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Paternity and Parental Leave: Towards a New International Labour Standard

*Katharine Booth**

Abstract

The article recommends for the International Labour Organization to implement a new Standard on paternity and parental leave. It sets out the most important provisions that should be incorporated into such a Standard to encourage the uptake of paternity and parental leave by fathers and partners, and thereby to contribute to the realization of gender equality. These provisions include: application of the Standard to as many workers as possible, generous length of and compensation for paternity and parental leave, an individual right to a significant period of non-transferable parental leave, and flexibility in relation to the scheduling of leaves.

To inform the provisions of the proposed Standard, the article examines the European Union's 2019 Directive on work-life balance for parents and carers. This Directive guarantees paternity and parental leave to fathers and partners in EU Member States. The article compares the EU and ILO's gender equality frameworks and concludes that the ILO's lags considerably behind the EU's. Accordingly, the adoption of the proposed Standard would fill the gap in the ILO's gender equality acquis.

Keywords: International Labour Organization, International labour standards, European Union, Work-life Balance Directive, paternity leave, parental leave, family leave, gender equality, unpaid work

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I. INTRODUCTION

The inequalities and gender gaps between working women and men are well-known and well-documented.¹ According to the International Labour Organization (ILO), the primary reason for these inequalities is the unequal division of unpaid work between women and men.² In both developed and developing economies, the burden of unpaid work, including caregiving and housework, disproportionately falls on women.³ A key consequence of this burden is that women have less time than men to engage in paid work.⁴ Indeed, the ILO recognizes that the greatest challenge for working women worldwide is the unequal balance between their personal and professional lives.⁵ With less time on their hands than men due to their disproportionate responsibility of unpaid work, women's availability and opportunity to advance their careers and increase their earnings and entitlements are considerably more limited than men's.⁶ It follows that inequalities between working women and men may be reduced if the responsibility for unpaid work shifts from the shoulders of mothers to rest equally on both parents.

The ILO describes paternity and parental leave (also called 'family leave') entitlements for fathers as the most direct and far-reaching policies to encourage their involvement in unpaid work and to increase caregiving responsibilities.⁷ This is because these policies take place at a pivotal point in parents' lives when patterns of caregiving crystallize.⁸ Therefore, family leave entitlements with a focus on the equalization of unpaid work between parents have enormous potential to alter gender stereotypes and norms of women as caregivers and men as breadwinners, and to equalize the currently unequal distribution of unpaid responsibilities between parents.⁹ As a result

1. International Labour Office [ILO], *A Quantum Leap for Gender Equality: For a Better Future of Work for All* (2019); Organisation for Economic Co-operation and Development [OECD], *The Pursuit of Gender Equality: An Uphill Battle*, at 3 (2017); World Economic Forum, *The Global Gender Gap Report 2018*, at vii (2018).

2. A Quantum Leap for Gender Equality: For a Better Future of Work for All, *supra* note 1, at 84; International Labour Office [ILO], *Women at Work: Trends 2016*, at xi (2016).

3. *Women at Work*, *supra* note 2, at 13.

4. *The Pursuit of Gender Equality: An Uphill Battle*, *supra* note 1, at 189.

5. Gallup Inc & International Labour Office [ILO], *Towards a Better Future for Women and Work: Voices of Women and Men*, at 39 (2017).

6. *The Pursuit of Gender Equality: An Uphill Battle*, *supra* note 1, at 190.

7. *Women at Work*, *supra* note 2, at 84; Karie Feldman & Brian K. Gran, *Is What's Best for Dads Best for Families: Paternity Leave Policies and Equity Across Forty-Four Nations*, 43 J. OF SOCIO. & SOC. WELFARE 95, 96 (2016).

8. Maria C. Huerta et al., *Fathers' Leave and Fathers' Involvement: Evidence from Four OECD Countries*, 16 EUR. J. OF SOC. SEC. 308, 309 (2014); Taylor Stoneman, *International Economic Law, Gender Equality, and Paternity Leave: Can the WTO Be Utilized to Balance the Division of Care Labor Worldwide*, 32 EMORY INT'L LAW REV. 51, 71-72 (2017).

9. Rossella Ciccica & Mieke 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*, 22 J. OF EUR. SOC. POL'Y 507, 508 (2012).

of such entitlements, new mothers may have more support to enter or re-enter the labour market following childbirth and better balance their personal and professional lives.¹⁰ This has a positive effect on gender equality in the home, which the ILO recognizes as being the basis for the realization of workplace gender equality.¹¹

Clearly, there are persuasive reasons in favour of national governments guaranteeing to men, in the pursuit of gender equality, paternity and parental leave. One way to encourage governments to do so is by setting an international standard. Therefore, the aim of this article is to explore what such a standard would look like, and how the ILO could embed this standard into its existing gender equality acquis.

To frame the structure and content of such an international standard, inspiration is drawn from the 2019 European Union (EU) Directive on work-life balance for parents and carers (Section II). The Directive is the first legally binding supranational instrument guaranteeing a right to paternity and parental leave to fathers and partners in EU Member States. The Directive also addresses women's rights and gender equality as worked out in other EU directives.

Section III examines the ILO's equality framework. The Organization recognizes the importance of the provision of paternity and parental leave to working fathers to encourage their involvement in unpaid work and familial responsibilities. However, such recognition has only taken the form of non-binding instruments and recommendations. Presently, the ILO's equality framework includes International Labour Standards on workplace gender equality, equal remuneration, non-discrimination, equality of opportunity and treatment for workers with family responsibilities, and maternity protection. However, *recognition* of the importance of family leave has not been followed by the *adoption* of a legally binding instrument incorporating rights to paternity and parental leave. The article urges the ILO to precisely do this.

The ILO is the most appropriate international organization to follow in the footsteps of the EU to adopt a legally binding standard on family leave, even though the Organization is under no obligation to do so. However, the EU and ILO have cooperated in the past and continue to do so on the basis of their shared foundational principles, values and objectives, including their belief that economic and social progress should go hand-in-hand.¹² In the

10. International Labour Organization [ILO], *Maternity, Paternity at Work: Baby Steps Towards Achieving Big Results*, at 4, 6 (2015).

11. *Id.* at 1; *Women at Work*, *supra* note 2, at 84; Andreas Kotsadam & Henning Finseraas, *The State Intervenes in the Battle of the Sexes: Causal Effects of Paternity Leave*, 40 SOC. SCI. RSCH. 1611, 1611-22 (2011).

12. International Labour Organization [ILO], *The European Union ILO Cooperation*, (May 2019), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@exrel/documents/publication/wcms_350516.pdf; see generally Rudi Delarue, *The EU-ILO Partnership and the Global Identity of the Union's Social Model*, THE EUROPEAN UNION'S EMERGING INTERNATIONAL IDENTITY (Henri de Waele & Jan-Jaap

case of family leaves, the EU Directive offers a higher ceiling of protection than the ILO, and reflects the broad consensus of 27 developed and liberal economies on the importance of the provision of paternity and parental leave for gender equality.

However, simply enshrining a right to family leave in an ILO Standard is insufficient to encourage the uptake of such leave by fathers.¹³ Section IV sets out the most important provisions that should be incorporated into such a Standard to encourage the uptake of paternity and parental leave, and thereby to contribute to the realization of gender equality. These provisions may be used as a reference point for delegates at a future International Labour Conference when considering the adoption of a standard addressing family leave.

II. EU DIRECTIVE ON WORK-LIFE BALANCE

A. Directive's Impetus and Significance

On 13 June 2019, the European Parliament and Council adopted Directive 2019/1158 on work-life balance for parents and carers (the **Directive**), which entered into force on 1 August 2019 and must be implemented into national legislation by 2 August 2022. Among other things, the Directive provides a right to paternity and parental leave to working fathers in the EU. The Directive has its basis in the EU's promotion of equality between women and men, particularly equal opportunities and treatment in matters of employment and occupation, as set out in Articles 8 and 157(3) of the Treaty on the Functioning of the European Union (TFEU)—one of the constitutional bases of the EU. Article 153(1)(i) TFEU obliges the EU to support and complement Member States' activities in relation to, among other things, equality with respect to labour market opportunities and treatment at work. To this end, the European Parliament and Council are permitted to take positive action, including the adoption of directives, to empower women.

The impetus for the adoption of the Directive was threefold. First, it intends to contribute to the realization of gender equality by promoting the participation of women in the labour market, facilitating the reconciliation of work and family life, promoting the equal sharing of caring responsibilities between working parents, and closing gender gaps in employment and earnings.¹⁴ The Directive seeks to realize gender equality by increasing incentives for working men to utilize paternity and parental

Kuipers eds., 2013).

13. JANNA VAN BELLE, PATERNITY AND PARENTAL LEAVE POLICIES ACROSS THE EUROPEAN UNION 14 (RAND Corporation, 2016).

14. Council Directive 2019/1185, preamble and art. 1, 2019 O.J. (L 188).

leave.¹⁵ For example, the Directive provides an individual the right to parental leave, as well as non-transferable entitlement to parental leave.¹⁶ Currently, parental leave is an individual right in 16 EU States, a combination of an individual and family right in two States, and a family right in 10 States.¹⁷ Studies show, however, that the uptake of parental leave by fathers is much higher when leave is reserved exclusively for men (namely, when it is offered as an individual right).¹⁸

Second, the Commission implemented the Directive in view of financial considerations. In 2019, the Commission estimated the economic cost of the gender employment gap to be approximately €370 billion per annum.¹⁹ The standardized provision of family leave to all fathers in EU Member States (as provided for in the Directive) aims to boost the competitiveness of the EU by increasing labour supply and making full use of human capital.²⁰ Third, the Directive was needed to standardize the provision of family leave by Member States.²¹ As noted in the preceding paragraph, not all EU governments guaranteed an individual right to parental family leave, meaning that such leave was unequally provided for across the Union. Accordingly, there were differences in the functioning of national labour markets within the European Economic Area.²²

The Directive has been praised as ‘ground-breaking’ by some scholars.²³ It is the first legally binding instrument (in the EU or otherwise) to explicitly acknowledge the pivotal role of men to the success of work-life reconciliation measures.²⁴ Its adoption represents a shift in focus from solely working mothers and maternity protection to the importance of equal and shared caregiving responsibilities between both parents to realize gender equality.²⁵ For example, the Directive’s adoption followed the withdrawal of the Commission’s proposal to revise the Pregnant Workers Directive.²⁶ This shift in focus – away from women as sole caregivers and towards both parents more equally sharing parental responsibilities – has the potential to profoundly and positively affect the balance between mothers and fathers’ personal and work lives.

15. *Id.* at preamble 11.

16. *Id.* at art. 5(1) and (2). In short, an individual right means that the leave is reserved exclusively for either the mother or father/partner. A family right means that parental leave can be shared between parents. Discussed further in Section IV of this article.

17. Barbara Janta & Katherine Stewart, *Paternity and Parental Leave Policies Across the European Union: Assessment of Current Provision*, EUROPEAN COMMISSION (2018).

18. VAN BELLE, *supra* note 13, at 16.

19. Commission Proposal 253/2017, 2017 O.J. (C 253).

20. Commission Proposal 253/2017, *supra* note 19.

21. *Id.*

22. *Id.*

23. E.g. Eugenia Caracciolo di Torella, *An Emerging Right to Care in the EU: A New Start to Support Work-Life Balance for Parents and Carers*, 18 ERA FORUM 187, 196 (2017).

24. *Id.*

25. *Id.*

26. Commission Proposal 253/2017, *supra* note 19, at 1.

B. Provisions on Paternity and Parental Leave

The Directive guarantees a minimum of ten working days of paternity leave to working fathers at around the time of childbirth.²⁷ If permitted under national law, this extends to co-parents on a gender-neutral basis. Paternity leave is to be compensated at the same rate as the minimum paid to mothers pursuant to the Pregnant Workers Directive.²⁸ The right to paternity leave is not subject to a period of work or length of service qualification; however, financial compensation may be subject to a six-month prior service requirement.²⁹ This means that, while all fathers working in the EU are entitled to ten working days of paternity leave, not all will be paid for taking such leave. Thus, the Directive fills a gap in the EU's legal framework on minimum paternity leave standards.³⁰ Moreover, the requirement for paternity leave to be paid is of paramount importance. Before adopting the Directive, seventeen States met the proposed minimum of two weeks' paternity leave; however, only thirteen offered 'well-paid' paternity leave (defined by the Commission as at least 66% of previous earnings).³¹

Further, the Directive repealed the EU's Revised Parental Leave Framework Agreement (2010/18), which entitled working parents to at least four months of parental leave, one month of which was to be provided on a non-transferable basis.³² The new Directive guarantees this same period of parental leave but importantly increases the non-transferable period from one to two months.³³ Such parental leave is also offered on a flexible, including full or part-time basis.³⁴

The Directive does not specify the payment or allowance that Member States should provide for parental leave. Instead, States are required to provide a payment or allowance "in such a way as to facilitate the take-up of parental leave by both parents."³⁵ Accordingly, while parental leave is encouraged to be "sufficiently well remunerated" and provide a "decent living standard" for families, the Directive does not require States to offer well-paid compensation to parents utilizing parental leave.³⁶ Unsurprisingly, the Directive has been criticized on this basis. The Rapporteur for the European Parliament's Committee on Employment and Social Affairs

27. Council Directive 0085/2017, *supra* note 14, at art. 4(1).

28. *Id.* at art. 8(2); di Torella, *supra* note 23, at 196; Council Directive 18/2010, 2010 O.J. (L 253) art. 54.

29. Council Directive 0085/2017, *supra* note 14, at art. 4(2), art. 8(2).

30. Commission Proposal 253/2017, *supra* note 19, at 11.

31. Janta & Stewart, *supra* note 17, at 3.

32. Council Directive 0085/2017, *supra* note 14, at preamble 15, preamble 16; *see generally* Council Directive 18/2010, 2010 O.J. (L 68/13) at Clause 2.

33. Council Directive 18/2010, *supra* note 28, at art. 5(2).

34. *Id.* at preamble 23, art. 5(6)-(7).

35. Council Directive 18/2010, *supra* note 28, at art. 8(3).

36. *Id.* at preamble 31.

recommended prior to the Directive's adoption that this provision be amended to entitle workers to payment or allowance of at least 75% of their gross wage.³⁷ According to the Rapporteur, this would:

... address the anomalies between the different rates at which workers are paid at sick pay level in the different Member States and create a level playing field for all workers and will help in the take up of leave by more fathers, for whom the lack of economic return is a strong disincentive to taking parental leave.³⁸

The imprecision of the Directive concerning compensation for parental leave is its most significant shortcoming.

Like other EU directives focused on gender issues, the Directive includes provisions protecting the employment rights of workers who utilize family leave. Workers' rights that have been acquired on the date that they take family leave are guaranteed until the end of their period of leave, and workers are entitled to return to their jobs on terms and conditions no less favourable to them.³⁹ Moreover, workers who utilize such leave may not be treated less favourably or in a discriminatory manner and may not be dismissed on the basis that they applied for or have taken family leave.⁴⁰

The Directive is the most recent EU instrument to recognize the evolving role of fathers in caregiving and the importance of the reconciliation of work and family life.⁴¹ It is the first binding supranational instrument to guarantee fathers a right to both paternity and parental leave. The Directive is not without criticism; as Section III illustrates, the EU's family leave framework is far more robust than the ILO's.

III. THE ILO'S GENDER EQUALITY FRAMEWORK

Gender equality has been a core objective of the ILO since its establishment.⁴² Both the ILO's Constitution and Declaration on Social Justice for a Fair Globalization (2008) refer to the importance of gender equality and non-discrimination.⁴³ The ILO recognizes that equality is an important human right necessary for, among other things, social justice, economic efficiency, and economic growth and development.⁴⁴ The Organization acknowledged the need for equally shared parental responsibilities in its (non-binding) Resolution concerning *Gender Equality at the Heart of Decent Work* (2009):

37. *Id.* at 54.

38. *Id.*

39. Council Directive 0085/2017, *supra* note 14, at art. 10.

40. *Id.* at art. 11, art. 12(1).

41. *See also* European Pillar of Social Rights, at Pillar 9.

42. International Labour Organization, *Resolution Concerning Gender Equality at the Heart of Decent Work (Adopted by the International Labour Conference at Its 98th Session)*, at 8 (2009).

43. Int'l Labour Org. [ILO], *International Labour Organization Constitution*, at Part II(a) (1919).

44. *See* Int'l Labour Org., *supra* note 42, at 9.

Men's behaviour needs to change, as shared parental responsibilities are key to changing gender stereotyped barriers. Readjusting the gender division of labour in the household to a more equitable distribution of tasks has significant benefits for both sexes. The reconciliation of work and family responsibilities is possible when approached in a holistic manner . . . When family-friendly policies are introduced, paid work and caregiving become compatible.⁴⁵

This Resolution highlights the importance of family leave for an increasing number of working fathers' involvement in sharing family responsibilities.⁴⁶ Accordingly, the importance of fathers taking more responsibility for household activities and caregiving is not new to the ILO. The Organization recognizes that sharing family responsibilities has eased tensions for women in several countries that combine work and home life, while promoting their economic empowerment.⁴⁷ The addition of family leave provisions and entitlements and the more equal distribution of family responsibilities shows a gradual shift towards 'paternity' as a social value and responsibility, as well as the breaking down of gender stereotypes.⁴⁸

Over 100 years since its establishment, equality between working women and men remains a key focus of the ILO. The Decent Work Agenda, which expands on the UN Sustainable Development Goals, emphasizes the importance of gender equality, noting that in order to promote decent work for all, including the achievement of full and productive work for all workers and equal pay for work of equal value, governments must implement policies that promote a balance between work and family life.⁴⁹ The Agenda also urges governments to overcome economic, social and cultural barriers to gender equality.⁵⁰

A. International Labour Standards

Four International Labour Standards (**Standards**) have addressed equality between working women and men. As its name suggests, the Equal Remuneration Convention (1951) requires states to guarantee equal pay for women and men for work of equal value.⁵¹ The Discrimination (Employment and Occupation) Convention (1958) obliges states to pursue policies designed to promote equality of opportunity and treatment in order to limit

45. See International Labour Organization, *supra* note 42, at 14.

46. International Labour Organization, *supra* note 42, at 6.

47. *Id.* at 28.

48. *Id.* at 6.

49. Int'l Labour Org. [ILO], *Decent Work and the 2030 Agenda for Sustainable Development*, at 11 (Sept. 25, 2015).

50. See *supra* note 42, at 9; see *infra* note 57, at art. 5(a).

51. Int'l Labour Org. [ILO], *C100 - Equal Remuneration Convention, 1951 (No. 100)*, 165 U.N.T.S. 303, art. 2(1) (June 29, 1951).

any (sex) discrimination in the workplace.⁵² Both Conventions have been ratified by the overwhelming majority of ILO Member States (173 and 175, respectively).⁵³

The Workers with Family Responsibilities Convention (1981) ‘opened the door’ to paternity and parental leave entitlements for working fathers.⁵⁴ This Convention attempts to create effective equality of opportunity and treatment between all workers with family responsibilities and workers and others without those responsibilities. It applies to all workers with responsibilities for dependent children where those obligations restrict their possibilities of preparing for, entering, participating in or advancing in economic activity.⁵⁵ Signatory states are required to incorporate the aim of enabling workers to exercise their right to prepare for, enter, participate or advance in economic activity and, to the extent possible, to do so without conflict between their work and family responsibilities into their national laws.⁵⁶

The 1951, 1958 and 1981 Conventions were all intended to further the realization of gender equality. Moreover, the Workers with Family Responsibilities Convention repeats much of what has already been said in international instruments with respect to gender equality, particularly the Convention on the Elimination of all Forms of Discrimination Against Women’s (CEDAW) call for traditional gender roles and social and cultural patterns of conduct of women and men to be modified.⁵⁷ States should modify the social and cultural patterns of conduct between women and men to eliminate prejudices, stereotypes and practices that are based on the inferiority and superiority of women and men, respectively.⁵⁸

Notably, the Workers with Family Responsibilities Recommendation (1981) suggests that governments introduce, for a period immediately following maternity leave, employment-protected parental leave for both parents.⁵⁹ States have discretion to determine the length and conditions of

52. Int’l Labour Org. [ILO], *C111 - Discrimination (Employment and Occupation) Convention*, 362 U.N.T.S. 31, art. 1, 2 (June 4, 1958).

53. Int’l Labour Org., *Ratifications of C100 - Equal Remuneration Convention, 1951 (No. 100)*, (Feb. 26, 2019), https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312245 [https://perma.cc/4T4Z-FQE7]; Int’l Labour Org., *Ratifications of C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, (Feb. 26, 2019), https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256 [https://perma.cc/9VFL-LXXS].

54. See ILO, *supra* note 1, at 74; Int’l. Labour Org. [ILO], *C156 - Workers with Family Responsibilities Convention, 1981 (No. 156)*, 1331 U.N.T.S 295 (June 3, 1981).

55. Int’l. Labour Org. [ILO], *C156 - Workers with Family Responsibilities Convention, 1981 (No. 156)*, 1331 U.N.T.S 295, art. 1(1) (June 3, 1981).

56. *Id.* at art. 3(1).

57. Convention on the Elimination of all Forms of Discrimination Against Women—Preamble, G.A. Res. 34/180 (Dec. 18, 1979).

58. *Id.* at art. 5(a).

59. Int’l Labour Org. [ILO], *R165 - Workers with Family Responsibilities Recommendation, 1981*

parental leave and the Recommendation notes that such leave may be incrementally introduced.⁶⁰

Finally, the Maternity Protection Conventions (1919, 2000) recognize women's right to paid maternity leave of not less than 14 weeks (including a period of six months' compulsory leave) following childbirth.⁶¹ The Maternity Protection Recommendation (2000) encourages governments to increase the minimum period of maternity leave from 14 to 18 weeks and for any cash benefits paid to women to be raised to the full amount of their previous earnings.⁶² The Recommendation also provides for limited forms of paternity and parental leave. In relation to paternity leave, it states that in the event of the death of the mother during any period of maternity leave, the father should be entitled to take leave for the remaining portion of the leave.⁶³ In cases of sickness or hospitalization of the mother after childbirth and before the expiry of maternity leave, and where the mother cannot look after the child, the father should be entitled to leave for a duration equal to the unexpired portion of the maternity leave.⁶⁴ Regarding parental leave, the Recommendation proposes that following the expiry of maternity leave, either working parent should be entitled to such leave, the duration and other conditions to be determined by national law or regulations.⁶⁵

Accordingly, the ILO has repeatedly recognized the importance of the provision of family leave to fathers for gender equality. Both the Maternity Protection and Workers with Family Responsibilities Recommendations propose that governments incorporate family leave entitlements into their national laws. However, these Recommendations impose no legally binding obligations, and serve only as encouragement for governments to implement greater protections for parents. Further, the scope of the right to paternity and parental leave is limited. The Maternity Protection Recommendation restricts paternity leave to extraordinary situations and, while both Recommendations propose that states enact a right to parental leave, neither provide guidance as to how this leave should be constructed. States are therefore given considerable discretion regarding the structure of parental leave if they choose to incorporate such provisions into their national laws. This lack of guidance also means that there are no quantifiable targets for either states or the ILO to measure progress towards workplace gender

(No. 165), art. 22(1) (June 3, 1981), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312503.

60. *Id.* at art. 22(2)-(3).

61. Int'l Labour Org. [ILO], *C003 - Maternity Protection Convention*, 38 U.N.T.S. 53, art. 3(c) (Oct. 29, 1919); Int'l Labour Org. [ILO], *C1833 - Maternity Protection Convention*, 2181 U.N.T.S. 253, art. 4 (May 30, 2000).

62. Int'l Labour Org. [ILO], *R191 - Maternity Protection Recommendation*, art. 1(1), 2 (May 3, 2000).

63. IRL, *supra* note 62, at art. 10(1).

64. *Id.* at art. 10(2).

65. *Id.* at art. 10(3)-(4).

equality. Further, the Workers with Family Responsibilities Recommendation proposes that either parent be offered parental leave—that is, on a gender-neutral basis—in which fathers are not exclusively entitled to leave. As will be further discussed in Section IV, gender-neutral parental leave does little to equalize the disproportionate burden of unpaid work on mothers.

While maternity protections are unquestionably important measures used to promote equality between women and men workers, extending periods of maternity leave is not the most effective legal or policy response to gender inequalities. Generally, the longer that women are out of the workforce, the more likely it is for their employment prospects and entitlements to decline, and the more likely they are to experience discrimination.⁶⁶

Obviously, the legal reach of the ILO's Standards is limited to countries that have ratified them. Neither the Workers with Family Responsibilities Convention nor the Maternity Protection Convention have been ratified to the same extent as the Equal Remuneration and Discrimination Conventions. Currently, only forty-four and twenty-four states have ratified these, respectively.⁶⁷ While only ratifying states can be held legally accountable for their noncompliance with the articles of these Conventions, the influence of these Conventions extends beyond ratifying governments. Despite the relatively small number of states that have ratified the Maternity Protection Conventions, in 2014, ninety-eight out of 185 ILO states (53%) offered a period of maternity leave of at least fourteen weeks, equivalent to the period in the Maternity Protection Convention.⁶⁸ Among these, forty-two reached or exceeded the eighteen weeks of leave proposed in the Maternity Protection Recommendation, and sixty provided twelve to thirteen weeks – consistent with the 1919 and 1952 Maternity Protection Conventions.⁶⁹ This indicates that, despite the relatively low rates of ratification of the ILO's Standards, most governments have nonetheless incorporated the provisions of the Maternity Protection Convention into their national laws. These conventions therefore have the potential to provide supranational guidance for governments implementing leave entitlements, even if those

66. YUSUF EMRE AKGUNDUZ & JANNEKE PLANTENGA, *LABOUR MARKET EFFECTS OF PARENTAL LEAVE: A EUROPEAN PERSPECTIVE* 5, 7 (Utrecht School of Economics, Tjalling C. Koopmans Research Institute, 2011).

67. Int'l Labour Org., *Ratifications of C156 - Workers with Family Responsibilities Convention, 1981* (No. 156), (Feb. 25, 2019), https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312301 [<https://perma.cc/6JSL-QGA4>]; Int'l Labour Org., *Ratifications of C103 - Maternity Protection Convention (Revised), 1952* (No. 103), (Feb. 26, 2019), https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312248 [<https://perma.cc/HC5L-D4QT>].

68. Addati, Cassirer & Gilchrist, *Maternity and Paternity at Work: Law and Practice Across the World*, 9 (2014).

69. Addati, Cassirer & Gilchrist, *supra* note 68.

governments have not ratified them.

It is evident that gender equality is central to the ILO's legal framework. However, mere *recognition* of the importance of gender equality and paternity and parental leave is insufficient to ensure their *implementation* and *realization* by states. This recognition must be matched by concrete international standards.

IV. AN INTERNATIONAL LABOUR STANDARD ADDRESSING PATERNITY AND PARENTAL LEAVE

A. Reasons for Action by the ILO

The ILO is the most appropriate international organization to implement a binding legal instrument on family leave. There are several reasons for this. First and foremost, such an instrument closely aligns with the ILO's mission, which explicitly addresses labour issues and seeks to promote and protect human and labour rights and social justice.⁷⁰ Family leave is also connected to the ILO's strategic objectives, including the setting and promotion of standards and fundamental principles and rights at work, creating more opportunities for decent employment and income for all, and the enhancement of coverage and effectiveness of social protection.⁷¹ These objectives would be furthered by the standardization of paternity and parental leave under the auspices of the ILO.

As outlined in section III, the ILO has repeatedly recognized the importance of family leave for gender equality. Further, a growing number of its Member States have implemented statutory rights to paternity and parental leave in their national laws. Statutory recognition of paternity leave increased from 40 out of 141 countries in 1994, to 94 out of 170 in 2015 (for which data was available).⁷² Importantly, recognition has not been limited to Western nations.⁷³ Despite such increasing recognition, the ILO has expressed concern about inadequate progress made by national governments in the closing of gender gaps over the past two decades, and has urged States to 'shake complacency' to progress gender equality.⁷⁴ The ILO recommends that governments develop a comprehensive legal framework, incorporating paid maternity leave as well as paid, mandatory, non-transferable paternity and parental leave, and notes that such leave is integral to advancing

70. JOHN BLACK ET AL., INTERNATIONAL LABOUR ORGANIZATION (Oxford University Press 2012).

71. Int'l Labour Org., *Mission and Impact of the ILO* (June 4, 2019), <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> [https://perma.cc/PQE9-4JDF]; Int'l Labour Org., *International Labour Organization: The U.N. Agency for the World of Work* (2019).

72. Int'l Labour Office, *supra* note 2, at 85.

73. *Id.*

74. Int'l Labour Office, *supra* note 1, at 12.

women's positions in the labour market.⁷⁵ However, unlike the EU, the ILO has not adopted a legally binding instrument addressing family leave.

The time is ripe for the ILO to do so. In preparation for its centenary, the ILO implemented seven centenary initiatives, including the Standards Initiative, which is aimed at ensuring that the Organization successfully engages with the challenges of its social justice mandate in the future.⁷⁶ In November 2011, the Standards Review Mechanism was established as part of the Standards Initiative to contribute to the implementation of the ILO's Standards policy and consolidate consensus on the role of the Standards.⁷⁷ The Standards Review Mechanism Tripartite Working Group (**SRMTWG**) was created to further this aim.⁷⁸ The SRMTWG is tasked with reviewing ILO Standards with a view to making recommendations to its Governing Body on the status of the Standards examined and the identification of any gaps in coverage.⁷⁹ Indeed, the next meeting of the SRMTWG, scheduled for late 2021, will review instruments concerning social security – including Standards addressing leave.⁸⁰ The SRMTWG will therefore be able to recommend to the ILO the adoption of a Standard on paternity and parental leave.

B. Key Elements of the Proposed Standard

This sub-section sets out the key elements that must be incorporated into a Standard on family leave, for the SRMTWG to recommend for adoption by the ILO at its next meeting. These elements should be incorporated into a convention (the **Proposed Convention**) because, if implemented, such a convention would be legally binding on signatory states. Provisions that may be considered to be beyond the scope of the Proposed Convention, or perhaps too divisive for the majority of delegates at an International Labour Conference (**Conference**) to agree upon, may be incorporated into a recommendation (the **Proposed Recommendation**).

The structure of this sub-section reflects the probable structure of the Proposed Convention, if or when it is adopted. It outlines the Proposed

75. *Id.* at 16.

76. ILO Director-General, *Towards the ILO Centenary: Realities, Renewal and Tripartite Commitment*, ¶ 155, ILC.102/DG/1A (2013).

77. Int'l Labour Org., *Standards Review Mechanism Tripartite Working Group* (June 1, 2019), https://www.ilo.org/global/standards/WCMS_449687/lang--en/index.htm [https://perma.cc/KH7V-P5PM].

78. Int'l Labour Org., *Standards Review Mechanism Tripartite Working Group and Its Terms of Reference (2015)* (June 1, 2019), https://www.ilo.org/global/standards/international-labour-standards-policy/WCMS_528959/lang--en/index.htm [https://perma.cc/WAL3-RA9E].

79. Governing Body of the Int'l Labour Org., *Terms of Reference for the Standards Review Mechanism Tripartite Working Group*, ¶ 4, ¶ 9 (2015).

80. Int'l Labour Org., *Sixth Meeting of the SRM TWG (2021)* (Aug. 19, 2020) https://www.ilo.org/global/standards/international-labour-standards-policy/WCMS_742423/lang--en/index.htm [https://perma.cc/JVL5-FQ5B].

Convention's preamble and scope, followed by its key provisions. Simply enshrining a right to paternity and parental leave is insufficient to ensure its uptake by fathers.⁸¹ There is persuasive evidence that fathers are more likely to utilize family leave when other factors incentivize them to do so. These factors include generous length of leave and compensation, an individual right to a significant amount of non-transferable parental leave, and flexibility in relation to the scheduling of leave.⁸² Other factors, including the collective financing of compensation of family leave, encourage the acceptance of fathers taking leave by employers and society more generally. The incorporation of these elements is more likely to encourage leave uptake and transform traditional gender norms.

1. Preamble

The Proposed Convention's preamble should reflect the numerous international instruments concerning gender equality and women's workplace rights.⁸³ It should refer to the pervasive inequalities between working women and men and state that the primary reason for these inequalities is the unequal distribution of unpaid work between mothers and fathers. It should highlight that the provision of paternity and parental leave to fathers is an important means to equalize the distribution of unpaid work between parents. Additionally, the preamble should refer to the structural, institutional, individual and economic reasons why fathers are, compared to mothers, less likely to make use of family leave.

The Proposed Convention is not the ultimate solution to gender inequality. Rather, it is one of many steps that the ILO must take to realize equality. Its adoption should therefore not occur in a vacuum, and ratifying states should ideally also implement complementary measures designed to realize gender equality. These measures should be incorporated into the

81. VAN BELLE, *supra* note 13, at 14.

82. *Id.* at 3; Linda Haas & Tine Rostgaard, *Fathers' Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave*, 14 CMTY., WORK & FAM. 177, 178 (2011); Eurofound Publications Office of the European Union, *Promoting Uptake of Parental and Paternity Leave among Fathers in the European Union*, 5 (2015); Margaret O'Brien, *Fathers, Parental Leave Policies, and Infant Quality of Life: International Perspectives and Policy Impact*, 624 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 190, 190 (2009); Peter Moss & Fred Deven, *Leave Policies and Research*, 39 MARRIAGE & FAM. REV. 255, 263 (2006).

83. U.N., *Universal Declaration of Human Rights* (1948), https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf; U.N. Human Rights Office of the High Commissioner, *International Covenant on Civil and Political Rights Art. 3* (Mar. 23, 1976), <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>; U.N. Human Rights Office of the High Commissioner, *International Covenant on Economic, Social and Cultural Rights Art. 3* (Jan. 3, 1976), <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>; U.N. Entity for Gender Equality and the Empowerment of Women, *Convention on the Elimination of All Forms of Discrimination against Women*, <https://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>; U.N. Human Rights Office of the High Commissioner, *Convention on the Rights of the Child Art. 18(1)* (Sept. 2, 1990), <https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>.

preamble in a similar manner to the preamble of the EU Directive. For instance, the preamble may state:

In implementing this Convention, Members should take into consideration that the equal uptake of family-related leave between women and men also depends on other appropriate measures, including the provision of readily available, accessible and affordable childcare systems and long-term care services, flexible working practices, and legislation addressing family support and taxation systems. Such measures are crucial because they assist parents and other carers to enter, remain in, or return to the labour market.⁸⁴

The departure of new mothers from the labour market is likely only postponed until after the conclusion of any period of leave by fathers, if complementary and concurrent measures are not implemented by Member States.⁸⁵ It may be that these measures are incorporated and elaborated on by the ILO in the Proposed Recommendation.

2. Scope

The Proposed Convention should apply to as many workers as possible. A provision based on Article 2 Directive and Article 2(1) Maternity Protection Convention should state something to the following effect:

This Convention applies to all employed women and men, including those who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, and those in atypical forms of dependent work.

It should guarantee to all employed men (and partners, as discussed below) a right to paternity leave, and to all employed women and men a right to parental leave, regardless of their employment in the public or private sector. Importantly, the Convention should refer to ‘atypical forms of dependent work’, including part-time, fixed-term, temporary and casual employment, all of which are commonplace in many ILO states due to the increasing casualization of workforces.⁸⁶

The ILO should consider substituting ‘paternity’ for ‘partner’ leave in the Proposed Convention. Whereas ‘paternity’ is associated with traditional fatherhood, ‘partner’ includes both fathers and non-traditional families (including same-sex parents and their children). Nonetheless, if the ILO continues to refer to ‘paternity’ leave in the Proposed Convention, the

84. Huerta, *supra* note 8, at 32; Council Directive, *supra* note 14, at preamble 12; RAY BROOMHILL & RHONDA SHARP, AUSTRALIA’S PARENTAL LEAVE POLICY AND GENDER EQUALITY: AN INTERNATIONAL COMPARISON, 4 (Australian Workplace Innovation and Social Research Centre, The University of Adelaide 2012).

85. VAN BELLE, *supra* note 13, at 15.

86. European Parliament and the Council of the EU, *supra* note 14, at preamble 17; *see generally* Valerio De Stefano, *Casual Work Beyond Casual Work in the EU*, 7 EUR. LAB. LAW J. 421 n.3 (2016) (regarding casualisation of the workplace).

Definitions provision should reflect Article 3(1)(a) Directive:

'Paternity leave' means leave from work for fathers or, where and in so far as recognized by national law, for equivalent second parents, on the occasion of the birth of a child for the purposes of providing care.

Such a provision leaves discretion for governments to determine the legal definition of 'paternity' and fatherhood.

3. Length of Leave

The guaranteed length of leave should encourage, over the long-term, equal caregiving responsibilities between parents. To do so, paternity and parental leave should be provided for a relatively long period because fathers who take family leave of longer duration are more likely to be involved in childcare and household activities than those who take leaves of shorter duration or none at all.⁸⁷

Between countries in which paternity leave is guaranteed to fathers, there is divergence about the length of such leave. Globally, 36% of ILO states provide leave exclusively for fathers for less than two weeks: 14% from seven to thirteen days and 22% from one to six days.⁸⁸ Of those countries that provide more than ten days, 9% offer leave between fourteen and twenty-nine days and 10% offer leave of more than one month.⁸⁹ Clearly, if fathers are offered paternity leave, the leave is not offered for a considerable period of time.

Nonetheless, a notable minority of governments offer approximately 10 working days of paternity leave to fathers. Indeed, there is some consensus that paternity leave should be offered for this length of time at minimum. The Directive guarantees fathers in the EU at least 10 working days of paternity leave. Studies show that fathers who take at least two weeks of leave are more likely to participate in childcare-related activities in the early years of children's lives than fathers who take less leave or none at all.⁹⁰ The Proposed Convention should reflect this by guaranteeing a minimum of 10 working days of paternity leave. The wording of the relevant provision should reflect Article 4(1) Directive and Article 4(1) Maternity Protection Convention:

Member States should take the necessary measures to ensure that fathers or, where recognized by national law, equivalent second parents, to whom this Convention applies should be entitled to a period of paternity leave of not less than 10 working days that is to be taken from the occasion of the birth of the worker's child.

87. Feldman & Gran, *supra* note 7, at 98.

88. Int'l Labour Org., *Care Work and Care Jobs for the Future of Decent Work* 128 (Int'l Labour Office, 2018).

89. *Id.*

90. Huerta, *supra* note 8, at 308; O'Brien, *supra* note 82, at 207.

Ten working days of paternity leave is the absolute minimum that should be incorporated into the Proposed Convention. Delegates at a Conference should aim to increase this period of leave, particularly in light of recent developments in European countries. In September 2020, the French government announced an extension to paid paternity leave for fathers and same-sex couples from fourteen to twenty-eight days and in February 2020, Finland extended paternity leave to seven months, the same length as maternity leave.⁹¹

There is also significant variation in the period of parental leave offered to mothers and fathers. In Europe, for example, parental leave ranges between three months and two-and-a-half years.⁹² However, in the EU, the Directive entitles each parent to a minimum of four months of parental leave. There are also varying amounts of parental leave recommended to be provided to each parent. As noted in section III, the Workers with Family Responsibilities and Maternity Protection Recommendations provide no guidance in relation to the period of parental leave that should be offered to fathers. Whereas some studies have recommended seven-and-a-half to nine months of parental leave⁹³, others have recommended a longer period. Some scholars have described the 'ideal' leave policy as fourteen months of well-paid leave, half of which should be reserved for fathers.⁹⁴ A 2012 study of individuals from 41 high- and middle- income countries (from regions apart from the Arab States) asked respondents about their views regarding leave for working parents: the average preferred length was 12.3 months (women preferred on average 12.8 months whereas men preferred 11.7) and the majority of respondents (57%, women and men equally) considered that fathers should take some leave (if not half of the statutory period of leave).⁹⁵

The drafters of the Proposed Convention will be required to balance the ideal period of parental leave with what may realistically be agreed upon by the delegates at a Conference. Based on the above information, the ideal period of parental leave that should be included in the Proposed Convention is between six and 12 months. The relevant provision in the Proposed Convention should reflect Article 5(1) Directive and its wording should mirror the above proposed article for the length of paternity leave.

4. Compensation

91. Elian Peltier, *France Doubles Paid Paternity Leave to 28 Days, One of Europe's Most Generous Plans*, NY TIMES (September 24, 2020), <https://www.nytimes.com/2020/09/24/world/europe/france-paternity-leave.html?fbclid=IwAR39sPw2tS3GZjH7nQgcNtaOoWazs48FCDvfREEDQMqnc-8kXTFqFONzqro> [https://perma.cc/A9MP-BKQ8].

92. Carmen Castro-García & Maria Pazos-Moran, *Parental Leave Policy and Gender Equality in Europe*, 22 FEMINIST ECON. 51, 56 n.3 (2015).

93. See Akgunduz & Plantenga, *supra* note 66, at 856; Véronique Genre, *European Women: Why Do(N't) They Work?*, 42 APPLIED ECON. 1499, 1506 n.20 (2010).

94. See Helene Dearing, *Gender Equality in the Division of Work: How to Assess European Leave Policies Regarding Their Compliance with an Ideal Leave Model*, 26 J. OF EUR. SOC. POL'Y 1, 7 (2016).

95. International Labour Organization, *supra* note 88, at 130.

One of the most important factors for fathers when they are deciding to take family leave is the level of compensation at which such leave is paid.⁹⁶ Fathers' rates of leave are significantly higher in countries that offer high wage or salary replacement.⁹⁷ For example, 89% of Danish fathers utilize parental leave provided at 90% of their salary, 90% of Swedish men take-up parental leave offered at 80% of their salary, and 91% of Icelandic men utilize such leave at 80% of their salary.⁹⁸ However, less than 1% of Spanish fathers eligible for three years of minimal or unpaid parental leave make use of this entitlement.⁹⁹ Participation by Dutch fathers in parental leave schemes offers another example: in the Dutch public sector, the take-up rate of leave is almost twice as high as in the private sector, with parental leave being compensated at 75% of previous earnings in the public sector, and only 25% in the private sector.¹⁰⁰ Evidently, there is a close correlation between high compensation for family leave and fathers utilizing their right to take such leave.¹⁰¹

The payment of high rates of compensation reverses the logic that the lowest earner – generally the mother due to the gender pay gap – stops working in order to commence caregiving because the household income is unaffected by the father taking leave.¹⁰² It also lessens socio-economic inequalities by assisting fathers in low income families, or families where the father is the sole breadwinner, to take family leave.¹⁰³ Importantly, high rates of compensation send a signal to parents that caregiving roles are valued by society and are as important as paid employment.¹⁰⁴

Ideally then, paternity and parental leave should be compensated at the highest amount possible. However, if high rates of compensation cannot be agreed to by delegates at a Conference, in order to encourage equal caregiving responsibilities, family leave should be compensated at a rate sufficient to allow fathers to participate in caring responsibilities without experiencing a significant loss of income.¹⁰⁵ Due to the importance of compensation for fathers' uptake of leave, a provision mirroring Article 6 Maternity Protection Convention addressing paternity and parental leave

96. Castro-García & Pazos-Moran, *supra* note 92, at 60; Gayle Kaufman, *Barriers to Equality: Why British Fathers Do Not Use Parental Leave*, 21 CMTY., WORK & FAM. 310, 316 n.3 (2018).

97. Organisation for Economic Co-operation and Development, *supra* note 1, at 202; O'Brien, *supra* note 82.

98. Castro-García & Pazos-Moran, *supra* note 92, at 60; Pedro Romero-Balsas et al., *Decision-Making Factors within Paternity and Parental Leaves: Why Spanish Fathers Take Time Off from Work*, 20 GENDER, WORK AND ORG. 678, 681(2013).

99. Castro-García & Pazos-Moran, *supra* note 92, at 63.

100. *Id.* at 57.

101. VAN BELLE, *supra* note 13, at 3.

102. Ciccía & Verloo, *supra* note 9, at 517.

103. O'Brien, *supra* note 82, at 204-05.

104. Ciccía & Verloo, *supra* note 9, at 516.

105. Broomhill & Sharp, *supra* note 84, at 4.

benefits should be incorporated into the Proposed Convention:

Cash benefits should be provided, in accordance with national laws and regulations, or in any other manner consistent with national practice, to men or equivalent second parents who are absent from work on paternity and parental leave.

Cash benefits should be at a level which ensures that the worker can sustain himself and his child in proper conditions of health and with a suitable standard of living.

Where, under national law or practice, cash benefits paid with respect to paternity and parental leave are based on previous earnings, the amount of such benefits should not be less than two-thirds of the worker's previous earnings or of such earnings as are considered for the purpose of computing benefits.

Formal equality between working women and men is ensured by the provision of paternity leave benefits at the same rate as for maternity leave under the Family Responsibilities Convention.¹⁰⁶ Indeed, paternity leave is generally compensated by governments and employers at the same rate as maternity leave.¹⁰⁷ The ILO estimates that 90% of governments that provide paternity leave compensate for this leave at 100% of fathers' previous earnings.¹⁰⁸ Therefore, the Proposed Convention should set minimum standards to be met (or hopefully exceeded) by national governments.

Globally, compensation for parental leave is generally paid at a lower rate than paternity leave. If parental leave is compensated, amounts vary widely from generous income replacement for shorter periods of leave to less generous flat rate benefits for longer periods.¹⁰⁹ For instance, of 66 countries that offer parental leave, thirty-six provide cash benefits and 30 provide leave without pay.¹¹⁰ Eighteen of these countries provide cash benefits of at least two-thirds of a worker's previous earnings, and others offer lower levels of support, such as Canada at 55% of previous earnings and Russia at 40%.¹¹¹ Evidently, there is considerable variation regarding parental leave compensation. However, evidence shows that fathers' use of parental leave is highest when compensated at a minimum of 50% of previous earnings.¹¹² Accordingly, if the Conference is unable to reach consensus regarding the payment of high rates of compensation to workers for parental leave, states should seek to agree on a minimum of 50% of a worker's previous earnings or benefits for parental leave. In the alternative, parental leave could be

106. See Monica Porter, *Combating Gender Inequality at Home and at Work: Why the International Labour Organization Should Provide for Mandatory Paid Paternity Leave*, 48 GEO. WASH. INT'L. L. REV. 203, 228 n.203 (2015).

107. Dearing, *supra* note 94, at 237.

108. Addati, Cassirer & Gilchrist, *supra* note 68, at 57.

109. Dearing, *supra* note 94, at 236.

110. Addati, Cassirer & Gilchrist, *supra* note 68, at 65.

111. *Id.*

112. O'Brien, *supra* note 82, at 194.

guaranteed at a rate that, at minimum, workers would receive if they had taken sick leave. In the event of the latter, an article relating to parental leave benefits should substantially reflect the wording of the above proposed provision regarding paternity leave benefits.

5. Financing

The Proposed Convention should ideally include a provision obliging states to collectively finance paternity and parental leave, including through compulsory social insurance or public funds.¹¹³ This article should be modelled on Article 6(8) Maternity Protection Convention and provide:

Benefits in respect of paternity and parental leave should be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. An employer should not be individually liable for the direct cost of any such monetary benefit to a woman employed by him or her without that employer's specific agreement except where:

(a) such is provided for in national law or practice in a Member State prior to the date of adoption of this Convention by the Conference; or

(b) it is subsequently agreed at the national level by the government and the representative organizations of employers and workers.

Most EU Member States pay paternity leave benefits at least partially through national social security systems.¹¹⁴ In Belgium, Denmark and the UK, paternity leave is paid by both the national government and employers; however, in Croatia, Greece, Luxembourg, Romania and the Netherlands, employers are solely liable for the payment of paternity leave benefits.¹¹⁵ Globally, most paternity leave policies are financed through employer's liability. Yet this financing mechanism places a disproportionate burden on employers and increases the likelihood of sex discrimination in the labour market.¹¹⁶ If paid parental leave is offered by ILO states, it is usually funded by the government's social insurance schemes through general taxation measures.¹¹⁷ As such, a provision requiring states to collectively finance family leave policies may be divisive. If its inclusion would prevent a significant portion of states from adopting the Proposed Convention due to economic considerations, this provision should be included in the Proposed Recommendation. Doing so would indicate to governments that the ILO intends for all governments to work towards the provision of publicly funded family leave benefits.¹¹⁸

113. ILO, *supra* note 1, at 76.

114. Eurofound, *supra* note 82, at 3.

115. *Id.*

116. ILO, *supra* note 1, at 76; Stoneman, *supra* note 8, at 75, 77.

117. Addati, Cassirer & Gilchrist, *supra* note 68, at 65.

118. Porter, *supra* note 106, at 229.

6. An Individual Right to Non-transferable Parental Leave

According to the ILO, an important factor of parental leave policies is whether the leave is offered as a family or shared entitlement, or as an individual and non-transferable entitlement.¹¹⁹ Most countries offer parental leave as a family or shared entitlement, meaning that both parents have the right to take parental leave and the allocation of leave is left to their discretion.¹²⁰ Consequently, across the world, mothers generally take more parental leave.¹²¹ To encourage the uptake of parental leave by fathers, increasing attention is being paid to the provision of individual entitlements to parental leave on a non-transferable basis.¹²² This entitlement cannot be transferred between parents – it is forfeited if it is not used (hence the colloquial terms ‘use it or lose it’ policies or ‘daddy quotas’).¹²³

Since 2010, most European countries have incorporated non-transferable parental leave entitlements for fathers into their national legislation.¹²⁴ For instance, in 2007, Germany amended its parental leave legislation so that if eligible fathers did not utilize their entitlement to two months of parental leave, they would ‘lose it’.¹²⁵ This resulted in an exponential increase in fathers’ uptake of parental leave from 3.3% to 29.3%.¹²⁶

In all the countries that have introduced non-transferable leave entitlements, fathers’ uptake of leave has significantly increased.¹²⁷ Fathers’ use of family leave is highest when leave is well-paid and reserved exclusively for them.¹²⁸ In 1974, Sweden was the first country to introduce equal access to paid parental leave for both parents.¹²⁹ However, few men took parental leave until 1995 when a highly paid, one-month, non-transferable entitlement was introduced.¹³⁰ This resulted in an increased uptake of parental leave by fathers from 9% to 47%.¹³¹ The Icelandic

119. Addati, Cassirer & Gilchrist, *supra* note 68, at 62.

120. *Id.*

121. *Id.*; Peter Moss & Fred Deven, *Leave Policies in Challenging Times: Reviewing the Decade 2004–2014*, 18 CMTY., WORK & FAM. 137, 139 (2015).

122. See generally Linda Haas & C. Philip Hwang, *The Impact of Taking Parental Leave on Fathers’ Participation in Childcare and Relationships with Children: Lessons from Sweden*, 11 CMTY., WORK AND FAM. 85, 91-92 (2008).

123. Huerta, *supra* note 8, at 15-16; Moss & Deven, *supra* note 82, at 264.

124. Lidia Farré, *Permisos de Paternidad e igualdad de género: Una revisión de la literatura [Parental Leave Policies and Gender Equality: A Survey of the Literature]*, 34 ESTUDIOS DE ECONOMÍA APLICADA 45, 48 (2016) (Spain).

125. ILO, *supra* note 10, at 6.

126. *Id.*

127. ILO, *supra* note 1, at 75; Moss & Deven, *supra* note 82, at 279.

128. Huerta, *supra* note 8, at 16.

129. Farré, *supra* note 124, at 52.

130. *Id.*

131. John Ekberg et al., *Parental Leave - a Policy Evaluation of the Swedish “Daddy-Month” Reform*, 97 J. OF PUB. ECON. 131, 142 (2013).

government currently offers parents a total of nine months parental leave, divided into thirds, with three months reserved for each parent, and the remaining three months to be allocated in accordance with the parents' wishes.¹³² This is the longest period of non-transferable leave offered to fathers and co-parents in the world.¹³³ The introduction of an individual right to non-transferable leave had a profound impact on the uptake of leave by Icelandic fathers. In 2009, 96% of fathers in Iceland utilized an average of 99 days of parental leave – nine days more than the non-transferable leave period.¹³⁴ Across the globe, non-transferable leave entitlements are often the only entitlements that fathers can take.¹³⁵

Highly paid 'use it or lose it' entitlements also encourage the more equal distribution of childcare and household activities. A study of countries that introduced individual parental leave entitlements between 1971 and 2013, which compared changes in time devoted to childcare by highly educated fathers, found that one extra, non-transferable week of parental leave for fathers increased the time spent by them with their child by seven minutes per week.¹³⁶ This is by no means an overwhelming period; nonetheless, the findings suggest that the implementation of individual entitlements to parental leave increases fathers' participation in childcare. It is also important to remember when considering such statistics that the implementation of national or international law guaranteeing paternity and parental leave is a step forward, but by no means a quick fix to the pervasive and institutionalized problem of the unequal distribution of unpaid work between parents.

Non-transferable leave may also provide normative guidelines for fathers to engage in caregiving roles, as well as normalize the taking of leave by fathers for employers and society generally.¹³⁷ In the short term, this normalization should reduce the likelihood of penalization of men who take leave.¹³⁸ In the long term, discrimination against women (based on the assumption that women are more likely than men to take family leave) and men for taking family leave should decrease and, hopefully, ultimately disappear.¹³⁹ Accordingly, the Proposed Convention should include a provision to this effect.

The duration of the non-transferable period of family leave will need to be determined by delegates at a Conference. Currently, in countries that offer both parents a separate and non-transferable entitlement to parental leave,

132. Addati, Cassirer & Gilchrist, *supra* note 68, at 67.

133. Farré, *supra* note 124, at 53.

134. Farré, *supra* note 124, at 52.

135. Castro-García & Pazos-Moran, *supra* note 92, at 54.

136. Christina Boll et al., *Parental Childcare and Parental Leave Policies: Evidence from Industrialized Countries*, 12 REV. OF ECON. OF THE HOUSEHOLD 129, 131 (2014).

137. Ciccía & Verloo, *supra* note 9, at 519.

138. Farré, *supra* note 124, at 53.

139. Farré, *supra* note 124, at 48.

women rather than men are offered the majority of this leave. For example, UK mothers are guaranteed fifty-two weeks of parental leave but fathers only two weeks, Denmark offers mothers eighteen weeks and fathers two weeks, in France mothers are guaranteed sixteen weeks and fathers only two weeks, and Spain provides mothers six weeks and fathers two weeks.¹⁴⁰ Iceland is the only country to offer both parents the same period of non-transferable leave.¹⁴¹ It is possible that, if the ILO can reach consensus regarding the inclusion of non-transferable leave in the Proposed Convention, the consensus would be, at maximum, two weeks. This length is not sufficiently long enough to significantly alter traditional gender stereotypes and norms. Hence, the ILO should aim for a considerably longer period of non-transferable leave to be included in the Proposed Convention. Ideally, this period should be at least half of the parental leave period set in the Proposed Convention. The relevant provision should reflect Article 5(2) Directive and provide: ‘Member States shall ensure that [3 – 6]¹⁴² months of parental leave cannot be transferred.’

7. Flexibility

The Proposed Convention should offer parents paternity and parental leave on a flexible basis. A provision to this effect should mirror Articles 4(1) and 5(6) Directive and provide:

Member States should take the necessary measures to ensure that workers have the right to request that they take paternity and parental leave in flexible ways.

The most common flexible paternity leave option is the provision of an extended period of leave for multiple births.¹⁴³ Flexible parental leave options generally take four forms: (1) the possibility to take all or part of leave when parents choose until their child reaches a certain age; (2) the possibility to take leave in one period or in several, shorter periods; (3) the availability of leave on both a full-time and part-time basis; and (4) the possibility of taking shorter periods of leave with higher benefits or longer periods with lower benefits.¹⁴⁴ In relation to the latter, for example, Norway, offers 44 weeks of parental leave at 100% of the statutory allowance or fifty-six weeks at 80%.¹⁴⁵

There are numerous benefits associated with flexible parental leave. A 2019 study of Swedish social insurance reform found that fathers’ access to

140. Castro-García & Pazos-Moran, *supra* note 92, at 57.

141. *Id.*

142. For clarity, three to six months has been recommended based on the length of the parental leave period proposed by the author (that is, six to twelve months).

143. Sonja Blum et al., *International Review of Leave Policies and Research 2018*, 12 (August 19, 2020), <https://www.leavenetwork.org/annual-review-reports/country-reports/>.

144. VAN BELLE, *supra* note 13, at 15; Moss and Deven, *supra* note 82, at 264.

145. Ciccica & Verloo, *supra* note 9, at 521.

workplace flexibility significantly improved mothers' postpartum health.¹⁴⁶ The study also found that increased flexibility reduced the likelihood of a mother seeking assistance for childbirth-related complications and prescription drugs in the first six months post-partum.¹⁴⁷ Flexibility may also support fathers to take family leave who would otherwise not do so. Flexible leave, especially part-time, may counter fathers' fears that they will become disconnected from their position and the workforce as a result of taking family leave and the negative attitudes of employers surrounding the taking by fathers of such leave.¹⁴⁸ The provision of flexible parental leave may encourage men to take family leave, thereby assisting women to better balance their personal and professional lives following childbirth.

There are, of course, downsides to the provision of flexible alternatives. Such leave may impose pressure on fathers to not take leave because flexibility does not encourage the taking of family leave to be considered the norm.¹⁴⁹ It may also mean that the time fathers spend with their children does not contribute to the equalization of the joys and burdens of child-rearing and housework, but rather fathers who take leave focus on "quality time" with their children.¹⁵⁰ The benefits, however, outweigh the detriments. A flexible leave provision should be incorporated into the Proposed Convention, the details or examples of which may be elaborated on in the Proposed Recommendation.

V. CONCLUSION

In its first century, the ILO has significantly contributed to the promotion and protection of human and labour rights in the global workforce. Despite this contribution, the pursuit of gender equality remains ongoing. It is recognized that the primary reason for such inequality is the disproportionate burden of unpaid work on women, and one of the key means to equalize this burden is the provision of paternity and parental leave to fathers, and the subsequent uptake of this leave by them. This article recommends for, and sets out the key provisions of, such an ILO Standard.

The EU's Directive provides a framework for the ILO to implement such an instrument. Further, the existence of the SRMTWG, which has been tasked with reviewing existing Standards and proposing new Standards to fill any gaps in their current coverage, provides an appropriate mechanism for a new Standard concerning family leave to be brought to the attention of the ILO.

146. Petra Persson & Maya Rossin-Slater, *When Dad Can Stay Home: Fathers' Workplace Flexibility and Maternal Health*, NAT'L BUREAU OF ECON. RSCH. WORKING PAPER 25902, 28 (2019).

147. *Id.*

148. Ciccia & Verloo, *supra* note 9, at 519; VAN BELLE, *supra* note 13, at 15.

149. Jule Mulder, *Promoting Substantive Gender Equality through the Law on Pregnancy Discrimination, Maternity and Parental Leave*, 1 EUROPEAN EQUALITY LAW REVIEW 39, 48 (2018).

150. *Id.* at 49.

The process of negotiating and drafting the proposed Standard will not be simple. A majority of ILO Member States, as well as employers and workers groups at a Conference, must agree to the provisions of the Standard. There will be a plethora of ideas and opinions to contend with. Undoubtedly, there will be resistance due to deeply entrenched, gendered notions of parenting. However, these stereotypes and norms must be broken down if we are to encourage fathers to uptake paternity and parental leave in greater numbers and to assume equal caregiving responsibilities.

The ILO's 2019 report 'A quantum leap for gender equality' stated: *'While significant advances have taken place for women at work over the past century, there is no room for complacency.'*¹⁵¹ The ILO must heed its own message and implement the proposed Standard on paternity and parental leave.

151. Int'l Labour Office, *supra* note 1, at 12.