

Women Workers: Is Equality Enough?

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Introduction

I am going to discuss women's work and the question I am asking is whether equality is enough. My title is intentionally ambiguous and provocative.

The phrase 'women's work' is essentially ambiguous in a way that the expression 'men's work' is not. Women's work can refer either to waged work or it can include what has traditionally been viewed as women's natural work – that of unpaid care and household work. By focusing on the patterns of change and continuity in women's work it is possible to trace the profound transformations in national and transnational labour markets that have been driven by global capitalism.

The question I have posed – is equality enough – is designed to trouble the normative goal of women's claims for equality in employment. I am concerned with the questions equality of what and for whom and how we are to achieve it.

There is an intimate relationship between women's paid work – employment – and legal norms of equality. In fact, the relationship is so close it is hard to recall that sixty years ago equality had no resonance when it came to women's work. The historic achievement of second-wave feminism, which emerged in the 1970s, 'was to make women fully free sellers of their own labour by substantially dismantling the legal and normative edifice which had mandated women's subservience.'¹

Law and especially equality rights occupied a privileged place in feminist campaigns for equality in employment. Colleen Sheppard's metaphor of overlapping layers or concentric circles of anti-discrimination norms in international labour law also captures the expanding nature of women's equality rights in employment.²

The goal of my lecture is to historicize the narrative of the expansion of the legal definition of equality and women's employment – to recontextualise and re-

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¹ J. Brenner, 'The Best of Times, the Worst of Times: US Feminism Today.' (1993) *New Left Review* 20, 101,103.

² C. Sheppard, 'Mapping Anti-Discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law.' (2012) *International Labour Law* 151, 1.

interpret this progressive narrative in light of changes in the labour market and political discourse. While the legal norms for women's employment have shifted, first from protection and exclusion in the 1950s to anti-discrimination and formal equality in the late-1960s and 1970s and then to substantive and transformative equality in the 1980s and 1990s, the path of women's position in the labour market has not been teleological, from worse to better treatment, but, rather, contradictory.³

This non-linear pattern is not surprising if we consider that not all women are similarly situated in the labour market. Social relations operating at different scales and along different axes create hierarchies among groups of women differentiated in terms of race, migrant status, and ability. Women's claims to equality in employment have become more nuanced and complex as the contours of the gender order have been redrawn to reflect the growing diversity between women and a deterioration in what has been the normative or standard employment relationship for men.

My lecture unfolds in four stages, beginning with a précis of the progressive expansion of legal equality norms, followed by a short conceptual interlude, when I discuss the concepts that shape my counter-narrative. The story I recount is about how equality norms are confounded by the simultaneous intensification and erosion of gender in the labour market in developed economies. I will use Canada and, occasionally, the United Kingdom, to illustrate the changes in the labour market and gender order. This narrative calls into question the potential of equality norms, however expansive, to solve the problems women workers face in the wake of global austerity.

The Expanding Legal Norm of Equality

Using international labour law as her illustration, Colleen Sheppard has mapped concentric circles of equality law that expand outward along four dimensions: first, the norm – from formal to transformative equality; second, the personal scope – from standard employment to precarious and informal work; third, the ground or characteristic – from a single ground or characteristic of discrimination to multiple or intersecting ones; and fourth, the scale – from national to transnational relations. She chronicles how, from a narrow beginning as a formal notion of treating like alike, equality has expanded through indirect or effects-based discrimination to address systemic inequalities at work that are related to structural constraints of

³ J. Fudge, 'From Segregation to Privatization: Equality, Law and Women Public Servants, 1908-2000' in B. Cossman and J. Fudge, eds., *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 86-127.

the market, the family and community.⁴ Equality's expansionary logic propels it into to more and more spheres.

The first concentric circle comprises equal treatment or formal equality in employment relationships. Two International Labour Conventions adopted in the 1950s, one providing for equal remuneration for men and women and the other offering protection from discrimination on race, colour, sex, religion, political opinion, national extraction or social origin, exemplify this approach.⁵ However, two limitations to the equal treatment norm combine to severely restrict its potential to redress women's inequality at work. First, formal equality tends to benefit those women workers who most closely resemble men. Not only does this limit the number of women who are able to use equality rights to reduce their subordination at work, it fosters assimilation to the standard male employee. Second, since the instruments only apply to formal employment, women in informal employment or engaged in precarious employment arrangements that diverge widely from the male employment norm cannot invoke them.

Despite these constraints, the two ILO equality conventions also contained the kernels of an alternative approach, by providing a limited possibility to challenge apparently neutral norms that have a detrimental effect on women's opportunities for, and terms and conditions, of employment.⁶

These seeds grew to form the second circle in the 1970s, when several jurisdictions, including the UK, adopted legal instruments to combat indirect or adverse-effects discrimination.⁷ Not only was the reach of anti-discrimination law expanded, this approach led to two remedial developments. Workplace norms that have the effect of excluding groups of workers without good reason can be challenged and employers can be legally compelled to revise the exclusionary rules, policies and practices. Moreover, even employers who can justify the impugned rule or practices can be legally required to accommodate workers who are detrimentally affected by a justifiable rule so long as the accommodation does not create undue hardship.

The legal recognition of indirect discrimination paved the way for a further expansion of the reach of anti-discrimination law to the systemic or institutional

⁴ Sheppard, *supra* n. 2.

⁵ Sheppard, *supra* n. 2, referring *Convention 100, Equal Remuneration*, 1951, and *Convention 111, Discrimination (Employment and Occupation)*, 1958.

⁶ The *Equal Remuneration Convention* provided for equal pay of work of equal value and the *Discrimination (Employment and Occupation) Convention*, Article 5, allows for special measure to meet the needs of 'persons who for reasons such as sex, age, disablement, family responsibilities or social or cultural status are generally recognized to require special protection or assistance.'

⁷ *Equal Pay Act*, 1970.

level. Instead of focusing on discrete rules and policies, this approach appreciates that discriminatory assumptions are deeply embedded in work place practices. Affirmative action or, in Canadian parlance, employment equity policies place two broad types of positive obligations on employers.⁸ The first solution to the problem of systemic discrimination is preferential treatment in the hiring and promotion of individuals from historically disadvantaged groups. The second technique is to identify and eliminate apparently neutral rules and practices that disproportionately exclude individuals from historically excluded groups. In a pivotal decision involving a challenge to fitness standards for firefighters that were based exclusively on men's physiology, the Supreme Court of Canada adopted such an approach. The unanimous judgment, penned by Beverly McLachlin in 1999, two years before she was appointed as the first female chief justice to Canada's highest court, rejected the prevailing technique of accommodating individual women because it 'may serve to entrench the male norm as the "mainstream" into which women must integrate.'⁹

However, implementation of the norm of systemic equality has been tentative, contested and incomplete. There is no clear definition of affirmative action in ILO instruments, although as Sheppard notes, there is support for it in two United Nations' instruments.¹⁰ In jurisdictions where preferential hiring mechanisms have been adopted, they tend to be confined to the public sector or large employers, and even there, they are likely to be of the soft touch variety – voluntary, limited to reporting or attached to procurement. The UK's Equality Act follows this pattern.¹¹ By contrast, affirmative action norms that take the form of robust preferences in hiring and promotion tend to generate a backlash. More promising are positive obligations that focus on transforming exclusionary policies and practices. To be successful, the systemic approach, which comprises the third circle of equality norms, depends on effective oversight and enforcement either through civil society organizations such as trade unions or state agencies.¹²

⁸ *Employment Equity Act* (S.C. 1995, c. 44), first enacted in 1986.

⁹ *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union* [1999] 3 S.C.R. 3.

¹⁰ *Ibid.*, 10. Sheppard notes that guidance on positive measures is provided in two United Nations instruments, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of Racial Discrimination, both of which provide for 'special measures' and 'special temporary measures'.

¹¹ *The Equality Act*, 2010.

¹² Sheppard, *supra* n. 2, 9, referring to C. Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010).

But the problem with even this conception of legal equality is that it is unable to address inequalities that arise outside of formal employment relationships. The ILO's Decent Work Agenda, which was adopted in 1999, extends fundamental rights such as equality to informal work.¹³ The ILO's Global Equality Reports emphasize the link between anti-discrimination, equality in all forms of work, poverty reduction and economic development.¹⁴

The final circle that Sheppard surveys takes equality law beyond the borders of the nation state to consider how under globalization status inequalities on the basis of race and migrant status are more firmly entrenched at the same time as social and economic inequality has deepened. The ILO adopted a rights-based approach to migration in the Multilateral Framework on Migration in 2006 which promotes equal treatment of national and migrant workers. In 2008 it issued the Declaration on Social Justice, which reaffirmed the Decent Work Agenda's focus on reducing poverty and creating sustainable development.¹⁵ Both the Framework and the Declaration as a form of soft-touch regulation.

In essence, the expanding circles of equality law combine anti-discrimination mechanisms that are designed to remedy horizontal inequality between groups with social and economic rights that target vertical inequality based on class.¹⁶ This trajectory has been driven, in part, by the iterative critique of legal scholars, feminists prominent amongst them, of limitations in earlier generations of equality rights.¹⁷

Yet, despite its momentum, the meaning and scope of equality is extremely controversial. In an article entitled 'Equality: The Most Difficult Right,' Chief Justice

¹³ *Decent Work*. Report of the Director-General to the 87th Session of the International Labour Conference. Geneva, 1999.

¹⁴ See for example, *Equality at Work: The Continuing Challenge* - Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights. International Labour Conference, 100th Session, Report I(B). Geneva, 2012.

¹⁵ *Towards a Fair Deal for Migrant Workers in the Global Economy, Report V*. International Labour Conference, 92nd Session. Geneva, 2004; *Declaration on Social Justice for a Fair Globalisation*. International Labour Conference, 97th Session. Geneva, 2008.

¹⁶ Sheppard, *supra* n. 2, 2, citing B. Hepple, 'Equality and Empowerment for Decent Work.' (2001) *International Labour Review* 140, 5. See also S. Fredman, 'Redistribution and Recognition: Reconciling Inequalities.' (2007) *South African Journal on Human Rights* 23, 214.

¹⁷ See Hepple, *ibid.*; Fredman, *ibid.*; Sheppard, *supra* n. 12; S. Liebenberg and B. Goldberg, 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution.' (2007) *South African Journal on Human Rights* 23, 335.

Beverly McLachlin of the Supreme Court of Canada described equality as a Tantalus promising 'more than it can ever deliver.'¹⁸ She warned that 'absolute substantive equality is impossible' because of 'the diversity of our society and its foundation in the competition of the marketplace.'¹⁹ According to the Chief Justice, 'a market-based representative democracy necessary tolerates a certain degree of disparity, economic and otherwise.'²⁰

This reminder of the limits to equality in a market economy suggests the need for a different image of the development of equality law. Instead of regarding the legal approach to equality as a series of concentric circles rippling throughout society, it may be more accurate to picture it as 'a swirling vortex of energies that compete and collide'²¹ in the turbulence of market economies. This latter metaphor captures not only the dynamic tension between different conceptions of equality, but also the conflict between a commitment to social and economic equality and globalised capitalism.

Conceptual Interlude

Before describing the disjuncture between the expanding legal conceptions of equality and growing inequality in the labour markets of Canada and the UK, I will explain two concepts – social reproduction and gender order – that I use to organize my narrative.

The concept of social reproduction refers to the social processes and labour that go into the daily and generational maintenance of the working population.²² It encompasses the human capacities available to create and maintain social bonds, which includes the work of socializing the young, building communities, reproducing shared meanings, affective dispositions, and horizons of value that underpin social cooperation,²³ as well as the tasks of daily provisioning. Social

¹⁸ B. McLachlin, 'Equality: The Most Difficult Right'. (2001) *Supreme Court Law Review* 14 (2d) 17, 20.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ J. Conaghan, 'Intersectionality and UK Equality Initiatives.' (2007) *South African Journal on Human Rights* 23, 317, 332.

²² Fudge, *supra* n. 3; J. Fudge, 'The New Dual-Earner Gender Contract: Work-Life Balance or Working-Time Flexibility?' in J. Conaghan and K. Rittich, eds., *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford: Oxford University Press, 2005) 261-88.

²³ N. Fraser, 'Can Societies be Commodities All the Way Down? Polanyian Reflections on Capitalist Crisis'. (2012) *fondation maison des sciences de l'homme*, no. 18, August, 4.

reproduction has predominantly been organized in households through normative families and kin relations, characterized by a gendered division of labour.

Like every social system, capitalism imposes a specific relationship between the production of goods and services and the process of social reproduction of the population. What distinguishes capitalism is the tendency towards the separation of the key site of social reproduction (the household) from productive relations (the workplace). This separation of production from reproduction gives rise to an essential contradiction in capitalist societies – the conflict between the standard of living of workers and the drive for accumulation, which is the need to make profits. The state's role is crucial in mediating this contradiction and organizing social reproduction.²⁴

A key component of the state's role is to stabilize a specific gender order.²⁵ Gendering is a process in which social significance is attached to sexual difference which, in turn, structures organizations, affects social and political relationships and becomes intrinsic to the construction of significant social categories and political identities. Every gender order encompasses a gendered division of labour between social reproduction and production, which is sustained through gender norms and social arrangements that are achieved at particular times and in particular places.

The gender order is stable to the extent that it has been institutionalized in certain key sites such as the family, labour market, firms, schools, and state policies. For this to be achieved, there must be a set of shared understandings, practices and policies about the appropriate roles and expectations of men and women as well as some fit, however temporary, fragile and incomplete, between the processes of reproduction and production.

There is a complex relationship between equality law and the gender order. Legal rights, like other norms, emerge out of the struggles over meaning, representation, power and legitimacy by social actors. Although these struggles over meaning are dynamic, they can nonetheless take on stabilized forms at specific moments and can be reproduced over time.²⁶ Stabilization can be achieved as a result of compromises reached by social actors. If they become widely shared among social actors, these compromises can congeal as 'societal paradigms', which are hegemonic sets of interconnected premises or meaning systems, and they include gender discourses. However, opportunities for temporarily subordinated identities to extend their

²⁴ A. Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge: Cambridge University Press, 1992).

²⁵ Fudge, *supra* n. 3.

²⁶ J. Jenson, 'Paradigms and Political Discourse: Protective Legislation in France and the United States Before 1914.' (1989) *Canadian Journal of Political Science* 22, 235-58.

representational reach and strength surface during periods of 'crisis', which occur when the dominant paradigm's ability to absorb its internal contradictions becomes compromised. Moments of crisis, such as an imbalance between social reproduction and production, are the 'moments of efflorescence', which can lead to a shift in the gender order.²⁷

Counter Narrative

After the crisis of World War II, in most democratic capitalist countries a stable and enduring gender order composed of a male breadwinner and female housewife was constructed on top of the Keynesian welfare state. It depended upon providing high wages and secure employment to men. Tax, labour, family and social welfare law supported this arrangement, and trade barriers created protected enclaves for developed industrial economies. Equality in employment for men and women was simply not part of the political discourse. Married women were treated as the most marginal of workers, and they were excluded from the labour force.²⁸ It was not until the mid-1960s that the Canadian and UK governments lifted their bans on employing married women in the civil service.

During the 1960s, the expansion in publicly provided services created employment opportunities for women and as men's wage increases started to stall, married women took on part-time jobs in order to maintain household consumption standards. Married women provided a reserve army of workers for the expanding welfare state and growing corporate bureaucracies.

The only equality law available to women was equal pay for equal work legislation, which was not enacted in the UK until 1970 (14 years after it was introduced by the Canadian federal government).²⁹ However, equal pay was perfectly compatible with the development of a different, and subordinate, employment norm for women. Women were much more likely to work in non-unionized jobs in the service sector on a part-time or temporary basis, and they were crowded into a small band of occupations at the bottom of the job hierarchy.³⁰ Sex segregation became a viable alternative to excluding married women from the labour market.

In the late 1960s and early 1970s, the second wave of the women's movement pushed to dismantle the last remnants of discriminatory laws, practices and policies.

²⁷ *Ibid.*, 239.

²⁸ Fudge, *supra* n. 3.

²⁹ *Equal Pay Act, 1970* and *Female Employees Equal Pay Act* (Statutes of Canada 4-5, Elizabeth II-Chap. 38).

³⁰ Fudge, *supra* n. 3.

Women demanded equal rights, and won greater legal and political independence from men. Improved access to the labour market and social welfare programs, especially for lone mothers, provided a material base for women's independence. So, too, did effective and reliable mechanisms for reproductive control. Divorce laws were liberalized and marriage breakdown increased. But formal legal equality did not address the underlying gender division of labour. Women's employment was shaped by the gendered division of labour that continued to give them primary responsibility for caring for human beings.

The increase in women's paid employment resulted in a recalibration of the gender order. Although the primary breadwinner was still male and unpaid domestic work continued to be performed by women, the male breadwinner was supplemented by a subordinated women worker. By the late 1970s, women no longer constituted a reserve army; their employment was necessary, but the employment arrangements that enabled them to balance their domestic responsibilities did not provide them with economic independence.

Second-wave feminism caught fire as the proportion of women in the labour force grew and the state recognized the importance of women's employment. For a brief moment in the early 1980s in Canada, substantive equality became dominant in Canadian political discourse. Pay and employment equity, a national and universal publicly funded child care system, and labour standards to improve the conditions of part-time workers were recommended by a series of federally appointed task forces and royal commissions.³¹

However, feminism's equality momentum was difficult to sustain when the economy went into decline. The deep recession at the beginning of the 1980s hit especially hard in Canada's manufacturing sector, where employment shrank dramatically. Economic restructuring and neoliberal policies designed to promote flexible employment led to a deterioration in employment standards, dropping unionization rates, declining real wages and the spread of precarious work.³² The feminization of labour was matched by a feminization of employment norms: employment terms, conditions and arrangements, such as low pay, poor benefits, part-time and temporary work, which historically have been associated with women, proliferated. Increasingly, men began to take these jobs too.

Equality began to be seen as a leveling down discourse in labour law and equality claims by women had less political resonance in a climate in which employment conditions and prospects for men were deteriorating. These changes fuelled the backlash against substantive equality that deepened during the 1990s. By the end of

³¹ *Ibid.*

³² *Ibid.* and J. Fudge, 'The New Workplace: Surveying the Landscape.' (2009) *Manitoba Law Journal* 33, 131-49.

the 1980s, the dilemmas facing women in the new gender order could not be resolved through expanding the definition of sex discrimination.

In some ways, the visibility and relevance of gender differences in the labour market began to disappear, as the employment experiences of men and women converged.³³

During the 1990s, the pattern of women's labour market participation more closely resembled men's and the gap between men and women's wages had narrowed. However, this convergence is not necessarily a cause for celebration. In Canada, between 1980 and 2000, men's median weekly earnings dropped by 7 per cent while women's grew by 13 per cent.³⁴ From 2000 to 2005, median earnings remained constant for men but rose by 4 per cent for women. The most dramatic improvement was among women aged 45 to 49 (17.8 per cent) and those at the higher end of the wage distribution (16.0 per cent).³⁵ The women's labour market also began to polarize, which was a marked departure from the 1950s and 1960s, when women's employment was much more homogenous. Age, race, migrant status and household composition are increasingly important for predicting women's labour market outcomes.³⁶

Yet, in other ways the relevance of gender has intensified.

In 2007, the wage gap between men and women in Canada was 21 per cent. Although gendered occupational segregation is declining, it is still very persistent. In 2009, 67 per cent of all employed women worked in teaching, nursing and related health occupations, clerical or other administrative positions, or sales and service occupations, compared with 31 per cent of employed men. The labour force participation rate of women is still below that of men, mostly due to women's childrearing responsibilities. Women with children under the age of three are less likely than other women to have a job. Married women with children continue to be disproportionately concentrated in part-time employment.³⁷ In the UK, the

³³ S. Walby, *Gender Transformations* (London: Routledge, 1997).

³⁴ R. Morissette and A. Johnson, *Are Good Jobs Disappearing in Canada?* Analytical Studies Branch Research Paper Series (Ottawa: Statistics Canada, 2005) 13.

³⁵ M. Drolet, 'Why Has the Gender Wage Gap Narrowed?' (2011) *Perspectives on Labour and Income Spring* (Ottawa: Statistics Canada) 4.

³⁶ Fudge, *supra* n. 32.

³⁷ V. Ferrao, *Paid Work: Women in Canada: A Gender-based Statistical Report* (Catalogue 89-503-X) (Ottawa: Statistics Canada, 2010) 21, 12, 13.

percentage of married women employed part-time is one of the highest in the developed world.³⁸

Women's increased employment rate and working hours have not been matched by a concomitant shift in unpaid domestic work to men, although men have increased their contribution to domestic labour. An increase in long hours of work, especially amongst men, and an increase in the length of the standard work week during the 1980s and 1990s contributed to a rise in work-life conflict.³⁹

The contradictory pressures of gender erosion and intensification are driving the reconfiguration of the gender order. There have been two general responses in developed countries such as Canada and the UK to the challenge of sustaining social reproduction: work-life balance policies and the commodification of a central component of social reproduction – care work.

Work-life balance policies are designed to achieve a new accommodation between the processes of production and requirements of social reproduction in light of the breakdown of the post-war gender order. Their goal is to institutionalize a form of family-friendly flexibility that makes it easier for individuals and households to combine family life and working life. Key components of policies for work/life balance are leave for family responsibilities and flexible working-time arrangements that enable workers to adjust their working time more easily.⁴⁰

However, a problem is that these policies can, depending upon their design, either alleviate or reinforce the gendered division of social reproduction labour. In the UK, the long hours of work culture for men runs counter to their invoking the right to request shorter hours. Thus, women are much more likely to resort to the flexible working time provisions.⁴¹ Although reduced-hour jobs constructed round individual requests are generally of higher quality than jobs constructed as part time, 'even better would be a fundamental rethinking of the construction of jobs at

³⁸ The UK has the third highest rate of part-time employment for women of the 34 OECD countries, J. Plunket, *The Missing Million: The Potential for Female Employment to Raise Living Standards* (Resolution Foundation, 2011).

³⁹ Fudge, *supra* n. 22; J. Fudge, 'Working-Time Regimes, Flexibility, and Work-Life Balance: Gender Equality and Families' in C. Krull and J. Sempruch, eds., *Demystifying the Family/Work Conflict: Challenges and Possibilities* (Vancouver: University of British Columbia Press, 2011) 170-93.

⁴⁰ *Ibid.*

⁴¹ A. Hegewisch, *Flexible Working Policies: A Comparative Review*, Research Report 16 (Manchester: Equality and Human Rights Commission, 2009); C. Fagan, *Working Time in the UK – Developments and Debates* (nd)

http://web.jil.go.jp/english/reports/documents/jilpt-reports/no.7_fagan.pdf (Accessed January 8, 2013).

all levels so they could be offered on a range of different hours packages, abandoning the concepts of part-time and full-time.⁴²

Moreover, despite the hoopla surrounding the recent reforms in the UK which provide greater flexibility for fathers to use parental leave, the low replacement rate for wages during parental leave virtually ensures that the lower-waged worker, typically the woman, in a two-earner family will take it.⁴³ These policies cultivate an ideal worker/marginalized caregiver gender order.

In order to promote gender equality proponents of family-friendly policies need to consider the politics of choice. Women's responsibility for childcare is typically seen as an individual choice and women are responsible for its costs. However, policies that enhance individual choice need to attend to the broader structures of employment and social reproduction. Policy discourse in Canada and the UK has only just begun to register ideas about men's greater involvement in domestic life. The problem is that so long as men can choose not to care women will have no choice but to do so. The choices of individual women are shaped by the opportunities open to them and the cultural norms that prevail. Thus, it is important to increase the incentives for men to take on a greater share of unpaid labour and to challenge cultural norms that associate women with certain kinds of domestic labour if women are to be given a real choice about how they spend their time.⁴⁴ What we need are forms of affirmative action policies when it comes to men and domestic work.

The benefit of widening the numbers of people who contribute time to caring is that it would not only reduce the individual costs of those who care, extending the experience of caring throughout the members of a society might also nurture a society that is more willing to contribute institutionally and financially to the costs of care.⁴⁵

The second way developed countries such as Canada and the UK have responded to the strains on social reproduction caused by too many demands placed on women is

⁴² L. Dickens, 'The Road is Long: Thirty Years of Equality Legislation in Britain.' (2007) *British Journal of Industrial Relations* 45, 463, 469.

⁴³ Department for Business, Innovation and Skills, Reform of flexible parental leave, November 13, 2012, <https://www.gov.uk/government/news/reform-of-flexible-parental-leave> (Accessed January 7, 2013); L. Dickens, 'Re-Regulation for Gender Equality: From Either or to Both.' (2006) *Industrial Relations Journal* 37, 299, 306.

⁴⁴ Fudge, *supra* n. 22; Fudge, *supra* n. 39.

⁴⁵ S. Himmelweit, 'Economic Theory, Norms and the Care Gap, or Why Do Economists Become Parents?' in A. Carling, S. Duncan and R. Edwards, eds., *Analysing Families: Morality and Rationality in Policy and Practice* (London: Routledge, 2002) 231, 247.

via the commodification of care, which is provided either through the market or as public services. Low-cost care and domestic services such as fast food and housecleaning are necessary if women are to be able to engage in waged work the way it is currently designed. This solution substitutes for the unpaid labour of female family members waged work by other women. The problem with this strategy is that it may deepen the economic polarization of women on the basis of age, race, ethnicity and migrant status. Unless the social reproduction services are provided publicly and financed through redistributive taxes, people accessing these services have an incentive to keep the wages and benefits of providers low.

The commodification of caring labour has been characterized as the new Wollstonecraft's dilemma - does it strengthen or weaken the gendered division of labour?⁴⁶ This dilemma is particularly acute in the current era of globalization. Neo-liberal policies have subjected women across the globe to similar pressures, although they have vastly different ways of responding to them depending on their social location.

On the demand side, the feminization of migration is fuelled by the rise in women's labour force participation, falling fertility rates, increasing life expectancy and the expanding marketization of care in the North. On the supply side, economic trends such as inequalities between high- and low-income countries, and insecurity, vulnerability, and instability due to economic crises combine with gender-related factors such as abuse, family conflict, and discrimination to increase the numbers of women who migrate in order to obtain paid work.⁴⁷

Women's transnational migration has contradictory impacts. The employment of migrant women to perform care work in the receiving countries of the North is an individual and privatised solution to the broader problem of combining paid work with unpaid care work. Since this solution is only an option for families who can afford it, lower-income families are left in the lurch. It might also contribute to a vicious circle in the host country, in which private solutions delay collective efforts to search for appropriate public policies. While women's decisions to migrate can increase their financial autonomy and increase their financial contribution to their household through remittances, their absorption into the care markets of the North

⁴⁶ R. Lister, *Citizenship: Feminist Perspectives* (Basingstoke: Macmillan, 1997).

⁴⁷ This discussion is drawn from 'Global Care Chains, Employment Agencies and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada' (2011) *Canadian Journal of Women and The Law* 23, 235-64; J. Fudge, 'Global Care Chains: Transnational Migrant Care Workers.' (2012) *International Journal of Comparative Labour Law and Industrial Relations* 28, 63-70; J. Fudge, 'Gender, Equality and Capabilities', in T. Novitz and D. Mangan, eds., *The Role of Labour Standards in Sustainable Development: Theory in Practice* (London: Oxford University Press and The British Academy, 2011).

reinforces the gendered nature of care. Moreover, the export of women's labour results in a 'depletion of care resources' that detrimentally affects the families and communities that women have left behind.⁴⁸ Since it is mostly women who assume the family roles of migrant women, there is a growing need for reconciliation policies in the South.⁴⁹

The commodification of care illustrates what Nancy Fraser called the 'dangerous liaison between second wave feminism and global capitalism,' which is the fetishism of waged labour, on the one hand, and the marketization and attack on care provision, on the other.⁵⁰ While capitalism dislodges patriarchy, it does not necessarily lead to greater substantive equality for all women.

Conclusion

Institutionalizing a new gender order is a difficult challenge. Women's labour power has historically functioned as an alternator under capitalism, mediating the tension between reproduction and production.⁵¹ Globalization has dramatically heightened and extended this tension. So, too, will the current climate of austerity.

Historically, economic crises have resulted in an erosion of women's, especially married women's, employment rights.⁵² The financial crisis hit first at men's jobs in manufacturing and construction. However, since the banking crisis has been transformed into a sovereign debt crisis, the state's ability to act as financier and employer of last resort has been restricted.⁵³ In UK, the attack on public sector employment and public services has been accompanied by an attack on social benefits. These cuts hit women the hardest.⁵⁴

The processes of social reproduction are relatively autonomous, and women's relationship to the waged labour market in any country is path dependent, shaped

⁴⁸ L. Benería, 'The Crisis of Care, International Migration, and Public Policy.' (2008) *Feminist Economics* 14, 1.

⁴⁹ *Ibid.*

⁵⁰ N. Fraser, 'Interview'. (2009) *European Alternatives*, October 23 <http://www.euroalter.com/2009/interview-with-nancy-fraser/> (Accessed August 1, 2010).

⁵¹ Picchio, *supra* n. 24.

⁵² Fudge, *supra* n. 3.

⁵³ J. Rubery, 'From Women and Recession to Women and Austerity: A Framework for Analysis' in M. Karamessini and J. Rubery, eds., *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (Routledge, forthcoming 2013).

⁵⁴ D. Elson, 'The Reduction of the UK Budget Deficit: A Human Rights Perspective'. (2012) *International Review of Applied Economics* 26, 177.

by a range of institutions, norms and policies.⁵⁵ However, returning to the male breadwinner and female housewife gender order will be difficult, not only because of the embeddedness of equality norms, but also because of the deterioration in many men's employment.

The labour market polarization in both Canada and the UK has meant that the best off have scooped most of the gains over the past two decades, while those in the middle have seen their situation deteriorate, and the proportion of jobs at the bottom has grown.⁵⁶ This polarization in both men's and women's labour market outcomes fuels contradictory gender ideologies.⁵⁷ Social actors and different factions draw on a range of societal resources, including discarded or dominant institutions and ideologies, in an attempt to construct a new gender order.

As either the baseball player Yogi Berra or the physicist Niels Bohr remarked, prediction is difficult, especially about the future. The two most likely scenarios that will result from the Coalition government's austerity policies are that there will be levelling down of men's employment norms so that they more closely resemble women's and some women will be pushed out of the labour market at the same time as others are driven into it.⁵⁸

There is some evidence of the first scenario. Although the private sector in the UK has begun to rally, the jobs that have been created are part time and poorly paid.⁵⁹

The future for women is less clear. However, it is likely that the ideology of women as homemaker will turn out to be selective; married women with children may be encouraged by changes to tax laws and benefits to bow out of paid employment,

⁵⁵ Rubery, *supra* n. 53.

⁵⁶ N. M. Fortin et al., 'Canadian Inequality: Recent Developments and Policy Options.' Forthcoming in *Canadian Public Policy*, <http://faculty.arts.ubc.ca/nfortin/CLSRNWP.pdf> (Accessed January 7, 2013); Conference Board of Canada, 'Canadian Income Inequality: Is Canada Becoming More Unequal?' <http://www.conferenceboard.ca/hcp/hot-topics/caninequality.aspx> (Accessed January 7, 2013); J. Hills (Chair) *An Anatomy of Economic Inequality in the UK: Report of the National Equality Panel* (London: Government Equalities Office, 2012).

⁵⁷ Rubery, *supra* n. 53.

⁵⁸ *Ibid.*

⁵⁹ 'UK becoming a part-time nation, figures reveal.' *The Telegraph*, November 12, 2012, <http://www.telegraph.co.uk/finance/jobs/9678663/UK-becoming-a-part-time-nation-figures-reveal.html> (Accessed January 7, 2013); L. Elliott, 'UK unemployment falls as private sector jobs hit all-time high.' *The Guardian*, 12 December 2012, <http://www.guardian.co.uk/business/2012/dec/12/uk-unemployment-falls-private-sector-jobs> (Accessed January 7, 2013).

while lone mothers will be forced into paid employment through more aggressive workfare laws or cuts to benefits.⁶⁰ Care could become a privilege of those women who have a spouse to support them.

What is clear, however, is that when a government is committed to austerity, equality is sacrificed. Although equality norms may have an expansionary logic, their implementation can be subject to abrupt reversals.

Despite the fact that the Coalition government did not repeal the Equality Act introduced by the former Labour government in its dying days, it has whittled away at it. Not only did the government refuse to commence the dual discrimination provision on the ground that it was too expensive, it repudiated the requirement that employers publish information relating to the gender pay gap.⁶¹ Most recently, it announced that it was dropping the requirement for public bodies to consider the impact of policies on social inequality and revoking the powers allowing Tribunals to make broad recommendations about future steps to be taken by employers who have been found to have discriminated. According to Theresa May, the Minister for Women and Equalities, these changes balance the need to protect people from discrimination and allowing businesses to 'get on with their jobs'.⁶² What is remarkable is that the government saw fit to continue to dismantle elements of the Equality Act despite the overwhelming objections of the participants in its consultations⁶³ and without waiting to hear the results of the Parliamentary Inquiry into Women in the Workplace, which was appointed in September 2012.⁶⁴

In Canada, the Conservative federal government has followed a similar path, cutting public service jobs and watering down the procurement provision in the Employment Equity Act.⁶⁵ Its decision in 2010 to order Statistics Canada to delete

⁶⁰ Rubery, *supra* n. 53.

⁶¹ Home Office, 'Frequently asked questions.' <http://www.homeoffice.gov.uk/equalities/equality-act/faq/> (Accessed January 7, 2013).

⁶² BBC News, 'Equality laws to be 'simplified' to ease obligations on business.' May 12, 2012, <http://www.bbc.co.uk/news/uk-politics-18077013> (Accessed January 7, 2013).

⁶³ Home Office, Equality Act 2010: consultation on repeal of two enforcement provisions, <http://www.homeoffice.gov.uk/publications/about-us/consultations/equality-act-wider-enforcement/> (Accessed January 18, 2013).

⁶⁴ House of Commons Business Innovation and Skills Select Committee, Inquiry into Women in the Workplace, September 4, 2012, final oral evidence January 15, 2013, <http://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/inquiries/parliament-2010/women-in-the-workplace/> (Accessed January 18, 2013).

⁶⁵ K. May, 'Government has cut nearly 11,000 public service jobs since budget:

questions pertaining to unpaid care work on the national census symbolizes its disdain for social reproduction.⁶⁶

A key problem with mounting a challenge to policies that roll back equality laws is that feminism's demand for equality has lost its emancipatory edge.⁶⁷ Equality for women workers is not enough since such claims are compatible with the rampant commodification of care, increasing polarization amongst women, and increasing inequality for men. Thus, it is crucial to revitalise feminism by emphasizing solidarity and transformation as well as equality.

Solidarity must be cultivated not just amongst women, but also between men and women. Jill Rubery argues that solidarity is critical in times of austerity; 'the importance of establishing common ground across the sexes is raised by the danger that the current crisis is changing the role of the state from an agent that in principle promotes gender equality to one that may reverse equality gains made over recent decades.'⁶⁸

Equality for women workers will be elusive so long as we do not cultivate both 'new modes of life beyond male and female roles'⁶⁹ and foster 'more diverse employment and working-time patterns without any loss of rights or marginalization'.⁷⁰ Men as well as women need to be liberated from a rapacious economic system that

Clement. 'Ottawa Citizen, November 16, 2012, <http://www.ottawacitizen.com/business/Government+nearly+public+service+jobs+since+budget+Clement/7562258/story.html> (Accessed January 7, 2013); M. G. Cohen, 'Federal Budget Bill and Employment Equity, BC.' Canadian Centre for Policy Alternative, Policy notes, June 1, 2012, <http://www.policynote.ca/federal-budget-bill-and-employment-equity/> (Accessed January 7, 2013).

⁶⁶ H. Scofield, 'Voluntary census deletes questions about unpaid work', *Globe and Mail*, July 28, 2010, <http://www.theglobeandmail.com/news/politics/voluntary-census-deletes-questions-about-unpaid-work/article1389740/> (Accessed January 7, 2013).

⁶⁷ A. Stewart, 'Gender, Justice and Law in a Global Market' in M. Davies and V. Munro, eds., *A Research Companion to Feminist Legal Theory* (Ashgate Publishing, forthcoming 2013). Warwick School of Law Research Paper No. 2012/13, available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071049 (Accessed January 7, 2013).

⁶⁸ Rubery, *supra* n. 53.

⁶⁹ L. Gonas, 'Balancing Family and Work: To Create a New Social Order'. (2002) *Economic and Industrial Democracy* 23, 59, 64 quoting U. Beck, *The Risk Society: Towards a New Modernity* (London: Sage, 1992).

⁷⁰J. Rubery, M. Smith, and C. Fagan, 'National Working-Time Regimes and Equal Opportunities'. (1998) *Feminist Economics* 4, 71, 99.

degrades the environment and does not value the work that goes into maintaining social life.