

Rethinking Parenting Leave, Sexual Division of
Labour, and Substantive Equality: A Transformative
EU Parenting Leave Model

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This thesis is the result of the author's original research. It has been composed by the author and contains material that has been previously submitted for examination leading to the award of a degree at the University of Glasgow in 2021.

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Signed:

A handwritten signature in black ink, appearing to read 'J. McInnes', is written on a light blue rectangular background.

Date:

28.11.2025

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I moved to Glasgow in 2016 to pursue a law degree at the University of Glasgow without any intention of ever practising law. Instead, I had, only half-jokingly, set one goal for myself: I had to be a doctor by thirty. I hereby declare that I successfully defended this thesis at Strathclyde Law School six months ahead of schedule. I thus dedicate this thesis to the wee girls in my life. Anni, Eevi, and Vera, may this be your inspiration to be and do whatever you want.

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ABSTRACT

This thesis offers a normative rethinking of parenting leave as a means of transforming the sexual division of labour within the family and facilitating substantive equality between the sexes and between groups of parents with different sexual and/or gender identities and family forms in the EU. The thesis normatively critiques and reconstructs the EU parenting leave framework, consisting of maternity leave under the *Pregnant Workers Directive* and paternity and parental leave under the *Work-Life Balance Directive*. To do so, it enriches socio-legal policy research with feminist legal theory. The thesis first makes an original contribution to feminist legal theory by examining the meaning of equality through a theoretical refinement of Fredman's four-dimensional model of substantive equality. It then turns this model into an analytical method by distilling from it methodological and normative principles for the purpose of critiquing and reconstructing parenting leave law and policy.

The thesis demonstrates that rather than facilitating substantive equality, EU law reinforces inequalities between parents: it perpetuates the gendered parental role stereotypes epitomised by the breadwinner-caregiver dichotomy, socially excludes parents who do not conform to the heteronormative nuclear family ideal, and entrenches socio-economic disadvantages by devaluing pregnancy and parenthood. Employing two Nordic parenting leave frameworks as current 'best practice' case studies of policy models which transform the sexual division of labour within the family, the thesis then devises a transformative parenting leave model for the EU. This model is an original contribution to socio-legal parenting leave policy research. By universalising the 'feminine' characteristic of caregiving as a gender-neutral parenthood norm, the transformative model deconstructs the sexual division of labour within the family and thus facilitates substantive equality between the sexes and between parents regardless of their sexual and/or gender identity and family form.

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ABBREVIATIONS

AG	Advocate-General
ART	Artificial reproductive technologies
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EES	European Employment Strategy
EIGE	European Institute for Gender Equality
EP	European Parliament
EPSR	European Pillar of Social Rights
ESM	European social model
ETD	Equal Treatment Directive
EU	European Union
EU PLF	European Union parenting leave framework
ILO	International Labour Organisation
IUI	Intrauterine insemination
IVF	In-vitro fertilisation
OECD	Organisation for Economic Cooperation and Development
OMC	Open method of coordination
PLD	Parental Leave Directive
PWD	Pregnant Workers Directive
QMV	Qualified majority voting
RD	Recast Directive
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WLBD	Work-Life Balance Directive
WLBI	Work-Life Balance Initiative

CHAPTER 1. INTRODUCTION

Parenting as a form of reproductive labour remains a realm of sex inequality. Responsibility for parental childcare in the European Union (EU) continues to fall disproportionately on women.¹ Although women's employment rates have increased over time, a pronounced gender employment gap exists among couples with children: whereas 92% of men with children worked full-time in the EU in 2022, 66% of women did.² Women continue to engage in paid work less than men because they spend more time engaging in the unpaid work of parenting and childcare.³ In 2022, 56% of EU women, compared to 26% of men, spent at least five hours a day caring for their own children.⁴ In this thesis, I am interested in how law and policy entrench inequality between the sexes as parents and between parents with different sexual and/or gender identities and in different types of families immediately or shortly following the birth or adoption of a child, and how law and policy can redress this inequality. I thus focus on an area of law and policy which supports workers upon becoming parents by affording them time away from work to care for their young children: parenting leave. Parenting leave policies are distinct from other work-life balance instruments – such as flexible working arrangements and public childcare provision – in that rather than only facilitating women's participation in the labour market, they explicitly facilitate men's participation in parental childcare.⁵ That is, inherent in maternity, paternity, and parental leave policies is the objective of enhancing sex equality

¹ ILO, 'Gender Equality in the G20 – Additional Analysis from the Time Dimension' (G20 Employment Working Group 2019), 5; European Commission, 'A Union of Equality: Gender Equality Strategy 2020-2025' COM (2020) 152 final, 11.

² EIGE, 'Gender Equality Index 2024 – Sustaining momentum on a fragile path' (Publications Office of the European Union 2024), 23.

³ *ibid* 23, 27.

⁴ EIGE, 'A Better Work-Life Balance: Bridging the gender care gap' (Publications Office of the European Union 2023), 2.

⁵ See J Lewis, 'Work/family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at the EU level and the Meaning of Gender Equality' (2006) 13 *J Eur Public Policy* 420, 428; E Chieragato, 'A Work-Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158' (2020) 36(1) *IJCLLR* 59, 61-62.

not only by ensuring equal treatment and opportunities between the sexes in employment but also by transforming the sexual division of labour between parents.

At EU level, workers are entitled to time away from their paid employment upon becoming parents – whether for the first time or to another child – under what I refer to as ‘the EU parenting leave framework’ (hereafter the EU PLF). I employ the term ‘parenting leave’ as an umbrella for maternity leave, paternity leave, and parental leave in this thesis to avoid confusion between the wider legal framework and specific parental leave instruments. Under the *Pregnant Workers Directive* (PWD⁶), a worker who is pregnant, has recently given birth and is breastfeeding is entitled to paid maternity leave for the protection of their health and safety during pregnancy and before and/or after childbirth.⁷ The *Work-Life Balance Directive* (WLBD) has as its specific objective the facilitation of work-family reconciliation for working parents in order to achieve equal opportunities and equal treatment between the sexes in employment.⁸ Its central element is to promote ‘a more equal sharing of caring responsibilities between women and men’⁹. To these ends, a working second parent is entitled to paid paternity leave in connection with a child’s birth for the purpose of care, and two parents are each entitled to paid parental leave for childcare following birth or adoption.¹⁰

⁶ I employ the EU’s own terminology of ‘Pregnant Workers Directive’ for Council Directive 92/85 to avoid reducing it to maternity leave, which using the terminology of ‘Maternity Leave Directive’ does. The acronym ‘PWD’ is not to be confused with that commonly employed for the ‘Posted Workers Directive’, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

⁷ Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and those who have recently given birth or are breastfeeding [1992] OJ 1992 L348/1 (Pregnant Workers Directive, PWD), art 8.

⁸ Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ 2019 L188/79 (Work-Life Balance Directive, WLBD), art 1.

⁹ *ibid* recital (19).

¹⁰ *ibid* arts 4-5.

Both Directives also offer parents employment-protection in relation to parenting leave: they prohibit the dismissal of workers for reasons related to pregnancy and parenting leave and require the maintenance of employment-related rights which the worker had acquired before leave or would have accrued during it, including the right to return to their job or an equivalent role after leave.¹¹ While I recognise the importance of employment-protection for ensuring equal treatment and equal opportunities between the sexes in employment, I do not discuss it in detail in this thesis.¹² I rather concentrate on equality between the sexes as it manifests between parents within the family, whereby my emphasis is on the leave entitlement itself rather than the employment-protection attaching to it.

The key research problem I address in this thesis is that rather than facilitating substantive equality, the EU PLF reinforces inequalities between parents. My primary research question therefore asks how the EU PLF can be reconstructed in a way which facilitates substantive equality between parents. I centre the EU's legal framework – as opposed to any one national parenting leave system or any combination of them – as the object of my inquiry because I am interested in the norm-setting power of EU parenting leave law and policy and its potential to enhance substantive equality between the sexes and between parents with different sexual and/or gender identities and family forms across the EU's 27

¹¹ PWD (n 7) arts 10-11; WLBD (n 8) arts 10-12.

¹² For ECJ case law, see C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus* [1990] ECR I-3941; C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-03567; C-136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-02011; C-109/00 *Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund i Danmark (HK)* [2001] ECR I-06993. For an overview of employment-protection for pregnancy, maternity, and parenting leave in EU law, see eg E Caracciolo di Torella and A Masselot, 'The ECJ Case Law on Issues Related to Pregnancy and Maternity: An Attempt of Classification' (2001) 26 *EL Rev* 239; European Commission, 'Family leave. Enforcement of the protection against dismissal and unfavourable treatment' (Publications Office of the European Union 2018); S Burri, 'Protection and Rights Related to Pregnancy and Maternity in EU Law' (2019) 4 *Revue de droit comparé du travail et de la sécurité sociale* 16 (English electronic version).

Member States. As Rianne Mahon explains, EU law and policy committed to transforming the sexual division of labour between parents

can contribute to the establishment of a new horizon of legitimate expectations, encouraging egalitarian forces in all [M]ember [S]tates and thus helping shift the balance in their favour¹³.

In order to address the research problem in this thesis, I critique the EU PLF against a feminist legal conceptualisation of substantive equality which I first theoretically refine and subsequently turn into an analytical method for legal and policy critique and reconstruction (Chapter 3). My core argument is that rather than facilitating substantive equality between parents, the EU PLF perpetuates the sexual division of labour within the family which underpins inequality between the sexes and between groups of parents with different sexual and/or gender identities and different types of families. It does so particularly by perpetuating a breadwinner-caregiver dichotomy, reinforcing a heteronormative nuclear family ideal, and socially and economically devaluing pregnancy and parenthood. I then reconstruct the EU PLF by devising a transformative parenting leave model for the EU which deconstructs the sexual division of labour within the family and thus facilitates substantive equality between the sexes and between parents regardless of their sexual and/or gender identity and family form. This transformative parenting leave model forms my original contribution to socio-legal parenting leave policy research in this thesis. In section 1.1 of this chapter, I outline the research problem motivating this thesis. I then set out the gap in knowledge and the research questions which I seek to address in sections 1.2 and 1.3. In section 1.4, I discuss my methodology for addressing the research questions which enriches socio-legal policy research with feminist legal theory and draws practical insights from the Finnish and Swedish parenting leave systems to inform the transformative EU parenting leave model. In section 1.5, I

¹³ R Mahon, 'Childcare. Toward What Kind of "Social Europe"?' (2002) 9(3) Soc Polit 349, 366.

set out my original contributions to knowledge. I outline the structure of this thesis in section 1.6.

1.1 The Research Problem

There is abundant literature on parenting leave across academic disciplines – including law, policy studies, sociology, economics, and psychology – and across jurisdictions, including in the EU legal context.¹⁴ Existing literature demonstrates that parenting leave is, overall, good for women, men, children, and businesses.¹⁵ Paid maternity leave is associated with women’s increased labour market participation both before and after pregnancy; and with improved maternal and child health outcomes, including increased rates of breastfeeding and childhood vaccination, and decreased infant mortality.¹⁶ Paid leave taken by men similarly positively affects child development and paternal health and improves parent-child bonding.¹⁷ In the long-term, paid leave has the potential to minimise family

¹⁴ See eg S Kamerman and P Moss (eds), *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Policy Press 2011); P Moss, A-Z Duvander, and A Koslowski (eds), *Parental Leave and Beyond: Recent International Developments, Current Issues and Future Directions* (Policy Press 2019); I Dobrotić, S Blum, and A Koslowski (eds), *Research Handbook on Leave Policy. Parenting and Social Inequalities in a Global Perspective* (Edward Elgar 2022); G Kaufman, *Fixing Parental Leave. The Six-Month Solution* (New York University Press 2022).

¹⁵ For a summary of research on the benefits of parenting leave, see G Kaufman, ‘Parental Leave is Good’ in G Kaufman, *Fixing Parental Leave. The Six-Month Solution* (New York University Press 2022).

¹⁶ CJ Ruhm, ‘Parental Leave and Child Health’ (2000) 19(6) *J Health Econ* 931; M Baker and K Milligan, ‘Maternal Employment, Breastfeeding, and Health: Evidence from Maternity Leave Mandates’ (2008) 27(4) *J Health Econ* 871; M Daku, A Raub, and J Heymann, ‘Maternal Leave Policies and Vaccination Coverage: A Global Analysis’ (2012) 74(2) *Soc Sci Med* 120.

¹⁷ L Nepomnyaschy and J Waldfogel, ‘Paternity Leave and Fathers’ Involvement with their Young Children’ (2007) 10(4) *Community Work Fam* 427; S Tanaka and J Waldfogel, ‘Effects of Parental Leave and Work Hours on Fathers’ Involvement their Babies’ (2007) 10(4) *Community Work Fam* 409; L Haas and CP Hwang, ‘The Impact of Taking Parental Leave on Fathers’ Participation in Childcare and Relationships with Children: Lessons from Sweden’ (2008) 11(1) *Community Work Fam* 85; M O’Brien, ‘Fathers, Parental Leave Policies, and Infant Quality of Life: International Perspectives and Policy Impact’ (2009) 624(1) *Ann Am Acad Pol Soc Sci* 190; A Kotsadam and H Finseraas, ‘The State Intervenes in the Battle of the Sexes: Causal Effects of Paternity Leave’

poverty.¹⁸ Moreover, paid leave policies enable businesses to remain competitive in terms of employee recruitment and retention, and have a positive effect on employee engagement and productivity.¹⁹ Existing literature also illustrates that parenting leave affects equality between the sexes particularly through men's take-up of leave: the more leave fathers take, the more they participate in both childcare and household labour, which subsequently reduces conflict between parents about the division of this labour.²⁰ Fathers' leave-taking is also known to develop more sex-equal attitudes among men and to gender-neutralise thinking about parental roles.²¹ That is, parenting leave has the potential to transform the sexual division of labour within the family and to promote a dual earner-carer family model in which responsibility for parenting labour and paid employment is equally shared between the sexes.²²

Research on various parenting leave systems nevertheless reaches the conclusion that most legal and policy frameworks fail to incentivise men's use of parenting leave whereby the positive effects of parents sharing leave on the

(2011) 40(6) Soc Sci Res 1611; M Lidbeck, S Bernhardsson, and T Tjus, 'Division of Parental Leave and Perceived Parenting Stress among Mothers and Fathers' (2018) 36(4) J Reprod Infant Psychol 406.

¹⁸ LC Maldonado and R Nieuwenhuis, 'Family Policies and Single Parent Poverty in 18 OECD Countries, 1978-2008' (2015) 18(4) Community Work Fam 395; J Heymann, A Sprague, A Nandi, A Earle, P Batra, A Schickedanz, PJ Chung, and A Raub, 'Paid Parental Leave and Family Wellbeing in the Sustainable Development Era' (2017) 38(1) Public Health Rev 21.

¹⁹ T Stroman, W Woods, G Fitzgerald, S Unnikrishnan, and L Bird, 'Why Paid Family Leave is Good Business' (Boston Consulting Group 2017), <<https://media-publications.bcg.com/BCG-Why-Paid-Family-Leave-Is-Good-Business-Feb-2017.pdf>>, accessed 22.2.2025.

²⁰ Kotsadam and Finseraas (n 17); G Meil, 'European Men's Use of Parental Leave and Their Involvement in Child Care and Housework' (2013) 44(5) J Comp Fam Stud 557.

²¹ T Johansson, 'Fatherhood in Transition: Paternity Leave and Changing Masculinities' (2011) 11(3) J Fam Commun 165; U Unterhofer and K Wrohlich, 'Fathers, Parental Leave and Gender Norms', Discussion Paper No. 10712 (IZA Institute of Labor Economics 2017).

²² L Haas and T Rostgaard, 'Fathers' Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave' (2011) 14(2) Community Work Fam 177, 182 onwards; H Dearing, 'Does Parental Leave Influence the Gender Division of Labour? Recent Empirical Findings from Europe' (Institut für Sozialpolitik, WU Vienna University of Economics and Business 2015).

division of reproductive labour between the sexes, and thus on sex equality, are not realised in practice.²³ In the EU context, this is demonstrated by the average share of fathers taking parental leave: only 10% took leave across the EU in 2018, with take-up varying from 0.02% of Greek fathers to 44% of Swedish fathers.²⁴ In the absence of reliable and comprehensive statistics on fathers' share of all parental leave used under national law, the European Institute for Gender Equality (EIGE) observes that '[s]carce available information does, however, indicate that the lion's share is taken up by women in all Member States'²⁵. Childcare immediately or shortly after a child's birth or adoption thus remains unequally shared between the sexes in accordance with the sexual division of labour which conceives childcare and parenting as women's natural responsibilities.²⁶ At the same time, EIGE reports that more women than men are legally ineligible for parental leave in the EU: 34% of women, compared to 23% of men, lacked access to parental leave in the EU in 2016, likely as a result of the prevailing gender employment gap.²⁷ There is again vast divergence among the

²³ R Ciccia and M Verloo, 'Parental Leave Regulations and the Persistence of the Male Breadwinner Model: Using Fuzzy-Set Ideal Type Analysis to Assess Gender Equality in an Enlarged Europe' (2012) 22(5) *J Eur Soc Policy* 507, 518; S Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10(4) *Int J L C* 442, 442-443; M Karu and D Tremblay, 'Fathers on Parental Leave: An Analysis of Rights and Take-Up in 29 Countries' (2018) 21(3) *Community Work Fam* 344, 355-356; A Plomien, 'EU Social and Gender Policy Beyond Brexit: Towards the European Pillar of Social Rights' (2018) 17(2) *Soc Policy Soc* 281, 291; A-Z Duvander, GB Eydal, B Brandth, IV Gíslason, J Lammi-Taskula, and T Rostgaard, 'Gender Equality: Parental Leave Design and Evaluating its Effects of Fathers' Participation' in P Moss, A-Z Duvander, and A Koslowski (eds), *Parental Leave and Beyond: Recent International Developments, Current Issues and Future Directions* (Policy Press 2019), 194-195.

²⁴ European Commission, 'Paternity and parental leave policies across the European Union: Assessment of current provision' (Publications Office of the European Union 2018), 4.

²⁵ EIGE, 'Gender Equality Index 2019. Work-life balance' (Publications Office of the European Union 2019).

²⁶ I acknowledge that women were disproportionately affected by the COVID-19 pandemic because of caring responsibilities but do not discuss the issue further in this thesis. See eg L Carli, 'Women, Gender Equality, and COVID-19' (2020) 35(7) *Gend Manag* 647; K Arabadjieva, 'Reshaping the Work-Life Balance Directive with Covid-19 Lessons in Mind', ETUI Working Paper 1/2022 (ETUI 2022); EIGE, 'Gender Equality Index 2022. The COVID-19 pandemic and care' (Publications Office of the European Union 2022).

²⁷ EIGE, 'Eligibility for parental leave in EU Member States' (Publications Office of the European Union 2020), 17.

Member States. Whereas Estonia, Finland, and Sweden had near-universal eligibility rates for both women and men regardless of employment status, family form, or type of relationship to the child, as many as 62% of women and 51% of men were ineligible for parental leave in Greece.²⁸ Access to parenting leave is therefore not universal across the EU, nor are parents eligible for parenting leave on a par with each other.

In particular, existing leave policy research – which itself has only relatively recently begun to take account of family diversity (see section 1.3) – demonstrates that parenting leave systems continue to render parents who do not conform to a heteronormative nuclear family ideal of a married, heterosexual, and cisgender couple with biological children legally ineligible for parental leave.²⁹ Most legal and policy frameworks do not adequately reflect societal changes in parental relationships and patterns of family formation over the past sixty years, including the normalisation of non-marital, non-biological, and LGBTQIA+ parenthood.³⁰ Declining marriage rates, increasing divorce rates, and increasing cohabitation rates among young people mean that more children are born to cohabiting couples and single people.³¹ The availability of artificial reproductive technologies (ART), adoption, and surrogacy as alternative routes to parenthood and the legalisation of LGBTQIA+ relationships have both brought new challenges to regulating parenthood and parenthood-related legal

²⁸ *ibid.*

²⁹ Chierogato (n 5); European Commission, ‘Leave policies and practice for non-traditional families’ (Publications Office of the European Union 2019); EIGE, ‘Eligibility for parental leave in EU Member States’ (n 27); P Foubert, ‘Child Care Leave 2.0 – Suggestions for the Improvement of the EU Maternity and Parental Leave Directives from a Rights Perspective’ (2017) 24(2) MJ 245, 249-250; E Wong, J Jou, A Raub, and J Heymann, ‘Comparing the Availability of Paid Parental Leave for Same-Sex and Different-Sex Couples in 34 OECD Countries’ (2019) J Soc Policy 525.

³⁰ European Commission, ‘Leave policies and practice for non-traditional families’ (n 29) 1.

³¹ Eg 42.2% of children were born outside marriage in 2022, compared to 17.7% in 1993, see Eurostat, ‘Marriage and divorce statistics’ (March 2024), <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divorces>, accessed 24.8.2024.

entitlements.³² Although the concept of a family underpinning EU law has evolved in response to changing demographic patterns through, for example, the extension of EU social protection to cohabitants³³ and same-sex partners³⁴, recent literature posits that the model European family continues to be ‘underpinned by the traditional nuclear family model which has as its basis heterosexual marriage and genetic parenthood’³⁵. Writing about the EU PLF, Petra Foubert observes that:

[t]he EU has taken into account evolutions in society to the extent that the ‘model family’ can now consist of two working parents (instead of just one, namely the man) and has paid some attention to adoptive parents. However, other family formats, for example families headed by a single parent, by two persons of the same sex, by a grandparent, by commissioning parents or by so-called social parents, are still not included in the picture.³⁶

With the introduction of the WLBD in 2019 ‘the EU legislature made a conscious attempt to depart from the traditional nuclear family model albeit [...] in a rather half-hearted manner’³⁷. The European Commission itself has acknowledged that the heteronormative nuclear family bias embedded in work-life balance discourse at EU level does not reflect the needs of non-normative parents and families.³⁸ Thus, the key research problem this thesis addresses is that not only do existing parenting leave systems – including that offered at the EU level –

³² European Commission, ‘Leave policies and practice for non-traditional families’ (n 29).

³³ Case 59/85 *Netherlands v Reed* [1986] ECR 1283.

³⁴ C-249/96 *Grant v South West Trains* [1998] IRLR 165; Joined cases C-122/99 and C-125/99 *D v Council* [2001] ECR I-4319.

³⁵ A Tryfonidou, ‘What is a ‘Family’ in EU Law? Do EU Policies Sufficiently Address Family Diversity and Its Consequences?’ in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 22. See eg C McGlynn, ‘A Family Law for the European Union?’ in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000), 223; H Stalford, ‘Concepts of Family under EU Law – Lessons from the ECHR’ (2002) 16(3) *IJLPF* 410, 411, 413. See also C-673/16 *Relu Adrian Coman and others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385; C-490/20 *VMA v Stolichna obshtina, rayon ‘Pancharevo’* ECLI:EU:C:2021:1008.

³⁶ Foubert (n 29) 249-250.

³⁷ Tryfonidou (n 35) 35.

³⁸ European Commission, ‘Leave policies and practice for non-traditional families’ (n 29) 2. See also Chierigato (n 5) 70.

perpetuate sex inequality, but they also perpetuate inequalities between groups of parents across different sexual and/or gender identities and family forms.

1.2 The Research Gap

To address inequalities between the sexes in using parenting leave, and indeed to facilitate substantive equality between parents in society more broadly, existing socio-legal policy literature asserts that parenting leave frameworks must affect transformation of the sexual division of labour within the family.³⁹ In particular, they must incentivise men's take-up of parenting leave and facilitate access to leave by parents who do not conform to the heteronormative nuclear family ideal.⁴⁰ More scarce, however, is the literature which proposes reasoned policy reform which affects this transformation, particularly from a normative perspective.⁴¹ In the EU context, Foubert has offered the most comprehensive suggestion for an EU legislative framework 'that is not detrimental to women workers and that caters for all sorts of families'⁴². Addressing gendered parental roles, family diversity, and children's best interests, her suggestions provide an

³⁹ See eg E Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' (2014) 20(1) ELJ 88, 105-106; Foubert (n 29) 259-261; Fredman, 'Reversing Roles' (n 23) 457-458.

⁴⁰ Arabadjieva (n 26) 21; Chierigato (n 5) 15; Foubert (n 29) 253; Fredman, 'Reversing Roles' (n 23) 442-443; Wong et al (n 29) 542.

⁴¹ For practical models proposed in various national and international contexts, see eg M Salmi and J Lammi-Taskula, '6+6+6 -malli vanhempainvapaan uudistamiseksi', Päätösten tueksi 1 (Finnish Institute for Health and Welfare 2010) [The 6+6+6 model for reforming parental leave] (Finland); M de la Corte Rodriguez, 'EU Directives on Maternity Leave: A Misleading Social Risk Approach and its Unsatisfactory Effects on Both Mothers and Fathers' (2018b) 9(2) ELLJ 171 (EU); Kaufman, *Fixing Parental Leave* (n 14) (the United States); Women and Equalities Committee, 'Equality at Work: Paternity and Shared Parental Leave', Sixth Report of Session 2024-25 HC 502 (House of Commons 2025) (the United Kingdom). For 'ideal' models, see eg H Dearing, 'Gender Equality in the Division of Work: How to Assess European Leave Policies Regarding Their Compliance with an Ideal Leave Model' (2016) 26(3) J Eur Soc Policy 234; J Javornik and A Kurowska, 'Work and Care Opportunities under Different Parental Leave Systems: Gender and Class Inequalities in Northern Europe' (2017) 51(4) Soc Policy Admin 617.

⁴² Foubert (n 29) 245.

evidence-based and pragmatic approach to reconstructing the EU PLF against the failure of an EU legislative initiative to reform the PWD (Chapter 2). What her paper lacks is a systematic explanation of the meaning of inequality between parents and an evaluation of how her reconstruction of the EU PLF, for example by making parenting leave compulsory for fathers⁴³, facilitates substantive equality between parents at a normative level. Published in 2017, her paper precedes the WLBD which now regulates paternity and parental leave at EU level. As a model for a reconstructed EU PLF, it is inevitably outdated. More recently, Kalina Arabadjieva has proposed ways to strengthen the WLBD from a sex equality perspective, with some consideration of how her proposed changes would affect the norms underpinning inequalities between the sexes.⁴⁴ Increasing the father's parental leave quota, for instance, would challenge gendered parental role norms.⁴⁵ These existing proposals for parenting leave reform at EU level, however, offer

only small steps towards a more profound rethinking of the organisation of paid work around unpaid care responsibilities, and a cultural shift towards greater recognition of the value of care work and away from the perception that such work is primarily the responsibility of women⁴⁶.

In addition to being limited by its superficial treatment of the question of reforming the EU PLF to affect transformation of the sexual division of labour within the family, this existing EU leave policy literature lacks in two important respects. First, literature published after the withdrawal of the PWD reform proposal in 2015 and particularly after the introduction of the WLBD in 2019 (Chapter 2) fails to engage with transformative proposals to reform the PWD.⁴⁷

⁴³ *ibid* 261.

⁴⁴ Arabadjieva (n 26).

⁴⁵ *ibid* 23.

⁴⁶ *ibid* 35.

⁴⁷ For reform suggestions in literature published between 2015 and 2018, see eg E Caracciolo di Torella, 'An Emerging Right to Care in the EU: A "New Start to Support Work-Life Balance for Parents and Carers"' (2017) 18 ERA Forum 187; de la Corte Rodriguez, 'EU Directives on Maternity Leave' (n 41); Foubert (n 29); P Foubert and Š Imamović, 'The Pregnant Workers

Long-standing critiques of the PWD demonstrate that maternity leave provision at EU level is unfit for purpose from both equality and health and safety perspectives while failing to reflect the current reality of human reproduction.⁴⁸ It continues to obscure workers' need for health and safety protection in light of the statistics that 10-15% of all known pregnancies end in miscarriage⁴⁹, 30% of all pregnancies end in abortion⁵⁰, and on a European average out of a thousand births, 3.2 were stillbirths in 2019⁵¹. The PWD has also not evolved to reflect the normalisation of ART like intrauterine insemination (IUI) and in-vitro fertilisation (IVF) although over two million infants were born from ART treatment cycles in Europe between 1997 and 2019.⁵² That recent literature has centred critique and reconstruction of the WLBD⁵³ has obscured the need to rethink maternity leave provision at EU level, leaving a crucial gap in leave policy research. Second, as it is only relatively recently that parenting leave policy research has begun to study the availability of parenting leave to, for instance, LGBTQIA+ parents and single parents⁵⁴, EU leave policy literature still exhibits a heteronormative nuclear family

Directive: Must Do Better. Lessons to be Learned from Strasbourg?' (2015) 37(3) JSWFL 309. For more recent discussion of the PWD, see V Hooton and EC Romanis, 'Artificial Womb Technology, Pregnancy, and EU Employment Rights' (2022) JLB 1.

⁴⁸ See eg S Burri, 'Care in Family Relations – The Case of Surrogacy Leave' (2015) 17(2) EJLR 271; E Caracciolo di Torella and P Foubert, 'Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU?' (2015) 40 EL Rev 52; Caracciolo di Torella, 'An Emerging Right to Care' (n 46); Foubert (n 29); Foubert and Imamović (n 47); Hooton and Romanis (n 47).

⁴⁹ Miscarriage is a spontaneous abortion or pregnancy loss before 28 weeks gestation. WHO, 'Stillbirth', <www.who.int/health-topics/stillbirth#tab=tab_1>, accessed 28.11.2023; WHO, 'Why we need to talk about losing a baby' <www.who.int/news-room/spotlight/why-we-need-to-talk-about-losing-a-baby>, accessed 17.1.2025.

⁵⁰ Abortion is an induced termination of pregnancy. WHO, 'Abortion', <www.who.int/health-topics/abortion#tab=tab_1>, accessed 13.4.2025.

⁵¹ Stillbirth is a birth of a foetus that died before or during birth at or after 28 weeks. WHO, 'Stillbirth' (n 49); Euro Peristat, 'European Perinatal Health Report 2015-2019' (Publications Office of the European Union 2022), 7.

⁵² J Smeenk, C Wyns, C de Geyter, M Kupka, C Bergh, I Cuevas Saiz, D de Neubourg, K Rezabek, A Tandler-Schneider, I Rugescu, and V Goossens, 'ART in Europe 2019: Results Generated from European Registries by ESHRE' (2023) 38(12) Human Reproduction 2321, 2324.

⁵³ See eg Arabadjieva (n 26); Chiericato (n 5).

⁵⁴ For recent literature, see eg J Jou, E Wong, D Franken, A Raub, and J Heymann, 'Paid Parental Leave Policies for Single-Parent Household: An Examination of Legislative Approaches in 34

bias. While scholars such as Foubert and Elisa Chierigato have addressed family diversity in their critiques of the EU PLF⁵⁵, critical and reconstructive engagements with family diversity and the impact of access to leave on equality between different normative and non-normative groups of parents remain limited. In particular, earlier research has systematically conflated sexual and gender identities, thus obscuring the experiences of trans families and subjecting trans parents and their children to further transphobia.⁵⁶

In this thesis, I address the limited breadth and depth of existing EU parenting leave policy literature around the reconstruction of the EU PLF. I offer a rethinking of parenting leave as a means of transforming the sexual division of labour within the family, and hence of facilitating substantive equality between the sexes and between groups of parents regardless of parents' sexual and/or gender identity and family form. I do so through a normative reconstruction of the EU PLF that seeks to deconstruct norms which underpin inequality between parents. Considering both the PWD and the WLBD, my reconstruction of the EU PLF is up to date while placing renewed emphasis on reforming the PWD which has been overshadowed by recent policy scholarship's focus on the WLBD. It contributes to the growing but still under-researched area of scholarship around non-normative parents' access to leave by addressing LGBTQIA+ parents, non-nuclear families (e.g. one-parent and multiple-parent families), and non-biological and/or non-gestational parents (e.g. adoptive and commissioning

OECD Countries' (2020) 23(2) Community Work Fam 184; G Kaufman, AM Auðardóttir, D Mazrekaj, RN Pettigrew, M Stambolis-Ruhstorfer, T Vuckovic Juros, and MA Yerkes, 'Are Parenting Leaves Available for LGBTQ Parents? Examining Policies in Canada, Croatia, France, Iceland, the Netherlands and the United Kingdom' in I Dobrotić, S Blum, and A Koslowski (eds), *Research Handbook on Leave Policy. Parenting and Social Inequalities in a Global Perspective* (Edward Elgar 2022); Wong et al (n 29).

⁵⁵ Foubert (n 29); Chierigato (n 5).

⁵⁶ CA Pfeffer and KB Jones, 'Transgender Parent Families' in AE Goldberg and KR Allen (eds), *LGBTQ-Parent Families. Innovations in Research and Implications for Practice* (Springer 2020), 202.

parents). In discussing LGBTQIA+ parents, my reconstruction centres same-sex parents on the one hand and transgender and gender non-conforming parents on the other, aiming to avoid ‘lump[ing] trans-parent families into analyses of LGBTQ-parent families’⁵⁷.

1.3 Research Questions

The aim of this thesis is to devise a transformative parenting leave model for the EU which better facilitates substantive equality between parents. To this end, my primary research question is:

- How can the EU PLF be reconstructed in a way which deconstructs the norms which underpin inequality between parents (e.g. the sexual division of labour) and thus facilitates substantive equality between the sexes and between groups of parents regardless of parents’ sexual and/or gender identity and family form?

To critique the EU PLF and to answer this question, I first explore the meaning of equality, determine which norms underpin inequality between parents, and conceptualise a way of critiquing and reconstructing law and policy with a view to enhancing equality. I also examine what kind of parenting leave framework facilitates a transformation of the sexual division of labour within the family. I therefore also address the following secondary research questions:

- What is (in)equality?
- How can law and policy be critiqued and reconstructed considering the goal of substantive equality?
- Which norms underpin inequality between women and men and between parents with different sexual and/or gender identities and different types of families (e.g. LGBTQIA+ parents, adoptive parents)?

⁵⁷ *ibid* 202-203.

- How does the EU PLF perpetuate inequality between parents reflected in these norms (e.g. the sexual division of labour)?
- What does a parenting leave framework that facilitates substantive equality between parents (e.g. by deconstructing the sexual division of labour within the family) look like?

1.4 Methodology

I approach the above research questions from a feminist socio-legal perspective. In this section, I outline my methodology. In section 1.4.1, I discuss my reasoning for adopting a theoretically informed approach to socio-legal policy research – one which enriches socio-legal policy research with feminist legal theory – and for opting to approach the reconstruction of the EU PLF in a way which entails elements of both the utopian and pragmatic reconstructive feminist legal project. That is, I reconstruct the EU PLF in a way which does not limit the transformative EU parenting leave model I devise in this thesis to what is legally, politically, and economically feasible at the EU level. I, however, employ the current EU PLF and the Finnish and Swedish parenting leave systems as practical reference points. I justify and contextualise my use of Finland and Sweden as current ‘best practice’ case studies in section 1.4.2. I develop my normative approach to legal and policy critique and reconstruction through my theoretical framework in Chapter 3. In section 1.4.3, however, I offer an overview of feminist equality theorising in order to begin defining equality and inequality for the purposes of this thesis and to contextualise my theoretical framework. In doing so, I identify Sandra Fredman’s model of substantive equality⁵⁸ as my primary analytical tool for critiquing and reconstructing the EU PLF in this thesis. I observe gaps in Fredman’s model and, in this chapter, outline how I develop my theoretical framework in order to address these gaps. Lastly, I engage in an exercise of

⁵⁸ S Fredman, ‘Substantive Equality Revisited’ (2016b) 14(3) *ICON* 712.

researcher reflexivity by discussing how my positionality affects the thesis and by outlining my commitment to anti-essentialist and intersectional feminist legal research in section 1.4.4.

1.4.1 Socio-Legal Scholarship Meets Feminist Legal Theory

Coming into the socio-legal methodology as a legal scholar, I understand it as a multi-disciplinary study of the law which recognises ‘the mutually constitutive relationship between law and society’⁵⁹. While the ‘socio’ in socio-legal research is often understood to denote a commitment to studying the law through empirical research using methods derived from social sciences⁶⁰, I rely on its broader definition as ‘an interdisciplinary alternative and a challenge to doctrinal studies of the law’⁶¹. From this perspective, the ‘socio’ represents ‘an interface with a context within which law exists’⁶² whereby socio-legal research simply denotes the study of the law within its social context. This is generally achieved by supplementing doctrinal legal research with insights from social theory.⁶³ As such, although I acknowledge that the legal academy has been critical of non-empirical socio-legal scholarship⁶⁴, this thesis, for reasons related to its limited scope, is a non-empirical socio-legal thesis which pursues the doctrinal analysis

⁵⁹ N Creutzfeldt, M Mason, and K McConnachie, ‘Introduction’ in N Creutzfeldt, M Mason, and K McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020), 4.

⁶⁰ See eg DR Harris, ‘The Development of Socio-Legal Studies in the United Kingdom’ (1983) 3(3) LS 315.

⁶¹ R Banakar and M Travers, ‘Introduction’ in R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005), xii.

⁶² S Wheeler and PA Thomas, ‘Socio-Legal Studies’ in DJ Hayton (ed), *Law’s Future(s)* (Hart Publishing 2002), 271. See also D Feenan, ‘Exploring the “Socio” of Socio-Legal Studies’ in D Feenan (ed), *Exploring the ‘Socio’ of Socio-Legal Studies* (Palgrave Macmillan 2013).

⁶³ Banakar and Travers (n 61) xii. See R Banakar and M Travers (eds), *Law and Social Theory* (Hart 2013).

⁶⁴ S Witherspoon, ‘Research Capacity: A Crisis in Waiting?’ (2002) 37 Socio-Legal Newsletter 1; H Genn, M Partington, and S Wheeler, ‘Law in the Real World: Improving Our Understanding of How Law Works. The Nuffield Inquiry on Empirical Legal Research’ (The Nuffield Foundation 2006); S Wheeler, ‘Socio-Legal Studies in 2020’ (2020) 47(S2) JLS S209, S211-S215.

of legal sources while also engaging with existing legal and social science literature as well as feminist legal theory literature to critique and reconstruct the EU PLF.

I engage in what Reza Banakar has called ‘applied socio-legal research’ and, specifically, ‘legal policy research’ which examines the meaning and impact of law and social policy on social conditions.⁶⁵ For the purposes of this thesis, a socio-legal approach to policy research allows me to understand how the EU PLF affects parents, particularly how it contributes to equality or inequality between them, and to recognise that redressing inequality between parents must involve social institutions beyond the law, including the family.⁶⁶ In section 1.2, I have observed that while existing socio-legal leave policy literature recognises that parenting leave policy perpetuates inequalities between parents, it tends to forego explaining and evaluating the meaning of norms and values, including equality and inequality, or engage with transformative ideas for legal and policy reform to enhance equality. Within the legal academy, socio-legal research has been critiqued for lacking recourse to critical legal theory in order to offer theorised and contextualised approaches to both critique and reform.⁶⁷ Thus, to engage in ‘an adequately theorized practice of socio-legal research’⁶⁸ in this thesis, I enrich socio-legal policy research with feminist legal theory. Feminist legal theory is

a body of theoretical scholarship committed to jointly understanding the role of law in the continuing subordination of women and the use of law as a tool with which to combat that subordination⁶⁹.

⁶⁵ R Banakar, *Normativity in Legal Sociology. Methodological Reflections on Law and Regulation in Late Modernity* (Springer 2015), 41–42, 48–49.

⁶⁶ N Lacey, ‘Normative Reconstruction in Socio-Legal Theory’ (1996) 5(2) Soc Leg Stud 131, 137–138.

⁶⁷ *ibid* 132–133; Banakar (n 65) 48–49; Banakar and Travers (n 61) xii.

⁶⁸ Lacey, ‘Normative Reconstruction’ (n 66) 144.

⁶⁹ R West, ‘Women in the Legal Academy: A Brief History of Feminist Legal Theory’ (2018) 87(3) Fordham L Rev 977, 995. Although frequently attributed to second-wave feminists of the 1970s,

It reacts against the purported objectivity, rationality, and universality of non-feminist legal theory to the extent that these values perpetuate male dominance, and instead endorses subjectivity, contextuality, and difference in legal doctrine.⁷⁰ Compared to non-feminist legal theory, feminist legal theory ‘has generally been characterized by a less radical divide between theoretical and socio-legal concerns’⁷¹. Being concerned with examining the meaning and impact of the law and the experience of the law by women, including analysing the family as a social institution, it is inherently compatible with the socio-legal method.⁷² However, feminist legal theory embodies a further urge to transform the law’s interaction with society through engagement with normative concepts like equality and imagining reconstructive legal and policy strategies.⁷³ It is

specifically concerned to dig beneath the surface of legal doctrines and practices; to go beyond a project of explication and rationalization and to interrogate the deeper political, historical and philosophical logics which underpin the power of law⁷⁴.

As such, I observe Päivi Neuvonen’s suggestion that grounding critique of EU law in critical theory would support a truly critical approach to EU legal scholarship which can both challenge and transform the law by interrogating the relationship

legal feminism first emerged from a 1848 women’s rights convention in Seneca Falls, New York, see T Thomas, ‘The Long History of Feminist Legal Theory’ in DL Brake, M Chamallas, and VL Williams (eds), *The Oxford Handbook of Feminism and Law in the United States* (Oxford University Press 2021). For the evolution of contemporary feminist legal theory, see A Scales, ‘Feminist Legal Theory: Not So Scary’ (1992) 2 UCLA Women’s LJ 1, 4; C Menkel-Meadow, ‘Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School”’ (1988) 38(1) J Leg Ed 61, 61. For the feminist legal methodology, see K Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harv L Rev 829.

⁷⁰ G Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* (NYU Press 1995), 132.

⁷¹ Lacey, ‘Normative Reconstruction’ (n 66) 134.

⁷² *ibid* 134, 138; R Hunter, ‘The Gendered “Socio” of Socio-Legal Studies’ in D Feenan (ed), *Exploring the ‘Socio’ of Socio-Legal Studies* (Palgrave Macmillan 2013), 205; R Hunter, ‘Feminist Approaches to Socio-Legal Studies’ in N Creutzfeldt, M Mason, and K McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2020), 260.

⁷³ Banakar (n 65) 229; Hunter, ‘Feminist Approaches to Socio-Legal Studies’ (n 72) 269; Lacey, ‘Normative Reconstruction’ (n 66) 134; West, ‘Women in the Legal Academy’ (n 69) 998.

⁷⁴ Lacey, ‘Normative Reconstruction’ (n 66) 131.

between EU law and its social, political, and economic contexts.⁷⁵ For the purposes of this thesis, feminist legal theory therefore provides a desirable normative reference point against which to critique the EU PLF and to propose reform affecting the deconstruction of the sexual division of labour within the family. Feminist legal theory allows me to explain what equality means and to imagine how it might be enhanced through the law. This said, I acknowledge that some feminist scholars – most famously Audre Lorde in asserting that ‘the master’s tools will never dismantle the master’s house’⁷⁶ and Carol Smart in warning feminists to ‘avoid the siren call of the law’⁷⁷ – have been suspicious of the law and the ability of legal reform to deconstruct the hierarchical social relations embedded within it.⁷⁸ In my view, however, feminist law reform which challenges the law’s androcentrism is essential to the pursuit of sex equality: disregarding the law merely preserves institutionalised inequality.⁷⁹

The logic of feminist legal theory is thus that ‘the law is X, and it ought to be Y’⁸⁰. It involves a critique and a reconstruction of the law as its two defining projects.⁸¹ While the critical feminist legal project undertakes ‘the unmasking and critiquing of the patriarchy behind purportedly ungendered law and theory’⁸², the reconstructive project entails legal reform which deconstructs the patriarchy as the law’s, or indeed the society’s, normative underpinning perpetuating

⁷⁵ PJ Neuvonen, ‘A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?’ (2022) 1 *Eur Law Open* 60, 61, 69–70.

⁷⁶ A Lorde, ‘The Master’s Tools Will Never Dismantle the Master’s House’ in A Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press 2007), 112.

⁷⁷ C Smart, *Feminism and the Power of Law* (Routledge 1989), 160.

⁷⁸ M Thornton, *Law and the Quest for Gender Equality* (Australian National University Press 2023), 65.

⁷⁹ See eg S Fredman, *Women and the Law* (Oxford University Press 1997), 368; H Samuels, ‘Feminist Legal Theory’ in R Banakar and M Travers (eds), *Law and Social Theory* (Hart 2013), 129.

⁸⁰ West, ‘Women in the Legal Academy’ (n 69) 998.

⁸¹ *ibid* 986.

⁸² R West, ‘Jurisprudence and Gender’ (1988) 55(1) *U Chi L Rev* 1, 60.

inequality between the sexes.⁸³ Here, I mean deconstruction in ‘the very ordinary sense’⁸⁴ that the law must remedy what causes inequality or injustice within the law and in society.⁸⁵ By its nature, the reconstructive project embodies both a utopian and a pragmatic element.⁸⁶ The former calls for a normative re-imagination of law and society, ‘engag[ing] in the “impossible” task of thinking beyond the conceptual limits of the present’⁸⁷. While central to reconstructive politics, it is not readily realised in practice.⁸⁸ Instead, pragmatic or reformist reconstructive politics entails ‘thinking, at a concrete and institutional level, how ideas generated at the level of critique or idealistic imagination might be approached or even realized in practice’⁸⁹. A pragmatic approach to the reconstructive feminist legal project is confined to legal reform that is practical in light of constraints related to, for instance, the legislative process.⁹⁰ Its goal is thus ‘the design of complete and idealized blueprints’⁹¹ for legal reform. In what follows, I outline how I reconcile these two aspects of the reconstructive feminist legal project in this thesis.

⁸³ *ibid* 69.

⁸⁴ JM Balkin, ‘Being Just with Deconstruction’ (1994) 3 Soc Leg Stud 393, 394.

⁸⁵ I thus do not mean deconstruction in the way intended by eg Jacques Derrida and Drucilla Cornell: I do not engage in semiotic analysis as part of the method nor am I primarily concerned with the institution of language in this thesis, see Lacey, ‘Normative Reconstruction’ (n 66) 140. See also J Derrida, *Of Grammatology* (Johns Hopkins University Press 1997); J Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’ in D Cornell, M Rosenfeld, and DG Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992); D Cornell, *Beyond Accommodation. Ethical Feminism, Deconstruction and the Law* (Rowman & Littlefield 1999).

⁸⁶ Lacey, ‘Normative Reconstruction’ (n 66) 139-140.

⁸⁷ *ibid* 140.

⁸⁸ *ibid*.

⁸⁹ *ibid*.

⁹⁰ *ibid* 141.

⁹¹ *ibid* 140.

1.4.1.1 Troubleshooting: EU Legal Scholarship and Normative Jurisprudence

Having said the above, I address an immediate reservation one might have about me working with EU law – instead of any one national legal system or any combination of them – in this thesis. This is that the EU lacks exclusive legislative competence over social policy and family law.⁹² As I outline in Chapter 2, the EU can enact law only in defined areas of social policy, such as equality between women and men with regard to labour market opportunities and treatment at work, social security and social protection of workers, and the improvement of the working environment to protect workers' health and safety.⁹³ The one area of family law in which the EU currently has legislative competence is the establishment of judicial cooperation on family law with cross-border implications.⁹⁴ Otherwise, the EU has

only been concerned with regulating family relationships in situations that come within the scope of EU law and where some other issue which falls within EU competence (e.g. in the areas of free movement, anti-discrimination, migration, and asylum) is predominant⁹⁵.

The family first assumed relevance for EU law as an auxiliary of the right to free movement in the 1960s with the introduction of the family reunification right to encourage the mobility of male migrant workers.⁹⁶ Over time, the scope of EU law

⁹² JM Scherpe, 'Epilogue to the Family in EU Law. Is There a European Family Law?' in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 249; A Tryfonidou and M Öberg, 'Introduction' in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 4. See eg K Boele-Woelki (ed), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003); E Caracciolo di Torella and A Masselot, 'Under Construction: EU Family Law' (2004) 29(1) EL Rev 32; C McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006).

⁹³ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), arts 153(1)-(3).

⁹⁴ *ibid* art 81(3); Tryfonidou and Öberg (n 92) 4. See eg European Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood' COM (2022) 695 final; A Tryfonidou, 'The Cross-Border Legal Recognition of Parenthood under European Law: Current Law and Future Prospects' (2024) 46(2) JSWFL 267.

⁹⁵ Tryfonidou and Öberg (n 92) 4-5.

⁹⁶ Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, Article 10; McGlynn, 'A Family Law for the European Union?' (n

concerning the family has broadened from free movement to other policy areas, particularly non-discrimination and immigration law, and the concept of family has evolved beyond the narrowly construed nuclear family of a worker, his spouse, and children under 21 to one which better reflects current demographic patterns.⁹⁷ While family law remains a competence of each individual Member State, EU law nevertheless ‘encompass[es] a range of different legal and policy fields, all of which have an impact on, construct and regulate family forms and practices’⁹⁸. EU social policy has come to concern parenthood and the sexual division of labour within the family through EU legislation and European Court of Justice (ECJ) jurisprudence in the realm of equality and non-discrimination. The EU PLF, as such, locates within the equality dimension of EU social policy (Chapter 2). The legal basis of the WLBD lies in equality between the sexes with regard to labour market opportunities and treatment at work, and while the PWD is grounded in the health and safety protection of workers, this sex equality objective is implicit in it.⁹⁹

In areas of social policy in which the EU does have legal competence, like equality and non-discrimination, the adoption of EU law is nevertheless hindered by the EU’s mode of governance which is susceptible to divergent economic and political interests among its Member States (Chapter 2).¹⁰⁰ The current EU PLF represents a lowest-common-denominator approach to harmonising 27 sets of national interests and the scope for legislating beyond this is likely limited. Engaging with EU law in this thesis thus presents me with two options. First, I

35) 225; Stalford (n 35) 412; Tryfonidou, ‘What Is a ‘Family’ in EU Law?’ (n 35) 22; Tryfonidou and Öberg (n 92) 4-5.

⁹⁷ McGlynn, ‘A Family Law for the European Union?’ (n 35) 223; Stalford (n 35) 411, 413; Tryfonidou, ‘What is a “Family” in EU Law?’ (n 35) 20.

⁹⁸ McGlynn, ‘A Family Law for the European Union?’ (n 35) 224.

⁹⁹ PWD (n 7) recital (1); TFEU (n 93) arts 153(1)(a), (i); WLBD (n 8) recital (1).

¹⁰⁰ C Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67 CLP 199, 214; A Crespy, ‘Social and Health Policy’ in S Faure and C Lequesne (eds), *The Elgar Companion to the European Union* (Edward Elgar 2023), 271.

could engage with the difficulty posed by the supranational quality of EU law and accept that there is limited scope for transformative legal reform, thus limiting my reconstruction of the EU PLF to what is legally, politically, and economically feasible for the EU in light of its mode of governance and limited social policy competences, as well as the economic logic of its social policy (see Chapter 2). Or, second, I could proceed on the basis that my feminist legal reconstruction of the EU PLF is a utopian one and accept that the supranational quality of EU law likely makes it a non-viable option for the EU. Rather than a completely utopian or a completely pragmatic approach, I opt to combine the two: the transformative parenting leave model I devise in this thesis embodies both utopian and pragmatic elements of the reconstructive feminist legal project.

My approach to devising the transformative EU parenting leave model is utopian in that I normatively reimagine the EU PLF without confining the model to reform that is legally, politically, and economically feasible at the EU level. I do not limit my reconstruction of the EU PLF to ensure its compatibility with the EU's current legal competences, nor do I evaluate the best method for reconstructing the EU PLF, such as whether this would entail amending the existing directives or employing alternative modes of policymaking.¹⁰¹ I do recognise that this kind of normative jurisprudence has come under critique both within and without the legal academy. These critiques have, in effect, posited that rethinking the law in pursuit of justice is not the proper purpose of legal scholarship – understanding the law in order to establish the truth is.¹⁰² In response, I appeal to Robin West's

¹⁰¹ On alternative modes of governance, see eg L Mósesdóttir, 'The European Social Model and Gender Equality' in M Jepsen and A Serrano Pascual (eds), *Unwrapping the European Social Model* (Bristol University Press 2006); B Braams, 'Equal Opportunities between Men and Women and Gender Mainstreaming under the European Employment Strategy (EES) and the Open Method of Coordination (OMC) – A New Policy Approach to Combat Gender Discrimination?' (2007) 11 *Eur Integ Online Pa* 1.

¹⁰² See eg P Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press 1999); S Fish, *Save the World on Your Own Time* (Oxford University Press 2008).

affirmation of normative jurisprudence that ‘[t]his kind of intellectual work, which has emanated from and been produced by the legal academy for well over a century now, is of great social value’¹⁰³. Nancy Fraser has similarly asserted that

[n]ormative theorizing remains an indispensable intellectual enterprise for feminism, indeed for all emancipatory social movements. We need a vision or picture of where we are trying to go, and a set of standards for evaluating various proposals as to how we might get there.¹⁰⁴

Rather than ‘engaging in the design of complete and idealized blueprints’¹⁰⁵ for parenting leave reform, my thesis offers a disruptive rethinking of parenting leave legislation and policy at EU level. This rethinking finds form in a transformative model for an EU parenting leave framework which challenges the way reproductive labour, namely that of pregnancy, childbirth, breastfeeding, and parental childcare, has been conceptualised and treated in the law and, indeed, in the society to produce and reproduce inequality between the sexes and different family forms. It envisions a society in which all people, regardless of sex, gender, sexuality, and type of family equally partake in parental childcare. To advance this utopian vision, I develop a theoretical framework around Fredman’s feminist legal conceptualisation of substantive equality in Chapter 3 (see section 1.4.3).

Instead of imagining a completely new EU PLF, however, I approach my utopian vision for a transformative parenting leave model pragmatically by restructuring the existing EU PLF and by employing Finland and Sweden as current ‘best practice’ case studies of national parenting leave systems which deconstruct the sexual division of labour within the family. That is, I do not extend the combined

¹⁰³ West, ‘Women in the Legal Academy’ (n 69) 999. See eg West, ‘Women in the Legal Academy’ (n 69) 1000 on the influence of 1980s-1990s feminist legal theory on the #MeToo movement in the late-2010s.

¹⁰⁴ N Fraser, ‘After the Family Wage: Gender Equity and the Welfare State’ (1994) 22(4) *Polit Theory* 591, 595.

¹⁰⁵ Lacey, ‘Normative Reconstruction’ (n 66) 140.

duration of 14 weeks of maternity leave, two weeks of paternity leave, and eight months of parental leave available under the current EU PLF (Chapter 2). Rather, I reconstruct the EU PLF by re-allocating existing leave in a new way, drawing insights from my ‘best practice’ case studies which comply with the current EU PLF while demonstrating an alternative way of allocating the leave available under EU law. There are two reasons for this. First, I do not endorse the overall extension of leave entitlements because of the negative labour market outcomes associated with long parenting leaves (Chapter 4).¹⁰⁶ Second, using the current entitlements as a reference point prevents me from levelling down the existing standard of rights and protections which feminist legal scholars warn against in the pursuit of substantive equality.¹⁰⁷ By approaching reconstruction of the EU PLF through these existing reference points, the transformative EU parenting leave model I devise in this thesis offers both a normative vision for facilitating substantive equality between parents through the deconstruction of the sexual division of labour within the family but also a concrete idea of what such a model might look like in practice in order to achieve this normative transformation. In the next section, I further justify the use of Finland and Sweden as case studies in this thesis.

1.4.2 Finland and Sweden as ‘Best Practice’ Case Studies

In order to answer my primary research question, I draw insights for my reconstruction of the EU PLF from the Finnish and Swedish parenting leave systems which I employ as current ‘best practice’ case studies. Finland and Sweden are frequently posited in leave policy literature as national parenting leave systems which deconstruct the sexual division of labour within the family

¹⁰⁶ Foubert (n 29) 256-257.

¹⁰⁷ Eg Fredman, ‘Substantive Equality Revisited’ (n 58) 718.

and thus facilitate substantive equality between parents.¹⁰⁸ The use of these case studies in this thesis is not intended as a comparative law method. That is, while I refer to ‘foreign’ legal systems in reconstructing the EU PLF, I do not adhere to the basic principle of comparative legal research which is to systematically engage in the ‘explicit comparison of aspects of two or more legal systems’¹⁰⁹. Rather, I use the case studies to offer practical examples of how Finland and Sweden have organised their parenting leave systems in order to facilitate substantive equality between parents. I then adapt this ‘foreign’ insight to inform the structure and content of my transformative EU parenting leave model.

Treating the Finnish and Swedish parenting leave frameworks (PLFs) as current ‘best practice’ case studies is not to imply that they have eliminated all inequalities between parents. They are not *ideal* parenting leave systems because parenting leave, and therefore reproductive labour, both remain unequally distributed between parents.¹¹⁰ Rather, it is to acknowledge that they

¹⁰⁸ Haas and Rostgaard (n 22) 192; Duvander et al (n 23) 191; K Dørum, ‘Perspectives on Nordic Gender Equality Policy and Europeanisation’ in K Dørum (ed) *Nordic Gender Equality Policy in a Europeanisation Perspective* (Routledge 2020), 1; J Kantola, ‘Persistent Paradoxes, Turbulent Times. Gender Equality Policies in the Nordics in the 2010s’ in A Koivunen, J Ojala, and J Holmén (eds), *The Nordic Economic, Social and Political Model. Challenges in the 21st Century* (Routledge 2021), 214.

¹⁰⁹ See eg JC Reitz, ‘How to Do Comparative Law’ (1998) 46(4) *Am J Comp L* 617, 618. See eg F Jacobs, ‘Comparative Law and European Union Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2019); R Scarciglia, *Methods and Legal Comparison. Challenges for Methodological Pluralism* (Edward Elgar 2023), 35.

¹¹⁰ A-Z Duvander, ‘Svensk föräldraförsäkrings utveckling och konsekvenser’ (2017) 34(1) *Søkelys på arbetslivet* 126 [Development and consequences of Swedish parental insurance], 127; A-Z Duvander and E Ruspini, ‘Who Benefits from Parental Leave Policies? A Comparison Between Nordic and Southern European Countries’ in A Castrén, V Česnuityté, I Crespi, J Gauthier, R Gouveia, C Martin, A Moreno Mínguez, and K Suwada (eds), *The Palgrave Handbook of Family Sociology in Europe* (Palgrave Macmillan 2021). See also G Kaufman, ‘The Swedish Model is Great – But Not Perfect’ in G Kaufman, *Fixing Parental Leave. The Six-Month Solution* (New York University Press 2022).

have addressed inequalities better than most other parenting leave systems.¹¹¹ Since the 1970s, Sweden and Finland have simultaneously facilitated women's employment by collectivising families' childcare needs in universal public childcare systems and addressed women's subsequent 'double burden' of paid employment and unpaid reproductive labour through paid parenting leave policies.¹¹² Nordic leave policy innovations have placed emphasis on facilitating fathers' take-up of parenting leave in order to 'induce men to become more like most women are now – that is, people who do primary care work'¹¹³. Sweden introduced the world's first gender-neutral shared parental allowance system in 1974.¹¹⁴ Finnish fathers – alongside Norwegian fathers as the first men in the world¹¹⁵ – became entitled to two weeks of paternity leave in 1978.¹¹⁶ The Nordic 'deconstructive vision'¹¹⁷ of transforming the sexual division of labour within the family in pursuit of substantive equality between the sexes has subsequently

¹¹¹ E Caracciolo di Torella, 'A Critical Assessment of the EC Legislation Aiming at Reconciling Work and Family Life: Lessons from the Scandinavian Model' in H Collins, P Davies, and R Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International 2000), 443.

¹¹² Fraser, 'After the Family Wage' (n 104) 593, 601, 606; H Hernes, *Welfare State and Woman Power: Essays in State Feminism* (Norwegian University Press 1987), 9, 16-18, 114, 126; A Leira, *Working Parents and the Welfare State. Family Change and Policy Reform in Scandinavia* (Cambridge University Press 2002), 3-4, 36-37, 71-72.

¹¹³ Fraser, 'After the Family Wage' (n 104) 611.

¹¹⁴ C Bergqvist, 'Childcare and Parental Leave Models' in C Bergqvist (ed), *Equal Democracies? Gender and Politics in the Nordic Countries* (Scandinavian University Press 1999), 122; J Julén Votinius, *Föräldrar i arbete. En könskritisk undersökning av småbarnsföräldrars arbetsrättsliga ställning* (Makadam 2007) [Parents at work. A gender-critical study on the position of parents of young children in labour law], 62. See Lag om allmän försäkring, SFS 1962:381 [General Insurance Act 1962], ch 3; Lag om rätt till föräldraledighet, SFS 1976:280 [Parental Leave Act 1976]; Lag om rätt till ledighet för vård av barn, SFS 1978:410 [Parental Leave Act 1978].

¹¹⁵ J Kellokumpu, 'Perhevapaiden kehitys 1990–2005: Isillä päärooli uudistuksissa, sivurooli käyttäjinä', Raportteja 10 (Palkansaajien tutkimuslaitos 2007) [Development of family leaves 1990–2005: Fathers' primary role in reform, secondary role as users], 4.

¹¹⁶ A Haataja, 'Pohjoismaiset vanhempainvapaat kahden lasta hoitavan vanhemman tukena' (2004) 12(1) *Janus* 25 [Nordic parental leaves supporting two childcaring parents], 25, 29; Kellokumpu (n 115) 7; S Varjonen, 'Äidin hoiva, jaettu vanhemmuus – ja vapaus valita. Perhevapaiden uudistamisen argumentointi 1970-luvulta 2000-luvulle', *Sosiaali- ja terveysturvan tutkimuksia* 118 (Kelan tutkimusosasto 2011) [Maternal care, shared parenthood – and freedom to choose. Family leave reform rhetoric from the 1970s to the 2000s], 44. See Laki sairausvakuutuslain muuttamisesta, L 1086/1977 [Act amending Sickness Insurance Act], s 23.

¹¹⁷ Fraser, 'After the Family Wage' (n 104) 613.

been the key objective of Nordic leave policies.¹¹⁸ To gently coerce men to take parental leave, Sweden reserved one month of parental allowance for each parent and made it non-transferable between parents in 1995.¹¹⁹ This ‘daddy-month’ was first extended to 60 days of the 240 parental allowance days available to each parent in 2002 and then to 90 days per parent in 2016 to further facilitate more equal distribution of reproductive labour between the sexes.¹²⁰ Finland similarly adopted a daddy-month in 2003 by offering a two-week bonus leave for fathers who used the last two weeks of shared parental leave.¹²¹ Prior to a 2022 leave reform which reconstructed the Finnish PLF to ensure its compliance with the WLBD and encourage equal sharing of parental leave and childcare responsibilities between the sexes, paternity leave and the daddy-month had been reserved for the father as an unconditional nine-week paternity leave entitlement since 2013.¹²² Inspired by the Swedish PLF, the reform replaced this

¹¹⁸ Hernes (n 112) 123; Julén Votinius (n 114) 61; Leira (n 112) 67; F Valdimarsdóttir, ‘Nordic Experiences with Parental Leave and Its Impact on Equality between Women and Men’, *Tema Nord* 531 (Nordic Council of Ministers 2006), 14–15; Varjonen (n 116) 9, 25.

¹¹⁹ A-Z Duvander and S Cedstrand, ‘Gender Equal Parental Leave Use in Sweden: The Success of the Reserved Months’ in C de la Porte, GB Eydal, J Kauko, D Nohrstedt, P ‘t Hart, and BS Tranøy (eds), *Successful Public Policy in the Nordic Countries: Cases, Lessons, and Challenges* (Oxford University Press 2022), 270; Julén Votinius (n 114) 84; R Klinth, *Göra pappa med barn. Den svenska pappapolitiken 1960–1995* (Boréa Förlag 2002) [To make father with child. Swedish father politics 1960–1995], 403. See General Insurance Act 1962 (n 114) ch 4, s 3.

¹²⁰ Statistics Sweden, ‘På tal om kvinnor och män. Lathund om jämställdhet 2022’ [Women and men in Sweden 2022], 10, 12, 52; Sveriges riksdag, ‘Regeringens proposition om föräldraförsäkring och föräldraledighet’ Prop. 2000/01:44 [The Swedish Government’s bill on parental insurance and parental leave], 24–25; Sveriges riksdag, ‘Regeringens proposition om en mer jämställd föräldrapenning’ Prop. 2014/15:124 [The Swedish Government’s bill for a more equal parental allowance], 10; Valdimarsdóttir (n 118) 31. See Lag om ändring i socialförsäkringsbalken, SFS 2015:674 [Act amending Social Insurance Code 2010], ch 12, s 17.

¹²¹ Haataja (n 116) 35–36; Kellokumpu (n 115) 13; M Saarikallio-Torp and A Haataja, ‘Isien vanhempainvapaiden käyttö on yleistynyt. Ketkä isistä vapaita käyttävät ja ketkä eivät?’ in A Haataja, I Airio, M Saarikallio-Torp, and M Valaste (eds), *Laulu 573 566 perheestä. Lapsiperheet ja perhepolitiikka 2000-luvulla* (Juvenes Print 2016) [Fathers’ use of parental leave has become more common. Which fathers use leave and which do not?], 107; Valdimarsdóttir (n 118) 23; Varjonen (n 116) 69–70. See Laki sairausvakuutuslain muuttamisesta, L 1075/2002 [Act amending Sickness Insurance Act 1963], s 23.

¹²² Eduskunta, ‘Hallituksen esitys eduskunnalle laeiksi sairausvakuutuslain, työsopimuslain ja varhaiskasvatustilain muuttamisesta sekä niihin liittyviksi laeiksi’ HE 129/2021 vp [The Finnish Government’s bill to the Parliament for acts amending the Sickness Insurance Act, Employment

entitlement with a non-transferable parental leave quota previously missing in the Finnish PLF by making 97 of the 160 working days of parental leave now available to each parent non-transferable.¹²³

Over time, father-specific leave policies have become the key policy export of Nordic PLFs, as illustrated by media attention in the 2010s and 2020s on Swedish ‘latte dads’¹²⁴ who congregate in cafés and parks with their young children during parental leave. And indeed, the Swedish approach to individualising parental leave to facilitate men’s take-up is emulated in the enhanced non-transferable parental leave entitlement under the WLBD (Chapter 2).¹²⁵ Relying on the Nordic example, the EU PLF has pursued a transition from what Fraser has conceptualised as a ‘universal-breadwinner’ model centred upon leave policies facilitating women’s labour market participation to the ‘universal-caregiver’ model which universalises both breadwinning and caregiving so that both parents are equally engaged in paid employment *and* childcare.¹²⁶ In this thesis,

Contract Act, and Early Education Act and for related acts], 1, 58-59; Saarikallio-Torp and Haataja (n 121) 85. See Laki sairausvakuutuslain muuttamisesta, L 903/2012 [Act amending Sickness Insurance Act 2004], ch 9, s 7. For implementation of the WLBD in Sweden, see Sveriges Riksdag, ‘Regeringens proposition om genomförande av balansdirektivet’ Prop. 2021/22:175 [The Swedish Government’s bill for implementing the Balance Directive].

¹²³ HE 129/2021 vp (n 122) 58, 84, 99–101, 128. See Työsopimuslaki, L 55/2001 [Employment Contract Act 2001], as amended by Laki työsopimuslain muuttamisesta, L 32/2022 [Act amending Employment Contract Act 2001], ch 4, s 1; Sairausvakuutuslaki, L 1224/2004 [Sickness Insurance Act 2004], as amended by Laki sairausvakuutuslain muuttamisesta, L 28/2022 [Act amending Sickness Insurance Act 2004], ch 9, ss 6-7.

¹²⁴ See eg R Orange, ‘All dads together: my new life among Sweden’s latte pappas’ (The Guardian 18.11.2012), <www.theguardian.com/money/2012/nov/18/swedish-latte-pappa-shared-child-care>, accessed 17.12.2024; L Kane, ‘Sweden is apparently full of “latte dads” carrying toddlers – and it’s a sign of critical social change’ (Business Insider 4.4.2018), <www.businessinsider.com/sweden-maternity-leave-paternity-leave-policies-latte-dads-2018-4>, accessed 17.12.2024.

¹²⁵ European Commission, ‘Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU’ SWD (2017) 202 final, 5.

¹²⁶ Fraser, ‘After the Family Wage’ (n 104) 593, 601, 611, 613. The universal-breadwinner model is also known as the dual-earner model and the universal-caregiver model as the dual earner-carer

I effectively illustrate how the EU PLF still falls short of the universal-caregiver model. And while I acknowledge Mahon's suggestion that the Nordics demonstrate that this model is not the 'impossible utopia'¹²⁷ Fraser presumes it to be, I remain realistic about the normative transformation the Finnish and Swedish PLFs have achieved thus far and their ability to further deconstruct the sexual division of labour within the family and achieve substantive equality.¹²⁸

While Finland and Sweden are both pioneers of father-specific parenting leave policies, they are different enough among the five Nordic PLFs¹²⁹ to offer varied perspectives on parenting leave. The Swedish PLF has pursued substantive equality between the sexes systematically since 1974, while the Finnish PLF has been more susceptible to conservative political influence.¹³⁰ Legal and policy scholars have been particularly critical of the Finnish homecare leave policy which was introduced in 1985 as an alternative to public daycare for families with children under three in order to enhance parents' freedom to choose where their children were cared for and how to share parental care responsibilities.¹³¹ In practice, the policy has reinforced the sexual division of labour within the family

model, see eg Leira (n 112); A Ellingsæter, *Nordic Earner-Carer Politics. A Comparative and Historical Analysis* (Edward Elgar 2024).

¹²⁷ Mahon (n 13) 350.

¹²⁸ For a more sceptical view on the deconstructive potential of the Nordic universal-caregiver model, see eg A Borchorst and B Siim, 'Woman-friendly Policies and State Feminism. Theorizing Scandinavian Gender Equality' (2008) 9(2) *Fem Theory* 207.

¹²⁹ For the current state of Danish, Norwegian, and Icelandic PLFs, see I Dobrotić, S Blum, G Kaufman, A Koslowski, P Moss, and M Valentova (eds), *20th International Review of Leave Policies and Related Research 2024* (International Network on Leave Policies and Research 2024).

¹³⁰ See eg Mahon (n 13) 349-350.

¹³¹ See eg C Bergqvist, J Kuusipalo, and A Styrkárssdóttir, 'The Debate on Child-Care Policies' in C Bergqvist (ed), *Equal Democracies? Gender and Politics in the Nordic Countries* (Scandinavian University Press 1999), 150; O Hiilamo and O Kangas, 'Trap for Women or Freedom to Choose? The Struggle over Cash for Child Care Schemes in Finland and Sweden' (2009) 38 *J Soc Policy* 457, 463, 470. See also *Laki lasten kotihoidon tuesta*, L 24/1985 [Act on children's homecare allowance].

by privileging maternal care within the confines of the private sphere.¹³² As such, I recognise that Finland has not always fallen within theoretical conceptualisations of the Nordic social-democratic welfare state or the universal-caregiver model.¹³³ Following the 2022 leave reform, however, I locate Finland within the universal-caregiver model alongside Sweden: in the three years since its introduction, the new Finnish PLF has demonstrated its ability to facilitate more equal take-up of parental leave between parents and transform the sexual division of labour (see Chapter 7).¹³⁴ As such, I expect my examination of the Swedish PLF to offer insight on how the normative underpinning of substantive equality can support a feminist parenting leave system in practice and the Finnish PLF reform to illustrate how a normative commitment to substantive equality can be employed to reconstruct parenting leave law and policy.

During the writing of this thesis, I spent three months in the two countries to access and, having knowledge of both Finnish and Swedish, read policy documents, legislation, and secondary literature in their original languages. I also spoke informally with experts in Finnish and Swedish labour law, equality law, and social policy to gain an understanding of the political, social, and cultural

¹³² GB Eydal, IV Gíslason, T Rostgaard, B Brandth, A-Z Duvander, and J Lammi-Taskula, 'Trends in Parental Leave in the Nordic Countries: Has the Forward March of Gender Equality Halted?' (2015) 18(2) *Community Work Fam* 167, 167; Mahon (n 13) 351–352; M Salmi and J Närvi, 'Johdanto' in M Salmi and J Närvi (eds), *Perhevapaat, talouskriisi ja sukupuolten tasa-arvo* (Terveyden ja hyvinvoinnin laitos 2017) ['Introduction' in Family leaves, economic crisis and sex equality], 34; Varjonen (n 116) 58.

¹³³ See eg G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990), 73–74; Mahon (n 13) 346.

¹³⁴ See eg Kela, 'Perhevapaaudistus lisäsi isien vanhempainvapaiden käyttöä – uusia joustomahdollisuuksia kuitenkin käytetään vain vähän' (20.5.2025), <https://tietotarjotin.fi/uutinen/1210598/perhevapaaudistus-lisasi-isien-vanhempainvapaiden-kaytto-uusia-joustomahdollisuuksia-kuitenkin-kaytetaan-vain-vahan>, accessed 24.11.2025 [Family leave reform increased fathers' parental leave use – new flexible opportunities, however, are utilised little].

context of the two parenting leave systems, and with colleagues, family members, and friends with experience of taking parenting leave in either country. My discussion of the Finnish and Swedish PLFs in this thesis is hence informed by a thorough understanding of how parenting leave operates normatively and in practice to transform gendered parental roles and facilitate substantive equality between parents. I outline the current status of both the Finnish and Swedish PLFs in Chapter 7 (see Appendices 2-3).¹³⁵ Broadly speaking, however, there are five policy features of the Nordic PLFs that promote sex equality: universal coverage of leave policies, non-transferable fathers' quotas, generous income replacement, flexible leave provision, and equality incentives.¹³⁶ I discuss these aspects of the Finnish and Swedish PLFs and draw insights from them for my transformative EU parenting leave model in Chapter 7.

1.4.3 Feminist Equality Theorising

In order to normatively critique and reconstruct the EU PLF in this thesis with a view to deconstructing the sexual division of labour within the family and facilitating substantive equality between parents, I first seek to understand what

¹³⁵ On the evolution of the Finnish and Swedish parenting leave systems, see eg Försäkringskassan, 'En historisk översikt av föräldrapenning. Korta analyser 2024:2' (Försäkringskassan 2024) [A historical overview of parental allowance. Short analyses]; A Haataja, 'Pieniä ja suuria reformeja pienten lasten perheille suunnatuissa perhevapaissa ja -etuuksissa' in A Haataja, I Airio, M Saarikallio-Torp, and M Valaste (eds), *Laulu 573 566 perheestä. Lapsiperheet ja perhepolitiikka 2000-luvulla* (Juvenes Print 2016) [Small and big reforms in family leaves and benefits targeted at families of young children]; Julén Votinius (n 114); Kela, 'Äitiysavustuksen historia', <www.kela.fi/aitiysavustus-historia>, accessed 27.1.2025 [History of maternity assistance]; Klinth (n 119); Å Lundqvist, 'Normative Foundations of Nordic Family and Gender Equality Policies: Developments and Changes' in S Kuhnle, P Selle, and S Hort (eds), *Globalizing Welfare: An Evolving Asian-European Dialogue* (Edward Elgar 2019); M Salmi, 'Perhevapaakeskustelu etenee: kotihoidon tuesta lastenhoidon järjestelmän uudistamiseen' in M Salmi and J Närvi (eds), *Perhevapaat, talouskriisi ja sukupuolten tasa-arvo* (Terveyden ja hyvinvoinnin laitos 2017) [The family leave conversation progresses: from homecare allowance to reforming the childcare system]; Varjonen (n 116).

¹³⁶ Haas and Rostgaard (n 22) 182, 186–188.

concepts such as equality and inequality mean in feminist legal theory and then develop a way to critique and reconstruct law and policy from an equality perspective. In this section, I provide a brief overview of feminist equality theorising to begin defining equality and inequality for the purposes of this thesis and to contextualise my theoretical framework and original contribution to feminist legal theory (Chapter 3). I outline how feminist legal theorists have conceptualised and critiqued equality as a legal concept and doctrine in section 1.4.3.1. I structure my literature review around a central debate in feminist legal theory: how the law should treat the sexes.¹³⁷ I have undertaken to review literature I consider to constitute the canon of feminist legal theory and refer to authors I consider to be its most important contributors. This said, I recognise that some feminist legal scholars argue a feminist legal canon to not exist – or if it does, it is systematically ignored.¹³⁸ The review of feminist legal canon in this thesis is thus based on my understanding of the founding texts of feminist legal theory as an early-career feminist legal scholar writing in the 2020s. The decision to refer to authors by their full names upon first introducing them in this thesis is similarly mine alone. Only using last names reinforces the presumption that legal scholarship is male and thus obscures the fact that, particularly for the purposes of this chapter, I mostly read and refer to work by female legal theorists.¹³⁹ Then, in section 1.4.3.2, I examine how feminist legal theorists have sought to overcome the sameness-difference dichotomy posed by equality as a concept by outlining alternative and supplementary approaches to it. Among the latter approaches, I identify Fredman’s model of substantive equality¹⁴⁰ as my primary analytical tool for critiquing and reconstructing the EU PLF in this thesis. In

¹³⁷ P Cain, ‘Feminist Jurisprudence: Grounding the Theories’ (2013) 4(2) Berkeley J Gender L & Just 191, 197; MA Fineman, ‘Feminist Legal Theory’ (2005) 13(1) Am U J Gender Soc Policy & L 13, 15; Minda (n 70) 130.

¹³⁸ See eg Critical Legal Thinking, ‘CfP: The Forgotten Foundations of Feminist Legal Scholarship, Part I: 1970-1985’ (25.3.2022), <<https://criticallegalthinking.com/2022/03/25/cfp-the-forgotten-foundations-of-feminist-legal-scholarship-part-i-1970-1985/>>, accessed 26.6.2023.

¹³⁹ Bartlett (n 69) 829.

¹⁴⁰ Fredman, ‘Substantive Equality Revisited’ (n 58).

section 1.4.3.3, I outline how I develop my theoretical framework in Chapter 3 in order to address gaps I observe in Fredman's model and to effectively employ the model to critique and reconstruct the EU PLF in this thesis.

1.4.3.1 The Sameness-Difference Dichotomy

The principle of equality – captured by the Aristotelian maxim ‘treating likes alike and unlikes unlike’¹⁴¹ – gives rise to the question of whether achieving equality requires women and men to be treated the same or differently. Hence, tension between two key conceptions of equality is depicted by ‘the sameness-difference dichotomy’. A formal conception of equality conceives women and men to be the same and therefore presents equality as an ‘equal treatment’ principle.¹⁴² A more substantive conception of equality, by contrast, recognises differences between the sexes and, to address inequality between women and men, deviates from the equal treatment principle by accommodating these differences through a ‘special treatment’ principle.¹⁴³ In this section, I briefly outline how feminist legal theorists have conceptualised equality and critiqued its earlier conceptions. I associate formal equality with liberal feminism, substantive equality with difference feminism, and anti-essentialist and intersectional conceptions of equality with postmodern and critical race feminism.

¹⁴¹ C MacKinnon, ‘Difference and Dominance: On Sex Discrimination’ in C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987), 32.

¹⁴² *ibid* 32–33.

¹⁴³ *ibid*. My reading of formal equality is that it does not allow accommodation of any difference between the sexes whereby the special treatment principle must relate to a substantive account of equality, see eg Thornton (n 78) 51.

1.4.3.1.1 Equality as Equal Treatment: Liberal Feminism

The emergence of liberal legal feminism coincided with second-wave feminism in the 1960s, informed by a commitment to formal equality of the sexes before the law and equal rights, treatment, and opportunities for women and men particularly in employment and education.¹⁴⁴ Liberal legal feminists hence advocated for gender-neutrality in the law: women and men are the same, whereby they should be treated equally and legal recognition of any differences between the sexes would be unequal.¹⁴⁵ As such, to determine the existence of unequal treatment of one sex in violation of the equal treatment principle, equality law necessarily involves comparing men and women.¹⁴⁶ In doing so, however, it employs a male norm: it compares women's sameness to men, not vice versa.¹⁴⁷ Formal equality achieved under this assimilationist approach therefore does not achieve equality for women *qua* women. Rather, the effect of the male norm is to denote that women are only entitled to equal treatment when they assimilate to the male norm.¹⁴⁸ While purporting to be gender-neutral, equality law grounded in this formal conception of equality thus effectively incorporates male supremacy into law and treats as inferior what it views as

¹⁴⁴ Cain (n 137) 198; N Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14(1) JLS 411, 413. See eg B Friedan, *The Feminine Mystique* (WW Norton 1963).

¹⁴⁵ A Scales, 'Towards a Feminist Jurisprudence' (1980) 56(3) Ind LJ 375, 428; C MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 Yale LJ 1281, 1287; R West, 'Relational Feminism and Law' in R West and C Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar 2019), 66.

¹⁴⁶ Lacey, 'Legislation Against Sex Discrimination' (n 144) 416.

¹⁴⁷ MacKinnon, 'Difference and Dominance' (n 141) 34; J Conaghan and L Chudleigh, 'Women in Confinement: Can Labour Law Deliver the Goods?' (1987) 14 JLS 133, 139; L Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 Notre Dame L Rev 886, 899; C MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989), 217; GC More, "'Equal Treatment" of the Sexes in European Community Law: What Does "Equal" Mean?' (1993) 1 Fem L S 45, 48-49.

¹⁴⁸ C Littleton, 'Reconstructing Sexual Equality' in K Bartlett and R Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991), 40. See also Thornton (n 78) 47.

different: women.¹⁴⁹ Even where women come to be in an empirically comparable situation to men and enjoy formal equality, sex inequality persists for instance in the form of the gender pay gap in the formally equal labour market.¹⁵⁰ This is because gender-neutral legal principles, grounded as they are in the male norm, fail to recognise the systemic and structural inequalities working against women in a capitalist society.¹⁵¹ Upholding the male norm ‘simply means that sex equality is conceptually designed never to be achieved’¹⁵².

Liberal legal feminism has been critiqued for its inability to account for differences between women and men, which is a problem particularly pronounced when the difference is biological (see Chapter 3).¹⁵³ Because formal equality does not recognise difference between the sexes to give rise to a legitimate claim to equal treatment, the bodily capacity for pregnancy associated with the female sex has been used to justify unequal treatment of women in the public sphere.¹⁵⁴ Alternatively, liberal legal feminists have assimilated pregnancy to illness or disability in the law in order to argue that because it does not make women different from male workers – but rather comparable to ill or disabled male workers – pregnancy is not unique and therefore does not entitle women to

¹⁴⁹ Finley, ‘Breaking Women’s Silence in Law’ (n 147) 893; Lacey, ‘Legislation Against Sex Discrimination’ (n 144) 419; MacKinnon, ‘Difference and Dominance’ (n 141) 34; MacKinnon, ‘Reflections on Sex Equality under Law’ (n 145) 1288–1289; MacKinnon, *Toward a Feminist Theory of the State* (n 147) 237–238; More (n 147) 51–52; West, ‘Relational Feminism and Law’ (n 145) 67.

¹⁵⁰ See S Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ (2016a) 16 H R L Rev 273, 290; MacKinnon, ‘Difference and Dominance’ (n 141) 36.

¹⁵¹ E Bonthuys, ‘Equality and Difference: Fertile Tensions or Fatal Contradictions for Advancing the Interests of Disadvantaged Women?’ in V Munro and M Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2016), 98; Fredman, ‘Substantive Equality Revisited’ (n 58) 737.

¹⁵² MacKinnon, ‘Difference and Dominance’ (n 141) 44.

¹⁵³ *ibid* 32–34, 36.

¹⁵⁴ Fredman, ‘Substantive Equality Revisited’ (n 58) 719; Lacey, ‘Legislation Against Sex Discrimination’ (n 144) 416; MacKinnon, *Toward a Feminist Theory of the State* (n 147) 222. For development of pregnancy discrimination jurisprudence, see eg W Williams, ‘Equality’s Riddle: Pregnancy and the Equal/Special Treatment Debate’ (1984) 5 NYU Rev L & Soc Change 325.

special treatment.¹⁵⁵ By doing so, they have effectively sought to eliminate pregnancy as a social experience to obscure the reality of this difference between men and women, some proponents of assimilation going so far as to concede artificial reproduction or extra-uterine gestation as options ‘to excise this basic sex-unique capability from the repertoire of female functions’¹⁵⁶. Failing to see pregnancy as a biological difference between the sexes overlooks the fact that pregnancy disadvantages women in our society. The liberal legal feminist concept of equality is therefore not conducive to substantive sex equality.¹⁵⁷

1.4.3.1.2 Equality as Special Treatment: Difference Feminism

In the late-1970s and the 1980s, feminist legal theory evolved to critiquing the conceptual framework utilised by liberal feminists and its very capacity to achieve sex equality.¹⁵⁸ This form of legal feminism rejects the ideal of assimilation and recognises that women are different from men – hence ‘difference feminism’.¹⁵⁹ In a departure from the purported gender-neutrality of liberal legal feminism, difference feminism advocates a gender-sensitive legal conception of equality. Where women are different from men, this difference reasonably entitles women to different or special treatment in lawful derogation from the equal treatment principle to mitigate any disadvantage they suffer because of this difference.¹⁶⁰ While purporting to enhance the position of the disadvantaged sex, this approach to equality, however, reverts to employing the

¹⁵⁵ L Finley, ‘Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate’ (1986) 86 Colum L Rev 1118, 1145; Scales, ‘Towards a Feminist Jurisprudence’ (n 145) 429; W Williams (n 154) 325-327.

¹⁵⁶ Scales, ‘Towards a Feminist Jurisprudence’ (n 145) 429. See eg S Firestone, *The Dialectic of Sex* (William Morrow & Co 1971).

¹⁵⁷ Scales, ‘Towards a Feminist Jurisprudence’ (n 145) 427; West, ‘Relational Feminism’ (n 145) 67.

¹⁵⁸ Lacey, ‘Normative Reconstruction’ (n 66) 139; West, ‘Women in the Legal Academy’ (n 69) 986-987, 989.

¹⁵⁹ Cain (n 137) 199.

¹⁶⁰ Fineman, ‘Feminist Legal Theory’ (n 137) 16-17; MacKinnon, ‘Difference and Dominance’ (n 141) 32-33, 36; MacKinnon, *Toward a Feminist Theory of the State* (n 147) 218, 222; Scales, ‘Towards a Feminist Jurisprudence’ (n 145) 431.

male norm as the reference point for determining the legitimacy of derogation from the equal treatment principle, thus maintaining disadvantage to women on account of their difference from men.¹⁶¹ Women's difference from men – as opposed to men's difference from women – as the premise for the special treatment principle is used to reproduce male supremacy and reinforce existing gender stereotypes.¹⁶² This is, again, best illustrated by reference to pregnancy which demands that women must be afforded special treatment to prevent less favourable treatment to them in the public sphere due to pregnancy.¹⁶³ Justifying this treatment by reference to the male norm merely perpetuates socially constructed differences between the sexes, namely the perception that women require paternalistic protection because of their reproductive capacity (Chapter 4).¹⁶⁴ Like the equal treatment principle, the special treatment principle fails to support substantive equality between the sexes.

Beyond admitting that women and men are different biologically, difference feminists have disagreed on the exact location of difference which explains sex inequality. A distinction within difference feminism can therefore be drawn between 'cultural feminism' frequently associated with Carol Gilligan's ethic of care thesis and 'radical feminism' epitomised by Catharine MacKinnon's 'dominance approach' to difference.¹⁶⁵ The length of this thesis does not allow

¹⁶¹ Bonthuys (n 151) 93; MacKinnon, 'Difference and Dominance' (n 141) 34.

¹⁶² Conaghan and Chudleigh (n 147) 137; Fraser, 'After the Family Wage' (n 104) 594-595; MacKinnon, 'Difference and Dominance' (n 141) 33, 42-43; MacKinnon, *Toward a Feminist Theory of the State* (n 147) 234.

¹⁶³ Conaghan and Chudleigh (n 147) 137; Finley, 'Transcending Equality Theory' (n 155) 1146; MacKinnon, 'Difference and Dominance' (n 141) 36; More (n 147) 50.

¹⁶⁴ MacKinnon, *Toward a Feminist Theory of the State* (n 147) 219; M Minow, 'Making All the Difference: Three Lessons in Equality, Neutrality, and Tolerance' (1989) 39 DePaul L Rev 1, 4.

¹⁶⁵ MJ Frug, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' (1992) 105 Harv L Rev 1045, 1050-1051. For cultural feminism, see eg N Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (University of California Press 1978); C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993); West, 'Jurisprudence and Gender' (n 82); West, 'Relational Feminism and Law' (n 145). For

me to discuss each of these forms of feminism and explanations of difference between the sexes. Instead, I highlight a branch of radical feminism which is conceptually important for the purposes of deconstructing the sexual division of labour within the family in this thesis: socialist and materialist feminism. The relationship between socialist and feminist analyses is one which Heidi Hartmann has famously described as an ‘unhappy marriage’¹⁶⁶. The socialist facet has failed to explain women’s oppression, effectively reducing it to a side-effect of class oppression, and the sexual division of labour, thus ignoring women’s contribution to social production.¹⁶⁷ The feminist facet has been ahistorical and non-material whereby it has failed to ground women’s oppression in a material base and to account for the historical development of social relations.¹⁶⁸ Prominent from the late 1960s through to the 1980s, socialist feminism centralises historical materialist study of capitalist economic relations with feminist analysis of patriarchal sexual relations.¹⁶⁹ Materialist feminism emerged in the late 1970s as an alternative to socialist feminism to

emphasize the point that although Marxism had not adequately addressed women’s exploitation and oppression, a historical materialist analysis might be developed that would account for the sexual division of labor¹⁷⁰.

radical feminism, see eg C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987).

¹⁶⁶ H Hartmann, ‘The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union’ (1979) 3(2) *Capital & Class* 1.

¹⁶⁷ J Conaghan, ‘Feminism, Law and Materialism: Reclaiming the “Tainted” Realm’ in V Munro and M Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2016), 32; M Gimenez, ‘What’s Material about Materialist Feminism? A Marxist Feminist Critique’ (2000) 101 *Radical Polit* 18, 21; Hartmann (n 166) 1-2, 7; R Hennessy and C Ingraham, ‘Introduction. Reclaiming Anticapitalist Feminism’ in R Hennessy and C Ingraham (eds), *Materialist Feminism: A Reader in Class, Difference, and Women’s Lives* (Routledge 1997), 2, 6.

¹⁶⁸ Conaghan, ‘Feminism, Law and Materialism’ (n 167) 32; Hartmann (n 166) 1-2; Hennessy and Ingraham (n 167) 2, 6.

¹⁶⁹ C Bowman, ‘Socialist Feminist Legal Theory: A Plea’ in R West and C Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar 2019), 92, 99; Hennessy and Ingraham (n 167) 4, 6-7.

¹⁷⁰ Hennessy and Ingraham (n 167) 7. See eg M Barrett, ‘Ideology and the Cultural Production of Gender (1980)’ in R Hennessy and C Ingraham (eds), *Materialist Feminism: A Reader in Class, Difference, and Women’s Lives* (Routledge 1997); C Delphy, ‘For a Materialist Feminism (1975)’ in

While materialist and socialist feminist concepts continue to be employed interchangeably¹⁷¹, on my reading of it, materialist feminism entails an element of anti-essentialism and intersectionality characteristic of postmodern feminism (section 1.4.3.1.3). Namely, it involves a feminist materialism which captures the interaction of sex and gender with material relations and processes which produce intersecting inequalities, such as those based on race, class, and sexuality.¹⁷² In essence, however, socialist and materialist feminists both explain sex inequality by the interaction of capitalism and patriarchy: difference between the sexes lies in the hierarchical social relations implemented by these systems of oppression, such as in the public-private dichotomy which associates men with the public sphere and women with the private sphere and in the sexual division of labour both within the economy and the family. This is therefore the feminist legal tradition within which I locate this thesis conceptually (Chapter 3). Socialist feminism allows me to identify and analyse the sexual division of labour as an underpinning of inequality between parents in the EU legal and policy context, and to envision the structural transformation required to change this division of labour so that all parents, regardless of sex, gender, sexuality, and family form, can equally partake in parental childcare and balance it with paid employment.¹⁷³

1.4.3.1.3 Anti-Essentialism and Intersectionality: Postmodern and Critical Race Feminism

I have observed above that materialist feminism reflects elements of postmodern feminism's anti-essentialism and intersectionality which themselves are, as I explain in section 1.4.4, of methodological importance to

R Hennessy and C Ingraham (eds), *Materialist Feminism: A Reader in Class, Difference, and Women's Lives* (Routledge 1997).

¹⁷¹ Gimenez (n 167) 22.

¹⁷² Conaghan, 'Feminism, Law and Materialism' (n 167) 46; M Hird, 'Feminist Engagements with Matter' (2009) 35(2) *Feminist Stud* 329, 329.

¹⁷³ Bowman (n 169) 100.

this thesis. Critical of the purported objectivity and universality of earlier feminist legal theory, postmodern or poststructuralist feminism emerged in the late 1980s.¹⁷⁴ Postmodern legal feminists reject the sameness-difference dichotomy underpinning feminist legal theory particularly as it has caused feminist scholars to treat women as a monolith.¹⁷⁵ On the one hand, they reject the assimilationism of liberal legal feminists which has led to the effective denial of differences between women and men.¹⁷⁶ On the other hand, they reject the essentialism – a term coined by Angela Harris to represent the presumption ‘that a unitary, “essential” women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience’¹⁷⁷ – of cultural and radical feminists, including Gilligan and MacKinnon.¹⁷⁸ Where sex equality is pursued by adopting an essentialist perception of some universal womanhood, the feminist legal epistemology risks becoming as oppressive as androcentric epistemologies.¹⁷⁹ Postmodern feminist legal theory therefore posits that

there is no existing [universal] truth about gender to be discovered, whether that truth be rooted in anatomy, chromosomes, psychology, individual choice, equality or inequality, power differentials or the capacity to gestate and breastfeed children¹⁸⁰.

¹⁷⁴ Cain (n 137) 204; Minda (n 70) 141; L Rosenbury, ‘Postmodern Feminist Legal Theory’ in R West and C Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar 2019), 128. See eg M Minow, ‘Justice Engendered’ (1987) 101 Harv L Rev 10; Z Eisenstein, *The Female Body and the Law* (University of California Press 1988); Cornell, *Beyond Accommodation* (n 85); Frug (n 165); J Williams, ‘Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminism and Critical Race Theory’ (1991) Duke LJ 296; L Irigaray, *An Ethics of Sexual Difference* (Cornell University Press 1993).

¹⁷⁵ Cain (n 137) 205.

¹⁷⁶ *ibid*; Frug (n 165) 1048.

¹⁷⁷ A Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42(3) Stan L Rev 581, 585.

¹⁷⁸ Cain (n 137) 204-205; Harris (n 177) 585, 592; Minda (n 70) 138; D Rhode, ‘The Ideology and Biology of Gender Difference’ (1996) 35 South J Philos 73, 88. See eg D Cornell, ‘Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon’s Toward a Feminist Theory of the State’ (1991) 100(7) Yale LJ 2247, 2272.

¹⁷⁹ J Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (2000) 27(3) JLS 351, 366-367.

¹⁸⁰ Rosenbury (n 174) 129.

Instead, it emphasises differences in women's subjective experiences reflecting race, class, age, ability, and sexuality.¹⁸¹ As such, the basic premise of postmodern feminist legal theory is that law and gender are mutually constitutive:

[g]ender does not exist but for law and other social structures, and law has been shaped, and continues to be shaped, by the many meanings society attaches to gender and other aspects of identity¹⁸².

Black feminist critiques of feminist legal theory similarly challenge its 'tendency to treat race and gender as mutually exclusive categories of experience and analysis'¹⁸³. Feminist legal theory's challenge to the law's male subjectivity is undermined by its failure to also address the law's purportedly non-racial – but distinctly white – perspective, seen in the way both liberal and difference feminists treat white women as the universal standard.¹⁸⁴ Central to critical race feminism is the concept of intersectionality devised by Kimberlé Crenshaw who argues that 'dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis'¹⁸⁵. Traditional equality doctrine utilises the perspective of a white woman which embeds race and/or class privilege, or a Black man which embeds sex and/or class privilege, with the effect of marginalising those experiencing multiple discrimination.¹⁸⁶ Black women may experience discrimination not only alike or unlike white women or Black men as women or as persons of colour, but also at the intersection of racism and sexism as *Black women* because 'the

¹⁸¹ Minda (n 70) 144.

¹⁸² Rosenbury (n 174) 127.

¹⁸³ K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) U Chi Legal F 139, 139.

¹⁸⁴ *ibid* 154; D Roberts, 'Critical Race Feminism' in R West and C Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar 2019), 112.

¹⁸⁵ Crenshaw (n 183) 140.

¹⁸⁶ *ibid* 140, 143; T Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10(1) Berkeley J Gender L & Just 16, 19.

intersectional experience is greater than the sum of racism and sexism'¹⁸⁷. The intersectional perspective introduced by critical race feminism allows all feminist legal research to account for 'the multiple, interlocking systems of oppression that affect women's lives and social status in ways typically overlooked by dominant feminist jurisprudence'¹⁸⁸. Intersectional feminist legal research acknowledges the complexity of women's identities informed by gender, race, class, sexuality, and disability.¹⁸⁹ I therefore reflect on the relevance of anti-essentialism and intersectionality to the critique and reconstruction of the EU PLF in this thesis in section 1.4.4.

1.4.3.2 Feminist Strategies for Overcoming the Sameness-Difference Dichotomy: Fredman's Model of Substantive Equality

I have demonstrated above that while equal and special treatment are both useful strategies for the resolution of certain sex inequality questions, neither achieves substantive equality.¹⁹⁰ The sameness-difference dichotomy, 'like a two-headed monster'¹⁹¹, continues to torment feminist legal theorists. They have subsequently questioned whether equality is the appropriate conceptual framework for feminist critique and reconstruction of the law and have proposed both alternative and supplementary approaches to equality.¹⁹² Here, I outline some of these feminist strategies for overcoming the sameness-difference dichotomy in order to identify a theoretical approach to equality which will enable me to critique and reconstruct the EU PLF with a view to facilitating

¹⁸⁷ Crenshaw (n 183) 140.

¹⁸⁸ Roberts (n 184) 112.

¹⁸⁹ *ibid* 113.

¹⁹⁰ Fraser, 'After the Family Wage' (n 104) 595; JA Sohrab, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1(2) *Fem L S* 141, 143; R Jhappan, 'The Equality Pit or the Rehabilitation of Justice?' (1998) 10(1) *CJWL* 60, 68.

¹⁹¹ Fredman, *Women and the Law* (n 79) 16.

¹⁹² Bonthuys (n 151) 86; R Hunter, 'Alternatives to Equality' in R Hunter (ed), *Rethinking Equality Projects in Law: Feminist Challenges* (Hart 2008), 84; Jhappan (n 190) 81–82; Lacey, 'Legislation Against Sex Discrimination' (n 144) 419; Sohrab (n 190) 143.

substantive equality between parents without falling victim to the sameness-difference dichotomy and essentialism. Common to these strategies is the rejection of the relative, abstract, and non-contextual nature of the 'grand theories' of liberal, cultural, and radical feminists which have failed to recognise and challenge systematic and socially constructed sex inequalities and risked essentialising both women's and men's experiences.¹⁹³

Some feminist legal scholars have moved away from equality as a legal concept and instead pursued alternative theories to address inequality between the sexes.¹⁹⁴ They have sought such alternatives from feminist care ethics¹⁹⁵, social justice theory¹⁹⁶, citizenship theory¹⁹⁷, capability theories¹⁹⁸, and dependency or vulnerability theory¹⁹⁹. Of these, care ethics and capability and vulnerability theories have been frequently employed in European work-life balance scholarship to produce new perspectives on inequalities between the sexes which have been unresponsive to traditional equality analyses. Grace James has argued that a feminist care ethics approach to work-family reconciliation in UK

¹⁹³ Bonthuys (n 151) 92; Finley, 'Transcending Equality Theory' (n 155) 1159; Harris (n 177) 585; Hunter, 'Alternatives to Equality' (n 192) 83; Jhappan (n 190) 65-66, 69, 79-80.

¹⁹⁴ Bonthuys (n 151) 86-88.

¹⁹⁵ See eg J Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993); S Sevenhuijsen, 'The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy' (2003) 4(2) *Fem Theor* 179; V Held, *The Ethic of Care: Personal, Political, and Global* (Oxford University Press 2006).

¹⁹⁶ IM Young, *Justice and the Politics of Difference* (Princeton University Press 2011); N Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in N Fraser and A Honneth, *Redistribution or Recognition?* (Verso 2003). See eg Jhappan (n 190).

¹⁹⁷ Young, *Justice and the Politics of Difference* (n 196). See eg G Bock and S James (eds), *Beyond Equality and Difference: Citizenship, Feminist Politics, Female Subjectivity* (Routledge 1992); R Lister, 'Dilemmas in Engendering Citizenship' (1995) 24(1) *Econ Soc* 35; A Gouws, 'Beyond Equality and Difference: The Politics of Women's Citizenship' (1999) 15(4) *Agenda* 54.

¹⁹⁸ A Sen, *Inequality Re-Examined* (Oxford University Press 1992); A Sen, *Development as Freedom* (Oxford University Press 1999); M Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000).

¹⁹⁹ MA Fineman, *The Autonomy Myth: A Theory of Dependency* (New Press 2004); MA Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008-09) 20 *Yale J Law Fem* 1.

labour law would better reflect the necessity of caregiving and challenge gendered conceptions of both care and work.²⁰⁰ Eugenia Caracciolo di Torella and Annick Masselot have similarly posited that the current EU care policy regime does not accurately reflect the informal and relational nature of caregiving, and have instead devised a normative framework based on the ethic of care.²⁰¹ Capability theory has been employed as an alternative to equality analysis by scholars such as Nicole Busby who has proposed a right to care in the EU work-life balance context.²⁰² By emphasising the needs of both the carer and the cared-for, she argues capabilities theory to have

limitless potential as an evaluative framework able to take full account of women's experiences, whether the same or different from men's, and capable of eliminating unnecessary differences²⁰³.

Jana Javornik and Anna Kurowska have demonstrated this in their analysis of eight Northern European parenting leave systems by employing insights of capabilities theory to reveal some of the socio-economic constraints on parents' real opportunities to take leave and their ability to make genuine choices about taking it.²⁰⁴ In a co-authored volume, Busby and James have approached critique and reimagination of the UK legal framework on work-life balance from a vulnerability perspective.²⁰⁵ This has enabled them to reveal, for example, how the norm of the independent and autonomous liberal subject underpinning the framework embeds vulnerability in the role of the working father by offering him 'a superficial opportunity to engage in caring'²⁰⁶ and thus 'denying him the

²⁰⁰ G James, 'Family-Friendly Employment Laws (Re)assessed: The Potential of Care Ethics' (2016) 45(4) ILJ 477, 496-497.

²⁰¹ E Caracciolo di Torella and A Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge 2020).

²⁰² N Busby, *A Right to Care? Unpaid Work in European Employment Law* (Oxford University Press 2011).

²⁰³ *ibid* 29.

²⁰⁴ Javornik and Kurowska (n 41).

²⁰⁵ N Busby and G James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (Hart 2020).

²⁰⁶ *ibid* 155.

opportunity to share in the benefits of caregiving or to experience solidarity with others like himself²⁰⁷. As Elsje Bonthuys observes, these theoretical approaches do not represent ‘true alternatives to equality, because they all contain intrinsic elements of equality or at least imply the goal of gender and other forms of social equality’²⁰⁸. Thus, they ‘widen the lens of equality from a narrow focus on legal rules and norms to the wider social, political and economic contexts within which law operates’²⁰⁹. Therefore, I opt for a wider theoretical model which embodies insights of these perspectives within the conceptual framework of substantive equality, as I will illustrate below.

Other feminist legal theorists have engaged in reconceptualising existing understandings of equality.²¹⁰ Rather than relying on abstract legal norms like the male comparator, these reconceptualisations employ relational and contextual approaches to equality in order to recognise differences between the sexes and prevent their essentialisation.²¹¹ This ‘ultimately dissolves the traditional dichotomy between sameness and difference’²¹². Often inspired by socialist feminism, these feminist theorists have employed concepts such as sexual division of labour, feminisation of poverty, and the public-private dichotomy to illustrate how sex inequalities manifest.²¹³ These supplementary conceptions have not, however, replaced equality analysis but have simply been incorporated into it to demonstrate the limits of formal equality.²¹⁴ Conceptual expansions of substantive equality have also been undertaken by reference to socio-economic

²⁰⁷ *ibid* 154.

²⁰⁸ Bonthuys (n 151) 89.

²⁰⁹ *ibid*.

²¹⁰ *ibid* 88.

²¹¹ *ibid* 96; Harris (n 177) 585; Minda (n 70) 146; Rhode (n 178) 91; J Williams (n 174) 322.

²¹² J Williams (n 174) 309.

²¹³ Bonthuys (n 151) 88. See eg SB Boyd, ‘Is Equality Enough? Fathers’ Rights and Women’s Rights Advocacy’ in R Hunter (ed), *Rethinking Equality Projects in Law* (Hart Publishing 2008).

²¹⁴ Bonthuys (n 151) 88.

rights, many of these relying on the ‘twin goals’²¹⁵ of Fraser’s theory of social justice: recognition and redistribution²¹⁶. This is effectively where Sandra Fredman’s model of substantive equality locates.²¹⁷ Asserting that ‘the challenges [equality] represents are not a reason to discard it’²¹⁸, Fredman expands the concept of substantive equality by incorporating insights from social justice, citizenship, and capabilities theories to a four-dimensional model consisting of redistribution, recognition, participation, and transformation. I define the dimensions in full in Chapter 3. Here, it suffices to note that redistribution redresses socio-economic disadvantage; recognition reduces stigma, stereotyping, humiliation, and violence; participation enhances full social and political participation; and transformation facilitates transformation of existing social structures.²¹⁹

In this thesis, although I briefly refer to citizenship and capabilities theories in outlining Fredman’s model in Chapter 3, I focus on its social justice aspect. A principle of substantive equality grounded in social justice has the potential to ‘render explicit the relationship between difference and power’²²⁰ by emphasising and eliminating the disadvantage attaching to difference, not the difference itself.²²¹ It avoids equating equality with sameness or difference whereby it avoids essentialism and assimilationism, rather emphasising flexible and contextual approaches to redressing inequalities.²²² It then identifies

²¹⁵ *ibid* 98.

²¹⁶ Eg N Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a “Post-Socialist” Age’ (1995a) 212 *NLR* 68; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 196).

²¹⁷ Bonthuys (n 151) 99. See also S Liebenberg and B Goldblatt, ‘The Interrelationship between Equality and Socio-Economic Rights under South Africa’s Transformative Constitution’ (2007) 23(2) *SAJHR* 335.

²¹⁸ Fredman, ‘Substantive Equality Revisited’ (n 58) 738.

²¹⁹ *ibid* 720, 727; S Fredman, *Discrimination Law* (Oxford University Press 2011), 25, 28, 30; Fredman, ‘Emerging from the Shadows’ (n 150) 273, 283.

²²⁰ Bonthuys (n 151) 95.

²²¹ *ibid*; Jhappan (n 190) 91.

²²² Bonthuys (n 151) 95; Jhappan (n 190) 91.

differences and associated inequalities in concrete social contexts rather than appealing to abstract legal norms in legal reasoning and law-making, recognising that inequality is systemic and structural.²²³ And while the notions of sameness and difference – and hence equal and special treatment – remain relevant in that the sexes ought to be treated alike or unlike depending on the context, this relational perspective allows feminist legal scholars to move past the conceptual dilemma posed by them being viewed dichotomously. Grounded in social justice, Fredman’s model thus represents a particular and contextual, rather than abstract and universalising, feminist reconceptualisation of equality. It demonstrates that substantive equality is irreducible to a single legal principle, like equal or special treatment, and should instead be understood as a multi-dimensional concept encompassing interacting and complementing objectives.²²⁴ For these reasons, I posit that Fredman’s model of substantive equality offers a valuable theoretical and analytical framework for socio-legal policy research. Rather than a definition of substantive equality, it is intended as ‘an analytic framework which can be used to assess and assist in modifying policies and practices to better achieve substantive equality’²²⁵. It thus also embodies the two defining actions of feminist legal theory: critique and reconstruction (section 1.4.1). This is also how I intend to use the model in this thesis.

1.4.3.3 Addressing Gaps in Fredman’s Model

I employ Fredman’s model of substantive equality as my primary analytical tool for normatively critiquing and reconstructing the EU PLF with a view to facilitating substantive equality between the sexes and between groups of parents with

²²³ Bonthuys (n 151) 95-96.

²²⁴ Fredman, ‘Emerging from the Shadows’ (n 150) 282; Fredman, ‘Substantive Equality Revisited’ (n 58) 714.

²²⁵ Fredman, ‘Substantive Equality Revisited’ (n 58) 728.

different sexual and/or gender identities and different types of families. Before doing so, however, I address gaps which I observe in the model in order to enhance its use as a critical and reconstructive tool. I first address a theoretical gap by theoretically refining the model. Then, I address an application gap by turning the model into a novel analytical method for the purposes of this thesis. This theoretical framework, which facilitates my understanding of equality and inequality for the purposes of this thesis and the development of a method for critiquing and reconstructing the EU PLF from an equality perspective, is developed in full in Chapter 3.

1.4.3.3.1 Theoretical Gap

I observe a certain infidelity or disregard for the feminist legal-theoretical tradition in Fredman's model. Both the structure and content are evidently influenced by earlier feminist legal scholarship, particularly that of Iris Marion Young²²⁶ and Nancy Fraser²²⁷, but their relationship to and location within this scholarship is not explicitly articulated. Fredman admits that '[her] concern as a human rights lawyer is with the evolving meaning of the right to equality in international and domestic human rights law'²²⁸. Her aim is therefore *not* 'to explicate a conception of equality in the abstract which would meet the objections of those philosophers who have attempted to do so'²²⁹. This, to me, reads as a deliberate omission of feminist legal theory from her model in favour of a more practical approach to substantive equality which can be implemented in both legal reasoning and law- and policymaking in human rights, and which

²²⁶ Eg Young, *Justice and the Politics of Difference* (n 196).

²²⁷ Eg Fraser, 'From Redistribution to Recognition?' (n 216); N Fraser, 'Recognition or Redistribution? A Critical Reading of Iris Young's *Justice and the Politics of Difference*' (1995b) 3(2) *J Political Philos* 166; Fraser, 'Social Justice in the Age of Identity Politics' (n 196).

²²⁸ Fredman, 'Substantive Equality Revisited' (n 58) 714.

²²⁹ *ibid.*

therefore resonates with legal academics²³⁰ and male-dominant international organisations²³¹ and national legislatures and courts²³² alike. And, indeed, Fredman posits that her model is grounded in ‘existing understandings of the right to equality in the law and literature’²³³. It is influenced by conceptions of substantive equality in the law of the United Kingdom (UK), the United States (US), Canada, and South Africa.²³⁴ Moreover, Fredman relies on mostly-male, liberal theories of equality and social justice – which have systematically obscured sex inequalities and the role of women and reproductive labour in the society²³⁵ – to devise her model.²³⁶ Despite the abundance of feminist legal theory on equality over the past sixty years, Fredman’s engagement with this

²³⁰ Eg M de Vos, ‘Substantive Formal Equality in EU Non-Discrimination Law’ in T Giegerich (ed), *The European Union as Protector and Promoter of Equality* (Springer 2020); M Campbell, ‘The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform’ (2021) 41(4) OJLS 1197.

²³¹ Eg UN Women, ‘Report for Progress of the World’s Women 2015-2016: Transforming Economies, Realizing Rights’ (UN Women 2015); UN Committee on the Rights of Persons with Disabilities, ‘General comment No. 6 (2018) on equality and non-discrimination’, CRPD/C/GC/6. See also S Fredman and B Goldblatt, ‘Gender Equality and Human Rights’, UN Women Discussion Paper No. 4/2015, <www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2015/Goldblatt-Fin.pdf>, accessed 13.6.2022.

²³² Eg Equality Act 2010, c. 15 (UK), s 149(3) public sector equality duty, subsequently cited in domestic courts in eg *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58; *R (on the application of Marouf) v Secretary of State for the Home Department* [2023] UKSC 23.

²³³ Fredman, ‘Substantive Equality Revisited’ (n 58) 714.

²³⁴ *ibid* 715. See eg D Majury, ‘Equality and Discrimination According to the Supreme Court of Canada’ (1990) 4 CJWL 407; Women’s Legal Education and Action Fund, *Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Emond Montgomery Publications 1996); C Albertyn and B Goldblatt, ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence on Equality’ (1998) 14(2) SAJHR 248; S Fredman and S Spencer, ‘Beyond Discrimination: It’s Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes’ (2006) 6 EHRLR 598; C Albertyn, ‘Substantive Equality and Transformation in South Africa’ (2007) 23 SAJHR 253; J Fudge, ‘Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution’ (2007) 23 SAJHR 235.

²³⁵ See eg C Chambers, *Freedom & Equality. Essays on Liberalism and Feminism* (Oxford University Press 2024).

²³⁶ Eg JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980); P Westen, ‘The Empty Idea of Equality’ (1982) 95 Harv L Rev 537; Sen, *Inequality Re-Examined* (n 198); Sen, *Development as Freedom* (n 198); J Raz, ‘On the Value of Distributional Equality’ (2008) 41 *Oxford University Legal Research Paper Series*.

scholarship remains limited to a preliminary reference to work by Young and Fraser in defining her four dimensions.

In my view, an implicit reverence of and commitment to the feminist legal-theoretical tradition is insufficient in conceptualising substantive equality. Making explicit the connections between Fredman's four-dimensional model of substantive equality and feminist legal theory has the potential to enrich the model and make it more fit for purpose as a critical and reconstructive analytical framework and more responsive to systemic and structural inequalities. In this thesis, I therefore identify the theoretical underpinnings of Fredman's model and theoretically refine it by tracing it back to and locating it within earlier feminist equality and social justice scholarship, namely Young's *Justice and the Politics of Difference*²³⁷ and Fraser's body of work on redistribution and recognition²³⁸. Bonthuys has previously drawn a useful connection between Fredman's model and Fraser's work which has, in part, inspired the further examination of the link between the scholars in this thesis.²³⁹ Beyond this, however, there are no theory-focused analyses of Fredman's model, or its location within feminist thinking, in academic literature at the time of writing. This theoretical refinement of Fredman's model in this thesis is thus my original contribution to feminist legal theory. By establishing dialogue between past and present feminist legal theory, I also respond to Rosemary Hunter and Maria Drakopoulou's call for rendering explicit 'the forgotten foundations'²⁴⁰ of feminist legal scholarship.

²³⁷ Young, *Justice and the Politics of Difference* (n 196)

²³⁸ Fraser, 'From Redistribution to Recognition?' (n 216); Fraser, 'Recognition or Redistribution?' (n 227); Fraser, 'Social Justice in the Age of Identity Politics' (n 196).

²³⁹ Bonthuys (n 151) 98-99.

²⁴⁰ Critical Legal Thinking (n 138); Critical Legal Thinking, 'CfP: The Forgotten Foundations of Feminist Legal Scholarship, Part II: 1985-1995' (29.8.2022), <<https://criticallegalthinking.com/2022/08/29/cfp-the-forgotten-foundations-of-feminist-legal-scholarship-part-2-1985-1995/>>, accessed 4.4.2024.

1.4.3.3.2 Application Gap

The most straightforward application of Fredman's model is a literal one, which employs the model as four thematic categories of redistribution, recognition, participation, and transformation to critique and reconstruct law and policy. This is how the model has thus far been employed in policy literature. The United Nation's (UN) 'Progress of the World's Women Report 2015-2016', for instance, draws on the model to set out redistributive, recognition, and participative means for public action – such as a universal minimum wage, universal social transfers to avoid stigmatisation of women in poverty, and support for women's organisations to enhance their influence in economic policymaking – to transform formal human rights into reality to achieve substantive equality.²⁴¹ Socio-legal literature, thus far, has similarly employed each of Fredman's four dimensions as individual analytical categories without further refinement of their scope.²⁴² Meghan Campbell, for example, has done so to examine the systematic failure of UK courts to recognise the concurrent operation of maldistribution and misrecognition in discrimination claims brought by single mothers affected by UK benefit reforms.²⁴³ While this 'literal approach' may be suitable to offer a general critique of broad areas of law and policy – as in the UN Women report²⁴⁴ – I anticipate it to be *too* broad in scope and hence to result in an exceedingly vague and convoluted analysis of the EU PLF, although I narrowly define the aspects of the EU PLF with which this thesis is concerned (Chapter 2).

For the purposes of this thesis, I therefore do not pursue a literal application of the model without some further refinement of the method of application. Instead, I devise a novel approach to employing Fredman's model as a critical

²⁴¹ UN Women (n 231) 42-43.

²⁴² See eg de Vos (n 230); M Dustin and K Malleon, 'Separate but Equal: Is Segregated Schooling (Still) Good for Girls?' (2025) 33 FLS 29.

²⁴³ Campbell (n 230).

²⁴⁴ UN Women (n 231).

and reconstructive analytical method. This novel method is grounded in a methodological principle – a ‘perspectival approach’ to the relationship between the four dimensions of Fredman’s model (Chapter 3) – which arises from my theoretical refinement of Fredman’s model. It involves three steps. First, I identify norms which underpin inequality between parents for the purpose of critiquing the EU PLF. These are *the sexual division of labour within the family, the breadwinner-caregiver dichotomy, the heteronormative nuclear family, and the devaluation of pregnancy and parenthood*. Second, I turn these norms into corresponding positive normative principles (e.g. *deconstructing the sexual division of labour within the family*) for the purpose of reconstructing the EU PLF to facilitate substantive equality between parents. And third, I attribute one of Fredman’s first three analytical dimensions to one norm/normative principle pairing to best ensure adherence to the perspectival approach. While this method retains the use of Fredman’s dimensions as distinct analytical categories, it approaches each dimension from the perspective of a defined normative principle in order to limit the analytical scope of each dimension (see section 1.6). This normative approach to addressing inequalities between parents is also how the thesis embodies the utopian reconstructive feminist legal project in devising the transformative EU parenting leave model (section 1.4.1.1).

1.4.4 Researcher Reflexivity: Positionality, Anti-Essentialism, and Intersectionality

Lastly, as a central tenet of the feminist legal methodology, I engage in an exercise of researcher reflexivity.²⁴⁵ I acknowledge the privilege and bias I bring to this thesis and admit here that I do not and cannot pretend to know the experience of all women or all parents whom the EU PLF concerns. While I am a bisexual woman from a working-class background, I am also a white, able, university-educated cis-gender woman who was raised in ‘the happiest country in the

²⁴⁵ Scales, ‘Feminist Legal Theory’ (n 69) 31-32.

world'²⁴⁶. Any disadvantage I might have on account of my identity is effectively mitigated by the enormous privilege I possess. I also analyse the normative underpinnings and impact of the EU PLF, as well as of the Finnish and Swedish PLFs, in light of my own gender ideology influenced by my legal education and relatively gender-ideologically progressive Nordic upbringing and as a child-free woman lacking intimate experience of gendered parental roles and balancing work with parenthood. With all this in mind, my commitment to anti-essentialist research in this thesis is to 'defin[ing] complex experiences as closely to their full complexity as possible'²⁴⁷.

This said, Patricia Cain critiques a 'perfunctory footnote'²⁴⁸ approach to anti-essentialism: that one acknowledges differences between women on account of race, class, and sexuality but fails to convey their significance.²⁴⁹ Performative anti-essentialism continues to assimilate and essentialise by positing the white, heterosexual, middle-class woman as the norm.²⁵⁰ While I am committed to anti-essentialist and intersectional feminist socio-legal research, I am also cognisant that one thesis cannot address all forms of inequality between all groups of parents. I therefore follow a recommendation for 'an application of critical judgment in selecting the categories for inclusion in accordance with their salience in the social, sectoral and organizational context of a particular study'²⁵¹. As such, while I recognise the existence of systemic and structural obstacles to accessing and using parenting leave experienced by, for example, parents of colour, disabled parents, and immigrant parents, I do not address

²⁴⁶ JF Helliwell, R Layard, JD Sachs, J de Neve, LB Aknin, and S Wang (eds), *World Happiness Report 2024* (University of Oxford Wellbeing Research Centre 2024).

²⁴⁷ Grillo (n 186) 22.

²⁴⁸ Cain (n 137) 206.

²⁴⁹ *ibid.* See also Harris (n 177) 595.

²⁵⁰ Cain (n 137) 206; Harris (n 177) 592-593, 595.

²⁵¹ MF Özbilgin, A Beauregard, A Tatli, and MP Bell, 'Work-Life, Diversity and Intersectionality: A Critical Review and Research Agenda' (2011) 13 *IJMR* 177, 188.

them in this thesis.²⁵² I instead address the intersections of sex, gender, and sexuality which I observe to offer another salient ground for feminist socio-legal research on parenting leave. Equality scholarship and socio-legal research centring the family, including research on parenting leave, have systematically failed to challenge the heteronormative nuclear family as the normative family and to account for the experiences of LGBTQIA+ parents.²⁵³ Hence, my normative critique and reconstruction of the EU PLF in this thesis explicitly addresses access to parenting leave under EU law by parents with non-normative gender and/or sexual identities and whose experiences of inequality locate at the intersections of sex, gender, and sexuality. In this light, I position this thesis in firm opposition to trans-exclusionary feminist rhetoric which rejects the inclusion of trans, gender non-conforming, and intersex people in policies that have sought to affirm (cisgender) women's difference from (cisgender) men and redress women's disadvantage through special treatment for fear of the consequent erasure of womanhood and women's rights.²⁵⁴

²⁵² See eg T Kil, J Wood, and K Neels, 'Parental Leave Uptake Among Migrant and Native Mothers: Can Precarious Employment Trajectories Account for the Difference?' (2018) 18(1) *Ethnicities* 106; AP Bartel, S Kim, J Nam, M Rossin-Slater, CJ Ruhm, and J Waldfogel, 'Racial and ethnic disparities in access to and use of paid family and medical leave: evidence from four nationally representative datasets' (Monthly Labor Review 2019), <www.bls.gov/opub/mlr/2019/article/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.htm>, accessed 11.4.2025; JM Goodman, C Williams, and WH Dow, 'Racial/Ethnic Inequities in Paid Parental Leave Access' (2021) 5(1) *Health Equity* 738; A-Z Duvander and A Koslowski, 'Access to Parenting Leaves for Recent Immigrants: A Cross-National View of Policy Architecture in Europe' (2023) 79(1) *Genus* 8. I am not aware of any literature on disabled parents' access to and use of parenting leave.

²⁵³ Chierigato (n 5) 18; MA Fineman, 'The Sexual Family' in MA Fineman, J Jackson, and A Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge 2016), 58; Wong et al (n 29) 526.

²⁵⁴ See eg R Pearce, S Erikainen, and B Vincent, 'TERF Wars: An Introduction' (2020) 68(4) *Sociol Rev* 677.

1.5 Contributions to Knowledge

In this thesis, I enrich feminist legal theory with socio-legal policy research to normatively critique the EU PLF against a feminist legal conceptualisation of substantive equality. I reveal that the EU PLF contributes to inequality between the sexes and between parents with different sexual and/or gender identities and in different types of families by perpetuating the sexual division of labour within the family. Relying on insights from feminist legal theory and the Finnish and Swedish PLFs as ‘best practice’ case studies of parenting leave systems which deconstruct the sexual division of labour within the family, I then normatively reconstruct the EU PLF. In addressing the research questions set out in section 1.3, I thus make the following original contributions to knowledge:

1. My primary original contribution is to socio-legal parenting leave policy research. I devise a transformative parenting leave model for the EU which deconstructs the sexual division of labour within the family and thus facilitates substantive equality between the sexes and between groups of parents regardless of parents’ sexual and/or gender identity and family form (Chapter 7).
2. My secondary original contribution is to feminist legal theory. I theoretically refine Fredman’s model of substantive equality²⁵⁵ by locating it within the earlier feminist equality and social justice scholarship of Young²⁵⁶ and Fraser²⁵⁷ (Chapter 3). This enhances its use as an analytical framework for critiquing and reconstructing law and policy which is responsive to systemic and structural inequalities.

²⁵⁵ Eg Fredman, ‘Substantive Equality Revisited’ (n 58).

²⁵⁶ Young, *Justice and the Politics of Difference* (n 196).

²⁵⁷ Fraser, ‘From Redistribution to Recognition?’ (n 216); Fraser, ‘Recognition or Redistribution?’ (n 227); Fraser, ‘Social Justice in the Age of Identity Politics’ (n 196).

1.6 Structure of Thesis

This thesis is structured as follows. In Chapter 2, I provide the legal and policy context for normatively critiquing and reconstructing the EU PLF by conceptualising the European social model and tracing its evolution, and the evolution of the EU PLF within it, from an equality perspective. In Chapter 3, I develop my theoretical and analytical framework. Above, I have identified Fredman's model of substantive equality as my primary analytical tool for critiquing and reconstructing the EU PLF (section 1.4). To ensure its fitness for purpose, I theoretically refine it by locating it within earlier feminist equality and social justice theorising, namely the work of Young and Fraser. I then turn the refined model into an analytical method for the purposes of this thesis in three steps. First, to instruct legal and policy critique, I identify the norm of the sexual division of labour within the family to underpin inequality between parents and a further three norms to underpin this division of labour: the breadwinner-caregiver dichotomy, the heteronormative nuclear family, and the devaluation of pregnancy and parenthood. Second, to instruct legal and policy reconstruction, I turn these norms into corresponding positive normative principles, such as deconstructing the sexual division of labour within the family, which facilitate substantive equality between parents. Third, I attribute one of Fredman's first three analytical dimensions – redistribution, recognition, or participation – to one norm/normative principle pairing.

In Chapters 4-6, I then critique the EU PLF against the three norms I have identified to underpin the sexual division of labour within the family in Chapter 3, each from their distinct analytical perspective. In Chapter 4, I critique the EU PLF from a recognition perspective to argue that it perpetuates the gendered parental role stereotypes conveyed by the breadwinner-caregiver dichotomy. In Chapter 5, I critique the EU PLF from a participative perspective. I argue that it privileges the heteronormative nuclear family and thus contributes to the social exclusion

of parents with non-normative sexual and/or gender identities (i.e. LGBTQIA+ parents) and parents in non-nuclear families (e.g. one-parent and multiple-parent families). In Chapter 6, I critique the EU PLF from a redistributive perspective to argue that it economically and socially devalues and invisibilises pregnancy and parenthood, hence contributing to a maldistribution of childcare responsibilities and financial resources between the sexes. I reconstruct the EU PLF in Chapter 7. Relying on the three normative principles I have identified to deconstruct the sexual division of labour in Chapter 3 and drawing insights from the Finnish and Swedish PLFs as current ‘best practice’ case studies of national parenting leave models which transform the sexual division of labour within the family, I devise a transformative EU parenting leave model. The transformative model deconstructs the breadwinner-caregiver dichotomy by challenging gendered parental role stereotypes, the heteronormative nuclear family by facilitating the social inclusion of non-normative parents and families, and the devaluation of pregnancy and parenthood by compensating pregnant people and parents for their socially necessary reproductive labour. By so doing, the model deconstructs the sexual division of labour within the family and subsequently facilitates substantive equality between the sexes and between groups of parents regardless of their sexual and/or gender identities and family forms. In the final chapter of this thesis, Chapter 8, I reflect on how this model deconstructs the sexual division of labour within the family to facilitate substantive equality between parents. I close the thesis by reflecting on its scope and limitations and by making recommendations for future research.

Conclusion

This is a non-empirical socio-legal thesis which is informed by feminist legal theory. In it, I make a primary original contribution to socio-legal parenting leave policy research and a secondary contribution to feminist legal theory. I critique the EU PLF against Fredman’s model of substantive equality once I have

theoretically refined it and have subsequently turned it into an analytical method for the purposes of normative critique and reconstruction of parenting leave law and policy. I demonstrate that rather than facilitating substantive equality between parents, the EU PLF perpetuates the sexual division of labour within the family which underpins sex inequality. I then devise a transformative parenting leave model for the EU which deconstructs the sexual division of labour within the family and thus facilitates substantive equality between the sexes and between parents regardless of their sexual and/or gender identity and family form. In a first step to doing so, in the next chapter, I conceptualise the European social model and trace its evolution, and the evolution of the EU PLF within it, from an equality perspective to provide the EU legal and policy context for my normative critique and reconstruction.

CHAPTER 2. THE EU PARENTING LEAVE FRAMEWORK WITHIN THE EUROPEAN SOCIAL MODEL

Reference to the EU PLF in this thesis encompasses maternity leave under the PWD¹ and paternity and parental leave under the WLBD² (Appendix 1). I locate the EU PLF within EU equality law which constitutes a key dimension of EU social policy and the European social model (ESM). I begin this chapter by conceptualising the ESM in section 2.1. I outline the EU's legal competence in social policy and highlight the tension between the economic and social dimensions of the EU, as well as the idea that the ESM enshrines certain values or norms which are shared between the EU and its Member States. In section 2.2, I then trace the evolution of the ESM's equality dimension from 1957 until 2025. Into this chronology, I embed my discussion of the development of the EU PLF. For terminological clarity, I refer to the European *Union* throughout this chapter. Similarly, except for the 1957 *Treaty Establishing the European Economic Community* (EEC Treaty)³, I refer to all treaty provisions as they exist in the current versions of the *Treaty on the European Union* (TEU)⁴ and the *Treaty on the Functioning of the European Union* (TFEU)⁵. The purpose of this chapter is to provide the legal and policy context for normatively critiquing and reconstructing the EU PLF against a feminist legal conceptualisation of substantive equality. It reveals that the EU PLF is underpinned by a normative commitment to substantive equality but conceived to support the achievement of the EU's economic objectives in practice.

¹ Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and those who have recently given birth or are breastfeeding [1992] OJ 1992 L348/1 (PWD).

² Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ 2019 L188/79 (WLBD).

³ Treaty establishing the European Economic Community [1957] (EEC Treaty).

⁴ Consolidated version of the Treaty on the European Union [2012] OJ C326/13 (TEU).

⁵ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

2.1 Conceptualising the ESM

The original *EEC Treaty* lacked specific legal basis for social policy and, driven by a market ethos enshrined in Article 100 EEC, the process of European integration initiated by the Treaty created ‘a constitutional asymmetry between policies promoting market efficiencies and policies promoting social protection and equality’⁶. I highlight this tension between the economic and social dimensions of the EU throughout this chapter. The EU’s social policy competence, both in respect of the policy areas in which the EU is authorised to act and the mode of governance, has evolved over time. In its current form, Article 151 TFEU outlines the social policy objectives of the EU: the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources to maintain high employment, and the combatting of social exclusion.⁷ To facilitate the achievement of these objectives, Article 153 TFEU then sets out the areas of social policy in which the EU has legal competence to enact hard law, such as directives.⁸ These areas of shared legislative competence include, for instance, the improvement of the working environment to protect the health and safety of workers, working conditions, social security and social protection of workers, and equality between women and men with regard to labour market opportunities and treatment at work.⁹ I highlight the evolution of EU social policy in the area of equality in section 2.2. In relation to this, however, the EU has specific competence under Article 157(3) TFEU to

adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value¹⁰.

⁶ F Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ (2002) 40(4) *JCMS* 645, 645. See EEC Treaty (n 3) art 100.

⁷ TFEU (n 5) art 151.

⁸ *ibid* art 153(2).

⁹ *ibid* art 153(1).

¹⁰ *ibid* art 157(3).

Progress within the EU's social dimension has been hindered by the EU's mode of governance which is susceptible to divergent national interests and demands of the Member States' diverse welfare systems.¹¹ It has therefore necessitated the gradual diversification of the mode of social policy governance from the Community Method to New Governance through the introduction of qualified majority voting (QMV) in 1986¹², the institutionalisation of European social dialogue in the 1990s (see section 2.2.2.2)¹³, and the introduction of the Open Method of Coordination (OMC) in the 2000s.¹⁴ In addition to hard law in the areas of social policy set out in Article 153(1) TFEU, and in place of hard law in certain policy areas under Article 156 TFEU such as employment, labour law and working conditions, and social security, the OMC entails the adoption of soft law (e.g. guidelines and indicators) to enable the EU to supervise the coordination of national social policies.¹⁵ It has facilitated the adoption and implementation of the European Employment Strategy (EES) and multiannual social policy action programmes like the Lisbon Strategy for growth and jobs and the Europe 2020 Strategy for smart, sustainable, and inclusive growth.¹⁶ It also underpins the

¹¹ Scharpf (n 6) 645; J Goetschy, 'Taking Stock of Social Europe: Is There Such a Thing as a Community Social Model?' in M Jepsen and A Serrano Pascual (eds), *Unwrapping the European Social Model* (Bristol University Press 2006), 49; C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 CLP 199, 206, 214; A Crespy, 'Social and Health Policy' in S Faure and C Lequesne (eds), *The Elgar Companion to the European Union* (Edward Elgar 2023), 271.

¹² TEU (n 4) arts 16(3)-(4).

¹³ Crespy (n 11) 271, 274-275; TFEU (n 5) arts 154-155.

¹⁴ Crespy (n 11) 271, 274-275; Scharpf (n 6). See eg J Scott and D Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8(1) ELJ 1; J Mosher and D Trubek, 'Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy' (2003) 41(1) JCMS 63; D Trubek and L Trubek, 'Social Europe: The Role of the Open Method of Co-ordination' (2005) 11(3) ELJ 343; C Lafoucriere and R Green, 'Social Dialogue as a Regulatory Mode of the ESM: Some Empirical Evidence from the New Member States' in M Jepsen and A Serrano Pascual (eds), *Unwrapping the European Social Model* (Bristol University Press 2006); M Büchs, *New Governance in European Social Policy. The Open Method of Coordination* (Palgrave Macmillan 2007).

¹⁵ Crespy (n 11) 271; TFEU (n 5) arts 153(2)(a), 156.

¹⁶ On the EES, see Commission of the European Communities, 'Taking stock of five years of the European Employment Strategy' COM (2002) 416 final. On the Lisbon Strategy, see Commission of the European Communities, 'Social Policy Agenda' COM (2000) 379 final; European

European Pillar of Social Rights (EPSR) introduced in 2017, which I discuss in greater detail in section 2.2.4.¹⁷

The EU's social dimension thus encompasses a broad range of social policy areas, instrumentalised through a combination of hard law, soft law, and policy. As such, Catherine Barnard observes that 'the resulting rules represent a patchwork of European social regulation and other policies rather than a fully-fledged social policy'¹⁸. Yet 'it is a sufficiently large body of law to enable the Commission to describe its content in terms of a European Social Model'¹⁹. This model is frequently conceptualised through the idea that it enshrines values or norms shared between the EU and its Member States.²⁰ Such a normative conception of the ESM was advanced in the Commission's 1994 White Paper on Social Policy which defined the ESM as a set of shared values, including democracy, equality of opportunity, and social welfare.²¹ This normativity is also reflected in the EU's legal foundations. Article 2 TEU sets out the EU's founding values and social goals – respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights – shared within a European

Parliament, 'Lisbon European council 23 and 24 March 2000: Presidency Conclusions', <www.europarl.europa.eu/summits/lis1_en.htm>, accessed 1.2.2022 (Lisbon Presidency Conclusions); P Copeland and D Papadimitriou (eds), *The EU's Lisbon Strategy. Evaluating Success, Understanding Failure* (Palgrave Macmillan 2012). On Europe 2020, see European Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' COM (2010) 2020 final; E Marlier, D Natali, and R van Dam (eds), *Europe 2020. Towards a More Social EU?* (PIE Peter Lang 2010).

¹⁷ European Commission, 'European Pillar of Social Rights' (Publications Office of the European Union 2017).

¹⁸ C Barnard, 'EU "Social" Policy from Employment Law to Labour Market Reform' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021), 695.

¹⁹ *ibid* 696.

²⁰ Barnard, 'EU Employment Law' (n 11) 200; Barnard, 'EU "Social" Policy' (n 18) 696; Crespy (n 11) 271; M Jepsen and A Serrano Pascual, 'The Concept of the ESM and Supranational Legitimacy Building' in M Jepsen and A Serrano Pascual (eds), *Unwrapping the European Social Model* (Bristol University Press 2006), 26-27.

²¹ Commission of the European Communities, 'European Social Policy – A Way Forward for the Union' COM (94) 333 final, 2.

society characterised by pluralism, non-discrimination, tolerance, justice, solidarity, and sex equality.²² Article 3 TEU subsequently asserts that the promotion of the above values is one of the EU's aims.²³ To this end, it establishes an area without internal frontiers characterised by the free movement of people and an internal market aiming at the sustainable development of Europe based on economic growth, a competitive social market economy with a view to full employment and social progress, and environmental protection.²⁴ In doing so, the EU combats social exclusion and discrimination, and promotes social justice and social protection, sex equality, solidarity, and children's rights.²⁵ Moreover, Articles 8–10 of the TFEU constitute the foundation of the ESM. Article 8 TFEU reiterates the EU's commitment to the elimination of inequalities and to gender mainstreaming through the promotion of equality between the sexes in all its activities.²⁶ Article 9 TFEU provides that the EU will define and implement its policies considering the promotion of a high level of employment, guaranteeing adequate social protection, combatting social exclusion, and providing a high level of education, training, and health protection within the EU.²⁷ Article 10 TFEU sets out the EU's general objective of combatting discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation in defining and implementing its policies.²⁸ These norms are also legally binding through the EU Charter of Fundamental Rights (section 2.2.3).²⁹

Further to its normative conceptualisation, the ESM has often been presented as a political alternative to American market-oriented capitalism, distinguished from it by the inseparability of economic and social objectives in EU law and

²² TEU (n 4) art 2.

²³ *ibid* art 3(1).

²⁴ *ibid* arts 3(2)-(3).

²⁵ *ibid* art 3(3).

²⁶ TFEU (n 5) art 8.

²⁷ *ibid* art 9.

²⁸ *ibid* art 10.

²⁹ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter).

policy.³⁰ Yet ‘there is a consensus among scholars in various disciplines including law, political economy, public policy and political theory that the EU is exhibiting a social deficit’³¹. While some view that the incremental development of EU social policy competences has met market-making with market-correcting, others posit that the operationalisation of EU social policy through economic policy renders it ineffective and irrelevant, or indeed that the subjection of social policy to economic policy means that ‘Social Europe’ is designed to never be achieved.³² Social policy programmes, like the Lisbon Strategy and Europe 2020, have demonstrated how the EU has continued to address issues like social exclusion through economic objectives, particularly the pursuit of a high employment rate, and in order to enhance economic integration rather than social objectives constituting ends in themselves.³³ Therefore, as Rebecca Zahn observes and as I highlight in section 2.2:

[a]lthough the [EU’s] social policy competence, and with that the number of EU-derived social policy norms, has increased since 1957 there remains an asymmetry between European social and market integration³⁴.

³⁰ Commission of the European Communities, ‘Employment and social policies: a framework for investing in quality’ COM (2001) 313 final, 5; J Alber and N Gilbert, ‘Introduction’ in J Alber and N Gilbert (eds), *United in Diversity? Comparing Social Models in Europe and America* (Oxford University Press 2010), 10; B ter Haar and P Copeland, ‘What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy’ (2010) 16(3) ELJ 273, 280; Jepsen and Serrano Pascual (n 20) 25.

³¹ Crespy (n 11) 272.

³² *ibid* 272-274. Compare eg F Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”’ (2010) 8(2) Socio-Econ Rev 211; P Copeland and M Daly, ‘Social Europe: From “Add-On” to “Dependence-Upon” Economic Integration’ in A Crespy and G Menz (eds), *Social Policy and the Euro Crisis: Quo Vadis Social Europe* (Palgrave Macmillan 2015); KD Ewing, ‘The Death of Social Europe’ (2015) 26(1) KLJ 76; W Streeck, ‘Progressive Regression: Metamorphoses of European Social Policy’ (2019) 118 NLR 117.

³³ Crespy (n 11) 275; S Jacquot, ‘Gender Equality Policy’ in S Faure and C Lequesne (eds), *The Elgar Companion to the European Union* (Edward Elgar 2023), 289; Jepsen and Serrano Pascual (n 20) 30; G Menz, ‘Whatever Happened to Social Europe? The Three-Pronged Attack on Social Policy’ in A Crespy and G Menz (eds), *Social Policy and the Euro Crisis: Quo Vadis Social Europe* (Palgrave Macmillan 2015), 47; Scharpf (n 6) 646-647, 654; ter Haar and Copeland (n 30) 288. See eg COM (2000) 379 final (n 16) 21; COM (2010) 2020 final (n 16) 4.

³⁴ R Zahn, ‘What Future for the European Social Model? The Relevance of Early Intellectual Concepts of Social Integration’ (2020) 7(2) JICL 351, 352.

2.2 The ESM, Equality Law, and the EU PLF

In this section, I trace the evolution of the equality dimension of the ESM chronologically, highlighting the shift in policy rhetoric from the economic to the social and the tension between these dimensions of EU law and policy. I locate the EU PLF within the equality dimension of the ESM. I therefore embed discussion of its development into my chronology to articulate the relevance of the equality dimension of the ESM to this thesis and to provide an account of the social policy objectives and legal responses underlying the EU PLF. To these ends – in addition to academic literature – I refer to the policy and legislative documents, and final text, of the Directives that have constituted the EU PLF over time: the PWD, the WLBD, and the two repealed *Parental Leave Directives* (PLDs)³⁵. To demonstrate how EU parenting leave provisions have been interpreted and applied in practice, I briefly refer to ECJ case law on the PWD and – in the absence of ECJ jurisprudence on the WLBD at the time of writing – the PLDs. I offer detailed analysis of cases which I identify to concern the sexual division of labour between parents and to convey the status the ECJ affords to pregnancy and parenthood in Chapters 4-6.

2.2.1 The EEC Treaty and the Beginnings of EU Equality Law

While the *EEC Treaty* lacked legal basis for EU social policy, it enshrined the principle of equal pay between women and men under Article 119 EEC.³⁶ Although sex equality is commonly cited as the EU's founding value, adoption of

³⁵ Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ 1996 L145/4 (Parental Leave Directive 1996, PLD); Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by Business Europe, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ 2010 L68/13 (Parental Leave Directive 2010, PLD).

³⁶ C Barnard and S Deakin, 'Social Policy and Labour Market Regulation' in E Jones, A Menon, and S Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012), 543; EEC Treaty (n 3) art 119; Zahn (n 34) 362-363.

the equal pay principle was not equality-driven but rather justified to prevent distortion of competition within the common market.³⁷ EU action in the realm of social policy thus had an economic objective from the beginning.³⁸ Social policy progress at the EU level remained slow until the adoption of the 1974 Social Action Programme against the backdrop of late-1960s social unrest in Western Europe and the first enlargement of the EU in 1973.³⁹ To give the EU ‘a human face’⁴⁰ – conveying that it was tackling the social consequences of economic integration – the Programme pursued full employment and improved living and working conditions.⁴¹ To attain full employment, it set out to achieve equality between the sexes with regard to access to employment and vocational training and working conditions, including pay.⁴² It consequently led to the prohibition of discrimination on grounds of sex in EU law through the adoption of the *Equal Pay Directive*⁴³ which consolidated the principle of equal pay between the sexes and the *Equal Treatment Directive*⁴⁴ (ETD) which implemented the principle of equal treatment of women and men in access to employment, vocational training and promotion, and working conditions.⁴⁵

It is this equality dimension of early EU social policy which can reasonably be said to have been market-correcting, not only market-making.⁴⁶ Beyond the

³⁷ Barnard and Deakin (n 36) 543; Jacquot, ‘Gender Equality Policy’ (n 33) 285.

³⁸ Crespy (n 11) 274.

³⁹ Barnard, ‘EU “Social” Policy’ (n 18) 683; B Bercusson, *European Labour Law* (Cambridge University Press 2009), 108; Zahn (n 34) 363–364.

⁴⁰ Barnard, ‘EU “Social” Policy’ (n 18) 683.

⁴¹ Bercusson (n 39) 108–109, 266; Zahn (n 34) 364.

⁴² Council of the European Communities, ‘Council Resolution of 21 January 1974 concerning a social action programme’ [1974] OJ C13/1, 3.

⁴³ Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ 1975 L45/19.

⁴⁴ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ 1976 L39/40.

⁴⁵ Bercusson (n 39) 16; Goetschy (n 11) 51.

⁴⁶ Barnard, ‘EU “Social” Policy’ (n 18) 682.

adoption of sex equality legislation, the ECJ engaged in considerable judicial activism in developing the law, as illustrated by the *Defrenne* cases.⁴⁷ In *Defrenne (No. 2)*, the ECJ recognised that equal pay – and thus sex equality – constitutes a legitimate social objective of the EU by facilitating the improvement of living and working conditions.⁴⁸ Its aim is therefore both economic and social, illustrating that the EU is ‘not merely an economic union’⁴⁹. In *Defrenne (No. 3)*, the ECJ declared sex equality a fundamental right.⁵⁰ This reasoning was consolidated in *Schröder* where the ECJ confirmed that the economic aim of the equal pay principle is secondary to its social aim.⁵¹ Whereas the ECJ had refrained from widening the scope of the equal pay principle in *Defrenne (No. 3)*, its subsequent jurisprudence extended it to equality at work and in social security.⁵² Over time, the ECJ has further extended the scope of the equal treatment principle to, for instance, pregnant women in *Dekker*⁵³ and gender reassignment in *P v S*⁵⁴. Evolution of the equal pay and equal treatment principles within the EU legal order illustrates the emergence of an overlap between equality law and labour law which, on my reading of the ESM, is characteristic to the EU’s social dimension. That the principle of sex equality remained confined to the employment realm reflected the legal basis for adopting EU legislation under

⁴⁷ Barnard and Deakin (n 36) 542, 544; Case 43/75 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* (No. 2) [1976] ECR 455, paras 2-3; Case 149/77 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* (No. 3) [1978] ECR 1365, paras 2-3; Goetschy (n 11) 51.

⁴⁸ Barnard and Deakin (n 36) 543-544; *Defrenne (No. 2)* (n 47) paras 8-10.

⁴⁹ *Defrenne (No. 2)* (n 47) para 10.

⁵⁰ Barnard and Deakin (n 36) 544; *Defrenne (No. 3)* (n 47) paras 26-27.

⁵¹ C-50/96 *Deutsche Telekom v Schröder* [2000] ECR I-743, para 57.

⁵² *Defrenne (No. 3)* (n 47) paras 19-20; Goetschy (n 11) 51. See eg Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, para 17; C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889, paras 25-28; Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ 1979 L6/24; Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ 1986 L225/40.

⁵³ C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus* [1990] ECR I-3941.

⁵⁴ C-13/94 *P v S and Cornwall CC* [1996] ECR I-2143.

Article 100 EEC, which made legislating contingent on its necessity for ensuring the functioning of the common market.

2.2.2 Sex Equality and Health and Safety: The Mainstays of EU Social Policy

Whereas EU law and policy had thus far emphasised economic integration, the late-1980s signalled the recognition that economic integration must be accompanied by social integration.⁵⁵ The incorporation of a set of social rights in the 1989 Community Charter of Fundamental Social Rights of Workers constituted a symbolic declaration of the principles underlying EU social policy, like equal treatment and equal opportunities for women and men and the protection of health and safety at work.⁵⁶ The latter had been established as a prominent area of EU labour law by the 1986 *Single European Act* which had authorised the Council of the EU (the Council) to act on QMV to adopt measures improving the health and safety of workers despite opposition from one or more Member States, leading to the introduction of the *Health and Safety Directive*.⁵⁷ The Community Charter's social rights content was to be implemented under the 1989 Social Action Programme.⁵⁸ In it, among other legislative initiatives, the Commission called for an agreement to be reached in the Council on its 1983 proposal for a directive on parental leave (section 2.2.2.2) and proposed the introduction of a directive protecting pregnant women at work (section 2.2.2.1)

⁵⁵ Crespy (n 11) 274-275.

⁵⁶ Bercusson (n 39) 140; Commission of the European Communities, 'Community Charter of the Fundamental Social Rights of Workers' (Publications Office of the European Union 1990); Goetschy (n 11) 53.

⁵⁷ Barnard, 'EU "Social" Policy' (n 18) 683; Barnard and Deakin (n 36) 545; Bercusson (n 39) 124; EEC Treaty (n 3) art 118a; Goetschy (n 11) 51. See Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ 1989 L183/1 (Health and Safety Directive).

⁵⁸ Commission of the European Communities, 'Communication from the Commission concerning its Action Programme relating to the implementation of the Community Charter of Basic Social Rights for Workers' COM (89) 568 final, 3.

to improve equal treatment for women and men.⁵⁹ Their introduction was subsequently facilitated by the 1992 *Treaty of Maastricht* and its accompanying Social Policy Protocol and Social Policy Agreement which extended the legal scope of EU social policy to the promotion of employment, improvement of living and working conditions, social protection, dialogue between management and labour, development of human resources, and combatting social exclusion.⁶⁰ To these ends, the Council was authorised to act on QMV on improving the working environment and working conditions to protect health and safety, information and consultation of workers, equality between the sexes with regard to labour market opportunities and treatment at work, and integration of persons excluded from the labour market.⁶¹ Sex equality and health and safety at work continued to ‘dominate the corpus of social legislation’⁶² at the EU level, constituting over 75% of EU labour law in the 1990s.⁶³ The emerging EU PLF locates in this nexus between equality and employment within the EU’s social dimension: the PWD and the first PLD derive from the Commission’s 1989 initiatives on equal treatment between the sexes in employment, although the former employs health and safety as its legal basis.

2.2.2.1 The PWD

The Commission had observed in the Social Action Programme that measures seeking to protect workers’ health and safety had not sufficiently addressed occupational risks to pregnant workers.⁶⁴ In 1990, it thus proposed a directive for

⁵⁹ *ibid* 35-37.

⁶⁰ Bercusson (n 39) 143; EEC (n 3) art 117. See also Council Directive 93/104/EC concerning certain aspects of the organisation of working time [1993] OJ 1993 L307/18; Council Directive 97/81/EC concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC [1997] OJ 1998 L14/9; Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ 1999 L175/43.

⁶¹ Bercusson (n 39) 143-144; EEC (n 3) art 118

⁶² Goetschy (n 11) 59.

⁶³ Bercusson (n 39) 79.

⁶⁴ COM (89) 568 final (n 58) 36-37.

the protection of the health and safety of pregnant workers and workers who have recently given birth, arguing fatigue, ergonomic difficulties, and the ‘delicate’ postpartum condition to render these workers a risk group entitled to protection.⁶⁵ Pursuant to Article 16(1) of the *Health and Safety Directive* – which authorised the Council to adopt additional directives on health- and safety-related topics – the legal basis of the PWD is found in Article 153(1)(a) TFEU.⁶⁶ It was initially conceived under the equal pay provision, but was changed to health and safety to allow the Council to surpass the unanimity requirement and adopt the PWD by QMV despite opposition from the United Kingdom (UK).⁶⁷ It is, however, without prejudice to the equal treatment principle: pregnancy and maternity constitute justified derogations from the principle, whereby measures protecting workers’ health and safety on these grounds should not disadvantage them in the labour market.⁶⁸ As such, the PWD prohibits dismissal on grounds of pregnancy and during maternity leave, and entitles workers to return to their jobs following maternity leave and to retain employment rights they had prior to leave or would have acquired during it.⁶⁹ It also protects workers in the risk groups against various work-related hazards and night work, which I do not discuss further in this thesis.⁷⁰

⁶⁵ Commission of the European Communities, ‘Proposal for a Council Directive concerning the protection at work of pregnant women or women who have recently given birth’ COM (90) 406 final, recitals (10)-(12).

⁶⁶ Health and Safety Directive (n 57) art 16(1); TFEU (n 5) art 153(1)(a).

⁶⁷ R Guerrina, ‘Mothering in Europe. Feminist Critique of European Policies on Motherhood and Employment’ (2002) 9(1) *Eur J Women’s Stud* 49, 56; C Fagan and J Rubery, ‘Advancing Gender Equality through European Employment Policy: The Impact of the UK’s EU Membership and the Risks of Brexit’ (2018) 17(2) *Soc Policy Soc* 297, 300.

⁶⁸ COM (90) 406 final (n 65) recital (21).

⁶⁹ PWD (n 1) arts 10(1), 11(2)(a).

⁷⁰ *ibid* arts 3-7. For ECJ case law on work-related hazards, see eg C-471/08 *Sanna Maria Parviainen v Finnair Oyj* [2010] ECR I-06533; C-531/15 *Elda Otero Ramos v Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social* ECLI:EU:C:2017:789. On night work, see eg C-13/93 *Office National de l’Emploi v Madeleine Minne* [1994] ECR I-00371; C-421/92 *Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb.Opf. e.V.* [1994] ECR I-01657.

The PWD entitles workers falling within its scope to a paid maternity leave of at least 14 continuous weeks, of which two weeks are compulsory around the time of birth.⁷¹ Its scope was extended from pregnant workers and workers who have recently given birth to also include workers who are breastfeeding.⁷² The ECJ has subsequently clarified that the PWD does not extend to female workers undergoing IVF before embryo transfer in *Mayr*⁷³, or to commissioning mothers in surrogacy arrangements in *CD v ST*⁷⁴ and *Z v A Government Department*⁷⁵ (Chapters 4-5). Rather than the proposed full pay, the PWD sets income replacement level at national sick pay.⁷⁶ Its dilution to this minimum standard reveals how the adopted text is ‘a compromise in favour of economic rather than social integration’⁷⁷. The ECJ has actively upheld these minimum standards of protection in light of what it had perceived to be the purpose of maternity leave in a 1984 case preceding the PWD, *Hofmann*: the protection of women’s biological condition during pregnancy and maternity *and* of the special relationship between a woman and her child by relieving the multiple burdens of motherhood and employment.⁷⁸ The line of ECJ jurisprudence on the purpose of maternity leave from *Hofmann* to a recent case of *Syndicat*⁷⁹ is itself of interest in this thesis because it demonstrates how the ECJ conceives parental roles and equality

⁷¹ PWD (n 1) arts 1(1), 8. For self-employed workers, see Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity [2010] OJ 2010 L180/1.

⁷² Commission of the European Communities, ‘Amendment to the proposal for a Council Directive concerning measures to encourage improvements in the safety and health of pregnant workers, women workers who have recently given birth and women who are breastfeeding’ OJ 1991 25/9, 9; European Parliament, ‘First reading opinion on Proposal for a Council directive concerning the protection at work of pregnant women or women who have recently given birth’ OJ 1991 C19/165, 165, 169.

⁷³ C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017, paras 41–42.

⁷⁴ C-167/12 *CD v ST* [2014] ECLI:EU:C:2014:169, para 47.

⁷⁵ C-363/12 *Z v A Government Department, The Board of Management of a Community School* [2014] ECLI:EU:C:2014:159, paras 54-55.

⁷⁶ PWD (n 1) arts 11(2)(b), 11(3).

⁷⁷ Guerrina, ‘Mothering in Europe’ (n 67) 56.

⁷⁸ Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECLI:EU:C:1984:273, para 25.

⁷⁹ C-463/19 *Syndicat CFTC v CPAM de Moselle and Others* ECLI:EU:C:2020:93.

between parents and reveals the normative underpinnings of parenting leave under EU law, which I interrogate in Chapters 4-6. Here, I highlight ECJ case law on the PWD on two recurring themes – the relationship of maternity leave to sick leave and parental leave; and the entitlement to and scope of maternity pay – to offer some demonstration of the scope of the minimum requirements for maternity leave in EU law.

In a case preceding the PWD, the ECJ had posited that

it is for every Member State to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur⁸⁰.

Maternity leave, per *Boyle*⁸¹, may hence be backdated to the beginning of a pregnancy-related period of paid sick leave during which the worker gives birth, or to six weeks before the due-date, whichever is later.⁸² It is, in principle, continuous and cannot be interrupted.⁸³ However, a worker who takes sick leave during maternity leave cannot be deprived of the right to resume the period of maternity leave which was left of the 14-week entitlement when the sick leave started without compromising the PWD's protective purpose.⁸⁴ Notably, however, whereas a worker cannot be forced to renounce their maternity leave, they may choose to renounce the non-compulsory period under national law, as held in *Betriu Montull*.⁸⁵ Moreover, in *TSN*⁸⁶ the ECJ confirmed the basic principle

⁸⁰ C-179/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3979, para 15.

⁸¹ C-411/96 *Margaret Boyle and Others v Equal Opportunities Commission* [1998] ECR I-6491.

⁸² *ibid* para 54.

⁸³ *ibid* para 59.

⁸⁴ *ibid* paras 59–61, 65–66.

⁸⁵ C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social* ECLI:EU:C:2013:571, paras 56–58.

⁸⁶ Joined cases C-512/11 and C-513/11 *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Terveyspalvelualan Liitto ry and Ylemmät Toimihenkilöt (YTN) ry v Teknologiateollisuus ry and Nokia Siemens Networks Oy (TSN)* ECLI:EU:C:2014:73.

articulated in *Kiiski*⁸⁷ that ‘a period of leave guaranteed by [EU] law cannot affect the right to take another period of leave guaranteed by that law’⁸⁸. Exercising the right to parental leave must not negatively affect the right to or conditions on which workers can exercise their right to maternity leave, including the right to maternity pay.⁸⁹ This is because ‘a new pregnancy is not always foreseeable’⁹⁰. If the purpose of maternity leave is to help the worker avoid multiple burdens, such as caring for a child during parental leave while heavily pregnant, the worker should be able to alter the duration of parental leave to avoid this burden.⁹¹

The protective purpose of the PWD would similarly be jeopardised if maternity leave was not accompanied by an adequate allowance (Chapter 6).⁹² The ECJ clarified the meaning of this in *Boyle and Gillespie*⁹³. While the PWD does not entitle the worker to full pay during maternity leave, it does entitle them to any pay rise awarded before or during maternity leave to avoid discrimination against female workers.⁹⁴ An employer’s maternity pay which surpasses statutory maternity pay but is conditional on the worker demonstrating their intention to return to work and imposes liability for repaying the difference between the levels of pay should they not do so, is compatible with the PWD as long as the level of pay meets the national sick pay minimum threshold.⁹⁵ Moreover, the PWD provides that entitlement to maternity pay under national law may be made subject to a period of employment qualification, as long as this does not exceed

⁸⁷ C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-7643.

⁸⁸ *ibid* para 56.

⁸⁹ *TSN* (n 86) paras 48, 52.

⁹⁰ *ibid* para 50.

⁹¹ *Kiiski* (n 87) paras 50–51.

⁹² PWD (n 1) recital (17).

⁹³ C-342/93 *Joan Gillespie and Others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996] ECR I-475.

⁹⁴ *ibid* paras 19–22.

⁹⁵ *Boyle* (n 81) paras 19, 36, 44.

12 months prior to the estimated due-date.⁹⁶ The scope of this was clarified in *Rosselle*: any such qualification cannot be limited to the employment ongoing prior to the estimated due-date but must account for successive periods of employment, including for different employers and under different employment statuses.⁹⁷ To limit it would again undermine the minimum level of protection afforded under the PWD.⁹⁸

2.2.2.2 The First PLD

Influenced by the cases of *Hofmann*⁹⁹ and *Commission v Italy*¹⁰⁰ in which it had acknowledged the role of fathers in childcare, the Commission had first proposed parental leave legislation as part of its 1982-1985 Action Programme on Equal Opportunities for Women to encourage gender-equal sharing of family responsibilities and support changing attitudes about gender roles within the family.¹⁰¹ Because the Council could not reach unanimity on the proposal, it had been set aside until a compromise proposal was introduced in 1993.¹⁰² The UK,

⁹⁶ PWD (n 1) art 11(4).

⁹⁷ C-65/14 *Charlotte Rosselle v Institut national d'assurance maladie-invalidité (INAMI) and Union nationale des mutualités libres (UNM)* [2015] ECLI:EU:C:2015:339, paras 38–41.

⁹⁸ *ibid* paras 45–46.

⁹⁹ *Hofmann* (n 78) para 23.

¹⁰⁰ Case 163/82 *Commission of the European Communities v Italian Republic* [1984] 3 CMLR 169, paras 11, 16-17.

¹⁰¹ Commission of the European Communities, 'A New Community Action Programme on the Promotion of Equal Opportunities for Women 1982-85' COM (81) 758 final, 19; Commission of the European Communities, 'Proposal for a Council Directive on parental leave and leave for family reasons' COM (83) 686 final; G Falkner, O Treib, M Hartlapp, and S Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press 2005), 148; M Weldon-Johns, 'EU Work-Family Policies – Challenging Parental Roles or Reinforcing Gendered Stereotypes?' (2013) 19(5) ELJ 662, 666-667.

¹⁰² Commission of the European Communities, 'Parental Leave: A Brief History' MEMO/95/171, <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_95_171>, accessed 21.2.2022; Falkner et al (n 101) 143-144; B Fusulier, 'The European Directive: Making Supra-National Parental Leave Policy' in S Kamerman and P Moss (eds), *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Policy Press 2011), 249-250; Weldon-Johns (n 101) 666-667.

however, vetoed this revised proposal.¹⁰³ In its 1994 White Paper on Social Policy, the Commission hence renewed its commitment to adopting a parental leave directive through European social dialogue in accordance with the procedure set out in Articles 154-155 TFEU.¹⁰⁴ Rather than the transformation of gender roles, however, it now framed parental leave through the objective of increasing women's employment rate to facilitate economic growth.¹⁰⁵ As Sophie Jacquot observes, gender equality had become a carrier for the EU's economic policy priorities in the mid-1990s.¹⁰⁶

Following negotiations between European social partners, the Framework Agreement on Parental Leave was adopted and enforced in the PLD in 1996.¹⁰⁷ The Agreement put down minimum requirements on parental leave: an individual right to at least three months of parental leave following the birth or adoption of a child, to be taken any time before the child's eighth birthday.¹⁰⁸ Like maternity leave, parental leave was job-protected.¹⁰⁹ The Agreement deferred the details on income replacement level, conditions of access to leave, and leave flexibility to the Member States.¹¹⁰ The ECJ subsequently clarified the scope of Member States' discretion with regard to the PLD. For instance, in *Maistrellis*, it held that Member States cannot make one parent's parental leave conditional on the other

¹⁰³ Falkner et al (n 101) 144; Commission of the European Communities, 'Parental Leave: A Brief History' (n 102).

¹⁰⁴ COM (94) 333 final (n 21) 22; TFEU (n 5) arts 154-155.

¹⁰⁵ COM (94) 333 final (n 21) 22, 33; Jacquot, 'Gender Equality Policy' (n 33) 287.

¹⁰⁶ Jacquot, 'Gender Equality Policy' (n 33) 287.

¹⁰⁷ Commission of the European Communities, 'Proposal for a Council Directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC' COM (96) 26 final, 7-8; PLD 1996 (n 35) arts 1-2.

¹⁰⁸ PLD 1996 (n 35) annex, clauses 2.1-2.2.

¹⁰⁹ *ibid* clauses 2.4-2.6. For ECJ case law, see eg C-333/97 *Susanne Lewen v Lothar Denda* [1999] ECR I-7243; C-7/12 *Nadežda Riežniece v Zemkopības ministrija and Lauku atbalsta dienests* ECLI:EU:C:2013:410; C-174/16 *H v Land Berlin* ECLI:EU:C:2017:637.

¹¹⁰ PLD 1996 (n 35) annex, clause 2.3. For ECJ case law, see eg *Lewen* (n 109); C-537/07 *Evangelina Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) and Alcampo SA* [2009] ECR I-06525.

parent's employment status: because the situation of male and female parents is comparable with regard to the need to care for their children, this would be discriminatory against one parent.¹¹¹

2.2.3 Consolidating Commitment to (Sex) Equality and Fundamental Rights

The 1997 *Amsterdam Treaty* further consolidated the position of equality as a value in EU law. Whereas sex equality had not previously been an explicit objective of the EU – rather measures had to relate to the establishment or functioning of the common market under Article 153 TFEU – Amsterdam made sex equality a legal basis in itself next to the equal pay provision under Article 157 TFEU.¹¹² Furthermore, it introduced the principle of gender mainstreaming under Article 8 TFEU which entails

the integration of the gender perspective into every stage of the policy process (design, implementation, monitoring and evaluation) to promote equality between men and women¹¹³.

As such, the EU began to incorporate sex equality into its multiannual social policy programmes.¹¹⁴ The Lisbon Strategy committed, for instance, to 'promot[ing] full participation of women in economic, scientific, social, political and civic life as a key component of democracy'¹¹⁵. Importantly, the *Amsterdam Treaty* also introduced Article 19 TFEU which established the general principle of

¹¹¹ C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthroponon Dikaionaton* ECLI:EU:C:2015:473, paras 17–19, 35–36, 41, 47.

¹¹² Bercusson (n 39) 340–341; TFEU (n 5) art 157(3).

¹¹³ L Mósesdóttir, 'The European Social Model and Gender Equality' in M Jepsen and A Serrano Pascual (eds), *Unwrapping the European Social Model* (Bristol University Press 2006), 149; TFEU (n 5) art 8. See eg R Cavaghan, *Making Gender Equality Happen: Knowledge, Change and Resistance in EU Gender Mainstreaming* (Routledge 2017); R Guerrina, 'From Amsterdam to Lisbon and Beyond: Reflections on Twenty Years of Gender Mainstreaming in the EU' in B Vanhercke, D Ghailani, S Spasova, and P Pochet (eds), *Social Policy in the European Union 1999-2019: The Long and Winding Road* (ETUI 2020).

¹¹⁴ Jacquot, 'Gender Equality Policy' (n 33) 289.

¹¹⁵ COM (2000) 379 final (n 16) 21.

equal treatment in employment by extending the legally enforceable grounds of discrimination under EU law beyond sex also to racial or ethnic origin, religion or belief, disability, age, or sexual orientation.¹¹⁶ This subsequently led to the adoption of the *Racial Equality Directive*¹¹⁷ prohibiting discrimination on the grounds of racial or ethnic origin and the *Employment Equality Directive*¹¹⁸ prohibiting discrimination on the grounds of religion or belief, disability, age, or sexual orientation in employment and occupation.

The 2001 *Nice Treaty* proclaimed the *EU Charter of Fundamental Rights* which attributes the same fundamental rights status to social and economic rights as it does to civil and political rights.¹¹⁹ The EU Charter safeguards the EU's normative values and supports the objectives and processes of EU social policy, becoming legally binding in 2009 with the enforcement of the *Lisbon Treaty*.¹²⁰ It, for instance, affords legal, economic, and social protection to the family and therefore entails the right to protection from dismissal on the ground of maternity and the right to paid maternity leave and parental or adoption leave to support work-family reconciliation.¹²¹ Following its introduction, discrimination is prohibited in the EU on at least 14 grounds.¹²² Of these, sex has remained 'the

¹¹⁶ Bercusson (n 39) 342; B Braams, 'Equal Opportunities between Men and Women and Gender Mainstreaming under the European Employment Strategy (EES) and the Open Method of Coordination (OMC) – A New Policy Approach to Combat Gender Discrimination?' (2007) 11 *Eur Integr Online Pa* 1, 8; TFEU (n 5) art 19; S Vanhoonacker, 'The Treaty of Amsterdam' in E Jones, A Menon, and S Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012), 139.

¹¹⁷ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ 2000 L180/22.

¹¹⁸ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ 2000 L303/16.

¹¹⁹ Bercusson (n 39) 215; TEU (n 4) art 6.

¹²⁰ EU Charter (n 29) arts 31, 34; J Piris, *The Lisbon Treaty. A Legal and Policy Analysis* (Cambridge University Press 2010), 148, 159.

¹²¹ EU Charter (n 29) art 33.

¹²² *ibid* art 21; TFEU (n 5) art 10.

mainstay of EU social policy'¹²³. In 2006, EU sex equality legislation was consolidated in the *Recast Directive* (RD) which ensures the implementation of the principle of equal opportunities and equal treatment of women and men in relation to access to employment and vocational training, working conditions, and occupational social security schemes.¹²⁴ In a departure from the EU's traditionally formal conception of equality grounded in the equal treatment principle, the RD consolidated the EU's normative commitment to 'full equality in practice'¹²⁵. This pursuit of 'substantive, rather than formal, equality by reducing de facto inequalities which may arise in society'¹²⁶ now constitutes an explicit objective of EU law. As such, the RD protects women's employment rights upon return from maternity leave and extends this protection to fathers and adoptive parents where rights to paternity leave and/or adoption leave are recognised in national law.¹²⁷

Neither the PWD nor the PLD fell within the scope of the RD: the former because its legal basis lies in health and safety, the latter due to its grounding in a social partner agreement.¹²⁸ In its Roadmap for Equality between Women and Men 2006-2010, the Commission, however, envisioned that improvements to parental leave would bridge the gender employment gap and facilitate work-family

¹²³ Barnard and Deakin (n 36) 544.

¹²⁴ Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast) [2006] OJ 2006 L204/23 (Recast Directive, RD), arts 1, 4–5, 14, 34.

¹²⁵ *ibid* art 3.

¹²⁶ C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR I-5539, para 48; C-319/03 *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice* [2004] ECR I-8807, para 25; C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-08661, para 34. For an overview of the shift from formal to substantive equality in the EU, see eg R Xenidis, 'Transforming EU Equality Law? On Disruptive Narratives and False Dichotomies' (2019) 38(1) YEL 2; M de Vos, 'The European Court of Justice and the March Towards Substantive Equality in European Union Anti-Discrimination Law' (2020) 20(1) IJDL 62.

¹²⁷ RD (n 124) arts 15–16.

¹²⁸ A Masselot, 'The State of Gender Equality Law in the European Union' (2007) 13(2) ELJ 152, 162.

reconciliation of both sexes.¹²⁹ To encourage action at both EU and national level, the Council agreed the European Pact for Gender Equality, with the Commission initiating consultation of the European social partners on work-family reconciliation in 2006.¹³⁰ While the social partners subsequently initiated negotiations for revising the Framework Agreement on Parental Leave (section 2.2.3.2), the Commission pursued reform of the PWD (section 2.2.3.1).¹³¹ Before discussing the reform initiatives, I note that the European Pact for Gender Equality underpinning them was renewed in 2011 to address barriers to women's labour market participation, such as gendered stereotypes and segregation in employment and education, in order to reach the 75% female employment target set out in the Europe 2020 Strategy.¹³² It also committed to enhancing work-family reconciliation by overcoming women's concentration in part-time work and difficulties reintegrating to the labour market following pregnancy- and childcare-related absences through the provision of flexible working arrangements, parental leave, and adequate and affordable childcare services.¹³³ As such, much like the Lisbon Strategy and Europe 2020 itself, it illustrates how the EU has normatively reformulated social issues like sex inequality as being caused by economic inactivity, thus effectively constructing them as obstacles to the optimal functioning of the EU economy and depoliticising them by obscuring the underlying structural imbalances of power.¹³⁴

¹²⁹ Commission of the European Communities, 'A Roadmap for equality between women and men 2006-2010' COM (2006) 92 final, 5-6, 16.

¹³⁰ Council of the European Union, 'Council conclusions of 23-24 March 2006' 7775/1/06 REV 1, para 40, annex II; Commission of the European Communities, 'First stage consultation of European social partners on reconciliation of professional, private and family life' SEC (2006) 1245.

¹³¹ Commission of the European Communities, 'A Better Work-Life Balance: Stronger Support for Reconciling Professional, Private and Family Life' (Communication) COM (2008) 635 final, 6.

¹³² COM (2010) 2020 final (n 16) 16; Council of the European Union, 'Council conclusions of 7 March 2011 on European Pact for Gender Equality 2011-2020' [2011] OJ C115/155.

¹³³ Council of the European Union, 'Council conclusions of 7 March 2011' (n 132) annex.

¹³⁴ Menz (n 33) 52.

2.2.3.1 The Failed PWD Reform

The Commission introduced a proposal for reforming the outdated PWD in its 2008 Work Programme.¹³⁵ Its objectives were two-fold: improving the level of protection afforded to pregnant workers and supporting better work-family reconciliation.¹³⁶ It therefore proposed to increase the duration of maternity leave to 18 weeks, with six weeks compulsory after childbirth in accordance with the International Labour Organisation's (ILO) Maternity Protection Recommendation.¹³⁷ While protecting workers' health and safety, this was envisioned to support the formation of a mother-child relationship, ensure a longer period of breastfeeding, and facilitate easier return to work which in turn was envisaged to reduce women's recourse to parental leave, hence providing employers more certainty as to the duration of women's childbirth-related absences.¹³⁸ To minimise the financial loss associated with having a child, the income replacement level was to be increased to full pay – a reasonable standard because most Member States already set it anywhere between 80% and full pay.¹³⁹ Moreover, the proposal amended the PWD's legal basis to include sex equality under Article 157 TFEU.¹⁴⁰ It thus acknowledged that in addition to health

¹³⁵ Commission of the European Communities, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding' COM (2008) 637 final, 2, 4.

¹³⁶ *ibid* 2.

¹³⁷ *ibid* recital (9), art 1(1); ILO, Maternity Protection Recommendation (2000) R191, clause 1(1).

¹³⁸ COM (2008) 637 final (n 135) recital (9), art 1(1); Commission of the European Communities, 'Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding' (Impact Assessment Report) SEC (2008) 2596, 36.

¹³⁹ COM (2008) 637 final (n 135) recital (10), art 1(3)(c); ILO, Maternity Protection Recommendation (n 137) clause 2; SEC (2008) 2596 (n 138) 31–32.

¹⁴⁰ COM (2008) 637 final (n 135) 6; P Foubert and Š Imamović, 'The Pregnant Workers Directive: Must Do Better. Lessons to be Learned from Strasbourg?' (2015) 37(3) JSWFL 309, 309.

and safety protection, maternity leave embodies an intrinsic sex equality dimension.¹⁴¹

The proposal faced legislative deadlock in 2011 due to lack of consensus between the European Parliament (EP) and the Council on the former's position which had involved the further extension of maternity leave to 20 weeks, accommodations for stillbirth and multiple births, and time away for breastfeeding.¹⁴² The Council questioned whether these amendments represented minimum standards and respected national diversity under Article 3(3) TEU and the subsidiarity and proportionality principles under Article 5 TEU.¹⁴³ Moreover, the EP had appealed to the proposal's dual legal basis to propose a compulsory two-week paternity leave for the mother's partner immediately following a child's birth and adoption leave for adoptive parents.¹⁴⁴ The Council highlighted the inappropriateness of incorporating paternity leave within the PWD because its purpose is to improve the health and safety of the risk group,

¹⁴¹ COM (2008) 637 final (n 135) 6; Foubert and Imamović (n 140) 310.

¹⁴² European Commission, 'Delivering for parents: Commission withdraws stalled maternity leave proposal and paves the way for a fresh approach' (press release 1.7.2015), <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5287>, accessed 11.10.2021; European Parliament, 'Position of the European Parliament adopted at first reading on 20 October 2010 with a view to the adoption of Directive 2011/.../EU of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and on the introduction of measures to support workers in balancing work and family life' P7_TC1_COD(2008)0193 ('First Reading Position on PWD Reform'), arts 1(8), 1(12). The UK, Germany, the Netherlands, Hungary, Sweden, Malta, Latvia, and Ireland formed the blocking minority.

¹⁴³ Council of the European Union, 'Press Release on the 3053rd Council meeting: Employment, Social Policy, Health and Consumer Affairs, 6 and 7 December 2010' PRES/2010/331, <https://ec.europa.eu/commission/presscorner/detail/en/PRES_10_331>, accessed 14.2.2022; Council of the European Union, 'Progress Report on the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding', <<https://data.consilium.europa.eu/doc/document/ST-10541-2011-INIT/en/pdf>>, accessed 15.2.2022 ('Progress Report on PWD Reform'), 5-6, 8.

¹⁴⁴ European Parliament, 'First Reading Position on PWD Reform' (n 142) arts 1(9)-(10).

not to reconcile work and family life.¹⁴⁵ That the Eurozone crisis had strengthened Member States' role in defining EU policy directions explains both the deadlock within the Council preventing legislative progress on the proposal – many Member States appealed to the financial costs it imposed on their already-weakened national economies¹⁴⁶ – and the Commission's hesitancy in the reform process.¹⁴⁷ The Commission's Work Programme for 2015 set the PWD proposal to be withdrawn and replaced with a new initiative if no agreement was reached within six months.¹⁴⁸ Although both the EP and the Council had indicated their will to re-negotiate the reform – and national maternity leave frameworks in 10 Member States already complied with the EP's position¹⁴⁹ – the Council subsequently expressed that there was no prospect for consensus between the legislators.¹⁵⁰ The Commission withdrew the reform proposal in 2015.¹⁵¹ In 2023, all 27 Member States met the PWD's requirement of a 14-week entitlement for

¹⁴⁵ Council of the European Union, PRES/2010/331 (n 143); Weldon-Johns (n 101) 676.

¹⁴⁶ Council of the European Union, PRES/2010/331 (n 143); Council of the European Union, 'Progress Report on PWD Reform' (n 143); P Foubert, 'Child Care Leave 2.0 – Suggestions for the Improvement of the EU Maternity and Parental Leave Directives from a Rights Perspective' (2017) 24(2) MJ 245, 246; Foubert and Imamović (n 140), 310.

¹⁴⁷ S Jacquot, 'A Policy in Crisis. The Dismantling of the EU Gender Equality Policy' in J Kantola and E Lombardo (eds), *Gender and the Economic Crisis in Europe: Politics, Institutions and Intersectionality* (Palgrave Macmillan 2017), 30-31, 37; J Kantola and Lombardo E, 'Gender and the Politics of the Economic Crisis in Europe' in J Kantola and E Lombardo (eds), *Gender and the Economic Crisis in Europe: Politics, Institutions and Intersectionality* (Palgrave Macmillan 2017), 13; A Plomien, 'EU Social and Gender Policy Beyond Brexit: Towards the European Pillar of Social Rights' (2018) 17(2) Soc Policy Soc 281, 291.

¹⁴⁸ European Commission, 'Commission Work Programme 2015: A New Start' COM (2014) 910 final, 4, annex II, 12.

¹⁴⁹ European Parliament, 'Maternity and paternity leave in the EU' ('At a Glance' infographic 2015), <[www.europarl.europa.eu/RegData/etudes/ATAG/2015/549004/EPRS_ATA\(2015\)549004_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/549004/EPRS_ATA(2015)549004_EN.pdf)>, accessed 22.3.2022, 1.

¹⁵⁰ N Busby and G James, 'Regulating Working Families in the European Union: A History of Disjointed Strategies' (2015) 37(3) JSWFL 295, 300-301; European Commission, 'Delivering for parents' (n 142).

¹⁵¹ European Commission, 'Delivering for parents' (n 142).

statutory maternity leave.¹⁵² Only Lithuania did not meet the requirement of a two-week compulsory leave around the time of birth.¹⁵³

2.2.3.2 The Second PLD

The European social partners began negotiations on revising the Framework Agreement on Parental Leave in 2008.¹⁵⁴ Because the Agreement caused the burden of combining unpaid care with paid employment to still fall disproportionately on women, the revision sought to incentivise men to take parental leave.¹⁵⁵ Although the Agreement had made parental leave non-transferable in principle, many Member States allowed some or all of one parent's entitlement to be transferred to the other parent in practice.¹⁵⁶ The Commission therefore recommended increasing the overall length of parental leave by one month, made contingent on the 'less-involved'¹⁵⁷ parent taking at least one month of leave. Moreover, the Agreement had failed to set a minimum income replacement level for parental leave whereby leave had remained low-paid or unpaid in many Member States, hence economically incentivising the lower earner – typically the mother, owing to the gender pay gap¹⁵⁸ – to take leave, subsequently causing the father to not take it.¹⁵⁹ The Commission therefore

¹⁵² European Parliament, 'Maternity and paternity leave in the EU' ('At a Glance' infographic 2023), <[www.europarl.europa.eu/RegData/etudes/ATAG/2023/739346/EPRS_ATA\(2023\)739346_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739346/EPRS_ATA(2023)739346_EN.pdf)>, accessed 13.2.2024, 1.

¹⁵³ *ibid.*

¹⁵⁴ Commission of the European Communities, 'Proposal for a Council Directive implementing the revised Framework Agreement on parental leave concluded by BUSINESS EUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC' COM (2009) 410 final, para 2.1.

¹⁵⁵ Commission of the European Communities, 'Second stage consultation of European social partners on reconciliation of professional, private and family life' SEC (2007) 571, 10-14; SEC (2008) 2596 (n 138) 53.

¹⁵⁶ S Clauwaert, 'Towards a Revised Parental Leave Framework Agreement/Directive' (2010) 16(3) *Transfer* 431, 433-434; COM (2009) 410 final (n 154) para 1.3.

¹⁵⁷ SEC (2008) 2596 (n 138) 37.

¹⁵⁸ See eg Á Oliveira, M de la Corte-Rodríguez, and F Lütz, 'The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?' (2020) 45(3) *EL Rev* 295, 299.

¹⁵⁹ SEC (2008) 2596 (n 138) 37.

recommended the adoption of a minimum income replacement level at 66%, which it had deemed to mark the threshold for well-paid leave that avoids subjecting workers to a low wage trap.¹⁶⁰ The Agreement had also allowed Member States to determine whether parental leave could be granted on a part-time or piecemeal basis which limited its flexibility, making it inaccessible to some parents, further disincentivising fathers' take-up.¹⁶¹ The Commission thus recommended the introduction of a right to flexible parental leave.¹⁶² Beyond the scope of the Framework Agreement, the Commission suggested that fathers' take-up of leave could be supported by the introduction of a ten-day paternity leave.¹⁶³

A second PLD giving legal effect to a revised Framework Agreement on Parental Leave and repealing the original PLD was adopted in 2010.¹⁶⁴ Grounded in Article 153(1)(c) TFEU on the social security and social protection of workers and Article 157(3) on the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, it sought to improve the ability of working parents to reconcile work and family life and to support the Lisbon Strategy by increasing women's labour market participation.¹⁶⁵ In line with the Commission's recommendation, the new PLD extended the minimum period of parental leave to four months per parent and made this additional month non-transferable between parents.¹⁶⁶ It still did not provide a set income replacement level for parental leave. Rather, it merely

¹⁶⁰ *ibid*; COM (2009) 410 final (n 154) para 2.3; European Commission, 'Indicators for monitoring the Employment Guidelines including indicators for additional employment analysis: 2009 compendium' <<https://ec.europa.eu/social/BlobServlet?docId=9460&langId=en>>, accessed 23.3.2022, 81.

¹⁶¹ E Caracciolo di Torella, 'An Emerging Right to Care in the EU: A "New Start to Support Work-Life Balance for Parents and Carers"' (2017) 18 ERA Forum 187, 191.

¹⁶² SEC (2008) 2596 (n 138) 39.

¹⁶³ *ibid* 41-42, 44-45.

¹⁶⁴ PLD 2010 (n 35) arts 1, 4.

¹⁶⁵ *ibid* annex, recitals (1), (2), (5), (8), clause 1(1).

¹⁶⁶ *ibid* annex, clauses 1(2), 2(1)-(2).

recommended national sick pay level compensation and encouraged Member States to consider the level of pay as a significant factor for fathers' take-up of parental leave.¹⁶⁷ Nor did it make parental leave more flexible: regulating the mode in which leave could be taken remained the responsibility of individual Member States.¹⁶⁸ With employers appealing to the Eurozone crisis to keep improvements to a minimum, changes to the previous minimum standards were limited.¹⁶⁹

2.2.4 Reviving the Social Dimension and the Emergence of Work-Life Balance Rhetoric

A 2016 report by the EP's Committee on Employment and Social Affairs had observed that through the Eurozone crisis 'the EU itself ha[d] come to be seen by many citizens as a machine for divergence, inequalities and social injustice'¹⁷⁰. Thus, to reinforce its social dimension, the EU introduced the EPSR in 2017.¹⁷¹ The EPSR comprises of twenty principles across three themes – equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion – and an Action Plan which sets out concrete objectives for their achievement.¹⁷² It is best understood as a dynamic process encompassing a range of legislative and non-legislative proposals which should be implemented at both EU and Member State level.¹⁷³ I highlight one of the first

¹⁶⁷ *ibid* annex, recitals (18)-(20), clause 5(5).

¹⁶⁸ *Ibid* annex, clauses 3(1)(a), 4.

¹⁶⁹ Jacquot, 'A Policy in Crisis' (n 147) 30.

¹⁷⁰ European Parliament, 'Report on a European Pillar of Social Rights' A8-0391/2016, <www.europarl.europa.eu/doceo/document/A-8-2016-0391_EN.pdf>, accessed 1.2.2022, 25.

¹⁷¹ Crespy (n 11) 275; Eurostat, 'Smarter, greener, more inclusive? Indicators to support the Europe 2020 Strategy' (Publications Office of the European Union 2018), para 5.1; S Garben, 'The European Pillar of Social Rights: An Assessment of Its Meaning and Significance' (2019) 21 *Camb YB Eur Leg Stud* 101, 124; Zahn (n 34) 354.

¹⁷² European Commission, 'European Pillar of Social Rights' (Publications Office of the European Union 2017) (EPSR); European Commission, 'The European Pillar of Social Rights Action Plan' (Publications Office of the European Union 2021) (EPSR Action Plan).

¹⁷³ European Commission, 'EPSR' paras 18–20; Garben (n 171) 104.

policy initiatives associated with the EPSR, the Work-Life Balance Initiative (WLBI), below. The EPSR itself is not legally binding nor are the rights and principles within it legally enforceable, although many are binding through the EU Charter.¹⁷⁴ As such, while it acknowledges that the EU's social objectives can no longer be linked to market-making, legal and policy scholars observe that it is unlikely to redress the constitutional asymmetry between the economic and the social.¹⁷⁵

Like earlier EU social policy, the EPSR demonstrates a firm commitment to equality. It calls for ensuring equality of treatment and opportunities between the sexes in all areas.¹⁷⁶ It also confirms the language of equal opportunities with regard to sex, race and ethnic origin, religion and belief, disability, age, and sexual orientation in policy areas *beyond* employment and occupation, namely social protection, education, and access to public goods and services.¹⁷⁷ To this end, the Commission is committed to progressing a 2008 proposal to extend the broader principle of equal treatment in these policy areas from sex and racial or ethnic origin also to religion or belief, disability, age, and sexual orientation.¹⁷⁸ Its 2020-2025 strategies on sex equality, anti-racism, and LGBTIQ equality similarly call for targeted policy measures to combat discrimination, emphasising the need for mainstreaming across the different grounds of non-discrimination and

¹⁷⁴ Garben (n 171) 104.

¹⁷⁵ *ibid* 110; Plomien (n 147) 292.

¹⁷⁶ European Commission, 'EPSR' (n 172) principle 2.

¹⁷⁷ *ibid* principle 3; European Commission, 'A Strong Social Europe for Just Transitions' COM (2020) 14 final, 7.

¹⁷⁸ European Commission, 'EPSR Action Plan' (n 172) 25; European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation' COM (2021) 139 final. See Commission of the European Communities, 'Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation' COM (2008) 426 final.

an intersectional approach to doing so.¹⁷⁹ They have subsequently led to the adoption of the *Pay Transparency Directive*¹⁸⁰ to strengthen the application of the equal pay principle and the Roadmap for Women's Rights¹⁸¹ which sets out policy objectives for advancing women's rights and sex equality with regard to e.g. gender-based violence and work-life balance.

2.2.4.1 The WLBD

Following the withdrawal of the PWD reform proposal, the Commission presented the WLBI in 2016.¹⁸² The WLBI sits under the EPSR's theme of 'fair working conditions' within the principle of work-life balance which entitles parents to leave, flexible working arrangements, and access to care services for the purpose of fulfilling care responsibilities and encouraging their more gender-balanced sharing.¹⁸³ As such, it recognises that acting on work-life balance at EU level is 'both a social and an economic imperative'¹⁸⁴. Yet the WLBI does not fall under the 'equal opportunities' theme of the EPSR. Rather, its sex equality rhetoric is employed to enhance the EU's economic priorities under the Europe 2020 Strategy: addressing the unequal sharing of care responsibilities between the sexes is envisioned to bridge the gender employment gap which contributes

¹⁷⁹ European Commission, 'A Union of Equality: Gender Equality Strategy 2020-2025' (Communication) COM (2020) 152 final; European Commission, 'A Union of Equality: EU Anti-Racism Action Plan 2020-2025' (Communication) COM (2020) 565 final; European Commission, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025' (Communication) COM (2020) 698 final.

¹⁸⁰ Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms [2023] OJ L 132/21.

¹⁸¹ European Commission, 'A Roadmap for Women's Rights' (Communication) COM (2025) 97 final.

¹⁸² European Commission, 'Commission Work Programme 2016: No Time for Business as Usual' COM (2015) 610 final, 5.

¹⁸³ European Commission, 'EPSR' (n 172) principle 9.

¹⁸⁴ European Commission, 'An initiative to support work-life balance for working parents and carers' (Communication) COM (2017) 252 final, 2.

to the annual economic loss of EUR 370 billion in the EU.¹⁸⁵ To this end, the WLBI entails both legislative and non-legislative proposals. Below, I outline the Commission's proposal for a directive on work-life balance, which provides the most recent legislative changes to the EU PLF. Before doing so, however, I note that rather than pursuing revision of the PWD, the Commission envisioned non-legislative measures, like policy guidance and awareness raising on dismissal protection and successful transitions from maternity leave to employment, to strengthen its application and enhance its enforcement.¹⁸⁶ Thus, at the time of writing, ten years after the abandonment of the reform proposal, the PWD has not been revised since its adoption in 1992 beyond updates to reporting procedures and the annexed list of hazardous substances.¹⁸⁷ Caracciolo di Torella deems the failure to revise the PWD within the WLBI 'paradoxical and disappointing'¹⁸⁸, given that the initiative itself derives from the failure to revise the PWD. The WLBI fails to support sex equality and work-life balance where they affect women during pregnancy and around childbirth. I illustrate this, and the consequences on equality between parents, in Chapters 4-6.

In contrast to non-legislative measures on maternity leave, the WLBI set out to introduce new legislative measures on parental leave to address women's underrepresentation in the labour market due to unequal sharing of parental care responsibilities between women and men, and to improve access to work-life balance instruments by both sexes.¹⁸⁹ The Commission had diagnosed the lack

¹⁸⁵ *ibid* 2, 5.

¹⁸⁶ European Commission, 'Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' SWD (2017) 202 final, 59, 73, 77; Plomien (n 147) 290-291.

¹⁸⁷ Busby and James (n 150) 300.

¹⁸⁸ Caracciolo di Torella (n 161) 194.

¹⁸⁹ COM (2017) 252 final (n 184) 6; European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' COM (2017) 253 final, 4.

of remuneration and inflexibility of parental leave, which caused men to not utilise their entitlements, as the main shortcomings of the 2010 PLD.¹⁹⁰ Moreover, balancing work and family life was not adequately supported at the EU level given the lack of paternity leave.¹⁹¹ The Commission introduced its proposal for the WLBD in 2017.¹⁹² The proposal attributed to it two primary objectives: facilitating work-family reconciliation for working parents and achieving equality between the sexes with regard to labour market opportunities and treatment in employment.¹⁹³ The legal basis for its adoption is thus found in Article 153(1)(i) TFEU.¹⁹⁴ To such ends, the Commission presented four core proposals: introducing paternity leave, reforming parental leave, introducing an annual entitlement to paid carers' leave, and extending the right to request flexible working arrangements for parents and carers of children under 12.¹⁹⁵ In what follows, I discuss the WLBD proposal and legislative process only with regard to paternity and parental leave. The WLBD was adopted in 2019 to be transposed into national law by 2 August 2022.¹⁹⁶

¹⁹⁰ European Commission, 'First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges of work-life balance faced by working parents and caregivers' C (2015) 7754, 2, 6.

¹⁹¹ *ibid* 7.

¹⁹² COM (2017) 252 final (n 184) 7.

¹⁹³ COM (2017) 253 final (n 189) 2.

¹⁹⁴ TFEU (n 5) arts 153(1)(i), 153(2); WLBD (n 2) recital (1).

¹⁹⁵ COM (2017) 253 final (n 189) arts 4-6, 8-9.

¹⁹⁶ Council of the European Union, '3698th meeting of the Council of the European Union 13 and 14 June 2019', <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10282_2019_INIT&from=EN>, accessed 24.2.2022, 1-2; WLBD (n 2) art 20(1). On national implementation, see European Commission, 'The transposition of the Work-Life Balance Directive in EU Member States: A long way ahead' (Publications Office of the European Union 2022); European Commission, 'The transposition of the Work-Life Balance Directive in EU Member States (II): Considerable work still to be done' (Publications Office of the European Union 2023).

2.2.4.1.1 Paternity Leave

Introducing paternity leave at the EU level was envisioned to support more equal sharing of parenting responsibilities between the sexes and contribute to more participative fatherhood immediately after a child's birth, consequently encouraging fathers to utilise their parental leave entitlements.¹⁹⁷ The Commission therefore proposed an individual entitlement to paternity leave of ten working days – comparable to a period of holiday absence from work with minimal administrative costs to employers¹⁹⁸ – upon the birth of a child, paid at a level equivalent to national sick pay.¹⁹⁹ Because 20 Member States already offered statutory paternity leave in 2015²⁰⁰, the proposal was 'not particularly controversial'²⁰¹. The final text of the WLBD therefore follows the Commission's initial proposal and, indeed, exceeds it in ambition. In line with the EP's definition of paternity leave as leave available not exclusively to fathers but also to second parents, the WLBD affords paternity leave of at least ten working days to fathers or equivalent second parents, where recognised by national law, in connection with a child's birth.²⁰² Leave is granted irrespective of marital or family status to avoid discriminating between couples on grounds of marital status or sexual orientation.²⁰³ It is intended to be taken around the time of birth, but Member States may determine whether leave is to be taken before and/or after birth and whether it is available on a full-time and/or part-time basis.²⁰⁴ The EP had called

¹⁹⁷ COM (2017) 252 final (n 184) 9.

¹⁹⁸ European Commission, 'Second-stage consultation of the social partners at European level under Article 154 TFEU on possible action addressing the challenges of work-life balance faced by working parents and caregivers' C (2016) 2472 final, 8; SWD (2017) 202 final (n 186) 61, 87.

¹⁹⁹ COM (2017) 253 final (n 189) arts 4(1), 8.

²⁰⁰ European Parliament, 'Maternity and paternity leave in the EU' (n 149) 1.

²⁰¹ Caracciolo di Torella (n 161) 191.

²⁰² WLBD (n 2) recital (19), arts 3(1)(a), 4(1); European Parliament, 'Report on the proposal for a directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU' A8-0270/2018, <www.europarl.europa.eu/doceo/document/A-8-2018-0270_EN.pdf>, accessed 28.2.2022 ('Report on WLBD Proposal'), 31, 34.

²⁰³ COM (2017) 253 final (n 189) 11; WLBD (n 2) recital (19), art 4(3).

²⁰⁴ WLBD (n 2) recital (19), art 4(1).

for paternity leave to be available around the time of adoption but the WLBD envisions the introduction of a separate adoption leave.²⁰⁵ Like maternity leave, paternity leave is job-protected and discrimination against a worker for having exercised their right to leave is prohibited.²⁰⁶ Because the EP and the Council disagreed about the income replacement level, the WLBD relies on the national sick pay standard for paternity leave.²⁰⁷ By introducing paternity leave and thus recognising the father's role in newborn care, the WLBD brings EU law more in line with the ECJ's reasoning in cases like *Roca Álvarez*²⁰⁸ and *Maistrellis*²⁰⁹ which present men and women as equal parents. As such, the WLBD constitutes 'the first legislative measure that expressly acknowledges that men are pivotal to the success of reconciliation measures'²¹⁰. In 2023, all Member States provided at least two weeks of paid statutory paternity leave.²¹¹

2.2.4.1.2 Parental Leave

While the 2010 PLD reform had tried to address issues underlying the Framework Agreement on Parental Leave – the transferability of leave, the lack of income replacement, and inflexibility of leave arrangements – these issues persisted, effectively disincentivising fathers from taking parental leave and causing the 'double burden' of paid employment and unpaid reproductive labour to still fall

²⁰⁵ European Parliament, 'Report on WLBD Proposal' (n 202) 31, 34; WLBD (n 2) art 18(2)(a).

²⁰⁶ WLBD (n 2) arts 10-12.

²⁰⁷ *ibid* art 8(2); Council of the European Union, 'General Approach on Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU' ('General Approach on WLBD'), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10291_2018_INIT&from=EN>, accessed 25.2.2022, recital (19), art 8(1); European Parliament, 'Report on WLBD Proposal' (n 202) 40, 54.

²⁰⁸ *Roca Álvarez* (n 126).

²⁰⁹ *Maistrellis* (n 111).

²¹⁰ Caracciolo di Torella (n 161) 196.

²¹¹ European Parliament, 'Maternity and paternity leave in the EU' (n 152) 1.

on women.²¹² In 2018, only 12 Member States had reserved some portion of their parental leave entitlement to the father and it often remained transferable to the mother in practice.²¹³ To facilitate men's take-up of parental leave and provide financial security for its duration, the Commission sought to reform existing provisions by making the entire four-month entitlement non-transferable and setting the minimum level of income replacement at national sick pay.²¹⁴ Furthermore, reasoning that flexibility would increase the likelihood of men utilising their entitlement, it proposed an entitlement to request flexible take-up of parental leave on a part-time or piecemeal basis and raising the age of the child in relation to whom parental leave could be taken from eight to 12.²¹⁵ With the legal basis of the PLD ceasing to be applicable because the social partners failed to reach an agreement for the re-negotiation of the Framework Agreement, the WLBD subsumed the basic provisions of the PLD into itself with the following amendments and subsequently repealed it in 2022.²¹⁶

Whereas the Commission's paternity leave proposal translated to the WLBD without issue, the final text concedes to Member States' concerns about the non-transferability of parental leave and the level of income compensation. The WLBD only extends the non-transferable period of parental leave to two months, owing to a disagreement between Member States on the proportionality of the Commission's approach.²¹⁷ Hence, under the WLBD, working parents are entitled

²¹² COM (2017) 252 final (n 184) 9; COM (2017) 253 final (n 189) 7; Eurofound, 'Promoting uptake of parental and paternity leave among fathers in the European Union' (Publications Office of the European Union 2015), 6.

²¹³ European Commission, 'Paternity and parental leave policies across the European Union: Assessment of current provision' (Publications Office of the European Union 2018), 4.

²¹⁴ COM (2017) 253 final (n 189) arts 5(1), 8; SWD (2017) 202 final (n 186) 64, 97.

²¹⁵ COM (2017) 252 final (n 184) 9; COM (2017) 253 final (n 189) recital (15), arts 5(1), 5(6).

²¹⁶ COM (2017) 253 final (n 189) 4, 15; WLBD (n 2) art 19.

²¹⁷ Council of the European Union, 'General Approach on WLBD' (n 207) recital (28), arts 5(1)-(2); Council of the European Union, 'Progress Report on Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council

to parental leave of at least four months per parent, of which at least two months are non-transferable between parents.²¹⁸ The ECJ has previously confirmed that the right to parental leave is conferred on the parents, not the child.²¹⁹ The birth of multiples therefore does not confer an entitlement to a number of parental leave periods equivalent to the number of children born.²²⁰ The ECJ observed that Member States do, however, have discretion to offer a parental leave regime that accommodates the needs of parents with multiples.²²¹ The WLBD also expressly obliges Member States to assess the adjustment of parental leave arrangements to better meet the needs of adoptive parents, disabled parents, and parents of disabled or seriously ill children, although it does not oblige the adoption of such adjustments.²²² Member States should also regulate provision of parental leave in flexible ways to facilitate its take-up in a manner that best suits the family without defaulting to gendered parental roles.²²³ In defining income compensation levels and the age of child in relation to whom parental leave could be taken, the Council's position was to similarly afford broad discretion to the Member States.²²⁴ Because most Member States opposed extending the maximum age of the child to 12, the WLBD retains the previous standard of eight years.²²⁵ Moreover, some Member States objected to the proposed national sick pay standard for parental leave because

sickness benefits are set with a view to generally short-term, health-related issues, whereas the leaves proposed in the [WLBD] are intended for facilitating the reconciliation of work, family and private life²²⁶.

Directive 2010/18/EU' ('Progress Report on WLBD'), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14280_2017_INIT&from=EN>, accessed 25.2.2022, 5.

²¹⁸ WLBD (n 2) arts 3(1)(b), 5(1)-(2).

²¹⁹ C-140/10 *Zoi Chatzi v Ipourgos Ikononikon* ECLI:EU:C:2010:534, paras 1–2, 39–40.

²²⁰ *ibid* paras 61, 75.

²²¹ *ibid* para 71.

²²² WLBD (n 2) art 5(8).

²²³ *ibid* recital (23), arts 5(6), 9(1).

²²⁴ Council of the European Union, 'General Approach on WLBD' (n 207) art 5(1).

²²⁵ Council of the European Union, 'Progress Report on WLBD' (n 217) 5; WLBD (n 2) art 5(1).

²²⁶ Council of the European Union, 'Progress Report on WLBD' (n 217) 6.

Thus, the WLBD does not set a minimum income replacement threshold for the *non-transferable* period of parental leave but allows Member States to define the payment or allowance – which is to be ‘adequate’ – with due consideration for the objective of facilitating leave take-up by both parents, particularly the higher-earners.²²⁷ Nothing is said about the *transferable* period of parental leave whereby it can, in principle, be unpaid. The WLBD thus closely resembles the 2010 PLD, and reproduces its issues, as I highlight in Chapters 4-6.

Conclusion

In this chapter, I have conceptualised the ESM and traced its evolution from an equality perspective to provide a comprehensive description of the legal and policy context of the EU PLF for the purposes of normatively critiquing and reconstructing it against a feminist legal conceptualisation of substantive equality in this thesis. In so doing, I have traced the development of the EU PLF within the ESM, which allows me to begin teasing out its normative underpinnings. Normatively, the EU PLF sits within the equality dimension of the ESM. The PWD and the first PLD both derive from the Commission’s initiatives on equal treatment between the sexes under the 1989 Social Action Programme. Due to a change in its legal basis during the legislative process, however, the PWD pursues the protection of workers’ health and safety. Although the rhetoric of equal opportunities and equal treatment between the sexes is absent in its legal basis and objectives, it has been frequently alluded to in judicial discourse and in the failed reform proposal. The 1996 PLD was introduced pursuant to the principle of work-family reconciliation embedded in the Community Charter to promote equal treatment and equal opportunities. Its revision in 2010 pursued improvements in workers’ social security and social protection and equal opportunities of the sexes in employment. The most recent update to the EU PLF,

²²⁷ WLBD (n 2) recital (31), art 8(3).

the WLBD, has its legal basis in equality between the sexes with regard to labour market opportunities and treatment at work.

While the EU PLF may be normatively grounded in sex equality, examining the underlying policy rhetoric has revealed how parenting leave – particularly by pursuing the facilitation of women’s integration to the labour market before and after having children – has been utilised as means to support the establishment of the internal market and the achievement of the EU’s economic objectives. That is, it has revealed how the EU has normatively reformulated sex inequality as being caused by women’s economic inactivity and not the sexual division of labour entrenched in both the economy and the family. By treating paid work, and not unpaid reproductive labour, as the primary conflict facing working parents, the EU misconceives sex inequality and presents it as an obstacle to economic progress. This is most recently evident in the WLBD: while the commitment to enhancing parents’ work-life balance suggests recognition that it is the unequal sharing of childcare responsibilities between the sexes, not paid work, which is the core inequality, the EU locates the work-life balance principle under the ‘fair working conditions’ dimension of the EPSR, rather than the ‘equal opportunities’ one. Work-life balance, and sex equality more broadly, thus remain rhetorically linked to the EU’s economic priorities rather than constituting ends in themselves. In Chapters 4-6 of this thesis, I will further demonstrate that the EU PLF does not live up to the EU’s normative commitment ‘to achiev[ing] substantive, rather than formal, equality by reducing *de facto* inequalities which may arise in society’²²⁸.

²²⁸ Roca Álvarez (n 126) para 34.

CHAPTER 3. THEORETICAL FRAMEWORK*

In Chapter 1, I identified Sandra Fredman’s model of substantive equality – most fully articulated in her 2016 article ‘Substantive Equality Revisited’¹ – as a supplementary concept of equality which draws insights from social justice, citizenship, and capabilities theories and which is relational, contextual, flexible, and anti-essentialist enough to mitigate feminist theorists’ concerns about equality as a concept. Intended as ‘an analytic framework which can be used to assess and assist in modifying policies and practices to better achieve substantive equality’², I use it to critique and reconstruct the EU PLF in this thesis. I have, however, observed both a theoretical gap and an application gap in the model. To enhance my theoretical understanding of substantive equality and to develop a method for applying the model, I address these gaps in this chapter. In section 3.1, I theoretically refine Fredman’s model of substantive equality by locating it within the earlier feminist equality and social justice theories of Iris Marion Young and Nancy Fraser. This theoretical refinement of the model forms my original contribution to feminist legal theory. Then, in section 3.2, I turn Fredman’s model into an analytical method for the purposes of normatively critiquing and reconstructing the EU PLF from an equality perspective.

3.1 A Feminist Legal-Theoretical Refinement of Fredman’s Model of Substantive Equality

I observed in Chapter 1 that while her four-dimensional model of substantive equality is evidently influenced by the social justice theories of Young and Fraser, Fredman does not explicitly articulate the model’s relationship to and location

* This chapter includes material from my dissertation submitted for the degree of Master of Research in Law at the University of Glasgow in 2021 (section 3.1), as well as original material produced for the degree of Doctor of Philosophy at the University of Strathclyde.

¹ S Fredman, ‘Substantive Equality Revisited’ (2016b) 14(3) ICON 712.

² *ibid* 728.

within these theories. I posited that making explicit the connections between her model and earlier feminist legal theory would, however, enrich the model and thus make it more fit for purpose as a critical and reconstructive analytical framework and more responsive to systemic and structural inequalities. In this half of the chapter, I therefore theoretically refine Fredman's model by tracing it back to and locating it within Young's *Justice and the Politics of Difference*³ and Fraser's body of work on redistribution and recognition⁴. I outline the four dimensions of Fredman's model in section 3.1.1. To identify the theoretical underpinnings of the model, I examine how its structure and content are influenced by Young's and Fraser's theories of social justice in section 3.1.2. In section 3.1.3, I then scrutinise the relationship between Fredman's redistributive and recognition dimensions in light of what Fraser has called 'the redistribution-recognition dilemma'. In section 3.1.4, I compare affirmative and transformative strategies for pursuing substantive equality. Finally, I discuss how Fredman, Young, and Fraser treat differences between social groups to mitigate against the sameness-difference dichotomy in section 3.1.5.

3.1.1 Fredman's Model of Substantive Equality

Fredman's basic premise is that substantive equality is irreducible to a single legal principle, like equal or special treatment, but should instead be understood as a multi-dimensional concept encompassing interacting and complementing objectives.⁵ Although it cannot resolve all the conceptual issues associated with

³ IM Young, *Justice and the Politics of Difference* (Princeton University Press 2011).

⁴ N Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995a) 212 NLR 68; N Fraser, 'Recognition or Redistribution? A Critical Reading of Iris Young's *Justice and the Politics of Difference*' (1995b) 3(2) J Political Philos 166; N Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in N Fraser and A Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003).

⁵ S Fredman, *Discrimination Law* (Oxford University Press 2011), 25; S Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016a) 16 H R L Rev 273, 282; Fredman, 'Substantive Equality Revisited' (n 1) 714.

equality, the interaction of the redistributive, recognition, participative, and transformative dimensions ‘create[s] a complex and dynamic conception of the right to equality’⁶ responsive to real social injustices. In this section, I outline the four dimensions of Fredman’s model. While the model is applicable to inequalities between social groups broadly conceived, I discuss it from a sex inequality perspective and link it to the sexual division of labour.

3.1.1.1 Redistribution

The redistributive dimension of Fredman’s model redresses the disadvantage experienced by individuals due to their social status or membership in a certain social group.⁷ Fredman derives the general approach of conceiving inequality as various forms of disadvantage in the first two dimensions from Canadian and South African equality jurisprudence.⁸ The Supreme Court of Canada has held that inequality entails perpetuation of disadvantage or stereotyping of certain social groups.⁹ The South African Constitutional Court has similarly argued that substantive equality remedies patterns of disadvantage.¹⁰ Acknowledging the difficulty of defining disadvantage, Fredman asserts that her model mitigates the need to firmly define it: the flexibility of the dimensional approach ‘means that not all the issues need to be dealt with in one concept’¹¹. The disadvantage in question is not, however, limited to socio-economic disadvantage caused by the maldistribution of resources but also encompasses non-material disadvantage remediable through redistributive measures.¹² Fredman thus suggests understanding disadvantage as a relation of domination – that is, as constraints

⁶ Fredman, ‘Substantive Equality Revisited’ (n 1) 738.

⁷ *ibid* 727.

⁸ *ibid*; Fredman, *Discrimination Law* (n 5) 25-26; Fredman, ‘Emerging from the Shadows’ (n 5) 273; S Fredman, ‘Redistribution and Recognition: Reconciling Inequalities’ (2007) 23(2) SAJHR 214, 226.

⁹ See eg *Withler v Canada* (Attorney General) [2011] 1 SCR 396 9 (Canada), para 3.

¹⁰ See eg *Brink v Kitshoff* (CCT15/96) [1996] ZACC 9 9 (South Africa), para 42.

¹¹ Fredman, *Discrimination Law* (n 5) 28.

¹² *ibid* 26-27; Fredman, ‘Emerging from the Shadows’ (n 5) 282.

imposed on individuals due to their social status or group membership by institutionalised power structures.¹³ Emphasising domination then enables the recognition that women's disadvantage – both material and non-material, such as the 'motherhood penalty' on income and career opportunities – is not characterisable solely as the maldistribution of resources but also as a consequence of hierarchical power relations between the sexes both within the family and in the public sphere.¹⁴ Moreover, disadvantage entails 'a deprivation of genuine opportunities to pursue one's own valued choices'¹⁵. Relying on capabilities theory, Fredman argues that beyond a formal right to equality in exercising one's choices, people should be *able* to exercise their choices.¹⁶ Where material or non-material disadvantage prevents them from doing so, people are deprived of basic capabilities.¹⁷ Substantive equality must thus go beyond equal treatment and equality of opportunity by accommodating differences between individuals' capabilities and by removing constraints to the exercise of them, thus facilitating genuine choice.¹⁸

3.1.1.2 Recognition

The recognition dimension redresses injustices not readily encompassed by the emphasis on disadvantage under the redistributive dimension; namely the stigma, stereotyping, humiliation, and violence faced by individuals by reason of

¹³ Fredman, *Discrimination Law* (n 5) 27; Fredman, 'Emerging from the Shadows' (n 5) 275; Fredman, 'Substantive Equality Revisited' (n 1) 729.

¹⁴ Fredman, 'Emerging from the Shadows' (n 5) 282, 289-290; Fredman, 'Substantive Equality Revisited' (n 1) 729.

¹⁵ Fredman, *Discrimination Law* (n 5) 27.

¹⁶ Fredman, 'Substantive Equality Revisited' (n 1) 730. See S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008), 11-12; A Sen, *Inequality Re-Examined* (Oxford University Press 1992); A Sen, *Development as Freedom* (Oxford University Press 1999); M Nussbaum, *Women and Human Development. The Capabilities Approach* (Cambridge University Press 2000).

¹⁷ Fredman, 'Substantive Equality Revisited' (n 1) 730.

¹⁸ *ibid.*

their social status or membership in a certain social group.¹⁹ Whereas her earlier work located the concept of dignity at the core of equality, given its conceptual ambiguity, Fredman has subsequently explicitly adopted Fraser's concept of recognition – which I discuss in detail in section 3.1.2.3 – as the premise of this dimension.²⁰ To summarise, however, misrecognition entails the devaluation of the norms and values of certain social groups and the subjection of the group to stigma, stereotyping, humiliation, and violence.²¹ The undervaluation of women's labour, for instance, is caused by negative stereotyping attaching to 'feminine' life patterns which then have negative socio-economic consequences for women.²² The recognition dimension grounds the entitlement to equality in the equal moral worth of human beings, not to the socially constructed identities individuals hold.²³ Substantive equality thus entails the recognition that inequality resides in the unjust detriment attaching to membership of a certain social group, not the fact of membership of that group, and therefore the recognition, not elimination, of these differences.²⁴

3.1.1.3 Participation

Influenced by US jurisprudence on the exclusion of racial, religious, and national minorities from the political process, the third dimension of Fredman's model entails individuals' full social and political participation in society.²⁵ Disadvantaged social groups must be compensated for their lack of political

¹⁹ Fredman, *Discrimination Law* (n 5) 25, 28; Fredman, 'Emerging from the Shadows' (n 5) 273.

²⁰ Fredman, *Discrimination Law* (n 5) 20, 23, 25; Fredman, 'Substantive Equality Revisited' (n 1) 730.

²¹ Fredman, 'Emerging from the Shadows' (n 5) 290.

²² *ibid.*

²³ Fredman, *Discrimination Law* (n 5) 28; Fredman, 'Substantive Equality Revisited' (n 1) 730-731.

²⁴ Fredman, *Discrimination Law* (n 5) 26, 30; Fredman, 'Redistribution and Recognition' (n 8) 219, 226; Fredman, 'Substantive Equality Revisited' (n 1) 729.

²⁵ Fredman, *Discrimination Law* (n 5) 25; Fredman, 'Emerging from the Shadows' (n 5) 273; Fredman, 'Substantive Equality Revisited' (n 1) 727. See eg *United States v Carolene Products Co.* 304 US 144 (1938) (US).

power, voice, and interest-representation.²⁶ Decision-makers must be open and responsive to the voices of excluded and marginalised groups and the state has a positive duty to ensure the meaningful participation of excluded groups.²⁷ This entails participatory democracy: the state must encourage active citizen engagement in decision-making processes and policy implementation, particularly where these policies directly affect disadvantaged groups, to ensure procedural fairness and the legitimacy of equality measures, and further to improve the accountability of democratic decision-makers.²⁸ Beyond the removal of obstacles to political participation, this dimension highlights the significance of community to social solidarity.²⁹ It hence involves proactive measures for overcoming social subordination caused by misrecognition through integrating disadvantaged individuals into society and enabling their participation on a par with others, for instance by facilitating women's equal participation in the labour market.³⁰ It is this latter meaning of participation that is particularly relevant to this thesis (Chapter 5).

3.1.1.4 Transformation

The final dimension of Fredman's model is transformation.³¹ It builds on the duty of accommodation in relation to disability and religion in US and UK law.³² Redressing socio-economic disadvantage; reducing stigma, stereotyping, humiliation, and violence; and enhancing social and political participation 'may

²⁶ Fredman, *Discrimination Law* (n 5) 31; Fredman, 'Emerging from the Shadows' (n 5) 282; Fredman, 'Substantive Equality Revisited' (n 1) 727.

²⁷ Fredman, 'Emerging from the Shadows' (n 5) 282-283; S Jagwanth, 'Expanding Equality' (2005) *Acta Jur* 131, 147.

²⁸ Fredman, *Discrimination Law* (n 5) 317-318; Fredman, *Human Rights Transformed* (n 16) 199; Fredman, 'Redistribution and Recognition' (n 8) 232; Jagwanth (n 27) 147.

²⁹ Fredman, *Discrimination Law* (n 5) 32.

³⁰ *ibid* 33; Fredman, 'Redistribution and Recognition' (n 8) 227.

³¹ Fredman, 'Redistribution and Recognition' (n 8) 273.

³² Fredman, 'Substantive Equality Revisited' (n 1) 727. See eg Equality Act 2010, c. 15 (UK), s 149; *US Airways v Barnett* 535 US 391 (2002) (US); *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 (Canada).

not go far enough towards achieving substantive equality unless accompanied by structural change'³³. Recognising that injustice pertains not to the differences between social groups but to the detriment attaching to the differences is inadequate: accommodating these differences demands transformation of the existing social structures.³⁴ While the principle of equal pay for part-time work as a response to the prevalence of women in part-time employment may redress women's labour market disadvantage, the gender disadvantage associated with part-time work persists until the sexual division of labour within both the family and the labour market is addressed through legal and policy reform.³⁵ Similarly, recognition of women's right to pregnancy and maternity entitlements does not achieve substantive equality because recognition measures alone fail to facilitate the structural change required to challenge women's disproportionate responsibility for childcare.³⁶ Substantive equality therefore entails:

restructuring institutions both in the public and private sphere, addressing the paid labour market, education, and other public institutions as well as the division of labour within the family itself.³⁷

3.1.2 Connecting Fredman with Feminist Equality and Social Justice Thinking

In this section, I locate Fredman's model of substantive equality in the feminist equality and social justice scholarship of Young and Fraser which Fredman makes brief reference to in conceptualising her model. By distilling the connections between Fredman's model and Young's and Fraser's work, I present my extrapolation of the theoretical underpinnings of Fredman's model. I demonstrate that Fredman borrows insights both for the structure and content of her model from both Young and Fraser (sections 3.1.2.2-3.1.2.3). First, however,

³³ Fredman, 'Emerging from the Shadows' (n 5) 283.

³⁴ Fredman, *Discrimination Law* (n 5) 30; Fredman, 'Emerging from the Shadows' (n 5) 283; Fredman, 'Substantive Equality Revisited' (n 1) 720.

³⁵ Fredman, 'Emerging from the Shadows' (n 5) 283, 290.

³⁶ *ibid* 291.

³⁷ Fredman, 'Redistribution and Recognition' (n 8) 226-227.

I outline the core premises of Young's and Fraser's conceptions of justice to be able to discuss their relation to Fredman's model (section 3.1.2.1).

3.1.2.1 The Core Premises of Young and Fraser

In *Justice and the Politics of Difference*, Young objects to a solely distributive conception of social justice which confines justice to the distribution of material resources and further extends redistribution to non-material resources.³⁸ Such a conception effectively ignores oppressive social norms, structures and institutions within the state, society, and the family – including decision-making structures, division of labour, and culture – and thus fails to acknowledge how they enhance or hinder individuals' ability to develop and exercise their capacities and to participate in determining their actions.³⁹ Distributive justice obscures the structural nature of oppression and the ability of dominant social groups to produce and reproduce their power over the oppressed.⁴⁰ While distributive concerns are inherent in a conception of social justice, justice is irreducible to distribution.⁴¹ Hence, Young advocates restricting distributive justice to material goods and instead employing a conception of justice defined by domination and oppression to centralise institutional rules and social relations informing decision-making structures, division of labour, and culture.⁴² To this end, she endorses Agnes Heller's conception of justice derived from Jürgen Habermas' concept of communicative ethics:

justice is primarily the virtue of citizenship, of persons deliberating about problems and issues that confront them collectively in their institutions and actions, under conditions without domination and oppression, with reciprocity and mutual tolerance of difference⁴³.

³⁸ Young, *Justice and the Politics of Difference* (n 3) 15-16.

³⁹ *ibid* 8, 15, 22.

⁴⁰ *ibid* 32.

⁴¹ *ibid* 15.

⁴² *ibid* 8-9, 16.

⁴³ *ibid* 33-34. See J Habermas, *The Theory of Communicative Competence. Vol 1: Reason and the Rationalization of Society* (Beacon 1983); A Heller, *Beyond Justice* (Blackwells 1987).

Justice thus requires ‘the full participation and inclusion of everyone in a society’s major institutions, and the socially supported substantive opportunity for all to develop and exercise their capacities and realise their choices’⁴⁴. Then, ‘social justice concerns the degree to which a society contains and supports the institutional conditions necessary for the realisation of [the values that constitute the good life]’⁴⁵ namely the ability to develop and exercise one’s capacities, and to participate in determining one’s action.⁴⁶ The injustices of oppression and domination entail a hindrance to the realisation of either value.⁴⁷ Social justice thus entails ‘the elimination of institutionalised domination and oppression’⁴⁸.

Contrary to Young, Fraser objects to the degree to which post-socialist identity politics have caused redistributive claims to be displaced by recognition claims, hence causing a decoupling of cultural and social politics, and difference and equality politics.⁴⁹ Justice requires *both* redistribution *and* recognition, as neither alone adequately redresses injustices.⁵⁰ The difficulty, however, lies in reconciling the two dimensions within a single framework. Fraser thus has two objectives. First, to develop a critical theory of recognition ‘which identifies and defends only those versions of the politics of difference that coherently synergise with the politics of redistribution’⁵¹. And second, ‘to devise a two-dimensional conception of justice that can accommodate both defensible claims for social

⁴⁴ Young, *Justice and the Politics of Difference* (n 3) 172.

⁴⁵ *ibid* 37.

⁴⁶ *ibid*.

⁴⁷ *ibid* 38.

⁴⁸ *ibid* 15.

⁴⁹ Fraser, ‘Recognition or Redistribution?’ (n 4) 166; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 8.

⁵⁰ Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 9.

⁵¹ Fraser, ‘From Redistribution to Recognition?’ (n 4) 69; Fraser, ‘Recognition or Redistribution?’ (n 4) 167.

equality and defensible claims for the recognition of difference'⁵². She therefore proposes a move from a politics of recognition grounded in an identity model to one grounded in a status model, which comes to inform her conception of justice (section 3.1.2.3). Fraser's conception of justice is normatively grounded in participatory parity: 'justice requires social arrangements that permit all (adult) members of society to interact with one another as peers'⁵³. This entails two conditions: that material distribution facilitates the independence and voice of participants in the society, and that the institutionalised patterns of cultural value within the society ensure equal respect and equal opportunities for these participants.⁵⁴ Both conditions are necessary and neither alone sufficient for participatory parity and therefore Fraser conceives redistribution and recognition as two irreducible dimensions of justice.⁵⁵

3.1.2.2 Fraser-Derivative Dimensionality of Fredman's Model

The structural dimensionality of Fredman's model noticeably resembles Fraser's conception of justice relying on three distinct paradigms: redistribution, recognition, and political participation.⁵⁶ These paradigms correspond to Fredman's first three dimensions. Thus, to understand Fredman's model, I summarise the structure of Fraser's conception of justice. Fraser's basic premise is that justice encompasses two distinct analytical dimensions:

a dimension of recognition, which concerns the effects of institutionalised meanings and norms on the relative standing of social actors; and a dimension of distribution, which involves the allocation of disposable resources to social actors⁵⁷.

⁵² Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 9.

⁵³ *ibid* 36.

⁵⁴ *ibid*.

⁵⁵ *ibid* 36-37.

⁵⁶ E Bonthuys, 'Equality and Difference: Fertile Tensions or Fatal Contradictions for Advancing the Interests of Disadvantaged Women?' in V Munro and M Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2016), 98.

⁵⁷ N Fraser, 'Rethinking Recognition' (2000) 3 NLR 107, 116.

That the two dimensions are distinct is demonstrated by five distinctions Fraser draws between them. First, the dimensions correspond to distinct spheres of society: recognition to the cultural and distribution to the economic.⁵⁸ Second, they assume different conceptions of injustice. Redistribution entails socio-economic injustice caused by the economic structures of society through general maldistribution of resources, exploitation, economic marginalisation, and deprivation.⁵⁹ Recognition entails cultural injustices caused by institutionalised patterns of cultural value in the society, namely injustices of misrecognition such as cultural domination and disrespect.⁶⁰ Maldistribution and misrecognition are both unjust because they undermine individuals' status as full partners in social interaction.⁶¹ Third, remedies for these injustices are also different: redistribution demands economic restructuring by redistributing resources and reorganising the division of labour, while recognition calls for cultural or symbolic change, such as the revaluation of devalued identities and recognition of cultural diversity.⁶² Fourth, the victims of the two types of injustices are conceptualised differently, as victims experiencing maldistribution are defined by reference to the economic structure of society, whereas victims of misrecognition are constituted as members of status groups defined by relations of recognition.⁶³ And lastly, the two paradigms assume different understandings of differences between social groups. Redistribution views socially constructed differences within the political economy to be unjust and therefore seeks to abolish these differences.⁶⁴ Recognition, by contrast, conceives of differences in two ways: some differences are mere cultural variations which have become instilled in a value hierarchy, while other differences only arise with the

⁵⁸ *ibid* 117; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 50.

⁵⁹ Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 12-13.

⁶⁰ *ibid*.

⁶¹ *ibid* 29.

⁶² *ibid* 13.

⁶³ *ibid* 14.

⁶⁴ *ibid* 15.

construction of such a value hierarchy.⁶⁵ In the former case, the objective is not to eliminate differences but to revalue devalued characteristics in celebration of these differences, in the latter it is not to celebrate differences but to deconstruct the cultural valuations grounding them.⁶⁶

Fredman's redistributive and recognition dimensions are evidently drawn from Fraser's two-dimensional conception of justice. The participative dimension similarly corresponds to Fraser's admittance that beyond economic and cultural dimensions, her conception of social justice entails a third, political, dimension within which the relevant injustice is political exclusion and the remedy political participation.⁶⁷ The political dimension is a later addition to Fraser's thesis: it only transpires in her correspondence with Axel Honneth, and Fraser herself admits neglecting it in her earlier work despite her conception's grounding in participatory parity.⁶⁸ Both Fredman and Fraser thus emphasise the importance of equal political participation for substantive equality and social justice. Fredman's four-dimensional approach to substantive equality hence effectively mirrors Fraser's now three-dimensional conception of justice. Functionally, in both theorists' frameworks, the dimensions are intended to operate as distinct and irreducible, although interacting, analytical dimensions.⁶⁹ The relationship between redistribution and recognition is, however, a particularly contested topic in social justice thinking whereby I defer discussing it to section 3.1.3. Here, it suffices to say that the Fraser-derivative dimensionality of Fredman's model implies that Fredman posits the same relationship between redistributive and recognition politics as Fraser does, demonstrated by both theorists' appeal to the

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *ibid.* 68.

⁶⁸ H Dahl, P Stolz, and R Willig, 'Recognition, Redistribution and Representation in Capitalist Global Society. An Interview with Nancy Fraser' (2004) 47(4) *Acta Soc* 374, 380.

⁶⁹ Fraser, 'Rethinking Recognition' (n 57) 116; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 63; Fredman, 'Substantive Equality Revisited' (n 1) 728.

'synthesis' of the two dimensions.⁷⁰ Finally, I highlight that Fredman goes beyond Fraser's three-dimensional framework structurally by incorporating transformation as her fourth dimension. The three theorists all posit that because any advancement in equality achieved under an existing system of oppression is itself prone to perpetuating oppression, an approach transforming the very oppressive institutions and structures is essential.⁷¹ I discuss transformation further in section 3.1.4.

3.1.2.3 The Substance of Injustices and Corresponding Remedies

Substance-wise, Fredman borrows from both Young and Fraser. Although not explicitly stated, the redistributive dimension of her model effectively employs Young's definition of injustice, given Fredman's argument that while there is no need for a single definition of disadvantage, domination and deprivation of one's capabilities to exercise one's choices succinctly depict the disadvantage to be redressed through redistribution.⁷² It is therefore helpful to outline Young's conception of injustice to understand Fredman's redistributive dimension. Young conceptualises injustice in terms of domination and oppression as 'two forms of disabling constraints'⁷³. Domination entails institutional constraints on self-determination, namely structural factors which exclude individuals from participating in determining their actions.⁷⁴ Fredman's view of domination as a constraint imposed on individuals by institutionalised power structures is therefore directly comparable to Young's.⁷⁵ Oppression, by contrast, transpires

⁷⁰ Fraser, 'Recognition or Redistribution?' (n 4) 167; Fredman, 'Substantive Equality Revisited' (n 1) 712.

⁷¹ M Ackelsberg and M Shanley, 'Reflections on Iris Marion Young's Justice and the Politics of Difference' (2008) 4(2) *Polit Gender* 326, 330; Fraser, 'From Redistribution to Recognition?' (n 4) 82; Fredman, 'Redistribution and Recognition' (n 8) 216; IM Young, 'Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory' (1997) 222 *NLR* 147, 153.

⁷² Fredman, *Discrimination Law* (n 5) 27-28; Fredman, 'Substantive Equality Revisited' (n 1) 729.

⁷³ Young, *Justice and the Politics of Difference* (n 3) 9, 39, 192.

⁷⁴ *ibid* 31, 37.

⁷⁵ Fredman, *Discrimination Law* (n 5) 27; Fredman, 'Emerging from the Shadows' (n 5) 275.

as structural and systematic constraints on self-development enacted by both deliberate and unconscious assumptions, behaviours, and norms embedded in and reproduced by every-day social structures and hierarchies which inhibit individuals' ability to develop and exercise their capabilities.⁷⁶ While Fredman does not explicitly label her understanding of disadvantage as hindrance to the exercise of capabilities as *oppression*, I see it corresponding to Young's definition of it: both Fredman and Young appeal to capabilities thinking in defining oppression and positing the elimination of constraints to individuals' exercise of capabilities as the proper objective of redistribution.⁷⁷ I therefore argue that Fredman's definition of disadvantage is equivalent to Young's definition of injustice as domination and oppression. But whereas Young warns against extending redistributive politics to non-material injustices and calls for redistribution to be restricted to redressing material injustices, Fredman suggests that redistributive remedies are not limited to addressing maldistribution of resources but can also be used to redress various non-material disadvantages.⁷⁸ By emphasising domination and hindrance to exercise of capabilities as the identifying principles of disadvantage, however, Fredman's redistributive dimension mitigates Young's concern about the tendency of distributive justice to overlook relations of domination and oppression embedded in social structures hindering individuals' ability to develop and exercise their capabilities.

Fredman's recognition dimension, by contrast, explicitly relies on Fraser's concept of recognition.⁷⁹ It is thus imperative I discuss this concept in some

⁷⁶ Young, *Justice and the Politics of Difference* (n 3) 37, 40-41.

⁷⁷ Fredman, *Discrimination Law* (n 5) 27; Fredman, *Human Rights Transformed* (n 16) 11; Fredman, 'Substantive Equality Revisited' (n 1) 730; Young, *Justice and the Politics of Difference* (n 3) 15.

⁷⁸ Fredman, *Discrimination Law* (n 5) 26-27; Fredman, 'Emerging from the Shadows' (n 5) 282; Young, *Justice and the Politics of Difference* (n 3) 8-9.

⁷⁹ Fredman, *Discrimination Law* (n 5) 20, 23, 25; Fredman, 'Substantive Equality Revisited' (n 1) 730.

detail, particularly regarding Fraser's move from an identity model of recognition to a status model (Table 1). Fraser's starting premise is that the politics of recognition is typically grounded in a Hegelian identity model in which identity constructs through a process of mutual recognition: 'one becomes an individual subject only by virtue of recognising, and being recognised by, another subject'⁸⁰. To be misrecognised is 'to suffer both a distortion of one's relation to one's self and an injury to one's identity'⁸¹ due to membership in a social group that is devalued by the dominant culture. Recognition politics effectively challenge the dominant culture's valuation of the devalued social group and encourage self-affirmation of the previously devalued group's culture.⁸² By equating recognition politics with identity politics, however, this identity model of recognition contributes to reifying group identities by requiring members to assimilate to an essentialised group identity and is prone to reinforcing repressive power dynamics within the social group, for instance by way of intolerance and patriarchalism.⁸³ Moreover, the identity model displaces distributive concerns due to its emphasis on cultural injustices: by neglecting the relationship between androcentric norms institutionalised in labour markets and the gender pay gap, identity politics undermine the social-structural grounding of misrecognition and may perpetuate economic inequalities.⁸⁴ Isolating culture and economic relations of society in this way misrepresents reality and 'the idea that one could remedy all maldistribution by means of a politics of recognition is deeply deluded'⁸⁵. The problems of displacement and reification thus risk undermining recognition politics and further threaten Fraser's project of integrating redistribution and recognition into one theoretical framework. The politics of

⁸⁰ Fraser, 'Rethinking Recognition' (n 57) 109; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 10.

⁸¹ Fraser, 'Rethinking Recognition' (n 57) 109.

⁸² *ibid* 109-110.

⁸³ *ibid* 108, 112.

⁸⁴ *ibid* 108, 110.

⁸⁵ *ibid* 112.

recognition must therefore be conceptualised in a manner that mitigates these problems.⁸⁶

To this end, Fraser proposes shifting focus from misrecognition as an issue of identity to misrecognition as status subordination.⁸⁷ Rather than entailing the devaluation of group identity, misrecognition comes to entail ‘an institutionalised relation of social subordination’⁸⁸ – that is, the prevention of one’s participation as a peer in social life. Misrecognition is perpetrated through institutionalised patterns of cultural value that constitute certain social actors as normative actors and others as deviant actors, with the result of denying the latter the ability of participating in society on a par with the former.⁸⁹ Status equality then exists where these patterns of cultural value posit social actors as peers ‘capable of participating on a par with one another in social life’⁹⁰. Consequently, the remedy for misrecognition does not entail recognition of group identity but of the status of individual group members as full partners in social life.⁹¹ This is achieved by de-institutionalising the patterns of cultural value that contribute to status subordination in order to replace these values with ones that foster participatory parity.⁹² Fraser argues the status model to ‘remedy misrecognition without encouraging displacement and reification’⁹³. By defining disadvantage as constraints imposed on individuals by institutionalised power structures, Fredman’s model effectively entails conceiving injustices of misrecognition as forms of institutionalised relations of social subordination in accordance with

⁸⁶ *ibid* 109.

⁸⁷ *ibid* 113.

⁸⁸ *ibid*.

⁸⁹ *ibid* 113-114; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 29.

⁹⁰ Fraser, ‘Rethinking Recognition’ (n 57) 113; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 29.

⁹¹ Fraser, ‘Rethinking Recognition’ (n 57) 113-114.

⁹² *ibid* 115-116; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 29-30.

⁹³ Fraser, ‘Rethinking Recognition’ (n 57) 120.

Fraser’s status model of recognition. Injustice resides in the detriment which attaches to membership of a social group because of these power structures.⁹⁴

Table 1. Identity vs. Status Model of Recognition

	Identity Model	Status Model
Misrecognition	Distortion of relation to oneself, injury to identity due to membership in a social group devalued by dominant culture	Institutionalised social subordination, prevention of participation as a peer in social life due to institutionalised patterns of cultural value
Recognition	Recognition of group identity, challenging dominant culture’s valuation of devalued social group	Recognition of the status of individual group members as full partners in social life, de-institutionalisation of the patterns of cultural value contributing to status subordination

3.1.3 Reconciling Redistribution and Recognition

The relationship between redistributive and recognition politics has been a topic of contention in social justice theory. To allow me to understand these two dimensions of Fredman’s model and their contribution to substantive equality, I first discuss the redistribution-recognition dilemma which Fraser argues to hinder the reconciliation of the two paradigms of justice into a single framework in section 3.1.3.1. Then, in section 3.1.3.2, I trace an eminent debate between Young and Fraser regarding the relationship between the paradigms in order to demonstrate how Fredman follows Fraser’s ‘perspectival approach’ to ensuring synthesis between the dimensions in section 3.1.3.3.

⁹⁴ Fredman, *Discrimination Law* (n 5) 26, 30; Fredman, ‘Redistribution and Recognition’ (n 8) 219, 226; Fredman ‘Substantive Equality Revisited’ (n 1) 729. See also M Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1990).

3.1.3.1 The Redistribution-Recognition Dilemma

Reconciling redistribution and recognition within a single framework is complicated by what Fraser calls the redistribution-recognition dilemma: ‘the politics of recognition and the politics of redistribution appear to have mutually contradictory aims’⁹⁵. Cultural injustices of misrecognition demand recognition remedies, such as revaluing group identities and characteristics and recognising and affirming cultural diversity.⁹⁶ Socio-economic injustices of maldistribution, by contrast, require redistributive remedies, such as political-economic restructuring entailing redistribution of income and resources and reorganisation of the division of labour.⁹⁷ While recognition remedies affirm group differences, redistributive remedies eliminate them.⁹⁸ The objectives are thus not readily compatible. Fraser demonstrates this by visualising a continuum between socio-economic and cultural injustice, and redistributive and recognition remedies respectively. Injustices experienced by social groups at either extreme are easy to categorise and redress.⁹⁹ But where social groups fall mid-way on this continuum by reason of experiencing *both* cultural *and* socio-economic injustices – thus requiring *both* recognition *and* redistributive remedies calling for the group differences to be *both* affirmed *and* eliminated – remedying injustice becomes complicated in practice.¹⁰⁰ The experience of both maldistribution and misrecognition makes these social groups ‘fit both paradigms of justice simultaneously’¹⁰¹.

⁹⁵ Fraser, ‘From Redistribution to Recognition?’ (n 4) 74.

⁹⁶ *ibid* 72-73.

⁹⁷ *ibid*.

⁹⁸ *ibid* 74.

⁹⁹ *ibid* 78.

¹⁰⁰ *ibid* 74, 78; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 16, 19.

¹⁰¹ Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 16.

Women constitute such a 'bivalent' social group because gender encompasses both political-economic and cultural dimensions.¹⁰² On the one hand, gender is 'a basic structuring principle of the political economy'¹⁰³. It informs the division of labour between productive and reproductive labour and between male and female occupations.¹⁰⁴ Redressing gender-based maldistribution demands redistribution of resources between the sexes, such as elimination of the gender pay gap and the sexual division of labour.¹⁰⁵ On the other hand, gender-based misrecognition entails the privileging of masculine characteristics and the devaluation of their feminine counterparts, which is redressed through decentralising androcentric and sexist norms and revaluing feminine characteristics.¹⁰⁶ Gender injustice thus requires both redistributive and recognition remedies, which are incompatible in accordance with the redistribution-recognition dilemma: while redistributive remedies pursue the elimination of gender specificity, recognition remedies pursue its affirmation.¹⁰⁷ The concern for Fraser, and for Fredman's model, is reconciling the two dimensions to effectively redress gender injustices without undermining either redistributive or recognition means to that end. The solution lies in positing a synergetic relationship between the dimensions (section 3.1.3.3) and in emphasising transformative remedies (section 3.1.4).

¹⁰² Fraser, 'From Redistribution to Recognition?' (n 4) 78-79; Fraser, 'Recognition or Redistribution?' (n 4) 179; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 19.

¹⁰³ Fraser, 'From Redistribution to Recognition?' (n 4) 78.

¹⁰⁴ *ibid*; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 20.

¹⁰⁵ Fraser, 'From Redistribution to Recognition?' (n 4) 78-79; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 20.

¹⁰⁶ Fraser, 'From Redistribution to Recognition?' (n 4) 79; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 20-21.

¹⁰⁷ Fraser, 'From Redistribution to Recognition?' (n 4) 79-80; Fraser, 'Recognition or Redistribution?' (n 4) 179; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 19.

3.1.3.2 Young-Fraser Debate on the Relationship between Redistribution and Recognition

Fraser's thesis has come under Young's critique for its 'brazenly dichotomous'¹⁰⁸ structure. By positing the political economy and culture as distinct and opposing spheres of society, Young argues Fraser's dual systems theory to misrepresent social movements, like feminism, as 'calling for recognition as an end in itself, when they are better understood as conceiving cultural recognition as a means to economic and political justice'¹⁰⁹. This risks disconnecting recognition from the economic questions of distribution and division of labour.¹¹⁰ Young argues that recognition correctly understood is a means to economic, social, and political equality – a goal which Fraser attributes exclusively to redistributive politics – rather than the objective of social movements.¹¹¹ Feminism pursues sex equality, not recognition. Moreover, Young asserts that pinning political economy and culture against each other establishes false dichotomies between cultural and socio-economic injustices, and recognition and redistribution.¹¹² Reducing injustices to mutually exclusive socio-economic and cultural injustices, and remedies to redistributive and recognition measures, implies that all oppression is definable by either redistribution or recognition.¹¹³ Such dichotomisation 'distorts the plurality and complexity of social reality and politics'¹¹⁴. Indeed, Young finds that the dichotomies Fraser establishes do not hold because they fail to observe the interpenetration of the economic and cultural spheres of society explaining the gendered nature of the political economy contributing to women's oppression.¹¹⁵ The redistribution-recognition dilemma put forward by Fraser similarly does not hold. Affirming feminine characteristics supports the

¹⁰⁸ Young, 'Unruly Categories' (n 71) 150.

¹⁰⁹ *ibid* 148.

¹¹⁰ *ibid* 156.

¹¹¹ *ibid* 152, 156.

¹¹² *ibid* 150.

¹¹³ *ibid*.

¹¹⁴ *ibid* 157.

¹¹⁵ *ibid* 159.

reevaluation of women's unpaid labour by undermining misogynistic cultural valuations, and revaluing women's unpaid labour in turn contributes to 'a redistributive structuring that takes account of the hidden social costs of markets and social policies'¹¹⁶. Contrary to what Fraser suggests, it is therefore 'difficult to see how a feminist politics of recognition "pulls against" a feminist politics of redistribution'¹¹⁷. Young asserts that questions of justice entailing recognition politics ought to rather be conceptualised as involving necessarily material economic underpinnings and consequences while still being irreducible to mere market dynamics or economic exploitation.¹¹⁸ The political economy must be understood as cultural and the culture as economic.¹¹⁹ Socio-economic and cultural injustices interpenetrate, and thus redistributive and recognition politics are continuous, as opposed to mutually exclusive, struggles.¹²⁰

In response to Young's critique, Fraser offers a correction to her initial conception of justice and categorises three approaches to theorising social justice and explaining the relationship between redistribution and recognition (Table 2). First, she defends the culture-economy and redistribution-recognition dichotomies to which Young objects as being intended merely as an analytical framework, or a heuristic device, acknowledging a divide or decoupling between social and cultural politics for the purpose of examining the relationship between them.¹²¹ Then, she accepts that redistribution and recognition cannot be conceived as mutually exclusive paradigms of justice pertaining strictly to the economic sphere of society in the former case and to the cultural sphere in the latter, because this 'substantive dualist' conception of justice overlooks how the

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid.* 154.

¹¹⁹ *ibid.*

¹²⁰ *ibid.* 159.

¹²¹ N Fraser, 'A Rejoinder to Iris Young' (1997) 223 *NLR* 126, 126-128.

economy and culture do interpenetrate.¹²² That the political economy and culture, and redistribution and recognition, are not mutually exclusive dimensions – but interpenetrative – is illustrated by the distributive effects of cultural claims and the recognition effects of economic claims characterising what Fraser calls ‘bivalent’ social groups.¹²³ Thus, any viable conception of social justice must integrate and accommodate both redistribution and recognition.¹²⁴ Yet while Fraser accepts that redistribution and recognition are not mutually exclusive, she maintains that they are irreducible to each other.¹²⁵ She rejects what she calls ‘post-structural anti-dualist’ approaches to justice, such as those put forward by Young, which reject distinctions between the political economy and culture as ‘dichotomising’ and instead hold culture and economy to be so interpenetrative and interconnected as to be indistinguishable.¹²⁶ Fraser argues this to be a misrepresentation of reality: the displacement of redistributive questions by recognition politics within the post-socialist political culture has caused a decoupling of cultural and social politics, illustrating that redistribution and recognition are irreducible to each other.¹²⁷ Notably, Young had argued Fraser to misrepresent the extent to which redistributive issues have been neglected by the politics of recognition as there is ‘little evidence’¹²⁸ of this in practice.

Fraser’s solution to evading Young’s critique is then a ‘perspectival dualist’ approach to reconciling the redistributive and recognition paradigms of justice:

¹²² *ibid* 126-127; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 61-62.

¹²³ Fraser, ‘A Rejoinder to Iris Young’ (n 121) 128; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 22.

¹²⁴ Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 26.

¹²⁵ Fraser, ‘A Rejoinder to Iris Young’ (n 121) 126-127; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 63.

¹²⁶ Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 60; Young, ‘Unruly Categories’ (n 71) 154.

¹²⁷ Fraser, ‘A Rejoinder to Iris Young’ (n 121) 126-127; Fraser, ‘Recognition or Redistribution?’ (n 4) 166; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 8-9.

¹²⁸ Young, ‘Unruly Categories’ (n 71) 147-148.

redistribution and recognition constitute two distinct analytical perspectives that are both applicable to the political-economic and cultural spheres of society.¹²⁹ Political economy and culture can neither be separated nor subsumed to one another – rather, they are ‘mutually imbricated’¹³⁰. Hence, redistribution claims will inevitably have either intended or unintended recognition effects, and recognition claims will inevitably have some such distributive effects.¹³¹ Perspectival dualism allows recognition to be employed in identifying cultural dimensions of redistributive politics, and redistribution to be employed in identifying economic dimensions of recognition politics, because the justice of any social practice can be analysed from two distinct normative perspectives.¹³² Fraser’s response is thus to treat redistribution and recognition as distinct but overlapping analytical perspectives on social justice applicable to any social movement. This correction directly addresses Young’s critique that effectively perceived Fraser’s initial conception of justice as a substantive dualist one. With it, Fraser’s conception of justice allows for the recognition of the gendered nature of the political economy and hence better serves feminist legal theory in pursuit of sex equality. I observe here that the notion of ‘dualism’ refers to the two distinct paradigms of Fraser’s initial conception of justice despite its subsequent extension to three paradigms with the addition of participation. Thus, in referring to Fraser’s idea of ‘perspectival *dualism*’ and in attributing it to Fredman’s model below, I hereafter refer to the ‘perspectival *approach*’ to avoid reducing Fraser’s and Fredman’s multi-dimensional conceptions only to redistribution and recognition. The point of the perspectival approach, on my reading of Fraser, is that in multi-dimensional conceptions of justice, dimensions function as distinct analytical perspectives regardless of their number.

¹²⁹ Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 63.

¹³⁰ *ibid* 54.

¹³¹ *ibid* 64-65.

¹³² *ibid* 63.

Table 2. Fraser's Categorisation of Approaches to Justice

Approach to Justice	Relationship between Redistribution and Recognition	Attributed by Fraser to
Substantive dualism	Mutually exclusive paradigms	Young's interpretation of Fraser
Post-structural anti-dualism	Interpenetrative, cannot be treated separately	Young
Perspectival dualism	Interpenetrative, but presented as distinct <i>analytical</i> categories (heuristic device)	Fraser

3.1.3.3 The Synthesis of Redistribution and Recognition in Fredman's Model

Fredman's approach to reconciling redistribution and recognition is compatible with Fraser's. Similarly to Fraser pursuing 'a synergy' between recognition and redistribution, Fredman seeks 'a synthesis' between the dimensions.¹³³ I thus use the terminology interchangeably to convey that social justice and substantive equality necessarily require the combination of, and interaction between, redistribution and recognition: the combined effect of these dimensions is greater than the effect of any one dimension alone, and each of Fredman's four dimensions is a necessary but not a sufficient dimension of substantive equality.¹³⁴ Like Fraser, Fredman begins from the acknowledgment that 'the approach to inequality has developed along two apparently independent trajectories'¹³⁵: socio-economic inequalities have called for redistributive measures within the welfare state with a view to correcting injustices hindering people's access to resources; and group-based inequalities for justiciable constitutional rights to equality and non-discrimination with a view to correcting injustices of misrecognition.¹³⁶ Socio-economic and group-based inequalities

¹³³ Fraser, 'Recognition or Redistribution?' (n 4) 167; Fredman, 'Redistribution and Recognition' (n 8) 228.

¹³⁴ Fredman, 'Substantive Equality Revisited' (n 1) 735.

¹³⁵ Fredman, 'Redistribution and Recognition' (n 8) 214.

¹³⁶ *ibid* 214, 216.

have hence been treated as separate issues and the interaction between the two has been obscured.¹³⁷ Fredman recognises, however, that ‘it is no longer tenable to keep the two spheres separate’¹³⁸. Like Fraser, she therefore rejects what Fraser calls ‘substantive dualism’ conceiving redistribution and recognition as two separate dimensions of justice restricted to their respective spheres of society because such a conception fails to recognise the interpenetration of the economy and culture.¹³⁹ Indeed, Fredman accepts that ‘it is not enough to address only recognition issues within [group-based] equality and only distributive issues within socio-economic equality’¹⁴⁰. Group-based inequalities involve a significant redistributive aspect, given that they typically correspond to socio-economic disadvantage.¹⁴¹ Although discrimination law may uphold equal treatment of full-time and part-time workers, such recognition measures fail to address women’s concentration in part-time employment due to the absence of a redistributive policy implementing affordable public childcare.¹⁴² Conversely, while women’s socio-economic disadvantage is often addressed through redistributive welfare state policies, welfare states further entrench sex inequalities by overlooking the gendered nature of the political economy, failing to recognise these disadvantages as deriving from misrecognition.¹⁴³ The gender pay gap appears at the surface to be an issue of redistribution but is grounded in the sexual division of labour and devaluation of women’s labour.¹⁴⁴ Failure to reconcile recognition and redistributive remedies risks undermining the effectiveness of both, further perpetuating both socio-economic and group-based inequalities.¹⁴⁵ Therefore, ‘a full understanding of equality needs to

¹³⁷ *ibid* 214.

¹³⁸ *ibid* 215.

¹³⁹ *ibid* 214-215.

¹⁴⁰ *ibid* 225.

¹⁴¹ *ibid* 218.

¹⁴² *ibid* 221.

¹⁴³ *ibid*; Fredman, ‘Emerging from the Shadows’ (n 5) 283; S Fredman, ‘Engendering Socio-Economic Rights’ (2009) 25(3) SAJHR 410, 410.

¹⁴⁴ Fredman, ‘Redistribution and Recognition’ (n 8) 218.

¹⁴⁵ *ibid* 215.

incorporate both recognition and redistribution'¹⁴⁶. This approach to reconciling redistribution and recognition in Fredman's work draws on Sandra Liebenberg and Beth Goldblatt's writing on 'engendering' socio-economic rights with substantive equality in the South African Bill of Rights.¹⁴⁷ In effect, it facilitates the explicit recognition of the gendered nature of the political economy which Young argued Fraser's dichotomous conception of justice to obscure.

I have demonstrated above that Fredman's approach to reconciling redistribution and recognition is effectively equivalent to Fraser's perspectival approach in that while the redistributive and recognition dimensions are *analytically* distinct, they interpenetrate in society whereby they cannot be separated.¹⁴⁸ To treat them as mutually exclusive paradigms is to obscure the reality of interpenetrating disadvantages, such as the gendered nature of the political economy contributing to women's oppression. Yet it is useful – as an analytical tool – to afford some distinction between the two dimensions as opposed to accepting what Fraser describes as Young's post-structural anti-dualism where the dimensions become reducible to each other.¹⁴⁹ Fredman's further solution to the redistribution-recognition dilemma lies in the structure of her model. The model emphasises interaction between the four dimensions: addressing inequalities requires reference to the model as a synergetic whole because none of the dimensions enjoys lexical priority over the others.¹⁵⁰ Where the dimensions 'pull in opposite directions'¹⁵¹ – as they do in the redistribution-recognition dilemma – the aim of Fredman's model is 'to look for synthesis or compromise, rather than

¹⁴⁶ *ibid* 218.

¹⁴⁷ Bonthuys (n 56) 99; Fredman, 'Engendering Socio-Economic Rights' (n 143) 410; S Liebenberg and B Goldblatt, 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23(2) SAJHR 335, 338-340.

¹⁴⁸ Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 60, 63; Fredman, 'Substantive Equality Revisited' (n 1) 728.

¹⁴⁹ Fredman, 'Substantive Equality Revisited' (n 1) 713.

¹⁵⁰ *ibid* 712.

¹⁵¹ *ibid* 728.

suggesting that substantive equality pursue one of the aims at the cost of obliterating the others'¹⁵². The objectives of redistribution and recognition therefore cannot undermine each other but the two dimensions are reconciled by their interaction. The redistributive and recognition dimensions 'should pull together rather than against each other'¹⁵³. Then, 'the resulting synthesis takes forward the approach to substantive equality in ways that can be more responsive to real social wrongs'¹⁵⁴. Fredman's dimensional approach facilitates recognition of the reality of overlapping and intersecting inequalities and offers flexible remedies for redressing them.

Moreover, the perspectival approach enables Fredman to rebut MacKinnon's objections to her model. In MacKinnon's view, Fredman's model is 'neither theoretically adequate nor a tool for practice, but at best a remap of many aspects of inequality long recognised'¹⁵⁵. She goes as far as saying that it is 'a four-cornered air castle'¹⁵⁶ which – while providing 'a perfectly valid laundry list of long-time virtually universally recognized conventional features of inequalities, aspiring to the dynamism of "dimensions"'¹⁵⁷ – does not offer instructions for identifying inequalities, or the substance of substantive equality, outside of this list.¹⁵⁸ Nor is she convinced that the interaction between the dimensions solves this problem.¹⁵⁹ The identifying principle of inequality endorsed by MacKinnon is,

¹⁵² *ibid.*

¹⁵³ Fredman, *Discrimination Law* (n 5) 29.

¹⁵⁴ Fredman, 'Substantive Equality Revisited' (n 1) 728.

¹⁵⁵ C MacKinnon, 'Substantive Equality Revisited: A Rejoinder to Sandra Fredman' (2017) 15(4) *ICON* 1174, 1176.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid* 1174.

¹⁵⁸ C MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (2016) 14(3) *ICON* 739, 744-745.

¹⁵⁹ *ibid* 741.

of course, social hierarchy.¹⁶⁰ Social hierarchy, she argues, is *the* element missing from each dimension of Fredman's model capable of 'coher[ing] the dynamic substance of her otherwise abstract concepts and static lists'¹⁶¹. Because Fredman's model obscures the hierarchical character of sex and gender, it risks reducing the transformative dimension to special treatment, hence reifying existing social hierarchies, unable to resolve sex inequalities.¹⁶² In her rejoinder to MacKinnon, Fredman's asserts that

[t]o pick off each separate element and criticize it as asymmetrical, abstract, or disguising hierarchy is to misunderstand the multi-dimensional approach: it is the way in which the dimensions buttress one another that is central to this conception¹⁶³.

If the four dimensions interact analytically, social hierarchy is inherent in the model and the transformative dimension is not reduced to special treatment, nor does it risk legitimising inequality.¹⁶⁴ Interaction of the redistributive, recognition, and transformative dimensions ensures, for example, that measures purported to protect pregnant women cannot be considered to promote substantive equality if they also perpetuate female primary caregiver stereotypes.¹⁶⁵ And indeed, Fredman points out that MacKinnon's position by which substantive equality is definable by relations of domination and subordination alone obscures other inequalities and power relations, and their intersections, which Fredman's model is designed to be perceptive of.¹⁶⁶

¹⁶⁰ *ibid* 740, 744. See C MacKinnon, 'Difference and Dominance: On Sex Discrimination' in C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987), 40.

¹⁶¹ MacKinnon, 'A Reply to Sandra Fredman' (n 158) 744.

¹⁶² *ibid* 740-741; MacKinnon, 'A Rejoinder to Sandra Fredman' (n 155) 1174-1175.

¹⁶³ S Fredman, 'Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon' (2016c) 14(3) *ICON* 747, 748.

¹⁶⁴ *ibid* 747-748.

¹⁶⁵ *ibid* 748.

¹⁶⁶ *ibid* 747.

I agree that, as postulated by Fredman, it is the interactive element of the model which makes it responsive to structural and systemic inequalities. At the same time, however, I understand MacKinnon's critique about the lack of substance in the model, having myself observed above that Fredman fails to engage with feminist legal theory in defining her dimensions and thus to make explicit the theoretical underpinnings of her model. As such, what I have done in this chapter – theoretically refining Fredman's model by reference to Young's and Fraser's work – addresses, at least in part, MacKinnon's critique about the lack of substance in the model. By clarifying that the recognition dimension relies on the status model of recognition in section 3.1.2.3, I have offered some insight for identifying instances of misrecognition, including those characterised by hierarchies between social groups. And by offering the differentiated feminist politics of difference as a substantive guide for accommodating difference and reconciling equal and special treatment in section 3.1.5, my refined understanding of Fredman's model better ensures that the transformative dimension does not reinforce existing inequalities.

3.1.4 The Appeal to Transformative Remedies

I have argued above that Fredman's model embodies the reconstructive tenet of legal feminism, also explicit in Young's and Fraser's scholarship, that substantive equality requires transformative, as opposed to merely affirmative, remedies. This tenet is best expressed by Fraser's distinction between affirmative and transformative remedies to injustices (Table 3). Affirmative remedies correct the unjust outcomes of existing institutional and social structures by revaluing devalued social groups and enforcing a fairer distribution of resources for the benefit of disadvantaged groups, while leaving intact these underlying structures that produce and reproduce said injustices.¹⁶⁷ Transformative remedies, by

¹⁶⁷ Fraser, 'From Redistribution to Recognition?' (n 4) 82.

contrast, correct the very structures and processes which produce the unjust end-state outcomes redressed by affirmative remedies.¹⁶⁸ To highlight the distinction between the types of remedies and their application to gender injustices, I follow Fraser's application of them to both misrecognition and maldistribution.

Affirmative recognition entails the revaluation of devalued group characteristics.¹⁶⁹ This, however, tends to perpetuate the problem of reification: revaluing women's unpaid labour and recognising women's role in caregiving, for example, has often essentialised womanhood.¹⁷⁰ Similarly, by highlighting women's difference from men, affirmative recognition is 'likely to have the effect of pouring oil into the flames of resentment against affirmative action'¹⁷¹. Transformative recognition, by contrast, entails deconstructing the cultural-valuational structure causing the misrecognition of women's labour, namely the sexual division of labour.¹⁷² Such remedies have a de-reifying effect and appear to avoid resentment against policies recognising women's difference.¹⁷³ Affirmative redistribution adjusts the end-state distribution of resources within the welfare state without addressing the political-economic structure causing the maldistribution.¹⁷⁴ In doing so, they 'often provoke a backlash of misrecognition'¹⁷⁵. Welfare policies compensating women for the socio-economic disadvantage associated with motherhood are known to subject women to the stigma of welfare reciprocity, further reinforcing negative

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.*; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 75.

¹⁷⁰ Dahl et al (n 68) 377; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 76-77.

¹⁷¹ Fraser, 'From Redistribution to Recognition?' (n 4) 89.

¹⁷² *ibid.* 83; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 75.

¹⁷³ Fraser, 'From Redistribution to Recognition?' (n 4) 86, 89-90; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 76-77.

¹⁷⁴ Fraser, 'From Redistribution to Recognition?' (n 4) 84; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 74.

¹⁷⁵ Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 77.

stereotypes associated with single motherhood in particular.¹⁷⁶ Transformative redistribution transforms the political-economic structure underlying maldistribution, for instance by reorganising the division of labour and adopting comprehensive and universal social welfare programmes.¹⁷⁷ While preventing the stigmatisation of welfare reciprocity, transformative redistribution also promotes solidarity within and between social groups, thus also redressing certain injustices of misrecognition.¹⁷⁸

Fraser then asserts that redressing both socio-economic and cultural injustices requires either affirmative redistribution *and* affirmative recognition, *or* transformative redistribution *and* transformative recognition.¹⁷⁹ Conflating affirmative and transformative remedies faces the redistribution-recognition dilemma due to the conflicting functional logics of affirmation and transformation.¹⁸⁰ Of the two possible strategies for redressing injustices, the combination of affirmative redistribution and affirmative recognition is also unfeasible: affirmative action and the revaluation of 'feminine' characteristics fail to address the gendered nature of the political economy, thus maintaining gender differences and the devaluation of these characteristics.¹⁸¹ Therefore, Fraser considers the most promising strategy for sex equality to consist of transformative remedies: socialist feminist redistributive politics and deconstructive feminist cultural politics entailing displacement of the male norms embedded in social and economic structures.¹⁸² Rather than requiring women to conform to male norms embedded in existing androcentric social and economic structures, this involves transformation of these structures to

¹⁷⁶ Fraser, 'From Redistribution to Recognition?' (n 4) 86.

¹⁷⁷ *ibid* 84-85; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 74.

¹⁷⁸ Fraser, 'From Redistribution to Recognition?' (n 4) 85-86; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 77.

¹⁷⁹ Fraser, 'From Redistribution to Recognition?' (n 4) 87-88.

¹⁸⁰ *ibid*.

¹⁸¹ *ibid* 89.

¹⁸² *ibid* 88-89.

challenge the public-private dichotomy and the sexual division of labour.¹⁸³ While the redistribution-recognition dilemma cannot be fully resolved, a transformative approach minimises conflicts between the two dimensions.¹⁸⁴

Like Fraser, Fredman recognises that affirmative remedies do not achieve substantive equality because they fail to address the underlying cause of inequalities and risk centralising distributive questions which, while important, are not the sole concern for substantive equality.¹⁸⁵ Hence, particularly to accommodate difference between social groups, structural transformation ensures that social groups deemed to deviate from dominant norms are no longer required to conform to these norms to be entitled to equality.¹⁸⁶ That is, ‘rather than requiring women to conform to male norms, substantive equality requires transformation of existing male-oriented institutions and social structures’¹⁸⁷. Fredman and Fraser both acknowledge the political utopianism, functional impracticability, and expense associated with structural transformation (see Chapter 1).¹⁸⁸ To mitigate, Fraser offers a strategy of non-reformist reforms that

engage people’s identities and satisfy some of their needs as interpreted within existing frameworks of recognition and distribution [while] they set in motion a trajectory of change in which more radical reforms become practicable over time¹⁸⁹.

In practice, this entails affirmative remedies in anticipation of the transformation, in the long-term, of the underlying unjust institutional and structural frameworks.¹⁹⁰

¹⁸³ *ibid* 84.

¹⁸⁴ *ibid* 92.

¹⁸⁵ Fredman, *Discrimination Law* (n 5) 16.

¹⁸⁶ *ibid* 30; Fredman, ‘Emerging from the Shadows’ (n 5) 283.

¹⁸⁷ Fredman, ‘Emerging from the Shadows’ (n 5) 283.

¹⁸⁸ Fraser ‘From Redistribution to Recognition?’ (n 4) 90; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 79; Fredman, *Discrimination Law* (n 5) 16, 30-31.

¹⁸⁹ Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 79.

¹⁹⁰ *ibid* 80.

Table 3. Affirmative vs. Transformative Remedies

Redistribution	Recognition	Redistribution + Recognition
Affirmative Redistribution	Affirmative Recognition	Fail to address the gendered nature of the political economy
Affirmative Redistribution	Transformative Recognition	Redistribution-recognition dilemma
Transformative Redistribution	Affirmative Recognition	Redistribution-recognition dilemma
Transformative Redistribution	Transformative Recognition	Minimise conflict between redistribution and recognition, transform androcentric social structures

3.1.5 Reconciling Equal and Special Treatment: The Feminist Politics of Difference

In this section, I examine the feminist politics of difference by which Fredman, Young, and Fraser treat differences between social groups and mitigate the sameness-difference dichotomy. All three reject the ideal of assimilation requiring individuals to conform to dominant norms implied by the equal treatment principle – rather, social justice and substantive equality demand recognition of difference.¹⁹¹ Equal treatment denies the existence of differences between social groups and pursues the elimination of these differences, thus perpetuating the oppression of social groups that differ from dominant groups.¹⁹² For example, subsuming pregnancy and maternity leave under gender-neutral sick leave frameworks on account of inability to work experienced by either sex effectively subjects women to male norms.¹⁹³ By assimilating pregnancy and childbirth to illness or disability, equal treatment stigmatises pregnancy and

¹⁹¹ *ibid* 7; Fredman, ‘Redistribution and Recognition’ (n 8) 226; Young, *Justice and the Politics of Difference* (n 3) 11, 157.

¹⁹² Fredman, ‘Redistribution and Recognition’ (n 8) 216; Young, *Justice and the Politics of Difference* (n 3) 157, 163.

¹⁹³ Young, *Justice and the Politics of Difference* (n 3) 161, 175.

childbirth and fails to recognise them as socially necessary forms of reproductive labour, hence perpetuating women's oppression and exclusion due to the very fact of their difference from, not sameness to, dominant male norms.¹⁹⁴ Substantive equality requires a feminist politics of difference for the recognition of women's difference from men on account of their biological capacity for pregnancy and childbirth.¹⁹⁵

Young's politics of difference characterised by a dual system of rights provides a useful basic notion for overcoming the sameness-difference dichotomy. On the one hand, the equal moral worth of human beings must reflect into a general system of rights where all rights – such as basic civil and political rights, and formal equality principles like equal pay – are the same for everyone.¹⁹⁶ The sameness between men and women on account of their equal moral worth entails them to equal rights and treatment. On the other hand, there should also be a specific system of rights pertaining to certain social groups.¹⁹⁷ It is only in this latter case where recognising difference between the sexes becomes relevant.¹⁹⁸ Here, Young and Fredman treat differences broadly alike. Both view differences between social groups relationally as the product of social processes and recognise that these differences are generally positive and desirable, whereby equality is best promoted by affirming – not eliminating – these

¹⁹⁴ S Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10(4) *Int J L C* 442, 445; Young, *Justice and the Politics of Difference* (n 3) 168, 175-176; IM Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99(2) *Ethics* 250, 269-270.

¹⁹⁵ Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 46; S Fredman, 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' (1994) 110 *LQR* 106, 107; Young, *Justice and the Politics of Difference* (n 3) 176.

¹⁹⁶ M La Caze, 'Splitting the Difference: Between Young and Fraser on Identity Politics' in L Burns (ed), *Feminist Alliances* (Rodopi 2006), 154-155; Young, *Justice and the Politics of Difference* (n 3) 174.

¹⁹⁷ La Caze (n 196) 154-155; Young, *Justice and the Politics of Difference* (n 3) 174.

¹⁹⁸ La Caze (n 196) 155.

differences.¹⁹⁹ Thus, equality can be facilitated through special treatment, such as affirmative action.²⁰⁰ Ideally, difference between social groups comes to signify a difference in terms of cultural variation, rather than the inferior half of such binary dichotomies as domination and subordination.²⁰¹ Both Fredman and Young emphasise recognising women's difference from men and affirming feminine characteristics to eliminate the detriment associated with them.²⁰² By ceasing to privilege men and to consolidate patriarchal gender roles between the sexes, such a gynocentric approach avoids assimilating women to men and thus avoids the need for a male comparator in equality law.²⁰³

The issue with Young's, and Fredman's, politics of difference is, however, that it neglects the point alluded to by Fraser that there are different kinds of differences whereby all differences ought not to be affirmed or celebrated as cultural variation. Fraser illustrates that feminist legal theory has treated differences between the sexes in three ways.²⁰⁴ First, MacKinnon's dominance thesis has endorsed the abolition of all gender differences due to their inherently oppressive character.²⁰⁵ Second, cultural feminists' gynocentric treatment of difference highlights women's cultural superiority over men: differences should be addressed by revaluing and universalising feminine characteristics.²⁰⁶ Third, Young's politics of difference is one of cultural variation: gender differences represent mere variations in cultural values, whereby they should not be

¹⁹⁹ Fredman, *Discrimination Law* (n 5) 3; Young, *Justice and the Politics of Difference* (n 3) 157, 163, 171.

²⁰⁰ Fredman, *Discrimination Law* (n 5) 26; Fredman, 'Engendering Socio-Economic Rights' (n 143) 419; Fredman, 'Substantive Equality Revisited' (n 1) 729; Young, *Justice and the Politics of Difference* (n 3) 158; Young, 'Polity and Group Difference' (n 194) 269.

²⁰¹ Young, *Justice and the Politics of Difference* (n 3) 166, 169-171.

²⁰² Fredman, 'Redistribution and Recognition' (n 8) 226; La Caze (n 196) 153; Young, *Justice and the Politics of Difference* (n 3) 161-162, 176-177.

²⁰³ La Caze (n 196) 151, 153.

²⁰⁴ *ibid* 158.

²⁰⁵ Fraser, 'Recognition or Redistribution?' (n 4) 180.

²⁰⁶ *ibid*.

universalised or eliminated but affirmed in order to signify human diversity.²⁰⁷ Because there appears to be some validity to all three approaches, Fraser proposes a differentiated politics of difference, namely that different kinds of differences should be treated differently.²⁰⁸ Oppressive differences should be eliminated, positive differences should be universalised, and differences that reflect cultural variations should be affirmed.²⁰⁹ As such, contrary to what Young suggests, all differences should not be affirmed because all differences are not mere cultural variations free of hierarchical values of domination and subordination – some are oppressive and must be eliminated. Although Young and Fredman treat differences broadly alike, Fredman accepts that difference should only be affirmed where it is ‘part of an individual’s positive identity’²¹⁰ and does not ‘attract detriment’²¹¹, which Young does not acknowledge, at least as her politics of difference is read by Fraser. Furthermore, contrary to MacKinnon’s position, all differences are not oppressive and hence ought not to be eliminated. Indeed, Fraser’s differentiated approach is appealing because treating all differences the same is susceptible to reinforcing systemic and structural inequalities. I agree with Marguerite La Caze that ‘distinguishing between different differences appears like a necessary refinement of the politics of difference’²¹².

3.2 Model into Method: A Novel Approach to Employing Fredman’s Model as an Analytical Framework

In Chapter 1, I observed that Fredman’s model has thus far been employed in socio-legal literature without refinement of the scope of the four analytical

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*

²¹⁰ Fredman, ‘Redistribution and Recognition’ (n 8) 226.

²¹¹ Fredman, ‘Emerging from the Shadows’ (n 5) 282.

²¹² La Caze (n 196) 159.

dimensions. I expect such a literal application of the model to cause my critique and reconstruction of the EU PLF within the scope of this thesis to become convoluted and remain superficial. In this latter half of this chapter, I therefore turn Fredman's model into an analytical method for the purposes of normatively critiquing and reconstructing the EU PLF by extracting from my theoretically refined understanding of the model a number of methodological and normative principles. In section 3.2.1, I identify and discuss two methodological principles which emerge from the model and guide my approach to utilising Fredman's model as an analytical tool: the differentiated feminist politics of difference and the perspectival approach to the relationship between the four dimensions. In section 3.2.2, I present my novel approach to employing the model as a critical and reconstructive analytical method arising from the latter principle. The purpose of this approach is to retain the use of the four dimensions as distinct analytical categories while approaching each dimension from the perspective of a defined normative principle in order to limit the analytical scope of each dimension. This involves three steps. First, I identify four norms which underpin inequality between parents for the purpose of critiquing the EU PLF in Chapters 4-6. The key norm I identify is *the sexual division of labour within the family*. This norm is further underpinned by *the breadwinner-caregiver dichotomy*, *the heteronormative nuclear family*, and *the devaluation of pregnancy and parenthood* norms. Second, I turn these norms into corresponding positive normative principles (e.g. *deconstructing the sexual division of labour within the family*) for the purpose of reconstructing the EU PLF in Chapter 7 in a way which deconstructs each of these norms and thus facilitates substantive equality between parents. I conceptually define both the norms and normative principles in section 3.2.3. And third, I attribute one of Fredman's first three analytical dimensions to one norm/normative principle pairing to ensure methodological adherence to the perspectival approach.

3.2.1 Methodological Principles

In using Fredman's model as a critical and reconstructive analytical method, I follow two methodological principles arising from my theoretical refinement of the model: the differentiated feminist politics of difference (section 3.1.5) and the perspectival approach to the relationship between the four dimensions (section 3.1.3). The former principle mitigates the sameness-difference dichotomy and hence instructs my treatment of differences between parents, while the latter mitigates the redistribution-recognition dilemma resulting from the conflicting functional logics of the first two dimensions of Fredman's model). In this section, I discuss the relevance of both methodological principles to this thesis.

3.2.1.1 The Differentiated Feminist Politics of Difference: De-Gendering Parenthood

To avoid the sameness-difference dichotomy and comparison between social groups in critiquing and reconstructing the EU PLF, I treat differences between the sexes and groups of parents in accordance with Fraser's differentiated feminist politics of difference. Instead of viewing these differences in an analytically inflexible or abstract way, I consider them contextually depending on their nature. If differences are oppressive, they should be eliminated; if positive, they should be revalued and universalised; and if of cultural variation, they should be affirmed.²¹³ For the purposes of this thesis, this prompts me to examine the meaning of 'difference' between the sexes. The basic explanation of difference between women and men, and thus sex inequality, has remained grounded in the female body's capacity for pregnancy, childbirth, and breastfeeding, which has subsequently presented childcare as women's essential biological characteristic.²¹⁴ This biological reductionist account of

²¹³ Fraser, 'Recognition or Redistribution?' (n 4) 180.

²¹⁴ D Rhode, 'The Ideology and Biology of Gender Difference' (1996) 35 *South J Philos* 73, 75; J Lorber, 'Using Gender to Undo Gender. A Feminist Degendering Movement' (2000) 1(1) *Fem Theory* 79, 83.

difference is, however, an inaccurate one – one which obscures the significance of sex inequality.²¹⁵ Instead, feminist theorists such as Simone de Beauvoir and Judith Butler have posited that biology does not explain all differences or inequalities between the sexes.²¹⁶ Rather, a distinction may be drawn between biological ‘sex’ and socially constructed ‘gender’ associated with either sex.²¹⁷ A social constructivist view of gender challenges the essentialism of biological reductionist accounts of difference between the sexes by recognising that gender relations and definitions of womanhood and manhood are continually reproduced and transformed by social and political forces.²¹⁸ In this thesis, I generally understand sex and sex-differences to be biological and gender and gender-differences to be socially constructed.²¹⁹ This said, I recognise that sex itself involves an element of social construction whereby the distinction between sex and gender becomes obscured.²²⁰ Like the gender-binary, the biological sex-binary is socially constructed and both, as well as the interaction between them, are actively challenged by intersex, gender non-conforming and non-binary, and transgender individuals.²²¹ Therefore, to avoid obscuring the existence and experience of intersex, gender non-conforming and non-binary, and transgender parents – like much of existing parenting leave policy literature has done (Chapter 1) – I discuss issues relevant to them in my critique and reconstruction of the EU

²¹⁵ Rhode (n 214) 74.

²¹⁶ *ibid* 77; J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999), 9; S de Beauvoir, *Second Sex* (Vintage Books 2010), 330; Ásta, *Categories We Live By: The Construction of Sex, Gender, Race and Other Social Categories* (Oxford University Press 2018), 55-56.

²¹⁷ Ásta (n 216) 54; Butler, *Gender Trouble* (n 216) 10; de Beauvoir (n 216) 330; T Miller, *Making Sense of Fatherhood. Gender, Caring and Work* (Cambridge University Press 2011), 35.

²¹⁸ Miller (n 217) 36; EN Glenn, ‘Social Constructions of Mothering: A Thematic Overview’ in EN Glenn, G Chang, and LR Forcey (eds), *Mothering: Ideology, Experience, and Agency* (Routledge 1994), 3.

²¹⁹ MacKinnon, ‘Difference and Dominance’ (n 160) 38-39; J Williams, ‘Deconstructing Gender’ in K Bartlett and R Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991), 108.

²²⁰ Ásta (n 216) 55; Butler, *Gender Trouble* (n 216) 10-11, 33.

²²¹ See eg A Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books 2000).

PLF (Chapters 5 and 7). I also make a deliberate effort to use gender- and sex-neutral language in discussing pregnancy and parenthood to avoid unnecessarily gendering or sexing either, unless the context requires reference to e.g. ‘women’ or ‘female workers’.²²²

Of relevance to this thesis is how the biological reductionist account of difference between the sexes conflates biological and social parenthood, consequently reinforcing inequalities between parents.²²³ Understanding difference between women and men, and hence sex inequality, as a difference in reproductive capacity conflates maternity with motherhood – a characteristic which underpins what Clare McGlynn conceptualises as ‘the dominant ideology of motherhood’.²²⁴ This ideology

broadly constructs a normative model of women and motherhood, the foundation of which is the perceived natural, universal and unchanging nature of the maternal role, together with the presumed existence of a strong maternal instinct in *all* women. This leads to the assumption that motherhood is the usual and appropriate role for women; the rightful (and actual) ambition of all ‘normal’ women.²²⁵

And because reproductive capacity, or the biological fact of maternity, entails that motherhood is their natural role, childcare is, naturally, perceived as women’s primary responsibility.²²⁶ This ideology then reinforces inequalities in at least two ways relevant to this thesis. First, it conveys an essentialist understanding of motherhood – the normative motherhood being white, middle-

²²² See eg R Dembroff and D Wodak, ‘He/She/They/Ze’ (2018) 5 *Ergo: An Open Access J Phil* 371; J Holroyd and MJ Cull, ‘Gender-Neutrality and Family Leave Policies’ in L Anderson and E Lepore (eds), *The Oxford Handbook of Applied Philosophy of Language* (Oxford University Press 2024).

²²³ Glenn, ‘Social Constructions of Mothering’ (n 218) 14; MR Polatnick, ‘Why Men Don’t Rear Children: A Power Analysis’ in J Trebilcot (ed), *Mothering. Essays in Feminist Theory* (Rowman and Allanhead 1983), 22; A Weissman, ‘Ideal Citizens and Family Values: The Politics of Reproductive Fitness’ in L Hall, A Weissman, and L Shepherd (eds), *Troubling Motherhood: Maternity in Global Politics* (Oxford University Press 2020), 109-110.

²²⁴ C McGlynn, ‘Ideologies of Motherhood in European Community Sex Equality Law’ (2000) 6(1) *ELJ* 29, 31-32.

²²⁵ *ibid* 31 (original emphasis).

²²⁶ *ibid*.

class, and heterosexual – and the act of mothering, whereby it perpetuates inequalities between groups of women and parents.²²⁷ I discuss the expectation that childbearing and childrearing should take place within the heterosexual nuclear family in section 3.3.3.3.²²⁸ This is also the topic of Chapter 5. Closely linked to this expectation is the reliance of the dominant ideology on the mother's gestational link to the child, which fails to recognise different forms of motherhood and types of mothering.²²⁹ This, too, is discussed in Chapter 5. Second, the dominant ideology of motherhood reinforces the prevalent conception of fatherhood as

being at the same time the biological progenitor of the child who has contributed sperm to the child's conception, married or in a stable relationship with the child's mother; heterosexual and [cis-gendered]; and the family breadwinner²³⁰.

That is, understanding reproductive capacity as the main difference between women and men removes men from caregiving and causes them to emerge as 'natural' breadwinners.²³¹ Parallel to the dominant ideology of motherhood thus runs a dominant ideology of fatherhood.²³² In combination, they institutionalise the sexual division of labour and the breadwinner-caregiver dichotomy discussed in section 3.3.3.

²²⁷ P Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge 2000), 89; SB Boyd, 'Motherhood and Law: Constructing and Challenging Normativity' in V Munro and M Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2016), 267; KH Averett, 'Queer Parents, Gendered Embodiment, and the De-Essentialisation of Motherhood' (2021) 22(2) *Fem Theory* 284. See eg EN Glenn, 'From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor' (1992) 18(1) *Signs* 1.

²²⁸ Boyd, 'Motherhood and Law' (n 227) 269.

²²⁹ R D'Alton-Harrison, 'Mater Semper Incertus Est: Who's Your Mummy?' (2014) 2(3) *Med L Rev* 357, 357.

²³⁰ A Margaria, 'Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?' (2020) 34(3) *IJLPF* 225, 235.

²³¹ McGlynn (n 224) 34; Miller (n 217) 41.

²³² Margaria (n 230) 235.

Sociologists Gerda Neyer and Laura Bernardi argue that ‘an essential contribution of feminism to the understanding of motherhood as a structuring category has been its insistence on the distinction between biological and social motherhood’²³³. By recognising motherhood as a social construct distinct from maternity (i.e. pregnancy, childbirth, and breastfeeding) as a bodily capacity, feminist theorists have revealed how motherhood has been socially constructed to enable women’s exploitation as both childbearers and childrearers.²³⁴ As Smart explains:

[m]otherhood is not a natural condition. It is an institution that presents itself as a natural outcome of biologically given gender differences, as a natural consequence of (hetero)sexual activity, and as a natural manifestation of an innate female characteristic, namely the maternal instinct.²³⁵

Fatherhood as it is associated with breadwinning is similarly socially constructed.²³⁶ Distinct from biological maternity and paternity, my understanding of motherhood and fatherhood in this thesis is similarly informed by a social constructivist understanding of the concepts.²³⁷ The difference between the sexes’ parental roles – and the inequalities perpetuated by them – cannot be explained by reference to the difference between the sexes’ reproductive roles. The bodily capacity for pregnancy, childbirth, and breastfeeding does not entail that women have a natural inclination for childcare and neither does the male body’s lack thereof entail a natural inclination for

²³³ G Neyer and L Bernardi, ‘Feminist Perspectives on Motherhood and Reproduction’ (2011) 36(2) *Hist Soc Res* 162, 162. See also E Jeremiah, ‘Motherhood to Mothering and Beyond: Maternity in Recent Feminist Thought’ (2006) 18 *J Ass Res Mothering* 21.

²³⁴ Boyd, ‘Motherhood and Law’ (n 227) 268; Jeremiah (n 233) 23; Neyer and Bernardi (n 233) 165-166; A Rich, *Of Woman Born. Motherhood as Experience and Institution* (Virago 1977), 42.

²³⁵ C Smart, ‘Deconstructing Motherhood’ in E Silva (ed), *Good Enough Mothering? Feminist Perspectives on Lone Motherhood* (Routledge 1996), 37.

²³⁶ Miller (n 217) 41.

²³⁷ Fredman, ‘Reversing Roles’ (n 194) 442; S Fredman, *Women and the Law* (Oxford University Press 1997), 207; Glenn, ‘Social Constructions of Mothering’ (n 218) 3; V Held, ‘The Obligations of Mothers and Fathers’ in J Trebilcot (ed), *Mothering. Essays in Feminist Theory* (Rowman and Allanhead 1983), 7.

breadwinning and a detachment from childcare. Both presumptions are mere social constructs.

Alongside Fraser's differentiated feminist politics of difference, this conceptual distinction between biological and social parenthood then informs my treatment of differences between the sexes as parents. Biological difference, namely the bodily capacity for pregnancy, childbirth, and breastfeeding, should be affirmed to facilitate substantive equality because neither eliminating nor universalising this difference is practicable. Indeed, liberal legal feminists' attempts at assimilating women to men by ignoring or eliminating pregnancy and childbirth altogether and equating them to sickness have only perpetuated pregnancy-related inequalities.²³⁸ The difference of persons with the bodily capacity for pregnancy and childbirth from those without this capacity must be affirmed through special treatment of the former. However, legal feminists' – particularly MacKinnon's – concern with cultural and radical feminists affirming women's biological difference from men through special treatment has been that because of the conflation of biological maternity with social motherhood, it has subsequently disadvantaged women by reinforcing the association of the female body with caregiving.²³⁹ In this thesis, I address this concern by detaching motherhood and the act of mothering from the female body – that is, from the concept of maternity – in critiquing and reconstructing the EU PLF.

Rather than affirming the socially constructed association of caregiving with the female body, substantive equality between parents must be facilitated by

²³⁸ A Scales, 'Towards a Feminist Jurisprudence' (1980) 56(3) *Ind LJ* 375, 429; C Littleton, 'Reconstructing Sexual Equality' in K Bartlett and R Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991), 38.

²³⁹ Lorber (n 214) 87; MacKinnon, 'Difference and Dominance' (n 160) 34; C MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989), 231.

revaluing and universalising feminine caregiving characteristics as the norm.²⁴⁰ Neither sex is naturally more inclined to caregiving or breadwinning but both sexes are equally capable of caregiving and should therefore bear equal responsibility for childcare.²⁴¹ Universalising caregiving in order for it to become the norm for both sexes mitigates the inequality between the sexes on account of socially constructed gender roles. As such, the emphasis on motherhood and the act of mothering must be displaced by, or rather reconceptualised as, *parenthood* and the gender-neutral act of *parenting*. Parenting must be ‘de-gendered’ and ‘unsexed’.²⁴² But rather than being achieved by eliminating caregiving as a difference between the sexes which would ultimately result in a masculine world and in the ‘neutering’²⁴³ of the mother – and because eliminating all reproductive labour by, for instance, redistributing it to the market is futile – the de-gendering of parenting must be achieved through the universalisation of the ‘feminine’ characteristic of caregiving, whereby only the difference and inequality in gendered parental roles is eliminated.²⁴⁴ The process ‘is not about reducing a woman’s status as mother, but rather opening that status up to people of all other sexes’²⁴⁵. Moreover, by detaching the act of mothering from the female body and recognising that it is not only cisgender women that ‘mother’, I pay attention to de-essentialising motherhood.²⁴⁶ A more anti-essentialist conception would accommodate non-normative parenting regardless of parents’

²⁴⁰ See eg N Fraser, ‘After the Family Wage: Gender Equity and the Welfare State’ (1994) 22(4) *Polit Theory* 591, 611.

²⁴¹ Fredman, ‘Reversing Roles’ (n 194) 442; Fredman, ‘A Difference with Distinction’ (n 195) 121; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 46; Young, *Justice and the Politics of Difference* (n 3) 176.

²⁴² Lorber (n 214) 88; D Rosenblum, ‘Unsex Mothering: Toward a New Culture of Parenting’ (2012) 35 *Harv J L & Gender* 58, 82-83.

²⁴³ MA Fineman, ‘The Neutered Mother’ (1992) 46(3) *U Miami L Rev* 653, 660.

²⁴⁴ See eg Fineman, ‘The Neutered Mother’ (n 243) 660; Lorber (n 214) 90; Margaria (n 230) 246; Rosenblum (n 242) 82.

²⁴⁵ Rosenblum (n 242) 82-83.

²⁴⁶ Averett (n 227) 285, 289-290.

sexual and/or gender identity and family form, particularly at the intersections of sex, gender, and sexuality.

3.2.1.2 Perspectival Approach

The second methodological principle I follow is the perspectival approach – that while the four dimensions interact, they must be analytically distinct (section 3.1.3.2) – to the relationship between the four dimensions of Fredman’s model because it mitigates the redistribution-recognition dilemma. Not adhering to the perspectival approach – that is, conflating the four dimensions analytically – renders the use of Fredman’s model redundant. Indeed, I further suggest that specifically in the EU legal context of this thesis, adhering to the perspectival approach in assessing the redistributive, recognition, participative, and transformative aspects of EU law and policy may mitigate the subordination of the EU’s social dimension to its economic dimension (Chapter 2). While emphasising synthesis between redistribution and recognition, the perspectival approach ensures that the economic and social dimensions of EU law and policy are both assessed in their own right and neither is prioritised over the other.²⁴⁷ In the next section, I outline my novel approach to employing Fredman’s model as a critical and reconstructive analytical framework. I refine the method in which I use Fredman’s model by delimiting the analytical scope of the four dimensions through defined norms and normative principles, while retaining their use as distinct analytical categories. This normative approach to inequality between parents and the pursuit of substantive equality is also how this thesis embodies the utopian reconstruction feminist legal project in devising the transformative EU parenting leave model (Chapter 1).

²⁴⁷ See eg A Plomien, ‘EU Social and Gender Policy Beyond Brexit: Towards the European Pillar of Social Rights’ (2018) 17(2) Soc Policy Soc 281, 284-285.

3.2.2 A Novel Approach to Employing Fredman's Model

My approach to employing Fredman's model as a critical and reconstructive analytical framework involves three steps. First, I identify norms which underpin inequality between parents for the purpose of critiquing the EU PLF. Second, I turn these norms into positive normative principles for the purpose of reconstructing the EU PLF to facilitate substantive equality between the sexes and between groups of parents regardless of sexual and/or gender identity and family form. And third, I attribute one of Fredman's first three analytical dimensions – redistribution, recognition, or participation – to one norm/normative principle pairing to best ensure adherence to the perspectival approach. I outline each step below. Here, I note that a normative approach to addressing sex inequality exists in Fraser's earlier work in which she has articulated five normative principles – anti-poverty, anti-exploitation, sex equality, anti-marginalisation, and anti-androcentrism – which constitute the preconditions for a sex-equal welfare state.²⁴⁸ I observe that these normative principles broadly correspond to the redistributive, recognition, and participative principles in her later work.²⁴⁹ They do not, as such, give rise to or correspond to my normative principles – hence the novelty of my principles – but do provide me with the verbiage for discussing the policy strategies, such as preventing gendered poverty, which characterise each of the three dimensions. My normative principles are distinct from Fraser's because they pinpoint the norm, such as the devaluation of pregnancy and parenthood as forms of reproductive labour, which underpins gendered poverty as a form of inequality and must be deconstructed through redistributive anti-poverty policies in order to facilitate substantive equality.

²⁴⁸ Fraser, 'After the Family Wage' (n 240) 601.

²⁴⁹ Anti-poverty and anti-exploitation principles correspond to redistribution; sex equality and anti-androcentrism to recognition; and anti-marginalisation to participation. The anti-androcentrism principle more broadly corresponds to the reconstructive tenet of Fraser's differentiated feminist politics of difference.

3.2.2.1 Identifying Norms

I first identify a set of norms which underpin inequality between parents, derived from my theoretical discussion of Fredman's model in the first half of this chapter. I identify *the sexual division of labour within the family* as the core underlying norm. It encompasses the first three dimensions of Fredman's model: it underpins disadvantage caused by the maldistribution of material and non-material goods and resources; the stigma, stereotyping, humiliation, and violence resulting from the misrecognition of social groups; and political and social exclusion.²⁵⁰ As such, within the norm of the sexual division of labour within the family, I identify three further norms which underpin inequality between parents: *the breadwinner-caregiver dichotomy*; *the heteronormative nuclear family*; and *the devaluation of pregnancy and parenthood*. All three similarly encompass the three dimensions of Fredman's model. As the first step in employing Fredman's model as an analytical method, I critique the EU PLF in light of these norms in Chapters 4-6, demonstrating how they form the normative underpinning of the EU PLF and consequently perpetuate inequalities between parents. I conceptually define these norms in section 3.2.3.

3.2.2.2 Turning Norms into Positive Normative Principles for Action

Then, for the purposes of facilitating substantive equality between parents – which I observe to require structural deconstruction in the transformative dimension of Fredman's model – I turn these norms into normative principles for action. The main normative principle which I identify to emerge from the transformative dimension is thus *deconstructing the sexual division of labour within the family*. This entails transformative, not merely affirmative, remedies in

²⁵⁰ Fraser, 'From Redistribution to Recognition?' (n 4) 78-79; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 20; Fredman, 'Redistribution and Recognition' (n 8) 218; Fredman, 'Emerging from the Shadows' (n 5) 283, 290.

the first three dimensions of Fredman's model.²⁵¹ To this end, I identify three normative principles which correspond to the above three norms and instruct the deconstruction of the sexual division of labour within the family: *deconstructing the breadwinner-caregiver dichotomy*; *deconstructing the heteronormative nuclear family*; and *deconstructing the devaluation of pregnancy and parenthood*. In conjunction, these three normative sub-principles deconstruct the sexual division of labour within the family and thus facilitate substantive equality between parents.²⁵² As the second step in employing Fredman's model as an analytical method, I hence reconstruct the EU PLF against these normative principles by devising a transformative EU parenting leave model in Chapter 7. I conceptually define these normative principles in section 3.2.3. Before doing so, I elucidate how I ensure methodological adherence to the perspectival approach to the relationship between Fredman's dimensions in this novel approach to employing the model as a critical and reconstructive analytical method.

3.2.2.3 Attributing an Analytical Dimension to a Norm/Normative Principle Pairing

Within each norm and their corresponding positive normative principle, Fredman's redistributive, recognition, and participative dimensions could be discussed in accordance with what I have called the 'literal approach' to applying the model, which would employ each of the three dimensions as distinct analytical categories under each of the normative principles (Chapter 1). That is, one norm and its positive normative principle would be analysed thematically from a redistributive, a recognition, and a participative perspective all in one chapter. To do so would, however, now overcomplicate the method for this thesis. Because the normative principles overlap – the devaluation of pregnancy and

²⁵¹ Fraser, 'From Redistribution to Recognition' (n 4) 84-86, 89-90; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 74-77; Fredman, 'Redistribution and Recognition' (n 8) 226-227.

²⁵² Fraser, 'From Redistribution to Recognition' (n 4) 83-85; Fraser, 'Social Justice in the Age of Identity Politics' (n 4) 74-75.

parenthood, for instance, being intrinsic to the breadwinner-caregiver dichotomy – discussing each of them from the perspective of each of the three dimensions would, in my view, result in the distinctiveness of both the analytical dimensions and normative principles being obscured.

In this light, I observe that while all the norms and their normative principles encompass all of Fredman's three dimensions, for the purposes of this thesis they each lend themselves usefully to critiquing and reconstructing the EU PLF from the perspective of a specific analytical dimension based on the form or type of inequality they involve. The breadwinner-caregiver dichotomy is particularly – *but not exclusively* – characterised by misrecognition because this dichotomous distinction between parental roles is grounded in biological reductionist gender stereotypes, and its deconstruction relies particularly – but, again, not exclusively – on transformative recognition remedies. The heteronormative nuclear family is characterised by social exclusion. Compounded with stigma and stereotyping attaching to gender and/or sexual identity and family form, parents and families which deviate from this normative family are often systematically excluded from work-life balance policies and thus prevented from participating in parental care on par with parents of these 'ideal' families.²⁵³ Deconstruction of the heteronormative nuclear family calls for transformative remedies which foster social inclusion and solidarity between different types of families. The devaluation of pregnancy and parenthood is characterised by maldistribution: male-associated productive labour is both economically and socially valued above female-associated reproductive labour – sexual,

²⁵³ I presume Fraser would object to my position here to argue that the primary injustice is one of misrecognition, not social exclusion underpinned by misrecognition. In my view, the latter demonstrates the interaction of the recognition and participation dimensions. There is room for nuance in the perspectival approach as long as the distinctiveness of analytical dimensions is upheld, as it is by my treating social exclusion as an injustice within the participative dimension rather than conflating it with the recognition dimension.

procreative, caring, and domestic labour, including childbearing and childrearing – and the latter remains mostly unpaid, which disproportionately disadvantages women. Deconstructing this devaluation requires transformative redistributive remedies to redistribute reproductive labour between the sexes and attribute economic value to this labour.

Therefore, although my normative principles are not intended to correspond to any one dimension of Fredman's model exclusively – rather they can be employed to discuss any of the dimensions – I further refine my employment of Fredman's model as an analytical framework in this thesis by attributing one of the first three dimensions to one norm/normative principle pairing. I approach the breadwinner-caregiver dichotomy from a recognition perspective, the heteronormative nuclear family from a participative perspective, and the devaluation of pregnancy and parenthood from a redistributive perspective. Because these norms underpin the sexual division of labour and their positive normative principles contribute to its deconstruction, deconstructing the sexual division of labour within the family in order to facilitate substantive equality between parents subsequently comes to encompass all of Fredman's four dimensions. By attributing one of Fredman's analytical dimensions to one norm/normative principle pairing, I convey the perspectival approach informing Fredman's model instead of conflating the dimensions to each other. And by still drawing connections between the dimensions when discussing each norm and its positive normative principle, I convey that the particular dimension I have attributed to a norm/normative principle pairing does not exist in a vacuum but operates in the interactive way Fredman intends her dimensions to operate. It should not be interpreted as positing any lexical priority between the dimensions. This approach obscures neither the perspectival approach nor the synthesis between the dimensions. Just as Fredman's model of substantive equality itself, my approach of attributing one of her analytical dimensions to one

norm/normative principle pairing is an analytical tool intended to make critique and reconstruction of law and policy effective for the purposes of this thesis.

3.2.3 Normative Principles

In this section, I conceptually define the norms and their corresponding positive normative principles which I have now distilled from my theoretical discussion of Fredman's model. My understanding of these norms and principles is informed by socialist feminism, given the conceptual importance of the sexual division of labour to socialist feminist legal scholarship and the enduring relevance of its insight about the political economy to analyses of gender, sexuality, and the family.²⁵⁴

3.2.3.1 Deconstructing the Sexual Division of Labour within the Family

The origin of the sexual division of labour in Western society is generally attributed to the Industrial Revolution.²⁵⁵ Socialist feminists, however, observe that the sexual division of labour within the family which posits men as superior to women and enables them to control women's labour pre-dates the capitalist mode of production, whereby capitalism merely institutionalised this gender hierarchy within the family.²⁵⁶ It did so and extended the sexual division of labour from the family to the economy by establishing the public-private dichotomy: a separation between productive labour in the public sphere and reproductive

²⁵⁴ See eg SB Boyd, 'Family, Law and Sexuality: Feminist Engagements' (1999) 8(3) Soc Leg Stud 369.

²⁵⁵ Rhode (n 214) 77-78; Rich (n 234) 49.

²⁵⁶ H Hartmann, 'Capitalism, Patriarchy, and Job Segregation by Sex' (1976) 1(3) Signs 139, 138, 168; V Beechey, 'On Patriarchy' (1979) 3(1) Fem Rev 66, 79; IM Young, 'Beyond the Unhappy Marriage: A Critique of the Dual Systems Theory' in L Sargent (ed), *Women & Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism* (Black Rose Books 1981), 61.

labour in the private sphere.²⁵⁷ Sexual division of labour thus resides both within the family and the economy. Within the family, it effectively follows the breadwinner-caregiver dichotomy, which I define below. Within the economy, certain occupations are associated with and reserved for one sex by reason of characteristics associated with that sex.²⁵⁸ This ‘mirrors with startling clarity the division [of labour] within the family’²⁵⁹: women’s concentration in traditionally ‘feminine’ occupations such as nursing, teaching, food production, and social services reflects women’s domestic responsibilities. The sexual division of labour has thus contributed to the consolidation of gender norms ‘by limiting the institutional domains to which women and men [have] access and the sort of activities in which they [tend] to regularly engage’²⁶⁰. For the purposes of this thesis, I focus on the sexual division of labour within the family because I am interested in how law and policy reinforce it between parents in the context of parenting leave. However, the extension of the devaluation of women’s labour to the public sphere illustrated by the less-skilled and lower-paid reality of ‘women’s jobs’ is of some relevance to this thesis because of the consequences on the division of labour and gendered power relations within the family.²⁶¹ Deconstructing the sexual division of labour within the economy demands comprehensive restructuring of androcentric labour market norms and working culture to facilitate substantive equality, which is not my primary focus.²⁶² Instead, in this thesis, I posit that deconstructing the sexual division of labour

²⁵⁷ R Delmar, ‘Sexism, Capitalism and the Family’ (1973) 4 *Radical Phil* 26, 26; E Zaretsky, *Capitalism, the Family & Personal Life* (Harper Colophon Books 1976), 29; H Hartmann, ‘The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union’ (1979) 3(2) *Capital & Class* 1, 13; L Fortunati, *The Arcane of Reproduction: Housework, Prostitution, Labor and Capital* (Autonomedia 1995), 8; Z Adams, *The Legal Concept of Work* (Oxford University Press 2022), 142.

²⁵⁸ Adams, *The Legal Concept of Work* (n 257) 145; Fraser, ‘From Redistribution to Recognition?’ (n 4) 78.

²⁵⁹ Delmar (n 257) 29.

²⁶⁰ Z Adams, ‘Invisible Labour: Legal Dimensions of Invisibilization’ (2022) 49 *JLS* 385, 389-390.

²⁶¹ Hartmann, ‘Capitalism, Patriarchy and Job Segregation by Sex’ (n 256) 152-153; Hartmann, ‘The Unhappy Marriage’ (n 257) 16-17; Zaretsky (n 257) 31.

²⁶² Fredman, ‘Reversing Roles’ (n 194) 457-458; Fredman, *Discrimination Law* (n 5) 30.

within the family entails the deconstruction of the breadwinner-caregiver dichotomy, the heteronormative nuclear family, and the devaluation of pregnancy and parenthood which normatively underpin inequality between parents. I pursue this deconstruction by devising a transformative parenting leave model for the EU.

3.2.3.2 Deconstructing the Breadwinner-Caregiver Dichotomy

The breadwinner-caregiver dichotomy depicts the division of women's and men's roles within the family: men engage in productive wage labour in the public sphere to provide for their families whereas women remain in the private sphere to engage in reproductive labour characterised by primary caregiving.²⁶³ This has been justified by reference to women's reproductive capacity that differentiates them from men, demonstrates some innate feminine inclination towards caring, and therefore imposes a 'natural' division of labour between the sexes in which women are responsible for childbearing and childrearing, caring for the sick and the elderly, and domestic labour.²⁶⁴ At the same time, men as perceived as having a natural ability for earning money through their labour in the labour market and concurrently extracting the results of women's reproductive labour.²⁶⁵ Socialist feminists reject this biological reductionist account of the sexes' roles: the relegation of women to the role of unpaid caregiver under the guise of biology derives from patriarchal ideology.²⁶⁶ That is, the dichotomy is neither neutral nor natural: it does not assign the sexes 'separate but equal' roles, but rather imposes oppressive roles to women while valorising male labour, thus reinforcing male

²⁶³ Delmar (n 257) 26; Zaretsky (n 257) 29.

²⁶⁴ Hartmann, 'The Unhappy Marriage' (n 257) 4; Young, 'Beyond the Unhappy Marriage' (n 256) 52-54.

²⁶⁵ Adams, 'Invisible Labour' (n 260) 389-390.

²⁶⁶ *ibid* 389; Beechey (n 256) 79; Delmar (n 257) 28; Young, 'Beyond the Unhappy Marriage' (n 256) 54.

domination and contributing to inequality between the sexes.²⁶⁷ Women's entry to wage labour under capitalist conditions has reinforced, rather than abolished, the sexual division of labour within the family.²⁶⁸ Although there has been a shift away from the male breadwinner family model towards a dual-earner family in which both partners contribute their wages to the family, this has not resulted in a reduction of women's responsibility for childcare and parenting.²⁶⁹ Women's association with the reproductive sphere and caregiving still represents an obstacle to sex equality, as women continue to experience the double burden of paid employment and unpaid reproductive labour and remain disproportionately disadvantaged by the patriarchal gender roles attributed to them.²⁷⁰ At the same time, men remain detached from childcare and parenting.²⁷¹ Deconstructing the breadwinner-caregiver dichotomy entails recognition of these gendered parental roles as social constructs and de-gendering parenthood to enable both parents to equally engage in paid work and parental childcare.

3.2.3.3 Deconstructing the Heteronormative Nuclear Family

I am cognisant that focusing substantive equality around the breadwinner-caregiver dichotomy alone in this thesis risks essentialising differences between parents who conform to the law's ideal of a 'traditional nuclear family of two persons, a woman and a man, who live together and care for their own biological children'²⁷² and parents who do not, particularly parents whose identities locate

²⁶⁷ A Ferguson and N Folbre, 'The Unhappy Marriage of Patriarchy and Capitalism' in L Sargent (ed), *Women & Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism* (Black Rose Books 1981), 319.

²⁶⁸ S Federici, 'Wages against Housework' in W Edmond and S Fleming (eds), *All Work and No Pay: Women, Housework, and the Wages Due* (Falling Wall Press 1975), 6; Ferguson and Folbre (n 267) 314; Hartmann, 'The Unhappy Marriage' (n 257) 19.

²⁶⁹ Ferguson and Folbre (n 267) 326; Young, 'Beyond the Unhappy Marriage' (n 256) 60.

²⁷⁰ Federici (n 268) 6; Hartmann, 'The Unhappy Marriage' (n 257) 20; Zaretsky (n 257) 31.

²⁷¹ McGlynn (n 224) 34; Miller (n 217) 41.

²⁷² P Foubert, 'Child Care Leave 2.0 – Suggestions for the Improvement of the EU Maternity and Parental Leave Directives from a Rights Perspective' (2017) 24(2) MJ 245, 249.

at the intersections of sex, gender, and sexuality. This prompts me to acknowledge the conceptual and methodological tension that resides between *feminist* legal theory and *queer* legal theory.²⁷³ That feminist legal scholarship has perpetuated heterosexism and cis-sexism constitutes queer legal theorists' primary critique of feminist legal theory.²⁷⁴ Feminist legal theorists, in turn, have critiqued queer legal theory for perpetuating misogyny and sexism.²⁷⁵ The result of this tension has been '[a] failure to account for the circumstances where these methodological approaches converge on legal projects aimed at advancing the complex justice interests of women and sexual minorities'²⁷⁶. While I approach this thesis from a feminist legal theoretical perspective, I certainly do not wish to obscure the heterosexist and cis-sexist assumptions about families, parents, and parenthood embedded in the EU PLF in my critique of it or perpetuate these assumptions in my reconstruction.

To avoid doing so, I attempt to reconcile insights of feminist and queer legal theory in this thesis. Common to both approaches is the commitment to 'dismantling existing social norms and structures so as to serve the larger goals of empowerment and equality'²⁷⁷ to which ends they can employ similar methods and strategies.²⁷⁸ Usefully for the purposes of this thesis, Elaine Craig observes that

the objectives of those interested in queering hegemonic family norms that serve to exclude those that don't/won't conform to them converge with the objectives of those

²⁷³ See eg E Weed and N Schor (eds), *Feminism Meets Queer Theory* (Indiana University Press 1997).

²⁷⁴ E Craig, 'Converging Queer and Feminist Legal Theories: Family Feuds and Family Ties' (2010) 28 *Windsor YB Access Just* 209, 214; A Romero, 'Methodological Descriptions: "Feminist" and "Queer" Legal Theories' in MA Fineman, J Jackson, and A Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge 2016), 195.

²⁷⁵ Romero (n 274) 195.

²⁷⁶ Craig (n 274) 211.

²⁷⁷ MA Fineman, 'Introduction: Feminist and Queer Legal Theory' in MA Fineman, J Jackson, and A Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge 2016), 1.

²⁷⁸ Romero (n 274) 194.

interested in reforming the social institutions that have perpetuated a gendered division of labour and eradicating a public/private sphere distinction that has subjugated and oppressed women²⁷⁹.

Feminist and queer approaches to conceptualising the heteronormative nuclear family converge in Fineman's notion of 'the sexual family'²⁸⁰ which describes 'the traditional or nuclear family, a unit with a heterosexual, formally celebrated union at its core'²⁸¹. The heteronormative nuclear family grounded in the 'sexual affiliation between a man and woman'²⁸² is presented in law and social policy as the normative setting for parenting, within which the social constructions of motherhood and fatherhood reside.²⁸³ On the one hand, the sexual division of labour grounded in biological reductionism 'privileges heterosexual, reproductive sex and links the (cis/heterosexual) female body with reproductive desire'²⁸⁴. Presenting a biologically determined view of sexuality, it obscures that sexuality, like gender, is a social construct. On the other hand, it defines as deviant or non-normative those families and partnerships which do not embody this heterosexual affiliation.²⁸⁵ Single parents, for instance, lack the necessary sexual connection and same-sex parents the heterosexual reproductive imperative for biological procreation.²⁸⁶ The result is 'a sociolegal rejection of non-normative parenting'²⁸⁷. Understanding the family in this light allows me to identify hetero- and cis-normative bias, as well as nuclear-family orientation, in the EU PLF which reinforces inequality between groups of parents.

²⁷⁹ Craig (n 274) 216.

²⁸⁰ MA Fineman, 'The Sexual Family' in MA Fineman, J Jackson, and A Romero (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge 2016).

²⁸¹ *ibid* 45.

²⁸² *ibid*.

²⁸³ *ibid* 48; M Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (ZED Books 2014), 46.

²⁸⁴ Weissman (n 223) 110.

²⁸⁵ Fineman, 'The Sexual Family' (n 280) 46.

²⁸⁶ *ibid* 48.

²⁸⁷ Weissman (n 223) 110.

By considering non-heteronormative parents in this thesis, I effectively posit that heterosexuality as a norm necessarily underpins the sexual division of labour within the family and hence inequality between parents. That is, the heteronormative nuclear family itself is ‘premised on the sexual division of labour’²⁸⁸. In a famous debate between Butler and Fraser regarding whether sexuality relates to the sexual division of labour under capitalism, I thus situate myself on Butler’s socialist feminist side of the argument.²⁸⁹ Fraser asserts that heteronormative sexuality is separate from the political economy: it ‘structures neither the social division of labour nor the mode of exploitation of labour-power in capitalist society’²⁹⁰. Butler, by contrast, argues that gender itself is normatively reproduced through the normative reproduction of heterosexuality and the family within the sexual division of labour, and vice versa, whereby sexuality is intrinsic to the political economy in the production of human beings.²⁹¹ Heteronormativity – and the simultaneous suppression of non-heterosexuality – sustains the capitalist mode of production because it ‘maintain[s] the stability of gender, the heterosexuality of desire, and the naturalisation of the family’²⁹². Yet I recognise that heterosexism is no longer *essential* to capitalism: capitalism is sustained by the paid productive labour of individuals who have come to fall within legal regulation outside of the heterosexual family; women through their engagement in paid employment and

²⁸⁸ A Tryfonidou, ‘What is a “Family” in EU Law? Do EU Policies Sufficiently Address Family Diversity and its Consequences?’ in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 20.

²⁸⁹ J Butler, ‘Merely Cultural’ (1998) 227 NLR 33; N Fraser, ‘Heterosexism, Misrecognition, and Capitalism: A Response to Judith Butler’ (1998) 228 NLR 140.

²⁹⁰ Fraser, ‘Heterosexism’ (n 289) 145.

²⁹¹ Butler, ‘Merely Cultural’ (n 289) 40. Fraser mobilises the same argument against Butler as she does against Young (section 3.1.3.2): that Butler obscures her theoretical framework by conflating the recognition and redistributive perspectives, see Fraser, ‘Heterosexism’ (n 289) 142, 146. If, as I posit, heterosexuality is intrinsic to the sexual division of labour and hence the capitalist political economy, then it seems that non-heterosexual social groups constitute bivalent social groups like women and inequalities between heterosexual and non-heterosexual social groups can be addressed in accordance with the perspectival approach and the differentiated politics of difference.

²⁹² Butler, ‘Merely Cultural’ (n 289) 42.

non-heterosexual people through the legal recognition of non-heteronormative relationships.²⁹³ Like Fraser, and like Susan Boyd, I therefore reject Butler's view that the legal recognition of non-normative sexuality constitutes 'a fundamental threat to [capitalism's] very workability'²⁹⁴. As Boyd explains, the legal recognition of LGBTQIA+ relationships has not transformed the role allocated to the heterosexual nuclear family in covering the costs of social reproduction like parenting.²⁹⁵ Without non-heteronormative redistributive politics which challenge the heteronormative nuclear family as the funder of reproductive labour, the transformation of the sexual division of labour – i.e. men assuming their half of reproductive labour – will only redistribute the costs of social reproduction between the sexes while keeping them privatised.²⁹⁶ Threatening capitalism requires redistributing resources from production to reproduction by, for instance, funding childcare services.²⁹⁷ In this thesis, I only begin to deconstruct the heteronormative nuclear family which underpins the sexual division of labour in order to facilitate substantive equality between parents. This entails, for instance, detaching parenthood and the act of parenting from the parent's biological connection to the child. Indeed, both feminist and queer legal scholars problematise the essentialism and heterosexism of privileging biology and heterosexual intercourse as the foundations of the normative family in law and policy.²⁹⁸ Moreover, examining non-heterosexual and non-cisgendered parenthood demonstrates how mothering can be assumed by cisgender men and fathering by cisgender women, and how mothering can be incorporated into the

²⁹³ Boyd, 'Family, Law and Sexuality' (n 254) 377; Fraser, 'Heterosexism' (n 289) 147.

²⁹⁴ Butler, 'Merely Cultural' (n 289) 41. See Boyd, 'Family, Law and Sexuality' (n 254) 376; Fraser, 'Heterosexism' (n 289) 146.

²⁹⁵ Boyd, 'Family, Law and Sexuality' (n 254) 377.

²⁹⁶ *ibid* 377, 382.

²⁹⁷ *ibid* 377-378.

²⁹⁸ Craig (n 274) 224–225, 229. See eg Fineman, 'The Sexual Family' (n 280); J Halley, 'Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability' (1994) 46 *Stan L Rev* 503.

normative understanding of fatherhood.²⁹⁹ It thus facilitates the de-essentialisation of motherhood and the de-gendering of parenthood necessary for deconstructing the sexual division of labour.

3.2.3.4 Deconstructing the Devaluation of Pregnancy and Parenthood

The public-private dichotomy supporting the sexual division of labour relies on ‘the implicit assumption that the private sphere is inferior to the public sphere’³⁰⁰. Reproductive labour has been relegated to the inferior private sphere and while productive work itself is exploited under the capitalist mode of production, the exploitation of reproductive labour is different still. Silvia Federici asserts that

[t]he difference lies in the fact that not only has [reproductive labour] been imposed on women, but it has been transformed into a natural attribute of our female physique and personality, an internal need, an aspiration, supposedly coming from the depth of our female character³⁰¹.

That is, ‘the capacities associated with [reproductive] labour appear as expressions of an innate femininity, rather than as acquired skills in which individuals and society ought to invest’³⁰². Women’s ‘natural’ capacity for performing reproductive labour hence rendered this labour women’s ‘natural’ responsibility, the abundance of available capacity for reproductive labour then justifying this labour to be exploited and unpaid.³⁰³ In doing so, capitalism ‘has got a hell of a lot of work almost for free’³⁰⁴. The sexual division of labour within the family ensures the direct benefit of women’s reproductive labour to capitalism because it allows much of socially necessary labour to be done for

²⁹⁹ Averett (n 227) 294, 297; D Berkowitz, ‘Theorizing Lesbian and Gay Parenting: Past, Present and Future Scholarship’ (2009) 1 *J Fam Theory Rev* 117, 121; J Stacey, ‘Gay Parenthood and the Decline of Parenting as We Know It’ (2006) 9(1) *Sexualities* 27, 48.

³⁰⁰ Fredman, *Women and the Law* (n 237) 17.

³⁰¹ Federici (n 268) 2.

³⁰² Adams, ‘Invisible Labour’ (n 260) 389.

³⁰³ Adams, *The Legal Concept of Work* (n 257) 141; Federici (n 268) 2.

³⁰⁴ Federici (n 268) 3.

free – that is, without cost to the capitalist – which is precisely why capitalists (read: men), have an incentive to maintain it.³⁰⁵ Pregnancy and parenthood create an important public good by generating the new generation of workers and taxpayers which maintains the capitalist society.³⁰⁶ Yet, as Maria Mies writes, ‘[t]he instruments of [productive] labour [...] are the hands and the head, but never the womb or the breasts of a woman’³⁰⁷. Pregnancy and parenthood, and the labour of those who are pregnant and who parent, have consequently become economically and socially devalued and invisibilised.³⁰⁸ This devaluation and invisibilisation of pregnancy and parenthood disproportionately disadvantages women, contributing to material and social inequality between the sexes.³⁰⁹

Thus, ‘[a]ny programme of reform must start with an acknowledgment of the pivotal role played by parenting in society’³¹⁰. Facilitating substantive equality between parents requires the deconstruction of the devaluation of pregnancy and parenthood – or the explicit legal recognition of the economic and social value of reproductive labour.³¹¹ I acknowledge here that the devaluation and invisibilisation of reproductive labour has been the subject of the Wages for

³⁰⁵ Beechey (n 256) 77; Delmar (n 257) 26; Federici (n 268) 5; Hartmann, ‘Capitalism, Patriarchy and Job Segregation by Sex’ (n 256) 138-139; Mies (n 283) 48; Young, ‘Beyond the Unhappy Marriage’ (n 256) 58, 61; Zaretsky (n 257) 23.

³⁰⁶ M Dalla Costa and S James, *The Power of Women and the Subversion of the Community* (Falling Wall Press 1975), 28; P England and N Folbre, ‘Who Should Pay for the Kids?’ (1999) 563 *Ann Am Acad Pol Soc Sci* 194, 195; Fortunati (n 257) 8, 11.

³⁰⁷ Mies (n 283) 46.

³⁰⁸ Adams, ‘Invisible Labour’ (n 260) 386; Adams, *The Legal Concept of Work* (n 257) 140; Dalla Costa and James (n 306) 28; Fortunati (n 257) 8, 11; Fredman, *Women and the Law* (n 237) 17, 98, 206; Mies (n 283) 45.

³⁰⁹ Adams, ‘Invisible Labour’ (n 260) 388; Fredman, ‘Reversing Roles’ (n 194) 444; Fredman, ‘Engendering Socio-Economic Rights’ (n 143) 413.

³¹⁰ Fredman, *Women and the Law* (n 237) 206. See also Fredman, ‘A Difference with Distinction’ (n 195) 238; M Campbell, S Fredman, J Fudge, and S Olney, ‘A Better Future for Women at Work’ (2018) 1 *U Oxf HRH J* 1, 5.

³¹¹ Fredman, ‘Redistribution and Recognition’ (n 8) 226; Fraser, ‘Social Justice in the Age of Identity Politics’ (n 4) 46; Fredman, ‘A Difference with Distinction’ (n 195) 107, 117, 121; Young, *Justice and the Politics of Difference* (n 3) 176.

Housework movement that emerged in the 1970s from the writing of Mariarosa Dalla Costa and Selma James.³¹² In effect, the movement posits that

[i]f [women's] wageless work is the basis of our powerlessness in relation both to men and to capital [...] then wages for that work, which alone will make it possible for us to reject that work, must be our lever of power³¹³.

Then, '[t]o say that we want money for housework is the first step towards refusing to do it, because to demand for a wage makes our work visible'³¹⁴. While I am influenced by the notion of visibilising reproductive labour through the attribution of economic value to it (Chapter 6), I also recognise critiques of the Wages for Housework movement which posit that this alone fails to address the real issue, which is the sexual division of labour.³¹⁵ To address this, parenting must be de-gendered to recognise the social value of parenthood.

Conclusion

In this chapter, I have made an original contribution to feminist legal theory by theoretically refining Fredman's four-dimensional model of substantive equality. I have done so by locating the model within the earlier equality and social justice scholarship of Young and Fraser. I have argued that, structurally, the model resembles Fraser's conception of social justice. It encompasses the three paradigms – redistribution, recognition, and participation – emerging in Fraser's work and adopts transformation as the fourth paradigm. I have clarified that Fredman relies on Fraser's perspectival approach to explain the relationship between her four dimensions. Moreover, I have demonstrated that the substance of Fredman's four dimensions is borrowed from both Young and Fraser:

³¹² Dalla Costa and James (n 306).

³¹³ *ibid* 3.

³¹⁴ Federici (n 268) 5.

³¹⁵ See eg AY Davis, 'The Approaching Obsolescence of Housework: A Working-Class Perspective' in AY Davis, *Women, Race and Class* (Vintage E-Books 1983), 128.

redistribution relies on Young's emphasis on domination and oppression as the primary injustices, recognition employs Fraser's status model of recognition, and participation reflects the goal of participatory parity emphasised by both Young and Fraser. The transformative dimension embeds a normative commitment to transformative remedies to inequalities which is intrinsic to the reconstructive feminist legal project and the work of both Young and Fraser. As such, I pursue the transformative EU parenting leave model in this thesis to facilitate substantive equality between the sexes and between parents with different sexual and/or gender identities and in different types of families. Lastly, in order to mitigate the sameness-difference dichotomy and to reconcile equal and special treatment, I have clarified how differences between the sexes and groups of parents should be treated contextually depending on their effect on the social group in accordance with Fraser's differentiated feminist politics of difference.

In order to employ Fredman's model as an analytical framework for normatively critiquing and reconstructing the EU PLF in this thesis, I have then distinguished between methodological principles which guide my approach to utilising the model as an analytical tool in practice and normative principles which guide my critique and reconstruction of the EU PLF in following chapters. I have then turned the model into an analytical method in three steps. I have identified four norms which underpin inequality between parents for the purpose of critiquing the EU PLF. I have turned these norms into corresponding normative principles which inform my reconstruction of the EU PLF. I have attributed one of Fredman's first three analytical dimensions to one norm/normative principle pairing to ensure methodological adherence to the perspectival approach to reconciling the four dimensions of Fredman's model in my critique and reconstruction of the EU PLF.

The remainder of this thesis is structured as follows. In Chapter 4, I critique the EU PLF from a recognition perspective to demonstrate that it perpetuates the breadwinner-caregiver dichotomy. In Chapter 5, I critique the EU PLF from a participative perspective to demonstrate that it privileges the heteronormative nuclear family. In Chapter 6, I critique the EU PLF from a redistributive perspective to demonstrate that it devalues pregnancy and parenthood. In these discussion chapters, I convey that the EU PLF – itself a collection of affirmative remedies adopted by the EU to address inequalities between the sexes and different family forms in anticipation of structural transformation in the longer-term – has reached the limits of affirmative remedies in facilitating substantive equality between parents whereby it is time to proceed to transformative remedies. In Chapter 7, I therefore reconstruct the EU PLF against the normative principles corresponding to the above norms and analytical perspectives, drawing insights from the Finnish and Swedish PLFs. I devise a transformative EU parenting leave model which deconstructs the breadwinner-caregiver dichotomy through transformative recognition, the heteronormative nuclear family through transformative participation, and the devaluation of pregnancy and parenthood through transformative redistribution. By approaching reconstruction from each of these perspectives, the transformative model deconstructs the sexual division of labour within the family and thus facilitates substantive equality between the sexes and between groups of parents regardless of parents' sexual and/or gender identities and family form.

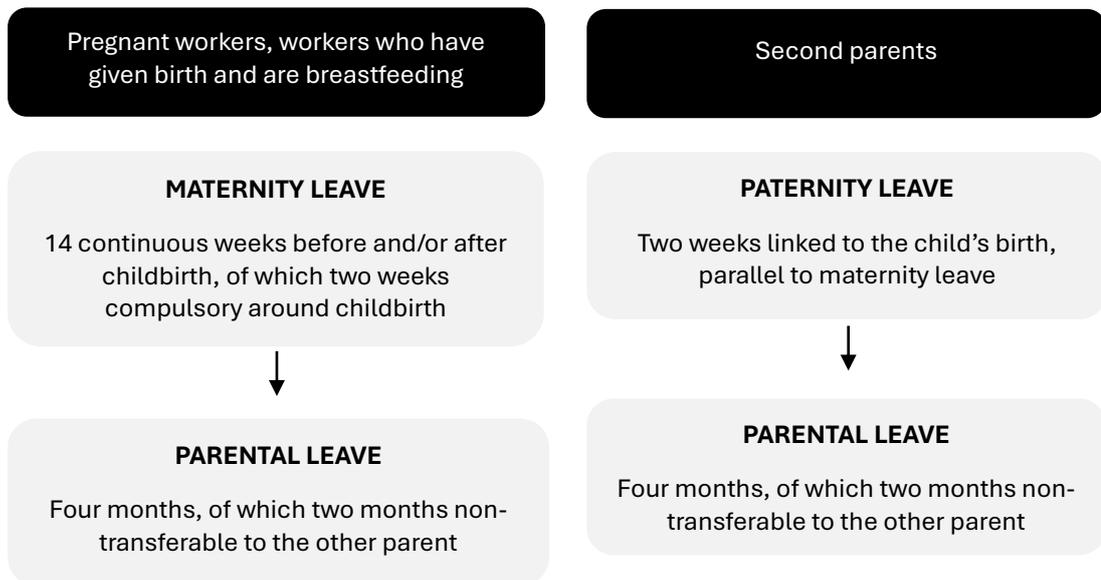
CHAPTER 4. THE EU PLF PERPETUATES THE BREADWINNER-CAREGIVER DICHOTOMY

Labour, as conceptualised in capitalist society, is divided between women and men in accordance with a breadwinner-caregiver dichotomy firmly embedded in the law. The difference in the sexes' reproductive capacity is thought to impose a natural division of labour in which one sex's capacity for pregnancy and childbirth demonstrates a natural inclination towards caregiving confined to the private sphere, while the other has a natural ability for earning money to support the family through their labour in the public sphere (Chapter 3). I therefore rely on *the breadwinner-caregiver dichotomy* norm to critique the EU PLF in this chapter. I approach critique primarily from the perspective of Fredman's recognition dimension, although I also highlight how this dimension interacts with the redistributive and participative dimensions to ensure synthesis between the dimensions in facilitating substantive equality between parents (see Chapter 3). I argue that the EU PLF – particularly the PWD – is structured (Table 4) in a way which essentialises and conflates biological and social differences between the sexes with the effect that it perpetuates the false dichotomy between breadwinning and caregiving. That is, it perpetuates the harmful gendered stereotypes that women are natural primary caregivers and, at best, earner-carers who must navigate combining childcare with paid employment, and that men are natural breadwinners and, at best, part-time babysitters for their own children.

In section 4.1 of this chapter, I establish that the PWD does so by embedding the dominant ideology of motherhood – which conflates the bodily capacity for pregnancy, childbirth, and breastfeeding with a natural inclination for caregiving – to the EU legal order. This is evident in the ECJ's interpretation of the purpose of maternity leave under EU law and its relationship to childcare-related paternity and parental leave. I then demonstrate the harmful essentialism of the dominant

ideology of motherhood because of the conflation of biological maternity with social motherhood in EU law by examining ECJ jurisprudence which excludes pregnant workers from the scope of the PWD’s health and safety protection after abortion, miscarriage, and stillbirth in section 4.2. In section 4.3, I argue that the short paternity leave under the WLBD allows the father to emerge as the mother’s helper, rather than inducing them to become an independent parent. In section 4.4, I argue that the transferability of parental leave under the WLBD reflects the breadwinner-caregiver dichotomy in that it presumes a division of parental leave in accordance with the gendered parental role stereotypes grounding the breadwinner-caregiver dichotomy and, in doing so, disincentivises men’s involvement in childcare.

Table 4. Structure of the EU PLF



4.1 The Purpose of Maternity Leave: The ECJ and the Dominant Ideology of Motherhood

Article 1 PWD. Purpose

1. The purpose of this Directive [...] is to implement measures to *encourage improvements in the safety and health at work* of pregnant workers and workers who have recently given birth or who are breastfeeding.

Article 8 PWD. Maternity leave

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to *a continuous period of maternity leave of at least 14 weeks* allocated before and/or after confinement in accordance with national legislation and/or practice.

2. The maternity leave stipulated in paragraph 1 must include *compulsory maternity leave of at least two weeks* allocated before and/or after confinement in accordance with national legislation and/or practice.

The PWD is a recognition instrument which has sought to affirm women's difference from men in recognition that the capacity for pregnancy and childbirth has systematically disadvantaged women in employment. It, however, demonstrates the very dangers of recognition politics alluded to by Fraser (Chapter 3).¹ Namely, affirming women's difference from men – by affording women special treatment in employment on account of their reproductive capacity in derogation from the equal treatment principle – has backfired because of the EU's gender-ideological misconception about the relevant difference between the sexes. It has thus perpetuated inequalities between women and men. To examine this argument further, I must first emphasise that it is well-established in EU legal and policy scholarship that the PWD is not ideally set out for ensuring that it protects the health and safety of workers who are

¹ N Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser N and Honneth A, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003), 76-77.

pregnant, have recently given birth, or are breastfeeding; or that it minimises disadvantage to these workers because of their reproductive capacity.

The length of maternity leave has been a particularly contentious topic, as seen in the failed PWD reform (Chapter 2). Article 8 PWD sets a minimum, but no maximum, threshold for maternity leave in EU law: maternity leave is to be *at least* 14 continuous weeks, of which *at least* two weeks are compulsory around the birth. Member States thus retain the competence to adopt long maternity leave policies – which overlook employment, equality, and medical evidence recommending against extended leave – under the guise of health and safety protection.² In 2023, the total length of maternity leave varied from 14 weeks in Germany and Sweden to 58 weeks in Bulgaria.³ Maternity leave was compulsory in its entirety in Austria, Estonia, Germany, Greece, Italy, Luxembourg, and Portugal.⁴ The prohibition to work imposed by compulsory leave and disguised as health and safety protection disproportionately hinders pregnant workers' autonomy over their finances and employment.⁵ And indeed, '[t]he rhetoric of protection taps into a stream of thinking which sees all women as delicate and in need of paternal/patriarchal control and supervision'⁶. Whereas short periods of paid and job-protected maternity leave – typically those up to three months – are

² P Foubert and Š Imamović, 'The Pregnant Workers Directive: Must Do Better. Lessons to be Learned from Strasbourg?' (2015) 37(3) JSWFL 309, 310, 312; P Foubert, 'Child Care Leave 2.0 – Suggestions for the Improvement of the EU Maternity and Parental Leave Directives from a Rights Perspective' (2017) 24(2) MJ 245, 252; M de la Corte Rodriguez, 'EU Directives on Maternity Leave: A Misleading Social Risk Approach and its Unsatisfactory Effects on Both Mothers and Fathers' (2018b) 9(2) ELLJ 171, 189.

³ European Parliament, 'Maternity and paternity leave in the EU' ('At a Glance infographic' 2023), <[www.europarl.europa.eu/RegData/etudes/ATAG/2023/739346/EPRS_ATA\(2023\)739346_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739346/EPRS_ATA(2023)739346_EN.pdf)>, accessed 13.2.2024, 1.

⁴ *ibid.*

⁵ J Julén Votinius, *Föräldrar i arbete. En könskritisk undersökning av småbarnsföräldrars arbetsrättsliga ställning* (Makadam 2007) [Parents at work. A gender-critical study on the position of parents of young children in labour law], 174.

⁶ C McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6(1) ELJ 29, 35.

known to improve workers' employment rates both before and after having children⁷, extended periods instead weaken their attachment to the labour market and increase the likelihood of them not returning to work.⁸ By not imposing a maximum threshold for maternity leave in national law, the PWD works against its underlying concern for facilitating women's labour market participation after childbirth to bridge the EU's gender employment gap and to reduce the associated economic loss (Chapter 2). Long maternity leave periods enabled by the PWD may also contribute to employers' reluctance to hire women of childbearing age, hence reinforcing structural inequalities between the sexes in employment.⁹ The motherhood penalty on income and career progression therefore affects *all* women, regardless of whether they are or want to be mothers.¹⁰ It also manifests in the reduction of women's income and therefore increases the gender pay gap in the short-term and contributes to the feminisation of poverty in the long-term.¹¹ From the perspective of Fredman's redistributive and participative dimensions, rather than preventing socio-economic disadvantage to workers on account of pregnancy and childbirth, the

⁷ CJ Ruhm, 'The Economic Consequences of Parental Leave Mandates: Lessons from Europe' (1998) 113(1) QJE 285, 309, 311-313; M Evertsson and A-Z Duvander, 'Parental Leave: Possibility or Trap? Does Family Leave Length Effect Swedish Women's Labour Market Opportunities?' (2011) 27(4) Eur Sociol Rev 435, 435-436; YE Akgunduz and J Plantenga, 'Labour Market Effects of Parental Leave in Europe' (2013) 37(4) Cam J Econ 845, 848; M de la Corte Rodriquez, 'Child-Related Leave and Women's Labour Market Outcomes: Towards a New Paradigm in the European Union' (2018a) 40(3) JSWFL 376, 384.

⁸ Akgunduz and Plantenga (n 7) 849, 859; de la Corte Rodriquez, 'Child-Related Leave and Women's Labour Market Outcomes' (n 7) 383-384; de la Corte Rodriquez, 'EU Directives on Maternity Leave' (n 2) 173, 189; Evertsson and Duvander (n 7) 435-436; Foubert (n 2) 256-257; Foubert and Imamović (n 2) 310; J van Belle, 'Paternity and parental leave policies across the European Union' (RAND Corporation 2016), 3.

⁹ de la Corte Rodriquez, 'Child-Related Leave and Women's Labour Market Outcomes' (n 7) 376; Foubert (n 2) 256-257.

¹⁰ N Busby, *A Right to Care? Unpaid Work in European Employment Law* (Oxford University Press 2011), 119; M Matero, 'Breadwinners and Primary Caregivers? A Feminist Critique of Gender Equality in the EU Law Parental Leave Framework' (2021) 24 TCLR 69, 80.

¹¹ de la Corte Rodriquez, 'Child-Related Leave and Women's Labour Market Outcomes' (n 7) 390; Ruhm (n 7) 303, 309; E Caracciolo di Torella, 'Men in the Work/Family Reconciliation Discourse: The Swallows that Did Not Make Summer?' (2015) 37(3) JSWFL 334, 336.

PWD contributes to the maldistribution of resources between the sexes and exacerbates women's social exclusion.

The length of maternity leave under the PWD – as well as its division into compulsory and non-compulsory periods (section 4.1.3) – thus prompts questions about its purpose. This is reflected in a series of cases in which the ECJ has examined the interpretation of the PWD in conjunction with the ETD or, more recently, the RD on the legitimate scope of measures protecting the health and safety of pregnant workers in derogation from the equal treatment principle. Below, I trace the ECJ's judicial narrative on the purpose of maternity leave chronologically from a 1984 case preceding the PWD, *Hofmann*¹², to the most recent 2020 case of *Syndicat*¹³. Like earlier feminist critique of ECJ jurisprudence, I demonstrate that although some cases suggest movement towards a more equality-based gender ideology in the 2010s, the ECJ continues to conceive motherhood in accordance with the dominant ideology of motherhood (Chapter 3) and thus reinforces a paternalistic gender ideology characterised by the breadwinner-caregiver dichotomy.¹⁴

¹² C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.

¹³ C-463/19 *Syndicat CFTC v CPAM de Moselle and Others* ECLI:EU:C:2020:93.

¹⁴ Foubert (n 2) 251; McGlynn, 'Ideologies of Motherhood' (n 6) 29; C McGlynn, 'A Family Law for the European Union?' in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000), 226; E Caracciolo di Torella and A Masselot, 'The ECJ Case Law on Issues Related to Pregnancy and Maternity: An Attempt of Classification' (2001) 26 *EL Rev* 239, 240; N Busby and G James, 'Regulating Working Families in the European Union: A History of Disjointed Strategies' (2015) 37(3) *JSWFL* 295, 299-300.

4.1.1 ‘The Special Relationship between a Woman and Her Child’¹⁵: Establishing the Dominant Ideology of Motherhood in *Hofmann*

With *Hofmann*, the health and safety objective of maternity leave in EU law became infused with a maternal care objective.¹⁶ The applicant, a father, had obtained unpaid leave equivalent to optional maternity leave afforded to mothers under German law and claimed maternity benefit from the relevant sickness fund, which the latter refused because only mothers were entitled to maternity leave.¹⁷ Hofmann argued that while pregnancy and the immediate postpartum period legitimately justified the special protection of women, health and safety considerations could not justify restricting optional childcare-related leave to mothers without discriminating against fathers under the ETD.¹⁸ The leave’s optionality demonstrated that it was offered in the interests of the child, not to protect the mother’s health and safety.¹⁹ The Commission echoed Hofmann’s argument and observed that the provision at issue appeared to conflate biological maternity and social motherhood, whereas the implication that women are better at caring for children than men was incompatible with the ETD.²⁰ The sickness fund argued that reserving the optional period of leave to mothers relieved mothers of the burden that their employment represented during the recovery period.²¹ Siding with the sickness fund, the ECJ noted that the purpose of the ETD was not to interfere with the division of labour between parents.²² It hence held the ETD to allow Member States to reserve a non-compulsory period of leave to mothers because the ETD

recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman’s needs in two respects. First, it is legitimate to ensure *the protection of a woman’s biological condition during pregnancy and thereafter until such time as her*

¹⁵ *Hofmann* (n 12) para 25.

¹⁶ Foubert (n 2) 251; Ruhm (n 7) 291.

¹⁷ *Hofmann* (n 12) paras 2–4.

¹⁸ *ibid* 3054–3055.

¹⁹ *ibid* para 10.

²⁰ *ibid* 3055.

²¹ *ibid* 3057.

²² *ibid* para 24.

*physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.*²³

In effect, national maternity leave policies could legitimately protect both the health and safety of pregnant workers *and* the mother-child relationship even prior to the introduction of the PWD.

The problem is that by admitting maternity leave's dual purpose, the ECJ conflates biological maternity and social motherhood. It perpetuates the idea embedded in the dominant ideology of motherhood that both maternity and motherhood are biologically determined, when the latter is a socially constructed ideological judgment about women's role (Chapter 3).²⁴ This

confines women to the characteristically feminine private sphere in which motherhood is a natural course of womanhood and 'good motherhood' contingent on caregiving and domestic work that is not socially valued, monetarily rewarded, or compatible with paid employment²⁵.

By conflating biological and social characteristics and by infusing maternity leave with a maternal care objective, the ECJ's interpretation of the purpose of maternity leave therefore perpetuates the stereotype of a female primary caregiver. This goes beyond the legitimate scope of special treatment of women for the protection of their health and safety and essentialises both womanhood and motherhood – like Fraser warned affirmative recognition would do – hence merely perpetuating inequality between the sexes.²⁶ Furthermore, by stating that EU law does not alter the division of labour between parents, the ECJ attributed

²³ *ibid* para 25 (emphasis added).

²⁴ Busby (n 10) 118-119; T Hervey and J Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law' (1998) 8 J Eur Soc Policy 43, 51; McGlynn, 'Ideologies of Motherhood' (n 6) 40; M de la Corte Rodriguez, 'The First Revision of the Hofmann Case Law on Maternity and Discrimination Against Fathers: Care-Giving as the Pivot?' (2021) 5(2) ILJ 306, 306.

²⁵ Matero (n 10) 76.

²⁶ Hervey and Shaw (n 24) 49.

to men a traditional gender role which mirrors the dominant ideology of motherhood.²⁷ It is for women, not men, to have a special relationship with their children that is undisturbed by paid work. *Hofmann* effectively embedded the breadwinner-caregiver dichotomy and the sexual division of labour within the family in EU law.²⁸ Over time, the *Hofmann* test has been frequently reiterated in ECJ case law and has hence become codified into the EU legal order and policy rhetoric on maternity leave.

4.1.2 Departing from the Dominant Ideology: Recognition of the Role of Fathers in *Roca Álvarez*

Rather than perpetuating the dominant ideology of motherhood, the ECJ should '[utilise] its interpretative space to pursue a more progressive and liberating exposition of women and men's relationships with children'²⁹. It did so for the first time in the 2010 case *Roca Álvarez*³⁰ in which it effectively challenged the *Hofmann* reasoning on the dual purpose of maternity leave.³¹ The case involved an employer's refusal to grant the applicant, a father, breastfeeding leave under Spanish law because the entitlement was conditional on the mother's employment status.³² The referring court asked whether this leave should apply equally to men and women; and if making the father's entitlement contingent on the mother's employment status discriminated against men.³³ Relying on the persuasive opinion of Advocate-General (AG) Kokott, the ECJ noted that

²⁷ *ibid* 50; McGlynn, 'Ideologies of Motherhood' (n 6) 42.

²⁸ de la Corte Rodriquez, 'EU Directives on Maternity Leave' (n 2) 179; Foubert (n 2) 252; Foubert and Imamović (n 2) 310.

²⁹ McGlynn, 'Ideologies of Motherhood' (n 6) 44.

³⁰ C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-08661.

³¹ Caracciolo di Torella, 'Men in the Work/Family Reconciliation Discourse' (n 11) 339; M Weldon-Johns, 'EU Work-Family Policies – Challenging Parental Roles or Reinforcing Gendered Stereotypes?' (2013) 19(5) *ELJ* 662, 679.

³² *Roca Álvarez* (n 30) paras 2, 11.

³³ *ibid* para 15.

the positions of a male and female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child³⁴.

That, as the referring court had explained, the leave at issue ‘ha[d] been detached from the biological fact of breastfeeding so that it [could] be considered as time purely devoted to the child’³⁵ indicated that its purpose was not the protection of pregnancy, childbirth, and breastfeeding; and that it could be taken by either parent demonstrated that men and women are equally capable of caring for their child, whereby the leave was accorded to workers in their capacity as parents.³⁶ It thus caused unequal treatment of the sexes which could not be legitimately justified by the *Hofmann* objectives under the ETD.³⁷ It was

liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties³⁸.

Therefore, the measure could not be considered to eliminate or reduce existing inequalities within the meaning of the ETD.³⁹

In contrast to *Hofmann*, in which it reinforced the traditional sexual division of labour between parents, the ECJ in *Roca Álvarez* challenged the very idea of the breadwinner-caregiver dichotomy in parental roles. It established that parental care responsibilities pertain to both sexes and indeed that parenthood and nurturing care are not innate biological capacities women possess but men lack. Rather than privileging maternal care and the dominant ideology of motherhood, it recognised men and women as equally capable parents. As such, it drew a conceptual distinction between biological and social parenthood,

³⁴ *ibid* para 24, opinion of AG Kokott para 30.

³⁵ *ibid* para 14.

³⁶ *ibid* paras 27–29, 31, opinion of AG Kokott paras 30, 33–34.

³⁷ *ibid* opinion of AG Kokott paras 33–34.

³⁸ *ibid* para 36, opinion of AG Kokott para 47.

³⁹ *ibid* paras 38–39.

demonstrating that the latter is gender-neutral whereby men and women should have equal access to policy instruments facilitating parental care and work-life balance. Candida Leone observes that the ECJ

was not implying that any differentiations between mothers and fathers should be prohibited; rather, and more wisely, it seems that it was trying to set up certain policy lines which should be taken into account when designing family-friendly legislation⁴⁰.

While measures protecting workers on account of pregnancy and childbirth, and those promoting equal opportunities in employment, constitute a legitimate exception to the equal treatment principle, measures promoting work-life balance and attaching to the sexes in their capacity as parents do not constitute such an exception but rather must comply with the principle.⁴¹ To put this in the vernacular of the differentiated feminist politics of difference, the ECJ appears to suggest that the basic policy principle ought to be that while the difference in reproductive capacity – pregnancy, childbirth, and breastfeeding – is affirmed through special treatment; positive differences, namely women’s responsibility for childcare, are universalised and de-gendered to facilitate equality between the sexes as parents. Indeed, the *Roca Álvarez* reasoning of equal parenthood became reflected in the WLBD which acknowledges and facilitates the role of men in childcare. I return to this observation in section 4.3.

4.1.3 ‘Pushing Fathers Back into the Shadow’⁴²: The Resurgence of the Hofmann Rhetoric in *Betriu Montull*

Despite the shift in its position between *Hofmann* and *Roca Álvarez*, the ECJ subsequently reinforced the former in *Betriu Montull*⁴³ with the effect of ‘pushing fathers back into the shadow’⁴⁴. The case arose following an employer’s refusal

⁴⁰ C Leone, ‘Towards a More Shared Parenthood? The Case of *Roca Álvarez* in Context’ (2010) 4 ELLJ 513, 515.

⁴¹ *ibid.*

⁴² Caracciolo di Torella, ‘Men in the Work/Family Reconciliation Discourse’ (n 11) 340.

⁴³ C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social* ECLI:EU:C:2013:571.

⁴⁴ Caracciolo di Torella, ‘Men in the Work/Family Reconciliation Discourse’ (n 11) 340.

to grant the applicant, a father, maternity benefit during a non-compulsory period of maternity leave because the mother of his child was not covered by the Spanish social security scheme.⁴⁵ Appealing to *Roca Álvarez*, the referring court argued that the non-compulsory period of leave must be understood as parental leave for the purpose of work-family reconciliation because the compulsory period covered pregnancy and maternity.⁴⁶ It asked whether making a father's right to non-compulsory leave contingent on the mother's social security status, and her choosing to transfer non-compulsory leave to the father, was compatible with the PLD and the ETD.⁴⁷ The ECJ applied the PWD.⁴⁸ It reiterated the *Hofmann* test on the dual purpose of maternity leave to conclude that the PWD does not preclude a situation in which the mother chooses to renounce the right to a non-compulsory period of maternity leave and transfer it to the child's father, provided that both parents are employed.⁴⁹ However, where the mother's circumstances fall outside the PWD, the PWD also does not preclude an employed father from *not* being entitled to a non-compulsory period of maternity leave.⁵⁰

Betriu Montull effectively 'reaffirm[ed] the association between parental rights and maternal care and the derivative nature of fathers' entitlement'⁵¹. Thus, whereas allowing the non-compulsory period of maternity leave to be transferred to the father was, according to Petra Foubert and Šejla Imamović, 'a step in the right direction'⁵² in terms of recognising men's role in childcare, father's rights as such continued to be secondary to those of mothers. The privileging of maternal care and the mother-child relationship under EU law therefore continued to correspond to the marginalisation of paternal involvement and men's

⁴⁵ *Betriu Montull* (n 43) paras 2, 21–22.

⁴⁶ *ibid* para 28.

⁴⁷ *ibid* para 30.

⁴⁸ *ibid* paras 46–47.

⁴⁹ *ibid* paras 50, 56–58.

⁵⁰ *ibid* para 59.

⁵¹ Busby and James (n 14) 304.

⁵² Foubert and Imamović (n 2) 313.

confinement to the public sphere characterised by the male breadwinner norm.⁵³ Regarding the maternal role, of particular interest in *Betriu Montull* is the ECJ's treatment of the compulsory and non-compulsory periods of maternity leave under the PWD. Only two weeks of maternity leave are compulsory whereas the 12 non-compulsory weeks may, per the ECJ, be renounceable by the mother and/or transferable to the father under national law.⁵⁴ It is not that the mother may renounce maternity leave, but the suggestion of its transferability, that I find problematic from a sex equality perspective. The admission that the non-compulsory period is transferable and may be utilised by the father conveys that it does not exist under the PWD to protect the health and safety of the parent who gave birth, but for the purpose of childcare.⁵⁵ There are no health and safety concerns relevant to cisgender male fathers which would justify transferring to them leave envisioned to protect health and safety in pregnancy-, childbirth-, and breastfeeding-related contexts. The transferability of the non-compulsory period of maternity leave detaches it from the biological fact of maternity whereby it must be 'construed as a period for giving care and attention to the child to which both employed mothers and fathers are entitled'⁵⁶. This period of leave is 'disguised parental leave'⁵⁷.

Therefore, only the first two weeks of maternity leave under the PWD are exclusively for health and safety protection. This gives rise to two dilemmas. First, two weeks is not long enough to adequately protect the health and safety of pregnant workers, workers who have recently given birth, or who are breastfeeding around the time of birth: from a medical perspective, 6-8 weeks is

⁵³ McGlynn, 'Ideologies of Motherhood' (n 6) 36; Weldon-Johns (n 31) 666-667.

⁵⁴ *Betriu Montull* (n 43) para 58; de la Corte Rodriguez, 'EU Directives on Maternity Leave' (n 2) 180-181.

⁵⁵ de la Corte Rodriguez, 'EU Directives on Maternity Leave' (n 2) 188.

⁵⁶ *Betriu Montull* (n 43) opinion of AG Wathelet para 46.

⁵⁷ Foubert (n 2) 252.

required to facilitate recovery from an uncomplicated pregnancy and birth.⁵⁸ Transferring the medically necessary 4-6 weeks of maternity leave to the father may risk the health and safety of these groups of workers. The way in which the PWD is structured and interpreted at EU level hence risks undermining its legal basis. Second, the remaining 12 weeks of maternity leave which are not only for health and safety protection, again, conflate biological and social conceptions of motherhood by positing caregiving as women's essential characteristic. The non-compulsory period of maternity leave under the PWD essentialises womanhood and differences between the sexes. I return to discuss the essentialism of the PWD in section 4.2 and further in Chapter 5.

4.1.4 Clarifying the Hofmann Test in *Syndicat*

After backpedalling on sex equality between parents in *Betriu Montull*, the ECJ again moved towards the *Roca Álvarez* position in the 2020 case *Syndicat*. The case arose between a trade union confederation and a sickness insurance fund following the latter's refusal to grant a single father leave provided by a French collective agreement for single mothers after statutory maternity leave.⁵⁹ The referring court relied on *Hofmann* to argue that the leave was intended to protect the special mother-child relationship but asked whether the RD precludes such a measure.⁶⁰ The ECJ followed AG Bobek's opinion which had observed that because *Hofmann* was decided before the PWD's adoption, it did not prescribe limiting criteria for justifying additional maternity leave periods; and because EU law and ECJ jurisprudence had evolved with regard to sex equality between parents since 1984, the *Hofmann* test was outdated.⁶¹ AG Bobek had asserted that it should be clarified with regard to the relationship between its first and

⁵⁸ de la Corte Rodriquez, 'EU Directives on Maternity Leave' (n 2) 187-188; Foubert (n 2) 252.

⁵⁹ *Syndicat* (n 13) paras 2, 20-21.

⁶⁰ *ibid* paras 25-26.

⁶¹ *ibid* para 54, opinion of AG Bobek paras 46-51, 56.

second criteria.⁶² The second half of the test pertaining to the protection of the special relationship between a woman and her child must be read narrowly.⁶³ That is, special protection must relate to the concept of *maternity*, which itself must be narrowly construed to relate to the biological capacity which distinguishes the sexes from each other and which cannot be equated with the social concepts of *motherhood* or *parenthood*.⁶⁴ Thus, the two halves of the *Hofmann* test – the biological protection criterion and the special protection criterion – are not separate criteria but must be read ‘as two sides of the same coin’⁶⁵. Relying on its previous judgments in *Commission v France*⁶⁶ and *Griesmar*⁶⁷, the ECJ similarly recognised that the situation of male and female workers is comparable regarding parenting whereby measures pertaining to the protection of women in their capacity as parents are directly discriminatory against men.⁶⁸

AG Bobek also argued for the *Hofmann* test to be clarified in respect of the elements which national courts ought to consider in order to determine whether an additional period of leave constitutes a protective measure within the meaning of the test.⁶⁹ In doing so, they should consider its compatibility with the PWD and the ETD in light of the conditions of entitlement to the leave; length and mode of enjoyment; and any legal protection attached to it.⁷⁰ The ECJ subsequently held that an additional period of leave, having the same objectives as statutory maternity leave, must be compatible with both the RD and the PWD:

⁶² *ibid* opinion of AG Bobek para 58.

⁶³ *ibid* opinion of AG Bobek para 61.

⁶⁴ *ibid* opinion of AG Bobek para 62 (original emphasis).

⁶⁵ *ibid* opinion of AG Bobek para 67.

⁶⁶ Case 312/86 *Commission of the European Communities v French Republic* [1988] ECR 6315, para 14.

⁶⁷ C-366/99 *Joseph Griesmar v Ministre de l'Économie, des Finances et de l'Industrie, Ministre de la Fonction publique, de la Réforme de l'État et de la Décentralisation* EU:C:2001:648, para 44.

⁶⁸ *Syndicat* (n 13) paras 55, 60-61.

⁶⁹ *ibid* opinion of AG Bobek para 58.

⁷⁰ *ibid* opinion of AG Bobek para 70.

its duration, for instance, must not exceed what is necessary for its stated purpose.⁷¹ Thus, while the RD read in conjunction with the PWD does not preclude a measure reserved to female workers such as the one at issue in the main proceedings, the measure must be ‘intended to protect workers in connection with the effects of pregnancy and motherhood, which is for the referring court to ascertain’⁷².

While the ECJ recognised that the *Hofmann* test conflates conceptions of biological maternity and social motherhood or parenthood, it nevertheless failed to challenge the core reasoning of *Hofmann*.⁷³ It continues to allow the special protection of the mother-child relationship under national law as long as this protection relates to biological maternity. It, however, fails to define maternity or explain how it distinguishes from motherhood or parenthood, rather deferring this to the Member States.⁷⁴ Instead of universalising caregiving in a gender-neutral conceptualisation of parenthood and hence facilitating the deconstruction of the breadwinner-caregiver dichotomy at EU level, the ECJ continues to associate caregiving with the bodily capacity for pregnancy, childbirth, and breastfeeding. It effectively perpetuates the prevailing gendered stereotypes about parental roles. As such, reflecting on transforming the sexual division of labour between parents, which he perceives to be an ambition of EU social legislation, AG Bobek vaguely observed that the EU approaches transformation ‘perhaps not by replacing the tradition with another, but rather by seeking to provide at least some degree of choice for parents in making [decisions about division of responsibility between them]’⁷⁵. *Syndicat*, however,

⁷¹ *ibid* paras 64–65.

⁷² *ibid* para 75. Note the ECJ’s slip in terminology: it refers to ‘pregnancy and motherhood’ when it means ‘pregnancy and maternity’.

⁷³ de la Corte Rodriguez, ‘The First Revision’ (n 24) 310; P Foubert and A Hendricks, ‘Additional (Maternity) Leave for Women Only? The Court of Justice Refines its Hofmann Test in *Syndicat CFTC* (C-463/19) Yet Forgets about the Children’ (2021) 28(6) MJ 908, 913.

⁷⁴ Foubert and Hendricks (n 73) 913-915.

⁷⁵ *Syndicat* (n 13) opinion of AG Bobek para 55.

demonstrates that the ECJ cannot be trusted to drive this change. To quote Wendy Williams:

to the extent that the law of the public world must be reconstructed to reflect the needs and values of both sexes, change must be sought from legislatures rather than the courts⁷⁶.

To deconstruct the breadwinner-caregiver dichotomy and facilitate substantive equality between parents, the EU PLF must be restructured to appropriately distinguish between health- and safety-related leave for pregnant workers, workers who have given birth, and who are breastfeeding, and childcare-related leave for parents regardless of sex or gender.

4.2 The Pregnancy/Childbirth Nexus in Access to Maternity Leave

Article 2 PWD. Definitions

For the purposes of this Directive:

- (a) pregnant worker shall mean *a pregnant worker* who informs her employer of her condition, in accordance with national legislation and/or national practice;
- (b) worker who has recently given birth shall mean *a worker who has recently given birth* within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;
- (c) worker who is breastfeeding shall mean *a worker who is breastfeeding* within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.

⁷⁶ W Williams, 'The Equality Crisis: Some Reflections on Culture, Courts and Feminism' in K Bartlett and R Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991), 15.

The wording of Article 2 PWD, read in conjunction with Article 8 PWD, suggests that maternity leave is granted to three categories of workers⁷⁷: those who are pregnant, those who have recently given birth, and those who are breastfeeding. The relevant qualification – the fact of pregnancy, childbirth, or breastfeeding – is determined by the worker informing her employer of her being pregnant, having given birth, or breastfeeding in accordance with national law and/or practice.⁷⁸ I note that my use of the female pronoun in the above deliberately follows its use in Article 2 PWD (see Chapter 5). Above, I have argued that the PWD’s attempt to affirm women’s difference from men has essentialised womanhood and, rather than mitigating inequalities between the sexes, reinforced the breadwinner-caregiver dichotomy. This is because the PWD’s conception of difference between the sexes conflates biological maternity with social motherhood. In this section, I examine the implications of the infusion of the PWD’s health and safety rationale with maternal care rhetoric in *Hofmann* on access to maternity leave under EU law. I observe that the Article 2 PWD qualifications are mutually inclusive. Maternity leave only attaches to workers if they have been pregnant *and* have subsequently given birth to a living child; or if they have been pregnant *and* have subsequently given birth to a living child *and* are breastfeeding said child (on breastfeeding, see Chapter 5). I demonstrate this pregnancy/childbirth nexus in access to maternity leave under EU law to conclude that the PWD excludes from its scope workers whose pregnancies do not end in childbirth and whose childbirths do not result in the birth of a new living person: workers who terminate their pregnancies and who experience miscarriage or stillbirth.

⁷⁷ For the purposes of the PWD, a worker is ‘any person employed by an employer, including trainees and apprentices but excluding domestic servants’ whether employed in the public or private sector, see Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ 1989 L183/1, arts 2(1), 3(a).

⁷⁸ Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and those who have recently given birth or are breastfeeding [1992] OJ 1992 L348/1 (PWD), art 2(a)-(c).

4.2.1 Pregnancy Without Childbirth: The Abortion/Miscarriage Exclusion

The period of maternity protection in EU law, in principle, extends from conception to weaning.⁷⁹ The scope of the definition of a ‘pregnant worker’ under the PWD was discussed by the ECJ in *Mayr*, where the applicant had been dismissed during sick leave she had been prescribed while undergoing treatment for IVF.⁸⁰ The applicant argued that the notice of dismissal had no legal effect because she had become entitled to protection against dismissal under Austrian law prior to the notice of dismissal when the fertilisation of her ova had taken place.⁸¹ The employer rejected this: the applicant was not pregnant when the notice was given, as the fertilised embryo was only transferred into her uterus after her dismissal.⁸² With Austrian courts producing contradictory judgments in the main proceedings, the referring court asked whether a worker undergoing IVF was a pregnant worker within the meaning of the PWD when her ova had been fertilised *ex utero* but not yet transferred into her uterus.⁸³ The ECJ noted that it is clear from the wording of Article 10 PWD that ‘to benefit from the protection against dismissal [...] the pregnancy in question must have begun’⁸⁴. It subsequently refused to accept that protection against dismissal under the PWD could be extended to a worker whose fertilised ova had not yet been transferred into her uterus for reasons of legal certainty: because these fertilised ova could be stored *ex utero* for an indeterminate period prior to their transfer, extending protection to a worker before they have been transferred would unduly extend the benefit of that protection.⁸⁵ The PWD hence does not extend to workers under-

⁷⁹ European Union, ‘Explanations relating to the Charter of Fundamental Rights’ OJ 2007 C303/17, 27.

⁸⁰ C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017, paras 1, 17–18.

⁸¹ *ibid* para 22.

⁸² *ibid* paras 21, 23.

⁸³ *ibid* para 28.

⁸⁴ *ibid* para 37.

⁸⁵ *ibid* paras 41–42. A worker undergoing IVF could potentially rely on protection against discrimination on grounds of sex: because IVF directly affects only women, the dismissal of a female worker because of IVF constitutes direct sex discrimination, para 50.

going fertility treatments, but its employment protection provisions may be relied upon once a pregnancy has been established.

While an established pregnancy triggers the PWD's employment protection provisions, it does not trigger the entitlement to maternity leave. Indeed, Susanne Burri asserts that the PWD does not cover situations where a pregnant worker miscarries.⁸⁶ The operational criterion for the entitlement to maternity leave to arise is thus not the fact of pregnancy but the fact of childbirth. This is in tension with the health and safety legal basis of the PWD. Most miscarriages – understood to mean spontaneous abortion or pregnancy loss before 28 weeks gestation⁸⁷ – occur before 12 weeks, many without the person knowing they were pregnant, and an estimated 10-15% of all *known* pregnancies end in miscarriage.⁸⁸ A pregnancy which ends in miscarriage entails the same reproductive function as a pregnancy which ends in childbirth, the bodily process of a miscarriage – particularly later in the pregnancy – may resemble the proceedings and pain of childbirth, and the period after a miscarriage may be similar to the postpartum period with regard to both physical and mental health concerns.⁸⁹ The health and safety reasons justifying the entitlement to maternity leave under EU law exist for pregnant workers who miscarry as they do for pregnant workers who give birth. My reasoning here also applies to induced

⁸⁶ S Burri, 'Care in Family Relations – The Case of Surrogacy Leave' (2015) 17(2) EJLR 271, 280.

⁸⁷ WHO, 'Stillbirth', <www.who.int/health-topics/stillbirth#tab=tab_1>, accessed 28.11.2023.

⁸⁸ WHO, 'Why we need to talk about losing a baby' <www.who.int/news-room/spotlight/why-we-need-to-talk-about-losing-a-baby>, accessed 17.1.2025.

⁸⁹ See eg S Quenby, ID Gallos, RK Dhillon-Smith, M Podeseck, MD Stephenson, J Fisher, JJ Brosens, J Brewin, R Ramhorst, ES Lucas, RC McCoy, R Anderson, S Daher, L Regan, M Al-Memar, T Bourne, DA MacIntyre, R Rai, OB Christiansen, M Sugiura-Ogasawara, J Odendaal, AJ Devall, PR Bennett, S Petrou, and A Coomarasamy, 'Miscarriage Matters: The Epidemiological, Physical, Psychological, and Economic Costs of Early Pregnancy Loss' (2021) 397 Lancet 1658; R Kelly-Harrington, C Murray, M Hennessy, S Leitao, M O'Sullivan, C Dalton-O'Connor, D Nuzum, K O'Donoghue, and M Donnelly, 'Statutory Leave for Early Pregnancy Loss: A Comparative Study' (2024) 15(4) ELLJ 695.

abortion: although 30% of all pregnancies end in termination⁹⁰ and an aborted pregnancy, whatever the reason for abortion at whichever stage of the pregnancy, involves the same reproductive and bodily processes as a pregnancy which ends in childbirth, the PWD does not protect the health and safety of pregnant workers whose pregnancies are terminated. By deduction, both miscarriage and abortion – particularly after the first trimester and once the worker has informed their employer of the pregnancy – ought to trigger the entitlement to the two weeks of maternity leave which exist for the protection of health and safety under the PWD (section 4.1.3). This is, however, not the case; although notably EU law does not preclude Member States from affording workers maternity leave after abortion or miscarriage.⁹¹ I observe that entitlement to maternity leave under EU law is effectively contingent on a nexus between pregnancy *and* childbirth. A pregnant worker must become a worker who has recently given birth within the meaning of Article 2 PWD to be entitled to maternity leave. As I demonstrate below, the reason is found in the dominant ideology of motherhood. I discuss how health- and safety-protection for workers whose pregnancies do not end in childbirth might operate under the EU PLF in Chapter 7.

4.2.2 Pregnancy and Childbirth Without a Living Child: The Stillbirth Exclusion

In addition to the exclusion of pregnant workers whose pregnancies end in abortion or miscarriage, implicit in the PWD is the exclusion of workers whose pregnancies end in stillbirth even though the qualifications of pregnancy and

⁹⁰ WHO, 'Abortion', <www.who.int/health-topics/abortion#tab=tab_1>, accessed 13.4.2025.

⁹¹ Approaches to leave after miscarriage vary from miscarriage leave to maternity leave, sick leave, and bereavement leave, see eg Kelly-Harrington et al (n 89); AL Middlemiss, I Boncori, J Brewis, J Davies, and VL Newton, 'Employment Leave for Early Pregnancy Endings: A Biopolitical Reproductive Governance Analysis in England and Wales' (2023) 31(1) *Gen Work Organ* 75.

childbirth are both met.⁹² As Aimee Louise Middlemiss et al. observe, stillbirth – understood as the birth of a foetus that died before or during birth at or after 28 weeks⁹³ – is a pregnancy which does not result in a new living person.⁹⁴ If stillbirth does not trigger the entitlement to maternity leave under EU law, then it cannot be the mere fact of childbirth that does. Rather, it must be the birth of a *living* child. Why the birth of a living child, as opposed to a stillborn, would be relevant for the worker who has given birth to be entitled to maternity leave for the protection of their health and safety can only be explained by the expectation that there must simultaneously be a special mother-child relationship to protect. That is, entitlement to maternity leave only arises from the birth of a living child to whom maternal care is owed. Without a newborn to care for, a worker who has given birth is not entitled to maternity leave which they ought to otherwise be entitled to on health and safety grounds. I argue that this is because the PWD is so saturated with the maternal care rhetoric that it presumes that pregnant workers' need for health- and safety-related leave is inseparable from the need for leave for the special protection of the mother-child relationship. This presumption is inherent in the dominant ideology of motherhood which associates the bodily capacity for pregnancy and childbirth with a natural inclination for maternal care and the act of gestation with the intention to mother. As such, whereas a worker who gives birth to a stillborn would never become entitled to maternity leave, a worker who has given birth to a living child would remain entitled to maternity leave under EU law even if the child does not remain in their care, whether because the child dies shortly after birth, is born via a surrogacy arrangement, or is placed for adoption. This is because the entitlement to maternity leave has been triggered by the birth of a living child to whom the worker who has given birth is, regardless of their intention to mother, presumed

⁹² Many Member States provide maternity leave after stillbirth, see European Commission, 'Family leave. Enforcement of the protection against dismissal and unfavourable treatment' (Publications Office of the European Union 2018), 129.

⁹³ WHO, 'Stillbirth' (n 87).

⁹⁴ Middlemiss et al (n 91) 76.

to owe maternal care.⁹⁵ Excluding workers whose pregnancies or childbirths do not result in the birth of a new living person because of abortion, miscarriage, or stillbirth from the scope of the PWD renders it unfit for purpose: the protection of the health and safety of workers with the bodily capacity for pregnancy, childbirth, and breastfeeding. As such, it may obscure the emotional and mental health impact of abortion, miscarriage, and stillbirth⁹⁶, reinforcing their social stigmatisation⁹⁷ and, in effect, essentialising womanhood and the biological capacity for pregnancy by privileging those who give birth to a living child and subsequently become mothers in the hegemonic meaning of motherhood grounded in the link between gestation and maternal care.

Notably, the EP had called for the extension of maternity leave to stillbirth during the failed PWD reform negotiations.⁹⁸ This proposal translated over to the WLBD which provides that ‘Member States are also able to grant paternity leave in the

⁹⁵ Z Mahmoud and EC Romanis, ‘On Gestation and Motherhood’ (2023) 31(1) *Med L Rev* 109, 116, 119; A Margaria, ‘Surrogacy Before European Courts. The Gender of Legal Fictions’ in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 198.

⁹⁶ See eg PK Coleman, CT Coyle, and VM Rue, ‘Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms’ (2010) *J Pregnancy* 1; T Davoudian, K Gibbins, and NH Cirino, ‘Perinatal Loss: The Impact on Maternal Mental Health’ (2021) 76(4) *Obstet Gynecol Surv* 223; K Ryninks, M Wilkinson-Tough, S Stacey, and A Horsch, ‘Comparing Posttraumatic Growth in Mothers after Stillbirth or Early Miscarriage’ (2022) 17(8) *PLoS ONE* 1.

⁹⁷ See eg A Kumar, L Hessini, and EMH Mitchell, ‘Conceptualising Abortion Stigma’ (2009) 11(6) *Cult Health Sex* 625; S Maitlis and G Petriglieri, ‘Going Back to Work After Pregnancy Loss’ (*Harvard Business Review* 5.12.2019), <<https://hbr.org/2019/12/going-back-to-work-after-a-pregnancy-loss>>, accessed 17.1.2025; A Grocutt and J Barling, ‘Miscarriage. The Next Challenge for Contemporary Workplace’ in A Kinder, R Hughes, and CL Cooper (eds), *Occupational Health and Wellbeing. Challenges and Opportunities in Theory and Practice* (Routledge 2023); WHO, ‘Why we need to talk about losing a baby’ (n 88).

⁹⁸ European Parliament, ‘Position of the European Parliament adopted at first reading on 20 October 2010 with a view to the adoption of Directive 2011/.../EU of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and on the introduction of measures to support workers in balancing work and family life’ P7_TC1_COD(2008)0193, art 1(8).

case of a stillbirth⁹⁹. There is thus a potential discrepancy between the sexes' access to leave under EU law. While pregnant workers who have an abortion, miscarriage, or stillbirth are not entitled to leave intended for the protection of their health and safety under the PWD because the need to protect the special mother-child relationship is not triggered by a live birth, fathers and second parents may be entitled to ten days of leave intended for the purpose of caring under the WLBD even if their child is stillborn and the leave is therefore not spent caring for a newborn. That entitlement to paternity leave is retained after stillbirth implies that, in such a case, it is instead available to support the emotional health of second parents. The effect, if it transpires in national law, is to neglect both the physical and emotional impact of stillbirth on the worker who gave birth under legislation intended for the protection of their health and safety, while supporting the well-being of second parents under legislation which does not have a legal basis in health and safety. This demonstrates the imperative for reconstructing the EU PLF in a way which adequately distinguishes between health- and safety-related leave and childcare-related leave to equalise the situation between the sexes.

4.3 Fathers as 'Visiting Care Assistants'¹⁰⁰: Short Paternity Leave

Article 4 WLBD. Paternity leave

1. Member States shall take the necessary measures to ensure that fathers or, where and insofar as recognised by national law, equivalent second parents, have the right to *paternity leave of 10 working days* that is to be taken on the occasion of the birth of the worker's child.

⁹⁹ Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ 2019 L188/79 (WLBD), recital (19).

¹⁰⁰ J Lammi-Taskula, 'Nordic Men on Parental Leave: Can the Welfare State Change Gender Relations?' in A Ellingsæter and A Leira (eds), *Politicising Parenthood in Scandinavia: Gender Relations in Welfare States* (Polity Press 2006), 95.

Without unnecessarily repeating my analysis of the ECJ's views on parental roles and division of labour in *Roca Álvarez* and *Betriu Montull* (sections 4.1.2-4.1.3), I discuss here how the cases reflect on men's childcare-related leave rights under the EU PLF. By deduction, the cases suggest that the absence of paternity leave at EU level prior to the introduction of the WLBD in 2019 was discriminatory against men.¹⁰¹ That is, the reasoning in *Betriu Montull* demonstrated that a non-compulsory period of maternity leave which was transferable from the mother to the father effectively detached the leave from the purpose of health and safety protection and revealed that it was instead intended for the purpose of childcare.¹⁰² Because the ability to care for a child does not attach to specific biological characteristics or socially constructed gender, the situations of women and men with regard to childcare are comparable and the failure to afford men a period of childcare-related leave – i.e. paternity leave – equivalent to the non-compulsory period of maternity leave available under EU law could not be objectively justified against the equal treatment principle.¹⁰³ Moreover, by 'keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties'¹⁰⁴, EU law alienated men from parental care. It effectively implied that the father had nothing to offer a newborn and overlooked the importance of establishing a father-child bond from birth and its positive outcomes for e.g. child development and health.¹⁰⁵ At the same time, it privileged maternal care, perpetuating the assumption that the birth of a child is only the concern and responsibility of women.¹⁰⁶ The absence of paternity leave at EU

¹⁰¹ C Costello and G Davies, 'The Case Law of the Court of Justice in the Field of Sex Equality since 2000' (2006) 43 CML Rev 1567, 1608-1609; de la Corte Rodriguez, 'EU Directives on Maternity Leave' (n 2) 173.

¹⁰² *Betriu Montull* (n 43) paras 56-58.

¹⁰³ Costello and Davies (n 101) 1609; Leone (n 40) 515; *Roca Álvarez* (n 30) para 24, opinion of AG Kokott para 30. See also C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* ECLI:EU:C:2015:473.

¹⁰⁴ *Roca Álvarez* (n 30) para 36, opinion of AG Kokott para 47.

¹⁰⁵ European Commission, 'Paternity and parental leave policies across the European Union: Assessment of current provision' (Publications Office of the European Union 2018), 3.

¹⁰⁶ McGlynn, 'A Family Law for the European Union?' (n 14) 228.

level thus reinforced the breadwinner-caregiver dichotomy, contributing to the unequal division of labour between the sexes.

The introduction of two weeks of paternity leave under Article 4 WLBD explicitly recognises the role of fathers and contributes to the normalisation of paternal care immediately after the child's birth and may facilitate more gender-equal sharing of domestic work and childcare responsibilities in the long-term.¹⁰⁷ However, because paternity leave remains short and is taken in connection with a child's birth parallel to maternity leave, it risks rendering the father a mere 'visiting care assistant'¹⁰⁸ to the mother, rather than encouraging them to become independent parents ready and able to assume childcare responsibility during parental leave and beyond. Moreover, on my reading of *Betriu Montull* and *Roca Álvarez*, in order to prevent discrimination against fathers as parents, the childcare-related leave afforded to fathers ought to be equivalent to the 12 weeks of childcare-related maternity leave under the PWD. The paternity leave entitlement under the WLBD, therefore, still appears to discriminate against fathers: men's childcare-related leave entitlement, after accounting for the four months of parental leave of each parent, remains 10 weeks shorter than women's even though the situation of men and women as parents with equal capacity and responsibility for childcare is comparable. Paternity leave, as currently offered under the WLBD, does not make caregiving an equal responsibility of the sexes or de-gender parenthood. Hence, it does not deconstruct the breadwinner-caregiver dichotomy or adequately facilitate the transformation of the sexual division of labour between parents.

¹⁰⁷ European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' COM (2017) 253 final, 11; van Belle (n 8) 15; WLBD (n 99) recital (19).

¹⁰⁸ Lammi-Taskula (n 100) 95.

4.4 Transferability of Parental Leave

Article 5 WLBD. Parental leave

1. Member States shall take the necessary measures to ensure that *each worker has an individual right to parental leave of four months* that is to be taken before the child reaches a specified age, up to the age of eight, to be specified by each Member State or by collective agreement. [...]
2. Member States shall ensure that *two months of parental leave cannot be transferred*.

Given the EU's tendency to prioritise the economic over the social, EU equality and parenting leave policy has commonly placed emphasis on facilitating women's labour market participation while neglecting to facilitate men's participation in childcare (Chapter 2).¹⁰⁹ The EU has thus failed to deconstruct the prevailing sexual division of labour within the family characterised by the breadwinner-caregiver dichotomy.¹¹⁰ Drawing from the successes of the Swedish parental allowance policy (see Chapter 7), the WLBD has attempted to challenge the gendered reality of parenting by enhancing the non-transferable parental leave entitlement afforded to each parent under EU law which specifically seeks to incentivise men's take-up of leave and participation in childcare and, in the longer-term, lead to a more equal sharing of reproductive labour between the sexes.¹¹¹ In this section, I therefore examine how the WLBD is structured between two months of transferable and two months of non-transferable parental leave. I

¹⁰⁹ M Stratigaki, 'The European Union and the Equal Opportunities Process' in L Hantrais (ed), *Gendered Policies in Europe: Reconciling Employment and Family Life* (Macmillan 1999), 47; L Mósesdóttir, 'The European Social Model and Gender Equality' in M Jepsen and A Serrano Pascual (eds), *Unwrapping the European Social Model* (Bristol University Press 2006), 155.

¹¹⁰ Stratigaki (n 109) 47; A Hubert, 'Gendering Employment Policy: From Equal Pay to Work-Life Balance' in G Abels and JM Mushaben (eds), *Gendering the European Union: New Approaches to Old Democratic Deficits* (Palgrave Macmillan 2012), 153; A Elomäki, 'The Economic Case for Gender Equality in the European Union: Selling Gender Equality to Decision-Makers and Neoliberalism to Women's Organizations' (2015) 22(3) *Eur J Women's Stud* 288, 295.

¹¹¹ COM (2017) 253 final (n 107) recital (14); European Commission, 'Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' SWD (2017) 202 final, 5.

argue that the option to transfer parental leave from one parent to the other continues to presume a division of parental leave in accordance with the breadwinner-caregiver dichotomy by privileging maternal care of young children and disincentivising men's take-up of leave.

The Commission's proposal for the WLBD had presented parental leave as an entirely non-transferable entitlement – each parent was to be entitled to four months of leave which was not transferable to the other parent – but the final provision was watered down in the Council due to disagreement about the proposal's proportionality (Chapter 2).¹¹² The WLBD provides that parental leave is non-transferable *in principle* to encourage fathers' take-up of leave and to facilitate the reintegration of mothers in the labour market.¹¹³ However, *in practice*, only two months of each parent's four-month entitlement is non-transferable from one parent to the other.¹¹⁴ The general consensus in early literature on the WLBD was that the extension of the non-transferable period, in conjunction with the introduction of paternity leave, would go some way to incorporating caregiving into men's life patterns and hence to supporting the deconstruction of the breadwinner-caregiver dichotomy at EU level.¹¹⁵ Its ability to do so is undermined by the option to transfer two months of parental leave between parents.

¹¹² COM (2017) 253 final (n 107) art 5(1); Council of the European Union, 'Progress Report on Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU', <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14280_2017_INIT&from=EN>, accessed 25.2.2022, 5.

¹¹³ WLBD (n 99) recital (20).

¹¹⁴ *ibid* art 5(2).

¹¹⁵ E Caracciolo di Torella, 'An Emerging Right to Care in the EU: A "New Start to Support Work-Life Balance for Parents and Carers"' (2017) 18 ERA Forum 187, 192; de la Corte Rodriguez, 'Child-Related Leave and Women's Labour Market Outcomes' (n 7) 391; Matero (n 10) 93.

That two parents can transfer parental leave between themselves has been thought to promote parents' freedom to choose how to share childcare responsibilities and therefore to avoid confining parents to their socially constructed parental roles.¹¹⁶ In reality, however, this notion of choice embedded in transferable parental leave operates to reinforce the breadwinner-caregiver dichotomy and reproduce the sexual division of labour within the family.¹¹⁷ On the one hand, freedom of choice thinking obscures that women's choices with regard to childcare are already constrained. The prevailing dominant ideology of motherhood promotes maternal care, making women feel compelled to take the father's transferable portion of leave in addition to using their own entitlement in full because that is what 'a good mother' does.¹¹⁸ Other policy features – such as the lack of adequate income replacement for parental leave under the WLBD (Chapter 6) – further rationalise women taking their partners' portion of transferable leave. Similarly to long maternity leave periods, extended parental leave further reinforces the socio-economic disadvantages associated with motherhood.¹¹⁹ On the other hand, the gender-neutrality and transferability of parental leave disincentivises men: men are more inclined to take leave when it is individual to them and of a use-it-or-lose-it type.¹²⁰ If the option to transfer leave to the mother does not exist, and the leave unused by the father is lost, causing

¹¹⁶ C Castro-García and M Pazos-Moran, 'Parental Leave Policy and Gender Equality in Europe' (2016) 22(3) *Fem Econ* 51, 55; Eurofound, 'Promoting uptake of parental and paternity leave among fathers in the European Union' (Publications Office of the European Union 2015), 7.

¹¹⁷ M Karu and D Tremblay, 'Fathers on Parental Leave: An Analysis of Rights and Take-Up in 29 Countries' (2018) 21(3) *Community Work Fam* 344, 346-347; Lammi-Taskula (n 100) 86-87.

¹¹⁸ Castro-García and Pazos-Moran (n 116) 55; COM (2017) 253 final (n 107) 7; de la Corte Rodriguez, 'Child-Related Leave and Women's Labour Market Outcomes' (n 7) 390; Lammi-Taskula (n 100) 95.

¹¹⁹ de la Corte Rodriguez, 'Child-Related Leave and Women's Labour Market Outcomes' (n 7) 388.

¹²⁰ L Haas and T Rostgaard, 'Fathers' Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave' (2011) 14(2) *Community Work Fam* 177, 178, 186; Karu and Tremblay (n 117) 355-356; A-Z Duvander, GB Eydal, B Brandth, IV Gíslason, J Lammi-Taskula, and T Rostgaard, 'Gender Equality: Parental Leave Design and Evaluating its Effects of Fathers' Participation' in P Moss, A-Z Duvander, and A Koslowski (eds), *Parental Leave and Beyond: Recent International Developments, Current Issues and Future Directions* (Policy Press 2019), 194-195.

the parents to have to rely on alternative childcare arrangements, men are incentivised to take the leave. As such, non-transferable parental leave entitlements normalise fathers' take-up of the non-transferable period of parental leave but fail to facilitate take-up beyond this period.¹²¹ I also note that although the WLBD makes half of the parental leave available to each parent under EU law non-transferable, it does not require that, proportionally, half of each parents' entitlement to leave must be non-transferable under national law. Men taking two months of parental leave, considering that most Member States offer at least double the length of parental leave per parent or per family than that provided under the WLBD¹²², does not entail that men take half the leave available under national law. It does, however, entail that women take disproportionately long leave. Thus, while the WLBD's provision is positive on the trajectory of the normative development of the EU PLF, it is not radical enough to challenge gendered parental roles or the sexual division of childcare and household labour between partners. By offering the option of transferable parental leave, the WLBD continues to reinforce the breadwinner-caregiver dichotomy.

Conclusion

In this chapter, I have critiqued the EU PLF from a recognition perspective to demonstrate that it perpetuates the socially constructed, gendered parental role stereotypes epitomised by the breadwinner-caregiver dichotomy. It thus reinforces the sexual division of labour within the family and contributes to socio-

¹²¹ A Almqvist and A-Z Duvander, 'Changes in Gender Equality? Swedish Fathers' Parental Leave, Division of Child Care and Housework' (2014) 20(1) J Fam Stud 19, 20; A-Z Duvander and M Johansson, 'Parental Leave Use for Different Fathers: A Study of the Impact of Three Swedish Parental Leave Reforms' in GB Eydal and T Rostgaard (eds), *Fatherhood in the Nordic Welfare States: Comparing Care Policies and Practice* (Policy Press 2014), 360.

¹²² European Commission, 'The transposition of the Work-Life Balance Directive in EU Member States (II): Considerable work still to be done' (Publications Office of the European Union 2023), 71.

economic inequalities between the sexes. Both the PWD and the WLBD allocate childcare responsibility to women because of the expectation underpinning the dominant ideology of motherhood that the bodily capacity for pregnancy and childbirth renders them naturally inclined to caring. The WLBD further alienates men from parental childcare by disincentivising their use of paternity and parental leave. In Chapter 7, I restructure the EU PLF in a way which deconstructs the breadwinner-caregiver dichotomy and begins to transform the sexual division of labour within the family by drawing a clear distinction between health- and safety-related leave and childcare-related leave.

CHAPTER 5. THE EU PLF PRIVILEGES THE HETERO-NORMATIVE NUCLEAR FAMILY

To sustain the capitalist mode of production, capitalist societies rely on heteronormative nuclear families to uphold the sexual division of labour and thus continue covering the costs of reproductive labour, including gestating and parenting (Chapter 3). Despite the evolution of the EU's conception of a family over time, existing research posits that the heteronormative nuclear family consisting of a married, heterosexual, and cisgender couple with biological children remains the model European family reflected in EU law and policy (Chapter 1).¹ In this chapter, I thus centre the norm of *the heteronormative nuclear family* in my critique of the EU PLF. I approach the norm, in the first instance, from the perspective of Fredman's participative dimension, while also exploring how this dimension interacts with redistribution and recognition. I examine how – and with what consequences for substantive equality between parents – the EU PLF privileges this type of family. I do so by examining the family-related legal eligibility criteria which the PWD and the WLBD impose on parents in order to access parenting leave (see Appendix 4).² In section 5.1, I demonstrate how the cis- and heteronormativity of the EU PLF operates at the intersections of sex, gender, and sexuality, namely regarding LGBTQIA+ parents.³ I focus on same-

¹ P Foubert, 'Child Care Leave 2,0 – Suggestions for the Improvement of the EU Maternity and Parental Leave Directives from a Rights-Perspective' (2017) 24(2) MJ 245, 249-250; A Tryfonidou, 'What Is a "Family" in EU Law? Do EU Policies Sufficiently Address Family Diversity and its Consequences?' in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 22.

² Employment- and citizenship-related eligibility criteria – such as period of employment qualifications and nationality- or residence-based qualifications for accessing parenting leave – imposed in EU law fall outside the scope of this thesis. See eg E Chieragato, 'A Work-Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158' (2020) 36(1) IJCLIR 59; A-Z Duvander and A Koslowski, 'Access to Parenting Leaves for Recent Immigrants: A Cross-National View of Policy Architecture in Europe' (2023) 79(1) *Genus* 8.

³ I have opted for the acronym LGBTQIA+ because it 'represents the most inclusive umbrella term for people whose sexual orientation differs from heteronormativity and/or whose gender identity falls outside binary categories', per EIGE, 'Eligibility for parental leave in EU Member States' (Publications Office of the European Union 2020), 4. This is different to the Commission's

sex parents on the one hand and transgender and gender non-conforming parents on the other. Then, in section 5.2, I demonstrate how the nuclear family norm underpinning the EU PLF obscures the needs of non-nuclear families, focusing on one-parent and multiple-parent families. In section 5.3, I discuss surrogacy and adoption as alternative routes to parenthood which challenge the nuclear family underpinning of the EU PLF which emphasises parents' gestational and/or biological link to the child as the basis for their entitlement to parenting leave. I argue that the limited legal access to parenting leave instruments at the EU level by parents and families which do not comfortably conform to the heteronormative nuclear family ideal raises concern about social exclusion and misrecognition.

5.1 Cis- and Heteronormativity as Access Criteria? Implications for LGBTQIA+ Parents

The EU PLF has not explicitly prohibited LGBTQIA+ parents from accessing parenting leave. During its evolution, however, it has nevertheless systematically perpetuated the hegemony of cisnormative and heteronormative parenthood by overlooking non-normative parenthood and subsequently failing to facilitate access to leave by same-sex, transgender, and gender non-conforming parents, thus effectively excluding these groups of parents from the scope of leave policies at the EU level. In this section, I first refer to my discussion of the purpose of maternity leave under the PWD in Chapter 4 to examine the potential exclusion of pregnant trans men and gender non-conforming people from the scope of health- and safety-protective leave under EU law (section 5.1.1). I then critically assess the WLBD's attempt to facilitate LGBTQIA+ parents' access to paternity and parental leave (section 5.1.2).

preferred acronym LGBTIQ which excludes asexual, aromantic, and agender people and people with identities falling outside those listed in the acronym, see European Commission, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025' (Communication) COM (2020) 698 final, 1.

5.1.1 The PWD and the Exclusion of Pregnant Trans Men and Gender Non-Conforming People

Whether pregnant trans men and pregnant gender non-conforming people who give birth are entitled to maternity leave under EU law remains unsettled. Given the lack of established case law at either EU or national level, the Commission admits that ‘most of the information on how the law may be expected to treat pregnant men [...] can be no more than an educated guess’⁴. Existing literature – itself scant – is cynical about the possibility. Burri has suggested that trans men would likely be excluded from the scope of the PWD because of the relevant categories of workers in Article 2 PWD being defined by reference to female pronouns: a pregnant worker ‘informs *her* employer of *her* condition’.⁵ This gender-specific language is common to various translations of the PWD across the EU and to its maternity leave provisions as transposed into national law.⁶ The terminology of *maternity* leave is itself gendered. In what follows, I highlight the implications of a literal interpretation of the PWD for pregnant trans men and pregnant gender non-conforming people who give birth. Before doing so, however, I make the broader point that the ECJ’s conception of pregnancy discrimination – conceived as a form of sex discrimination in *Dekker*, it only arises in relation to *women* because only *women* can become pregnant⁷ – is similarly gendered. The Commission recognises that it ‘may leave pregnant (trans) men unprotected’⁸. At the national level, the Commission has observed that in 2018 pregnant men were unequivocally entitled to equal employment protection in

⁴ European Commission, ‘Trans and Intersex Equality Rights in Europe – A Comparative Analysis’ (Publications Office of the European Union 2018), 101.

⁵ S Burri, ‘Care in Family Relations – The Case of Surrogacy Leave’ (2015) 17(2) EJLR 271, 280-281.

⁶ European Commission, ‘Trans and Intersex Equality Rights in Europe’ (n 4) 100-101.

⁷ C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus* [1990] ECR I-3941, para 12.

⁸ European Commission, ‘Trans and Intersex Equality Rights in Europe’ (n 4) 100. For alternative approaches to conceptualising pregnancy discrimination in EU law, see H van Dijke, ‘Pregnant Transgender People: What to Expect from the Court of Justice of the European Union’s Jurisprudence on Pregnancy Discrimination’ (2022) 29(1) Mich J Gender & L 179.

only four Member States: Denmark, Estonia, Germany, and Sweden.⁹ In 12 other Member States, gender-specific law was assumed to be interpreted inclusively to ensure protection.¹⁰ Overall, however, pregnancy- and childbirth-related legal protections and entitlements remain, at least formally, exclusive to women in the EU.

The PWD's gender-specific language conveys the essentialist presumption that pregnant workers and workers who give birth as a group only includes female-identifying people and/or people of the female sex.¹¹ However, pregnant people and people who give birth do not always identify as women, nor are they always female.¹² As Hannah van Dijke explains:

[p]regnant transgender people may not identify with the female sex they were assigned at birth, and at times seek gender-affirming medical intervention to partially or fully align their sex characteristics with their male gender identity. [...] Under societal binary sex norms, categorization into male and female sex is based on external sex characteristics. Internal characteristics, such as possessing a uterus and ovaries, are irrelevant. [...] Such norms also put a transgender man who had a partial gender-affirming medical intervention to align his external sex characteristics with his male gender identity, but who chose to keep his uterus and ovaries, in the male sex box.¹³

Interpreted literally, the PWD's framing of health- and safety-related leave as maternity leave for female and female-identifying workers thus excludes from the scope of the PWD groups of workers with the bodily capacity for pregnancy and childbirth. Similarly to the exclusion of workers who terminate, miscarry, or have a stillbirth (Chapter 4), the exclusion of pregnant trans men and pregnant gender non-conforming people who give birth trivialises the health and safety concerns

⁹ European Commission, 'Trans and Intersex Equality Rights in Europe' (n 4) 101.

¹⁰ *ibid.* Finland, France, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, and Portugal.

¹¹ R Dembroff and D Wodak, 'He/She/They/Ze' (2018) 5 *Ergo: An Open Access J Phil* 371, 373; J Holroyd and MJ Cull, 'Gender-Neutrality and Family Leave Policies' in L Anderson and E Lepore (eds), *The Oxford Handbook of Applied Philosophy of Language* (Oxford University Press 2024), 370.

¹² Holroyd and Cull (n 11) 370.

¹³ van Dijke (n 8) 191.

associated with pregnancy and childbirth and renders the PWD unfit for purpose. Moreover, reifying pregnancy and childbirth as essential female experiences obscures the specific pregnancy-related disadvantage experienced by trans men and gender non-conforming people.¹⁴ In practice, this may transpire where pregnant workers are misgendered by the law and must disclose private details about their gender and/or sexual identity in order to gain access to maternity leave and may inadvertently subject themselves to further stigma, stereotyping, and discrimination.¹⁵ A literal interpretation of the PWD thus privileges cis-normative pregnancy, childbirth, and motherhood, and hence reinforces inequalities between cisgender parents and transgender and gender non-conforming parents in access to leave under EU law. I recognise that a purposive interpretation of the PWD, in which the operational criterion for legal eligibility for health- and safety-related leave would be pregnancy and/or childbirth as a matter of fact, would entitle pregnant trans men and gender non-conforming people who give birth to maternity leave.¹⁶ However, the gender-specific language of the PWD would continue to misgender and disadvantage them in comparison to cisnormative people.¹⁷

¹⁴ J Clarke, 'Pregnant People?' (2019) 119 *Colum L Rev* F 173, 181; Dembroff and Wodak (n 11) 376, 379; Holroyd and Cull (n 11) 368; L Karaian, 'Pregnant Men? Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law' (2013) 22(2) *Soc Leg Stud* 211, 222; CA Pfeffer and KB Jones, 'Transgender Parent Families' in AE Golberg and KR Allen (eds), *LGBTQ-Parent Families. Innovations in Research and Implications for Practice* (Springer 2020), 200, 208; van Dijcke (n 8) 187.

¹⁵ Dembroff and Wodak (n 11) 373; Holroyd and Cull (n 11) 369.

¹⁶ See Transgender Europe, 'TGEU's Activist's Guide on Trans People's Rights under EU Law. An Overview of Current EU Law Covering Gender Reassignment, Gender Identity and Gender Expression' (Transgender Europe 2015), 19.

¹⁷ Holroyd and Cull (n 11) 366.

5.1.2 The WLBD's 'Second Parent' Provision and Gender-Neutral Parental Leave

Article 3 WLBD. Definitions

1. For the purposes of this Directive, the following definitions apply:

(a) 'paternity leave' means *leave from work for fathers or, where and insofar as recognised by national law, for equivalent second parents*, on the occasion of the birth of a child for the purposes of providing care [...]

(b) 'parental leave' means *leave from work for parents* on the grounds of the birth or adoption of a child to take care of that child [...]

To prevent discrimination between parents on account of sexual orientation, the WLBD affords paternity leave to a working father *or* an equivalent second parent.¹⁸ It recognises that any parent of the child whose role is equivalent to the father's should have the right to paternity leave immediately following the child's birth.¹⁹ While the terminology of *paternity* leave remains gendered – and as such misgenders and disrespects LGBTQIA+ parents' sexual and/or gender identities²⁰ – the gender-neutral language of Article 4 WLBD, in principle, facilitates access to leave by, for instance, the gestational mother's female partner. It also does so for parents who otherwise may not identify as the child's *father*, such as trans and gender non-conforming parents. Parental leave is similarly provided gender-neutrally to working *parents* under Article 5(1) WLBD.²¹ The WLBD facilitates

¹⁸ European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' COM (2017) 253 final, 11; Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ 2019 L188/79 (WLBD), arts 3(1)(a), 4(3).

¹⁹ Compare to eg *Hallier and others v France*, Application No. 46386/10 (ECtHR 12 December 2017), paras 31-32. The ECtHR argued the father's role to justify the exclusion of co-mothers: limiting paternity leave to *biological* fathers did not constitute a breach of ECHR Article 8 in conjunction with Article 14 but supported the legitimate aim of facilitating paternal involvement and the division of domestic labour between the sexes.

²⁰ Holroyd and Cull (n 11) 368-369.

²¹ WLBD (n 18) arts 3(1)(b) and 5.

parents' access to parental leave after the birth or adoption of a child regardless of their sex and gender and/or sexual identity. It hence makes parental leave, in principle, equally available to heterosexual and non-heterosexual parents and to cisgender, transgender, and gender non-conforming parents. And although its policy rhetoric makes a period of parental leave non-transferable between parents specifically to incentivise fathers' take-up, the WLBD avoids discriminating against same-sex female couples by providing the period in a way which makes it parent-specific yet gender-neutral.²² By facilitating LGBTQIA+ parents' access to paternity leave and parental leave, the WLBD facilitates their social inclusion and participation in socially necessary parental care on a par with heteronormative parents. As such, it mitigates some of the stigma and stereotyping attaching to LGBTQIA+ relationships and parenthood on account of gender and/or sexual identity.

For second parents to be in a role equivalent to the father's which entitles them to paternity leave and parental leave, the WLBD normatively broadens the understanding of fatherhood in EU law by detaching it from the biological concept of paternity. Just as legal motherhood has traditionally been derived from a gestational link to the child through the *mater semper certa est* (the mother is always certain) principle, legal fatherhood has been derived from a biological link to the child – namely the act of insemination.²³ Examining the judicial attribution of legal fatherhood to trans men who give birth – who, despite identifying as their child's father, are typically not afforded legal fatherhood²⁴ –

²² European Commission, 'Family leave. Enforcement of the protection against dismissal and unfavourable treatment' (Publications Office of the European Union 2018), 85; E Wong, J Jou, A Raub, and J Heymann, 'Comparing the Availability of Paid Parental Leave for Same-Sex and Different-Sex Couples in 34 OECD Countries' (2019) *J Soc Policy* 525, 540.

²³ A Margaria, 'Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?' (2020) 34(3) *IJLPF* 225, 237.

²⁴ See *R (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 [UK]. Notably, the EP has called for positive measures facilitating the recognition of the legal gender of transgender parents in determining legal parenthood, see European Parliament,

Alice Margaria argues that involvement in childcare has not been sufficient to make someone a legal father but rather fatherhood has been legally construed through biology.²⁵ And while courts and legislatures have begun deconstructing the dominant ideology of fatherhood by challenging the father's role as a breadwinner and secondary carer in emphasising childcare as a central element of fatherhood (Chapter 4), Margaria notes that this has often been limited to heterosexual and cisgender fatherhood as it has continued to presume care for a child to whom the father has a relevant biological link.²⁶ Under the WLBD, the purpose of paternity leave and, hence the father's role immediately following the child's birth, is grounded in newborn care and parent-child bonding. The purpose of parental leave is similarly to care for a child following their birth or adoption. Beyond challenging fathers' absence from childcare, the WLBD appears to recognise that this caring paternal role does not only pertain to biological male fathers, whereby it effectively detaches fatherhood from the biological conception of paternity and attaches it instead to a more functional conception grounded in care. This subsequently requires broadening the relevant category of parents responsible for childcare from biological male fathers to non-biological and/or non-male second parents. At the transformative level, the WLBD thus furthers the deconstruction of fatherhood and begins to de-gender parenthood as a social concept. It also begins to deconstruct the heteronormative nuclear family on route to substantive equality between parents by including some of the previously excluded groups of LGBTQIA+ parents in the scope of the EU PLF.

In practice, however, the WLBD's inclusiveness is impeded by its interaction with national law. Paternity and parental leave are only available to second parents

Resolution 2021/2679 on LGBTIQ rights in the EU, art 4. See also D Alaattinoğlu and A Margaria, 'Trans Parents and the Gendered Law: Critical Reflections on the Swedish Regulation' (2023) 21(2) *ICON* 603.

²⁵ Margaria, 'Trans Men Giving Birth' (n 23) 235-236.

²⁶ *ibid* 241.

where their parenthood is recognised by national law.²⁷ Eligibility for and access to parenting leave by same-sex parents on a par with heterosexual parents under EU law remains contingent on the legal recognition of their relationship and right to become parents through second-parent recognition, joint adoption, ART, and surrogacy under national law.²⁸ While I recognise the exclusion of same-sex parents from parenting leave to be a consequence of the division of legal competences between the EU and its Member States, whereby the former cannot compel the legal recognition of same-sex parenthood and access to parenting leave instruments at the national level, I demonstrate here the scale of ineligibility across the EU.²⁹ Where Member States regard male and female co-parents as adoptive parents or legally recognise same-sex co-parenthood, they afford same-sex couples parental leave on a par with different-sex biological and adoptive parents.³⁰ This was the case in just 16 Member States in 2023.³¹ Only 14 Member States granted paternity leave to second parents.³² The participation of non-heteronormative parents in parental care on a par with parents who conform to the heteronormative nuclear family ideal is thus hindered by the divergence in

²⁷ WLBD (n 18) recital (19).

²⁸ Chiericato (n 2) 71; European Commission, 'Leave policies and practice for non-traditional families' (Publications Office of the European Union 2019), 2, 4; G Kaufman, AM Auðardóttir, D Mazrekaj, RN Pettigrew, N Stambolis-Ruhstorfer, T Vuckovic Juros, and MA Yerkes, 'Are Parenting Leaves Available for LGBTQ Parents? Examining Policies in Canada, Croatia, France, Iceland, the Netherlands and the United Kingdom' in I Dobrotić, S Blum, and A Koslowski (eds), *Research Handbook on Leave Policy. Parenting and Social Inequalities in a Global Perspective* (Edward Elgar 2022), 326-327; Wong et al (n 22) 535. See eg J Long, M Naldini, and A Santero, 'The Role of Reproductive Rights and Family Policies in Defining Parenthood' in T Knijn and M Naldini (eds), *Gender and Generational Division in EU Citizenship* (Edward Elgar 2018); L Bracken, 'Recognition of LGBTQI+ Parent Families Across European Borders' (2022) 29 MJ 399.

²⁹ EIGE reported the family-related ineligibility rate, including of same-sex parents, to have been less than 1% of potential parents in the EU in 2016 but suggested the real rate to be higher due to the data limitations of their study, see EIGE, 'Eligibility for parental leave in EU Member States' (n 3) 17-18. I therefore omit this result from my discussion.

³⁰ European Commission, 'The transposition of the Work-Life Balance Directive in EU Member States (II): Considerable work still to be done' (Publications Office of the European Union 2023), 52-53.

³¹ *ibid.* Austria, Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Malta, the Netherlands, Portugal, Slovenia, Spain, and Sweden.

³² *ibid.* 40. As (n 31), excluding Croatia and Germany.

family-related legal eligibility criteria imposed in national law. More socially conservative Member States keen on protecting the heteronormative nuclear family continue excluding non-heteronormative parents and hence perpetuating the negative stigma and stereotypes attaching to them.³³

Moreover, in their study comparing the availability of paid parenting leave to same-sex and different-sex couples in 34 member countries of the Organisation for Economic Cooperation and Development (OECD), including 20 EU Member States, Elizabeth Wong et al. concluded that same-sex *female* couples enjoy better access to leave than same-sex *male* couples.³⁴ They are typically entitled to leave on a par with different-sex parents, as was the case in ten of the EU Member States observed in the study in 2016.³⁵ Same-sex male couples, by contrast, are entitled to leave on a par with different-sex couples only where the parenting leave system is entirely gender-neutral or gender-inclusive, which it was in only one Member State observed in the study: Sweden.³⁶ In the other Member States – and under the EU PLF – they receive less leave compared to both different-sex couples and same-sex female couples and may consequently be prevented from realising the benefits of paid leave, such as parent-child bonding

³³ JM Scherpe, 'Epilogue to the Family in EU Law. Is There a European Family Law?' in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 255-256. Bulgaria, Latvia, Lithuania, Poland, Romania, and Slovakia did not allow legal recognition of same-sex relationships or joint legal parenthood in 2019, see European Commission, 'Leave policies and practice for non-traditional families' (n 28) 5. On conservative approaches to parenting leave, see D Szelewa and D Szikra, 'Leave Policies in Populist and Illiberal Regimes: The Cases of Hungary and Poland' in I Dobrotić, S Blum, and A Kosłowski (eds), *Research Handbook on Leave Policy. Parenting and Social Inequalities in a Global Perspective* (Edward Elgar 2022); B Pircher, C de la Porte, and D Szelewa, 'Actors, Costs and Values: The Implementation of the Work-Life Balance Directive' (2024) 47(3) *West Eur Polit* 543; M Latos-Mitkowska, 'The Missed Opportunity of Poland's Implementation of Parental Leave Provisions' (2025) 16(1) *ELLJ* 140.

³⁴ Wong et al (n 22) 532.

³⁵ *ibid.* Belgium, Denmark, Ireland, Finland, France, Germany, the Netherlands, Slovenia, Spain, and Sweden.

³⁶ *ibid* 533-534, 537.

and more equal division of childcare responsibilities between parents.³⁷ Under EU law, this disparity in access to parenting leave is explained by reproductive reasons. Same-sex male couples are inherently entitled to less leave than different-sex or same-sex couples in which one partner gestates and births the child and is therefore entitled to maternity leave under the PWD.³⁸ The WLBD also does not facilitate access to paternity leave by one or both fathers in a same-sex male parent family. A cisgender male couple becoming parents generally presumes adoption or surrogacy, and parents – whether in same-sex or different-sex partnerships – through adoption or surrogacy are not entitled to paternity leave because of its contingency on childbirth (section 5.3.2).³⁹ There is hence no explicit difference in the treatment of LGBTQIA+ and hetero- and cis-normative adoptive and commissioning parents under the WLBD. However, Gayle Kaufman et al. remark that

differences may still exist due to the fact that adoption is a much more common path to parenthood for same-sex couples than different-sex couples. Therefore, these policies mean that, on average, [LGBTQIA+] parents likely receive less leave than different-sex couples or couples in which one parent delivers the child.⁴⁰

When not explained by biological reasons, existing literature suggests that discrepancies in same-sex male and female parents' access to leave may imply that same-sex female parenthood is more palatable than same-sex male parenthood: the dominant ideology of motherhood privileges all motherhood, while undermining men's ability to parent.⁴¹ Gay men's ability to parent has been particularly scrutinised because of the negative stereotypes and stigma

³⁷ *ibid* 533-534, 539.

³⁸ *ibid* 539.

³⁹ COM (2017) 253 final (n 18) 11; E Caracciolo di Torella and P Foubert, 'Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU?' (2015) 40 *EL Rev* 52, 53.

⁴⁰ Kaufman et al (n 28) 333.

⁴¹ D Berkowitz, 'Theorizing Lesbian and Gay Parenting: Past, Present and Future Scholarship' (2009) 1 *J Fam Theory Rev* 117, 121; M Evertsson, E Jaspers, and Y Moberg, 'Parentalization of Same-Sex Couples: Family Formation and Leave Rights in Five Northern European Countries' in R Nieuwenhuis and W Van Lancke (eds), *The Palgrave Handbook of Family Policy* (Palgrave Macmillan 2020), 398; Wong et al (n 22) 539.

attaching to homosexuality which perpetuate the presumptions that gay fathers are a demoralising influence and an unsuitable gender role model for children and that children need both a mother and a father.⁴² While both have been disproved – children’s well-being is not negatively affected by having homosexual parents, nor do children of same-sex parents receive two measures of either mothering or fathering⁴³ – and LGBTQIA+ parenthood has become more normalised, same-sex female parenting continues to be preferable to same-sex male parenting. Where national PLFs continue to misrecognise groups of LGBTQIA+ parents and therefore to exclude them from parenting leave, their inclusion in the EU PLF and the EU PLF’s ability to deconstruct the heteronormative nuclear family and facilitate substantive equality between parents continues to be undermined in practice.

5.2 The ‘Unalterable Two-Parent Paradigm’⁴⁴: Implications for One-Parent and Multiple-Parent Families

WLBD Preamble

(23) [...] Member States *should assess* whether the conditions of access to and the detailed arrangements for *parental leave* should be adapted to *the specific needs of parents in particularly disadvantaged situations*.

(37) [...] Member States *are encouraged to assess* whether conditions for access to, and the detailed arrangements for, exercising the right to *paternity leave* [...] should be adapted to particular needs, *such as of those of single parents, adoptive parents, parents with a disability...*

⁴² Berkowitz (n 41) 120, 125; Pfeffer and Jones (n 14) 206-207; E Ruspini, *Diversity in Family Life: Gender, Relationships, and Social Change* (Policy Press 2013), 94, 120.

⁴³ KH Averett, ‘Queer Parents, Gendered Embodiment, and the De-Essentialisation of Motherhood’ (2021) 22(2) *Fem Theory* 284, 292; Berkowitz (n 41) 122; Ruspini (n 42) 121.

⁴⁴ A Margaria, ‘Surrogacy Before European Courts. The Gender of Legal Fictions’ in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 200.

Article 5 WLBD. Parental leave

8. Member States *shall* assess the need for the conditions of access to and the detailed arrangements for the application of *parental leave* to be *adapted to the needs of adoptive parents*, parents with a disability and parents with children with a disability or a long-term illness.

Article 4(3) WLBD affords fathers and second parents access to paternity leave irrespective of marital or family status, as defined in national law, to avoid discrimination between parents on these grounds.⁴⁵ Reserving paternity leave to married and resident parents would effectively restrict access to leave immediately after a child's birth by parents who are not married to and/or cohabiting with the worker who gives birth to the child.⁴⁶ While this provision is not replicated for parental leave under the WLBD, it appears that in addition to being available gender-neutrally, parental leave is similarly available irrespective of marital or family status. In principle, then, the WLBD accommodates the early childcare needs of families that do not conform to the traditional nuclear family presumption that the two parents are married and live together. As such, it better reflects societal changes in patterns of family formation and parental relationships which sees more children being born to cohabiting couples and single people.⁴⁷ It also accommodates differences in typical family formations between Member States.⁴⁸ Moreover, the WLBD makes the EU PLF more responsive to parental separation: divorce or separation before or after the child's birth, in principle, should not make parents – particularly fathers – ineligible for childcare-related leave. In practice, defining marital and family status for the

⁴⁵ COM (2017) 253 final (n 18) 11; WLBD (n 18) recital (19), art 4(3).

⁴⁶ COM (2017) 253 final (n 18) 11; E Craig, 'Converging Queer and Feminist Legal Theories: Family Feuds and Family Ties' (2010) 28 Windsor YB Access Just 209, 226.

⁴⁷ WLBD (n 18) recital (19); European Commission, 'Leave policies and practice for non-traditional families' (n 28) 1.

⁴⁸ 65.2% of births occurred outside marriage in France in 2022, whereas 80% of births occurred within marriage in Greece, see Eurostat, 'Marriage and divorce statistics' (March 2024), <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divorces>, accessed 24.8.2024.

purposes of the EU PLF remains the competence of individual Member States.⁴⁹ Paternity leave and parental leave are both granted without any qualifying criteria, such as parents' residential status, in all but two Member States.⁵⁰ The EU PLF thus effectively broadens access to parenting leave to parents in normalised non-nuclear families founded upon non-marital and non-cohabiting relationships. In this section, I analyse whether the EU PLF does so for other non-nuclear family arrangements. I examine access to parenting leave at the EU level by one-parent and multiple-parent families which challenge the nuclear family norm that places responsibility for childcare on two primary parents.

The wording of the WLBD's paternity leave provisions suggests that paternity leave remains available to only one individual – hence not both a father and a second parent, nor two fathers, nor two second parents. Parental leave is similarly not available to more than two parents. Therefore, the EU PLF does not accommodate the early childcare needs of multiple-parent families, such as those in which both a non-resident biological father and the gestational mother's resident partner perform a parental role. As such, 'a key aspect of [the] traditional parenthood paradigm remains largely unquestioned: that of the maximum number of two parents'⁵¹. That the WLBD reinforces the nuclear family presumption that each child has two primary parents interacts with national law: most Member States allow a child to have two legal parents, and few Member States offer leave to a parent's partner unless they have a legal relationship to the child.⁵² I recognise that as the financing of parenting leave remains the

⁴⁹ WLBD (n 18) recital (18).

⁵⁰ European Commission, 'The transposition of the Work-Life Balance Directive' (n 30) 42-44, 58. To access paternity leave, the father or second parent must live in the child's residence in Austria and must be married to or cohabiting with the mother in Bulgaria. To access parental leave, the worker must live in the same household as the child in Austria and Germany.

⁵¹ D Lima, 'Three Models for Regulating Multiple Parenthood: A Comparative Perspective' in K Duden and D Wiedemann (eds), *Changing Families, Changing Family Law in Europe* (Intersentia 2024), 97.

⁵² European Commission, 'Leave policies and practice for non-traditional families' (n 28) 2.

responsibility of national welfare state systems, Member States have an interest in limiting the number of recipients of leave to the child's legal parents in implementing the EU PLF in order to minimise the cost of leave on national economies.⁵³ The failure to facilitate access to leave by multiple parents, however, renders at least one parent in reconstituted families ineligible for childcare-related leave. It also disproportionately affects LGBTQIA+ and immigrant communities which often form 'chosen families' disconnected from biological and/or legal ties between family members.⁵⁴ Same-sex couples, for instance, often have children with a friend or a same-sex couple of the opposite sex and all parties contribute to parenting the child.⁵⁵ By limiting access to paternity leave to one parent and parental leave to two parents, the EU PLF caters to families with legally regulated and recognised relationships between two parents and their children. It continues to reinforce the heteronormative nuclear family norm by excluding both normalised non-nuclear families with multiple parents and less formal extended kinship-based families from parenting leave.

Furthermore, the WLBD fails to support the early childcare needs of one-parent families by not making paternity and parental leave available to a non-parent in a caring role equivalent to the father's or second parent's, such as a grandparent or a close friend. Single parents – whether so by choice or due to separation or partner's death – are eligible for parental leave in all Member States.⁵⁶ However,

⁵³ On the costs of implementing the WLBD, see eg European Commission, 'Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU' SWD (2017) 202 final; C de la Porte, TP Larsen, and D Szelewa, 'A Gender Equalizing Regulatory Welfare State? Enacting the EU's Work-Life Balance Directive in Denmark and Poland' (2020) 691 *Ann Am Acad Pol Soc Sci* 84; C de la Porte, ZJ Im, B Pircher, and D Szelewa, 'The EU's Work-Life Balance Directive: Institutional Change of Father-Specific Leave Across Member States' (2023) 57(4) *Soc Policy Admin* 549, 549; Pircher et al (n 51) 548.

⁵⁴ Berkowitz (n 41) 126.

⁵⁵ Kaufman et al (n 28) 334; Lima (n 51) 99.

⁵⁶ EIGE, 'Who is eligible for parental leave in the EU-28?' (Publications Office of the European Union 2021), 1.

Judy Jou et al.'s study of one-parent families' access to parental leave in 34 OECD countries, including 20 EU Member States, observes that most countries do not explicitly address paid parental leave to single parents.⁵⁷ Particularly where leave is reserved to one parent within a two-parent family to promote gender-equal sharing of leave, one-parent families do not have access to equal duration of leave with two-parent families and are hence disadvantaged in comparison.⁵⁸ In the case of independent parents, the second parent's four months of parental leave are lost because a single parent is not entitled to them or the two transferable months. Nor is the second parent's entitlement currently available to a non-parent which would allow a one-parent family to enjoy an additional four months of paid leave and enable a non-parent to share the entitlement with the single parent. In the case of separated co-parents, the WLBD ensures that non-resident single fathers or second parents remain entitled to paternity leave immediately after the child's birth and that both parents remain entitled to their individual parental leave entitlement after a child's birth or adoption regardless of whether they live together.⁵⁹ Prior to the WLBD, the parental leave period of the non-resident parent – often the father – would likely have been lost: non-resident parents were ineligible for parental leave in at least ten Member States in 2017.⁶⁰ Overall, the EP argues the WLBD to benefit single parents by addressing their 'triple bind'⁶¹ – the gendered nature of single parenthood, gendered labour market disadvantage, and obstacles to work-life balance – insofar as its aims of supporting parents' work-life balance, encouraging a gender-equal sharing of

⁵⁷ J Jou, E Wong, D Franken, A Raub, and J Heymann, 'Paid Parental Leave Policies for Single-Parent Household: An Examination of Legislative Approaches in 34 OECD Countries' (2020) 23(2) *Community Work Fam* 184, 191–193.

⁵⁸ *ibid* 191–194.

⁵⁹ European Commission, 'The transposition of the Work-Life Balance Directive' (n 30) 42-44, 58.

⁶⁰ EIGE, 'Who is eligible for parental leave in the EU-28?' (n 56) 1. Austria, Belgium, Czechia, Germany, Greece, Hungary, Latvia, Luxembourg, Poland, and Slovakia.

⁶¹ R Nieuwenhuis and LC Maldonado, 'The Triple Bind of Single-Parent Families: Resources, Employment and Policies' in R Nieuwenhuis and LC Maldonado (eds), *The Triple Bind of Single-Parent Families. Resources, Employment and Policies to Improve Well-Being* (Policy Press 2018).

parental leave, and facilitating women's labour market participation are met.⁶² The WLBD may well facilitate both parents' equal involvement in childcare following separation and may subsequently reduce the poverty risk and improve the employment rates of single co-parents and single mothers in particular.⁶³ In doing so, however, it continues to privilege families with two involved, albeit separated and non-cohabiting, parents while disadvantaging independent parents. This demonstrates the prevailing normative importance of the two-parent family in the EU PLF.

Recital (37) of the WLBD does expressly encourage, but does not oblige, Member States to assess whether eligibility criteria for access to and arrangements relating to the use of paternity leave should be adapted to accommodate the particular needs of single parents.⁶⁴ The legislative documents, however, offer no reasoning for this recommendation nor do they suggest any particular adaptations. Interestingly, on my reading of the WLBD, this recommendation does not extend to parental leave. Article 5(8) WLBD imposes on Member States an obligation to assess the adaptation of the eligibility criteria for access to and arrangements relating to the use of parental leave for adoptive parents, disabled parents, and parents with disabled or ill children.⁶⁵ When read in conjunction with recital (23), this conveys that only these categories of parents are 'in particularly disadvantaged situations' for the purposes of the WLBD to warrant an obligation for assessment at national level.⁶⁶ Therefore, Member States are neither obliged

⁶² European Parliament, 'The Situation of Single Parents in the EU' (European Parliament 2020), 16-17, 69.

⁶³ See, however, Swedish evidence suggesting that use of parental leave remains more gendered among separated parents than non-separated parents, A-Z Duvander and N Korsell, 'Whose Days are Left? Separated Parents' Use of Parental Leave in Sweden' in R Nieuwenhuis and LC Maldonado (eds), *The Triple Bind of Single-Parent Families: Resources, Employment and Policies to Improve Wellbeing* (Policy Press 2018), 279.

⁶⁴ WLBD (n 18) recital (37).

⁶⁵ *ibid* art 5(8). For accommodations adopted in EU Member States, see European Commission, 'The transposition of the Work-Life Balance Directive' (n 30) 60-61.

⁶⁶ See also COM (2017) 253 final (n 18) 12.

nor recommended to assess the adaptation of parental leave arrangements to single parents.⁶⁷ By failing to oblige Member States to assess the adaptation of paternity and parental leave to single parents – or indeed to provide adaptations in the WLBD – the EU PLF obscures the fact that single parents headed 12.4% of EU households with children in 2023 and that, compared to two-parent families, they are disproportionately socio-economically disadvantaged.⁶⁸ The suggestion that single parents do have needs different to those of two-parent families must also be viewed against the evidence that women are more likely than men to be single parents. In 2023, 5.4% of 25-54 -year-old women in the EU were single parents, compared to 0.9% of men.⁶⁹ Therefore, single parents' socio-economic disadvantage is also gendered disadvantage. The normative privileging of the two-parent nuclear family and the simultaneous invisibilisation of one-parent families in the EU PLF continues to subject single parents to the triple bind of inadequate resources, employment, and social policies addressing these disadvantages.⁷⁰ It subsequently reinforces the welfare reciprocity stigma and negative gendered stereotypes attaching to single motherhood, including the association of single mothers with the unemployed and uneducated 'underclass'.⁷¹

⁶⁷ Whether the ECJ's interpretation of Article 5(8) WLBD corresponds with mine remains to be seen. It ruled the first request for a preliminary ruling concerning the assessment of the needs of single-parent families regarding access to and arrangements for parental leave inadmissible in *C-673/22 CCC v Tesorería General de la Seguridad Social (TGSS), Instituto Nacional de la Seguridad Social (INSS)* ECLI:EU:C:2024:407.

⁶⁸ Eurostat, 'Household composition statistics' (May 2024), <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Household_composition_statistics>, accessed 7.8.2024; Jou et al (n 57) 185–186; LC Maldonado and R Nieuwenhuis, 'Family Policies and Single Parent Poverty in 18 OECD Countries 1978–2008' (2015) 18(4) *Community Work Fam* 395, 404; Ruspini (n 42) 97.

⁶⁹ Eurostat, 'Household composition statistics' (n 68).

⁷⁰ Nieuwenhuis and Maldonado (n 61) 7-11.

⁷¹ *ibid* 11; Ruspini (n 42) 94.

5.3 Alternative Routes to Parenthood: Adoption and Surrogacy

With the introduction of the WLBD, the EU PLF has come to better reflect the normalisation of both non-marital and LGBTQIA+ parenthood in European society. Normatively, while a child's parents can now be of the same sex and they do not have to be married or live together, the EU PLF continues to reinforce the ideal of a nuclear family in which a child has two primary parents from birth or adoption, no more and no less. To end this half of the chapter, I demonstrate that its further normative mainstay is that the link between parent and child should, ideally, be gestational or biological. I do so by considering the implications of non-biological and non-gestational parenthood – facilitated by the normalisation of ART, adoption, and surrogacy – on legal eligibility for and access to parenting leave under the PWD and the WLBD. Adoption and surrogacy as alternative routes to parenthood challenge the normative expectation that a cisgender heterosexual couple naturally procreates to have biological children. As such, they interact with both LGBTQIA+ and independent parenthood by enabling same-sex couples and single people to become parents.

5.3.1 The Not-So-Special Relationship between Non-Gestational Mothers and Their Children: The Exclusion of Adoptive and Commissioning Mothers

In Chapter 4, I have demonstrated that access to maternity leave under the PWD is complicated by the conflation of its health and safety objective with maternal care rhetoric. Per the ECJ in *Betriu Montull*, the non-compulsory period of maternity leave under the PWD is renounceable by the worker and potentially transferable to the child's father under national law. The suggestion of its transferability implies that it is a period for the purpose of newborn care, not only the protection of the health and safety of the worker who gave birth. On this reasoning, it follows that this non-compulsory childcare-related period of

maternity leave should, in principle, benefit a broader cohort of workers. This includes workers who have not recently given birth and therefore do not require compulsory maternity leave for the protection of their health and safety, but who have nevertheless become responsible for the primary care of a child, whether a newborn or, often in the case of adoption, an older child. I focus my argument on adoptive mothers and commissioning mothers in surrogacy arrangements. With regard to the latter, I am aware that approaches to regulating surrogacy are fragmented across the EU, with some national jurisdictions allowing it, others prohibiting it, and many leaving it outwith legal regulation.⁷² This reflects the moral contentiousness of (commercial) surrogacy: while the surrogacy abolitionist movement calls for its illegalisation as an exploitative commodification of the female reproductive function⁷³, surrogacy-inclusionary feminists posit that it should be conceived as a productive form of gestational labour and subject to legal regulation in order to prevent exploitation of surrogates as workers.⁷⁴ My position in this thesis is neither anti-surrogacy nor pro-surrogacy. Rather, because surrogacy, whether commercial or altruistic, takes place in the EU, I consider that EU law ought to secure, on the one hand, surrogates' right to pregnancy- and childbirth-related leave as a matter of health and safety protection and, on the other hand, commissioning parents' access to childcare-related parental leave as parents with primary responsibility for the care of the newborn birthed by the surrogate (see Chapter 7).

⁷² Margaria, 'Surrogacy Before European Courts' (n 44) 181. See European Parliament, 'A Comparative Study on the Regime of Surrogacy in EU Member States' (Publications Office of the European Union 2013).

⁷³ See European Parliament, 'Motion for a European Parliament Resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the matter' 2015(2229)(INI), para 114; Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims [2024] OJ L 2024/1712, art 1(1). Sophie Lewis notes that the EP Resolution reflects the position of the lobby group 'No Maternity Traffic' which she describes as a faith-based, pro-life, and right-wing organisation, see S Lewis, *Full Surrogacy Now: Feminism Against Family* (Verso 2021), 41.

⁷⁴ See Lewis (n 73).

The ECJ has confirmed that the PWD excludes commissioning mothers from the scope of the non-compulsory period of maternity leave. Its logic is also directly applicable to adoptive mothers. The cases of *Z v A Government Department*⁷⁵ and *CD v ST*⁷⁶ both concerned the right to leave of female workers who became mothers through a surrogacy arrangement.⁷⁷ In both cases, a commissioning mother had been refused paid leave equivalent to maternity or adoption leave by her employer under national law because, in the case of maternity leave, the applicant had not been pregnant and, in the case of adoption leave, the child was not adopted.⁷⁸ The applicant in each case subsequently claimed sex discrimination but the ECJ held that the refusal to grant a commissioning mother maternity or adoption leave does not constitute direct or indirect discrimination: commissioning mothers and fathers are treated in the same way in that neither is entitled to leave equivalent to maternity leave and therefore refusing maternity leave does not put female workers at a disadvantage as compared to male workers.⁷⁹ There can also be no discrimination on the ground of pregnancy because the commissioning mother, by definition, cannot experience less favourable treatment given that she has not been pregnant.⁸⁰

The contingency of maternity leave on the birth of a living child (Chapter 4) makes the ECJ's refusal to extend the scope of the PWD to situations where the worker does not give birth but nevertheless becomes the mother of a living child through

⁷⁵ C-363/12 *Z v A Government Department, The Board of Management of a Community School* [2014] ECLI:EU:C:2014:159.

⁷⁶ C-167/12 *CD v ST* [2014] ECLI:EU:C:2014:169.

⁷⁷ A distinction should be drawn between traditional surrogacy arrangements where the surrogate is also the genetic parent of the child and gestational surrogacy where the genetic material, whether from the commissioning parent or a donor, is implanted into the surrogate's uterus whereby the surrogate has no genetic tie to the child, see European Parliament, 'A Comparative Study on the Regime of Surrogacy in EU Member States' (n 72) 12. These two cases appear to concern the latter.

⁷⁸ *CD* (n 76) paras 20-21; *Z* (n 75) paras 2, 38-39.

⁷⁹ *CD* (n 76) para 47; *Z* (n 75) paras 44, 52, 54-55.

⁸⁰ *CD* (n 76) para 52; *Z* (n 75) paras 57, 59.

adoption or surrogacy – in which case they may even be the child’s biological mother – paradoxical. When a worker who comes to have primary responsibility for the child’s care in practice has not been pregnant with and given birth to said child, the *Hofmann* reasoning on protecting the ‘special’ mother-child relationship ceases to apply. In the ECJ’s view, ‘motherhood cannot be seen as detached from pregnancy’⁸¹ whereby the special protection of the mother-child relationship only exists as ‘a logical corollary of childbirth’⁸². That is, the ECJ treats gestation and motherhood as a continuum: the entitlement to maternity leave for the special protection of the mother-child relationship flows from the mother’s gestational link to the child and the child’s birth, rather than being triggered by the social act of mothering.⁸³ This fails to protect the mother-child relationships of non-gestational mothers and their children and to recognise ‘specialness’ in maternal care when it is not provided by a gestational mother. It therefore ‘does not reflect the social reality of child-rearing and creates a situation whereby circumstances that should logically be appreciated as child-rearing are simply not’⁸⁴. The exclusion of commissioning and adoptive mothers from the scope of the PWD reinforces the normative importance of the mother’s gestational link to the child grounded in both the dominant ideology of motherhood and the heteronormative nuclear family ideal. It again reifies pregnancy and childbirth as essential women’s experiences and consequently perpetuates the social devaluation and stigmatisation of non-gestational motherhood like adoptive and LGBTQIA+ motherhood.⁸⁵

⁸¹ *CD* (n 76) opinion of AG Kokott para 47.

⁸² *Z* (n 75) opinion of AG Wahl para 47.

⁸³ Caracciolo di Torella and Foubert (n 39) 56, 58; Margaria, ‘Surrogacy Before European Courts’ (n 44) 185-186.

⁸⁴ *V Hooton and EC Romanis*, ‘Artificial Womb Technology, Pregnancy, and EU Employment Rights’ (2022) *JLB* 1, 30.

⁸⁵ Averett (n 43) 291; Margaria, ‘Surrogacy Before European Courts’ (n 44) 199; SM Park, ‘Adoptive Maternal Bodies: A Queer Paradigm for Rethinking Mothering?’ (2006) 21(1) *Hypatia* 201, 206.

In *CD*, AG Kokott had appealed to the objective of protecting the mother-child relationship to argue that the entitlement to maternity leave under the PWD must extend to a commissioning mother because

precisely because she herself was not pregnant, she is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother. This ‘special relationship between a woman and her child over the period which follows pregnancy and childbirth’ warrants protection in the case of [a commissioning] mother in the same way as it does in the case of a biological mother.⁸⁶

This purposive interpretation of the PWD detaches motherhood from the bodily processes of pregnancy and childbirth by highlighting that because the PWD is not only for the protection of the health and safety of pregnant workers and workers who have given birth, it should facilitate access to maternity leave for the purpose of parent-child bonding and newborn care by ‘parents who have not followed the conception-gestation-birth pattern’⁸⁷. This interpretation subsequently ‘allows maternity leave when an individual assumes care of a newborn and not simply when they have just given birth’⁸⁸. It would hence entitle commissioning mothers to maternity leave after the child’s birth on a par with gestational mothers.⁸⁹ The ECJ, however, refrained from AG Kokott’s interpretation.⁹⁰ I observe two main arguments in support of the ECJ’s decision. First, considering the absence of established EU and national legislation on surrogacy and the various ethical concerns related to the practice, it would not have been prudent for the ECJ to extend the PWD to commissioning mothers.⁹¹ Second, as AG Wahl had argued in *Z*, broadening the scope of the PWD would

⁸⁶ *CD* (n 76) opinion of AG Kokott para 46.

⁸⁷ *Hooton and Romanis* (n 84) 15-16.

⁸⁸ *ibid* 22.

⁸⁹ *CD* (n 76) opinion of AG Kokott para 48.

⁹⁰ *CD* (n 76) para 40.

⁹¹ *Burri* (n 5) 278; M Cousins, ‘Surrogacy Leave and EU Law’ (2014) 21 *MJ* 476-486, 486; M Finck and B Kas, ‘Surrogacy Leave as a Matter of EU Law: *CD* and *Z*’ (2015) 52 *CML Rev* 281, 298; A Tryfonidou and M Öberg, ‘Introduction’ in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 7. See eg NR Koffeman, *Morally Sensitive Issues and Cross-Border Movement in the EU. The Cases of Reproductive Matters and Legal Recognition of Same-Sex Relationships* (Intersentia 2015).

have resulted in a situation where the right to maternity leave is extended to commissioning mothers but not to commissioning fathers or indeed adoptive parents – thus particularly to the disadvantage of same-sex male couples – with the effect of discriminating on grounds of both sex and sexual orientation.⁹² As such, AG Kokott’s opinion is still grounded in a normative privileging of motherhood and maternal care:

[w]hereas mothers are indeed in a different situation in comparison to fathers after childbirth, it is not entirely clear why they are in the case of surrogacy, save if one assumes that mothers always have a stronger connection to offspring or that they should be (they in fact are) more likely to take employment leave to care for a newborn⁹³.

Extended only to commissioning mothers, the PWD would therefore perpetuate both the breadwinner-caregiver dichotomy and the heteronormative nuclear family ideal, reinforcing the sexual division of labour within the family and contributing to inequality between parents. I address this in my reconstruction of the EU PLF in Chapter 7.

5.3.1.1 Non-Gestational Breastfeeding

Here, I engage with the ECJ’s affirmation in *CD* that breastfeeding alone cannot trigger entitlement to maternity leave.⁹⁴ The PWD presumes ‘a biological monist concept of motherhood’⁹⁵ where the pregnant worker and the breastfeeding worker are one person. This confirms my argument in Chapter 4 that the Article 2 PWD categories of workers entitled to maternity leave under EU law are mutually inclusive: for a worker who is breastfeeding within the meaning of Article 2(c) PWD to be entitled to maternity leave, they must have been a pregnant worker under Article 2(a) PWD *and* must be a worker who has recently given birth under Article 2(b) PWD. A worker who merely assumes primary care for a child after the

⁹² Finck and Kas (n 91) 294-295, 298; Z (n 75) opinion of AG Wahl para 51.

⁹³ Finck and Kas (n 91) 294.

⁹⁴ *CD* (n 76) paras 37, 40.

⁹⁵ *CD* (n 76) opinion of AG Kokott para 39.

child's birth or adoption is not entitled to leave equivalent to maternity leave to breastfeed the child. As Kate Ewing observes,

requiring pregnancy and childbirth to be a pre-condition for maternity rights does not engage with the reality that breastfeeding is not dependent on pregnancy and childbirth, but can be induced in a [person] who has neither been pregnant nor given birth⁹⁶.

The conditionality of maternity leave on gestation and childbirth excludes non-gestational breastfeeding – or ‘chestfeeding’, as may be the case with trans or gender non-conforming parents – adoptive and commissioning parents, as well as gestational mothers’ partners, from leave intended to support the health and safety of those with the bodily capacity for lactating and breastfeeding. The health and safety risks and childcare demands of workers who breastfeed their child are, of course, ‘entirely comparable with [those] of breastfeeding biological mothers’⁹⁷. The PWD is therefore not fit for purpose: it does not protect the health and safety of all breastfeeding workers, only of those who have themselves gestated and birthed the breastfed child. Here, too, the *Hofmann* newborn care objective of maternity leave is obscured. Workers who do not gestate and birth their child – but do breastfeed it and otherwise care for it from birth or adoption – do not have access to maternity leave which, for gestational mothers, enables mother-child bonding and the pursuit of this necessary caring labour without the multiple burdens of motherhood and employment. Implicit in the PWD is thus the idea that maternal care does not hold ‘special’ value in need of legal protection if it is not preceded by gestational and birthing labour. The PWD is therefore irrefutably outdated: by upholding a gestational link between parent and child as the relevant trigger for an entitlement to maternity leave to arise, it fails to keep up with social and medical advancements in reproduction and parenthood with the effect of socially excluding non-normative parents and families.⁹⁸ EU law

⁹⁶ K Ewing, ‘Surrogacy: Beyond Equality?’ (2014) 120 ELB 6, 7. This presumes a manual and/or medical induction of lactation, see eg La Leche League International, ‘Breastfeeding Without Giving Birth’ (23.3.2020), <<https://llli.org/news/breastfeeding-without-giving-birth-2/>>, accessed 8.8.2024.

⁹⁷ CD (n 76) opinion of AG Kokott para 44.

⁹⁸ Caracciolo di Torella and Foubert (n 39) 68; Hooton and Romanis (n 84) 12.

continues to treat unequally parents who conform to the heteronormative nuclear family ideal and parents who do not.

5.3.2 Paternity Leave for Adoptive and Commissioning Fathers and Second Parents?

Under Article 4 WLBD, paternity leave is linked to the event of the child's birth.⁹⁹ It is therefore, by definition, unavailable to adoptive fathers and second parents. At national level, however, there is some divergence: some Member States enable adoptive parents to access paternity leave on a par with biological parents, while others offer specific adoption leave in place of paternity leave.¹⁰⁰ The situation of commissioning fathers and second parents under EU law is more ambiguous due to a lack of ECJ case law on their entitlement to paternity leave. Caracciolo di Torella and Foubert suggest that the exclusion of commissioning mothers from the scope of maternity leave in *CD* and *Z* appears to similarly exclude commissioning fathers from paternity leave.¹⁰¹ Marianna Iliadou, by contrast, observes that Article 4(3) WLBD which grants paternity leave irrespective of marital or family status

seemingly covers cases of surrogacy, particularly for [commissioning] fathers with a genetic link to the child, as even where surrogacy is unlawful, genetic fathers can establish their legal parenthood¹⁰².

At best, it appears the WLBD may facilitate access to paternity leave by genetic commissioning fathers while excluding non-genetic commissioning fathers and all commissioning second parents. While the suggestion that the WLBD may be

⁹⁹ COM (2017) 253 final (n 18) 11.

¹⁰⁰ European Commission, 'Leave policies and practice for non-traditional families' (n 28) 6-7.

¹⁰¹ Caracciolo di Torella and Foubert (n 39) 53.

¹⁰² M Iliadou, 'Surrogacy and the Workplace: Maternity, Paternity, and Parental Leave in the European Union' (Bill of Health Blog, Petrie-Flom Centre for Health Law, Biotechnology and Bioethics at Harvard Law School 12.9.2023), <<https://petrieflom.law.harvard.edu/2023/09/12/surrogacy-and-the-workplace-maternity-paternity-and-parental-leave-in-the-european-union/>>, accessed 30.8.2024.

neutral with regard to the method of becoming a parent in determining legal eligibility for paternity leave is welcome, in the absence of an ECJ judgment in the affirmative, it is best to presume that, like adoptive fathers and second parents, commissioning fathers and second parents, whether genetic or not, are excluded from the scope of paternity leave at EU level. I argue to this effect below. Should the WLBD entitle commissioning fathers to paternity leave, the EU PLF would treat commissioning mothers and fathers unequally, as the former are currently not entitled to equivalent leave under EU law.

On my reading of the WLBD, the exclusion of adoptive and commissioning fathers and second parents from paternity leave at EU level cannot be explained by the presumption inherent in the heteronormative nuclear family ideal that the parent has a necessary biological link to the child. As I have argued in section 5.1.2, the extension of paternity leave to second parents detaches paternity leave from a biological conception of fatherhood and enables non-biological parents to assume a parental role immediately after the child's birth. Adoptive and commissioning fathers and second parents should therefore be eligible for paternity leave under EU law. Because the WLBD does not, in principle, normatively privilege biological parenthood but nevertheless excludes certain groups of non-biological parents, the explanation for the exclusion of adoptive and commissioning fathers and second parents must instead be inferred from the purpose of paternity leave. On the one hand, paternity leave is intended to enable parent-child bonding immediately after childbirth.¹⁰³ The early formation of a parent-child bond is, surely, as important for an adoptive parent and a parent through surrogacy as it is for a biological parent.¹⁰⁴ Indeed, in the early case of *Commission v Italy*, the ECJ recognised that there is

¹⁰³ WLBD (n 18) recital (30).

¹⁰⁴ CD (n 76) opinion of AG Kokott para 46; European Parliament, 'Report on the proposal for a directive of the European Parliament and of the Council on work-life balance for parents and

[a] legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a newborn child in the family during the very delicate initial period¹⁰⁵.

Moreover, the parent-child bond under Article 4 WLBD does not have to be a biological one – allowing the inclusion of, for instance, a gestational mother’s same-sex partner – which would otherwise explain the exclusion of adoptive and commissioning fathers and second parents. In my view, then, highlighting parent-child bonding as a specific purpose of paternity leave does not explain the exclusion of adoptive and commissioning fathers and second parents from paternity leave under the WLBD.

On the other hand, contrary to my presumption earlier in this thesis that paternity leave is for the purpose of *newborn* care (section 5.1.2), a closer reading of the WLBD reveals that paternity leave is simply provided ‘for the purposes of providing care’¹⁰⁶. It does not specify to whom the care undertaken during paternity leave is owed. It is here I suggest the explanation to the exclusion of adoptive and commissioning fathers and second parents lies. While newborn care is certainly inherent in paternity leave policy rhetoric particularly as it links to the WLBD’s objectives of facilitating parent-child bonding and equal sharing of caring responsibilities between the sexes in the longer-term, reducing the purpose of paternity leave to newborn care again fails to explain the exclusion of commissioning fathers or second parents who typically assume parental responsibility immediately following the child’s birth. It might, however, explain the exclusion of adoptive fathers and second parents unless purposively interpreted to encompass caring for a child, regardless of their age, immediately

carers and repealing Council Directive 2010/18/EU’, A8-0270/2018, <www.europarl.europa.eu/doceo/document/A-8-2018-0270_EN.pdf>, accessed 28.2.2022, 54.

¹⁰⁵ Case 163/82 *Commission of the European Communities v Italian Republic* [1984] 3 CMLR 169, para 16. The ECJ, however, relied on this argument to justify the exclusion of adoptive fathers from childcare-related leave provided to adoptive mothers.

¹⁰⁶ WLBD (n 18) recital (19), art 3(1)(a).

after adoption. Other than the newborn, care could be owed to the pregnant partner ‘around the time of the birth of the child’¹⁰⁷ when they are most in need of care. Alternatively, care could be owed to the family’s other children during and after the birth of a new child when the pregnant partner – the children’s presumed primary caregiver – is unable to perform the caring labour otherwise expected of them for reasons of pregnancy, childbirth, and breastfeeding. In both cases, the exclusion of adoptive and commissioning fathers and second parents from paternity leave can be explained by the nexus between *childbirth* – not *the child’s birth* – and the care undertaken during paternity leave imposed by the WLBD. That paternity leave must be ‘clearly linked to the birth for the purposes of providing care’¹⁰⁸ links the provision of care by a father or second parent not to the child’s entrance to the world but to childbirth as a process undergone by their partner. This interpretation of the WLBD is supported by the notion that paternity leave is designed to be taken parallel to the two compulsory weeks of maternity leave intended for the protection of the health and safety of the pregnant worker. It also rationalises the EU’s openness towards the provision of paternity leave after stillbirth under national law, which I have critiqued in light of the absence of an equivalent guarantee under the PWD (Chapter 4). I thus posit that the entitlement to paternity leave of fathers and second parents under the WLBD is effectively triggered by the pregnancy and imminent childbirth of their partner. This, to me, is the only way to reasonably explain the exclusion of adoptive and commissioning fathers and second parents from paternity leave: because their partner – an adoptive or commissioning mother or parent – is not pregnant and does not give birth, no necessary link arises between childbirth and care undertaken during paternity leave. This is the case even if commissioning parents (whether genetic or not) or adoptive parents are present at the child’s birth and assume parental responsibility immediately after birth. This, then, undermines

¹⁰⁷ *ibid* recital (19).

¹⁰⁸ *ibid*.

Iliadou's suggestion that genetic commissioning fathers may be entitled to paternity leave under the WLBD.

All this said, the above represents my interpretation of the WLBD in an attempt to rationalise the exclusion of certain groups of non-biological parents from paternity leave at EU level. None of what I have attributed to the WLBD in this section is vocalised in the statute or, to the best of my knowledge, in the legislative documents. If my interpretation is an incorrect one, I cannot identify any rational basis for the EU to exclude adoptive and commissioning fathers and second parents from paternity leave. And while my interpretation may explain the exclusion of adoptive and commissioning fathers and second parents, it cannot justify it. The effect of the WLBD is to obscure the need for leave to care for one's child immediately after adoption, or birth through surrogacy, and thus to trivialise the importance of facilitating early parent-child bonding and more equal sharing of parental care responsibilities for parents who deviate from the heteronormative nuclear family ideal because of the way in which they become parents. As such, the WLBD treats fathers and second parents differently based on the way in which they become parents. It privileges fathers and second parents in different-sex relationships and second parents in same-sex female relationships who conceive naturally or with recourse to ART and in which one partner can gestate and birth the child. It concurrently disadvantages any couple that cannot rely on one partner to gestate and birth the child but must instead rely on adoption or surrogacy. Moreover, it discriminates between parents based on sexual orientation and/or gender identity because LGBTQIA+ couples rely on alternative non-biological or non-gestational means to become parents more often than cisgender heterosexual couples do.¹⁰⁹

¹⁰⁹ Kaufman et al (n 28) 333.

5.3.3 Parental Leave for Adoptive and Commissioning Parents?

Adoptive parents were already eligible for parental leave on a par with biological parents under both EU and national law prior to the introduction of the WLBD.¹¹⁰ Reflecting the normalisation of adoption over time, the EU PLF, in this regard, displaces a strictly biological conception of parenthood and recognises parenthood also as a social concept grounded in the practice of parental care. In doing so, it also facilitates the recognition of LGBTQIA+ parenthood and the inclusion of LGBTQIA+ parents in parental care policies. The EU PLF thus effectively challenges the heteronormative nuclear family ideal and subsequently facilitates substantive equality between parents regardless of their sexual and/or gender identity. Article 5(8) WLBD further obliges Member States to assess the adaptation of the eligibility criteria for access to and arrangements relating to the use of parental leave for adoptive parents. While this obligation is subject to a report-and-review procedure under Article 18(1) WLBD, there is no obligation to adopt any specific measures to adapt parental leave in practice.¹¹¹ Nevertheless, 19 Member States have adopted some accommodations for the relevant groups of parents.¹¹² For adoptive parents, accommodations commonly relate to the age of the adopted child to ensure that both parents can effectively utilise their full leave entitlements even if the adopted child is older.¹¹³ The situation of commissioning parents under EU law is, again, unclear, owing to the lack of established EU or national law on their eligibility for parental leave. The ECJ in *Z* and *CD* confirmed that commissioning parents are not entitled to leave equivalent to adoption leave because the child has not been adopted.¹¹⁴ Nor is their entitlement to parental leave under the WLBD explicitly stated, although

¹¹⁰ EIGE, 'Who is eligible for parental leave in the EU-28?' (n 56) 1; Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity [2010] OJ 2010 L180/1, annex clause 2(1).

¹¹¹ European Commission, 'The transposition of the Work-Life Balance Directive' (n 30) 60.

¹¹² *ibid.*

¹¹³ *ibid* 60-61; WLBD (n 18) recital (24), art 5(1).

¹¹⁴ *CD* (n 76) paras 20-21; *Z* (n 75) para 39.

Member States ‘are encouraged to grant the right to parental leave to all workers who exercise parental responsibilities’¹¹⁵. Iliadou argues that this ‘seems promising for surrogacy, as even when [commissioning parents] are not recognised as legal parents, they usually have parental responsibility’¹¹⁶. As with commissioning fathers’ and second parents’ access to paternity leave, however, I presume that unless their parenthood is legally recognised under national law, commissioning parents are not entitled to parental leave under EU law. The exclusion of commissioning parents from parental leave then reinforces a difference in treatment between adoptive and commissioning parents. Rather than a normative privileging of adoption over surrogacy, however, the exclusion likely reflects the lack of legal regulation of surrogacy at EU and national level.

Conclusion

From a participative perspective, I have demonstrated in this chapter that the EU PLF perpetuates the heteronormative nuclear family ideal of a cisgender and heterosexual married and/or cohabiting couple with biological children. The family-related eligibility criteria underpinning the PWD and the WLBD constrain access to both health- and safety-related leave and childcare-related leave when parents do not conform to this ideal, particularly when families consist of LGBTQIA+ parents, single parents, multiple parents, or adoptive or commissioning parents. By preventing their access to parenting leave on a par with parents in heteronormative nuclear families, the EU PLF socially excludes these groups of parents and, moreover, reinforces the prejudice, stigma, and stereotyping already attaching to them, such as trans- and homophobia and the stigmatisation of single motherhood. In Chapter 7, to deconstruct the heteronormative nuclear family ideal underpinning the EU PLF, I reconstruct the

¹¹⁵ WLBD (n 18) recital (21).

¹¹⁶ Iliadou (n 102).

EU PLF with a view to ensuring access to parenting leave by these groups of non-normative parents, hence enhancing their social inclusion as well as solidarity between parents and subsequently facilitating substantive equality between parents regardless of their sexual and/or gender identities and family forms.

CHAPTER 6. THE EU PLF DEVALUES PREGNANCY AND PARENTHOOD

The sexual division of labour within the family, in a capitalist society, relies on the ‘natural’ association of socially necessary reproductive labour – such as that of gestating and parenting – with women in order to justify the devaluation and invisibilisation of this labour (Chapter 3). Economic analyses have revealed reproductive labour to be productive and therefore to have economic value.¹ But by failing to recognise it as work for which those performing it ought to be compensated, the law has systematically perpetuated the devaluation of this labour.² In this chapter, I centre the norm of *the devaluation of pregnancy and parenthood* to demonstrate that this is also the case with the EU PLF. I approach the chapter from the perspective of Fredman’s redistributive dimension, although I also illustrate how this dimension interacts with the recognition and participative dimensions. To do so, I first briefly examine how the EU’s legal conception of work is underpinned by the devaluation of reproductive labour in section 6.1. Then, I examine the leave-related income replacement provisions of the EU PLF. I critique the sickness analogy underlying the minimum threshold for maternity pay under the PWD in section 6.2 and the inadequate income replacement levels for paternity and parental leave under the WLBD in section 6.3. As an affirmative redistributive remedy, *paid* parenting leave seeks to address, on the one hand, the maldistribution of resources between the sexes and, on the other hand, of reproductive labour by attributing monetary value to pregnancy, childbirth, and parental care. I argue that by failing to set adequate pay levels for maternity, paternity, and parental leave, the EU PLF fails to

¹ I Moebius and E Szyszczak, ‘Of Raising Pigs and Children’ (1998) 18(1) YEL 125, 153. See eg N Ahmad and S Koh, ‘Incorporating Estimates of Household Production of Non-Market Services into International Comparisons of Material Well-Being’, OECD Statistics Working Paper No. 2011/07 (OECD 2011); N Folbre, ‘Valuing Non-Market Work’ (UNDP Human Development Report Office 2015).

² Z Adams, *The Legal Concept of Work* (Oxford University Press 2022), 140; S Lewis, *Full Surrogacy Now: Feminism Against Family* (Verso 2021), 72.

recognise both the economic and social value of pregnancy and parenthood – and rather devalues and invisibilises both. The result is a structural maldistribution of both reproductive labour and available financial resources between the sexes, which perpetuates gendered socio-economic disadvantage like the motherhood penalty, gendered parental role stereotypes like the breadwinner-caregiver dichotomy, and the social exclusion of mothers and non-normative parents.

6.1 The EU’s Legal Conception of Work

A ‘worker’ in EU law has generally been defined by reference to an employment relationship, an essential feature of which is that ‘for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’³. Work appears to require an economic purpose and, as such, the ECJ has implied that reproductive labour does not constitute work under EU law.⁴ In *Sala*, which concerned a refusal to grant the applicant child-raising allowance for residence reasons, it implicitly rejected that unpaid care work could constitute work and a person caring for their children be considered a worker for the purposes of EU law.⁵ In *Lewen* – the first interpretation of the PLD concerning an employer’s refusal to pay a female worker a Christmas bonus during parental leave – the ECJ argued that parental leave absences from work do not amount to periods of active employment for the purpose of calculating an annual bonus.⁶ This is because EU law allows Member States to determine whether parental leave ‘involves suspension of the contract of employment and, therefore, of the respective obligations of the employer and the

³ C-66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, para 17. See Moebius and Szyszczak (n 1) 126.

⁴ Moebius and Szyszczak (n 1) 126, 128.

⁵ *ibid* 126; C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-02691, see eg para 32.

⁶ C-333/97 *Susanne Lewen v Lothar Denda* [1999] ECR I-07243, paras 43–44.

worker⁷. Accordingly, a female worker on parental leave cannot be assimilated to a male worker – rather the refusal to pay the bonus applies to both male and female workers on parental leave – whereby the refusal does not constitute sex discrimination.⁸ If, however, the bonus was considered retroactive pay for work during the year the bonus was awarded, the refusal to pay it to a female worker on parental leave could constitute indirect discrimination within the meaning of Article 157 TFEU because, compared to male workers, female workers are more likely to be on parental leave.⁹ The ECJ’s presumption that women are responsible for childcare itself effectively perpetuates the female caregiver stereotype (Chapter 4).¹⁰

Similarly, in *Dicu*, the ECJ rejected that childcare during parental leave could amount to ‘actual work’ which accrues paid annual leave.¹¹ Conceptually, annual leave is intended for rest and leisure, and presumes that a worker has ‘actually worked’ to deserve this rest.¹² Here, the ECJ drew a tenuous distinction between parental leave on the one hand and sick leave and maternity leave on the other. In a departure from the presumption that for the entitlement to annual leave to arise, the worker must have worked during the qualifying period, sick leave and

⁷ *ibid* para 37. See Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by Business Europe, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ 2010 L68/13, annex, clause 5(3); Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ 2019 L188/79 (WLBD), art 10(3).

⁸ *Lewen* (n 6) paras 33, 38. Maternity leave absences, by contrast, constitute periods of work to prevent indirect sex discrimination, para 41.

⁹ *ibid* paras 39-40.

¹⁰ E Caracciolo di Torella, ‘Childcare, Employment and Equality in the EC: First (False) Steps of the Court’ (2000) 25 EL Rev 310, 315.

¹¹ C-12/17 *Ministerul Justiției and Tribunalul Botoșani v Maria Dicu* ECLI:EU:C:2018:799, paras 35–36.

¹² *ibid* paras 27-28. See eg Joined cases C-350/06 *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund* and C-520/06 *Mrs C Stringer and Others v Her Majesty’s Revenue and Customs* EU:C:2009:18, para 25; C-219/14 *Kathleen Greenfield v The Care Bureau Ltd* EU:C:2015:745, para 29.

maternity leave accrue annual leave although the worker has been unable to perform the duties required of them by virtue of their employment contract.¹³ This is because the need for sick leave is unforeseeable and the need for maternity leave arises from the bodily condition of pregnancy and childbirth.¹⁴ Parental leave, by contrast, does not accrue annual leave because it ‘is not unforeseeable and, in most cases, is a reflection of the worker’s wish to take care of his or her child’¹⁵. That is, the ECJ implies that taking parental leave is not a need but rather a choice. This obscures the fact that caring for young children is necessary to keep them alive and that alternative forms of childcare, such as high-quality affordable daycare, remain inaccessible to many parents.¹⁶ It also undermines the way in which the dominant ideology of motherhood constrains the choices available to women.¹⁷ While taking parental leave may represent a choice for fathers who have thus far been able to opt-in to parental care responsibilities, the maternal care norm does not afford women the freedom to choose to take parental leave. Parental leave is only ‘foreseeable’ because good mothers are expected to, and do, take it – and that it is foreseeable explains the systemic discrimination of women by hiring employers.

As such, *Dicu* reinforces the gendered parental role stereotypes – namely the breadwinner-caregiver dichotomy – underpinning the sexual division of labour.¹⁸ Indeed, the ECJ’s reasoning that parental leave cannot accrue annual leave merely exacerbates the general disincentivisation of men’s parental leave take-

¹³ *Dicu* (n 11) paras 29–30. See also *Schultz-Hoff and Others* (n 16) para 40; C-342/01 *María Paz Merino Gómez and Continental Industrias del Caucho SA* EU:C:2004:160, paras 34–35, 38.

¹⁴ *Dicu* (n 11) paras 32, 34.

¹⁵ *ibid* para 32. See C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007] ECR I-7643, para 35.

¹⁶ E Caracciolo di Torella, ‘Here We Go Again: The Court, the Value of Care and Traditional Roles within the Family: *Dicu*’ (2020) 57 CML Rev 877, 884-885.

¹⁷ *ibid* 885; C McGlynn, ‘Ideologies of Motherhood in European Community Sex Equality Law’ (2000) 6(1) ELJ 29, 33.

¹⁸ Caracciolo di Torella, ‘Here We Go Again’ (n 16) 886.

up caused by the EU PLF's inadequate parental pay provision (see section 6.3).¹⁹ And by reasoning that parental leave does not constitute productive work which entitles workers to leave intended for leisure, the ECJ 'impl[ies] that looking after a child is akin to a period of leisure'²⁰. It trivialises the reality that 'staying at home with a young child can be as exhausting, time-consuming, physically and emotionally demanding as "active work"'²¹. Parental leave cannot be assimilated to annual leave. That the ECJ does so, fails to recognise the social and economic value of reproductive labour.²² It demonstrates that the EU's legal conception of work is grounded in the false dichotomy between the public and the private: by failing to consider the reproductive labour occurring in the private sphere as work, it justifies this labour going unpaid and renders it invisible.²³ This devaluation of gestating and parenting is reflected in the minimum income replacement levels set out in the PWD and the WLBD.

6.2 The PWD, Sickness Analogy, and the Devaluation of Pregnancy

Article 11 PWD. Employment rights

In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:

[...]

2. in the case referred to in Article 8, the following must be ensured:

[...]

(b) *maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2*

¹⁹ *ibid* 885-887.

²⁰ *ibid* 884.

²¹ *ibid* 883-884.

²² Moebius and Szyszczak (n 1) 152.

²³ Caracciolo di Torella, 'Childcare, Employment and Equality in the EC' (n 10) 316; Caracciolo di Torella, 'Here We Go Again' (n 16) 883; Moebius and Szyszczak (n 1) 150.

3. the allowance referred to in point 2(b) shall be *deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health*, subject to any ceiling laid down under national legislation.

Article 11 PWD entitles pregnant workers, workers who have given birth and who are breastfeeding to maternity pay or allowance at least at the level of national sick pay during maternity leave. Undoubtedly aware of feminist critiques of the comparison of pregnant workers to ill or disabled male workers in early sex discrimination jurisprudence²⁴, the EU attempts to evade the assimilation of pregnancy to illness by positing that the sick pay minimum threshold

must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness²⁵.

The ECJ has also explicitly rejected the ‘ill male’ comparator in its sex equality jurisprudence.²⁶ Fredman, however, argues that drawing the analogy is inevitable: the implication of Article 11(3) PWD is that ‘maternity is considered in the same way as illness’²⁷. And by equating pregnancy and childbirth to illness, the PWD effectively

reinforces the sexist idea of women as the victims of their hormones and presents an inaccurate and damaging image of pregnant women as genuinely comparable with sick or other abnormally situated men²⁸.

²⁴ See eg N Lacey, ‘Legislation Against Sex Discrimination: Questions from a Feminist Perspective’ (1987) 14(1) JLS 411, 416-417.

²⁵ Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and those who have recently given birth or are breastfeeding [1992] OJ 1992 L348/1 (PWD), recital (18). See C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, paras 15-18.

²⁶ S Fredman, *Women and the Law* (Oxford University Press 1997), 199. See eg C-179/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3979, para 16; C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-03567, paras 24–25.

²⁷ Fredman, *Women and the Law* (n 26) 199.

²⁸ Lacey (n 24) 417.

To suggest that pregnant people are ill enables the law to justify paternalistic control over them and obscures the biological difference in ‘female’ and ‘male’ reproductive capacities, thus invisibilising women’s contribution to the society and the economy.²⁹ Rather than recognising the social and economic contribution of those with the ‘female’ reproductive capacity, the sickness analogy embedded in the provision of maternity pay stigmatises and devalues pregnancy and childbirth.³⁰ By association, it devalues the people who gestate and give birth. Indeed, the stigma of illness attaching to pregnancy – and the paternalistic idea that pregnant people need protection – has then justified women’s exclusion from public life and confined them to unpaid labour in the private sphere.³¹ Although intended as an instrument to mitigate pregnancy- and childbirth-related disadvantage by affirming women’s biological difference from men, the PWD only reinforces this disadvantage and perpetuates inequalities between the sexes within both the recognition and participative dimensions of substantive equality.

That the national sick pay level income replacement under the PWD devalues pregnancy and childbirth is also a redistributive issue: it entails that maternity pay is regulated at a low level.³² As an affirmative redistribution measure, maternity leave is paid to ensure that workers with the ‘female’ reproductive capacity are not socio-economically disadvantaged because of pregnancy and childbirth. It is known that short but well-paid and job-protected maternity leave supports financial security during maternity leave by minimising loss of income and redresses socio-economic disadvantages associated with having children, like the motherhood penalty on income and career progression, by increasing

²⁹ *ibid*; C Littleton, ‘Reconstructing Sexual Equality’ in K Bartlett and R Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991), 38.

³⁰ Fredman, *Women and the Law* (n 26) 180.

³¹ *ibid*.

³² *ibid* 199.

women's labour market participation rates both before and after having children.³³ At EU level, however, how the ECJ has interpreted Article 11 PWD undermines the redistributive effects of maternity pay. In *Gillespie*, the ECJ held that while maternity pay constitutes pay within the meaning of Article 157 TFEU, EU law does not require workers on maternity leave to receive full pay, nor does failure to offer full pay amount to direct sex discrimination because there is no relevant male or female at work against whom to compare the special situation of women on maternity leave.³⁴ The ECJ failed to apply equality analysis to maternity pay and, in so doing, reinforced the motherhood penalty which contributes to the prevailing gender pay gap.³⁵ Beyond observing that the level of maternity pay should not undermine the purpose of maternity leave, the ECJ did not offer any specific criteria for determining the level of 'adequate' maternity allowance.³⁶ It merely advised national courts to consider the length of maternity leave and the broader social protections available during work absences under national law.³⁷ Notably, the Commission has previously recommended that in order to minimise the detrimental financial effects of parenting leave on families and the disincentive to fathers' use of leave (section 6.3), the income replacement level should be at least 66%.³⁸ Only 14 Member States provided sick

³³ CJ Ruhm 'The Economic Consequences of Parental Leave Mandates: Lessons from Europe' (1998) 113(1) QJE 285, 309, 311-313; M Evertsson and A-Z Duvander, 'Parental Leave: Possibility or Trap? Does Family Leave Length Effect Swedish Women's Labour Market Opportunities?' (2011) 27(4) Eur Sociol Rev 435, 435; YE Akgunduz and J Plantenga, 'Labour Market Effects of Parental Leave in Europe' (2013) 37(4) Camb J Econ 845, 848; M Campbell, S Fredman, J Fudge, and S Olney, 'A Better Future for Women at Work' (2018) 1 U Oxf HRH J 1, 5.

³⁴ N Burrows and M Robison, 'The Motherhood Penalty: The Contribution of Europe' in N Nic Shuibhne and LW Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press 2012), 205; C-342/93 *Joan Gillespie and Others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996] ECR I-475, paras 14, 17, 20.

³⁵ Burrows and Robison (n 34) 201, 215; Fredman, *Women and the Law* (n 26) 199.

³⁶ *Gillespie* (n 34) para 20.

³⁷ *ibid.*

³⁸ European Commission, 'Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of

pay at this level in 2018.³⁹ Overall, the national sick pay level varied between 50% and 100% across Member States in 2016.⁴⁰ In Member States with lower national sick pay, the PWD financially disadvantages women and demonstrates the economic and social devaluation of pregnancy – and indeed of maternal care. And while 13 Member States compensated maternity leave at full pay in 2023, maternity pay in the other Member States varied between 70-90% income replacement levels or was a generally lower flat rate.⁴¹ The ECJ's failure to set specific criteria for adequate maternity pay ultimately 'disadvantages women by consciously reducing [their] earnings when they can least afford it'⁴².

This, I suggest, contradicts with the explicit reasoning in both the PWD and *Gillespie* that the entitlement to an adequate allowance during maternity leave is intended to ensure that the protective purpose of maternity leave is not jeopardised.⁴³ Noreen Burrows and Muriel Robison have observed the tension within the PWD between this criterion and the national sick pay minimum standard: whereas a 55% income replacement rate – which had been pinpointed by the Commission as the lowest maternity pay level in the EU in 2008⁴⁴ – certainly undermines the purpose of maternity leave if one considers the costs

pregnant workers and workers who have recently given birth or are breastfeeding' (Impact Assessment Report) SEC (2008) 2596, 37; European Commission, 'Paternity and parental leave policies across the European Union: Assessment of current provision' (Publications Office of the European Union 2018), 4-5; European Commission, 'Indicators for monitoring the Employment Guidelines including indicators for additional employment analysis: 2009 compendium', <<https://ec.europa.eu/social/BlobServlet?docId=9460&langId=en>>, accessed 23.3.2022, 81.

³⁹ European Commission, 'Paternity and parental leave policies across the European Union' (n 38) 5.

⁴⁰ European Commission, 'Sick pay and sickness benefit schemes in the European Union – Background report for the Social Protection Committee's in-depth review on sickness benefits' (Publications Office of the European Union 2016), 4.

⁴¹ European Parliament, 'Maternity and paternity leave in the EU' ('At a Glance' infographic 2023), <[www.europarl.europa.eu/RegData/etudes/ATAG/2023/739346/EPRS_ATA\(2023\)739346_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2023/739346/EPRS_ATA(2023)739346_EN.pdf)>, accessed 13.2.2024, 1-2.

⁴² Burrows and Robison (n 34) 203.

⁴³ PWD (n 25) recital (17); *Gillespie* (n 34) paras 19-20.

⁴⁴ SEC (2008) 2596 (n 38) 19.

workers face during it, it is nevertheless compatible with EU law if it corresponds to the level of national sick pay.⁴⁵ I argue that the reasoning about the purpose of maternity pay in *Gillespie* is also revealing of the ECJ's conservative gender ideology. The ECJ in *Hofmann* has, of course, confirmed that the purpose of maternity leave is to protect women's health and safety during pregnancy and childbirth and the special mother-child relationship 'by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment'⁴⁶. The purpose of maternity pay is therefore to support these two objectives. I have already asserted that the primary purpose of maternity leave under the PWD is not to protect the health and safety of pregnant workers and workers who have given birth (Chapter 4). Instead, most of maternity leave protects the mother-child relationship and reinforces the maternal care ideal. By deduction, the point of maternity pay is to prevent employment from jeopardising the special relationship between mother and child in the time after childbirth. That is, the worker should receive maternity pay at a level which prevents them from being distracted from their motherly duties by the need to return to work for financial reasons. I suggest that allowing Member States to set low maternity pay levels as long as they comply with the national sick pay standard has the opposite effect: the loss of income associated with low maternity pay makes taking long maternity leave financially inaccessible and may force parents to return to work sooner than recommended after childbirth. This is unless the worker on maternity leave can rely on the family's (male) breadwinner to supplement their income and ensure the family's financial security during maternity leave. Not only does such a presumption perpetuate the breadwinner-caregiver dichotomy, but it also undermines female workers' financial independence and privileges workers in two-parent families. Hence, by failing to afford sufficient economic value to pregnancy and parenthood by way of maternity pay, the PWD merely operates to disadvantage those with the bodily

⁴⁵ Burrows and Robison (n 34) 207.

⁴⁶ C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 3047, para 25.

capacity for pregnancy and childbirth engaging in these forms of reproductive labour.

6.3 The WLBD, Adequate Parental Pay, and the Devaluation of Parenthood

Article 8 WLBD. Payment or allowance

1. [...] Member States shall ensure that workers who exercise their right to [paternity leave and non-transferable parental leave] receive a payment or an allowance in accordance with paragraphs 2 and 3 of this Article.

2. With regard to *paternity leave* as referred to in Article 4(1), such *payment or allowance shall guarantee an income at least equivalent to that which the worker concerned would receive in the event of a break in the worker's activities on grounds connected with the worker's state of health*, subject to any ceiling laid down in national law. [...]

3. With regard to [non-transferable] parental leave as referred to in Article 5(2), such *payment or allowance shall be defined by the Member State or the social partners and shall be set in such a way as to facilitate the take-up of parental leave by both parents*.

Article 8 WLBD sets minimum income replacement thresholds for paternity leave and parental leave. Before critiquing the inadequacy of parental pay at EU level, I briefly discuss paternity pay, as my critique of it from a redistributive perspective is much the same as that directed at maternity pay. Paid paternity leave promotes equal sharing of newborn care between parents and, in so doing, constitutes a transformative recognition measure addressing the female primary caregiver stereotype and men's concurrent exclusion from childcare.⁴⁷ Like maternity pay under the PWD, the minimum threshold for paternity pay under the WLBD is set at national sick pay.⁴⁸ Because both types of leave facilitate parent-child bonding in connection with birth, the WLBD encourages Member States to provide

⁴⁷ Campbell et al (n 33) 5.

⁴⁸ WLBD (n 7) art 8(2).

paternity pay at the same level as maternity pay.⁴⁹ In 2023, 21 Member States provided paternity pay at 70-100% income replacement rate, with 13 Member States compensating paternity leave at full pay.⁵⁰ In all but four Member States, paternity pay was equal to or higher than the national sick pay.⁵¹ However, as I have argued above, adherence to the sick pay standard does not guarantee the adequacy of paternity pay. While providing paternity pay at national sick pay level does not assimilate paternity to sickness – here the sick pay standard does represent ‘a technical point of reference with a view to fixing the minimum level of protection’⁵² – it financially disadvantages workers on paternity leave just like low maternity pay does. Low paternity pay represents a significant loss of income to fathers and second parents – even if only over two weeks – and may consequently constitute a disincentive for paternity leave take-up.⁵³ If the loss of income does deter fathers and second parents from taking paternity leave – which it is known to do⁵⁴ – the WLBD fails to contribute to the equal sharing of childcare responsibilities between parents immediately upon the child’s birth *and* in the longer-term, hence causing the breadwinner-caregiver dichotomy to remain unchallenged. Sick pay level paternity pay implies that paternal care and father-child bonding are not deemed socially important enough to warrant full income replacement at a time when encouraging participative fatherhood is the

⁴⁹ *ibid* recital (30).

⁵⁰ European Parliament, ‘Maternity and paternity leave in the EU’ (n 41) 1-2; European Commission, ‘The transposition of the Work-Life Balance Directive in EU Member States (II): Considerable work still to be done’ (Publications Office of the European Union 2023), 45.

⁵¹ European Commission, ‘The transposition of the Work-Life Balance Directive’ (n 50) 46. Austria, Ireland, and Slovenia, and Sweden because of an income ceiling.

⁵² PWD (n 25) recital (18).

⁵³ S Fredman, ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10(4) *Int J L C* 442, 449-450; A Plomien, ‘EU Social and Gender Policy Beyond Brexit: Towards the European Pillar of Social Rights’ (2018) 17(2) *Soc Policy Soc* 281, 291.

⁵⁴ See eg M O’Brien, ‘Fathers, Parental Leave Policies and Infant Quality of Life: International Perspectives and Policy Impact’ (2009) 624(1) *Ann Am Acad Pol Soc Sci* 190, 204; A-Z Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *J Fam Issues* 909, 922-923; European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU’ COM (2017) 253 final, 7.

key to deconstructing the sexual division of labour between parents and enhancing substantive equality.

With the PLD still in force, parental leave remained unpaid in seven Member States in 2018 while only 13 Member States provided ‘well-paid’ parental leave above the Commission’s recommended income replacement level of 66%.⁵⁵ No longer merely recommending that Member States consider offering paid leave, the WLBD now obliges Member States to provide paid leave but continues to defer the setting of income replacement to national law (Chapter 2). It merely sets out that the pay level for the *non-transferable* period of parental leave should be set at an ‘adequate’ level to

take into account that the take-up of parental leave often results in a loss of income for the family and that first earners in a family are able to make use of their right to parental leave only if it is sufficiently well remunerated, with a view to allowing for a decent living standard⁵⁶.

While the WLBD fails to offer specific criteria for parental pay to be adequate, Álvaro Oliveira et al. note that ‘the freedom of Member States to define this “adequate” payment of parental leave is not absolute, but is framed by certain parameters and is, of course, subject to the control of the [ECJ]’⁵⁷. In the absence of ECJ jurisprudence on Article 8 WLBD at the time of writing this thesis, the basic test appears to be that income replacement during parental leave must be sufficient to enable both parents to take parental leave and should allow for a ‘decent living standard’⁵⁸. Oliveira et al. offer that the reference to a decent living standard could relate to ‘concrete points of reference at national level’⁵⁹ which in

⁵⁵ European Commission, ‘Paternity and parental leave policies across the European Union’ (n 38) 4-5. Parental leave was unpaid in Greece, Spain, Ireland, Malta, the Netherlands, the UK, and Cyprus.

⁵⁶ WLBD (n 7) recital (31).

⁵⁷ Á Oliveira, M De la Corte-Rodríguez, and F Lütz, ‘The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?’ (2020) 45(3) EL Rev 295, 305.

⁵⁸ WLBD (n 7) recital (31); Oliveira et al (n 57) 305–306.

⁵⁹ Oliveira et al (n 57) 305–306.

some way promote such a standard, like a national minimum wage or unemployment or sickness benefits. The other guiding principle for the interpretation of Article 8(3) WLBD seems to be a purposive one: it does not entitle workers on non-transferable parental leave to full pay but nevertheless ensures that the level of pay cannot be so low as to undermine the purpose of the WLBD, which is to promote the equal sharing of caring responsibilities between the sexes.⁶⁰ As such, the Commission has observed that in 2023 only 10 Member States appeared to provide adequate parental pay above the 66% threshold during the two non-transferable months of parental leave.⁶¹ It voiced its concern over the implementation of the WLBD in this regard ‘as only when non-transferability and a good level of compensation go hand-in-hand are fathers encouraged to take parental leave’⁶².

It is indeed well-established that a high income replacement level incentivises men to take parental leave and therefore promotes its more equal sharing between parents.⁶³ A low income replacement level, by contrast, is known to undermine equal sharing of parental leave by specifically financially disincentivising men’s use of it.⁶⁴ At least 13 Member States appear to be at risk of this because they fail to provide adequate parental pay, often because they

⁶⁰ *ibid* 306; C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR I-06281, paras 67–68.

⁶¹ European Commission, ‘The transposition of the Work-Life Balance Directive’ (n 50) 72. Austria, Finland, Croatia, Lithuania, Luxembourg, the Netherlands, Poland, Sweden, Slovenia, and Slovakia.

⁶² *ibid*.

⁶³ Duvander (n 54) 922-923; European Commission, ‘Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU’ SWD (2017) 202 final, 284; M Karu and D Tremblay, ‘Fathers on Parental Leave: An Analysis of Rights and Take-Up in 29 Countries’ (2018) 21(3) *Community Work Fam* 344, 356; L Ma, G Andersson, A-Z Duvander, and M Evertsson, ‘Fathers’ Uptake of Parental Leave: Forerunners and Laggards in Sweden, 1993-2010’ (2020) 49(2) *J Soc Policy* 361, 372-373.

⁶⁴ COM (2017) 253 final (n 54) recitals (8), (19); Duvander (n 54) 921-922.

only offer flat rate allowances, during non-transferable parental leave.⁶⁵ And where the father does use his non-transferable leave, a low income replacement level continues to make it financially rational for the lower-earning parent – often the mother owing to the gender pay gap⁶⁶ – to take the father’s transferable period of parental leave to avoid the financial loss incurred by the family by the father taking leave.⁶⁷ The EU’s deference to the Member States on parental pay therefore ‘fails to address the impact of economic hierarchies on parental choices about employment and care’⁶⁸. Rather than facilitating a more equal sharing of reproductive labour, Article 8(3) WLBD therefore reinforces the breadwinner-caregiver dichotomy between parents by causing men to not assume their parental care responsibilities while effectively compelling women to do so. This in turn ensures that socially necessary reproductive labour continues to be done for free, or well below market value, by women within the home.

The WLBD has also created a discrepancy between non-transferable and transferable periods of parental leave. While Article 8 WLBD attaches pay to non-transferable leave, it does not oblige Member States to provide pay or allowance for the *transferable* period, meaning that it can, in principle, be unpaid in national law. As such, while all Member States offered paid parental leave in 2023, some part of parental leave remained unpaid in 16 Member States.⁶⁹ The availability of unpaid, transferable parental leave under the EU PLF represents a double

⁶⁵ European Commission, ‘The transposition of the Work-Life Balance Directive’ (n 50) 71.

⁶⁶ SWD (2017) 202 final (n 63) 42.

⁶⁷ L Haas and T Rostgaard, ‘Fathers’ Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave’ (2011) 14(2) *Community Work Fam* 177, 187; J Lammi-Taskula, ‘Nordic Men on Parental Leave. Can the Welfare State Change Gender Relations?’ in A Ellingsæter and A Leira (eds), *Politicising Parenthood in Scandinavia. Gender Relations in Welfare States* (Policy Press 2006), 87; S Tanaka and J Waldfogel, ‘Effects of Parental Leave and Work Hours on Fathers’ Involvement with Their Babies: Evidence from the Millennium Cohort Study’ (2007) 10(4) *Community Work Fam* 409, 411-412.

⁶⁸ R Guerrina, ‘Mothering in Europe: Feminist Critique of European Policies on Motherhood and Employment’ (2002) 9(1) *Eur J Women’s Stud* 49, 58.

⁶⁹ European Commission, ‘The transposition of the Work-Life Balance Directive’ (n 50) 68.

disincentive for men's leave take-up – and hence a setback for deconstructing the sexual division of labour and facilitating substantive equality. While it *may* normalise men's use of two months of parental leave – and it only does so in Member States where they are well-paid – the expectation prevails that women take their four months of leave because the dominant ideology of motherhood compels them to take it, as well as the father's transferable leave because they are not only normatively but also financially compelled to do so. This aptly demonstrates how the redistributive and recognition dimensions of Fredman's model interact within the EU PLF. The breadwinner-caregiver dichotomy and the devaluation of parenthood are mutually inclusive issues, and neither is sufficiently addressed by the WLBD.

Finally, I note that inadequate income replacement under the WLBD, leave-related financial loss, and the consequent risk of poverty, highlight socio-economic differences between groups of parents. If unpaid or low-paid, parental leave 'becomes de facto a privilege of affluent families, of little use to those with modest income'⁷⁰. One-parent families are at a higher risk of poverty than two-parent families, and single mothers at a higher risk than single fathers.⁷¹ An inadequate income replacement level is, in practice, therefore more prohibitive and financially detrimental to one-parent families than to two-parent dual-earner families.⁷² Adequately paid parental leave, by contrast, reduces single parents' poverty risk both during and after leave.⁷³ Similarly, LGBTQIA+ people are more likely than heterosexual and cisgender people to be economically

⁷⁰ Caracciolo di Torella, 'Here We Go Again' (n 16) 882.

⁷¹ LC Maldonado and R Nieuwenhuis, 'Family Policies and Single Parent Poverty in 18 OECD Countries 1978-2008' (2015) 18(4) *Community Work Fam* 395, 404.

⁷² European Parliament, 'The Situation of Single Parents in the EU' (European Parliament 2020), 51.

⁷³ *ibid* 48; N Fraser, 'After the Family Wage: Gender Equity and the Welfare State' (1994) 22(4) *Political Theory* 591, 596; LC Maldonado and R Nieuwenhuis, 'Dual-Earner Family Policies at Work for Single-Parent Families' in R Nieuwenhuis and W Van Lancke (eds), *The Palgrave Handbook of Family Policy* (Palgrave Macmillan 2020), 303-330, 308-309.

disadvantaged, whereby the low income replacement levels for paternity and parental leave under the WLBD disproportionately financially disadvantage LGBTQIA+ parents and may further restrict their access to parenting leave in comparison to parents in cis- and heteronormative partnerships (see Chapter 5).⁷⁴ Disabled parents are similarly affected in comparison to non-disabled parents.⁷⁵ Moreover, Nordic leave policy research illustrates that men's use of parental leave is fragmented across class, employment status, and educational levels: highly-educated and higher-income fathers use leave more than lower-educated and lower-income fathers for whom leave remains financially inaccessible.⁷⁶ There appears to also be an equality-ideological divide between these groups of fathers: the former often represent 'a type of ideological renegade'⁷⁷ for whom loss of income may not constitute a disincentive to take leave, while the latter often fall back on the traditional sexual division of labour in their childcare arrangements.⁷⁸ The failure to offer high income replacement for parenting leave at EU level is a missed opportunity to encourage participative fatherhood for fathers who otherwise would not take leave and to facilitate social inclusion of parents in all socio-economic positions.

⁷⁴ E Wong, J Jou, A Raub, and J Heymann, 'Comparing the Availability of Paid Parental Leave for Same-Sex and Different-Sex Couples in 34 OECD Countries' (2019) *J Soc Policy* 525, 526.

⁷⁵ European Women's Lobby, 'Work-Life Balance Directive. The EWL Assessment of the recently adopted Directive on work-life balance for parents and carers' (European Women's Lobby 2019), 7.

⁷⁶ Duvander (n 54) 915–916; Ma et al (n 63) 372, 378; M Saarikallio-Torp and A Haataja, 'Isien vanhempainvapaiden käyttö on yleistynyt. Ketkä isistä vapaita käyttävät ja ketkä eivät?' in A Haataja, I Airio, M Saarikallio-Torp, and M Valaste (eds), *Laulu 573 566 perheestä. Lapsiperheet ja perhepolitiikka 2000-luvulla* (Juvenes Print 2016) [Fathers' use of parental leave has become more common. Which fathers use leave and which do not?], 97, 100.

⁷⁷ K Allard, L Haas, and CP Hwang, 'Exploring the Paradox: Experiences of Flexible Working Arrangements and Work-Family Conflict among Managerial Fathers in Sweden' (2007) 10(4) *Community Work Fam* 475, 487. See eg C Bendall and G Mitchell, 'The Shared Parental Leave Framework: Failing to Fit Working-Class Families?' (2023) 23(4) *IJDL* 299, in which the authors argue that notions of equal parenting may not resonate with working class parents.

⁷⁸ M Evertsson, 'Gender Ideology and the Sharing of Housework and Childcare in Sweden' (2014) 35(7) *J Fam Issues* 927, 945.

Conclusion

In this chapter, I have critiqued the EU PLF from a redistributive perspective. I have demonstrated that although the EU has recently attributed more *social value* to parenthood through improvements to fathers' and second parents' access to parenting leave (Chapters 4-5), this does not translate into *economic* or *monetary value*. By setting low income replacement levels for maternity leave, paternity leave, and non-transferable parental leave, and by allowing transferable parental leave to remain unpaid, the PWD and the WLBD reinforce the sexual division of labour within the family by both economically and socially devaluing pregnancy and parenthood as forms of reproductive labour. Inadequately paid parenting leave, particularly by financially disincentivising men's use of leave, contributes to the structural maldistribution of both reproductive labour and financial resources between the sexes. This in turn perpetuates existing gendered socio-economic disadvantages between parents, such as the motherhood penalty, while also reinforcing the breadwinner-caregiver dichotomy and the social exclusion of mothers and non-normative parents, particularly LGBTQIA+ parents and single mothers. In Chapter 7, to deconstruct the devaluation of pregnancy and parenthood and to facilitate substantive equality between the sexes and between parents regardless of their sexual and/or gender identity and family form, I reconstruct the EU PLF in a way which explicitly recognises pregnancy and parenthood as forms of reproductive labour with inherent economic and social value.

CHAPTER 7. A TRANSFORMATIVE EU PARENTING LEAVE MODEL

I have now normatively critiqued the EU PLF from three distinct analytical perspectives offered by Fredman's model of substantive equality (Chapters 4-6).¹ I have demonstrated that the EU PLF reinforces the sexual division of labour within the family by perpetuating the breadwinner-caregiver dichotomy, privileging the heteronormative nuclear family, and devaluing pregnancy and parenthood. Rather than facilitating substantive equality, the EU PLF thus reinforces inequalities between the sexes and between parents regardless of their sexual and/or gender identities and family forms. In this chapter, I therefore normatively reconstruct the EU PLF. I devise a transformative EU parenting leave model which deconstructs the sexual division of labour within the family and subsequently facilitates substantive equality between parents (Appendix 7). This model is my original contribution to socio-legal parenting leave policy research.

I reiterate that my reconstruction of the EU PLF embodies the utopian reconstructive feminist legal project in that it is not limited to what is legally, politically, or economically feasible at the EU level in light of the EU's mode of governance and limited social policy competences (Chapter 1). However, I approach my utopian vision for a transformative parenting leave model pragmatically by restructuring the existing EU PLF consisting of 14 weeks of maternity leave, two weeks of paternity leave, and eight months of parental leave. Throughout this chapter, I also draw insights from the Finnish and Swedish PLFs as current 'best practice' case studies of national parenting leave systems which deconstruct the sexual division of labour within the family. Employing Finland and Sweden as 'best practice' case studies aligns with Fredman's observation

¹ S Fredman, 'Substantive Equality Revisited' (2016b) 14(3) ICON 712.

that the Nordic social-democratic welfare state ‘comes closest to expressing’² and is ‘most attuned to achieving’³ the desired synthesis between redistribution and recognition (Chapter 3). This is because it universalises social rights as an integral part of active citizenship rather than conceiving them as a safety net for passive welfare recipients, and it socialises risks and offers generous social benefit levels in recognition of the market as a source of inequality.⁴ In particular, the Nordics have addressed gender-based inequalities and implemented comprehensive policy regimes to facilitate the deconstruction of the breadwinner-caregiver dichotomy through the universalisation of currently ‘feminine’ patterns of caregiving as a gender-neutral parenthood norm.⁵ The de-gendering of parenthood similarly emerges as a key normative tenet of the transformative EU parenting leave model I devise in this chapter.

This chapter sits firmly within the transformative dimension of Fredman’s model (Chapter 3). In section 7.1, I centre the normative principle of *deconstructing the breadwinner-caregiver dichotomy* to reconstruct the EU PLF from a transformative recognition perspective with a view to eliminating this false dichotomy in parental roles. I examine how the Finnish and Swedish PLFs are structured to facilitate the deconstruction of the breadwinner-caregiver dichotomy and adapt this insight to structure my transformative EU parenting

² S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008), 235.

³ *ibid* 236.

⁴ S Fredman, ‘Redistribution and Recognition: Reconciling Inequalities’ (2007) 23(2) SAJHR 214, 224. See eg H Hernes, *Welfare State and Woman Power: Essays in State Feminism* (Norwegian University Press 1987); G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990); W Korpi, ‘Faces of Inequality: Gender, Class and Patterns of Inequalities in Different Types of Welfare States’ (2000) 7(2) Soc Polit 127.

⁵ See eg N Fraser, ‘After the Family Wage: Gender Equity and the Welfare State’ (1994) 22(4) Polit Theory 591, 611, 613; S Fredman, ‘A Difference with Distinction: Pregnancy and Parenthood Reassessed’ (1994) 110 LQR 106, 121; Fredman, ‘Redistribution and Recognition’ (n 4) 224; D Rosenblum, ‘Unsex Mothering: Toward a New Culture of Parenting’ (2012) 35 Harv J L & Gender 58, 82-83; S Fredman, ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10(4) Int J L C 442, 442.

leave model. In section 7.2, I then approach reconstruction of the EU PLF through the normative principle of *deconstructing the heteronormative nuclear family* from a transformative participation perspective in order to facilitate the social inclusion of non-normative parents and foster solidarity between different types of families. I draw insights from the Finnish and Swedish PLFs which offer near-universal access to parenting leave and have addressed family diversity since the 1970s (see Appendices 5-6).⁶ In section 7.3, I reconstruct the EU PLF from a transformative redistribution perspective against the normative principle of *deconstructing the devaluation of pregnancy and parenthood*. I highlight how the relatively generous income replacement levels offered during parenting leave in Finland and Sweden convey the social value afforded to pregnancy and parenthood.

7.1 Deconstructing the Breadwinner-Caregiver Dichotomy

In Chapter 4, I have demonstrated that while the EU PLF has attempted to facilitate substantive equality between the sexes by affirming women's difference from men and normalising men's engagement in childcare, it continues to perpetuate the breadwinner-caregiver dichotomy underpinning the sexual division of labour within the family. Because it conflates biological and social conceptions of parenthood – particularly biological maternity and social motherhood – the EU PLF merely reinforces the false dichotomy of gendered stereotypes. It allows men to remain 'incidental collaborators'⁷ in childcare,

⁶ L Carlson, *Searching for Equality. Sex Difference, Parental Leave and the Swedish Model with Comparisons to EU, UK, and US Law* (Iustus förlag 2007), 117–118; A Haataja, 'Pieniä ja suuria reformeja pienten lasten perheille suunnatuissa perhevapaissa ja -etuuksissa' in A Haataja, I Airio, M Saarikallio-Torp, and M Valaste (eds), *Laulu 573 566 perheestä. Lapsiperheet ja perhepolitiikka 2000-luvulla* (Juvenes Print 2016) [Small and big reforms in family leaves and benefits targeted at families of young children], 47; EIGE, 'Eligibility for parental leave in EU Member States' (Publications Office of the European Union 2020), 17.

⁷ C Castro-García and M Pazos-Moran, 'Parental Leave Policy and Gender Equality in Europe' (2016) 22(3) *Fem Econ* 51, 67.

whereas women continue to face the double burden of paid employment and unpaid childcare. In this section, I therefore posit that deconstructing the breadwinner-caregiver dichotomy requires a complete restructuring of the EU PLF. I agree with the suggestion in existing socio-legal policy literature that reconstructing the EU PLF should depart from a distinction being drawn between biological and social conceptions of parenthood, and between health- and safety-related pregnancy and childbirth leave on the one hand and childcare-related parental leave on the other.⁸ To this end, I observe that the EU PLF should be restructured following Finnish and Swedish examples which uphold these distinctions. In section 7.1.1, I hence illustrate how the Finnish and Swedish PLFs are structured to deconstruct the breadwinner-caregiver dichotomy, and use this as the basis to begin reconstructing the EU PLF. In section 7.1.2, I then argue that what is now maternity leave under the PWD should be reconceptualised as pregnancy and childbirth leave in order to affirm women's difference from men without conflating the need for health and safety protection with the maternal care ideal. In section 7.1.3, I outline the scope of parental leave into which the period of non-compulsory maternity leave – which currently pertains to protecting 'the special relationship between a woman and her child'⁹ – and the two weeks of paternity leave currently found in the EU PLF should be subsumed in order to de-gender parenthood.

⁸ S Fredman, *Women and the Law* (Oxford University Press 1997), 207; E Caracciolo di Torella and P Foubert, 'Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU?' (2015) 40 EL Rev 52, 52; P Foubert, 'Child Care Leave 2.0 – Suggestions for the Improvement of the EU Maternity and Parental Leave Directives from a Rights Perspective' (2017) 24(2) MJ 245, 258; V Hooton and EC Romanis, 'Artificial Womb Technology, Pregnancy, and EU Employment Rights' (2022) JLB 1, 22.

⁹ C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 3047, para 25.

7.1.1 Restructuring the EU PLF: The Nordic Example

To begin deconstructing the breadwinner-caregiver dichotomy, the EU PLF must uphold a distinction between maternity – namely pregnancy, childbirth, and breast-feeding – on the one hand, and motherhood, fatherhood, and parenthood on the other (section 7.1.1.3). Maternity is a biological fact which gives rise to the special treatment of those with the reproductive capacity to protect their health and safety and mitigate against socio-economic disadvantage attaching to this capacity.¹⁰ This is the appropriate scope of maternity leave under EU law. Motherhood, fatherhood, and parenthood are social constructs which must fall within the scope of parenting leave legislation addressing the sexes in their capacity as parents to facilitate equality between them.¹¹ I observe that the Finnish and Swedish PLFs are structured in a way which upholds this separation (Tables 5 and 6). Both Finland and Sweden rely on the Article 20(6) WLBD ‘passerelle clause’ to structure their PLFs in a way which better aligns with their equality ideological views about the division of labour between the sexes.¹² This clause enables all national parenting leave provisions to be taken into account when determining whether Member States comply with the relevant standards under the WLBD and the PWD as long as the national provisions go beyond the minimum requirements set out in the EU PLF.¹³ Both Finland and Sweden hence subsume some of the non-compulsory maternity leave provided under the PWD

¹⁰ Fredman, ‘Reversing Roles’ (n 5) 445; IM Young, ‘Polity and Group Difference: A Critique of the Ideal of Universal Citizenship’ (1989) 99(2) *Ethics* 250, 269-270; IM Young, *Justice and the Politics of Difference* (Princeton University Press 2011), 175-176.

¹¹ E Caracciolo di Torella and A Masselot, ‘The ECJ Case Law on Issues Related to Pregnancy and Maternity: An Attempt of Classification’ (2001) 26 *EL Rev* 239, 258.

¹² European Commission, ‘The transposition of the Work-Life Balance Directive in EU Member States (II): Considerable work still to be done’ (Publications Office of the European Union 2023), 40. See eg Eduskunta, ‘Hallituksen esitys eduskunnalle laeiksi sairausvakuutuslain, työsopimuslain ja varhaiskasvatuslain muuttamisesta sekä niihin liittyviksi laeiksi’ HE 129/2021 vp [The Finnish Government’s bill to the Parliament for acts amending the Sickness Insurance Act, Employment Contract Act, and Early Education Act and for related acts], 149.

¹³ Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ 2019 L188/79 (WLBD), art 20(6).

to national parental leave legislation. I demonstrate this by outlining the current Swedish and Finnish PLFs.

7.1.1.1 The Swedish PLF

Current provisions for the Swedish PLF are found under *Parental Leave Act 1995*¹⁴ and *Social Insurance Code 2010*¹⁵ (Appendix 2). Pregnant workers, who because of health and safety risks related to their employment cannot continue their usual work, are entitled to pregnancy leave and allowance from 60 days and until 11 days before their estimated due-date.¹⁶ All pregnant workers are statutorily entitled to 14 continuous weeks of job-protected maternity leave in connection with childbirth: seven before their estimated due-date and seven after childbirth, with two weeks compulsory before or after childbirth.¹⁷ They may choose whether they take maternity leave unpaid or, because maternity allowance was subsumed to parental allowance in 1974, use part of their 240-day parental allowance entitlement during it.¹⁸ Economically inactive pregnant people (e.g. students, unemployed persons) are entitled to a fixed parental allowance from 60 days prior to their estimated due-date and up to 29 days after childbirth.¹⁹ In a departure from the basic principle that one must care for the child to be entitled to parental allowance, the postnatal period of maternity leave applies even if the person who has given birth is not caring for the child.²⁰ In connection with a child's birth, second parents are entitled to ten days of temporary parental allowance equivalent to paternity leave during the first 60 days after birth to enable them to be present at birth, support the pregnant parent during the

¹⁴ Föräldraledighetslag 1995:584 [Parental Leave Act 1995].

¹⁵ Socialförsäkringsbalken, SFS 2010:110 [Social Insurance Code 2010].

¹⁶ Parental Leave Act 1995 (n 14) ss 19-20.

¹⁷ *ibid* s 4.

¹⁸ *ibid*.

¹⁹ Social Insurance Code 2010 (n 15) ch 12, s 5.

²⁰ *ibid*.

hospital stay, and care for the newborn and the family's other children.²¹ This allowance is also afforded to adoptive parents from the day the child comes into their care, although two adoptive parents must share the ten days.²²

Since the introduction of shared parental leave in 1974, the Swedish PLF has been bifurcated between parental leave and parental allowance.²³ After the child's birth or adoption, all parents are entitled to 18 months of full parental leave under the *Parental Leave Act* and can choose whether to take this unpaid or on parental allowance.²⁴ Under the *Social Insurance Code*, parents are entitled to 480 parental allowance days per child: 240 days per parent, of which 90 are currently non-transferable between parents in order to encourage equal sharing of leave between the sexes.²⁵ Because parental leave and parental allowance are not firmly attached to each other, parents can, in principle, postpone the use of their 240 days of paid leave for 18 months by taking unpaid leave and thus extend their total parental leave period.²⁶ At least 384 days of parental allowance must, however, be used before the child's fourth birthday while the remaining 96 days can be postponed until the child turns 12.²⁷ Except during the 90 non-transferable days, parents can use parental allowance days at the same time for up to 60 days

²¹ *ibid* ch 13, ss 10–12; Försäkringskassan, 'Förälder', <www.forsakringskassan.se/privatperson/foralder>, accessed 1.11.2024 [Parents].

²² Försäkringskassan, '10-dagar vid barnets adoption', <www.forsakringskassan.se/privatperson/foralder/adoption/10-dagar-vid-barns-adoption>, accessed 29.1.2025 [10 days in connection with child's adoption].

²³ J Julén Votinius, *Föräldrar i arbete. En könskritisk undersökning av småbarnsföräldrars arbetsrättsliga ställning* (Makadam 2007) [Parents at work. A gender-critical study on the position of parents of young children in labour law], 62. See Lag om ändring i lagen om allmän försäkring, SFS 1973:473 [Act amending General Insurance Act 1962], ch 3, ss 9, 12–13; Lag om rätt till föräldraledighet, SFS 1976:280 [Parental Leave Act 1976]; Lag om rätt till ledighet för vård av barn, SFS 1978:410 [Parental Leave Act 1978], s 4.

²⁴ Parental Leave Act 1995 (n 14) ss 3, 5.

²⁵ Social Insurance Code 2010 (n 15) ch 12, s 17.

²⁶ Statistics Sweden, 'På tal om kvinnor och män. Lathund om jämställdhet 2022' [Women and men in Sweden 2022], 57; Parental Leave Act 1995 (n 14) ss 3, 5; Social Insurance Code 2010 (n 15) ch 12, s 17.

²⁷ Social Insurance Code 2010 (n 15) ch 12, ss 12-13.

during the child's first 15 months of life ('double-days') to help them establish a more equal division of labour in the long-term.²⁸ To balance parents' need for flexibility with employers' need for efficiency in planning their operations, parental leave is available as part-time leave through a reduction in working hours or as piecemeal leave in up to three periods per calendar year.²⁹ In addition to a child's two parents, other parents and non-parents (e.g. parent's partners, grandparents) have access to up to 45 days of parental allowance if they are transferred allowance days from one parent.³⁰

Here, I make the important qualification that Swedish national practice around parenting leave looks different from statutory provision of leave, which I observed during my time in Sweden while writing this thesis. The basic principle in the Swedish PLF has, since 1974, been that during the immediate post-birth period, the parent who gave birth enjoys priority over the second parent to parental leave for the protection of their health and safety, after which parents are afforded equal opportunity to care for their child and, as such, are expected to share parental allowance between themselves.³¹ The Swedish PLF relies on well-

²⁸ *ibid* ch 12, s 4a; Regeringskansliet, 'Större flexibilitet i föräldrapenningen – utökade möjligheter att använda dubbeldagar' S2023/01375 [Greater flexibility in parental allowance – increased opportunities to use double-days], 13–14, 16. This became possible in 2012 with the introduction of 30 'double-days', see Sveriges riksdag, 'Regeringens proposition om förbättringar inom familjepolitiken' Prop. 2010/11:146 [The Swedish Government's bill on improvements to family policy], 14–15; A-Z Duvander and S Cedstrand, 'Gender Equal Parental Leave Use in Sweden: The Success of the Reserved Months' in C de la Porte, GB Eydal, J Kauko, D Nohrstedt, P 't Hart, and BS Tranøy (eds), *Successful Public Policy in the Nordic Countries: Cases, Lessons, and Challenges* (Oxford University Press 2022), 277; Statistics Sweden, 'På tal om kvinnor och män 2022' (n 26) 52.

²⁹ Parental Leave Act 1995 (n 14) ss 10–12; Betänkande av föräldraförsäkringsutredningen, 'Reformerad föräldraförsäkring – Kärlek, omvårdnad, trygghet', SOU 2005:73 [Report of the parental insurance investigation, 'Reformed parental insurance – love, care, security'], 91.

³⁰ Lag om ändring i socialförsäkringsbalken, SFS 2023:905 [Act amending Social Insurance Code 2010, ch 12, s 17a-17b.

³¹ Betänkande av föräldraförsäkringsutredningen, 'Reformerad föräldraförsäkring' (n 29) 110–111; Social Insurance Code 2010 (n 15) ch 12, s 17. See Sveriges riksdag, 'Kungl. Maj:ts proposition angående förbättrade familjeförmåner inom den allmänna försäkringen' Prop.

established national custom which avoids reference to maternity leave: Swedish policymakers – and legal and policy scholars – categorically obscure the existence of statutory maternity leave under Swedish law. This reflects a normative conflict between Swedish and EU law on maternity leave which emerged during Swedish accession to the EU in 1995.³² Transposition of the PWD into Swedish law mandated the extension of statutory maternity leave from 12 to 14 weeks as well as the implementation of the two-week compulsory period.³³ Swedish policymakers have historically rejected the *Hofmann* conceptualisation of maternity leave now underpinning the PWD, which they perceive to be gender-ideologically incompatible with Swedish custom.³⁴ The compulsory maternity leave period, in particular, has been seen to limit women’s decision-making regarding parenting leave and thus to promote a return to the maternal care ideal.³⁵ It has also been considered unnecessary in light of Swedish national practice of offering pregnant workers health and safety protection through the combination of pregnancy leave before the estimated due-date and parental leave immediately after childbirth.³⁶ As such, Sweden did not enact the two-week compulsory period of maternity leave until 2000, following the EU notifying it of

1973:47 [Royal Majesty’s bill regarding improved family benefits within the general insurance system], 20, 40–41; SFS 1973:473 (n 23) ch 3, s 13.

³² Julén Votinius, *Föräldrar i arbete* (n 23) 102.

³³ Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and those who have recently given birth or are breastfeeding, OJ 1992 L348/1 (PWD), art 8; Parental Leave Act 1995 (n 14) ss 3(1), 4, 18–19.

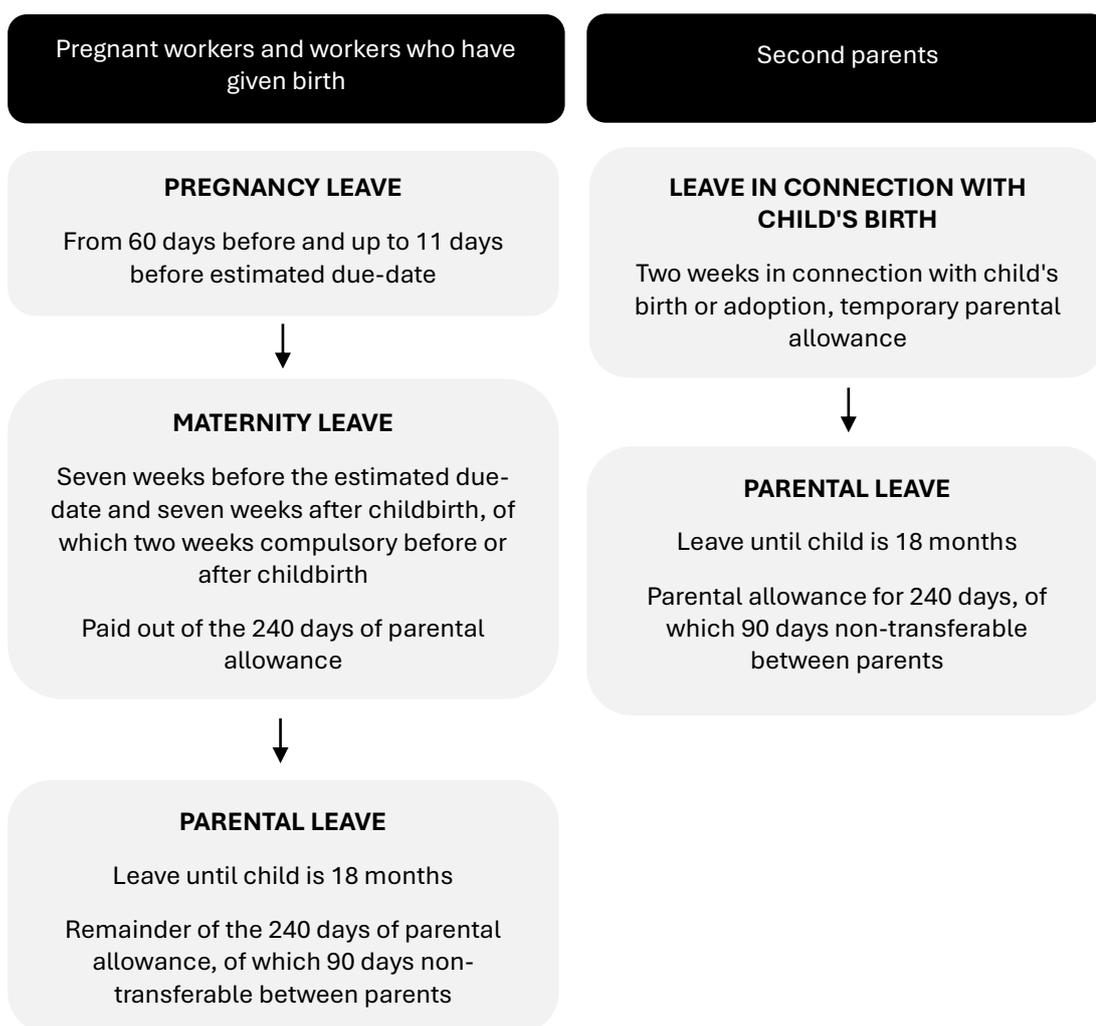
³⁴ Betänkande av föräldraförsäkringsutredningen, ‘Reformerad föräldraförsäkring’ (n 29) 80; Julén Votinius, *Föräldrar i arbete* (n 23) 69. See R Eklund, ‘Obligatorisk mammaledighet – Nytt vin i gamla lägrar’ in A Numhauser-Henning (ed), *Normativa perspektiv. Festskrift till Anna Christensen* (Jurisförlaget i Lund 2000) [Obligatory maternity leave – new wine in old barrels].

³⁵ Carlson (n 6) 136; Julén Votinius, *Föräldrar i arbete* (n 23) 102; J Julén Votinius, ‘Normative Distortions in Labour Law: Exploring the Field of Parental Rights in Working Life’ (2018) 27(4) Soc Leg Stud 493, 501. See also J Julén Votinius, ‘Troublesome Transformation. EU Law on Pregnancy and Maternity Turned into Swedish Law on Parental Leave’ in M Rönmar (ed), *Labour Law, Fundamental Rights and Social Europe. Swedish Studies in European Law Vol 4* (Hart Publishing 2011).

³⁶ Betänkande av föräldraförsäkringsutredningen, ‘Reformerad föräldraförsäkring’ (n 29) 80; Julén Votinius, *Föräldrar i arbete* (n 23) 69.

its failure to implement the provision.³⁷ Statutory maternity leave therefore effectively exists in Swedish law as a concession to EU law. Reference to it is generally avoided to convey Sweden’s normative commitment, firmly embedded in its shared parental allowance policy, to gender-equal parenting from birth.

Table 5. Structure of the Swedish PLF



³⁷ A-Z Duvander and J Lammi-Taskula, ‘Parental Leave’ in IV Gíslason and GB Eydal (eds), *Parental Leave, Childcare and Gender Equality in the Nordic Countries* (Nordic Council Ministers 2011), 37; Julén Votinius, ‘Normative Distortions in Labour Law’ (n 35) 500. See Sveriges Riksdag, ‘Regeringens proposition om obligatorisk mammaledighet’ Prop. 1999/2000:87 [The Swedish Government’s bill on compulsory maternity leave], 5, 8; Lag om ändring i föräldraledighetslagen, SFS 2000:580 [Act amending Parental Leave Act 1995], s 4.

7.1.1.2 The Finnish PLF

Prior to the leave reform which came into force on 1 August 2022 (see Chapter 1), the Finnish PLF followed the structure of the EU PLF with a long protective period by way of maternity leave for the parent who gave birth, paternity leave for the second parent, and parental leave for both parents after the end of the maternity leave period. It had consisted of 105 working days of maternity leave and 158 working days of shared parental leave since 1987.³⁸ Similarly to the EU PLF, rather than deconstructing the sexual division of labour within the family, it reinforced the maternal care ideal.³⁹ The structure of the new Finnish PLF – found under *Employment Contract Act 2001*⁴⁰ and *Sickness Insurance Act 2004*⁴¹ – was modelled on the Swedish PLF (Appendix 3). Maternity leave ceased to exist. Instead, ‘special’ pregnancy leave, originally introduced in 1991, remains available until the beginning of pregnancy leave to pregnant workers for protection against health and safety risks in employment.⁴² From 30 working days

³⁸ S Varjonen, ‘Äidin hoiva, jaettu vanhemmuus – ja vapaus valita. Perhevapaiden uudistamisen argumentointi 1970-luvulta 2000-luvulle’, *Sosiaali- ja terveysturvan tutkimuksia* 118 (Kelan tutkimusosasto 2011) [Maternal care, shared parenthood – and freedom to choose. Family leave reform rhetoric from the 1970s to the 2000s], 47. See Laki sairausvakuutuslain muuttamisesta, L 471/1981 [Act amending Sickness Insurance Act 1963], s 23; Laki sairausvakuutuslain muuttamisesta, L 32/1985 [Act amending Sickness Insurance Act 1963], s 23; Laki sairausvakuutuslain muuttamisesta, L 981/1986 [Act amending Sickness Insurance Act 1963], s 23.

³⁹ HE 129/2021 vp (n 12) 7; M Saarikallio-Torp and A Haataja, ‘Isien vanhempainvapaiden käyttö on yleistynyt. Ketkä isistä vapaita käyttävät ja ketkä eivät?’ in A Haataja, I Airio, M Saarikallio-Torp, and M Valaste (eds), *Laulu 573 566 perheestä. Lapsiperheet ja perhepolitiikka 2000-luvulla* (Juvenes Print 2016) [Fathers’ use of parental leave has become more common. Which fathers use leave and which do not?], 95, 107; M Salmi and J Närvi, ‘Johdanto’ in M Salmi and J Närvi (eds), *Perhevapaat, talouskriisi ja sukupuolten tasa-arvo* (Terveiden ja hyvinvoinnin laitos 2017) [Introduction], 22–23; J Närvi, J Lammi-Taskula, M Salmi, and A Miettinen, ‘Finland Country Note’ in A Koslowski, S Blum, I Dobrotić, G Kaufman, and P Moss (eds), 18th *International Review of Leave Policies and Research 2022* (International Network on Leave Policies and Research 2022), 234.

⁴⁰ Työsopimuslaki, L 55/2001 [Employment Contract Act 2001], as amended by Laki työsopimuslain muuttamisesta, L 32/2022 [Act amending Employment Contract Act 2001], ch 4.

⁴¹ Sairausvakuutuslaki, L 1224/2004 [Sickness Insurance Act 2004], as amended by Laki sairausvakuutuslain muuttamisesta, L 28/2022 [Act amending Sickness Insurance Act 2004], ch 9.

⁴² Employment Contract Act 2001 (n 40) ch 4, s 1; Sickness Insurance Act 2004 (n 41) ch 9, ss 3–4.

before their estimated due-date and for up to 40 continuous working days, pregnant parents and parents who have recently given birth are entitled to pregnancy leave for the protection of their health and safety.⁴³ The period of health and safety protection afforded to workers on account of pregnancy and childbirth is therefore short: under seven weeks, of which two weeks are compulsory both before and after childbirth.⁴⁴ The rest of the old maternity leave entitlement was subsumed to parental leave to be made available to either parent. Whereas the basic principle is that pregnancy leave is for health and safety protection and parental leave is for childcare, to ensure compliance with the 14 continuous weeks of leave required by the PWD and to maintain the level of protection which existed before the reform, the parent who gave birth has the right to parental leave immediately following pregnancy leave.⁴⁵ That is, pregnant parents and parents who give birth are statutorily entitled to 105 continuous working days (17.5 weeks) of pregnancy and parental leave combined.⁴⁶ Similarly to the Swedish PLF, the first period of parental leave is thus, in principle, reserved for the person who gave birth even if they do not have the child in their care.⁴⁷

Beyond this initial period of parental leave, childcare is shared between parents whereby they are afforded equal opportunity for parental leave. Two parents, whether biological or adoptive, or legal guardians of a child are each entitled to 160 working days of parental leave until the child's second birthday or until an adopted child has been in the parents' care for two years.⁴⁸ 97 days are non-

⁴³ Employment Contract Act 2001 (n 40) ch 4, ss 1–2; Sickness Insurance Act 2004 (n 41) ch 9, ss 1–2.

⁴⁴ Employment Contract Act 2001 (n 40) ch 4, ss 1–2; Sickness Insurance Act 2004 (n 41) ch 9, s 2. The total entitlement is 40 working days, with 6 working days in a Finnish week.

⁴⁵ HE 129/2021 vp (n 12) 148.

⁴⁶ *ibid* 132, 148; Sickness Insurance Act 2004 (n 41) ch 9, s 9.

⁴⁷ HE 129/2021 vp (n 12) 132.

⁴⁸ Employment Contract Act 2001 (n 40), ch 4, s 1; Sickness Insurance Act 2004 (n 41) ch 9, ss 5–6, 8.

transferable between parents.⁴⁹ The other 63 days are transferable to the other parent or an eligible non-parent (i.e. a parent's partner).⁵⁰ Paternity leave available to the second parent before the reform was subsumed to parental leave. However, the second parent becomes eligible for parental leave immediately after the child's birth or adoption.⁵¹ To ensure the maintenance of the previous entitlement to 18 working days of leave in connection with a child's birth or adoption, three weeks of parental leave can thus be taken at the same time with the other parent's pregnancy or parental leave.⁵² Whereas the Finnish PLF has traditionally been the least flexible of the Nordic PLFs, with parental leave only available in two periods before the child's second birthday and part-time leave conditional on both parents working part-time, its flexibility was improved by the reform.⁵³ Parental leave can now be taken in up to four periods of at least 12 working days and one parent can take part-time leave while working up to five hours a day.⁵⁴

⁴⁹ Sickness Insurance Act 2004 (n 41) ch 9, s 7.

⁵⁰ *ibid* ch 9, s 7.

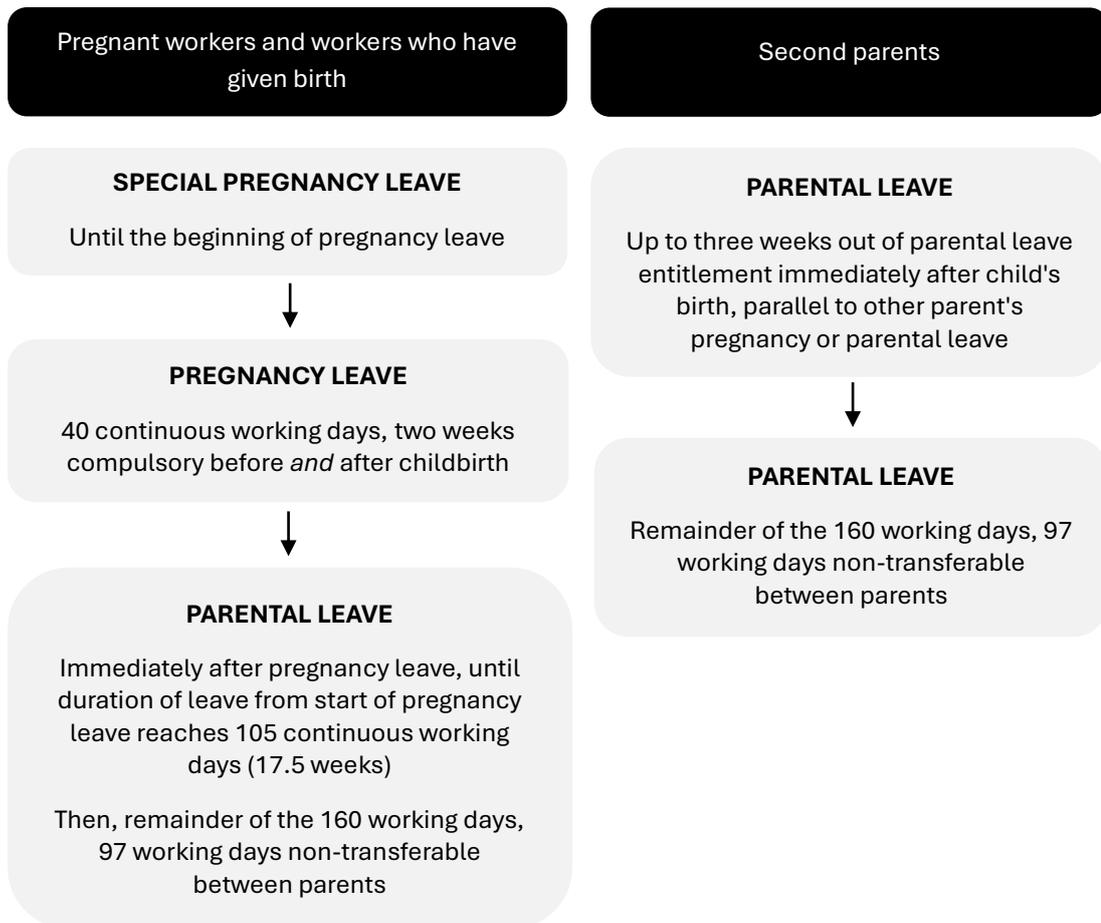
⁵¹ *ibid* ch 9, s 8.

⁵² HE 129/2021 vp (n 12) 149; Sickness Insurance Act 2004 (n 41) ch 9, s 8.

⁵³ Duvander and Lammi-Taskula (n 37) 42; F Valdimarsdóttir, 'Nordic Experiences with Parental Leave and Its Impact on Equality between Women and Men', *Tema Nord* 531 (Nordic Council of Ministers 2006), 32, 39; J Kellokumpu, 'Perhevapaiden kehitys 1990–2005: Isillä päärooli uudistuksissa, sivurooli käyttäjinä', *Raportteja* 10 (Palkansaajien tutkimuslaitos 2007) [Development of family leaves 1990–2005: Fathers' primary role in reform, secondary role as users], 14; J Lammi-Taskula, *Parental Leave for Fathers? Gendered Conceptions and Practices in Families with Young Children in Finland* (Tampere University 2007), 49; L Haas and T Rostgaard, 'Fathers' Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave' (2011) 14(2) *Community Work Fam* 177, 187. See eg Laki sairausvakuutuslain muuttamisesta, L 1075/2002 [Act amending Sickness Insurance Act 1963], s 23.

⁵⁴ HE 129/2021 vp (n 12) 58, 62; Employment Contract Act 2001 (n 40) ch 4, ss 1, 2a; Sickness Insurance Act 2004 (n 41) ch 9, s 11.

Table 6. Structure of the Finnish PLF



7.1.1.3 Health and Safety vs. Childcare Distinction

Unlike the EU PLF, the two Nordic PLFs do not incorporate parental leave intended for childcare into maternity leave to reinforce the maternal care ideal. They avoid conflating maternity with motherhood and rather recognise motherhood, fatherhood, and parenthood as social constructs, hence challenging the breadwinner-caregiver dichotomy associated with the sexual division of labour within the family. Moreover, I observe that they avoid reinforcing a link between gestation and motherhood or parenthood, namely the inverse presumptions that pregnancy always leads to motherhood and that motherhood is always the outcome of a pregnancy. While all pregnant workers and workers

who give birth require leave for health and safety protection, all may not necessarily need leave for childcare. The distinction between health-related leave and childcare-related leave – and indeed subsuming a period of the non-compulsory maternity leave mandated by the PWD into parental leave – clarifies the legal entitlement to health- and safety-related leave of workers whose pregnancies end in abortion, miscarriage, or stillbirth and workers who give birth to children born via surrogacy arrangements or given up for adoption.⁵⁵ It similarly clarifies the legal entitlement to childcare-related parental leave of parents who did not gestate or give birth to their children, such as adoptive mothers (section 7.2). In this light, I argue that the reconstruction of the EU PLF must begin from the separation of the 14-week entitlement to maternity leave under the PWD into a health- and safety-related period and a maternal care -related period. Following *Betriu Montull*⁵⁶, only the two compulsory weeks of maternity leave can reasonably have been conceived as health- and safety-related leave, while the 12 non-compulsory weeks have been for maternal care (Chapter 4). I proceed with this as the initial foundation of my reconstructed EU PLF in the following sections.

7.1.2 Health- and Safety-Related Pregnancy and Childbirth Leave

Reconstructed Article 1 PWD. Purpose

1. The purpose of this Directive is to implement measures to encourage improvements in the safety and health at work of pregnant workers, *workers who have recently miscarried or terminated their pregnancy* and workers who have recently given birth or who are breastfeeding.

⁵⁵ HE 129/2021 vp (n 12) 111.

⁵⁶ C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social* ECLI:EU:C:2013:571.

Reconstructed Article 2 PWD. Definitions

For the purposes of this Directive:

(a) pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;

(aa) worker who has recently miscarried shall mean a worker who has recently miscarried after 12 weeks but before 28 weeks of pregnancy and who had informed her employer of her pregnancy in accordance with national legislation and/or practice;

(ab) worker who has recently terminated their pregnancy shall mean a worker who has recently terminated their pregnancy after 12 weeks of pregnancy and who had informed her employer of her pregnancy in accordance with national legislation and/or practice;

(b) worker who has recently given birth shall mean a worker who has recently given birth, *including to a stillborn at or after 28 weeks gestation*, within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice...

Reconstructed Article 8 PWD. Pregnancy and childbirth leave

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2, as relevant to them subject to paragraphs 2 and 3 of this Article, are entitled to a continuous period of pregnancy and childbirth leave *available before the estimated due-date and after termination, miscarriage, or childbirth.*

2. In the case of workers who have recently miscarried or terminated their pregnancy within the meaning of Article 2, the pregnancy and childbirth leave stipulated in paragraph 1 must include compulsory leave of six weeks allocated after miscarriage or termination.

2. In the case of pregnant workers and workers who have recently given birth within the meaning of Article 2, the pregnancy and childbirth leave stipulated in paragraph 1 must include compulsory leave of eight weeks, of which two weeks are allocated before the estimated due-date and six weeks after childbirth.

In Chapter 4, I have illustrated that while maternity leave under the PWD was introduced for the protection of the health and safety of pregnant workers, workers who have recently given birth, and workers who are breastfeeding, its purpose has become infused with the maternal care objective because the ECJ

in *Hofmann* conflated the bodily capacity for pregnancy, childbirth, and breastfeeding with a natural inclination for childcare. Therefore, as Foubert puts it, the PWD should be ‘stripp[ed] [...] of all elements that are not strictly linked to the protection of the health and safety of pregnant [workers], [workers] who have just given birth, or are breastfeeding’⁵⁷. The dual purpose afforded to it by the ECJ should be abandoned and the PWD ‘reduced to its original objective’⁵⁸. It should no longer be legitimate for EU maternity leave provisions to protect ‘the special relationship between a woman and her child’⁵⁹. When the period for the special protection of the mother-child relationship is stripped from the PWD, the PWD is reduced to two weeks of compulsory leave around the time of birth for health and safety protection. This forms the basis for a reconstructed health- and safety-related leave under EU law, terminologically reconceptualised as pregnancy and childbirth leave to avoid ‘the impression of being connected with more than just the physical events of being pregnant and giving birth’⁶⁰.

Considering medical evidence which suggests that the first 6-8 weeks facilitate physical recovery from an uncomplicated delivery⁶¹, two weeks is too short a protective period. I therefore suggest reallocating four additional weeks of leave from the 12 weeks allocated for childcare-related parental leave in section 7.1.1.3 to ensure the provision of six weeks of postnatal pregnancy and childbirth leave under EU law. There should, of course, be scope in national law to extend the protective period on a case-by-case basis to meet workers’ medical needs.

⁵⁷ Foubert (n 8) 258. I have gender-neutralised the reference to women.

⁵⁸ *ibid* 259.

⁵⁹ *Hofmann* (n 9) para 25.

⁶⁰ Foubert (n 8) 259.

⁶¹ M de la Corte Rodriquez, ‘EU Directives on Maternity Leave: A Misleading Social Risk Approach and its Unsatisfactory Effects on Both Mothers and Fathers’ (2018b) 9(2) ELLJ 171, 187-188; Foubert (n 8) 252; P Foubert and Š Imamović, ‘The Pregnant Workers Directive: Must Do Better. Lessons to be Learned from Strasbourg?’ (2015) 37(3) JSWFL 309, 312; WHO, ‘WHO recommendations on maternal and newborn care for a positive postnatal experience’ (WHO 2022).

Moreover, Foubert notes that medical evidence suggests that ‘leave from the 36th week of pregnancy onwards may protect against poor birth outcomes’⁶². In discussing the length of antenatal leave during the 2022 leave reform, however, Finnish policymakers alluded to a lack of medical evidence to support the provision of a four-week antenatal leave and therefore retained the Finnish PLF’s old standard of two weeks of compulsory leave before the estimated due-date.⁶³ To further improve health and safety protection under EU law, I hence suggest that another two weeks should be reallocated from the eight weeks of parental leave remaining in the section 7.1.1.3 allocation to be made available as pregnancy and childbirth leave before the estimated due-date. Under a reconstructed EU PLF, pregnancy and childbirth leave would thus be eight weeks, of which two weeks would be available to pregnant workers immediately before the estimated due-date and six weeks to workers who have given birth after childbirth.

I must then address the issue of compulsory pregnancy and childbirth leave. I read the situation in light of the Swedish position that maternity leave should not be compulsory because compulsory leave equates pregnancy and childbirth to an illness requiring paternalistic protection and restricts women’s freedom to make their own decisions about taking leave (section 7.1.1.1).⁶⁴ While it may be true that the Swedish PLF, and the broader Swedish legal context and national practice, protect the interests of pregnant workers and workers who have given

⁶² Foubert (n 8) 259. See eg S Guendelman, M Pearl, S Graham, A Hubbard, N Hosang, and M Kharazzi, ‘Maternity Leave in the Ninth Month of Pregnancy and Birth Outcomes among Working Women’ (2009) 19(1) *Women Health Iss* 30.

⁶³ HE 129/2021 vp (n 12) 149, 152.

⁶⁴ Betänkande av föräldraförsäkringsutredningen, ‘Reformerad föräldraförsäkring’ (n 29) 80; Carlson (n 6) 136. See also Fredman, ‘Reversing Roles’ (n 5) 450–451; JC Suk, ‘From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe’ (2012) 60(1) *Am J Comp Law* 75.

birth without imposing compulsory leave⁶⁵, I recognise that this will certainly not be true in all EU Member States. Therefore, retaining a compulsory element to pregnancy and childbirth leave under EU law is vital to adequately protect the health and safety of all pregnant workers and workers who have given birth against pressures, whether put on them by their exploitative employers or the family's financial circumstances, to work until childbirth and/or to return to work prematurely after childbirth.⁶⁶ The basic principle under a reconstructed EU PLF would hence follow the ILO's recommendation that six weeks of pregnancy and childbirth leave after childbirth are compulsory.⁶⁷ The two antenatal weeks of leave would similarly be compulsory immediately before the estimated due-date. To balance medically necessary compulsory leave against protecting women's autonomy from paternalistic lawmaking, the two weeks and six weeks would represent maximum thresholds for pregnancy and childbirth leave under EU law to prevent Member States from imposing long, compulsory leave for all workers. Leave could only be extended beyond these thresholds before and/or after childbirth on a case-by-case basis in accordance with a worker's medical needs. This would also ensure that pregnancy and childbirth leave remains available for health and safety protection of all pregnant workers and workers who have given birth without being affected by the maternal care ideal.

This said, I acknowledge that recovery from childbirth and caring for a newborn – if the pregnant worker gave birth to a living child and remains responsible for the child's primary care – will inevitably overlap, particularly if the worker breastfeeds the newborn. In practice, no clear dividing line can therefore be drawn between

⁶⁵ Sveriges riksdag, 'Regeringens proposition om ny Föräldraledighetslag' Prop. 1994/95:207 [The Swedish Government's bill on a new parental leave act], 25; Duvander and Lammi-Taskula (n 37) 37. In implementing the PWD, the Swedish Government reasoned against compulsory maternity leave by appealing to national practice which was that at least 98% of female employees had recourse to leave in connection with pregnancy, childbirth, and/or breastfeeding and the last 2% to sick leave, and that they actually took advantage of this leave, see Prop. 1994/95:207 (n 65) 25.

⁶⁶ Fredman, 'Reversing Roles' (n 5) 450-451; Suk (n 64) 79.

⁶⁷ Foubert (n 8) 259; ILO, Maternity Protection Convention (2000) R183, art 4(4).

health and safety protection and childcare. What can be avoided, though, is the law embedding and systematically reinforcing the stereotype that it is the exclusive and biologically pre-destined responsibility of the person who gave birth to care for the child immediately after birth and, ultimately, for the rest of the child's life. The proposed reconstruction undermines this basic premise of the dominant ideology of motherhood. It hence deconstructs the female primary caregiver stereotype as a misrecognition injustice. In section 7.1.3, I demonstrate how the other side of the breadwinner-caregiver dichotomy – the stereotype that men's natural inclination is to provide for the family through productive labour which alienates them from childcare – is deconstructed by reconstructing the EU PLF in a way which allows the responsibility for childcare bestowed upon the mother under the PWD and the WLBD to be redistributed to the father. This is essential for de-gendering parenthood and parenting to ultimately deconstruct the sexual division of labour within the family.⁶⁸

Finally, the division of the PWD into health- and safety -related pregnancy and childbirth leave and childcare-related parental leave would de-essentialise pregnancy and motherhood by challenging the presumption embedded in the PWD that pregnancy inevitably leads to childbirth and childbirth to the birth of a living child and, ergo, to maternal care for the newborn. By not conflating leave for the protection of the health and safety of pregnant workers and workers who have recently given birth with the maternal care objective, the EU PLF would recognise that the biological events of pregnancy and childbirth are separate from the socially constructed events of motherhood or parenthood. And that rather the need for pregnancy and childbirth leave can arise without the need for parental leave being triggered – and vice versa (section 7.2). The reconstructed EU PLF would therefore address my critique of the exclusion of workers whose pregnancies end in abortion, miscarriage, or stillbirth – rather than in the birth of

⁶⁸ Rosenblum (n 5) 60.

a living newborn – from health- and safety-related leave under the PWD (Chapter 4). Both Finland and Sweden already offer health- and safety-related leave after second-trimester abortion and miscarriage, and/or stillbirth. In Finland, miscarriage or abortion at or after 22 weeks and stillbirth entitle the pregnant person to 40 working days of pregnancy leave and 65 days of parental leave.⁶⁹ In Sweden, stillbirth entitles the person who gave birth to 29 days of parental allowance immediately after childbirth and a subsequent ten days of temporary parental allowance.⁷⁰ The issue is that both PLFs inadequately protect the health and safety of people who terminate or miscarry earlier in the pregnancy and, interestingly, both now conflate health- and safety-related leave with childcare-related leave in an attempt to comply with the protective period mandated by the PWD (see section 7.1.3). Under the reconstructed EU PLF, workers who give birth to a stillborn at or after 28 weeks of pregnancy would be eligible for six weeks of compulsory pregnancy and childbirth leave after the stillbirth to recover physically and emotionally.⁷¹ If the pregnancy progressed to around 38 weeks before the stillbirth, they would also be entitled to the two weeks of leave before their estimated due-date.

With regard to workers who miscarry or terminate their pregnancy, I recognise that the application of pregnancy and childbirth leave must be more conditional to limit the potential scope of workers eligible for leave to make its provision more practicable. The reconstructed EU PLF should, however, ensure access to the two groups of workers on the same principle to avoid unequal treatment of

⁶⁹ Sickness Insurance Act 2004 (n 41) ch 9, s 1, ss 8-9; Kela, 'Eryitystilanteet: lapsi kuolee', <www.kela.fi/vanhempainvapaalla-erityistilanteet#lapsi-kuolee>, accessed 13.2.2025 [Extraordinary circumstances: child dies]; Kela, 'Raskaus keskeytyy', <www.kela.fi/raskausaikana#raskaus-keskeytyy>, accessed 19.4.2025 [Pregnancy terminates].

⁷⁰ Social Insurance Code 2010 (n 15) ch 12, s 5, ch 13, s 14; Försäkringskassan, 'Om du har mist ett barn', <www.forsakringskassan.se/privatperson/foralder/om-du-har-mist-ett-barn>, accessed 13.2.2025 [If you have lost a child].

⁷¹ K Ryninks, M Wilkinson-Tough, S Stacey, and A Horsch, 'Comparing Posttraumatic Growth in Mothers after Stillbirth or Early Miscarriage' (2022) 17(8) PLoS ONE 1, 9.

workers experiencing spontaneous abortions and those undergoing induced abortions. Because most miscarriages occur before 12 weeks, many without the person knowing they were pregnant, my suggestion for the application of pregnancy and childbirth leave after miscarriage presumes that the worker was aware of their pregnancy before the miscarriage occurred, the pregnancy had passed the 12-week mark after which the risk of spontaneous abortion reduces, and the worker had informed their employer of the pregnancy which defines ‘a pregnant worker’⁷² for the purposes of EU law. I thus suggest that six weeks of compulsory pregnancy and childbirth leave would become available to workers who miscarry after 12 weeks but before 28 weeks for the protection of their health and safety. Entitlement to six weeks’ compulsory leave after induced abortion, regardless of its reason, would similarly be conditional on the termination taking place after 12 weeks (i.e. the first trimester) and on the worker having informed their employer of the pregnancy. Because ‘[t]he standard practice across Europe is to not impose time limits’⁷³ on induced abortion where the pregnancy risks the life or health of the pregnant person, access to leave for health and safety protection after abortion would be secured for abortions at any time after 12 weeks. My proposed approach to reconstructing the PWD would displace an exclusively physical conception of health and safety in the pregnancy and childbirth leave context.⁷⁴ As such, it would better align with the ECJ’s confirmation in *Hofmann* and *Webb* that the PWD protects both the physical and mental health of the relevant groups of workers.⁷⁵ Extending the scope of workers

⁷² PWD (n 33) art 2(a).

⁷³ Center for Reproductive Rights, ‘European Abortion Laws. A Comparative Overview’ (2023), <<https://reproductiverights.org/wp-content/uploads/2023/09/European-Abortion-Laws-A-Comparative-Overview-new-9-13-23.pdf>>, accessed 18.4.2025, 3.

⁷⁴ I acknowledge Hooton and Romanis (n 8) 20-21, who suggest that emphasis on mental health protection under the PWD would also justify extension of leave to parents ‘relying on non-traditional reproductive and gestational practices’ (e.g. commissioning parents) to enable them to care for and bond with their child without unnecessary emotional and psychological stress. I do not endorse this approach as it continues to attribute to the PWD a caring and bonding purpose.

⁷⁵ *Hofmann* (n 9) para 25; C-32/93 *Carole Louise Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-03567, para 21.

eligible for pregnancy and childbirth leave under EU law to those groups for whom time away from work for mental health reasons may be particularly relevant would make this true. And finally, including leave for abortion, miscarriage, and stillbirth in an EU legal instrument would de-stigmatise and normalise abortion and pregnancy and baby loss in working life, and in society more broadly, thus addressing the systemic stigmatisation of people with the bodily capacity for pregnancy.

7.1.3 Childcare-Related Parental Leave

Reconstructed Article 5 WLBD. Parental leave

1. Member States shall take the necessary measures to ensure that each worker has *an individual right to parental leave of at least five months* that is to be taken before the child reaches a specified age, up to the age of eight, to be specified by each Member State or by collective agreement. [...]

1a. Member States shall ensure that a month of the second parent's individual parental leave entitlement can be used immediately after the child's birth parallel to the postnatal pregnancy and childbirth leave provided under the PWD for the parent who gave birth.

2. Member States shall ensure that *parental leave cannot be transferred between the two parents.*

In my reconstructed EU PLF, the six weeks left over from the 12 weeks allocated to childcare-related parental leave in section 7.1.1.3 after reallocating six weeks for pregnancy and childbirth leave in section 7.1.2 would be subsumed into the parental leave entitlement existing under the WLBD to be equally shared between parents.⁷⁶ Each parent would then be entitled to four months and three weeks of parental leave under EU law. Whereas subsuming childcare-related parental leave into health- and safety-related maternity leave has the effect of privileging maternal care and thus perpetuating the breadwinner-caregiver dichotomy,

⁷⁶ de la Corte Rodriquez, 'EU Directives on Maternity Leave' (n 61) 193; Foubert (n 8) 259.

making childcare-related leave equally available to both parents reinforces the sexes' equal responsibility for childcare and does not presume either sex to be biologically more or less inclined to caring. Because this reconstruction of the EU PLF seeks to uphold this distinction between health and safety and childcare, and only the former justifies unequal treatment between the sexes, the childcare-related leave entitlement available to the sexes under the WLBD must be the same. The problem to be addressed, then, is that once the PWD is stripped of the period of maternity leave for the special protection of the mother-child relationship and this period is subsumed to parental leave under the WLBD, women will be entitled to less childcare-related leave than men. In addition to four months and three weeks of parental leave, men would be entitled to two weeks of paternity leave intended for caring in connection with the child's birth.

Here, the reconstructed EU PLF would emulate the Finnish PLF reform which subsumed paternity leave into parental leave to ensure formal equality between the sexes in access to childcare-related leave (section 7.1.1.2).⁷⁷ Divided between two parents, the two weeks of paternity leave subsumed into parental leave would bring each parent's individual parental leave entitlement under EU law to four months and four weeks. For the purposes of clarity, I treat this as five months. The parent who gave birth would become entitled to parental leave immediately after the end of pregnancy and childbirth leave and the second parent immediately after the child's birth. Below, I outline how reconstructed parental leave might be conceptualised to ensure that fathers and second

⁷⁷ Emulating the Swedish PLF is not an option because the problem there is the same: men are statutorily entitled to ten days more childcare-related leave than women, see Social Insurance Code 2010 (n 15) ch 13, s 10. In discussion with Professor Jenny Julén Votinius at Lund University in February 2023, I asked if the situation was not unequal between the sexes. In response, she offered that the Swedish view is that it would only become unequal if men took all the leave available to them (i.e. more leave than women). As with non-compulsory pregnancy and childbirth leave in section 7.1.2, the position is too specific to Swedish custom to be readily applicable to the EU PLF.

parents retain access to leave equivalent to paternity leave in connection with the child's birth. The proposed reconstruction of parental leave in EU law contributes to the deconstruction of the breadwinner-caregiver dichotomy and facilitates substantive equality between the sexes by recognising gendered parental roles as social constructs and, thus, by de-gendering parenting.

7.1.3.1 Parental Leave in Connection with Birth

While the paternity leave available under the WLBD would be subsumed to parental leave, it would remain available to fathers and second parents in connection with the child's birth. It would resemble the approach taken to paternity leave provision in Finland where the second parent can take three weeks of parental leave simultaneously to the other parent's pregnancy or parental leave.⁷⁸ For the reconstructed EU PLF, the shortness of the two-week paternity leave under the WLBD would be addressed by enabling fathers and second parents to use up to a month of their five months of parental leave immediately after the child's birth. This would extend the continuous period of leave equivalent to paternity leave which could be taken parallel to the pregnancy and childbirth leave of the parent who gave birth.⁷⁹ The concern in Sweden – where two parents can use 60 parental allowance days at the same time during the child's first 15 months of life⁸⁰ – has been that parents taking leave at the same time undermines the development of father's independent parenting skills, leading the father to become 'more of a mother's helper than an independent

⁷⁸ Sickness Insurance Act 2004 (n 41) ch 9, s 8.

⁷⁹ Unlike what I posit with regard to maternity leave under the PWD and paternity leave under the WLBD in Chapter 4, that postnatal pregnancy and childbirth leave and the month of combined newborn care and parental leave are different lengths following the reconstruction of the EU PLF is not discriminatory against fathers: pregnancy and childbirth leave is afforded to the person who gave birth for health and safety protection, not in their capacity as a parent, which justifies unequal treatment of the sexes.

⁸⁰ SFS 2023:905 (n 30) ch 12, s 4a.

carer'⁸¹. The policy has, however, been shown to contribute to a more equal sharing of parental leave between parents who utilised the 'double-days' as compared to parents who did not.⁸² In order to mitigate concerns about parents' simultaneous leave-taking, the 90 non-transferable parental allowance days available to parents in Sweden can no longer constitute 'double-days', thus compelling men to take 90 days of leave independently.⁸³ By limiting the availability of parental leave which can be taken parallel to pregnancy and childbirth leave to the month after the child's birth, the reconstructed EU PLF would similarly mitigate this concern. As such, by affording parents of a newborn the opportunity to be on leave together for the first month, the EU PLF could increase men's use of the remaining four months of non-transferable parental leave and thus transform the breadwinner-caregiver dichotomy with a view to facilitating substantive equality. Second parents assuming newborn care responsibilities during pregnancy and childbirth leave would also better enable the parent who gave birth to recover physically.⁸⁴

I recognise that some feminist scholars – including Foubert and Fredman⁸⁵ – have argued for compulsory paternity leave equivalent to compulsory maternity leave to convey that the birth of a child concerns both sexes and to equalise the situation between the sexes particularly in the eyes of employers. Parental leave in connection with a child's birth would, however, remain non-compulsory in the reconstructed EU PLF. Pregnancy and childbirth leave under the PWD is

⁸¹ A-Z Duvander, GB Eydal, B Brandth, I Gíslason, J Lammi-Taskula, and T Rostgaard, 'Gender Equality: Parental Leave Design and Evaluating its Effects of Fathers' Participation' in P Moss, A-Z Duvander, and A Koslowski (eds), *Parental Leave and Beyond: Recent International Developments, Current Issues and Future Directions* (Policy Press 2019), 197.

⁸² *ibid* 197; Regeringskansliet, 'Större flexibilitet i föräldrapenningen' (n 28) 9. Only 12% of parents used all double-days in 2019.

⁸³ Regeringskansliet, 'Större flexibilitet i föräldrapenningen' (n 28) 15.

⁸⁴ Försäkringskassan, 'Föräldralediga tillsammans – dubbeldagar', <www.forsakringskassan.se/privatperson/foralder/foraldrapenning/foraldralediga-tillsammans---dubbeldagar>, accessed 5.3.2025 [Parental leave together – double-days].

⁸⁵ Eg Fredman, 'Reversing Roles' (n 5) 451; Foubert (n 8) 261.

compulsory to ensure adequate protection of the health and safety of pregnant people and people who have given birth, not to facilitate newborn care. There is no health and safety basis which would justify making newborn care-related parental leave compulsory for fathers and second parents. Moreover, the high paternity leave take-up rates of Nordic PLFs demonstrate that compulsory leave in connection with a child's birth is not necessary to incentivise men to take it, as long as the leave is accessible to most fathers by being relatively short and well-paid.⁸⁶ In Finland, paternity leave has become 'an everyman's mass movement'⁸⁷ – 81% of fathers took paternity leave in 2020⁸⁸ – because its limited duration has enabled men from effectively all socio-economic and occupational groups to utilise it.⁸⁹ Finally, I address the potential discrepancy between the sexes in access to leave after stillbirth under the PWD and the WLBD (Chapter 4). Because parents who gave birth to a stillborn would become entitled to six weeks of pregnancy and childbirth leave after stillbirth under the reconstructed EU PLF, allowing second parents access to parental leave in connection with stillbirth – even though the WLBD has no legal basis in health and safety protection – would no longer constitute unfavourable treatment of parents who have given birth, but would support second parents' well-being.⁹⁰ I therefore suggest that second parents would be entitled to the month of leave afforded to them after their child's birth also in the case of stillbirth.

⁸⁶ J Lammi-Taskula, 'Nordic Men on Parental Leave: Can the Welfare State Change Gender Relations?' in A Ellingsæter and A Leira (eds), *Politicising Parenthood in Scandinavia: Gender Relations in Welfare States* (Polity Press 2006), 84.

⁸⁷ *ibid.*

⁸⁸ Närvi et al (n 39) 233–234.

⁸⁹ Lammi-Taskula, *Parental Leave for Fathers?* (n 53) 70.

⁹⁰ Both Finland and Sweden provide second parents leave after stillbirth to support their well-being, see Kela, 'Erytyistilanteet: lapsi kuolee' (n 69); Försäkringskassan, 'Om du har mist ett barn' (n 70).

7.1.3.2 Non-Transferable Parental Leave

After the end of compulsory postnatal pregnancy and childbirth leave (or lactation leave, see section 7.2.2), parents would be free to utilise their individual entitlements to parental leave in turn. Here, the reconstructed EU PLF would structurally deviate from the two Nordic PLFs. Because I have restructured the EU PLF so that the health- and safety-related protective period is limited to six weeks after childbirth, there is no need to apply the Nordic policy logic which earmarks the first period of childcare-related parental leave after pregnancy and childbirth leave for the parent who gave birth.⁹¹ The Finnish and Swedish PLFs do so to ensure compliance with the 14-week protective period mandated under the PWD while they have otherwise been structured in ways which subsume some of this period to national parental leave entitlements (section 7.1.1).⁹² The reconstructed EU PLF need not reserve any period of parental leave immediately following pregnancy and childbirth leave to the parent who gave birth. After pregnancy and childbirth leave, parental leave is equally available to both sexes in their capacity as parents for the purpose of childcare. In practice, of course, it is likely the parent who gave birth who first takes parental leave after the end of pregnancy and childbirth leave to, for example, continue breastfeeding. This approach to reconciling pregnancy and childbirth leave with parental leave continues to distinguish between leave protecting the health and safety of the worker who has given birth and leave facilitating childcare without presuming maternity to coincide with motherhood, while affording a continuous period of leave for the parent who has given birth during time when it is difficult to

⁹¹ Limiting the protective period to a total eight weeks is not ‘levelling down’ the protection afforded to workers under Article 8 PWD because, as I have shown, only the two compulsory weeks of the 14 weeks were protective of workers’ health and safety. Workers’ health and safety is better protected under the reconstructed PLF offering a six-week compulsory protective period.

⁹² Sickness Insurance Act 2004 (n 41) ch 9, s 9; Prop. 1973:47 (n 31) 20, 40–41; SFS 1973:473 (n 23) ch 3, s 13.

distinguish between recovery from birth and newborn care in practice (section 7.1.2).

Furthermore, this approach addresses the one situation in which I observe the Finnish and Swedish PLFs to conflate health- and safety-related leave with childcare-related leave: when the newborn does not remain in the care of the worker who gave birth but instead comes to be cared for by e.g. adoptive or commissioning parents (see Chapter 5). In such a situation, the worker who gave birth has no need for childcare-related leave but is nevertheless provided this under Finnish and Swedish law to bridge the gap between statutory maternity protection and the PWD's 14-week standard.⁹³ This essentialises pregnancy and motherhood by imposing a mothering role to each person who gestates and gives birth even if they do not intend to parent the child, including gestational surrogates and workers who give the child for adoption.⁹⁴ By not linking pregnancy and childbirth leave with parental leave, the reconstructed EU PLF does not conflate gestational labour with motherhood – while still adequately protecting the health and safety of the person who gave birth – and reserves access to childcare-related leave to working parents who care for their children after their birth or adoption.

Regarding the non-transferability of parental leave, my reconstructed EU PLF would go beyond the current position of both the EU and Nordic PLFs. Although Finland and Sweden have successfully incentivised men's take-up of parental

⁹³ HE 129/2021 vp (n 12) 132; Social Insurance Code 2010 (n 15) ch 12, s 5.

⁹⁴ Z Mahmoud and EC Romanis, 'On Gestation and Motherhood' (2023) 31(1) *Med L Rev* 109, 109; A Margaria, 'Surrogacy Before European Courts. The Gender of Legal Fictions' in M Öberg and A Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 198-199. See eg Z Mahmoud, *Surrogates Across the Atlantic: Comparing the Impact of Legal and Health Regulatory Frameworks on Surrogates' Autonomy, Health and Wellbeing* (PhD Thesis, University of Exeter 2022).

leave by gradually increasing non-transferable entitlements (see Chapter 1), they still fail to facilitate *equal* sharing of parental leave – and hence of reproductive labour – which is essential for the deconstruction of the breadwinner-caregiver dichotomy. The adoption of three daddy-months in Sweden has increased fathers' share of parental allowance days from 7% in 1990 to 30% by 2017 where take-up has since plateaued, the policy failing to incentivise men to take their full eight months.⁹⁵ Just 20% of Swedish parents shared allowance equally in 2022.⁹⁶ Finnish men's share of used parental allowance days increased from 12.6% to 15.2% in the year after and to 20.5% in the two years after the 2022 reform individualised 97 working days of parental leave.⁹⁷ In 2023, 70% of fathers continued to transfer their 63 transferable days to the mother.⁹⁸ This demonstrates, at the same time, the effectiveness of non-transferable parental leave as a gently coercive policy instrument and its ineffectiveness in incentivising men to use leave beyond what is reserved for them and what has thus become normalised in national practice.⁹⁹ Childcare and household labour

⁹⁵ Duvander and Cedstrand (n 28) 265–266; Statistics Sweden, 'På tal om kvinnor och män 2022' (n 26) 54; Statistics Sweden, 'På tal om kvinnor och män. Lathund om jämställdhet 2024', <www.scb.se/webbreporter/le0201/lathund2024/>, accessed 20.4.2025 [Women and men in Sweden 2024].

⁹⁶ Duvander and Cedstrand (n 28) 265.

⁹⁷ Kela, 'Perhevapaaudistuksen voimaantulosta vuosi – näin isät ovat käyttäneet vapaita tähän mennessä', 15.12.2023, <<https://tietotarjotin.fi/uutinen/839248/perhevapaaudistuksen-voimaantulosta-vuosi-nain-isat-ovat-kayttaneet-vapaita-tahan-menessa>>, accessed 24.11.2024 [A year since the enforcement of the family leave reform – this is how fathers have used leaves thus far]; Kela, 'Isät käyttivät jo yli viidenneksen vanhempainpäivärahopäivistä vuonna 2024' (5.2.2025), <<https://tietotarjotin.fi/uutinen/1168680/isat-kayttivat-jo-yli-viidenneksen-vanhempainpaivarahapaivista-vuonna-2024>>, accessed 6.2.2025 [Fathers already used over a fifth of parental allowance days in 2024].

⁹⁸ Kela, 'Perhevapaaudistuksen voimaantulosta vuosi' (n 97).

⁹⁹ Duvander and Cedstrand (n 28) 265, 277; A-Z Duvander and M Johansson, 'Does Fathers' Care Spill Over? Evaluating Reforms in the Swedish Parental Leave Programme' (2019) 25(2) *Fem Econ* 67, 73; Haas and Rostgaard (n 53) 191; J van Belle, 'Paternity and parental leave policies across the European Union' (RAND Corporation 2016), 16. In 2008 Sweden also adopted a tax deduction as 'an equality bonus' for parents who shared sick-pay level parental allowance days equally in 2008, see *Lag om jämställdhetsbonus*, SFS 2008:313 [Act on equality bonus], It was abolished in 2017 for having failed to affect either parent's use of leave and for being too procedurally complex, see eg *Försäkringskassan, 'Jämställdhetsbonusen – en effektutvärdering. Socialförsäkringsrapport 2010:5'* (Försäkringskassan 2010) [The equality bonus – an impact

remain gendered in accordance with the breadwinner-caregiver dichotomy within the Nordic dual earner-carer family. Nordic evidence from individualising a portion of parental leave – even a significant one – therefore suggests that my reconstruction of the EU PLF must take the ‘gentleness’ out of parental leave provision. As long as the option to transfer leave between parents exists, men will continue to be disincentivised to use the transferable period available to them and will continue to transfer it to the presumed primary caregiver: the mother. To facilitate transformation of parental roles, men must be coerced into utilising their parental leave entitlements by offering them a non-transferable period of leave on a use-it-or-lose-it principle. If one parent does not use a period of parental leave available to them, it should be unavailable to use by the other parent, causing the parents to have to rely on alternative childcare arrangements. The more radical alternative would, of course, be to make parental leave compulsory. Given that women’s life choices are constrained enough without the EU PLF compelling them to take parental leave only in order to force the fathers of their children to do so, I do not endorse this.

The minimum period of parental leave available to each parent under the WLBD after the reconstruction – five months – would thus be fully non-transferable between parents. Where Member States legislate above this minimum standard in national law, leave entitlements exceeding five months would similarly be non-transferable. That is, the option of transferring parental leave from one parent to the other would be eliminated.¹⁰⁰ Parental leave would remain non-compulsory, but renouncing a period of leave would mean both parents forfeiting it. To minimise the need for parents to renounce any period of parental leave, the WLBD would continue to oblige Member States to offer parental leave in flexible

assessment. Social security report], 30; Inspektionen för socialförsäkringen, ‘Ett jämställt uttag? Reformer inom föräldraförsäkringen. Rapport 2012:4’ (ISF 2012) [An equal withdrawal? Parental insurance reforms], 48, 56.

¹⁰⁰ However, see section 7.2.3 on transferability of leave to a non-parent.

ways – such as by way of part-time or piecemeal leave – particularly with a view to incentivising men’s take-up of leave.¹⁰¹ While I perceive this as one aspect of parenting leave policy that is reasonable to defer to the Member States and therefore do not discuss it in great detail, I posit that both the EU and Member States must be cognisant of reconciling flexible leave provision with the equality objectives of the EU PLF. I demonstrate this with reference to the Swedish PLF. Swedish parental allowance has traditionally been flexible: the option of part-time and piecemeal parental leave has been available since the 1970s and, because parental allowance is not tied to parental leave, parents have been able to postpone parental allowance days to use later in the child’s life.¹⁰² Currently, at least 384 of the 480 days of parental allowance per child must be used before the child’s fourth birthday but the remaining 96 days can be postponed until the child turns 12.¹⁰³ The result, however, has been the fragmentation of leave taken by fathers, and parents’ exploitation of the system by arranging the father’s leave to coincide with, for instance, the mother’s holiday or Christmas.¹⁰⁴ This has undermined the primary aims of parental leave, namely the development of the father’s independent childcaring ability by allowing men to avoid taking a continuous period of leave on their own.¹⁰⁵ While flexible leave provision facilitates men’s leave take-up, it does not always challenge gendered parental

¹⁰¹ WLBD (n 13) recital (23), art 5(6).

¹⁰² Parental Leave Act 1978 (n 23) s 6; Parental Leave Act 1995 (n 14) ss 10–12; Betänkande av föräldraförsäkringsutredningen, ‘Reformerad föräldraförsäkring’ (n 29) 91; B Brandth and E Kvande, ‘Flexibility: Some Consequences for Fathers’ Caregiving’ in P Moss, A-Z Duvander, and A Koslowski (eds), *Parental Leave and Beyond: Recent International Developments, Current Issues and Future Directions* (Policy Press 2019), 215; Duvander et al (n 81) 199; Statistics Sweden, ‘På tal om kvinnor och män 2022’ (n 26) 52, 57.

¹⁰³ Social Insurance Code 2010 (n 15) ch 12, ss 12-13; A-Z Duvander and I Viklund, ‘How Long is a Parental Leave and for Whom? An Analysis of Methodological and Policy Dimensions of Leave Length and Division in Sweden’ (2019) 40(5) *Int J Sociol Soc Pol* 479, 482.

¹⁰⁴ Brandth and Kvande (n 102) 215; Duvander et al (n 81) 199.

¹⁰⁵ C Bergqvist and S Saxonberg, ‘The State as a Norm-BUILDER? The Take-up of Parental Leave in Norway and Sweden’ (2017) 51(7) *Soc Policy Admin* 1470, 1485; Duvander et al (n 81) 199; M Evertsson, ‘Parental Leave and Careers: Women’s and Men’s Wages After Parental Leave in Sweden’ (2016) 29 *Adv Life Course Res* 26, 26.

roles or deconstruct the sexual division of labour in practice: '[t]oo much flexibility [...] hurts gender equality'¹⁰⁶.

Individual and non-transferable parental leave affords the father a primary caregiver role and the opportunity to develop their parenting skills independently of the mother, hence challenging the male breadwinner and part-time babysitter stereotypes.¹⁰⁷ In the longer-term, it encourages participative fatherhood and participation in household labour, therefore also encouraging a more equal sharing of these forms of reproductive labour between the sexes.¹⁰⁸ Men's participation in childcare also challenges the female primary caregiver stereotype by enabling women's return to work and, in the longer-term, by alleviating the double burden of paid employment and unpaid reproductive labour.¹⁰⁹ Over time, the normalisation of participative fatherhood would mitigate the motherhood penalty, particularly employers' reluctance to hire women, as employers would come to see parenthood as a life pattern of both sexes.¹¹⁰ The sexual division of labour is deconstructed by the transformation of both male and

¹⁰⁶ Bergqvist and Saxonberg (n 105) 1485.

¹⁰⁷ Lammi-Taskula, 'Nordic Men on Parental Leave' (n 86) 95; A Kotsadam and H Finseraas, 'The State Intervenes in the Battle of the Sexes: Causal Effects of Paternity Leave' (2011) 40(6) *Soc Sci Res* 1611, 1612; S Tanaka and J Waldfogel, 'Effects of Parental Leave and Work Hours on Fathers' Involvement with Their Babies: Evidence from the Millennium Cohort Study' (2007) 10(4) *Community Work Fam* 409, 413.

¹⁰⁸ European Commission, 'Paternity and parental leave policies across the European Union: Assessment of current provision' (Publications Office of the European Union 2018), 3; L Haas and CP Hwang, 'The Impact of Taking Parental Leave on Fathers' Participation in Childcare and Relationships with Children: Lessons from Sweden' (2008) 11(1) *Community Work Fam* 85, 99; Kotsadam and Finseraas (n 107) 1611-1612, 1619; Á Oliveira, M De la Corte-Rodríguez, and F Lütz, 'The New Directive on Work-Life Balance: Towards a New Paradigm of Family Care and Equality?' (2020) 45(3) *EL Rev* 295, 306; Tanaka and Waldfogel (n 107) 413.

¹⁰⁹ Foubert (n 8) 261; M O'Brien, B Brandth, and E Kvande, 'Fathers, Work and Family Life: Global Perspectives and New Insights' (2007) 10(4) *Community Work Fam* 375, 380; Tanaka and Waldfogel (n 107) 421; van Belle (n 99) 10.

¹¹⁰ European Commission, 'Paternity and parental leave policies across the European Union' (n 108) 3; Foubert (n 8) 261; M Matero, 'Breadwinners and Primary Caregivers? A Feminist Critique of Gender Equality in the EU Law Parental Leave Framework' (2021) 24 *TCLR* 69, 85.

female gender roles, and the transition from a dual-earner to a dual earner-carer family model where the sexes share equal responsibility for paid and unpaid labour.

Of course, I recognise that this picture is complicated by structural sex inequalities, like the gender pay gap, and various intersecting socio-economic, cultural, and religious differences between parents which mean that non-transferable leave alone will not facilitate equal sharing of parenting leave between all parents, never mind the complete deconstruction of the sexual division of labour within the family. The parents whose behaviour is affected by the non-transferability of leave the most, and who are most likely to challenge the breadwinner-caregiver dichotomy in their parenting, are neither economically nor socially marginalised.¹¹¹ Older, highly-educated, higher-income, white-collar, and native fathers are known to take more leave than younger, lower-educated, lower-income, blue-collar, and immigrant fathers because they are less affected by employment-related disincentives to taking leave, like loss of income, precarity of employment, and negative workplace attitudes.¹¹² Different religious and cultural norms may entail that parents adhere to a traditional division of labour within the family and may hence not be affected by egalitarian parenting leave policies.¹¹³ In practice, these norms often interact with socio-economic disadvantage, as demonstrated by Nordic parenting leave research which finds

¹¹¹ Lammi-Taskula, 'Nordic Men on Parental Leave' (n 86) 87.

¹¹² *ibid*; L Ma, G Andersson, A-Z Duvander, and M Evertsson, 'Fathers' Uptake of Parental Leave: Forerunners and Laggards in Sweden, 1993-2010' (2020) 49(2) *J Soc Policy* 361, 378.

¹¹³ C Diehl, M Koenig, and K Ruckdeschel, 'Religiosity and Gender Equality: Comparing Natives and Muslim Migrants in Germany' (2009) 32(2) *Ethnic Racial Stud* 278, 293; M Voicu, B Voicu, and K Strapcova, 'Housework and Gender Inequality in European Countries' (2009) 25(3) *Eur Sociol Rev* 365, 374; R Carriero, 'The Role of Culture in the Gendered Division of Domestic Labor: Evidence from Migrant Populations in Europe' (2021) 64(1) *Acta Soc* 24, 37-38; A-Z Duvander and E Ruspini, 'Who Benefits from Parental Leave Policies? A Comparison Between Nordic and Southern European Countries' in A Castrén, V Česnuitytė, I Crespi, J Gauthier, R Gouveia, C Martin, A Moreno Mínguez, and K Suwada (eds), *The Palgrave Handbook of Family Sociology in Europe* (Palgrave Macmillan 2021), 232.

both inegalitarian cultural norms and obstacles to accessing employment, and hence leave entitlements, to contribute to the low parental leave take-up among immigrant fathers.¹¹⁴ Of these socio-economic constraints to parents' leave take-up, I addressed the loss of income in Chapter 6.

I close this section by observing that by limiting women's access to men's parental leave, non-transferable parental leave may address the issue of mothers' 'gatekeeping'¹¹⁵ leave which has been suggested as a reason for fathers not taking any or not extending it beyond what has been explicitly reserved for them. Fathers' quotas may support men's 'negotiations with partners unwilling to share leave'¹¹⁶. Whether women gatekeep parental leave because their jobs are 'unrewarding [whereby] it is not unsurprising that [they want] to use the whole leave by [themselves]¹¹⁷; because they feel that they must take all the leave to be good mothers; because they conform to the essentialist idea that they are biologically better at parenting than the fathers of their children; or simply because they want to spend time with their children, the issue resides in the dominant ideology of motherhood. Indeed, Boyd writes that

women can be coerced into normative ideals of motherhood and penalized for failure to conform, but women can also 'consent' or choose to conform to ideological norms, raising far more complex questions for feminists and for feminist legal strategy¹¹⁸.

Admitting that women, often willingly, contribute to maintaining the sexual division of labour within the family through the unequal sharing of parental leave

¹¹⁴ Ma et al (n 112) 378; J Tervola, A-Z Duvander, and E Mussino, 'Promoting Parental Leave for Immigrant Fathers – What Role Does Policy Play?' (2017) 24(3) Soc Polit 269, 276.

¹¹⁵ See eg G Kaufman, *Fixing Parental Leave. The Six-Month Solution* (New York University Press 2022), 116.

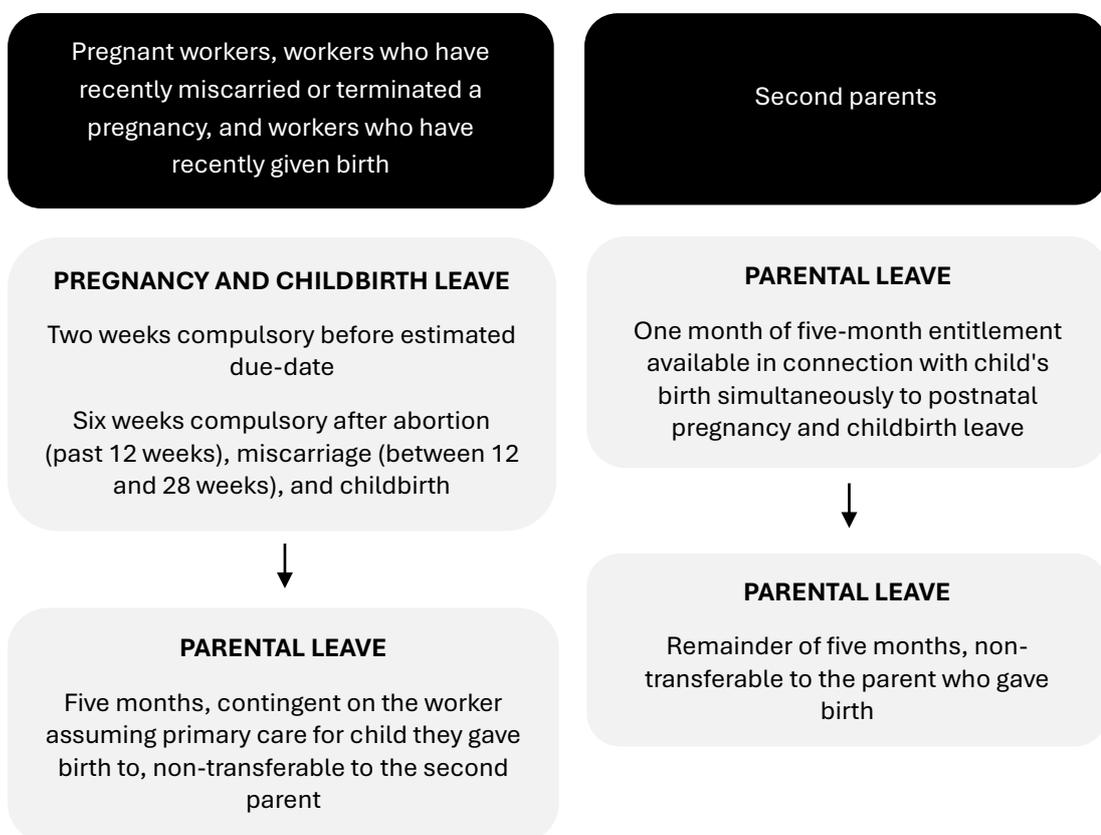
¹¹⁶ L Haas, K Allard, and P Hwang, 'The Impact of Organizational Culture on Men's Use of Parental Leave in Sweden' (2002) 5 Community Work Fam 319, 339.

¹¹⁷ M Sundström and A-Z Duvander, 'Gender Division of Child Care and the Sharing of Parental Leave Among New Parents in Sweden' (2002) 18 Eur Sociol Rev 433, 443.

¹¹⁸ SB Boyd, 'Motherhood and Law: Constructing and Challenging Normativity' in V Munro and M Davies (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2016), 267.

is important to do in this thesis. Transforming the sexual division of labour within the family and achieving substantive equality between the sexes does not only require men to become primary caregivers alongside women, but women to let go, if you will, of the role they have internalised. Like Boyd suggests, this may be more difficult to unravel through feminist law and policy than getting men to take parental leave.

Table 7. Structure of the EU PLF After Section 7.1 Reconstruction



7.2 Deconstructing the Heteronormative Nuclear Family

In Chapter 5, I have demonstrated that the EU PLF continues to best serve the heteronormative nuclear family: cisgender and heterosexual married and/or cohabiting mothers and fathers with biological children. Access to parenting

leave at the EU level becomes more constrained when the family consists of LGBTQIA+ parents, non-nuclear parental relationships, and/or where at least one parent does not have a biological or gestational link to the child. This is

problematic for the regulation of the diversity of family forms and practices in contemporary EU as it marginalises, excludes, and potentially discriminates anyone who does not conform to this model¹¹⁹.

In this section, I offer a normative reconstruction of the EU PLF which seeks to facilitate access to parenting leave by these non-normative parents and families (see Appendix 8). Approaching reconstruction primarily from the perspective of Fredman’s participative dimension, I demonstrate that by enhancing social inclusion and participation of non-normative parents and hence solidarity between groups of parents, the reconstructed EU PLF begins to deconstruct the heteronormative nuclear family on route to substantive equality between parents.¹²⁰ In section 7.2.1, I posit that gender-neutralising language throughout the EU PLF is necessary to address both the breadwinner-caregiver dichotomy and the heteronormative nuclear family. In section 7.2.2, I propose the introduction of lactation leave to ensure health and safety protection for non-gestational parents who breast- or chestfeed their infant under the PWD. In section 7.2.3, I suggest that parental leave under the WLBD would be transferable not between two legal parents but from legal parents to non-parents who contribute to parenting the child in order to accommodate the needs of one-parent and multiple-parent families. It would also be available to all adoptive and commissioning parents on a par with biological parents. Throughout, I refer to the Finnish and Swedish PLFs as practical reference points for reconstructing the EU PLF (see Appendices 5-6). Of the 27 EU Member States, Finland and Sweden – alongside Estonia – have the most inclusive parenting leave systems, with ‘nearly

¹¹⁹ A Tryfonidou, ‘What is a “Family” in EU Law? Do EU Policies Sufficiently Address Family Diversity and its Consequences?’ in M Öberg and a Tryfonidou (eds), *The Family in EU Law* (Cambridge University Press 2024), 36.

¹²⁰ S Fredman, *Discrimination Law* (Oxford University Press 2011), 32-33; Fredman, ‘Redistribution and Recognition’ (n 4) 227.

100 % eligibility rates for both women and men [...] regardless of whether they were in a heterosexual or same-sex partnership or a single-parent household; and regardless of whether their child was biological or adoptive'¹²¹. Whereas changes to the Nordic PLFs in the 2010s and 2020s have increasingly facilitated family diversity particularly from an LGBTQIA+ inclusion perspective, both PLFs have been accommodating of adoptive parents, unmarried cohabiting parents, and non-resident parents since the 1970s and 1980s.¹²²

7.2.1 Gender-Neutralising the Language of Parenting Leave

As I have argued in Chapter 5, the use of female-pronouns in assigning health- and safety-related leave reifies pregnancy and childbirth as essential women's experiences, while reliance on the gendered concepts of *maternity* and *paternity*, and *mother* and *father*, perpetuates binary parental role stereotypes, reinforces role differentiation in accordance with the breadwinner-caregiver dichotomy, and embeds cis- and heteronormative bias in parenting leave systems.¹²³ To facilitate the deconstruction of both the breadwinner-caregiver dichotomy and the heteronormative nuclear family, the reconstructed EU PLF must abandon gendered language in regulating access to parenting leave.¹²⁴ This was also the specific objective of the 2022 Finnish PLF reform: it eliminated 'unnecessarily

¹²¹ EIGE, 'Eligibility for parental leave in EU Member States' (n 6) 17.

¹²² Carlson (n 6) 117–118; Haataja, 'Pieniä ja suuria reformeja' (n 6) 47. See also A Moring and J Lammi-Taskula, 'Parental Leave Reforms in Finland 1977–2019 from a Diversity Perspective' (2021) 9(2) *Social Inclusion* 338.

¹²³ J Holroyd and MJ Cull, 'Gender-Neutrality and Family Leave Policies' in L Anderson and E Lepore (eds), *The Oxford Handbook of Applied Philosophy of Language* (Oxford University Press 2024), 370–371; E Wong, J Jou, A Raub, and J Heymann, 'Comparing the Availability of Paid Parental Leave for Same-Sex and Different-Sex Couples in 34 OECD Countries' (2019) *J Soc Policy* 525, 542.

¹²⁴ G Kaufman, AM Auðardóttir, D Mazrekaj, RN Pettigrew, M Stambolis-Ruhstorfer, T Vuckovic Juros, and MA Yerkes, 'Are Parenting Leaves Available for LGBTQ Parents? Examining Policies in Canada, Croatia, France, Iceland, the Netherlands and the United Kingdom' in I Dobrotić, S Blum, and A Kosłowski (eds), *Research Handbook on Leave Policy. Parenting and Social Inequalities in a Global Perspective* (Edward Elgar 2022), 334.

gendered terminology'¹²⁵ from leave legislation, thus addressing interpretive issues in regulating access to leave and enhancing equality between different family forms in recognition of family diversity.¹²⁶ Like the current Finnish PLF, a transformative EU parenting leave model would adopt gender-neutral terminology to entitle all pregnant *people* and people who have terminated, miscarried, or given birth to *pregnancy and childbirth leave* and all *parents* to parental leave regardless of their sex or gender.¹²⁷ Moreover, it would employ gender-neutral pronouns (they/them/theirs) to refer to all parents across the PLF to mitigate against cis- and/or heteronormative presumptions about parents' sexual and/or gender identities.¹²⁸ Gender-neutralising language and terminology at EU level would eliminate obstacles to accessing parenting leave for non-normative parents and enhance their social inclusion and equal participation, while facilitating sex equality for heteronormative parents in nuclear families.¹²⁹ A gender-neutral PLF 'does not privilege heterosexual relationships or afford the preferred gender-specific parenting role only to those who meet a heteronormative ideal'¹³⁰. It therefore effectively deconstructs the heteronormative nuclear family ideal embedded in the EU PLF. A gender-neutral parenting leave model is also anti-essentialist: it 'does not import gendered assumptions about the parental role or about the gender of who takes up the role'¹³¹. It thus avoids the perpetuation of parental role stereotypes and in this way deconstructs the breadwinner-caregiver dichotomy. Yet it does not deny the gender-specificity of parental roles or devalue motherhood to those who want to

¹²⁵ HE 129/2021 vp (n 12), 91.

¹²⁶ *ibid* 49.

¹²⁷ Kela, 'Perhevapaaudistus koskee kaikenlaisia perheitä – näin erilaiset perhemuodot on huomioitu' (27.6.2023), <<https://elamassa.fi/koti-ja-perhe/perhevapaaudistus-koskee-kaikenlaisia-perheita-nain-erilaiset-perhemuodot-on-huomioitu/>>, accessed 14.3.2025 [Family leave reform concerns all kinds of families – this is how different family forms have been considered].

¹²⁸ R Dembroff and D Wodak, 'He/She/They/Ze' (2018) 5 *Ergo: An Open Access J Phil* 371, 387-388; Holroyd and Cull (n 123) 373.

¹²⁹ Wong et al (n 123) 542.

¹³⁰ Holroyd and Cull (n 123) 373.

¹³¹ *ibid* 370.

conform to these roles.¹³² Rather, using gender-neutral language ‘works to undermine the feminisation of parenting work and renders this important work more visible and appropriately valued’¹³³.

7.2.1.1 ‘Unsexing’ Pregnancy and Childbirth

Reconstructed Article 2 PWD. Definitions

For the purposes of this Directive:

(a) pregnant worker shall mean a pregnant worker who informs *their* employer of *their* condition, in accordance with national legislation and/or national practice;

(aa) worker who has recently miscarried shall mean a worker who has recently miscarried after 12 weeks but before 28 weeks of pregnancy and who had informed their employer of their pregnancy in accordance with national legislation and/or practice;

(b) worker who has recently given birth shall mean a worker who has recently given birth, including to a stillborn at or after 28 weeks gestation, within the meaning of national legislation and/or national practice and who informs *their* employer of *their* condition, in accordance with that legislation and/or practice...

To be fit for purpose as a health and safety protective instrument, pregnancy and childbirth leave under a normatively reconstructed EU PLF must include all workers with the bodily capacity for pregnancy, childbirth, and breastfeeding. By gender-neutralising the language relating to pregnancy and childbirth, the EU PLF would extend the scope of leave from pregnant women to all pregnant people and would thus begin to ‘unsex’ pregnancy and childbirth – that is, disconnect them from their sole association with women and the female sex.¹³⁴ The operational

¹³² *ibid* 374.

¹³³ *ibid* 380.

¹³⁴ J Clarke, ‘Pregnant People?’ (2019) 119 *Colum L Rev* F 173, 179; Holroyd and Cull (n 123) 380; L Karaian, ‘Pregnant Men? Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law’ (2013) 22(2) *Soc Leg Stud* 211, 211–212; H van Dijke, ‘Pregnant Transgender People: What to Expect from the Court of Justice of the European Union’s Jurisprudence on Pregnancy Discrimination’ (2022) 29(1) *Mich J Gender & L* 179, 203. I acknowledge, but do not include, David Fontana and Naomi Schoenbaum’s article ‘Unsexing Pregnancy’ (2019) 119 *Colum L Rev* 1, which argues for involving non-pregnant parents in the

criterion for legal eligibility for health- and safety-related pregnancy and childbirth leave would be the bodily process of pregnancy and/or childbirth as a matter of fact, not the worker's sex or gender identity.¹³⁵ The EU PLF would then explicitly recognise that transgender and gender non-conforming people become pregnant and give birth and ensure them health and safety protection in connection with pregnancy and childbirth on a par with cisgender women.¹³⁶ And indeed, recognising that gestation and childbirth have no gender, and deconstructing the cisnormative presumption underpinning the law, acts as the first step in de-gendering reproductive labour more broadly.¹³⁷

7.2.2 Lactation Leave for Non-Gestational Parents: Challenging the Gestation-Childbirth-Breastfeeding Continuum

Reconstructed Article 2 PWD. Definitions

For the purposes of this Directive:

(c) worker who is *lactating* shall mean *a worker who is lactating to feed an infant* within the meaning of national legislation and/or national practice and who informs *their* employer of *their* condition, in accordance with that legislation and/or practice.

Article 8a PWD. Lactation leave

1. Member States shall take the necessary measures to ensure that workers who are lactating within the meaning of Article 2 are entitled to a continuous period of lactation leave of 6 weeks after a child's birth or adoption.

2. The lactation leave stipulated in paragraph 1 must be compulsory.

caregiving labour that happens during pregnancy (eg buying a car seat) and, in the authors' view, consolidates sexual division of labour between parents prior to the child's birth. As Jessica Clarke argues, 'reconceptualizing pregnancy as a two-person experience trivializes the impacts and risks of gestation and childbirth for the body of the person carrying the child and obscures the way that pregnancy has long been a justification for the oppression of women', see (n 134) 191.

¹³⁵ Clarke (n 134) 176.

¹³⁶ *ibid* 179; Holroyd and Cull (n 123) 380.

¹³⁷ D Alaattinoğlu and A Margaria, 'Trans Parents and the Gendered Law: Critical Reflections on the Swedish Regulation' (2023) 21(2) *ICON* 603, 619, 621; S Lewis, *Full Surrogacy Now: Feminism Against Family* (Verso 2021), 24.

Access to health- and safety-related leave under EU law must also be broadened to non-gestational parents with the bodily capacity for lactating – such as a gestational parent’s female co-parent and an adoptive or commissioning parent – if they breast- or chestfeed their child after birth or adoption. The EU PLF must therefore abandon the presumption underpinning its current maternity leave arrangements that the person who gave birth and the person who comes to care for the child are always the same person. To this end, I suggest that the EU implements lactation leave which would be made available to a breast- or chestfeeding non-gestational parent. Because breast- or chestfeeding begins after the child’s birth or adoption, only the six weeks equivalent to postnatal pregnancy and childbirth leave would be available as lactation leave. To ensure adequate health and safety protection in connection with breast- or chestfeeding, the leave would be compulsory. Lactation leave would be distinct from pregnancy and childbirth leave to ensure that the person who gave birth and the person who breast- or chestfeeds the child are both protected under EU law. As such, I reject AG Kokott’s suggestion in *CD* to divide the period of maternity leave available under the PWD between a gestational surrogate and a commissioning mother in accordance with their respective ‘mothering’ roles (Chapter 5).¹³⁸ In her view, regardless of whether a commissioning mother breastfeeds a child born via surrogacy, they should be entitled to leave under the PWD once they assume a mothering role because their situation with regard to protecting the special mother-child relationship is then comparable to that of a biological mother.¹³⁹ Not only does AG Kokott conflate gestation and childbirth with motherhood by imposing a mothering role to a gestational surrogate, she also reinforces the *Hofmann* rhetoric infusing health- and safety-related leave with the maternal care objective by affording a non-gestational parent access to leave under the PWD for the purpose of facilitating mother-child bonding (Chapter 4). To uphold the distinction I have drawn between health- and safety-

¹³⁸ C-167/12 *CD v ST* [2014] ECLI:EU:C:2014:169, opinion of AG Kokott paras 73–74.

¹³⁹ *ibid* paras 46–47, 51, 61–62.

related leave and childcare-related leave in section 7.1, pregnancy and childbirth leave under the PWD would remain an exclusive entitlement of the worker who gestated and birthed the child.¹⁴⁰ A non-gestational parent's entitlement to health- and safety-related leave under the PWD would be contingent on them breast- or chestfeeding. Thus, if an adoptive or commissioning parent or a gestational mother's female partner, breast- or chestfeeds the child once they assume primary care for them, they would then be individually entitled to lactation leave. If the non-gestational parent does not breast- or chestfeed the child, regardless of their bodily capacity for doing so, they would rely on the five months of childcare-related parental leave available to them under the WLBD and would be able to utilise a month of childcare-related parental leave immediately after birth or adoption to facilitate parent-child bonding (section 7.1.3).

Implementing lactation leave would better protect the health and safety of pregnant workers, workers who have given birth, and workers who are breast- or chestfeeding under EU law. It would challenge the gestation-childbirth-breastfeeding continuum currently underpinning the PWD which posits the three categories of workers in Article 2 PWD as mutually inclusive categories and would thus recognise that gestation and childbirth as bodily processes do not necessarily continue into motherhood and motherhood as a social construct does not always derive from gestation. It would therefore effectively unsex and de-essentialise motherhood by recognising that the legal conception of motherhood can no longer be predicated on gestation and childbirth.¹⁴¹ As such, an EU PLF implementing lactation leave would be inclusive of cis- and heteronormative mothers who become mothers through non-biological or non-gestational means, non-gestational LGBTQIA+ parents, and parents in non-

¹⁴⁰ Caracciolo di Torella and Foubert (n 8) 68.

¹⁴¹ KH Averett, 'Queer Parents, Gendered Embodiment, and the De-Essentialisation of Motherhood' (2021) 22(2) *Fem Theory* 284, 291; Rosenblum (n 5) 71.

nuclear families who all participate in primary caregiving through breast- or chestfeeding. By facilitating the social inclusion of these parents, the transformative EU parenting leave model would deconstruct the heteronormative nuclear family presumption inherent in the current EU PLF and therefore facilitate substantive equality between groups of parents regardless of their sexual and/or gender identities and relationships to their children.

7.2.3 Parental Leave for Parents in Non-Nuclear Families

Reconstructed Article 5 WLBD. Parental leave

1. Member States shall take the necessary measures to ensure that *each parent* has *an individual right to parental leave of at least five months* that is to be taken before the child reaches a specified age, up to the age of eight, to be specified by each Member State or by collective agreement. [...] *Independent parents have an individual right to parental leave of at least ten months.*

1a. Up to a month of the second parent's individual parental leave entitlement may be used immediately after the child's birth parallel to the postnatal pregnancy and childbirth leave provided for the parent who gave birth under the PWD.

1b. In the case of adoptive parents and commissioning parents in a surrogacy arrangement, paragraph 1a applies simultaneously to both parents eligible for parental leave after the child's adoption or birth via a surrogacy arrangement.

2. Member States shall ensure that *parental leave cannot be transferred between parents to facilitate equal sharing of parental leave.*

2a. Without prejudice to paragraph 2, Member States shall ensure that at least one month of each parent's entitlement is transferable to any person who assumes care for the child, such as a grandparent or a social parent. This may include the leave referred to in paragraph 1a.

A reconstructed EU PLF would focus particularly on facilitating access to childcare-related parental leave by parents in non-nuclear families. In this section, I outline how a reconstructed EU PLF could accommodate the needs of one-parent and multiple-parent families on the one hand and adoptive and commissioning parents on the other. The basic principle would be that childcare-

related leave would be available to all parents of young children ‘irrespective of the way in which those children have arrived in their families and irrespective of the way in which their families are built’¹⁴².

7.2.3.1 One-Parent and Multiple-Parent Families: Transferability of Parental Leave to Non-Parents

To better suit both one-parent and multiple-parent families, the scope of workers eligible for parental leave under EU law should be extended beyond the two legal parents who are the presumed primary caregivers of the child.¹⁴³ That is, for the purposes of deconstructing the heteronormative nuclear family and facilitating substantive equality between groups of parents beyond this ideal, the conception of a parent underpinning the EU PLF should not be limited to legal parents but should be a more functional conception to reflect de facto parenting relationships existing between children and non-parents.¹⁴⁴ While each parent’s individual entitlement to parental leave under the WLBD would be non-transferable between two legal parents of a child to incentivise men’s use of parental leave and deconstruct the breadwinner-caregiver dichotomy (section 7.1.3), parental leave would be transferable from either or both parents to a non-parent who takes leave from work to assume primary responsibility for the child’s care. Here, the reconstructed EU PLF would draw from the Finnish and Swedish PLFs: while both reinforce the presumption that the child has at least one but no more than two legal parents, they enable all legal parents to transfer some part of parental leave to people who are not their child’s legal parents but participate in parental care as social parents and legal guardians.

¹⁴² Foubert and Imamović (n 61) 318.

¹⁴³ J Jou, E Wong, D Franken, A Raub, and J Heymann, ‘Paid Parental Leave Policies for Single-Parent Household: An Examination of Legislative Approaches in 34 OECD Countries’ (2020) 23(2) *Community Work Fam* 184, 195.

¹⁴⁴ Holroyd and Cull (n 123) 377; Kaufman et al (n 124) 334; D Lima, ‘Three Models for Regulating Multiple Parenthood: A Comparative Perspective’ in K Duden and D Wiedemann (eds), *Changing Families, Changing Family Law in Europe* (Intersentia 2024), 102.

Under both PLFs, independent parents are individually entitled to the full parental leave entitlement attaching to a child: 320 working days in Finland, 480 days in Sweden.¹⁴⁵ They can also transfer up to 126 working days and 90 days of parental leave, respectively, to a person who is not the child's legal parent.¹⁴⁶ But whereas in Sweden this includes, for instance, a relative or another person close to the child, in Finland the transferring is in practice limited to a legal parent's partner who is not the child's parent.¹⁴⁷ Under a reconstructed EU PLF, independent parents would similarly be entitled to the full ten months of parental leave available under the WLBD. They would then be able to transfer *at least* one month, and up to five months, of parental leave to a non-parent, whether a grandparent, a friend, or a non-parent partner. A minimum transferable period of one month would be equivalent to the period of parental leave available to second parents in connection with birth. This would ensure that independent gestational parents, in particular, could rely on a family member's or friend's support in connection with their child's birth. A similar approach is found in Sweden where a non-parent can also take the ten-day parental leave in connection with a child's birth to support an independent parent during and after childbirth.¹⁴⁸ Facilitating non-parents' access to parental leave under the WLBD through independent parents transferring them all or part of a second parent's entitlement would allow one-parent families to rely on a wider social support system in caring for their children.¹⁴⁹ It would subsequently facilitate

¹⁴⁵ Sickness Insurance Act 2004 (n 41) ch 9, s 6 (Finland); Social Insurance Code 2010 (n 15) ch 12, s 14 (Sweden).

¹⁴⁶ Sickness Insurance Act 2004 (n 41) ch 9, s 7 (Finland); Social Insurance Code 2010 (n 15) ch 12, s 17a (Sweden).

¹⁴⁷ Försäkringskassan, 'Föräldraledig med någon annans barn', <www.forsakringskassan.se/privatperson/foralder/foraldrapenning/foraldraledig-med-nagon-annans-barn>, accessed 16.3. 2025 [On parental leave with someone else's child]; Kela, 'Perhevapaaudistus koskee kaikenlaisia perheitä' (n 127).

¹⁴⁸ Försäkringskassan, '10-dagar vid barns födelse', <www.forsakringskassan.se/privatperson/foralder/10-dagar-vid-barns-fodelse>, accessed 17.4.2025 [10 days in connection with child's birth]; Social Insurance Code 2010 (n 15) ch 13, ss 10–11.

¹⁴⁹ K Arabadjieva, 'Reshaping the Work-Life Balance Directive with Covid-19 Lessons in Mind', ETUI Working Paper 1/2022 (ETUI 2022), 26; Jou et al (n 143) 195.

independent parents' labour market participation, distribute the childcare burden, and support a better work-life balance, thus addressing the 'triple bind'¹⁵⁰ of single parents.

To facilitate access to childcare-related leave by multiple-parent families, the Finnish PLF enables each legal parent to transfer up to 63 working days of parental leave to their partner and/or the other legal parent's partner who are not the child's legal parents.¹⁵¹ In practice, parental allowance can therefore be paid to three or four different people who each contribute to parenting the child.¹⁵² Similarly, since 2024, each legal parent in Sweden has been able to transfer up to 45 parental allowance days not only to parents' partners but to relatives or any close adults who take leave from work to care for the child.¹⁵³ A reconstructed EU PLF would therefore enable each legal parent – not only independent parents – to transfer one month of their individual five-month entitlement to parental leave to at least one other person who ceases work to assume a parental caring role for the child. It would be the intention to parent the relevant child, not a gestational and/or biological link to the child, which would trigger this derivative entitlement to parental leave.¹⁵⁴ This would facilitate access to parental leave by multiple parents in reconstituted families and LGBTQIA+ co-parenting families. It would thus equalise access to parenting leave between heteronormative nuclear families and non-normative families at EU level. It would, of course, also benefit

¹⁵⁰ R Nieuwenhuis and LC Maldonado, 'The Triple Bind of Single-Parent Families: Resources, Employment and Policies' in R Nieuwenhuis and LC Maldonado (eds), *The Triple Bind of Single-Parent Families. Resources, Employment and Policies to Improve Well-Being* (Policy Press 2018).

¹⁵¹ Kela, 'Perhevapaaudistus koskee kaikenlaisia perheitä' (n 127); Sickness Insurance Act 2004 (n 41) ch 9, s 7.

¹⁵² Kela, 'Perhevapaaudistus koskee kaikenlaisia perheitä' (n 127).

¹⁵³ Försäkringskassan, 'Fler dubbeldagar och nya regler för vem som kan få föräldrapenning', <www.forsakringskassan.se/privatperson/foralder/foraldrapenning/fler-dubbeldagar-och-nya-regler-for-vem-som-kan-fa-foraldrapenning>, accessed 14.11.2024 [More double-days and new rules on who can receive parental allowance]; Social Insurance Code 2010 (n 15) ch 12, s 17a-b.

¹⁵⁴ Caracciolo di Torella and Foubert (n 8) 58.

parents in two-parent nuclear families by extending the support network available to parents in the caring of their young child and balancing work and family responsibilities to grandparents and beyond. As such, it would support the deconstruction of the heteronormative nuclear family in recognition of parenting as socially necessary labour which ought to be the responsibility of the wider community, not only of the biological and/or legal parents.¹⁵⁵

7.2.3.2 Adoptive and Commissioning Parents' Access to Parental Leave

As Kaufman et al. recommend, the reconstructed EU PLF would remove differences in access to parenting leave at EU level between biological and/or gestational parents on the one hand and adoptive and commissioning parents on the other.¹⁵⁶ Whereas adoptive and biological parents are equally entitled to parental leave under the WLBD, commissioning parents appear to not be. Under a reconstructed EU PLF, they would become entitled to parental leave on a par with adoptive and biological parents. Moreover, adoptive parents of all sexes and genders currently lack access to leave equivalent to paternity leave in connection with adoption whereby two adoptive parents also cannot take leave together in the time immediately following the child coming into their care. Here, EU law would reflect the Nordic PLFs which allow two parents, even where neither is the gestational parent who gave birth to the child, to take leave simultaneously to enable parents to care for their child together immediately after birth or adoption. In Finland, two parents can be on parental leave together for up to 18 working days.¹⁵⁷ In Sweden, two parents can first share the 10 parental allowance days available to second parents in connection with birth or adoption and then use 60

¹⁵⁵ Fredman, 'A Difference with Distinction' (n 5) 123; Holroyd and Cull (n 123) 381.

¹⁵⁶ Kaufman et al (n 124) 334.

¹⁵⁷ HE 129/2021 vp (n 12) 130-131; Sickness Insurance Act 2004 (n 41) ch 9, s 8.

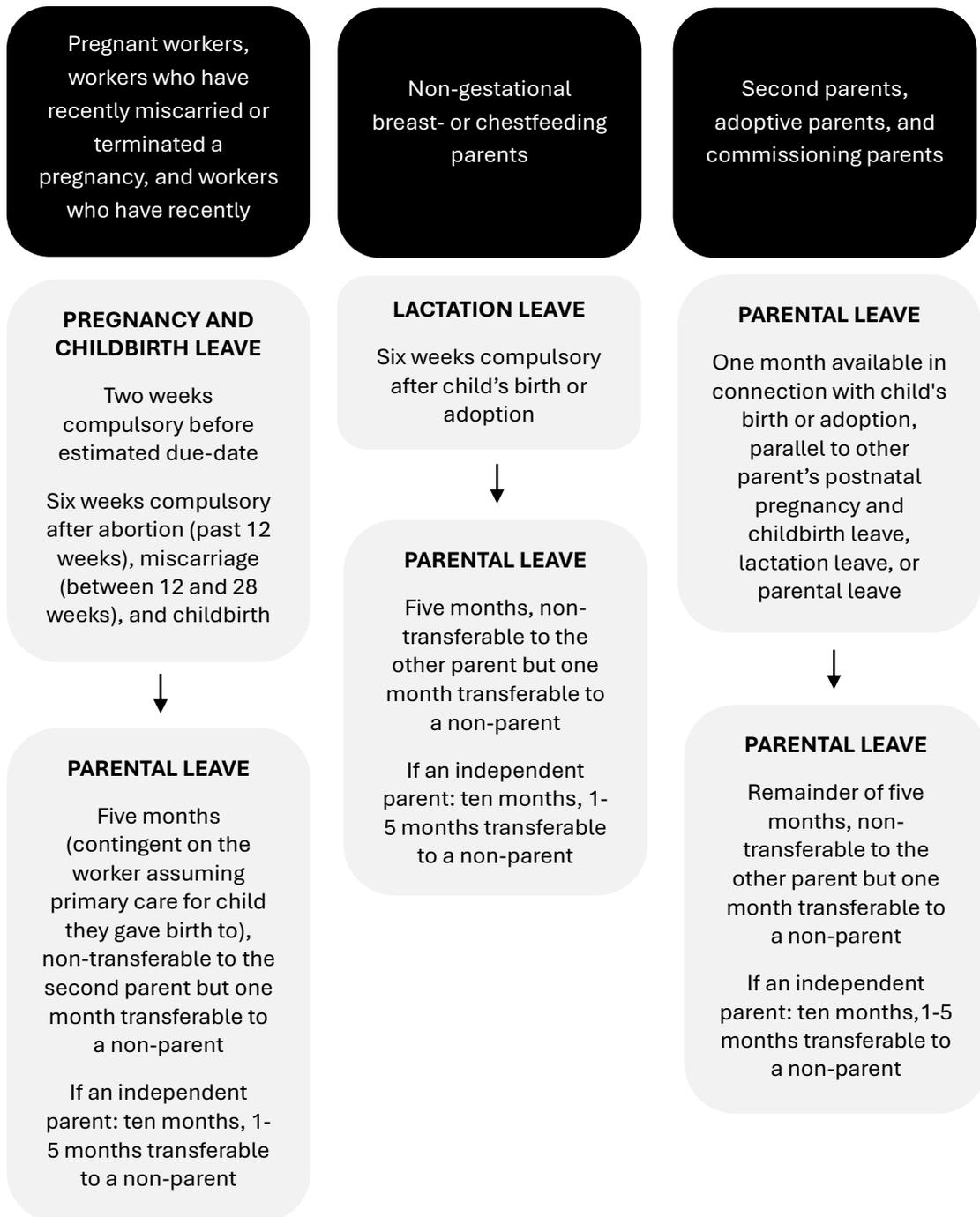
parental allowance days at the same time during the child's first 15 months of life or in the 15 months following an adopted child coming into their care.¹⁵⁸

This principle would be modelled in the reconstructed EU PLF: adoptive and commissioning parents, regardless of sex or gender, could use the first month of parental leave available to them under the WLBD at the same time immediately after they assume care for the adopted child or the child born via a surrogacy arrangement. If an adoptive or commissioning parent breast- or chestfeeds the child, they would additionally be entitled to six weeks of compulsory lactation leave (section 7.2.2). Extending the scope of legal eligibility for parental leave under EU law to adoptive and commissioning parents in practice would decentralise gestational and biological conceptions of parenthood and consequently enhance the social inclusion of parents who rely on alternative – that is, non-biological and/or non-gestational – routes to parenthood.¹⁵⁹ Social inclusion through participation in legally regulated paid leave policies on a par with normative parents would particularly benefit LGBTQIA+ parents: it would contribute to de-stigmatising and hence normalising forms of parenthood which do not conform to the heteronormative nuclear family ideal. It would therefore facilitate substantive equality between groups of parents beyond the heteronormative nuclear family regardless of parent's sexual and/or gender identities, particularly at the intersections of sex, gender, and sexuality.

¹⁵⁸ Försäkringskassan, 'Föräldralediga tillsammans – dubbeldagar' (n 84); Försäkringskassan, '10-dagar vid barnets adoption' (n 22); Social Insurance Code 2010 (n 15) ch 12, s 4a, ss 12–13.

¹⁵⁹ Moring and Lammi-Taskula (n 122) 339.

Table 8. Structure of the EU PLF After Section 7.2 Reconstruction



7.3 Deconstructing the Devaluation of Pregnancy and Parenthood

I have argued in Chapter 6 that rather than deconstructing the sexual division of labour within the family, the social and economic devaluation of pregnancy and parenthood underpinning the PWD and the WLBD perpetuates this division of labour and thus undermines the EU PLF's ability to facilitate substantive equality between parents. Like Fredman, I view that 'it is necessary to make a conscious and explicit decision on the social value of parenthood and to formulate legal rules to reflect this'¹⁶⁰. In this section, I therefore reconstruct the EU PLF in a way which explicitly recognises pregnancy and parenthood as productive labour with economic and social value.¹⁶¹ Approaching reconstruction through Fredman's redistributive dimension, I posit that attributing monetary value to pregnancy and parenthood through high income replacement attaching to pregnancy and childbirth leave, lactation leave, and parental leave (as devised in sections 7.1 and 7.2) would convey that these forms of reproductive labour are socially valued and would redistribute both reproductive labour and available resources between parents to support the deconstruction of the sexual division of labour within the family.¹⁶² In practice, social value can be conveyed by affording the gestating and parenting labour undertaken during maternity, paternity, and parental leave high economic value, namely by setting generous income replacement levels across the leave system.¹⁶³ I demonstrate this by referring to the income replacement levels under the Finnish and Swedish PLFs.¹⁶⁴ While I acknowledge that various legal scholars have suggested that reproductive labour must be brought under the remit of work under EU law, along with a complete restructuring of the labour market, in order to deconstruct the public-private

¹⁶⁰ Fredman, 'A Difference with Distinction' (n 5) 107.

¹⁶¹ *ibid.*

¹⁶² Arabadjieva (n 149) 20.

¹⁶³ Fredman, *Women and the Law* (n 8) 208.

¹⁶⁴ Haas and Rostgaard (n 53) 182, 186–188.

dichotomy and the sexual division of labour – and agree with the argument – discussing this in further detail falls outwith the scope of this thesis.¹⁶⁵

7.3.1 Full Pay for Pregnancy and Childbirth Leave and Lactation Leave

Reconstructed Article 11 PWD. Employment rights

In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that: [...]

2. in the case referred to in Articles 8 *and 8a*, the following must be ensured: [...]

(b) maintenance of *full pay or entitlement to an allowance equivalent to full pay* for workers within the meaning of Article 2

3. the allowance referred to in point 2(b) *may not be subject to any income threshold or ceiling laid down under national legislation*

Recognition of the social value of pregnancy requires the affirmation of women's biological difference from men by means of paid health- and safety-related leave in a way which does not disadvantage them because of their bodily capacity for pregnancy, childbirth, and breastfeeding.¹⁶⁶ Increasing the income replacement level for the EU's current maternity leave entitlement under the PWD, which goes beyond what is medically necessary for health and safety protection by infusing health- and safety-related leave with the maternal care objective, would only incentivise women to take long leave while falling into the maternal care trap.¹⁶⁷ If, however, leave is limited to what is necessary for health and safety protection as I have proposed in section 7.1, increasing pay will affirm women's biological

¹⁶⁵ See eg Arabadjieva (n 149) 33-34; E Caracciolo di Torella, 'Childcare, Employment and Equality in the EC: First (False) Steps of the Court' (2000) 25 EL Rev 310, 316; D Elson, 'Recognize, Reduce and Redistribute Unpaid Care Work: How to Close the Gender Pay Gap' (2017) 26(2) New Labor Forum 52, 58; I Moebius and E Szyszczak, 'Of Raising Pigs and Children' (1998) 18(1) YEL, 153-154.

¹⁶⁶ Fredman, 'Reversing Roles' (n 5) 445; Young, *Justice and the Politics of Difference* (n 10) 168, 175-176.

¹⁶⁷ Foubert (n 8) 257.

difference from men without perpetuating the female primary caregiver stereotype. To deconstruct the devaluation of pregnancy under the PWD, the reconstructed EU PLF must therefore increase the income replacement level beyond the 66% threshold which currently represents the EU's only concrete reference for 'well-paid' parenting leave (Chapter 6). It must also detach the income replacement attaching to pregnancy and childbirth leave from the national sick pay standard. Here, I refer to the pregnancy- and childbirth-related allowances found in Finland and Sweden which demonstrate how PLFs can convey the social value afforded to pregnancy and childbirth through generous income replacement.

Similarly to the EU PLF, leave allowances in Finland and Sweden are conceptually linked to national sick pay. In referring to the Nordic PLFs, I do not endorse the analogy between pregnancy and sickness – rather I explicitly reject it (see Chapter 6) – but simply highlight that Finland and Sweden afford higher economic value to pregnancy and childbirth than the EU's 66% standard and the average sick pay across the EU. In Sweden, antenatal pregnancy leave and statutory maternity leave are both compensated at national sick pay level amounting to 77.6% of the worker's income or at a set basic level of SEK 250 (approx. EUR 22) per day for people without sickness benefit qualifying income or with income below a minimum threshold, like students and unemployed parents.¹⁶⁸ In Finland, antenatal special pregnancy leave is similarly compensated at national sick pay level corresponding to 70% income replacement or at a flat rate of EUR 31.99 per day.¹⁶⁹ To minimise the loss of income during pregnancy leave,

¹⁶⁸ Försäkringskassan, 'Graviditetspenning', <www.forsakringskassan.se/privatperson/foralder/vantar-barn/graviditetspenning>, accessed 14.5.2025 [Pregnancy allowance]; Social Insurance Code 2010 (n 15) ch 10, ss 10–11.

¹⁶⁹ Kela, 'Kuinka paljon voit saada vanhempainrahaa?', <www.kela.fi/vanhempainvapaalla#kuinka-paljon-vanhempainrahaa>, accessed 20.4.2025 [How much parental allowance can you get?]; Sickness Insurance Act 2004 (n 41) ch 11, s 1.

pregnancy allowance is paid at a higher 90% income replacement level.¹⁷⁰ There is a symbolic association between the high income replacement level and the social value Finland and Sweden place on pregnancy and childbirth as forms of reproductive labour.¹⁷¹ However, it is important to note that parenting allowances in both Finland and Sweden are subject to relatively low income ceilings – e.g. parental income above EUR 50,606 per annum reduces pregnancy allowance to 32.5% replacement level in Finland¹⁷² – which hinders access to well-paid leave by moderate- and high-income parents.¹⁷³ In practice, the income replacement level may therefore be lower than the above suggests.¹⁷⁴ While Nordic labour politics otherwise fall beyond the scope of this thesis, I must then observe that, since the 1990s fixed income ceilings combined with increasing income levels have caused leave allowances to become increasingly inadequate, whereby allowances have become supplemented through collective agreements.¹⁷⁵ The loss of income by Finnish and Swedish parents on leave is mitigated by collective agreements, particularly in the public sector and in female-dominated occupational areas, which make employers liable to cover the difference between the worker’s income and statutory social insurance-based leave allowance.¹⁷⁶ Collective agreements may thus increase the pay received by

¹⁷⁰ Sickness Insurance Act 2004 (n 41) ch 11, s 1.

¹⁷¹ Arabadjieva (n 149) 20.

¹⁷² Sickness Insurance Act 2004 (n 41) ch 11, s 1.

¹⁷³ European Commission, ‘The transposition of the Work-Life Balance Directive in EU Member States’ (n 12) 45; A Haataja, ‘Pohjoismainen ansaitsija-hoivaajamalli: Ruotsin ja Suomen perhevapaajärjestelmän vertailu’, *Sosiaali- ja terveysministeriön selvityksiä* 43 (Yliopistopaino 2006) [Nordic earner-carer model: Comparing Swedish and Finnish family leave systems], 26; J Javornik and A Kurowska, ‘Work and Care Opportunities under Different Parental Leave Systems: Gender and Class Inequalities in Northern Europe’ (2017) 51(4) *Soc Policy Admin* 617, 630.

¹⁷⁴ European Commission, ‘The transposition of the Work-Life Balance Directive’ (n 12) 45.

¹⁷⁵ J Julén Votinius, ‘Collective Bargaining for Working Parents in Sweden and its Interaction with the Statutory Benefit System’ (2020) 36(3) *IJCLLR* 367, 368.

¹⁷⁶ A-Z Duvander, ‘How Long Should Parental Leave Be? Attitudes to Gender Equality, Family, and Work as Determinants of Women’s and Men’s Parental Leave in Sweden’ (2014) 35(7) *J Fam Issues* 909, 914, 921; U Hämäläinen and P Takala, ‘Isien perhevapaat ja tasa-arvo’ in R Lilja, R Asplund, and K Kauppinen (eds), *Perhevapaavalinnat ja perhevapaiden kustannukset sukupuolten välisen tasa-arvon jarruina työelämässä?*, *Sosiaali- ja terveysministeriön selvityksiä* 69 (Yliopistopaino 2007), 38 [Fathers’ family leaves and sex equality]; Julén Votinius, ‘Collective

workers on leave, particularly during maternity leave: in Sweden, sick pay level parental allowance frequently increases to 90%, whereas in Finland workers on pregnancy leave often receive full pay.¹⁷⁷ The implication is that even a high statutory income replacement level of 80-90%, if subject to income-related eligibility criteria, may not sufficiently redress socio-economic disadvantages associated with pregnancy and childbirth and that only full and unconditional income replacement will do so. This said, I recognise that the Commission has previously deemed full pay income replacement for maternity pay in EU law unrealistic due to the high costs it would impose on the Member States.¹⁷⁸

Nevertheless, I argue that under the reconstructed EU PLF, the pregnancy and childbirth leave proposed in section 7.1.2 and the lactation leave proposed in section 7.2.2 should be compensated at full pay.¹⁷⁹ In order to facilitate access to leave by all working parents, no minimum income threshold or maximum ceiling could be imposed under national law.¹⁸⁰ This approach would detach maternity pay from the sickness analogy and appropriately affirm the biological difference between the sexes without stigmatising pregnancy, childbirth, and breast- or chestfeeding.¹⁸¹ It would also render visible both the disadvantages women

Bargaining' (n 175) 368, 372, 379; A Miettinen and A Rotkirch, *Kolme myyttiä perhevapaista. Pohjoismaiden vanhempainvapaat vertailussa* (Agenda 2017) [Three myths about parental leaves. Comparing parental leaves in the Nordic states], 32.

¹⁷⁷ Duvander, 'How Long Should Parental Leave Be?' (n 176) 914; HE 129/2021 vp (n 12) 34; Hämäläinen and Takala (n 176) 38; Julén Votinius, 'Collective Bargaining' (n 175) 374.

¹⁷⁸ Commission of the European Communities, 'Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding' (Impact Assessment Report) SEC (2008) 2596, 37.

¹⁷⁹ Fredman, *Women and the Law* (n 8) 208; Javornik and Kurowska (n 173) 630; C McGlynn, 'Webb v EMO: A Hope for the Future?' (1995) 46(1) NILQ 50, 56.

¹⁸⁰ A flat rate allowance would have to be adopted at national level to provide a non-income-related allowance for parents who are not economically active. This should be unrelated to the national sick pay.

¹⁸¹ McGlynn (n 179) 56.

experience because of their reproductive capacity and their social and economic contribution through the labour of pregnancy and childbirth.¹⁸² Namely, full pay during pregnancy and childbirth leave would ensure that time away from work on account of pregnancy and childbirth does not result in financial loss and subject gestating parents to poverty. It would therefore effectively ensure that the objective of pregnancy and childbirth leave and lactation leave – which is health and safety protection – is not undermined by financial insecurity which would cause workers to return to work before it is medically recommended to do so.¹⁸³ It would also allow workers to retain their financial independence during leave rather than rendering them dependent on a partner's income, which supports a more equal division of labour between the sexes and challenges the breadwinner-caregiver dichotomy.¹⁸⁴ Financial independence has also been shown to reduce the risk of physical, sexual, and psychological violence within the home.¹⁸⁵ Deconstructing the devaluation of pregnancy through the attribution of both economic and social value to pregnancy and childbirth – namely by way of full income replacement during pregnancy and childbirth leave and lactation leave – under EU law would consequently contribute to the deconstruction of the sexual division of labour within the family and facilitate substantive equality between parents.

¹⁸² *ibid.*

¹⁸³ Eg M Stanfors, *Mellan arbete och familj. Ett dilemma för kvinnor i 1900-talets Sverige* (SNS Förlag 2007) [Between work and family. A problem for women in 20th century Sweden], 244–245.

¹⁸⁴ Fraser, 'After the Family Wage' (n 5) 597.

¹⁸⁵ EIGE, 'Gender Equality Index 2024 – Sustaining momentum on a fragile path' (Publications Office of the European Union 2024), 23, 63.

7.3.2 Full Pay for Parental Leave

Reconstructed Article 8 WLBD. Payment or allowance

1. In accordance with national circumstances, such as national law, collective agreements or practice, and taking into account the powers delegated to the social partners, Member States shall ensure that *workers who exercise their right to parental leave receive a payment or an allowance in accordance with paragraph 3 of this Article.*

2. [removed]

3. With regard to parental leave, to facilitate the take-up of parental leave by both parents, such *payment or allowance shall guarantee an income equivalent to the worker's full pay and may not be subject to any income threshold or ceiling laid down in national law.*

Recognition of the social value of parenthood, or the deconstruction of its devaluation as a form of reproductive labour, requires the universalisation of currently feminine patterns of caregiving and, hence, the de-gendering of parenthood.¹⁸⁶ To achieve this, parents must share equal responsibility for childcare, which the inadequate income replacement level for paternity and parental leave under the WLBD fails to facilitate. From a redistributive perspective, facilitating participative parenting requires increasing the income replacement attaching to parental leave. The relatively generous income replacement level under the Finnish and Swedish PLFs 'sends a strong message that parent care is socially valued'¹⁸⁷ whereby I return here to discuss the paternity and parental leave related allowances in the two Nordic countries. Recognising that the financial cost of parenting leave is a key determinant of leave use for both parents, and particularly for fathers, Finland and Sweden have adopted higher income replacement rates and various financial incentives to encourage higher leave take-up.¹⁸⁸ In Sweden, allowance for the ten-day birth or

¹⁸⁶ Elson (n 165) 58; Fredman, 'A Difference with Distinction' (n 5) 121; Fredman, 'Reversing Roles' (n 5) 442; Fredman, *Women and the Law* (n 8) 207.

¹⁸⁷ Haas and Rostgaard (n 53) 187.

¹⁸⁸ Duvander, 'How Long Should Parental Leave Be?' (n 176) 922–923; Fredman, *Women and the Law* (n 8) 221; Miettinen and Rotkirch (n 176) 54.

adoption leave equivalent to paternity leave is paid at national sick pay level (77.6% income replacement) or at the basic level of SEK 250 per day.¹⁸⁹ The level of parental allowance varies: the first 90 days per parent are also paid at national sick pay or basic level and of the remaining 150 days per parent, 105 are paid at sick pay or basic level and 45 at a minimum level of SEK 180 (approx. EUR 16) per day.¹⁹⁰ In Finland, the first 16 working days of parental leave for each parent – corresponding to paternity leave for the second parent and the first period after pregnancy leave for the parent who gave birth – are paid at 90% income replacement level to act as a specific financial incentive for fathers to take leave.¹⁹¹ After this, parental allowance is reduced to the national sick pay level (approx. 70% income replacement) or the minimum flat rate of EUR 31.99 per day.¹⁹² While conveying to men that parental care during leave is socially valued and that the father-child relationship is as valuable as the mother-child relationship, high income replacement level minimises the financial loss associated with using father-specific leave entitlements, such as paternity leave and fathers' quotas.¹⁹³ The economic value attributed to parental care in the two Nordic PLFs therefore directly promotes participative parenting, redistributes parental care from the mother to the father, and hence contributes to the de-gendering of parenthood and the deconstruction of the sexual division of labour within the family. Yet the Nordic parenting leave policies have not led to *equal* sharing of parenting leave: women continue to take the majority of parental allowance days (section 7.1.3.2).¹⁹⁴ Even in Finland and Sweden, the financial

¹⁸⁹ Försäkringskassan, '10-dagar vid barns födelse' (n 148); Social Insurance Code 2010 (n 15) ch 13, s 33.

¹⁹⁰ Social Insurance Code 2010 (n 15) ch 12, ss 15, 19, 23-24.

¹⁹¹ HE 129/2021 vp (n 12) 58; Sickness Insurance Act 2004 (n 41) ch 11, s 1.

¹⁹² Kela, 'Kuinka paljon voit saada vanhempainrahaa?' (n 169); Sickness Insurance Act 2004 (n 41) ch 11, s 1.

¹⁹³ Duvander et al (n 81) 199–200; Haas and Rostgaard (n 53) 182, 187; Ma et al (n 112) 372–373; van Belle (n 99) 13.

¹⁹⁴ A-Z Duvander, 'Svensk föräldraförsäkrings utveckling och konsekvenser' (2017) 34(1) *Søkelys på arbetslivet* 126 [Development and consequences of Swedish parental insurance], 127; Duvander and Ruspini (n 113).

cost of leave represents a disincentive for men's use of leave and the remaining gender gap in the uptake of parental leave perpetuates the unequal division of reproductive labour between parents.¹⁹⁵

Therefore, providing further financial incentives in EU law for men to take more childcare-related leave is crucial in order to deconstruct the sexual division of labour and facilitate substantive equality between parents. In *Syndicat*, AG Bobek observed that a central objective of EU social policy is transforming the sexual division of labour by 'removing, as far as possible, the economic incentives petrifying certain established social conventions into law'¹⁹⁶. In my view, the only conceivable transformative policy solution which facilitates men's participative parenting, and begins to de-gender parenthood, is to increase the income replacement level for the five months of parental leave proposed in section 7.1 to full pay. The same has been suggested by various policy scholars.¹⁹⁷ From a redistributive perspective, the one concern with full pay during parental leave is that high income replacement, like that in the Nordics, is known to reinforce the breadwinner-caregiver dichotomy by encouraging mothers to stay at home for a longer period.¹⁹⁸ Health- and safety-related leave followed by long childcare-related leave, of course, only reinforces the motherhood penalty.¹⁹⁹ I posit that the solution lies in the combination of full pay with non-transferable, parent-specific parental leave as proposed in section 7.1.3.2. The non-transferability of parental leave limits the total period of leave available to women, thus mitigating the concern about full pay causing women

¹⁹⁵ Duvander, 'How Long Should Parental Leave Be?' (n 176) 922–923; Duvander, 'Svensk föräldraförsäkrings utveckling och konsekvenser' (n 194) 127.

¹⁹⁶ C-463/19 *Syndicat CFTC v CPAM de Moselle and Others* ECLI:EU:C:2020:93, opinion of AG Bobek para 55.

¹⁹⁷ Arabadjieva (n 149) 23; Javornik and Kurowska (n 173) 626.

¹⁹⁸ M Rønsen and M Sundström, 'Family Policy and After-Birth Employment Among New Mothers – A Comparison of Finland, Norway and Sweden' (2002) 18 *Eur J Popul* 121, 140.

¹⁹⁹ Eg M de la Corte Rodriguez, 'Child-Related Leave and Women's Labour Market Outcomes: Towards a New Paradigm in the European Union' (2018a) 40(3) *JSWFL* 376, 383–384.

to take disproportionately long leave. This strategy of non-transferable parental leave on full pay would effectively deconstruct both sides of the breadwinner-caregiver dichotomy.²⁰⁰ On the one hand, by redistributing parental responsibilities between the sexes, full pay in combination with non-transferable leave would promote women's return to work after having children and redress the socio-economic disadvantages associated with becoming a parent. On the other hand, by minimising disincentives to doing so, it would induce men to take childcare-related leave and to 'become more like most women are now – that is, people who do primary care work'²⁰¹. It would detach parenthood and parental care from their socially constructed association with women and therefore de-gender parenthood. Rather than the breadwinner-caregiver dichotomy, the EU PLF would become normatively underpinned by the dual earner-carer family model in which parenthood is the equal responsibility of both sexes.²⁰²

Moreover, guaranteeing full pay during parental leave would make leave more accessible to parents in different socio-economic positions, including structurally socio-economically disadvantaged groups of parents, like single mothers and LGBTQIA+ parents. It would hence also facilitate the de-stigmatisation of non-normative parenthood and the social inclusion of these parents. Parental leave on full pay under EU law would thus effectively facilitate substantive equality between the sexes and between groups of parents regardless of their sexual and/or gender identity and family form from each of the three analytical perspectives offered in this thesis: it would deconstruct the devaluation of parenthood, the breadwinner-caregiver dichotomy, and the heteronormative nuclear family. This said, I recognise that fully paid parental leave would continue to privilege parents in secure employment relationships under EU law and therefore, for instance, native parents over immigrant parents.

²⁰⁰ Fredman, 'Reversing Roles' (n 5) 457–458.

²⁰¹ Fraser, 'After the Family Wage' (n 5) 611.

²⁰² *ibid* 611, 613.

And while fully paid parental leave would not address the gender pay gap as a redistributive inequality between women and men, enhancing the economic and social value of parenthood, redistributing childcare from women to men, and de-gendering parenthood by universalising and gender-neutralising the feminine pattern of caregiving would support the bridging of this gap with further employment-related legal and policy measures.²⁰³

Conclusion

In this chapter, I have made an original contribution to socio-legal parenting leave policy research by devising a transformative EU parenting leave model (Appendix 7). This model facilitates substantive equality between the sexes and between parents regardless of their sexual and/or gender identities and family forms by deconstructing the sexual division of labour within the family. It does so by deconstructing the three norms underpinning the sexual division of labour I identified in Chapter 3. To deconstruct the breadwinner-caregiver dichotomy, the model makes a clear distinction between two types of leave. Compulsory pregnancy and childbirth leave would become available to pregnant workers before their estimated due-date and after miscarriage, abortion, and childbirth for health and safety protection. Childcare-related non-transferable parental leave would become available to workers who have given birth after pregnancy and childbirth leave and to second parents immediately after their child's birth. Structured in this way, the EU PLF would avoid the essentialisation and conflation of biological and socially constructed differences between the sexes. It would, on the one hand, adequately protect the health and safety of workers with the bodily capacity for pregnancy and childbirth as a legitimate difference between the sexes without conflating this capacity with the maternal care ideal. And on the other hand, it would universalise childcare as the parental norm to de-gender

²⁰³ Elson (n 165) 58.

the ‘vision of parenting that boxes women into primary childcare and men out of it’²⁰⁴ so that each parent ‘[is] able to choose a parenting role, whether gendered or not’²⁰⁵.

To deconstruct the heteronormative nuclear family ideal underpinning the EU PLF, the model facilitates access to parenting leave by non-normative parents and enhances their social inclusion as well as solidarity between parents. It operates on gender-neutral language to ensure that, regardless of their sex, gender, and sexuality, every worker with the bodily capacity for pregnancy, childbirth, and lactation is entitled to leave for the protection of their health and safety in connection to these bodily processes and that every worker has access to parental leave to care for their child. To this end, in addition to the envisioned pregnancy and childbirth leave, I have proposed the introduction of a lactation leave to support non-gestational breast- or chestfeeding. Furthermore, the transformative model explicitly extends the scope of legal eligibility for parental leave under EU law to adoptive and commissioning parents and to non-parents in order to de-centralise the gestational and biological conception of parenthood underlying the EU PLF, therefore enhancing the social inclusion of parents who rely on alternative routes to parenthood (e.g. LGBTQIA+ parents) and of one-parent and multiple-parent families. Non-normative parents’ access to paid parenting leave on a par with normative parents would deconstruct the heteronormative nuclear family particularly by normalising non-normative parenthood in the EU. And by broadening the imagery associated with parenthood and offering alternatives to the gendered parental role stereotypes underpinning the heteronormative nuclear family, it would contribute to the de-gendering of parenthood and transformation of the sexual division of labour within the family.

²⁰⁴ Rosenblum (n 5) 80.

²⁰⁵ *ibid* 95.

Lastly, to deconstruct the devaluation of pregnancy and parenthood, the transformative EU parenting leave model I have devised in this chapter explicitly recognises pregnancy and parenthood as forms of reproductive labour with economic and social value. It sets income replacement levels for pregnancy and childbirth leave, lactation leave, and parental leave at full pay. Receiving full pay during leave would minimise the financial loss associated with pregnancy, childbirth, and breast- or chestfeeding while ensuring adequate health and safety protection for workers with these bodily capacities. While conveying that parenthood is socially valued, it would also minimise the financial loss associated with becoming a parent and caring for one's child, thus incentivising men's use of parenting leave. The transformative EU parenting leave model would subsequently facilitate participative parenting regardless of sex or gender and begin to de-gender parenthood, thus further facilitating the deconstruction the sexual division of labour within the family.

CHAPTER 8. CONCLUSION

In this thesis, I have critiqued the EU PLF, constituted of the PWD and the WLBD, against Sandra Fredman's four-dimensional conceptualisation of substantive equality which I have theoretically refined and turned into an analytical method for legal and policy critique and reconstruction. I have demonstrated that rather than facilitating substantive equality between the sexes and between parents with different sexual and/or gender identities and in different types of families, the EU PLF reinforces inequalities between parents by perpetuating the sexual division of labour within the family. I have then reconstructed it by devising a transformative parenting leave model for the EU which deconstructs the sexual division of labour within the family and thus facilitates substantive equality between the sexes and between parents regardless of their sexual and/or gender identity and family form. In section 8.1 of this concluding chapter, I reiterate my original contributions to socio-legal parenting leave policy research and feminist legal theory. In section 8.2, I summarise the transformative EU parenting leave model I have devised in this thesis by connecting the legal and policy reconstruction I have envisioned in Chapter 7 (Appendices 7-8). I also reflect on how this model deconstructs the sexual division of labour within the family to facilitate substantive equality in the EU. In section 8.3, I reflect on the scope and limitations of this thesis and make suggestions for future research.

8.1 Summary of Original Contributions

In Chapter 1, I identified that prior socio-legal parenting leave policy literature has concluded that the EU PLF reinforces the sexual division of labour within the family and that to facilitate substantive equality between the sexes and between parents regardless of sexual and/or gender identity and family form, the EU PLF

must affect transformation of this division of labour.¹ To this end, the literature has not, however, offered transformative, systematic, and reasoned reform recommendations which explain the meaning of equality and inequality between parents and evaluate how legal and policy reform would facilitate substantive equality between parents at a normative level.² It has not offered a normative rethinking of parenting leave as a means of transforming the sexual division of labour within the family. My primary research question therefore asked how the EU PLF can be reconstructed in a way which facilitates substantive equality between parents.

To answer this, I have enriched socio-legal policy research with feminist legal theory and made a primary original contribution to socio-legal parenting leave policy research and a secondary contribution to feminist legal theory. I have explained the meaning of equality and inequality and developed a way to critique and reconstruct parenting leave law and policy from an equality perspective. I have theoretically refined Fredman's four-dimensional model of substantive equality³ by locating it within the earlier feminist equality and social justice scholarship of Iris Marion Young⁴ and Nancy Fraser⁵ (Chapter 3). This theoretical

¹ Eg E Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' (2014) 20(1) ELJ 88, 105-106; S Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10(4) Int J L C 442, 442-443, 457-458; P Foubert, 'Child Care Leave 2.0 – Suggestions for the Improvement of the EU Maternity and Parental Leave Directives from a Rights Perspective' (2017) 24(2) MJ 245, 249-250, 259-261; A Plomien, 'EU Social and Gender Policy Beyond Brexit: Towards the European Pillar of Social Rights' (2018) 17(2) Soc Policy Soc 281, 291; E Chiericato, 'A Work-Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158' (2020) 36(1) IJCLIR 59, 72, 80.

² Eg Foubert (n 1); K Arabadjieva, 'Reshaping the Work-Life Balance Directive with Covid-19 Lessons in Mind', ETUI Working Paper 1/2022 (ETUI 2022).

³ S Fredman, 'Substantive Equality Revisited' (2016b) 14(3) ICON 712.

⁴ IM Young, *Justice and the Politics of Difference* (Princeton University Press 2011).

⁵ N Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995a) 212 NLR 68; N Fraser, 'Recognition or Redistribution? A Critical Reading of Iris Young's *Justice and the Politics of Difference*' (1995b) 3(2) J Political Philos 166; N Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in N Fraser and A Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003).

refinement of Fredman's model constitutes my original contribution to feminist legal theory. While this refinement has enhanced the use of Fredman's model as an analytical framework, to further enhance its application in this thesis, I have turned the model into an analytical method by distilling from it methodological and normative principles for the purposes of a normative critique and reconstruction of parenting leave law and policy (Chapter 3). I have identified the norm of the sexual division of labour within the family to underpin inequality between the sexes and between parents with different sexual and/or gender identities and in different types of families. This norm is itself underpinned by a further three norms: the breadwinner-caregiver dichotomy, the heteronormative nuclear family, and the devaluation of pregnancy and parenthood.

I have normatively critiqued the EU PLF against these norms from the recognition, participative, and redistributive analytical perspectives offered by Fredman's model of substantive equality in order to demonstrate that the EU PLF perpetuates inequalities between parents particularly by perpetuating the sexual division of labour within the family (Chapters 4-6). I have then reconstructed the EU PLF in light of the normative principles of deconstructing the breadwinner-caregiver dichotomy, deconstructing the heteronormative nuclear family, and deconstructing the devaluation of pregnancy and parenthood (Chapter 7). In doing so, I have drawn insights from the Finnish and Swedish PLFs as current 'best practice' case studies of national parenting leave models which enhance substantive equality between parents by transforming the sexual division of labour within the family. I have devised a transformative EU parenting leave model with a view to thus deconstructing the sexual division of labour within the family and facilitating substantive equality between the sexes and between groups of parents regardless of their sexual and/or gender identity and family form in the EU. This transformative model forms my original contribution to socio-legal parenting leave policy research.

8.2 The Transformative EU Parenting Leave Model

Envisioning a society in which all parents equally partake in parental childcare, the transformative parenting leave model I have devised for the EU in this thesis offers a rethinking of how to organise parenting leave at EU level in a way which deconstructs the sexual division of labour within the family in order to facilitate substantive equality between parents. The model restructures the EU PLF so that it is grounded in a clear distinction between health- and safety-related leave for workers with the bodily capacity for pregnancy, childbirth, and breast- or chestfeeding on the one hand and childcare-related leave for working parents on the other. For the protection of their health and safety, pregnant workers – regardless of their sex or gender – would be entitled to two weeks of compulsory pregnancy and childbirth leave before their estimated due-date. Workers who have a miscarriage between 12 and 28 weeks, who have an abortion after 12 weeks, who give birth, and who have a stillbirth would all be entitled to six weeks of compulsory pregnancy and childbirth leave immediately after miscarriage, abortion, childbirth, or stillbirth. Non-gestational working parents who breast- or chestfeed their child would also be entitled to six weeks of compulsory lactation leave after birth or adoption. While protecting the health and safety of these groups of workers against pressures to work close to childbirth, immediately after abortion, miscarriage, or childbirth, and during the first weeks of breast- or chestfeeding, the leave periods would represent maximum thresholds for compulsory leave to prevent the law imposing paternalistic restrictions on individual autonomy. Pregnancy and childbirth leave and lactation leave would both be compensated at full pay or an allowance equivalent to it.

To enable working parents to care for their young children, the transformative EU parenting leave model would facilitate time away from work for all parents through parental leave. Two parents – regardless of sex, gender, or sexuality, marital or family status, and the method by which they become parents – would

each be entitled to at least five months of parental leave after their child's birth or adoption, while independent parents would be entitled to ten months. A parent who gives birth would become entitled to parental leave after pregnancy and childbirth leave and a breast- or chestfeeding non-gestational parent after lactation leave. A second parent would become entitled to parental leave immediately after their child's birth or adoption when one month of their individual entitlement would become available to use parallel to postnatal pregnancy and childbirth leave, lactation leave, or the other parent's parental leave. Two adoptive or commissioning parents could hence take one month of leave simultaneously after their child comes into their care. Parental leave would be available on a use-it-or-lose-it principle: it would be entirely non-transferable between the two parents. Each parent could, however, transfer up to one month of their individual entitlement to a non-parent who assumes care for the child, such as their non-parent partner, the child's grandparent, or a friend. Independent parents could transfer up to five months to a non-parent, reflecting the leave entitlement which would otherwise be available to the second parent. Parental leave would be compensated at full pay or an allowance equivalent to it.

8.2.1 Deconstructing the Sexual Division of Labour within the Family

The distinction between health- and safety-related leave and childcare-related leave is the first step to deconstructing the sexual division of labour within the family at EU level. Structured in this way, the transformative EU parenting leave model deconstructs the breadwinner-caregiver dichotomy underpinning the current EU PLF. It protects the health and safety of workers with the bodily capacity for pregnancy, childbirth, and breast- or chestfeeding through pregnancy and childbirth leave and lactation leave without perpetuating the dominant ideology of motherhood which conflates this capacity with the essentialist presumption that those with this capacity – especially heterosexual cisgender women – are biologically more inclined to care and therefore naturally

responsible for childcare within the home. Instead, the model imposes equal responsibility for childcare on parents regardless of their sex or gender through non-transferable parental leave in order to universalise the ‘feminine’ characteristic of caregiving as a gender-neutral parental norm and thus to de-gender the socially constructed, gendered parental role stereotypes epitomised by the breadwinner-caregiver dichotomy informing the sexual division of labour within the family.

Moreover, by entitling parents to both health- and safety-related leave and childcare-related leave regardless of their sex, gender, sexuality, and family form, the transformative parenting leave model deconstructs the sexual division of labour within the family by deconstructing the heteronormative nuclear family underpinning the current EU PLF. It enhances access to leave by non-normative parents – such as LGBTQIA+ parents, parents in one-parent and multiple-parent families, and adoptive and commissioning parents – on a par with parents who conform to the heteronormative nuclear family ideal, and hence facilitates their social inclusion, as well as solidarity between these groups of parents. It thus broadens the imagery associated with parenthood in the EU and offers alternatives to the gendered parental role stereotypes underpinning the heteronormative nuclear family, thereby further de-gendering parenthood to transform the sexual division of labour within the family.

The transformative EU parenting leave model also does so by deconstructing the economic and social devaluation of pregnancy and parenthood as forms of reproductive labour under the current EU PLF. It provides parents full income replacement during pregnancy and childbirth leave, lactation leave, and parental leave to convey that pregnancy and parenthood are socially valued and necessary forms of reproductive labour for which those performing this labour ought to be compensated. It minimises the financial loss associated with

pregnancy and becoming a parent and incentivises men's use of childcare-related leave. And by facilitating participative parenting regardless of sex and gender, the transformative EU parenting leave model distributes both reproductive labour and financial resources between the sexes, alleviating existing gendered socio-economic disadvantages between parents, and supports the de-gendering of parenthood to further enhance the deconstruction of the sexual division of labour within the family. To redress inequalities between the sexes and between parents with different sexual and/or gender identities and in different types of families, the transformative EU parenting leave model I have devised in this thesis thus facilitates the deconstruction of the sexual division of labour within the family from the three distinct analytical perspectives offered by Fredman's model of substantive equality while also emphasising the interaction of redistribution, recognition, and participation.

What emerges in the model is the principle inherent in the differentiated feminist politics of difference that rather than affirming the socially constructed association of caregiving with the female body as a difference between women and men, parenting leave law and policy must facilitate substantive equality between parents by de-gendering parenthood through the universalisation of caregiving as a gender-neutral norm.⁶ Once parenthood is de-gendered and all parents – regardless of their sex, gender, sexuality, and family form – equally partake in parental childcare, the sexual division of labour, underpinned by the breadwinner-caregiver dichotomy, the heteronormative nuclear family, and the devaluation of pregnancy and parenthood, ceases to make sense as an organising principle of a capitalist society and as a source of inequality. This de-

⁶ See eg N Fraser, 'After the Family Wage: Gender Equity and the Welfare State' (1994) 22(4) *Polit Theory* 591, 611; Fredman, 'Reversing Roles' (n 1) 442; D Rosenblum, 'Unsex Mothering: Toward a New Culture of Parenting' (2012) 35 *Harv J L & Gender* 58, 82-83.

gendering of parenthood is, in effect, how the transformative parenting leave model facilitates substantive equality between parents.

8.3 Thesis Limitations and Suggestions for Future Research

While the transformative EU parenting leave model I have devised in this thesis enhances substantive equality between the sexes and between parents regardless of their sexual and/or gender identity and family form by deconstructing the sexual division of labour within the family, I recognise that it does not affect this deconstruction for all parents. It cannot possibly address the full complexity of socio-economic, cultural, and religious differences between groups of parents that contribute to reinforcing a traditional division of labour within the family. And whereas it, for example, addresses the family-related legal eligibility criteria imposed on parents under the EU PLF to improve access to parenting leave by e.g. LGBTQIA+ parents, it obscures the employment- and citizenship-related eligibility criteria which constrain economically inactive parents' and immigrant parents' access to leave.⁷ Similarly, I recognise deconstructing the sexual division of labour within the family to be just one aspect of the transformation of existing social structures in the pursuit of substantive equality. In particular, the transformative model does not address the sexual division of labour within the economy, nor does it transform structural labour market inequalities like the gender pay gap and androcentric working time norms. And of course, I recognise that although my reconstruction of the EU PLF is pragmatic in that rather than imagining a completely new framework, it restructures the existing EU PLF and employs the Finnish and Swedish PLFs as 'best practice' case studies in doing so, it is skewed towards the utopian side of the reconstructive feminist legal project. It normatively reimagines the EU PLF

⁷ See eg Chierigato (n 1); EIGE, 'Eligibility for parental leave in EU Member States' (Publications Office of the European Union 2020).

without confining it to what is legally, politically, and economically feasible at EU level in light of the EU's social policy competences, mode of governance, and divergence between its Member States (Chapter 1). As such, it does not offer 'complete and idealized blueprints'⁸ for EU legal reform. One obvious direction for future research would hence be to engage in knowledge exchange with EU policymakers to examine if, and how, the transformative EU parenting leave model devised in this thesis could be implemented at EU and/or national level and how it could be adjusted in light of various legal, political, and economic constraints while retaining its transformative potential. This would additionally integrate an empirical research aspect to what is currently a non-empirical socio-legal thesis.

The analytical method I have devised in Chapter 3 and the normative principles distilled from Fredman's model of substantive equality in that chapter, however, also allow this thesis to be developed beyond its current scope. Future research could expand the thesis by examining the citizenship- and employment-related legal eligibility criteria for access to parenting leave under EU and national law and thus extend the transformative parenting leave model to accommodate the needs of economically inactive parents and immigrant parents. This would be a particularly valuable contribution to EU legal and policy scholarship to highlight how the EU's economic objectives could be balanced with its social policy objectives, including the normative commitment to substantive equality, in the free movement and immigration and asylum contexts. Beyond the reconstruction of the EU PLF, the analytical method could be employed to a broader reconstruction of EU law and policy in relation to employment and the family in order to facilitate the deconstruction of the sexual division of labour within the family and substantive equality between parents. Because 'paid leave policies do not operate in a vacuum, and should be designed alongside other family

⁸ N Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 Soc Leg Stud 131, 140.

policies⁹, transforming the sexual division of labour within the family requires legal and policy reform to e.g. redefine legal parenthood and affect changes in the labour market. As such, future research could move past the deconstruction of the sexual division of labour within the family and apply the novel analytical method to deconstructing the sexual division of labour within the economy by examining normative transformation of gender roles within the labour market and different occupational areas under EU law from redistributive, recognition, and participative perspectives.¹⁰

Lastly, the original contributions to feminist legal theory and socio-legal parenting leave policy research in this thesis have broader application beyond this thesis. The transformative model itself – such as the notion of distinguishing between health- and safety-related leave and childcare-related leave to deconstruct the breadwinner-caregiver dichotomy – could be generalised and applied to parenting leave systems in any jurisdiction, including any of the 27 national leave systems in the EU. The analytical method I have devised in this thesis similarly offers scope for application to different jurisdictions because the normative principles derived from Fredman’s model are not specific to the EU legal order. It is also applicable to different areas of law and policy, hence not only other family or work-life balance policies beyond parenting leave, because an unlimited number of normative principles could be distilled from Fredman’s model to guide legal and policy critique and reconstruction. The novel methodological approach of enriching socio-legal policy research with feminist legal theory in this thesis thus carries the potential to enhance future critiques and reconstructions of law and policy which go in pursuit of substantive equality.

⁹ E Wong, J Jou, A Raub, and J Heymann, ‘Comparing the Availability of Paid Parental Leave for Same-Sex and Different-Sex Couples in 34 OECD Countries’ (2019) *J Soc Policy* 525, 541.

¹⁰ Eg D Elson, ‘Recognize, Reduce and Redistribute Unpaid Care Work: How to Close the Gender Pay Gap’ (2017) 26(2) *New Labor Forum* 52, 58.

APPENDICES

Appendix 1. The EU PLF¹

	Maternity Leave (PWD)	Paternity Leave (WLBD)	Parental Leave (WLBD)
Addressed to	Pregnant workers, workers who have recently given birth and are breastfeeding	Working fathers or equivalent second parents	Working parents
Eligibility	Informing employer of pregnancy, childbirth and breastfeeding in accordance with national practice	May not be subject to a period of employment qualification, granted irrespective of marital or family status	May be subject to a period of employment qualification not exceeding 12 months
Purpose	Health and safety protection	Childcare and parent-child bonding	Childcare
Length	At least 14 continuous weeks, of which at least two weeks compulsory around childbirth	Ten working days	At least four months per parent, of which at least two months non-transferable between parents
Timing	Immediately before and/or after childbirth	In connection with a child's birth	After birth or adoption before the child reaches a specified age, up to the age of eight
Income compensation	National sick pay minimum threshold, entitlement to compensation may be subject to period of employment qualification not exceeding 12 months	National sick pay, entitlement to compensation may be subject to period of employment qualification not exceeding six months	No set level of compensation, should be 'adequate' for non-transferable period
Flexibility	Continuous entitlement, non-compulsory period renounceable	Member States regulate availability on full-time and part-time basis	Member States regulate availability on full-time, part-time and piecemeal basis
Notes	Applicable to self-employed female workers under Directive 2010/41/EU		Member States assess the need to adapt arrangements to meet the needs of adoptive parents, disabled

¹ Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and those who have recently given birth or are breastfeeding [1992] OJ 1992 L348/1; Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ 2019 L188/79.

			parents, and parents with children with a disability or a long-term illness
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Appendix 2. Swedish PLF²

	Pregnancy Allowance	Temporary Parental Allowance in Connection with Birth or Adoption	Parental Allowance	
Corresponding Leave	Pregnancy leave	Paternity leave	Maternity leave	Parental leave
Addressed to	Pregnant workers with reduced capacity to work or prohibited from working on account of risk to health or the foetus, who cannot be transferred to other work	Second parents, prospective adoptive parents of adopted children under ten	Workers who are pregnant and workers who have given birth	Parents
Purpose	Health and safety protection	Newborn care, parent-child bonding, caring for family's other children	Health and safety protection	Childcare
Length	Up to fifty working days	Up to ten working days	14 weeks	Full leave until the child is 18 months, 240 paid allowance days per parent, of which 90 days non-transferable between parents
Timing	From 60 days up to 11 days before the estimated due-date	In connection with birth or adoption until up to 60 working days from when the child came home after birth or when the parents received the child in their	Seven weeks before estimated due-date and seven weeks after childbirth, two weeks compulsory before or after childbirth	384 days per child must be used before child's fourth birthday or before the child has been in adoptive parents' care for four years, 96

² Föräldradighetslag 1995:584 [Parental Leave Act 1995]; Socialförsäkringsbalken, SFS 2010:110 [Social Insurance Code 2010]; Försäkringskassan, 'Förälder', <www.forsakringskassan.se/privatperson/foralder>, accessed 1.11.2024 [Parents].

		care, parallel to other parent's parental allowance		days may be postponed until the child turns 12
Income compensation	Sick pay (77.6%) or basic level (SEK 250 per day in 2024)	Sick pay or basic level	Sick pay or basic level	Sick pay or basic level for the first 90 days and for 105 days of the remaining 150 days, minimum level for 45 days (SEK 180 per day in 2024)
Flexibility	Available part-time through reduction in working hours	Available part-time through reduction in working hours		Available part-time through reduction in working hours and in a piecemeal way in up to three periods each calendar year, 60 double-days available during days during the first 15 months of child's life
Notes		Multiple births entitle to ten working days per child, two adoptive parents share the entitlement Available to non-parents to support a single parent who gives birth	Pregnant people ineligible by reason of employment status eligible for basic level allowance from 60 days prior to estimated due-date and up to 29 days after childbirth	Multiple births entitle to 180 days per child, single parents entitled to 480 days 45 days transferable to a non-parent, 90 days if transferring parent a single parent

Appendix 3. Finnish PLF³

	Special Pregnancy Allowance	Pregnancy Allowance	Parental Allowance
Corresponding Leave	Special pregnancy leave	Pregnancy leave	Parental leave
Addressed to	Pregnant workers subject to health risks, whether to them or the foetus, in employment who cannot be reassigned to a different role	Pregnant parents and parents who have recently given birth	Parents
Purpose	Health and safety protection	Health and safety protection	Childcare
Length		Up to 40 continuous working days	160 working days per parent, of which 97 days non-transferable between parents
Timing	Until the beginning of pregnancy allowance period	From 14-30 days before the estimated due-date, 2 weeks compulsory before estimated due-date <i>and</i> after childbirth	Immediately after the end of pregnancy leave to ensure 105 continuous working days' leave to parent who gave birth; immediately after the child's birth to second parent or after adoption to both parents; available until the child's second birthday or until an adopted child has been in the parents' care for two years
Income compensation	Sick pay or minimum flat rate (EUR 31.99 per day in 2024) for those without income or income below a minimum threshold	Income-related allowance at 90% or the minimum flat rate	First 16 working days for each parent compensated at an income-related allowance rate of 90%, remaining days at sick pay level (70%) or the minimum flat rate

³ Työsopimuslaki, L 55/2001 [Employment Contract Act 2001], as amended by Laki työsopimuslain muuttamisesta, L 32/2022 [Act amending Employment Contract Act 2001]; Sairausvakuutuslaki, L 1224/2004 [Sickness Insurance Act 2004], as amended by Laki sairausvakuutuslain muuttamisesta, L 28/2022 [Act amending Sickness Insurance Act 2004]; Kela, 'Lapsen syntymä ja hoito', <www.kela.fi/lapsen-syntyma-ja-hoito>, accessed 29.4.2025 [Child's birth and care].

Flexibility			Can be taken simultaneously by two parents or parallel to pregnancy allowance for up to 18 working days; available part-time and in a piecemeal way in up to four blocks of at least 12 working days
Notes			<p>Multiple births entitle parents to an additional 84 working days per child, shared equally between parents</p> <p>63 days transferable to a non-parent partner, 126 if transferring parent a single parent</p>

Appendix 4. Access to Parenting Leave under the EU PLF

	Maternity Leave	Paternity Leave	Parental Leave
GESTATIONAL PARENT	14 weeks		Four months
Single parent	14 weeks		Four months
After abortion	No		
After miscarriage	No		
After stillbirth	No		
If a trans man or a gender non-conforming person	Unclear		Four months
If a gestational surrogate	14 weeks		No
SECOND PARENT		Two weeks	Four months
After stillbirth		Potentially two weeks	No
Single parent		Two weeks	Four months
If a trans woman or a gender non-conforming person		Two weeks	Four months
If gestational parent's same-sex partner		Two weeks	Four months
If second parent's same-sex partner		No	Four months
ADOPTIVE PARENTS			
Adoptive mother / parent	No		Four months
if breastfeeds	No		Four months
Adoptive father / parent		No	Four months
COMMISSIONING PARENTS			
Commissioning mother / parent	No		Unclear
if breastfeeds	No		Unclear
Commissioning father / parent		Maybe	Unclear
NON-PARENTS (e.g. non-parent partner, grandparent)		No	No

Appendix 5. Access to Parenting Leave in Sweden⁴

	Maternity Leave	Paternity Leave	Paid Parental Leave
GESTATIONAL PARENT	14 weeks		What remains of 240 working days
Single parent	14 weeks		What remains of 480 working days
After abortion	No		
After miscarriage	No		
After stillbirth	29 days		Up to two weeks
If a trans man or a gender non-conforming person	14 weeks		What remains of 240 working days
If a surrogate	14 weeks		
SECOND PARENT		Up to two weeks	240 working days
After stillbirth		Up to two weeks	Up to two weeks
Single parent		Up to two weeks	480 working days
If a trans woman or a gender non-conforming person		Up to two weeks	240 working days
If gestational parent's same-sex partner		Up to two weeks	240 working days
If second parent's same-sex partner		Up to two weeks	240 working days
ADOPTIVE PARENTS			
Adoptive mother / parent		Up to two weeks, but shared with other adoptive parent	240 working days
if breastfeeds	No		240 working days
Adoptive father / parent		Up to two weeks, but shared with other adoptive parent	240 working days
COMMISSIONING PARENTS			
Commissioning mother / parent			240 working days
if breastfeeds	No		240 working days
Commissioning father / parent			240 working days
NON-PARENTS (e.g. non-parent partner, grandparent)		Up to two weeks, if supporting a single parent who gives birth	Up to 45 working days, or up to 90 days if transferring parent is a single parent

⁴ Försäkringskassan (n 2); Parental Leave Act 1995 (n 2); Social Insurance Code 2010 (n 2).

Appendix 6. Access to Parenting Leave in Finland⁵

	Pregnancy Leave	Parental Leave
GESTATIONAL PARENT	Up to 40 working days	160 working days
Single parent	Up to 40 working days	320 working days
After abortion	Up to 40 working days, if at or after 22 weeks	Up to 65 working days
After miscarriage	Up to 40 working days, if at or after 22 weeks	Up to 65 working days
After stillbirth	Up to 40 working days, if at or after 22 weeks	Up to 65 working days
If a trans man or a gender non-conforming person	Up to 40 working days	
If a surrogate	Up to 40 working days	Up to 65 working days
SECOND PARENT		160 working days
After stillbirth		25 working days
Single parent		320 working days
If a trans woman or a gender non-conforming person		160 working days
If gestational parent's same-sex partner		160 working days
If second parent's same-sex partner		160 working days
ADOPTIVE PARENTS		
Adoptive mother / parent		160 working days
if breastfeeds	No	160 working days
Adoptive father / parent		160 working days
COMMISSIONING PARENTS		
Commissioning mother / parent		160 working days
if breastfeeds	No	160 working days
Commissioning father / parent		160 working days
NON-PARENTS (e.g. non-parent partner, grandparent)		Non-parent partners up to 63 working days, or up to 126 working days if transferring parent is a single parent

⁵ Employment Contract Act 2001 (n 3); Sickness Insurance Act 2004 (n 3); Kela (n 3).

Appendix 7. The Transformative EU Parenting Leave Model

	Pregnancy and Childbirth Leave	Lactation Leave	Parental Leave
Addressed to	Pregnant workers, workers who have recently miscarried or terminated, and workers who have recently given birth, including to a stillborn	Workers who are lactating	Working parents
Eligibility	Workers who have miscarried at 12-28 weeks, employer informed of pregnancy; workers who have terminated after 12 weeks, employer informed of pregnancy	Breast-/chestfeeding to feed an infant, employer informed	Regardless of family or marital status
Purpose	Health and safety protection	Health and safety protection	Childcare
Length	6-8 weeks	Six weeks	Five months per parent, entirely non-transferable
Timing	Two weeks compulsory before estimated due-date, six weeks compulsory after miscarriage, termination, childbirth, or stillbirth	Six weeks compulsory after birth or adoption	One month available immediately after child's birth or adoption parallel to other parent's postnatal pregnancy and childbirth leave or parental leave; remaining four months available until a time specified in national law, up to the age of eight
Income compensation	Full pay or allowance equivalent to	Full pay or allowance equivalent to	Full pay or allowance equivalent to
Flexibility	Leave extendable at either end on a case-by-case basis for medical reasons		Member States regulate provision on part-time and piecemeal basis
Notes			One month from each parent transferable to a non-parent; independent parents ten months, of which up to five months transferable to non-parent

Appendix 8. Access to Parenting Leave under the Transformative Model

	Pregnancy and Childbirth Leave/Lactation Leave	Parental Leave
GESTATIONAL PARENT	Eight weeks	Five months
Single parent		
if independent	Eight weeks	Ten months
if co-parenting with non-resident parent	Eight weeks	Five months
After abortion	Six weeks	No
After miscarriage	Six weeks	No
After stillbirth	Six weeks	No
If a trans man or a gender non-conforming person	Eight weeks	Five months
If a surrogate	Eight weeks	No
SECOND PARENT		Five months
After stillbirth		One month
Single parent		
if independent		Ten months
if co-parenting with non-resident parent		Five months
If a trans woman or a gender non-conforming person		Five months
If gestational parent's same-sex partner		Five months
If second parent's same-sex partner		Five months
ADOPTIVE PARENTS		
Adoptive mother / parent		Five months
if breastfeeds	Six weeks	Five months
Adoptive father / parent		Five months
COMMISSIONING PARENTS		
Commissioning mother / parent		Five months
if breastfeeds	Six weeks	Five months
Commissioning father / parent		Five months
NON-PARENTS (e.g. non-parent partner, grandparent)		One month, or up to five months if transferring parent is an independent parent

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