family responsibilities between women and men. The ILO Office intends to step up its efforts to promote ratification of C156, also in light of the General Survey of this year. Increasingly, governments and social partners are recognizing the benefits of this convention. In the Dominican Republic, for instance, there was a big trade union campaign around C156. Part of that campaign was educating

[1] Int'l Lab. Org. (ILO), Convention no. 156, *Workers with Family Responsibilities Convention* (1981), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156

[2] ILO, Recommendation no. 165, *Workers with Family Responsibilities Recommendation* (1981), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R165

[3] ILO, Recommendation no. 123, *Employment (Women with Family Responsibilities)*, (1965) (superseded).

society at large about the role of all parents in caring for children, including the role of the father in supporting breastfeeding. So, there's still work to do, but this shows that ILO conventions don't simply reflect prevailing gender norms but can react to changes in societal attitudes and can influence and change norms for greater equality.

***JV:*** *To what extent are other identities like race, class, and sexuality influencing approaches to questions of gender in ILS?*

**CK**: Here, I would mention the rather novel approach taken in Convention 190 on Violence and Harassment in the World of Work (C190),[4] which is forward-looking and comprehensive in terms of the role that gender constructs, norms, and stereotypes have in shaping the world of work, especially in relation to violence and harassment at work. So here you have a strong example (as we do in Convention 189 on decent work for domestic workers) of the potential of ILO conventions to influence and change norms. The Convention and its Recommendation 206[5] talk about unequal gendered power relations and the abuse of power relations. Here is a recognition that different social identities interact and can compound discrimination and exclusion. If you look at the supervisory mechanisms, and in particular, the general observation that the Committee of Experts made about race in 2018,[6] there is an important emphasis on how inequalities intersect and interact to compound experiences of discrimination, and the need therefore for this to be reflected in national policies and strategies to promote substantive equality.

***JV:*** *You've described how thinking within the ILO has changed over time, and how the ILO has, in some respects, been ahead of the game. What are the obstacles that states are having given that some of these conventions have been on the books for 50, 60, 70 years? Certainly, there is a need for legal reform, and there are capacity questions. But there are also deeply rooted social and cultural norms. I would be interested in your reflections on why, given some of these instruments are in fact "fundamental," we're still seeing such difficulty in realising the promise of these conventions.*

**CK**: There are probably a number of issues. One is that progress is never linear. And when we are talking about progress that involves human relations and power dynamics, that is even more the case. One could say, for example, that there is a political and economic expediency to discrimination. The fact that women are constantly paid below the real cost of their labour is detrimental to gender equality and fairness. It has an enormous societal and economic cost. But it can also be economically expedient for those who benefit from that discrimination. Let's look at the amount of unpaid care work that is performed by women. The ILO has for many years made the case that if unpaid care work were shared more equitably between the state and households, then women, who still perform two-thirds of this work, would be freer to take up economic opportunities that they are otherwise excluded from. On the other hand, the expediency of that is well, if somebody's performing all of this and subsidising our economies why would we act to change that? The reality is that expediency comes at huge individual, societal, economic, and development costs.

[4] ILO, Convention no. 190, *Violence and Harassment in the World of Work* (2019), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190

[5] ILO, Recommendation no. 206, *Violence and Harassment in the World of Work* (2019), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:4000085

[6] ILO, Comm. of Experts on the Application of Standards, General observation on discrimination based on race, colour and national extraction (adopted 2018), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3996050,,,2018

Social norms are never static. You may think that you're making progress, and then suddenly there's a big backlash. We're right in the middle of that now. A lot of the gains that have been made have unravelled to an extent, generally. Progress has pretty much stalled. We have seen a much more conservative approach to the question of women and gender equality, and then additionally LGBTQI+ issues as well. So, it's complex. And it's political. The way our institutions are built does not necessarily allow for the change that needs to happen.

It's also, importantly, about the ability to organise. When you look at the world of work, women are in areas that are poorly organised, because they are precarious, casual, etcetera. There's a change that needs to happen in trade unions as well, actually, in terms of organising and that's a very important part of the puzzle. We've seen real change, for instance, when trade unions have made this part and parcel of their agenda. Where trade unions have really championed issues that may affect groups that tend to be marginalised, progress has been made.

***JV:*** *There's a negative feedback loop that's created if you prohibit or disempower workers in large segments of the economy, whether in the informal economy, precarious, or work that is not viewed as work, from being able to organise, then you disallow or disempower collective power to emerge, which then can change or shift the political will. That seems to be a very conscious decision that states are making to keep a large segment unorganised or under organised.*

**CK:** With C190, you had this cross-movement building of women in organised sectors of the economy, women in less organised sectors, women working in the informal economy really coming together around a common cause. There was a school of thought that the convention was too complex to be ratified. But the level of interest and ratification rates belie that thinking. The organised advocacy from unions and other groups of workers who are coming together is no doubt a part of the story. C190 is itself a story of women's leadership in trade unions.

***JV:*** *What expectations do you have for the general discussion on the care economy at the ILO this year to push the boundaries of whose work is recognized, valued and protected?*

**CK:** This is definitely a very key discussion. And it's such a broad topic that part of the challenge is making sure that we distil the discussion down to things that are the game changers and of the highest interest to our constituents. The relationship between decent work and the care economy, and that relationship to gender equality and broader equality issues is certainly an important aspect. Aspirations for decent work and social justice cannot be met without meeting our aspirations for equality, including and especially gender equality. Investing in the care economy is part of the puzzle. Investing not only in quality, accessible care services, but investing also in decent work by making sure that care workers have social protection, good wages, health and safety at work, and other fundamental rights, and can access lifelong learning and skills training. A huge number of workers who are providing care can't afford the care themselves and yet are expected to provide quality care that is going to help us reproduce our societies and our workforce. So we need those large-scale investments.

I'm hoping that through the general discussion, we can connect the dots in a way that enables our constituents to chart the way forward for decent work and the care economy.

***JV:** Is there a particular issue you think really needs to be at the forefront of a feminist labour struggle? Is it one of the issues that we've already discussed? Or is there something that is not yet fully on the agenda that needs to be there?*

**CK**: I think there are a number of things, but I think we've touched on many of them. We talk about substantive equality and the need for deconstructing the norms that lead to the inequalities that we see, but actually doing it is complex. Until we translate the nice broad statements into the how, progress will continue to be relatively slow and also very fragile. We talk about power dynamics, but we don't really go into what it means to change those power dynamics. What needs to happen for those power dynamics to really change? It means that those who hold power will need to cede power to others, and that's the elephant in the room. The only way that will change is through collective power and social dialogue.

***JV:** The final question. Given that this is a journal for labour lawyers, do you have any thoughts about how labour lawyers can support advancing a feminist vision of labour law, at the national but also within the international system?*

**CK:** I think all the issues that we touched on here can be addressed through labour law and other dimensions of law and policy, though of course not alone. The issue of care work is a fundamental area where many of these issues crystallise. When you look at who is providing it, and yet who has the least access to it - and may need the most access to it - it is women, migrant women, racialized women, indigenous women, and women from poor communities, etc. So, reforming those laws and institutions, and progressing a more feminist agenda, is important. We also need laws and policies around parental and other care leaves and flexible work arrangements, while also recognising that work for the many women is outside of formal or secure employment relationships. Some important developments are happening at the regional and international levels in relation to a right to care and to be cared for.[7]

Laws and related policies need to play a role in shifting the power structure. We're all responsible for the home, but the work that goes on in the home needs to be elevated as well, and not seen as something marginal. It contributes hugely to our economies and societies. That needs to change. Again, violence and harassment is a major issue as a tool of oppression and inequality. C190 recognizes the power dynamics and the role of power relations. But laws, policies, and institutions will need to change. Laws alone are not enough, but if they give that strong signal that this is something that society will not tolerate, then it helps shape the broader culture. Of course, the laws need to be enforced. So I think the law has an extremely important role to play. And in that sense, labour lawyers do have an extremely important role to play in this.

[7] *See, e.g.* United Nations Human Rts. Council, *Call for Input: Human Rights Council resolution 54/6 on the centrality of care and support from a human rights perspective* (2024), https://www.ohchr.org/en/calls-for-input/2024/call-input-human-rights-council-resolution-546-centrality-care-and-support ; Republic of Argentina, Request for an Advisory Opinion to the Interamerican Court of Human Rts.: *The content and scope of care as a human right, and its interrelationship with other rights*, (January 9, 2023), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231203_18528_na.pdf

# TELEWORK AND CARE WORK IN ARGENTINA

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*Argentina | Originally written in Spanish*

Labour is the "prime basic condition of all human existence," and its exploitation is the cornerstone of a capitalist society.[3] The different forms of organisation of production and labour, and their legal regulation, have responded to the historical demands of capitalist accumulation and of class struggle. From the Industrial Revolution and the rise of wage labour, we have seen labour organised under two basic arrangements: work performed in the factory, under the direct supervision of an employer; and work performed in the home, without direct supervision, for the benefit of the owner of capital.

Work performed outside of the establishment,[4] referred to as home-based or remote work, has existed since the origins of capitalism. Such work is usually performed on a piece-rate basis, that is, by the quantity and quality of outputs, regardless of the legal working hours. This modality is traditionally associated with low-productivity activities that mainly employ women and unorganised labour in situations of precariousness and poverty.[5] Technological changes have continued to transform how labour is performed. Telework is just one of the most recent examples, incorporating information and communication technologies (ICTs) in the production and execution of work.

In 2020, workplaces around the world were upended by the COVID-19 pandemic, and resulted in changes in the way tasks were performed in many sectors. These workers were forced to set up a workspace in their homes to carry out work activities, often using personal equipment such as cell phones, tablets, notebooks, and computers to complete the work. At the same time, the pandemic exacerbated the care crisis, increasing the overall workload of women[6] and, with it, gender inequalities in Argentina and around the world.

Care, which includes the possibility of caring, being cared for and self-care, is a right guaranteed by various international norms, especially the Quito Consensus adopted at the Tenth Regional Conference on Women in Latin America and the Caribbean in 2007,[7] which was subsequently expanded in the successive conferences that

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[3] Frederick Engels, *The Part Played By Labour in the Transformation of the Monkey into Man*, *in* Dialectics of Nature (Clemens Dutt trans., 2d rev. ed. 1954) (1883).

[4] "Establishment" is understood as the technical or execution unit destined to achieve the company's purposes, through one or more operations. Law. No. 20744, Sept. 5, 1974, B.O 23003, Sept. 27, 1974 (Arg.), https://www.argentina.gob.ar/normativa/nacional/ley-20744-25552.

[5] Primarily the work performed by seamstresses and tailors, as well as the manufacture of footwear.

[6] Inter-American Commission of Women, Organization of American States, *Covid-19 in Women's Lives: Reasons to Recognize Differentiated Impacts*, OAS Doc. OEA/Ser.L/ II.6.25 (2020) (hereinafter Inter-American Commission of Women report), http://www.oas.org/es/cim/docs/ArgumentarioCOVID19-ES.pdf.

[7] Tenth Regional Conference on Women in Latin America and the Caribbean, Econ. Commission for Latin America and Caribbean, *Quito Consensus* (Aug. 14, 2007), https://www.cepal.org/sites/default/files/events/files/quitoconsensus.pdf.

followed. In this document, states agree to promote co-responsibility, that is, the redistribution of care responsibilities among family members and between families and the state to reduce gender inequalities.[8] However, this principle of co-responsibility has not yet been reflected in Argentina's domestic laws and policies. While a law on teleworking adopted during the pandemic does recognise care and the need to balance caregiving and work responsibilities, it does not propose structural changes and contains significant limitations which will be examined below.

## Gender Inequalities in the Labour Market and Care Work

Although women's participation in the labour market has increased in recent years, women continue to suffer greater unemployment or find employment in more precarious working conditions or in the informal economy. The number of families headed by women has increased in the context of the "feminization of poverty,"[9] and it is women with children who are at a more significant disadvantage.

Gender inequalities or "gaps" in the labour market result from horizontal and vertical segregation, and low union participation and representation, among other phenomena.[10] These inequalities are informed by traditional gendered division of roles within the framework of an androcentric, patriarchal and capitalist culture, which assigns productive work to men and reproductive work to women. The sexual division of labour is also linked to gender stereotypes that are socially reproduced and contribute to sustaining these inequalities.

Care tasks, part of reproductive work, have been historically, socially and culturally assigned to women. This work is primarily performed by women in the home, mainly for other family members, and includes domestic chores. This work is unpaid, but it involves burdens, time, material costs and responsibilities. Often, these tasks are not considered work, but the truth is that they are fundamental for maintaining society.[11] Unpaid care work is a constraint on participation in paid work. The long hours women dedicate to these tasks limit their time for other activities, whether commercial, study or leisure. This fact generates tensions and conflicts between "work-life" and "family life."

The "social organisation" of care refers to how care is carried out and distributed among families, the state, the market and community organisations. In Argentina and the rest of Latin America, this organisation is unfair, as responsibilities fall mainly on families and, within them, on women. This situation is accentuated in low-income households, where women cannot access care services in the private market, often provided by other women as employees in private homes.[12] As pointed out, "[t]he social organisation of care is a vector for the re-production and deepening of inequality."[13]

Recently, Argentina's Department of Economics, Equality and Gender presented a study,[14] stating that unpaid domestic and care work represents almost 16% of the country's GDP and is the sector with the highest economic contribution. It is followed by industry (13.2% of GDP) and commerce (13%). According to this report, 75% of

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[8] *Id*. at xiii.

[9] Agustín Salvia et al., Observatorio de la Deuda Social Argentina, Pobreza y desigualdad por ingresos en la Argentina Urbana 2010-2016 (2017), https://repositorio.uca.edu.ar/handle/123456789/8207.

[10] Coordinación de Equidad de Género e Igualdad de Oportunidades en el Trabajo, Ministerio de Trabajo, Empleo y Seguridad Social de Argentina, Indicadores más relevantes de la inserción de mujeres y los varones en el mercado de trabajo (2014)., https://www.argentina.gob.ar/sites/default/files/140703_brochure.pdf.

[11] Karina Batthyany, Natalia Genta & Carla Tomassini, Mujeres jóvenes que cuidan pero no estudian ni trabajan en el mercado (2012), https://guiaderecursos.mides.gub.uy/innovaportal/file/20568/1/argumentos_n2.pdf.

[12] Corina M. Rodríguez Enríquez, *Economía feminista y economía del cuidado: Aportes conceptuales para el estudio de la desigualdad,* Nueva Sociedad, Mar.-Apr. 2015, https://nuso.org/articulo/economia-feminista-y-economia-del-cuidado-aportes-conceptuales-para-el-estudio-de-la-desigualdad/.

[13] *Id*.

[14] Ministerio de Economía Argentina, Los cuidados, un sector económico estratégico Medición del aporte del Trabajo Doméstico y de Cuidados no Remunerado al Producto Interno Bruto (2020), https://www.argentina.gob.ar/sites/default/files/los_cuidados_-_un_sector_economico_estrategico_0.pdf.

these tasks are performed by women. It is necessary to move towards public policies that promote co-responsibility for care, so that this burden does not fall exclusively on mothers or within families, and that recognise and value care work.

### The Impact of the Covid-19 Pandemic

In March 2020, the Argentine National Government stipulated that while health restrictions were in force and school classes were suspended, the absence from work of the responsible adult in charge, whose presence at home was indispensable for the care of infants and adolescents, was justified. It was also established that workers who could perform their tasks from their place of isolation could do so. Consequently, many workers started working from their homes.[15]

According to the International Labour Organization (ILO), women are responsible for 76.2% of all hours of unpaid care work, which is more than three times as much as men. These double or triple working hours were aggravated by confinement, particularly in families with young children.[16] The care of minors, sick family members and older people multiplied with the closure of schools, therapeutic education centres, job training centres, outpatient rehabilitation centres and special schools, among others. The crisis in care and the extreme fragility on which these care chains are based were brought to the forefront.

Research conducted by UNICEF Argentina indicates that during the pandemic, the increased care burden was more often than not carried by women.[17] Added to this dynamic is the pressure for women to perform paid work remotely, with no consideration from employers or the state regarding the increase in care work. This situation was aggravated in situations of precarious

A woman helps her husband with his face mask in Argentina. Credit: Wirestock Creators / Shutterstock.com

housing in vulnerable neighbourhoods,[18] where overcrowding, lack of employment or precarious jobs make women's situation even more complicated.

The Inter-American Commission of Women emphasised that confinement measures were not gender neutral, and that increased care work.

> is not distributed equitably but falls mainly on women and is not socially or economically valued. Outside the home, women also make up the largest contingent of caregivers in the health sector, in paid domestic work and in specialised centres for the care of minors, older people and people with disabilities. This situation has a differentiated impact on women's health.[19]

In other words, "the unfair distribution of care responsibilities, which continues to fall fundamentally on households, through the unpaid work of women and on people who work in the paid care sector under precarious and

*"The pandemic uncovered the social and economic importance of care work for the sustainability of life in society, making it imperative to democratise care work between men and women and promote co-responsibility policies."*

[15] Resolución 219/2020, Mar. 20, 2020, B.O. 34344, Mar. 20, 2020 (Arg.), https://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=335796; Resolución 279/2020, Mar. 30, 2020, B.O. 34345, at 24, Apr. 1, 2020 (Arg.), https://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=335988.

[16] Int'l Lab. Org. (ILO), El Trabajo de Cuidados y los Trabajadores de Cuidados para un Futuro de Trabajo Decente (2018), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633168.pdf.

[17] Gala Díaz Langou, et al., *Imaginar el futuro: ¿Son más probables los viajes intergalácticos que el cuidado compartido? #DíadelPadre,* Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento (CIPPEC), https://www.cippec.org/textual/imaginar-el-futuro-son-mas-probables-los-viajes-intergalacticos-que-el-cuidado-compartido-diadelpadre/ (last visited Feb. 12, 2024).

[18] According to the National Registry of Vulnerable Neighbourhoods, under the Ministry of Territorial Development and Habitat, there are currently 4,416 vulnerable neighbourhoods in Argentina.

[19] Inter-American Commission of Women report, *supra* note 6.

poorly paid working conditions,"[20] deepened during the pandemic. An indicator of this change is that care work increased its share of national GDP to 21.8%, showing once again its centrality and indispensability to sustain the functioning of society.[21]

### Telework and Law 27.555 of Argentina

Telework is defined by Law 27555,[22] article 2, as the "performance of acts, execution of works or provision of services" carried out totally or partially at home "through the use of information and communication technologies." This law was debated and sanctioned during the health crisis in July 2020, and came into force on April 1, 2021.

Different studies have been carried out to measure the impacts and limits of teleworking, in Argentina, during the COVID-19 pandemic.[23] The possibilities of teleworking and its effective performance are distributed asymmetrically in terms of income level, branches of economic activity, geographic area, age groups, educational level and gender. The total number of jobs that could be performed through telework was estimated at 27 to 29%.[24] The jobs that men could perform through telework were between 32 and 34%, while in the case of women, it is lower, between 24 and 25%. This is because the tasks with the most significant potential for telework are managerial roles, which are preponderantly performed by men, whereas women predominate in service sector jobs that are difficult to perform remotely.[25]

Before the pandemic, approximately 8% of workers teleworked at least one day a week.[26] During the health emergency in the second quarter of 2020, estimates of workers teleworking ranged between 13.6%[27] to 22% of workers.[28] The majority of this group is women due to the occupations converted to this modality during the pandemic: education, public employment and administrative work.[29] In terms of geographical regions, there was growth throughout the country, but mainly in the city of Buenos Aires.[30] Regarding educational level, there is a preponderance of university educated workers among those who telework.[31]

### Telework, Gender and Care

One of the problems posed by teleworking is the blurring of the boundaries between the tasks inherent to commercial work and the tasks that correspond to unpaid domestic work, which includes care work. The ILO notes the following:

> Research on telework has repeatedly shown that employees working from home tend to work longer hours than when working on the employer's premises, partly because work activities replace commuting time, changes in work routines and the blurring of boundaries between paid work and personal life. Teleworking, in general, can lead to longer working hours and an increased workload during evenings and weekends.[32]

In the case of women, who have a more significant burden of unpaid work, this by product of telework has been aggravated even more in the context of the pandemic. Women's presence in the home requires them to simultaneously fulfil the obligations imposed by their commercial and domestic work, which implies greater mental and

[20] Comisión Económica para América Latina (CEPAL), Cuidados en América Latina y el Caribe enTiempos de Covid-19: Hacia Sistemas Integrales para Fortalecer la Respuesta y la Recuperación 14 (2020), https://repositorio.cepal.org/bitstream/handle/11362/45916/190829_es.pdf?sequence=1&isAllowed=y.

[21] Ministerio de Economía Argentina, *supra* note 14.

[22] Law no. 27555, July 30, 2020, B.O. 34450, at 3, Aug. 14, 2020 (Arg.), https://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=341093#:~:text=Resumen%3A,Y%20PARTICULARES%20CARACTERISTICAS%2C%20LO%20PERMITAN.

[23] Ramiro Albrieu, Evaluando las oportunidades y los límites del teletrabajo en Argentina en tiempos del *COVID- 19* (2020), https://www.cippec.org/wp-content/uploads/2020/04/Albrieu-abril-2020-Oportunidades-y-limites-del-teletrabajo-en-Argentin...-3.pdf; Daniel Schteingart, Igal Kejsefman & Facundo Pesce, *Evolución del trabajo remoto en Argentina desde la pandemia* (Ministerio de Desarrollo Productivo Argentina, Documento de Trabajo No. 5, 2021, https://www.argentina.gob.ar/sites/default/files/2021/05/dt_5_-_evolucion_del_trabajo_remoto_en_argentina_desde_la_pandemia_1.pdf.

[24] Albrieu, Evaluando las oportunidades, *supra* note 24.

[25] *Id*.

[26] *Id*.

[27] Schteingart et al., *Evolución del trabajo remoto en Argentina desde la pandemia*, *supra* note 24.

[28] CEPAL, Teletrabajo y Cuidados, en Cuidados y Mujeres en Tiempos del COVID-19: La Experiencia en la Argentina 160 (2020), https://www.cepal.org/es/publicaciones/46453-cuidados-mujeres-tiempos-covid-19-la-experiencia-la-argentina.

[29] Schteingart et al., *Evolución del trabajo remoto en Argentina desde la pandemia*, *supra* note 24.

[30] Albrieu, Evaluando las oportunidades, *supra* note 24.

[31] Schteingart et al., *Evolución del trabajo remoto en Argentina desde la pandemia*, *supra* note 24.

[32] ILO, Teleworking During and After the COVID-19 Pandemic: A Practical Guide 5 (2020), https://www.ilo.org/travail/info/publications/WCMS_751232/lang--en/index.htm

emotional pressure and stress, generating risks to their health.

To address these problems, Law 27555 of Argentina provides for the right to disconnect in article 5 and equal rights between those who work under the telework modality and those who work in person, which includes the same working hours and pay. Article 6 establishes:

> Persons who work under this modality and who prove that they are responsible… for the care of persons under thirteen years of age, persons with disabilities or elderly persons who live with the worker and who require specific assistance shall be entitled to schedules compatible with the care tasks for which they are responsible and/or to interrupt the workday. Any act, conduct, decision, reprisal, or hindrance from the employer violating these rights will be presumed discriminatory…. Specific guidelines for exercising this right may be established through collective bargaining.[33]

It is worth mentioning that this is one of the first national regulations that expressly refers to "care tasks," which are usually invisible, especially after the period of parental leave. It also links them to working hours and provides for the right to make both tasks compatible. In other words, there is an implicit recognition that caregiving tasks involve time and effort, in which other tasks cannot be performed simultaneously. It should also be noted that no distinction is made between genders for exercising this right.

However, this provision has severe limitations. First, it only applies to those recognised as workers under the Labour Contract Law,[34] which does not apply to the public sector, self-employed workers or unregistered workers. Concerning those who receive care, the law limits assistance to persons under 13 years. This limitation departs from the Convention on the Rights of the Child, which protects children under 18 years.[35]

It is also arbitrary to restrict care only to people who live in the teleworker's home, because it leaves out the right of those in care of the workers who are not cohabitants. On the other hand, the law does not establish guidelines for the compatibilisation of hours or interruptions.

*"The law leaves it up to each family to decide how to resolve care schedules and interruptions. In other words, it continues with the paradigm of care familiarisation, which means that most of this responsibility will be assumed by women.[36] In this sense, the regulation proposes interrupting the working day as the only measure, without containing any co-responsibility mechanism or imposing obligations on employers concerning care, such as childcare spaces."*

Subsequently, the Executive Branch issued a regulation through Decree 27/2021.[37] The regulation provides.

> The person who exercises the right to interrupt the task for reasons of care under the terms of article 6 of the law hereby regulated shall communicate virtually and precisely the time when the inactivity begins and when it ends. In cases where the caregiving tasks are not allowed to comply with the legal or conventional working day in force, its reduction may be agreed upon according to the conditions established in the collective bargaining agreement. Incentives conditioned to the non-exercise of the right indicated in the previous paragraph may not be established. Employers and workers shall ensure an equitable use, in terms of gender, of the measures provided for in this article, promoting the participation of men in caregiving tasks.

As such, the right to interrupt the working day for care is subject to the employer being notified when the inactivity begins. This requirement, which was not present in the law and only introduced in the

[33] Law no. 27.555, July 30, 2020, B.O. 34450, at 3, Aug. 14, 2020 (Arg.), https://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=341093#:~:text=Resumen%3A,Y%20PARTICULARES%20CARACTERISTICAS%2C%20LO%20PERMITAN.

[34] Law no. 20.744, Sept. 20, 1974, B.O 23003, at 2, Sept 27, 1974 (Arg.), https://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=25552.

[35] Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.

[36] *Reflexiones en torno al proyecto de teletrabajo y el derecho al cuidado*, Equipo Latinoamericano de Justicia y Género (ELA): News (June 25, 2020), https://ela.org.ar/novedades/reflexiones-en-torno-al-proyecto-de-teletrabajo-y-el-derecho-al-cuidado/.

[37] Decreto 27/2021, Jan. 19, 2021, B.O. 34565, at 3, Jan. 20, 2021, https://www.boletinoficial.gob.ar/detalleAviso/primera/239929/20210120.

regulation, hinders the exercise of this right and is therefore regressive. It denaturalises the right to interruption since, in many cases, this could be due to situations that are not foreseeable, neither in their beginning nor in their duration, as would be the case with accidents or emergencies. The regulations do not protect workers in cases where it is impossible to comply with the notice for these reasons, so this non-compliance could be used to his or her detriment.[38]

The possibility of reducing working hours is subject to collective bargaining and agreement with the employer, so it may not be allowed. It is also unclear whether it would be with a reduced remuneration or in what form.

Finally, the obligation to ensure equitable use "in terms of gender" of the norm and promote the participation of men in caregiving tasks is no more than a declaration of principles, since no specific conduct or sanctions for non-compliance are detailed. The mere possibility of making the working day more flexible, which is contained in the law and presented as one of the main advantages of the teleworking modality, has been restricted by regulation. Under these conditions, it does not mean an improvement in the compatibility between work and care tasks. These interruptions may imply an even greater overload of caregiving tasks, especially for women. Moreover, these regulations reinforce gender stereotypes that assume women are primarily responsible for caregiving and could also generate greater negative effects on their health.

**Final Considerations**

"The COVID-19 pandemic exacerbated the global care crisis in which we find ourselves by deepening gender inequalities. The state must assume its role as regulator, guarantor and provider of care, ensuring that care responsibilities are de-feminised, de-familialised, de-commercialised and de-privatised. The regulation on teleworking makes visible situations usually hidden and, therefore, is an advance. However, it does not propose necessary structural changes."

The mere possibility of making the working day more flexible, contained in the law and later limited by its regulation, does not result in an improvement in the compatibility between work and care tasks. It will depend on the collective bargaining of each sector to give effect to many of the rights set forth therein.

The construction of a comprehensive care system with quality, universal services is fundamental in reducing the burden of unpaid work within households that falls mainly on women. Doing so would allow women better labour market accessibility, improved working conditions, increased economic autonomy and better health.

Having a comprehensive care system would require far-reaching reforms to the Labour Contract Law, public employment regulations and other legal regimes that protect working people. These modifications must be operative and not subject to regulations or conditions. Otherwise, they constitute a mere declaration of principles.

The Argentine Labour Contract Law, passed in 1974, only protects "work" performed as a private, dependent and remunerated activity, excluding different people, situations and forms of work. Furthermore, this law responds to an unequal paradigm in the distribution and allocation of care responsibilities, focusing its measures on the protection of women in their role as caregivers, promoting a model of masculinity dedicated to the provision of income separated from care issues, which deepens the system of the sexual division of labour.

Although it is beyond the scope of this article, which focuses on the specific analysis of the recent regulation of telework, we should mention that it is necessary to continue the debates that feminists have been developing for decades on the concept of "work" that includes care work and, therefore, would be protected within labour law. Such an inclusive concept of work would provide those who perform it with protections such as decent and equitable conditions, limitations to the working day and minimum pay, among others.

[38] *Sobre la reglamentación de la ley de teletrabajo: Análisis de AAL de la reglamentación de la ley 27.555, aprobada en junio de 2020*, Asociación de Abogados Laboralistas, http://www.laboralistas.net/2021/01/27/sobre-la-reglamentacion-de-la-ley-de-teletrabajo/ (last visited Feb. 12, 2024).

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# AFTER WORK: TIME FOR A FEMINIST PENSION AGENDA?

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*Global | Originally written in English*

## Introduction

The gender pension gap is given much less attention than the gender pay gap, notwithstanding the fact that globally, women in retirement earn an average of 25% to 30% less than men.[1] Although women are considerably at higher risk of poverty than men in old age,[2] the issue of income security in old age is given considerably little attention in the political agenda.

Whereas the primary objective of a pension is to provide income security in old age, the ways in which entitlements are calculated in pension schemes leave older women with significantly less income than their male counterparts. The COVID-19 pandemic and national pension reforms in Europe have accentuated gendered vulnerabilities and increased the risk of widening the pension gap. This piece offers sound reflections on how labour law and policies can ensure that women and unpaid carers are adequately protected after retirement.

## How the implicit gender bias in pension systems creates the gender pension gap

The birth of pension systems in modern states is strongly connected to the welfare states of the 19th century. It developed around the traditional family of the second industrial revolution, centred on a male breadwinner and a female caregiver, and thus on the assumption of a strict division of labour between the sexes.[3] Social insurance systems offered protection to male breadwinners on the basis of their contribution to paid labour and their status as head of the family, and treated women as their dependents. This is still reflected today in pension systems that reward typically male patterns of work and value engagement in full-time, uninterrupted, and formal types of employment, which has a persistent discriminatory effect on women.[4] Women struggle to conform to the standard "male-type" of work, and do not engage as much as men in full-time, continuous, and permanent work – as such, they lose income security and financial independence.[5] Women's different working patterns, often interrupted because of several years spent out of wage work to fulfil care obligations or spent in precarious segments of the labour market, either disqualify them completely from

[1] Miglena Abels, Ioli Arribas-Banos, & Gustavo Demarco, *The gender pension gap: What does it tell us and what should be done about it?,* World Bank Blogs (June 27, 2023), https://blogs.worldbank.org/jobs/gender-pension-gap-what-does-it-tell-us-and-what-should-be-done-about-it.

[2] Marta Roig & Daisuke Maruichi, *Old-age poverty has a woman's face*, U.N. Dep't of Econ. & Soc. Aff. (Nov. 16, 2022), https://www.un.org/development/desa/dspd/2022/11/old-age-poverty; Organisation for Econ. Co-operation & Dev. (OECD), *Old-age income poverty*, in Pensions at a Glance 2021: OECD and G20 Indicators (2021), https://www.oecd-ilibrary.org/finance-and-investment/pensions-at-a-glance-2021_d76e4fad-en.

[3] Jane Lewis, *Gender and the Development of Welfare Regimes*, 2 J. Eur. Soc. Pol'y (August 1992) 159-173, 159; Nancy Fraser, *After the Family Wage: A Postindustrial Thought Experiment*, in Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis, 111-35, 111 (Verso Books 2013); Ingeborg Heide, *Sex Equality and Social Security: Selected Rulings of the European Court of Justice*, 143 Int'l Lab. Rev., 299–339, 300 (2004).

[4] Heide, *supra* note 3.

[5] Kimberly Earles, *Reprint of: The gendered consequences of the European Union's pensions policy*, 39 Women's Stud. Int'l F. (July-Aug. 2013), 22–29, 22.

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social security protection or give them insufficient entitlements to be economically independent. Restrictive conditions such as long eligibility requirements, minimum contributory periods, and labour market segregation makes it difficult for women to acquire enough entitlements.[6] Typically, part-time work and domestic work do not offer the same protection as full-time work in terms of social security and pensions. Women make up almost 60% of part-time workers in the world,[7] and over 75% of domestic workers are women,[8] which further widens the gender pension gap. For women who stay out of or leave the labour market to care for children or disabled or elder relatives, vulnerability is even higher, as social security often fails to cover this typically "female" type of risk. This situation entrenches their dependency on a male partner, and leaves women more vulnerable to the risk of poverty in old age.[9] As feminism should struggle for equality for *all* women, regardless of age, equal pensions should be a major issue of feminist labour law.

**How can labour laws, institutions, and practices progress toward pension equality for women?**

In order to ensure that women have income security in old age and are at less risk of living in poverty, there is a need for radical change in how pension systems value and reward work. Below are some suggestions that can serve as starting points for constructing less gender-biased pension systems.

*Equal treatment in pension systems*

Some pension systems still treat men and women differently in relation to, for example, pension age, obliging or allowing women to retire earlier. This can hamper women's ability to earn adequate entitlements. Imposing formal equality of men and women in pension systems is one endeavour of gender equality policy. While it is desirable for laws to treat all citizens alike, this approach does not fully ensure that women have the same opportunities as men to acquire pension rights. Indeed, if women are not able to comply with male working patterns, and if entitlements continue to be modelled upon male standards, women will continue to struggle to earn a pension equal to that of men.

*Noncontributory pension entitlements criteria*

State pension rules are currently mainly based on time spent on paid employment. This rewards workers that have been able to spend a long time in paid employment; however, this typically leaves out those who did not enter or remain in the labour market because of, for example, care responsibilities.

> *"For pension calculation rules to be fairer, they would need to be based on criteria other than work history and include also non-contributory criteria, such as age, health, or other determinants of social or economic status. Non-contributory pensions and universal social pensions are proliferating, and many countries are succeeding in introducing a universal floor of income security for older persons."*

For example, in 2007 Bolivia introduced a non contributory old-age pension with universal coverage ("*Renta Dignidad*"). In a similar vein, Namibia enacted a Basic Social Grant guaranteeing all its residents over 60 years old a monthly allowance of 1,100 Namibian dollars (approximately US$78).[10] These initiatives have been successful in

[6] Heide, *supra* note 3.

[7] Mariya Aleksynska, *Women in Non-standard Employment*, INWORK Pol'y Brief No. 9 (May 2017), 1, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_556160.pdf.

[8] Int'l Lab. Org., *Who are domestic workers*, https://www.ilo.org/global/topics/domestic-workers/who/lang--en/index.htm (last visited Jan. 15, 2024).

[9] *See* Gender and Social Security Reform: What's Fair for Women? (Neil Gilbert, ed., Transaction Publishers 2006); Linda Luckhaus, *Equal Treatment, Social Protection and Income Security for Women*, 139 Int'l Lab. Rev. 149-178, 149 (2000); Athina Vlachantoni, *Socio-economic Inequalities in Later Life: the Role of Gender,* in Ageing, Diversity and Equality: Social Justice Perspectives 25-35, 25 (Sue Westwood, ed., Routledge 2019).

[10] Int'l Lab. Org., World Social Protection Report 2020-22: Social Protection at the Crossroads – in Pursuit of a Better Future (2021), 174, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_817572.pdf.

reducing old-age poverty. However, there is still much progress to be done to guarantee equal opportunities for women to acquire pension rights.

*Family-friendly pensions: care-related credits*

Given women's higher share of care responsibilities and its repercussions on their pensions, an important measure to promote pension equality is the introduction of care-related credits or benefits in pension calculation systems. This can take the form of rewarding time spent on raising children or on maternity, paternity, or parental leave in terms of pension entitlements. In France, for example, public servants are entitled to four additional trimesters per child in the calculation of their retirement pension. In occupational and private pension schemes, this type of measure can be considered as part of a work-life balance benefit package and can reduce the negative impact of care responsibilities on pension entitlements, which could also encourage men to take on a greater share of care responsibilities. Such systems would give carers better recognition of their reproductive work and contribution to society, and may contribute to a reduction of gender inequalities in labour markets and pension systems in the long run.[11]

*Prioritising public pension systems*

Pension reforms in many countries have increased citizens' reliance on private pensions. Pension privatisation may result in a deterioration of protections and accentuate the vulnerability of women, who strongly rely on public pensions.

*"In private pension schemes, women's disadvantages are evident across all levels of education, both in terms of years of membership and level of contributions.[12] States need to ensure a strong public pension pillar to guarantee that women in old age do not find themselves at higher risk of poverty."*

*Improved protection of part-time workers*

In order to reconcile their paid employment with their care obligations, many women resort to part-time work: for example, in the European Union (EU), 32% of women work part time, compared with 8% of men.[13] However, this type of work typically offers less protection compared with full-time work in terms of social security and pensions. In the EU, strategic litigation has been successful in this regard thanks to the concept of indirect discrimination. Starting from the ground-breaking case of *Bilka,* the European Court of Justice (ECJ) has guaranteed part-time working women equality in terms of pension protection where they are the majority of an undertaking.[14] The *Bilka* case concerned the exclusion of part-time workers from an occupational pension scheme, which the European Court of Justice ruled to be contrary to the principle of equal pay. The concept of indirect discrimination has since been used by the ECJ in similar cases to rule that part-time working women across the EU should be granted the same working conditions as men when they constitute the majority of part-time workers in relation to, for example, sick pay, occupational pensions, and to a lesser extent statutory social security. While differential treatment of part-time workers in relation to statutory social security can still be justified, the ECJ established that such justification must rest on objective grounds, be necessary and proportionate,[15] or rely on aims of social policy.[16]

*Work-life reconciliation measures*

At last, particular attention should be granted to measures allowing women to better reconcile paid employment and care responsibilities, such as flexible working conditions, better paid care leaves, childcare services, child-friendly workplaces, and other measures that can facilitate women's full participation in the labour market and offer equal opportunities to earn pension entitlements. For example, the EU Work-life Balance Directive adopted in 2019 gives parents

[11] Int'l Lab. Org., Social Protection for Older Persons: Policy Trends and Statistics 2017-19 (2018), 22, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_645692.pdf.

[12] Jay Ginn & Liam Foster, *The Gender Gap in Pensions: How Policies Continue to Fail Women,* 11 J. Brit. Acad. (Aug. 10, 2023), 223–242, 223, https://www.thebritishacademy.ac.uk/documents/4878/JBA-11s2-11-Ginn-Foster.pdf.

[13] Eur. Inst. for Gender Equal. (EIGE) , Gender Inequalities in Care and Pay in the EU (2020), https://eige.europa.eu/sites/default/files/documents/20203246_mh0320445enn_pdf.pdf.

[14] Case 170/84, *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, 1986 E.C.R. 1607, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61984CJ0170.

[15] *Id.,* paragraph 36.

[16] Case 171/88, *Ingrid Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG*, 1989 E.C.R. 2743, paragraph 14, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61988CJ0171.

in the EU a right to four months of parental leave, 10 days of paternity leave, and five days of carers' leave.[17] These minimum rights are also crucial to encourage men to take on a greater share of care responsibilities, with expected positive impact on women's ability to participate in the labour market. Of notable importance is that during child-related leave, the employment relationship should be maintained in relation to social protection and pension entitlements, so that workers taking time off from work for caring purposes do not lose out in terms of pension calculations or contributions.

**Conclusion**

The way pension systems reward past work in retirement is telling about a society's values: reproductive work and care work are less valued in pension systems compared with "productive" work, although its contribution to society cannot be overstated. If feminist labour law seeks to advance the re-evaluation of care work, pension schemes should be a core subject matter. Labour laws, unions, and lawyers should work toward a feminist pension agenda and ensure better income security for all women in old age.

[17] Council Directive 2019/1158, 2019 O.J. (L 188), 79–93, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1158.

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