

LAW REVIEW

GENDER MAINSTREAMING: A NORMATIVE FRAMEWORK FOR DECENT WORK AND OCCUPATIONAL SAFETY AND HEALTH



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ACRONYMS

AGE	Agency for Gender Equality
KAS	Kosovo Agency for Statistics
GE	Gender Equality
LGE	Law on Gender Equality
EU	European Union
GM	Gender Mainstreaming
ILO	International Labour Organization
KCGS	Kosovar Centre for Gender Studies
KSI	Kosovo Stability Initiative
KWN	Kosovo Women's Network
KPGE	Kosovo programme for gender equality
LFTUS	Labour Force and Time Use Study
LI	Labour Inspection
LL	Law on Labour
LPD	Law on Protection from Discrimination
MS	Member State
MLSW	Ministry of Labour and Social Welfare
NDS	National Development Strategy
OSH	Occupational Safety and Health
SME	Small and Medium Enterprises
TFEU	The Treaty of the Functioning of the European Union
TU	Trade Union

EXECUTIVE SUMMARY

Kosovo¹ entered 2021 with continuing challenges for gender equality in the labour market. Among the issues identified by the Agency for Gender Equality (AGE) as stated in the Kosovo Program for Gender Equality (KPGE).² KPGE, as the national program of gender equality, outlines responsibilities for all state institutions and therefore also identified challenges and goals for these respective areas of responsibility. Inequality and socio-economic-structural exclusion is observed in limited gender mainstreaming (GM) practices that include few or no gender-responsive budgeting examples, strong occupational gender segregation and employment discrimination against women; unequal sharing of child care responsibilities and lack of childcare to support women in their professional development.

Women are in an unfavourable position, compared to men, in accessing the labour market. Data from the Kosovo Agency for Statistics 2020 indicate that women's participation rate in labour at 14% is significantly lower than men's at around 40%. When employed, women tend to have employee status (83%) with only around 10% being self-employed, while 69% of men maintain employee status and around 25% are registered as self-employed.³

Types of employment and associated risks, including atypical forms of employment are explored in the review, due to differences in participation by men and women (self-employed, part-time). At the same time, choice or availability of public sector jobs for women ensures greater stability, while more men tend to have unstable jobs.

Among the reasons for the low participation rate of women in the labour market, women cite care and family responsibilities (40 % of women, compared to 3.8 % for men) which correlates with the cultural context. A 2018 time-share survey⁴ found that men spend more time at work while women spend more time on household activities and family care, also leading to men spending more time on leisure activities than women. Furthermore, the unpaid share of work by women is highest in agriculture (43%) and for men in services and sales (20%). Informal employment (undeclared work, domestic work, unpaid share of work) is strongly gendered. By sectors, it is considered that the level of informality is more pronounced in agriculture and construction. Half of the workforce engaged in agriculture are family members, of which 58.2 per cent are women. These data show that women form an important part of the workforce in this sector, which mostly functions informally. As a consequence of informal employment, women suffer from less income as well as damage to their future by not contributing to the pension savings fund.

From the perspective of representation of men and women as employers, KPGE refers to a trend of increased ownership or co-ownership by women of small and medium size enterprises (SMEs) from 13% in 2014 to 30.2 % in 2017. This may be one of the impacting factors for the low level of women in employment in the private sector.

The gender-segregated labour market is therefore among the strongest factors to be taken into account during the development of new laws and regulations and ongoing occupational safety and health (OSH) system reform. While the key reasons for women's lower participation in the labour market include lack of child-care facilities and persistent gender roles, Law Review indicates the need for special protection measures for pregnant and breastfeeding women, and some elements of the

1 For the European Union, this designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence. For UN Women, references to Kosovo shall be understood to be in the context of UN Security Council Resolution 1244 (1999).

2 Kosovo Programme for Gender Equality, 2020-2024: <https://abgj.rks-gov.net/assets/cms/uploads/files/Programi%20i%20Kosov%C3%ABs%20p%C3%ABr%20Barazi%20Gjinore%202020-2024%20-%20ANGLISHT.pdf>

3 KPGE, Page 20-21, KAS Data of 3rd quarter of 2020

4 <https://millenniumkosovo.org/wp-content/uploads/2018/11/MCC-Kosovo-Labor-Force-and-Time-Use-Study-Final-Research-Report-1.pdf>

laws that contribute to stereotypes with regard to the care function expected from women. Special rules for protection of pregnant and breastfeeding women are in place to ensure gender equality in line with EU law. Minor adjustments are recommended to ensure the rights perspective of women, rather than a mandated prohibition on working. The child rights perspective is demonstrated through parental rights, where fathers' rights are guaranteed to a degree, and with minor adjustments, the laws could contribute to more gender equality, allowing men to use childcare rights to a greater extent. The combination of the burden of parental leave compensation on employers in combination with parental rights (night work, overtime, parental leave) for women, may contribute to maintaining some gender stereotypes. This review does not assess the social protection system with regard to parental rights (maternity, paternity leave coverage).

More specifically, the OSH system risks assessment legislation and related certification schemes of specialists, training programmes and accreditation require more investment in gender awareness to ensure mainstreaming of gender equality and broader non-discrimination procedures being built into multiple entry points. Among these are education and training of OSH specialists who can in turn ensure identification of gender risks in the workplace and secure appropriate measures of prevention, setting standards for an occupational health system – defining hazards and occupational disease taking into account gender analysis results and science on different impacts on men and women.

To alleviate hardship, Project “*Gender component in Occupational Safety and Health (OSH) management and Social Dialogue*” will be implemented as part of the *UNOPS Program on promoting decent work through strengthening Occupational Safety and Health (OSH) management and Social Dialogue.*”

The long-term goal of the programme is set against Sustainable Development Goal 8⁵ and its particular target 8 to ‘*protect labour rights and promote safe and secure working environments for all workers*’. Overall, the programme supports achieving SDG 5 on Gender equality. In this light the Law review addresses SDG goals through gender mainstreaming perspective and assessing the laws vis-à-vis gender equality goals, as well as addressing more specific decent work decent work and OSH standards with the ultimate aim of fostering women’s economic empowerment, particularly considering violence at work, conformity of laws to gender equality and non-discrimination provisions.

5 <https://sdgs.un.org/goals>

1. METHODOLOGY

AND APPROACH

Gender-sensitive legislation is a central part of mainstreaming gender considerations into the legal system. This refers to integration of a gender perspective into all components of the legislative process – design, implementation, monitoring and evaluation – in order to achieve the ultimate objective of equality between women and men. Similar to other gender-mainstreaming endeavours, GSL is not a goal in itself, but a means of achieving equality.⁶

As the New Zealand Legislative Guidelines state “Legislation involves coercive power, and law making comes with responsibility to make legislation that is proportionate, reasonable, rational, and consistent with New Zealand’s constitutional principles. Legislation that overreaches can do significant harm by inhibiting freedoms or undermining important values or institutions of our society. The quality of the law-making processes can either reinforce or undermine the legitimacy of a particular piece of legislation, and the State and legislation more generally”.⁷ Thus, high-quality legislation is critical to the functioning of democracy as poorly designed legislation will not achieve its goals, in the labour and OSH context – saving lives, respecting human dignity, creating a sustainable economy that respects every human being and their contribution to the common good. Moreover, good legislation also saves significant costs for the system.

Overall Scope of the review will be limited to the OSH profile outline of the legislative framework and inclusion of the decent work perspective. Therefore, this will be coordinated with the gender-mainstreaming comments to the OSH profile legal and policy section and requires defining the limits for the decent work extension of the review. Extensive discrimination review was undertaken on part of the laws in 2019 by the Kosovo Women’s Network⁸ and this review will

build upon the findings in the report and extend it with regard to specific OSH profile needs and the decent work perspective.

Decent work and safety and health overlap on highly specific issues, such as basic working conditions – working time, rest time, vacation rights, pay – where in part EU minimum standards are also set. These are also often gender-segregated by profession, type of working contracts (full time, part time, permanent contracts, temporary etc.), type of working hours (norms, shift work etc.).

1.1. DECENT WORK CONCEPT

For this review, the **decent work concept** is constructed by reference to the ILO framework for a Decent Work Agenda,⁹ set within the framework of the Resolution on Advancing Social Justice through Decent Work;¹⁰ and European Social Pillar¹¹ principles.

EU Social pillar Chapter I sets overall equal opportunities and access to labour market principles. Here, in similarity to SDGs, gender equality is particularly highlighted, along with the principle of equal opportunities that includes broader reference to gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public.

⁶ Making Laws Work for Women and Men: A Practical Guide to Gender-Sensitive Legislation Warsaw, 2017 OSCE/ODIHR, available at <https://www.osce.org/files/f/documents/a/1/327836.pdf>

⁷ <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-1/>

⁸ Available at <https://womensnetwork.org/wp-content/uploads/2019/05/GBD-Labour-Kosovo-ISBN-978-9951-737-31-9-FINAL.pdf>

⁹ <https://www.ilo.org/global/topics/decent-work/lang--en/in-dex.htm>

¹⁰ Resolution on Advancing Social Justice through Decent Work, Adopted on 9 June 2016 at the General Conference of the International Labour Organization, meeting at its 105th Session; Principles of decent work agenda are set in Article 13; available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---rel-conf/documents/meetingdocument/wcms_497583.pdf

¹¹ <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&ewsId=9003&furtherNews=yes>

Chapter II in turn sets the core principles on fair working conditions: secure and adaptable employment, work-life balance, health and safety at work, as well as fair wages set in a transparent and predictable manner, and the right to information on working conditions and social dialogue – protection of the rights and fostering of dialogue.

Chapter III further defines the social protection principles that guide childcare support and long-term care for adults, social protection, minimum income, health care, unemployment protection, and focus on special needs for people with disabilities.

These principles are similar to the ILO principles on employment and social protection that ensure a just share of the fruits of progress for all, social dialogue, essential working conditions – fundamental principles of work as in other ILO conventions, gender equality and non-discrimination, and increased cooperation among the member states to harmonise implementation of these principles.

The legal review includes a gender perspective on the following OSH and decent work principles:

Labour-related **social security issues**: the review considers the impact of essential working conditions regulation in the Law on Labour (LL) and the Law on Safety and Health at Work (OSH Law), the impact on beneficiaries of the law from a social security perspective – sick leave, vacation pay, unemployment benefit payments, pension contributions, pregnancy-related regulation and parental leave conditions. The review does not assess the social security system in Kosovo.

Addressing **essential working conditions**¹² in line with the EU Social Pillar and ILO fundamental rights principles to include questions of:

- Safe and decent working conditions: primarily focusing on OSH provisions through OSH law.
- **Violence at work**, which is closely associated with safety at work, physical and mental health, and gender aspects of sexual harassment. Specifically applying to gender

equality cases, harassment and sexual harassment is considered discrimination for the purposes of the EU Equal Treatment Directive,¹³ as well as less favourable treatment based on a person's rejection of or submission to such conduct. 'Harassment' is defined as unwanted conduct related to the sex of a person with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment; and 'sexual harassment' as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

- **Equal pay**:¹⁴ in line with the minimum requirements of EU directives and case law of the European Union Court, elements constituting pay include **basic salary** and **complementary components of pay** - whether in cash or in kind that workers receive directly or indirectly from their employers. These components include bonuses, overtime compensation, travel facilities (including cars provided by the employer and travel cards), housing allowances, compensation for attending training courses, payments in case of dismissal, overtime supplements, gratuities paid at the discretion of the employer, statutory sick pay, statutory required compensation, and occupational pensions. **Value of pay** in turn should be assessed and compared based on **objective criteria**, such as educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of tasks involved. For the purposes of non-discrimination and burden of proof in discrimination cases, the right to information for employees must be embedded in the understanding and application of equal pay. Equal pay criteria should be applied to all types of workers: full time, part time, fixed term, or workers posted through temporary agen-

¹² Also through EU developments on transparent and predictable working conditions, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, general information available at <https://ec.europa.eu/social/main.jsp?langId=en&catId=1313>, directive text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1152>

¹³ Directive 2006/54/EC

¹⁴ DIRECTIVE 2006/54/EC, Case C-400/93, Royal Copenhagen; Case C-309/97, Angestelltenbetriebsrat der Wiener Gebietskrankenkasse; Case C-381/99, Brunnhofer; Case C-427/11 Margaret Kenny and Others v Minister for Justice, Equality and Law Reform and Others; proposal for Transparent pay provisions, and COMMISSION RECOMMENDATION of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (Text with EEA relevance) (2014/124/EU) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014H0124&from=EN>

cies. Questions on atypical workers – domestic work, on demand, platform, trainees – have also been raised at the EU level.¹⁵

- **Contracting and dismissal conditions:**¹⁶ to include protected groups, protection of pregnant women from dismissal and non-discrimination during hiring phase. Non-discriminatory criteria for hiring, linked to privacy of individuals, including family status, reproductive rights.
- **Working time and rest time:**¹⁷ type of working time – normal working time, conditions for shift work or aggregated work; determination of minimum rest and maximum working time daily, weekly or running 7-day period, including additional limits for specific professions. This is linked to safety issues for example drivers, airline and air traffic employees; night and overtime work.
- **Vacations:** EU minimum criteria include 4 weeks of paid leave.¹⁸
- **Social dialogue** regulation: aspects of social dialogue in the form of tripartite forums, employer-employee collective relationships and rights, including *collective bargaining*
- **Freedom of association** and rights of trade unions, considering aspects of collective rights, membership, and protection of employees.

¹⁵ For more see case C-66/85 Lawrie-Blum; case C-216/15 Ruhr-landklinik

¹⁶ DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

¹⁷ EU law references include Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time; Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organization of the working time of persons performing mobile road transport activities and Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organization of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (Text with EEA relevance)

¹⁸ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time OJ L 299, 18.11.2

1.2. LABOUR MARKET DATA AND GENDER EQUALITY ENTRY POINTS

Labour market data for the 3rd quarter of 2020¹⁹ indicate that the employment rate of women is only at 14.4%, while of men 46.2%. Other decent work- and OSH-relevant data provide the following findings on segregation of the labour market and vulnerable situations:

- **Employment and sector segregation:** women are primarily employed in Education (18.4%) and wholesale and retail, including repair of motor vehicles (further details on the distinction in this category not available) 18.6%, followed by health care and social work 12.7%, manufacturing 7.6%, public administration, other service activities and agriculture around 5% in each of these categories. The most considerable male employment is also in wholesale and retail, including repair of motor vehicles at 16.7%, construction at 17% (vs. women in construction 0.7%) agriculture and fishing at 5.8% and accommodation and catering services at 7%, other services, education, and administrative services at 4-5%.
- **Vulnerable employment:** Contributing family workers are usually associated with informality and poor working conditions. For a gender analysis perspective, data on vulnerable employment are required, together with data on the informal sector. The ILO indicates that overall men are over-represented among employers and own-account workers around the world (in 2017, 79 % of the world's employers and 68 % of own-account/self-employed workers were male), while women are over-represented among contributing family workers.²⁰

¹⁹ Kosovo Statistics Agency. Labour Force Survey Q3.2020 available at <https://ask.rks-gov.net/en/kosovo-agency-of-statistics/add-news/labour-force-survey-q3-2020>

²⁰ Paid employment vs vulnerable employment A brief study of employment patterns by status in employment, prepared by Rosina Gammarano, Economist in the Data Production and Analysis Unit, ILO Department of Statistics. https://ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_631497.pdf

- KAS data on vulnerable employment²¹ indicates that the highest male unpaid family work is expected under elementary work occupation at 40.8%, service and sales workers in shops and markets at 18% and crafts at 15%, with agriculture at 13%.
- Women have the highest unpaid share of work in agriculture at 43.8%, almost half of recorded data,²² followed by crafts and service and sales workers in shops and markets at 20%. LFTUS demonstrates data differences, recording higher average than KAS data on unpaid family work (33%). It is difficult to draw clear conclusions because of comparative data references, nevertheless the tendency that is relevant for employment-related policies and legal and implementation measures indicates vulnerability of men in unpaid services and elementary work, compared with vulnerability of women in agriculture and services. These gender differences need to be considered in designing decent work and OSH provisions and systems, ensuring that unpaid work and vulnerability in the agriculture and services sectors are addressed.
- **Part time work** data²³ also indicate different reasons for work for men and women: while 75% of men and 40% of women indicate they are not able to find a full-time job, 25% of women indicate “other personal or family reasons” as the main cause. The labour force time use survey (LFTUS) also demonstrates further segregation of part-time work: the highest level of permanent employment was in mining and quarrying (84.1%), human health and social work (73.1%), education (68.4%), and public administration and defence (67.1%). The lowest level of permanent employment was in wholesale and retail (18.1%), accommo-

dation and food services (18.4%) and construction (23.0%).²⁴ Part-time work is also associated closely with the seasonality of sectors. Highest seasonality is observed in agriculture, forestry and fishing, construction, other services.

- **Self-employed:** More men are also registering as self-employed with and without employees at around 25% of employment share vs around 10% for women,²⁵ while women’s employment is predominantly as employees at 83% vs men at 69%. With the rise of the gig economy and through freedom of movement of services in the EU it is observed that bogus forms of employment increase as contracting work is used to replace employees, thus changing employee protection levels.
- **Pay:** a net pay bracket between 250 – 500 EUR is equally represented by men and women, while 10% of women vs 5.4% of men receive 200-250 EUR, and 10% of men vs 7.6% of women the 500-600 EUR.
- **Employment models**²⁶ indicate that more men *usually* work in the evenings and at night compared to women, and more women indicate they *never* work in the evenings and at night. Work on Saturdays and Sundays is relatively equally distributed, indicating rather high numbers for *usually* performing work during weekends, and finally work from home (Q.3.2020) still constitutes 18.2% for men and 25% for women.
- **Working hours:** the majority of men and women work between 40-48 hours per week, while men work more overtime (15% compared to 5.2% of women) and less than 25 hours are worked by 21% of women vs 12% of men. This is consistent with part-time work tendencies.
- **Accidents at work:** while 2019 general population data on external causes of morbid-

21 Vulnerable employment by occupation and gender by variable, year, period, sex and self-employed without other employees (%) / unpaid family workers (%), https://askdata.rks-gov.net/PXWeb/pxweb/en/askdata/askdata_Labour%20market_01%20Quarterly%20labour%20market_Pun%3%absimi/tab1.6.px/table/tableViewLayout1/?rxid=c3e44c2e-1aff-4e4a-b55b-2ca64a485a50

22 Data on gender within the category Agricultural labour and Family labour force in agricultural households and individual businesses by age in Kosovo, 2014 is not available through <https://askdata.rks-gov.net/> system, but may indicate better unpaid family work distribution.

23 Data on Reason for working part-time by reason, year, period and sex, 2020 Q3, https://askdata.rks-gov.net/PXWeb/pxweb/en/askdata/askdata_Labour%20market_01%20Quarterly%20labour%20market_Pun%3%absimi/tab1.11.px/table/tableViewLayout1/?rxid=c3e44c2e-1aff-4e4a-b55b-2ca64a485a50

24 Hira Siddiqui, Ardiana Gashi, Julia Higgins, Basab Dasgupta, and Mateusz Pucilowski of Social Impact, Inc. at the request of MCC, Kosovo Labor Force and Time Use Study Research Report Millennium Challenge Corporation, 2018; Table 22, page 63, available at <https://millenniumkosovo.org/wp-content/uploads/2018/11/MCC-Kosovo-Labor-Force-and-Time-Use-Study-Final-Research-Report-1.pdf>

25 Data on: Employment status by gender by employment status, year, period and gender. Q3, 2020 https://askdata.rks-gov.net/PXWeb/pxweb/en/askdata/askdata_Labour%20market_01%20Quarterly%20labour%20market_Pun%3%absimi/tab1.4.px/table/tableViewLayout1/?rxid=c3e44c2e-1aff-4e4a-b55b-2ca64a485a50

26 Employment models by variable, category, year, period and sex, Q3, 2020

ity and mortality demonstrate that 164 men and 36 women died, deaths due to crime and other causes. vs deaths related to work need to be identified. Furthermore, 6 cases of death were registered in mines and factories and a cross-check of the relation with work accidents is required. The Labour Inspectorate²⁷ (LI) registered 2 lethal accidents in the first quarter of 2021. Overall, LI registered 38 work-related accidents in Q1 2021, all experienced by men, of which 26 were light injuries, 10 severe injuries, 2 fatalities.

- **Time use:** LFTUS registered substantial differences in time use in employment: males spent 3.7 hours a day working, compared to 0.8 hours a day spent by women. The starkest differential in time spent on activities by sex was on household and family care: women were 3.1 times more likely than men to spend time on household and family care, with males dedicating an average of 2.5 hours per day to cleaning and child care compared to women spending 7.2 hours on these responsibilities. Consistent with EU Gender Equality Data, Kosovo men were also more likely to spend time on hobbies and computing (0.1 hours), mass media consumption (2.0 hours), and travel/transportation (0.7 hours) than women, who spend 0.0 hours, 1.2 hours, and 0.3 hours on these activities, respectively. Men also spend more time on voluntary work and meetings, social life and entertainment, and sports and outdoor activities.²⁸ Higher rates of domestic and care work lead to a triple burden by women in employment. These aspects are to be considered for labour law and health and safety measures in employment as leading to impact on productivity, higher risks of fatigue for women, minimum standards for working time and organization, and relevant social security aspects of sickness and child care.
- **Social security and employment:** type of contract, status of the self-employed and other forms for bogus autonomous work, and informal work dominance impact social protection. The role and obligation of employers in covering most of the social security costs of employees, including pregnant women and parents after childbirth, put a

disproportionate burden on employment of women. This may explain relative dominance of unpaid family work²⁹ and lower employment of women in the private sector³⁰.

- **Violence at work:** the KSI draft report on women in employment post-Covid of January 2021³¹ surveyed incidents of sexual harassment at work. Around 30% of women reported different degrees of sexual harassment at work, but only 18% reported it to the employer. LFTUS also demonstrates that women do not recognize many discrimination factors, internalizing discrimination as a norm. Therefore, a combination of survey data and an understanding of the forms of violence at work have to be taken into account in designing decent work and OSH measures. Sexual harassment and other forms of violence can be both a discrimination issue and a safety and health issue, impacting men and women differently. No surveys on mobbing and other forms of violence have been available.
- **Employers and gender:** LFTUS 2018 data correspond with trends in Kosovo as analysed in KGEF of the AGE. Female entrepreneurship was quite low, with the aggregate entrepreneurship rate for women reported at 3.2% compared to 14.1% for men. By sector, the highest proportion of business was in agriculture, forestry and fishing (32.5%), followed by wholesale and retail trades (18.4%) and other service activities (16.3%). Most female businesses were in agriculture (35.6%), other service activities (24.8%), wholesale and retail trade (12.6%), manufacturing (10.9%) and accommodation and food services (7.2%). By comparison, most male businesses were in agriculture (31.8%), wholesale and retail trades 919.7%), other service activities (14.3%), manufacturing (10.2%) and construction (7.8%).³²

27 Interview on 28 April 2021.

28 LFTUS, Page 96, Time Use

29 LFTUS, Figure 19

30 LFTUS, Table 16

31 Kosovo Stability Initiative, Research report: Women Employment in Post Covid Kosovo (Draft title), January 2021 (available from IKS)

32 LFTUS, Tables 46 and 47

1.3. CONCEPTS OF EMPLOYMENT RELATIONS

Considering that minimum standards for essential working conditions are to be applicable not just to full-time employees on working contracts, a brief overview of the [concept of worker](#) is provided, assessing potential gender impact. Considering the EU accession process and transposition of EU law in Kosovo, it is essential that national clarity of definitions is achieved, using the opportunity provided by comprehensive changes to the labour relations system and OSH.

The terms ‘worker’ and ‘employee’ are used in EU directives and mostly refer to the nationally accepted definition of the concept of worker/employee. The wording is used interchangeably in EU secondary law, although some Member States of the EU distinguish between the two terms.³³ For this reason, Kosovo legislators need to clarify application of the terms in national law and what choices of systemic application of labour law they make. Within EU secondary law, the autonomous legal definition of the notion of worker is included in the OSH Framework Directive 89/391/EEC. This definition is not very specific and application of OSH measures is therefore broadly defined.

Discussion of the concept of worker in EU law refers to Articles 45 and 157 of the Treaty of the Functioning of the European Union (TFEU) in the light of the founding purpose of the EU, namely to create a common market and remove barriers to trade. However, the treaty does not define the concept of worker. Article 45 TFEU is relevant for the rights of free movement of workers and granting them access to the labour market. However, this purpose is different from the aim of labour law provision on essential working conditions. The objective of labour law is to protect the weaker party in the employment relationship – the workers.³⁴ The rights perspective derives from equal pay principles set in Article 157 TFEU.

The conceptual definition within national legal systems is relevant for the need to ensure uniform application of OSH and essential working conditions. Transposition of EU law in Kosovo

would thus clarify any interchangeable use of the term, ensuring clarity of application of protection of temporary workers, the self-employed, part time workers, and – with the possible future development of wage transparency – also domestic workers and other atypical forms of employment. Other directives such as the Maternity Protection Directive (92/85/EEC), the Collective Redundancy Directive (98/59/EC) and the Temporary Agency Work Directive (2008/104/EC) also use the term ‘worker’ but do not explicitly refer to a nationally accepted definition.³⁵

Clarity on use and definition of the self-employed is required, to distinguish false self-employment. There are no uniform criteria; however, the EU Court has consistently moved towards a broad interpretation of worker applying the argument of ‘effet utile’ or practical effect of EU law. To determine objectively who should be included in the labour law system as a worker and who can be excluded, the *Lawrie-Blum* test is applied in EU Court judgments. A summary of test criteria is as follows:

- economic activity: subject of activity, nature of relationship between the parties;
- real and genuine activity (economic), not to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary;
- control of decisions - a person performs services for and under the direction of another person, the contractual partner, who determines details of the working conditions such as what tasks are to be carried out and setting working hours;
- autonomy of a person to choose their own working hours;
- sharing the commercial risks of the business;
- freedom for a person to engage their own assistants;
- conditions relating to work and pay are governed by collective labour agreements;
- a person is ‘in fact engaged under fixed-term contracts of employment’;
- a person is, for the duration of that relationship, incorporated into the undertaking concerned and thus forms an economic unit with and within it;

33 Page 26, <https://www.etui.org/sites/default/files/18%20Concept%20of%20worker%20Risak%20Dullinger%20R140%20web%20version.pdf>

34 Page 19, <https://www.etui.org/sites/default/files/18%20Concept%20of%20worker%20Risak%20Dullinger%20R140%20web%20version.pdf>

35 Martin Risak and Thomas Dullinger,

- the substance of the contract and the arrangements for giving effect to it;
- the contractual partner has powers of management and supervision and, where appropriate, may sanction the working person;
- the working person has more leeway in terms of choice of the type of work and tasks to be executed and of the manner in which that work or those tasks are to be performed;
- who controls aspects of remuneration, and how this is managed.

Certain groups are excluded, such **public servants** who are not considered 'workers' in many Member States but are allocated a category of their own. In the **Lawrie-Blum** case the Court stated that the exception in Article 45 (4) TFEU ('employment in the public service') must be understood as meaning those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities and which therefore require a special relationship of allegiance to the State on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality. It refers not to the status of the persons concerned but to the way in which the work is done – and if it is done in subordination, i.e., 'under the direction of another person', they fall within the scope of application of the relevant legislation.³⁶

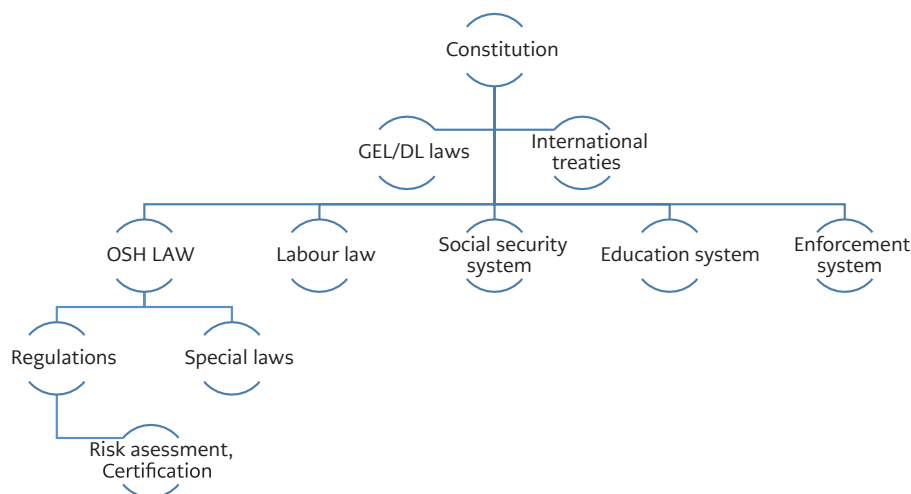
The second group sometimes excluded from concept of worker are **members of the board of directors** of a capital company.

EU court practice repeatedly clarifies that an employee or worker is the weaker party in the employment relationship and therefore interpretation of the labour system provisions has to consider the purpose of protection of rights.

Gender aspects of employment of men and women in the public or private sector in Kosovo imply the need for a clear national position on essential definitions, clarity on groups exempt from the general OSH system or from certain essential working conditions, and securing alternative protection mechanisms for workers in those groups. Equally, clarification of the position of the self-employed in employment relationships will be required.

1.4. APPROACH OF ANALYSIS FOR LEGAL REVIEW

The hierarchy of laws presumes supremacy of the Constitution and related international treaties, followed by laws and subsequent related regulations and other administrative acts by public institutions. To follow the hierarchy, the review will include an overview of equality and decent work-related clauses in the Constitution that should be embedded in the design of all laws and regulations. For the purposes of the review cross references will be made to the applicable and related international treaties.



³⁶ Page 41, <https://www.etui.org/sites/default/files/18%20Concept%20of%20worker%20Risak%20Dullinger%20R140%20web%20version.pdf>

To analyse specific OSH and decent work laws, these are the Constitution and [Law on Gender Equality in Kosovo \(LGE\)](#), Law No. 2004/2 and the [Law on Protection from Discrimination \(LPD\)](#), Law No. 05/L-021 setting equality principles and minimum requirements. More detailed analysis is performed of:

- The [Law on Safety and Health at Work \(OSH Law\)](#), Law No. 04/L-161 and the draft OSH Law of April 2021
- [Law on Labour \(LL\)](#), Law No. 03/L-212 and the draft LL of April 2021
- Regulation on OSH Risk assessment
- Criminal code

Each review of the law will include a section on the findings of existing reports. The following gender-specific analysis of decent work and OSH-related laws are available on Kosovo:

- 2011, Kosovar Centre for Gender Studies (KCGS) report Impact of the Labour Law on Women in Kosovo
- 2017,³⁷ By Sylvia Cleff le Divillec and Katharina Miller for Kosovo Women's Network (KWN); Policy paper: *Kosovo's Progress in Aligning Its Laws with the European Union Gender Equality Acquis*
- 2019, Kosovo Women's Network report *Gender Based Discrimination and Labour in Kosovo*
- 2021³⁸ Kosovo Stability Initiative *Research report: Women Employment in Post Covid Kosovo*

³⁷ <https://womensnetwork.org/wp-content/uploads/2018/10/20171108105226438.pdf>

³⁸ Draft report used for the review and final report to be available from IKS

2. GENDER IMPACT ASSESSMENT OF THE LAW

The practical approach of gender-sensitive analysis includes the principles of designing effective legislation and gender impact assessment. Legislation can be gender-blind: *failing to recognize that the roles and responsibilities of women and men/boys are ascribed to, or imposed upon, them in specific social, cultural, economic and political contexts*.³⁹ Gender-blind laws will maintain the status quo and will not help transform the unequal structure of gender relations.

In designing the law, lawmakers have to transform ideals, ideas, and assumptions into effective provisions using concepts of law, language, structure and form. The effectiveness of legislative measures has to be comprised of four fundamental elements present in every law: objectives, the solution expressed in the content of the law, results, and context (over-reaching structure or superstructure).⁴⁰ Law is only used when necessary and the policy goal cannot be achieved by other means and it has to fit the purpose. Once used, the law has to **be constitutionally sound** and reflect the fundamental values and principles of a democratic society, including goals and the principle of equality; and **accessible** for users - easily found, easy to navigate and understand.

The laws analysed will consider the following gender equality questions:

- **Context or regulatory system**: the questions to be asked prior to analysing the content of the law will be with regard to the system within which the law is placed. This assessment will link the law in question with the main policy documents or strategy;
- What is the purpose of the current regulatory system?
- What is it trying to achieve?
- Who is the system trying to protect or help (for example, employees)?
- What are the essential differences in needs of men and women in this system?

- **Constitutionality** and fundamental values and principles: to what degree the law reflects overall gender equality principles and how it is linked with the international treaties;
- What are the legitimate aims and constitutionality of the law – to what degree the law reflects the fundamental values and principles of a democratic society or the principle of equality.⁴¹
- What is the degree of conformity to the relevant international treaties and decent work principles?
- **Objectives**: this sets the benchmark of what legislation aims to achieve. Objectives or goals are neither justification of legislation, nor reasons for its enactment. A problem the law addresses may be broader and may highlight a number of reasons why legislation is needed, or the **test of necessity – problem addressed, link to public interest, legitimacy, political priorities**. The objective of the law may target all or only part of the problem, so justification of the law responds to the weighing and balancing of available options, thus invoking the questions of **proportionality, cost, rationality**.⁴² later essential for interpretation of the law. This leads to the **objective** requiring a clear message – precise terms in what state will be achieved or desired after enacting the law. Insight is given into policy documents on OSH and decent work in Kosovo.
- Preambles introduce the context of a law, provide information on the legal basis, explain its object or reasons.⁴³ They are particularly relevant for the application of EU law, as they are seen to establish the purpose of provisions and may determine interpretation and application of the law. This also means that values and principles, like those

39 EIGE, <https://eige.europa.eu/thesaurus/terms/1157>

40 M. Mousmouti, p. 13

41 Chapter 1: Good legislative design, <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-1/>

42 M. Mousmouti, p.19

43 M. Mousmouti, pp. 27

of gender equality, are often included in the recitals or preambles of laws.

- While the purpose of the law needs to be defined early in the law-making process and tested through public consultations and involvement of relevant expertise, this review will not analyse the process of adoption of laws. The analysis will focus on objectives, not the reason or justification for this legislation. The main gender equality questions to be asked are:
- whether the objective or purpose of the law is set to continue or change existing inequalities between men and women (and groups of men and women) and patterns of gender relations; and
- determining whether and to what degree proposed laws/policies enhance women and men's democratic rights⁴⁴
- It is important to identify the **direct and indirect beneficiaries** of the law/provisions in question. While mostly reflected in policy documents related to the law, the question of exemption of certain groups from application of decent work and OSH measures will be asked, raising questions of the core concepts of worker, the self-employed, exempt groups and assessment of impact either directly on men/women or through impact on structural segregation.
- The **benchmarks for effectiveness** of law for gender equality goals, asking questions with regard to the direct impact of the law, namely presumed gender neutrality. Specific essential working conditions are assessed with their **short, medium, and long-term impact on men and women**, and questioning the assumption that laws and policies are "gender-neutral" in their effects. Impact questions are asked in the light of core principles.⁴⁵
- **Direct discrimination** - will be taken to have occurred where one person is treated less favourably than another is, has been or would be treated in a comparable situation
- **Indirect discrimination** - is considered when

a provision, criterion or impartial practice in appearance has or will put a person in an unequal position compared with others,

For example, with regard to well-being and health – does the impact of the law on mental and physical health or well-being differ between women and men? Are differences in risk factors for the health and well-being of women and men accounted for? Does the law reduce health discrepancies between women and men or within the respective group? Or, with regard to Health and Safety – for this review the following aspects of decent work will be reviewed in each law and its gender impact.

Labour-related **social security issues**: review considers the impact of essential working conditions regulation in the Law on Labour (LL) and Law on Safety and Health at Work (OSH Law) including the impact on beneficiaries of the law from a social security perspective – sick leave, vacation pay, unemployment benefit payments, pension contributions, pregnancy-related regulation and parental leave conditions. The review does not assess the social security system in Kosovo.

Address **essential working conditions** in line with the EU Social Pillar and ILO fundamental rights principles to include questions of safe and decent working conditions: including gender equality questions. Does the impact of the law on mental and physical health or well-being differ between women and men? Are differences in risk factors for the health and well-being of women and men accounted for? Does the law reduce health discrepancies between women and men or within the respective group? Are structural segregations issues and unpaid care work taken into account for risk assessments? Does the law have different effects on safety as experienced by women and men? More specifically, the following essential working conditions are addressed:

- Equal pay regulation assessed in the light of core principles of equal pay for work of equal value;
- Contracting and dismissal conditions;
- Working time and rest time: Are the different security risks for women and men at home, at work and during recreation considered in the law?

44 The specific approach is combining the perspectives of M. Mousmouti Designing Effective Legislation, OSCE practical guide, and other resources, e.g. https://www.iknowpolitics.org/sites/default/files/gender_perspective_roundtable.pdf and New Zealand Legislation Guidelines <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/early-design-issues/chapter-1/>

45 LAW No. 05/L-021 ON THE PROTECTION FROM DISCRIMINATION, <http://old.kuvendikosoves.org/?cid=2,191,1111>

- Vacations⁴⁶
- Violence at work - Are special measures needed to reduce violence against women?⁴⁷

Social dialogue regulation: the aspect of social dialogue in the form of tripartite forums, employer-employee collective relationships and rights, including *collective bargaining*. Gender equality questions on participation and representation - does the law strengthen the social participation and wellbeing of both women and men?

Freedom of association and right of trade unions, considering aspects of collective rights, membership, and protection of employees. Questions of representation and the right to collective action in discrimination cases are considered.

Special measures or protective grounds. Identifying sex-specific legal objectives and relevant measures, particularly with regard to sexual and other harassment at work to highlight specific gender differences in normative regulation of

sexual and other harassment. Violence – physical and emotional – is often part of organizational culture, thus harassment and mobbing / bossing will have to be reviewed both from normative perspective and effective employer obligation overview

- Considerations on the **effectiveness of compliance mechanisms** and whether they address gender equality goals and are equitable, and how individual and collective rights protection is sectorized, including trade union rights. Within limitations of data, effectiveness towards men/women and complaint mechanisms will be assessed, identifying whether any stereotypes impact perceived complaints; e.g., how employer obligations are defined and what are the monitoring processes and complaint reviews; along with segregated data on complaints.

The legislative process as such will not be subject to this review,⁴⁸ apart from identifying whether gender analysis was done as part of the legislative and policy making process.

46 Also through EU developments on transparent and predictable working conditions, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, general information available at <https://ec.europa.eu/social/main.jsp?langId=en&catId=1313>, directive text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1152>

47 OSCE handbook, Page 31. <https://www.osce.org/files/f/documents/a/1/327836.pdf>

48 M. Mousmouti, Designing Effective Legislation, 2019, available electronically at <https://www.elgaronline.com/>

3. GENERAL PRINCIPLES OF EQUALITY AND DECENT WORK

3.1. CONSTITUTION

The Constitution has the highest legal authority in The Republic of Kosovo and laws and other legal acts must be in line with the Constitution.⁴⁹ For this purpose, the equality provisions of the Constitution have to be part of each gender review of a given legal act.

The preamble sets the core principles and context of the national system, and through its content develops core values, principles, substantive rights and sets the basic principles of the functioning of national governance system and institutions.

The Constitution (Article 19) also determines the role of international law, making it part of the legal system, directly applicable (unless exempt). International law has superiority over the laws of the Republic of Kosovo. This is an important factor with regard to gender analysis of laws and later for interpretation and application of laws. Furthermore, specific direct applicability clauses (Article 22) presume the superiority of the eight listed human rights documents, including the UN Declaration of Human Rights. Furthermore, under **Article 53 [Interpretation of Human Rights Provisions]: Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.**

Thus, in the case of conflict, human rights and fundamental freedoms have priority over the provisions of laws and other acts of public institutions. Together with Article 19, this is a significant indication of the importance of interpretation of Constitutional and specific legal provisions, including those of OSH and decent work, to the degree they are included in the ratified treaties.

3.1.1. Gender equality in the Constitution

The preamble sets the purpose: [...] *Committed to the creation of a state of free citizens that will guarantee the rights of every citizen, civil freedoms and equality of all citizens before the law;* [...] This implies equality to be guaranteed in each law as the purpose of a democratic state.

Gender equality is defined through general equality considerations in Article 3 **Equality Before the Law** that includes democratic governance, and respect for the rule of law through legislative, executive and judicial institutions. Part 2 specifically refers to equality: [...] **2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all Communities and their members.**[...] . Clear reference is given to international human rights obligations, and further strengthened through other provisions of the Constitution.

Furthermore, Article 7 [Values] sets the constitutional principle of equality, respect for human rights, democracy, and social justice. That way equal participation in democratic decision-making, and substantive equality should be considered as a principle throughout the whole system of governance and law-making. Part two of the article expressly mentions gender equality:

“2. The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.”

⁴⁹ Article 16, Constitution

Respect for the rule of law through legislative, executive and judicial institutions and ***exercise of public authority based on principles of equality*** explicitly presumes gender equality as a fundamental value. Therefore it should be interpreted to include also mainstreaming of equality, including gender equality.

3.1.2. Equality and decent work

Through Article 61 the State undertakes equitable employment and representation in public bodies and public enterprises, that way demonstrating best practices for the private sector. Diversity among the population, and gender equality accordingly, has to be reflected in the civil service. Thus Article 61 sets the fundamental right for candidates for employment in the public sector and presumes almost 50/50 representation of men and women.

The Kosovo Constitution makes direct reference to selected human rights instruments and sets principles of direct applicability of these agreements in Article 22. That way, individuals can directly use the listed treaties for protection of their rights. This puts a clear obligation on the lawmakers to ensure that core principles are embedded in each national legal act. The table in [Annex 1](#) provides an overview of core decent work provisions embedded in the treaties and instruments mentioned in Article 22. For the purposes of interpreting and applying the provisions, individuals, employers, national administrations and dispute resolution authorities also have to take account of respective decisions of the European Court of Human Rights, or General Comments or Recommendations issued by the competent treaty bodies.

3.1.3. Essential working conditions

The Constitution prohibits slavery, forced labour and trafficking, particularly relevant for the employment contract and abuse of vulnerable workers (Article 28), freedom to choose one's profession (Article 49) which is closely linked to opportunities to apply for work and get hired, as well as to educational opportunities and qualification training. Any restrictions for men or women to occupy a specific profession, or any indirect restrictive measures limiting access to that profession have to be objectively justified in line with Article 55 of the Constitution.

Article 24 on **equality before the law** sets the core non-discrimination principle for law-makers. It clarifies the scope of special measures and requires target-setting for such measures (for example, quotas). In the context of decent work and OSH legislation this is particularly relevant for the purposes of assessing any exemptions from protection provided by the law, defining special measures of protection with regard to essential working conditions of recruitment, dismissal, pay, working conditions and other rights.

Personal data protection principles as in Article 36 are essential when setting monitoring, compliance, risk assessment, and other decent work and OSH mechanisms.

Freedom of association in Article 44 embeds the core labour rights of social dialogue: to form and participate in trade unions, equally to have the right not to participate. Rights of trade unions include the right to strike, take other action and the right to collective bargaining. This right may be limited by law for specific categories of employees and exempt groups of employees have to undergo the required necessity test in Article 55.

Fundamental rights and freedoms can be **limited** (Article 55), except non-derogable rights as in international instruments mentioned in Article 22. Such limitations have to be necessary in a democratic society and the principle of proportionality of means has to be observed. This core assessment has to be done with regard to exemptions of any group from decent work and OSH provision.

3.1.4. Grievance mechanisms

Article 31 on fair trial sets the core principles for accessibility of courts as one of the grievance mechanisms for violation of rights, both of individuals, but also for the employee representatives – trade unions. The State is under obligation to ensure everyone is entitled to legal remedies in Article 32, in case someone perceives their rights or interests to be infringed by a judicial or administrative decision.

3.2. LAW ON GENDER EQUALITY^{50 51} AND DECENT WORK

Horizontal gender equality principles are further detailed in the Law on Gender Equality (LGE). Its scope (Article 1) is very wide and applies to both public and private sectors, including employment. On the one hand, the LGE is a special law (*lex specialis*) with its implementation framework; on the other hand, it provides general principles that are used holistically to provide extended interpretation tools for other laws. As explained in the commentary to the LGE it only sets out some basic rules, whereas specific rules are defined by specific laws. Equal treatment of genders is therefore required to be implemented within the framework of terms and conditions established by these laws. Its reference is the Constitution and relevant gender equality and decent work provisions therein, and interpretation of these provisions as present in the international law.

Enforcement of the law is secured through the Criminal Code⁵² which presumes liability for violation of equality provisions (Article 190) and offences of labour rights violations set in laws are thus also violations. Likewise, the Labour Inspection under its mandate has to use the LGE for interpretation and application of LL provisions in its administrative duties.

The LGE provides core definitions to be cross-referenced in other special laws for gender inclusion. Article 3 includes core definitions to be used and cross-referenced in other laws and regulations, as well in implementation, monitoring and enforcing rights and norms.

The GLE defines gender mainstreaming (GM) and sets as a legal requirement to consider GE (Article 4) for legislation, policies, programmes and practice in all planning, budgeting and implementation of the above acts by public and private entities. The task of GM is mandated for Institutions in Kosovo in Article 5, along with other tasks of data collection, GM in action planning, organizational development (recruitment,

allocation of resources, practical arrangements such as communication, events). In essence, Kosovo should have available data on GE and well-designed policies, following the AGE guidelines, whereas in reality gender analysis is not available for most laws.

Chapter III of the law sets minimum GE standards in employment relationships. These, within the scope of criminal law, are reinforced by criminal liability in addition to the administrative liability mandated by law.

Essential working conditions and GE goals are specified in Article 15. The general principle of non-discrimination – “*It is prohibited the direct or indirect discrimination on grounds of sex, marital or family status, pregnancy, birth, parenting and each custody form in the public or private sectors*” refers to particular employment conditions, also supplemented by Article 17, particularly on the recruitment phase:

- **Access to employment**, self-employment or occupation. This refers to the recruitment process (selection criteria, recruitment conditions), professional development and advancement. The core right to employment has to be seen in conjunction with the right to work as defined in international treaties. Article 17 further mentions specific areas for non-discrimination, like job advertisements and equal opportunities in vacant positions;
- **Professional development**: Access to all types of vocational guidance, training, requalification and practical work experience;
- **Employment conditions**, explicitly stating dismissal and pay, further specified in Article 17 as equal pay for work of equal value; harassment, including sexual, and related non-punitive complaint mechanisms within the employer's organization; working time balance and family needs, and parental rights.
- **Freedom of association**, to include membership of organizations of workers or employers.
- Article 17 further obliges employers (public or private) to ensure **active promotion** of gender equality during employment and representation of men and women in different job categories.

50 LAW No. 05/L -020 ON GENDER EQUALITY https://equineteurope.org/wp-content/uploads/2019/10/Annex-LAW_NO_05_L-020_ON_GENDER_EQUALITY.pdf

51 Prof. dr. iur. Haxhi Gashi, Commentary to the Law on Gender Equality, 2017; Agency for Gender Equality,

52 CODE NO. 06/L-074 CRIMINAL CODE OF THE REPUBLIC OF KOSOVO <https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf>

Exemptions are set for access to employment and relevant training prior to such employment.

Article 16 provides a checklist of detailed criteria where gender discrimination needs to be assessed when setting up occupational social security schemes.

Enforcement measures include penalties for administrative or minor offences and civil proceedings initiated by an individual. At the same time, criminal law allows for prosecution on the provisions related to labour law.

Conclusions

The LGE sets out some basic GE rules, and is a tool for interpreting key GE concepts. Applying GE law in labour relations includes:

- a gender mainstreaming obligation for institutions in developing policies and laws;
- defined core concepts have to be used in interpreting the same concepts in the labour relations laws and regulations;
- Gives clear essential working conditions content with regard to gender discrimination: equal pay, access to employment and decent work and dismissal; freedom of association and related collective labour agreement and protection measures.
- Specific rules defined by labour law have to be synchronised with the GLE or cross references made for uniform application and interpretation.

Strengthening GE through application of LGE in the labour system can be through cross-referencing LGE to labour laws and related regulations and in cases of questions of interpretation requires active use of the Constitution and international treaties. AGE tools⁵³ for Gender mainstreaming provide an excellent step-by-step practical guide for any policy- and law-maker for better GM.

⁵³ For example, the 2019 AGE manual for gender impact assessment available at <https://abgi.rks-gov.net/assets/cms/uploads/files/Publikimet%20ABGj/Gender%20Equality%20Impact%20Assessment%20Manual.pdf>, and other.

3.3. LAW ON PROTECTION FROM DISCRIMINATION⁵⁴ AND DECENT WORK

The purpose of Law on Protection from Discrimination (LPD) is to establish a general framework for prevention and combating discrimination based on an open list of grounds that include sex, gender, gender identity, genetic inheritance or any other grounds, in order to implement the principle of equal treatment. The law also makes specific reference to international treaties and EU directives that this law should be seen in context with.

The scope covers both public and private sectors and formally allows monitoring of violations that are in preparation, but have not yet taken place: “who violate, violated or may violate the rights of any person or natural and legal entities in all areas of life”, related to, for example, essential working conditions. Decent work elements include:

- access to employment, self-employment and occupation, including employment conditions and selection criteria,
- at all levels of the professional hierarchy, including promotions;
- conditions of employment and working conditions, including discharge or termination of the contract and salary;
- social protection, including a social assistance scheme, social security and [health protection](#).

The LPD includes health protection that can be applied to OSH implementation and defines discrimination.

For compliance and [social dialogue](#) and trade union rights – relevant provisions are included in Article 18 allowing [for group action](#), which includes affiliation to trade unions or taking collective discrimination class action. This action can be taken by a non-governmental organization or by the Ombudsperson, in which case, the consent of the members of the group is sought. This allows for collective complaints on gender discrimination. The system presumes both TU action (without identifying their members) as

⁵⁴ LAW No. 05/L-021 ON THE PROTECTION FROM DISCRIMINATION https://equineteurope.org/wp-content/uploads/2019/10/Annex-LAW_NO_05_L-021_ON_THE_PROTECTION_FROM_DISCRIMINATION.pdf

collective action, and class action – a joint claim by affected individuals. This review does not assess the procedural norms on how these claims can be brought to court.

Reverse burden of proof – where the perpetrator has to prove that they did not discriminate, rather than the victim having to prove the existence and intention of discrimination – is applied to the LPD. Criminal law may be applied for LPD employment standard violations, if they fulfil the objective requirements of criminal law.

Conclusions

LPD overlaps with LGE with regard to definitions of discrimination and inclusion of gender equality into LPD as such. LGE provides some more specific provisions related to labour and requires GM to be practiced at all levels. LPD in turn gives additional tools on taking action, like collective action by trade unions also on GE grounds.

3.4. DECENT WORK FRAMEWORK AND CORE POLICY INSTRUMENTS

The context for OSH derives from data on the labour market, specific OSH data on substantive application of safety and health measures, and monitoring mechanisms.

OSH law is an instrument to achieve envisaged system changes. Therefore, it derives from the following national policy planning documents:

National Development Strategy 2016 – 2021⁵⁵ of Kosovo, which addresses informal employment and creation of adequate working conditions. Activity 2 within Objective 7 of the Human Capital section states: *“Improve the workers’ rights and guarantee the minimum standard of safety and health at work, in accordance with international standards. This will be done by enhancing the legal framework, promoting awareness and better monitoring of the legal framework implementation. In 2016, 10 sub-legal acts regulating the safety and health at work will be approximated to 10 corresponding EU Directives”* and addressing

informal employment - *Activity 3 Strengthening the mechanisms and coordination of institutional actions targeting decrease of informal employment of men and women, by creating joint platforms and bodies for inspection on the ground.*

The Strategy also spells out specific labour market-related gender equality activities under Objective 1 ENROLMENT IN PRE-SCHOOL AND PRE-PRIMARY EDUCATION: *Increased inclusion of children in pre-school institutions. This will allow better success at higher levels of education, decrease inequality and increase participation of women in the labour market. This means that a child may learn while his or her mother may work.*

Other NDS measure are indirectly linked with the functioning labour system and therefore also decent work conditions – education, including VET, SME development, access to funding, social dialogue measures, infrastructure development. However, gender equality aspects are not explicit and clear, therefore sector strategies have to ensure proper gender analysis and integrate sector-specific equality goals into action plans.

Sectoral strategy 2018-2022 of the Ministry of Labour and Social Welfare is continued by the new ministry under reorganization post elections in 2021. The Strategy explicitly sets Objectives of *Improving working conditions and reducing informal employment by strengthening oversight mechanisms and strengthening social dialogue* and Specific Objective 2.1: *Improving workers’ rights and guaranteeing minimum standards of safety and health at work, in conformity with international standards through improvement of the legal framework* that corresponds with the objective of NDS.

Like laws, these documents have to conform with the Constitution and its principles, so the above assessment of Constitutional principles of equality apply to policy documents and laws.

Draft Intersectoral Strategy on Safety and Health at Work 2021-2026 and action plan 2021-2023 provides an up-to-date insight into the OSH context. However, there is little gender data and results of analysis. Planned strategic objectives include effectiveness of legal framework and expect further harmonisation. It is recommended to extend the use of AGE tools on gender impact assessment for each planned law and regulation review. Definitions of workers, employer relations and objective clarification

⁵⁵ “National Development Strategy 2016 – 2021” of Kosovo; Government of Republic of Kosovo; 2016; Web: http://www.kryeministri-ks.net/repository/docs/National_Development_Strategy_2016-2021_ENG.pdf (last accessed on 22.05.2021)

is required for any group to be excluded from the application of main laws, and a broader perspective to be considered, assessing conformity of planned action against international treaties.

Objectives with regard to Improving and strengthening the legal framework aspect is structured around effective legal framework activities on harmonization with EU OSH directives. Particular relevance in this section should be paid to a broader EU law harmonization, ensuring that core elements included in equality directives are integrated into OSH provisions. As general gender data indicates, planned activities on drafting specific sub-legal acts on OSH in agriculture, transport, forestry etc.

Action 1.1.3 cannot be performed to high quality without clear data on gender segregation in the sectors, and planned gender analysis to ensure OSH provisions work against reconfirming gender segregation and stereotypes and foster GE goals. As this report indicates, key decisions will also be related to national definition of core concepts and conceptual decisions on how to address domestic work, undeclared/unpaid family work where women are overrepresented, especially in agriculture, while similarly addressing overrepresentation of men in HoReC. The ILO recognizes that the need for GM and Kosovo segregation by industry conforms with main issues recognized worldwide. Agriculture, for example, remains a high-risk sector for both women and men, but many women working in agriculture end up doing the worst jobs, such as working with pesticides, chemical or biological agents, without protection, or doing heavy cultivation or harvesting work without mechanical assistance.⁵⁶ When this labour is unrecognized and unpaid, the risks do not diminish.

Core LI reform is planned, to strengthen the capacities of the Inspectorate. All reform instruments have to include a clear gender equality approach, due to the central role of LI in OSH

and labour law monitoring and all related certification, licensing and education activities. LI has to have non-discrimination – including gender equality – competence, to evaluate safety hazards, monitor and control implementation of the LL and labour conditions, and preventive action on discrimination in labour relations. These long-term impact activities and planned reforms offer an opportunity to demonstrate an excellent GM approach. As Austrian (and other EU MS) LI experience has demonstrated, GM happens only when it is a conscious and explicit decision taken that changes the functioning of the LI.⁵⁷

Similarly, a new **certification and licensing** scheme will be set up and Strategic actions indicate new accreditation systems, curricula and other essential steps (Actions 1.1.9 – 1.1.13) and for the **health surveillance system**, where gender specifics have to be built into the core, to prevent stereotyping, unjustified limitations and link to risk assessment systems in enterprises.

All elements of objectives with regard to **prevention** will be directly linked to the target audiences, where data demonstrates strong segregation by industry, professions, public/private workplaces and atypical forms of employment. These gender differences require both a clear plan towards reducing segregation and communicating it, and a different approach towards preventive actions on OSH to men and women, taking into account their needs and experiences. Explicit gender demonstration of gender awareness is missing from this part of the Strategy.

As one of the objectives of the Strategy relates to the legislative improvement, a **draft concept paper for improvement of legislation in the field of safety and health at work (Dated April 2021)** is being developed.

A **gender equality action plan** includes action towards social security schemes that affect the design of labour and OSH measures.

⁵⁶ https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf

⁵⁷ Mainstreaming gender into occupational safety and health practice, European Agency for Safety and Health at Work's, 2014, see section 4.1. on Austrian example, and other GM approaches and strategies. [Literature Review \(europa.eu\)](#)

4. LAW ON LABOUR, DECENT WORK AND EQUALITY

The scope of review is limited to the decent work and OSH principles, and includes only assessment of respective articles of the law. General considerations with regard to workers, employers, and special employment groups are provided, as these define the scope of labour protection in the OSH system and other provisions implementing labour law. Draft law discussions still ongoing provide the opportunity to clarify some of the terms and ensure harmonisation between LL and OHS Law, as well as to add clarification of concepts in policy documents under adoption for the purposes of uniform interpretation in all related areas.

4.1. CONTEXT

Questions asked for the context review relate to the labour relations context, including occupational segregation - what is the purpose of the current regulatory system? Who is the system trying to protect or help? – and questions to identify specific essential differences in needs of men and women in this system.

It is generally considered that the object of labour laws is to protect workers, whether it be from democratic deficits in the workplace, from social, psychological or economic domination and dependence or inequality of bargaining power between the employer and employee.⁵⁸ This approach recognizes the impact of inequality in labour relations and inequality of power.

Globally, and in Kosovo, women are substantially less likely than men to participate in the labour market, and once in the workforce, they are also less likely to find jobs than men. Overall, for example, women are more likely to work longer hours than men when both paid and unpaid work is taken into account,⁵⁹ [Data on Kosovo](#)

also show segregation by sectors and within unpaid family work.

Among strategic policy objectives Kosovo aims to increase access to the labour market for young people and women.⁶⁰ The KPEG sets the objective as “*Creating equal opportunities to contribute to and benefit from economic development, increased inclusion and improvement of social welfare, will be achieved by: enhancing women’s skills in line with labour market demands, focusing on the underrepresented areas; addressing the gender-based discrimination in employment by amending the Law on Labour [...]*”. This to be done in order to guarantee equal parental leave and transposition of the EU Directives [...] and reduction of informal employment and improvement of working conditions.⁶¹

The Sector Strategy of the Ministry of Labour and Social Welfare 2018-2022 aims to increase employment and improve social welfare in the country. The strategy aims at addressing gender inequalities in the labour market by designing services and active employment measures in line with women’s demands, addressing occupational gender segregation, and includes activities to enhance social welfare by expanding and enhancing the quality of protection and social and family services, with special focus on vulnerable groups and gender equality.⁶²

4.2. CONSTITUTIONALITY

Constitutionality review questions what are the legitimate aims and constitutionality of the law – to what degree the law reflects the fundamental values and principles of a democratic society or principle of equality, and what is the conformity to the relevant international treaties and decent work principles?

58 [Dáire McCormack-George](#), On the Nature of Work and the Purpose of Labour Law: Some Irish and European Perspectives

59 ILO, [World Employment and Social Outlook: Trends for women 2017](#), report and information available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_566891/lang-en/index.htm

60 Kosovo Program for Economic Reform 2020-2022

61 <https://abgj.rks-gov.net/assets/cms/uploads/files/Programi%20i%20Kosov%C3%ABs%20p%C3%ABr%20Barazi%20Gjinore%202020-2024%20-%20ANGLISHT.pdf>

62 KGEAP_ <https://abgj.rks-gov.net/assets/cms/uploads/files/Programi%20i%20Kosov%C3%ABs%20p%C3%ABr%20Barazi%20Gjinore%202020-2024%20-%20ANGLISHT.pdf>

The scope of application of non-discrimination provision is defined in Article 5 of LL:

“1. Discrimination is prohibited in employment and occupation in respect of recruitment, training, promotion of employment, terms and conditions of employment, disciplinary measures, cancellation of the contract of employment or other matters arising out of the employment relationship and regulated by Law and other Laws into force.”

The formulation is open with regard to applicable labour relations situations to include any situations, while the essential working conditions are listed.

Article 5.5. cross links LL with LPD and states direct applicability of LDP. As analysed earlier, [LPD does have direct application to labour relations deriving from the law itself](#). This reference nevertheless helps for interpretation and application of duties of monitoring institutions – LI – which are required to apply LPD in complaint handling. Cross-referencing other laws where relevant makes the links more explicit and unquestionable.

Article 3.1.17 defines discrimination, meaning exclusions or preference on the basis of listed grounds including sex and trade union membership. This definition limits grounds of discrimination, while later the article cross-refers to LPD where list of grounds is non-exclusive.

Labour law functions on the premise that in case of clash of two conflicting provisions, the more favourable provision is to be applied for the benefit of the employee as the weaker party.

In point 4 of the article specific gender equality reference is made for recruitment and hiring with regard to opportunities and hiring criteria, and point 2 explicitly prohibits direct or indirect discrimination of persons with disability if the job in question may be performed by the person.

The draft law specifies the non-discrimination definition with the same reference to exclusion or preference grounds, but an action “which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation capacity building is prohibited.” By referring to the effect of the law it does not require

a victim who has experienced discrimination for the provisions to be applied. In labour relations this means employers’ internal rules and procedures which would have a discriminatory effect if applied may be appealed, even before someone has suffered negative consequences.

The draft law also provides a new definition for the purpose of applying and interpreting non-discrimination provisions: comparative groups “1.31. **“Comparable employee - an employee who has an employment contract concluded with the same employer, who carries out or would carry out the same type of work or a similar type of work taking into consideration qualifications and experience in a relevant field”.**

The ILO highlights trade union representative discrimination, as one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions.⁶³ Special protection of trade union representatives is usually set in the law. LL in force (May 2021) and draft LL do not provide clear special protection measures. The ILO Freedom of Association committee recommends, “since inadequate safeguards against acts of anti-union discrimination, in particular against dismissals, may lead to the actual disappearance of trade unions composed only of workers in an undertaking, additional measures should be taken to ensure fuller protection for leaders of all organizations, and delegates and members of trade unions, against any discriminatory acts.”⁶⁴

Constitution and international treaties (see [ANNEX 1: International treaties](#)) are also implemented by Article 6 on prohibition of forced labour, Article 55 on equal pay for men and women, Article 79 access to court.

The draft law also sets an obligation for employer to inform trade union representatives yearly on the gender equality situation at the enterprise. (Article 147). This provision is a unique measure that, linked with the general duty of the employer set in Article 5 to promote GE, gives a tangible tool to plan action for the employer and to monitor progress for both employer and employee representatives.

63 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3946840,1

64 Decision No. 1078 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3946840,1

Access to fair trial, however, is limited in disciplinary action, where Article 83 presumes resolution of disciplinary action through the Labour Inspectorate. This limitation has to be considered unconstitutional. The option to resolve disciplinary measures out of court, giving explicit additional powers to the LI, is consistent with the principle of trying to resolve disputes peacefully. Nevertheless, the individual has to maintain the right to resolve a dispute in a competent court.

The ECHR provides guidance⁶⁵ on interpretation of the right to fair trial. Access to fair trial includes elements of access to the court. Disciplinary action taken against an employee confirms the key admissibility criteria for application of fair trial rights. Firstly, it is a genuine and serious dispute with a definitive outcome, as disciplinary action is part of employment relations, subject to internal rules and procedures of the company and often used as a power tool by the employer. Secondly, it is a civil matter of employment relations – a dispute between two private parties, albeit the employee being objectively the weaker party in that relationship. Thirdly, it relates to the rights set in the Labour law – for example, disciplinary action can be brought against an employee for insisting on exercising their rights. While LL prohibits creating unfavourable consequences for exercise of employee rights, it nevertheless will require employee action to challenge such a decision by the employer.

As to potential gender impact, lack of access to the court may affect women more, especially if they exercise the specific exemptions of night work, overtime, and business travel provided because of children, or insist on exercising breastfeeding rights, disobeying an employer's order that violates those rights. Such disputes will have a direct effect on women to a greater degree, due to current regulation. From the OSH perspective, safety reporting systems in companies have to be set up so that they do not lead to disciplinary punishment for reporting safety breaches. This aspect in turn will have occupational segregation aspects in defined high-risk industries – addressing mainly male-dominated sectors and in case of disputes on safety and resulting disciplinary action, will limit men's opportunities for a fair trial. The true extent of gen-

der impact, however, will have to be analysed separately.

The ECHR further determines the elements of the right, to include: access to a court must be “practical and effective”; an individual must “have a clear, practical opportunity to challenge an act that is an interference with his rights”; the formal steps required for a complaint, and time limits are meant for the purpose of ensuring the proper administration of justice and compliance with the principle of legal certainty.

Excluding disciplinary action from the competence of the courts, thus also denying the right to adequate compensation to the employee, does not serve the goal of proper administration of justice, nor does it allow the individual to protect their interests or rights. Exclusion of disciplinary action from availability of court proceedings does not seem to address any legitimate aim. While it is legitimate to foster out-of-court settlement of disputes in labour relations, where LI could take into account the weaker position of the employee or support mediation for a better solution, exclusion from further court proceedings with an opportunity for decision on the legality of employer action and respective compensation of damages does not serve a legitimate aim.

4.3. OBJECTIVES OF THE LAW AND BENEFICIARIES

Questions asked for the review of objectives of the law include: whether the objective or purpose of the law is set to continue or change existing inequalities between men and women (and groups of men and women) and patterns of gender relations; and determining whether and to what degree proposed laws/policies enhance women and men's democratic rights.

The purpose of the law is set as: “*This Law aims at regulating the rights and obligations deriving from employment relationship, as defined by this Law*”. Its focus is formal on rights and obligations of both parties. No goals for improving equality in labour relations are set. The key terms in LL define

⁶⁵ Guide to Article 6 of the European Convention on Human Rights, Council of Europe/European Court of Human Rights, 2021, 31 December 2020, available at https://www.echr.coe.int/documents/guide_art_6_eng.pdf

1.1. Employee - a natural person employed to perform paid labour or services for an employer;

1.2. Employer - a natural or legal person who employs an employee and pays a salary for the labour or services performed

1.10. Employment Relationship - an agreement or contractual arrangement between an employer and an employee for the performance of specified functions or tasks by the employee under the supervision of the employer in return for an agreed remuneration, normally in the form of money.

The draft law (of 22.04.2021) also plans to regulate relationships, without setting clear goals of purpose of LL, like the purpose of the OSH Law.

Considering the general purpose of the labour law (above) and a similarly purposeful law on OSH, the opportunity should be used to adjust the purpose and scope of the law with regard to key concepts and objectives of the law, including equality objectives. The currently existing purpose and scope definitions of LL are formalistic, focused on transaction of labour rather than labour relationships of power and segregated inequality.

LL applies to private and public sector employees and employers. Similar discussion as under OSH law is required with regard to LL to ensure that no group is unjustifiably excluded from minimum protection in labour relations. As the EU Court has on numerous occasions stated – the employee is the weaker party in the relationship and therefore the purpose of the law is to protect the individual and ensure employers meet the conditions for exercise of employee rights.

Any exemptions to the minimum standards set by law have to be assessed against the principles of the Constitution, Article 55.

4.4. BENCHMARKING EFFECTIVENESS: SOLUTIONS PROPOSED BY THE LAW

Benchmarking section assesses impact of the law on men and women in short, medium and long term with regard to essential working conditions and OSH. The following key areas are reviewed:

- Safe and decent working conditions: including gender equality questions: Does the impact of the law on mental and physical health or well-being differ between women and men? Are differences in risk factors for the health and well-being of women and men accounted for? Does the law reduce health discrepancies between women and men or within the respective group? Basic working conditions include aspects of working time: Are structural segregation issues and unpaid care work taken into account for risk assessments? Does the law have different effects on safety as experienced by women and men?
- Equal pay;
- Contracting and dismissal conditions,
- Vacations⁶⁶
- Violence at work.

Safe and decent working conditions

Work safety is the primary domain of [OSH law](#). Labour law Chapter VI sets the right of employees for OSH during their employment and presumes an employee duty to comply with instructions for their safety. To assign hazardous work, employer has to assess health conditions, qualifications, experience of the employee, and age. This is a positive obligation of the employer applied to men and women equally. Limits are set to night work duration for all.

[Night work rules](#) further limit the employment of young employees under 18, pregnant and breastfeeding women, further providing social

⁶⁶ Also through EU developments on transparent and predictable working conditions, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, general information available at <https://ec.europa.eu/social/main.jsp?langId=en&catId=1313>, directive text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1152>

protection for single parents or women with children under age 3 to work nights only with their consent. Article 46 in turn provides for protection of women employees, defined in general terms (e.g., hard work) and more specific health and safety references like biological, chemical or physical factors that may impact health of a pregnant woman or a child.

General prohibitions or restrictions should be avoided. The provision provides a good example of formulating a protective measure with references of objectively justifiable reasons that can be proved by scientific references, for example – chemical impact on reproductive health. Other measures, like lifting maximum weights, however, should be revised in a gender-neutral way to consider diversity both among men and among women, instead of the current approach of setting specific weight limits for men, and different limits for women, presuming sex-specific capabilities.

The draft law defines working time measures and protected groups. Among protected groups are pregnant women,⁶⁷ breastfeeding women and women who have recently given birth. The purpose of the restrictions of certain hazardous work is **“a risk to her or her child’s health due to exposure to risk factors or working conditions”** Further, night work and overtime work⁶⁸ restrictions on work only with employee’s prior written consent⁶⁹ extends protection to the “single parent” and the “female employee who is caring for a child under the age of three”. It is not clear whether the following “or a child with permanent disability” applies to a single parent, or female employees only, but it may be a question of translation. The rest of Article 113 also refers only to “female employee” defined in part 1 of the article with regard to special protection when carrying out such work with consent.

Such formulation demonstrates in part a protective attitude based on sex, rather than the needs of a woman because of pregnancy, or the perspective of the child, and discriminates the other parent in part. The purpose of the measures has to be seen from two perspectives:

- special rules for pregnant and breastfeeding women are justified and reasonable, like not prohibiting employment, but requiring

their consent and subsequently adjusting safety measures if required;

- protection of the child and best interests of the child.

Thus, what is the purpose of special conditions allowing certain female employees not to work nights or overtime for female employee? Night work and excessive work has a detrimental effect on employee performance, health, and social life. Thus, there is a legitimate reason to consider that night work and overtime work may harm pregnant woman.

On the other hand, the right to be employed at night or do overtime when one has a child under the age of 3 derives from the interests of the child, not health protection of the parent. Therefore, such a provision also risks contributing to further stereotyping. Current draft proposals in Article 113 and 115 presume that if the child has two parents, one will be able to stay with the child while other is working, indirectly presuming women will carry out that work, so that the father of young children should not have the same right; it also presumes that female workers will be taking care of a child with special needs.

It is therefore recommended to adjust the provisions of night work and overtime work, distinguishing when the restrictions are posted because of health and safety of pregnant women or breastfeeding women, and when the provisions derive from protection of the interests of the child, assigning the right to parents of the child, not only a female worker.

Basic working conditions

Non-discrimination in recruitment derives from Article 5, and is applied to all employees, setting special conditions for young people, pregnant women, breastfeeding women, parents of children under a certain age and those caring for disabled children.

Equal pay

Current law provides a simple definition of equal pay “the employer shall pay men and women an equal remuneration for work of equal value covering base salary and any other allowances.” This is considerably improved through the draft

67 Draft on Labour, 22.04.2021 Article 113

68 See also Draft on Labour, 22.04.2021, Article 58 o overtime work.

69 Draft on Labour, 22.04.2021, Article 115

law⁷⁰ addressing all the core elements of equal pay – work of equal value, definition of pay, providing nuanced elements of assessment of value of work in different conditions and rules on system of job evaluation.

Contracting and dismissal

Advertising and contracting interviews are commonplace for expression of gender stereotypes. There are no specific conditions in current law, apart from an obligation of the employer to apply general provisions of non-discrimination and LPD. The draft law, on the other hand, includes a prohibition on requiring information on religion or belief, disability; sexual orientation; ethnic origin; pregnancy; family matters; political preferences. Article 14.3 specifically limits job advertising: **“An employer can not publish any job offer containing any limitation or discrimination based on race, ethnicity, sexual orientation, sex, age, religion or belief, disability, family matters, unless such conduct is justifiable according to paragraph 3 of Article 5”**. This in principle applies to the content of the job announcement, visual format and language used.

Dismissal provisions do not include any specific categories. The draft law in principle does not permit dismissal for pregnant women, parents during maternity/paternity leave (Art. 35), and dismissal during trial period, unless justification is provided and does not relate to pregnancy.

Collective dismissal or redundancy situations are expanded in the draft law to ensure harmonization with the EU directive (see under Trade union rights and collective representation).

Trade union rights and collective representation

Collective rights of employees are exercised through the agency of employee representatives or trade unions. Collective rights include at least the following aspects:

- Freedom of association that includes right to form TUs, right to join and freedom from joining a TU.
- Collective bargaining and right to strike as part of the rights of trade unions.
- A right of representation that is demonstrated in two ways – TU right to represent

its individual members as a representative, and the right to defend and take action as a TU on behalf of TU members. Collective representation includes the right to take action (talks with different stakeholders, actions to defend rights in administrative institutions or courts, collective bargaining actions and strikes) either on behalf of a group of identifiable members of TUs, or as a TU on behalf of its members for collective interest protection without identifying individual members.

The right to represent TU members collectively, without identifying individuals (collective bargaining talks, collective action in courts or administrative institutions) is closely linked to protection of individual members from discrimination based on TU status.

LL Article 3 provides core definitions, including *social dialogue* for tri-partite (employers, employees, Government) dialogue on national policies and measures relating to the labour market. It does not explain the meaning of consultations, information to trade unions and has to be derived from international treaties on the understanding of freedom of association.

Through practice of the European Court of Human Rights, EU law and UN treaties, as well as ILO treaties (Kosovo not being a signatory can use these instruments for the purposes of formulating and interpreting provisions related to ILO standards) exercise of freedom of association⁷¹ includes:

- the right to form employee/employer organizations; in particular the right to form and join trade unions; this includes the negative right not to be a member of a trade union;
- independence and autonomy from the State and in case of trade unions (TU) also freedom from interference of the employer;
- trade union right to take action: securing individual member protection (representation), right to take collective action;
- collective bargaining rights as part of the right to form and join trade unions;
- the right to strike, as a form of the right to take action, and lockout options for the employer;

⁷¹ ECHR Article 8, ILO general explanation available at <https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang--en/index.htm> and access to ILO NORMLEX database <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70001:0::NO::>

⁷⁰ Draft on Labour, 22.04.2021, Article 81

- the right to take action by trade unions, to include representation and collective action rights;
- in contracts, workers councils, lacking the autonomy of trade unions, may not be considered trade unions from the freedom of association perspective.

Section 3 of LL provides social dialogue clauses, mainly related to collective labour agreements. *The draft law expands* on collective rights and provides improved regulation with more clarity on obligations of employers and employee representatives:

Consultations prior to adoption of internal rules and procedures of the employer (Article 146) setting a time frame for communication. In practice the formulation of the law still presumes possible unilateral activity by the employer, since there is no obligation to take into account the position of employee representatives. Consultation thus serves two purposes: fostering dialogue, which may work in a setting of a socially responsible employer; ensuring written information is provided at least within the given framework of the law, allowing employees to prepare and consider possible action through other means – LL, employer organizations, the media. In situations when the employer chooses to disregard the view of employee representatives, this may pose the risk of draining trade union resources and demoralizing employees if no results are achieved.

In cases of essential rights, like pay system changes at the enterprise, night and overtime work, the option to consider some enforcement measures with regard to consultation procedures may be considered.

The right to information is defined in Article 147 and further clarified in Article 149 and includes obtaining relevant information on the enterprise by TU, but also the duty of the employer to inform. The unique provision for a yearly mandated obligation of the employer to inform TUs on GE measures at the enterprise is a way to maintain focus on GE for both employer and employees and gives a tangible tool to plan action for the employer and to monitor progress for both employer and employee representatives.

Protection against discrimination because of trade union membership takes various forms in the draft LL:

- Protection against dismissal without consent from trade union. Clarity on when the employer may ask for individual membership may be added.
- Article 151 defines special rights of TU and works council representatives for the use of time and prohibition of dismissal.
- Special rights during collective dismissal.

With regard to essential working conditions, trade union rights are in particular secured through LL Article 76 on **Collective dismissals** (Draft law, Article 43). This provides the key steps for information, consultations and minimum conditions of the collective dismissal process. Challenges with implementation may remain since the soft formulation of consultations “with a view to reaching agreement” does not provide specific minimum rights where agreement has to be reached. The COVID-19 crisis has demonstrated that achieving a balance of employer rights and employee rights at a time of extensive collective dismissals depends on the position of the employer and the conditions of collective agreements. Proposing re-hiring limits of 1 year in the law is a positive push factor to ensure better and clearer agreements during collective talks.

The draft law also details the severity of violations – among those are violations against the right to information and consultation with TUs are defined as serious violations (Article 182), which is consistent with ILO decisions on the importance of the role of TUs.

Collective rights are addressed in a gender-neutral way and provide equal access to employee representation and protection. A positive observation is protection of trade union members from dismissal, a requirement to negotiate working conditions, and the right to collective labour agreement talks. The draft law, however, sets limits to validity of a collective labour agreement. Such limitation may be seen as infringement of the freedom to agree on the conditions of the collective labour agreement.

Violence at work

The general discrimination clause in Article 5 is formulated with a non-exclusive list of grounds for discrimination. Sexual harassment is considered direct discrimination against women (as in LPD); therefore, while not explicitly, this article

can be used with regard to sexual harassment cases against women. Moreover, Point 5 of this article directly links LPD to Labour Law, that way making LPD provisions on labour relations directly used under labour disputes subject to the unquestionable competence of LI.

For specific violence at work provisions see [8.5.4 Violence at work](#)

4.5. SPECIAL MEASURES

In addition to special measures described under health and safety provisions (see [8 LAW ON SAFETY AND HEALTH AT WORK](#)) Labour law defines protective groups of:

- young employees – provisions formulated neutrally;
- protection of persons with disabilities (Article 47)
- protection of motherhood (Article 48)
- rights of a child's father (Article 50)

Articles 48 and 50 presume certain gender stereotypes, which are partially carried over to the draft law.

Motherhood is not defined, but the article includes references to pregnancy. Rights of fathers can in turn be exercised if the mother of a child is sick, dies, leaves the family, or gives explicit consent.

Better formulation of the special measures requires an understanding of the purpose of such measures. As explained before, it is either protection of health because of reproductive rights, or it is the interests of the child. Policy makers can also set other objectives. In the labour law context these are defined in the AGE Action plan – increased participation of women in the labour market and promotion of gender equality in general, through elimination of stereotypes. The law-drafting process has to assess the purpose and objectives to be achieved.

Current formulation (removed in the draft law) of reference to motherhood may also raise the question whether a woman is protected because of her pregnancy, or she is already defined as the mother during pregnancy and protection measures are in place primarily to protect the child.

LL in force and the draft law, as it seems, continues to build on the stereotypes of presumed protection of motherhood rather than the autonomous woman at work, presumed responsibility for care work by women and only in exceptional cases can it be transferred to the father. Even draft law provisions on maternity leave presume the mother's responsibility.

The draft law also presumes mandatory maternity leave of 2 weeks, thus prohibiting work for the woman: *"3. Maternity leave according to paragraph 1 of this Article is mandatory for the employed women to be taken for at least two (2) weeks of maternity leave before birth or after birth."* It is recommended to avoid mandating such restrictions, since each pregnancy is monitored by the woman and her doctor and it is up to them to consider the best possible course of action.

The draft law also specifies the reverse burden of proof for cases related to protected categories as in Article 111.

[Other special considerations](#) are included with regard to transposition of posted workers, temporary employment and transfer of enterprise EU regulation. These groups of employees in the EU context receive more specific protection considering the starting point of less favourable conditions of work. No general data are available on men/women being posted or working through temporary agencies, but will derive from general trends in the labour market: freedom of movement of services includes most physical transfer of employees in transport sector (road, air, rail transport), construction services and delivery and set-up of goods (related to construction, equipment set-up, etc.).

Temporary employment, on the other hand, is more varied: medical assistants (nurses), social workers and care workers, doctors, certain support services like cleaning, event servicing (catering, set-up, design etc). Thus, there is a possibility for gender equality impact based on segregation by profession.

These categories of workers that are transferred across borders are by definition more exposed to exploitation and lower protection with regard to access to control institutions like LI, courts, trade union protection. Special forced labour, slavery and human trafficking risks require assessment for final design of the LL. This review has not considered data on trafficking, forced labour.

4.6. COMPLIANCE MECHANISMS AND ENFORCEMENT

Enforcement of labour law provisions can be exercised in two ways:

- Through civil claims to a competent court (Article 78). Challenges of access to court are discussed under [health and safety provision](#).

The draft LL provides a system for protecting one's own rights – the opportunity to resolve complaints within the company, or submitting a claim to court within 30 days. Such a short complaint procedure raises questions with regard to access to justice or within the understanding of a fair trial as in international treaties. Accessibility has to be effective, real and considerations of the weaker position of the employee in employment relations needs to be considered in labour relations.

The Labour Inspectorate is an administrative law mechanism whereby LI can effectively control and monitor the employer any time upon complaint from employees, and take decisions within the limits of its mandate.

- In cases of violations of the right to strike, or discrimination in working conditions, labour violations may constitute a criminal offence.

The criminal code⁷² defines the scope of its application to include criminal sanctions. These are foreseen only for those actions that infringe and violate freedoms, human rights and other rights and social values guaranteed and protected by the Constitution of the Republic of Kosovo and international law to the extent that is not possible to protect these values without criminal sanctions. It requires a causal link between the act or omission and the consequence (Art. 20), is committed with intent – direct or potential (Art.21), and requires knowledge, intention, negligence or purpose of committing a violation, which can be inferred from the actual situation (Art.22). This means the perpetrator knew or should have known they were committing a violation.

⁷² CODE NO. 06/L-074 CRIMINAL CODE OF THE REPUBLIC OF KOSOVO, <https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf>

On the substance of labour relations, Article 219 defines the scope of possible criminal liability in terms of labour rights:

“1. Whoever denies or restricts the right of persons to employment under equal conditions which have been determined by law shall be punished by a fine or by imprisonment of up to two (2) years.

2. Whoever fails to abide by the law on the rights of the unemployed and in this way denies or restricts the rights to which they are entitled shall be punished as provided for in paragraph 1. of this Article.”

Obstruction and limitation of the [right to strike](#) is recognised as a potentially serious violation if committed by force or serious threat, including employer criminal liability for dismissal of a person because of exercise of the right to strike (Art 221). Thus, criminal liability may be assigned for an equality breach, though the content on “equal working conditions” requires further specification, and breach of the fundamental right to strike or causing unfavourable consequences by dismissal of the employee exercising the right.

[Mediation](#) as a form of labour conflict resolution is presumed in the draft labour law with cross reference to the Law on Mediation. The scope and aspects of mediation are not reviewed here; however, protection of employees through mediation requires gender sensitivity on the mediator's part and therefore gender equality principles should be part of the Law on Mediation and related education, training, definition of processes of mediation, accessibility and outcomes.

4.7. CONCLUSIONS ON LABOUR LAW

LL, compared to OSH law, does have a cross-reference to LPD. Thus, all LPD provisions are directly applicable in labour relations, therefore also subject to monitoring and control by the Labour Inspectorate. Similar clear and unquestionable cross referencing is not done with the LGE, but derives from the Article 5 reference to other applicable laws.

From the perspective of law drafting a clearer [purpose of the law](#) that includes reference to

the values of the employment relationship may improve later application and interpretation of LL. Currently the scope and purpose is defined in terms of to what part of labour relations the law applies, but it does not include, for, example, suggestions towards protection of employees or references to fundamental rights. It is recommended to consider reformulating the objective or purpose of the law, taking a similar approach as in OSH law.

Labour law **defines discrimination**. The draft law overall is well developed and up to date with regard to harmonization with EU law, while some clarifications will improve application of the law and remove possible negative impact clauses. While LL in its definition of grounds for discrimination limits its scope, at the same time is cross-references LPD with a non-exclusive list of grounds. Labour law's purpose is to regulate labour relations, but also to provide minimum protection for the employee, who is the weaker party in the employment relationship. Therefore, one should presume that in case of conflict between two norms, the more favourable to the employee will prevail. To avoid need for legal arguments over application of one or another law, the definitions between LGE, LPD and LL on discrimination should be harmonised.

It could be acceptable to have certain areas where the list of different treatment grounds is limited. However, this remains a political decision and should appear under discussion in core concept and policy documents, to ensure any exclusion is constitutional, objective and justified. At the time of the review, it seems more a question of harmonisation between the horizontal LGE and LPD laws and LL, rather than conscious choice not to apply equal treatment principle to some groups.

Essential working conditions are formulated by using his/her pronouns in English text, making the language neutral where possible and therefore the overall design is intended to be gender-neutral. In terms of language, other forms avoiding specific binary sex reference may work in English.⁷³

With regard to substance however, the exemptions and special groups affected by the **night work, overtime work** rules demonstrate a **protective attitude, rather than full assessment of gender impact on women**. This includes prohibi-

tion of work while pregnant (last two weeks of pregnancy prior to due date), rights of fathers for children under age 3 are restricted, and indirectly the care responsibility is transferred to women as parents, not allowing men to use their rights.

Draft law Article 111 – 113 and respective section should be reconsidered in the following aspects to remove possible negative blanket prohibition:

- **Interests of the child** under the age of 3 is the primary purpose of special measures in allowing exemptions from night work. When considering these measures, the Child rights convention and encouraging the bond with parents, or in certain cases caregivers, not just mothers, are essential for the wellbeing of the child. Therefore, adjusting formulation to **parents of children under the age of 3** will have a positive gender equality impact, allowing men and women to be part of a child's life in the essential first years.
- **Protective prohibition** of work in the last two weeks of pregnancy prior to expected due date can be formulated as a right. In the current formulation it means also unnecessary intervention in **personal medical data**, like the due date for birth. Personal data protection extends to pregnancy. While OSH measures require the employer to be informed in certain cases, the employer has no justifiable reason to a) know the due date of expected birth, b) limit work of a pregnant woman, unless objective reasons of the type of work and related OSH measures require reassigning her to other, safer tasks.

Equal pay measures are well developed in the Draft LL and likewise other working conditions do not observe any direct or indirect discrimination measures. By reviewing the special pregnancy and child rights derived measures in LL (as above) it is recommended to consider how such measures (revised) will diminish gender stereotypes that otherwise will be reinforced. Care work as a woman's prerogative will is a gender stereotype that limits the rights of fathers and changes to labour rights to increase parental – men's and women's – rights will increase the use of these rights, if accompanied by policy measures and cooperation with employers on execution of employer duty to foster gender equality.

⁷³ For gender-neutral language in Albanian and Serbian local resources have to be identified.

Violence at work is mostly defined through LPD and cross reference in Labour law Article 5. It is recommended to consider a more specific cross reference to harassment provisions, to ensure it is an unquestionable part of labour relations and under the monitoring and supervision of the Labour Inspectorate.

Collective rights are addressed in a gender-neutral way and provide equal access to employee representation and protection. A positive observation is protection of trade union members from dismissal, requirements to negotiate working conditions, and the right to collective labour agreement talks.

Collective rights – namely, to defend interests and rights through class action and collective complaints without identifying union members – is closely dependent on overall union activity in the country. While 90% of trade union density features in the public sector,⁷⁴ private sector unionization is, in turn very low, and for this reason union membership also reflects occupational segregation. There are no clear rules in the Law for Organizing Trade Unions in Kosovo, which merely refers to the right of employees to self-organize. This is another aspect of the need to have clear core concepts defined, to clarify whether, for example, self-employed, unregistered workers, and family workers who are either paid or unpaid, have the right to organize. This in turn has a gendered impact based on the segregation of men and women in these vulnerable employment situations. Currently neither LL, nor Trade union law are clear on these aspects. When clarifying the core concepts of worker, employee, self-employed and other forms, these should then be harmonized with other laws.

The draft law sets limits to the validity of a collective labour agreement, which may be considered an infringement of the right to collective labour agreements (CLA). The purpose should be to protect employee representatives and thus the law can be formulated in a way that provides minimum guarantees, e.g., if there is no date for the validity of the CLA in the document, it is presumed to be valid until conclusion of a new CLA, or similar neutral provision.

Enforcement of rights sets a short timeframe for the opportunity of the employee to raise a claim. Review does not include a general theoretical discussion on enforcement purpose and time frame for claims to be an effective measure of protection of rights. It is recommended to have the discussion as part of the review of the draft law and consider a more extended time frame for employees to raise a claim in court.

The employee is the weaker party in employment relationships and the very limited time allowed to raise claims to LI or court may be considered a limitation of the right to fair trial or access to court as part of the fair trial concept. Particularly in discrimination cases, or in cases of harassment, it may be difficult for an employee to bring any claim as it would most certainly cause negative consequences at work. Certain reference points – when someone became aware of the fact of discrimination, or the maximum time period after termination of labour relations – may provide more security in exercising rights than currently provided.

Access to fair trial, however, is limited in disciplinary action, where Article 83 presumes resolution of disciplinary action with the Labour Inspectorate. This limitation has to be considered unconstitutional. The option to resolve disciplinary measures out of court, giving explicit additional powers to the LI, is consistent with the principle of trying to resolve disputes peacefully. Nevertheless, the individual has to maintain the right to resolve a dispute in a competent court.

The **review does not address** the social system of maternity and child care coverage, through state social insurance or private insurance measures. When designing and reviewing the social insurance system it is advised to cross check the impact on labour law and related regulations, and OSH law, as both main laws include references to maternity and child care, less so paternity rights.

⁷⁴ EUROFOND, Kosovo: industrial relations profile (2012). Available at: <https://www.oshresearch.co.uk/2529407A8400006F17E1DDD89154C050842C32CE74C6ACFC4DE981CDF82E9737B9940FD6124009E/EUROFOUND.EUROPA-%20Kosovo,%20Industrial%20relations%20profile.pdf>

5. LAW ON SAFETY AND HEALTH AT WORK

Linked with the development of an occupational safety and health profile (OSH Profile) in Kosovo, this review focuses on core OHS law because it follows the minimum standard approach similar to the principles of EU Directives, and sets the framework for the OSH approach and system.

The ILO's long-term objectives define the scope of national OSH measures,⁷⁵ guiding policy and legal development in national States towards:

- reducing the number and seriousness of occupational accident and diseases;
- adapting the working environment, working conditions, equipment and work processes to the physical and mental capacities of all workers;
- enhancing the physical, mental and social well-being of male and female workers in all occupations;
- encouraging national policies on OSH and preventive action programmes.

The following are some ways in which gender equality can be addressed in OSH and should be considered in the OSH law and related acts:

- Health promotion policies should be based on more accurate information about the relationship between OSH and gender issues.
- Epidemiological research into the effects of hazards on occupationally defined populations should be critically assessed for bias so as to avoid assumptions based on gender stereotypes.
- Occupational health services, whose function is preventive, should include analysis of the different health situations and needs of male and female workers in their study of work methods, conditions of work and factors in the working environment that may cause diseases or injuries.⁷⁶

- Segregation of occupation should be accounted for in the scope and applicability of the laws and regulations.
- Preventive measures should be designed in a way to be accessible, needs based and practicable for men and women.
- Monitoring and enforcement measures require sex segregated data collection and clear reporting principles, understood by the employers, employees and the relevant institutions.

Measures designed should reflect the major **shift in thinking** – from the traditional focus of protection of women based on an assumed difference between all women and all men to equalization of rights and protection for all workers, male and female. Diversity of employees and underlying structural inequality of the systems need to be taken into account. As the ILO puts it, the focus is now on removing the risk from the workplace in the interests of protecting the health of all workers rather than excluding any social group from hazardous occupations.⁷⁷

The **Covid-19** pandemic in 2020 highlighted **inequality in care work** and increased awareness of **mental health**, including at work. Work-related stress is recognised as an OSH issue and the reasons for stress will often be different for men and women, requiring targeted approaches of prevention. Gender stereotypes on overachievement for men and the triple roles of work, family and social care responsibilities mean that stress and fatigue may differ and cause cumulative fatigue. **Health promotion** policies for working women and men should take into account their different roles in the workplace, home and community, examining the health effects of each role and their possible interaction or accumulation.⁷⁸

⁷⁵ https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf

⁷⁶ https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf

⁷⁷ https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf

⁷⁸ The aviation industry has moved to include fatigue management as a safety prerequisite and basic concepts are explained here <https://www.skybrary.aero/index.php/Fatigue>

Stereotyping vs human-centred design in OSH derives from broad generalizations about women's (and men's) physical capacities. An example of stereotyping in OSH is use of ergonomic considerations (maximum weight, national standards for manual handling, etc.) which should be directed away from setting different limits for male and female workers to a system based on individual human variability irrespective of sex, age or ethnic characteristics.⁷⁹ Standards for protection from hazards should use a human- or user-centred design,⁸⁰ which by definition avoids stereotyping and instead "is a way of looking at the world that focuses on the capabilities, limitations, motivations, behaviours and preferences of people. The aim is to maximise efficiency, effectiveness, quality, comfort, safety and health by ensuring that work systems are designed in such a way that human interaction with them is consistent with individuals' capabilities, limitations, motivations, behaviours and preferences".⁸¹

5.1. CONTEXT

Questions asked for the context review relate to the OSH context that is gender-sensitive - what is the purpose of the current regulatory system? Who is the system trying to protect or help? – and questions to identify specific essential differences in needs of men and women in this system.

The OSH system is designed **for the prevention and reduction of occupational and work-related accidents, injuries, and diseases through the improvement of working conditions and work environments**.⁸² It is an essential part of labour relations and affects the fundamental rights and freedoms of the parties involved. Conformity with fundamental rights principles is explored in section **5.2 Constitutionality and application of international law**

⁷⁹ The aviation industry has moved to include fatigue management as a safety prerequisite and basic concepts are explained here <https://www.skybrary.aero/index.php/Fatigue>

⁸⁰ IDEO a Californian (US) based company has developed various tools for the design thinking and application <https://www.ideo.com/tools>

⁸¹ Horberry, T. et al., (2014). A User-Centred Safe Design Approach to Control. In Safety Institute of Australia, The Core Body of Knowledge for Generalist OHS Professionals. Tullamarine, VIC. Safety Institute of Australia.

⁸² ABC of women workers' rights and gender equality, ILO, 2000, Page 141, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf

The OSH law is **an instrument** to achieve the OSH purpose and system changes identified in the NDS 2016-2021 and Sectoral Strategy of the MLSW of 2018-2022. In May 2021 the **Intersectoral Strategy on Safety and Health at Work 2021-2026 and Action Plan 2021-2023** and **Draft concept paper for improvement of legislation in the field of safety and health at work (2021)** were being reviewed. While the Intersectional Strategy has no clear references to gender equality, the Draft Concept Paper is integrating gender equality data relevant for the sector. Special provisions for protection of women because of their reproductive function are present.

Since 2011 reports by Kosovo Women's Network, Kosovo Stability Initiative, Solidar, LFTUS and specific project reports have indicated key gender inequality aspects that impact the OSH system:

- **Unpaid family work** Segregation of unpaid work and social, cultural aspects outside employment relations that contribute to the continuity of health and safety risks and therefore have effects on OSH risks at work. Different needs of men and women.
- **Segregation of labour market**, Unequal distribution of jobs is one of the key factors in gender differences when observing exposure to occupational hazards, accidents and disease".⁸³ This impacts OSH preventive measures, risk assessment and coping measures; "Segregation by occupation leads to exposure to health risks and hazards peculiar to those occupations, which affects the over-represented sex more than the other".⁸⁴ Segregation in the workplace is another aspect of assigning specific roles to men and women.
- **Representation** of men and women at different levels of the company or organization, in OSH bodies and institutions.
- **Pregnancy- and maternity-related discrimination** which is linked to social security aspects of national policy and LL.

⁸³ E.Sorrentino, R.Vona, D.Monterosio, A.M.Giammarioli; Gender issues on occupational safety and health; 2016; Annali dell'Istituto superiore di sanità 52(2):190-197, downloaded from https://www.researchgate.net/publication/306172643_Gender_issues_on_occupational_safety_and_health

⁸⁴ https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_087314.pdf

The OSH system requires gender-specific assessment at OSH hazard identification level, subsequent risk assessment during implementation and work processes, and through choice of measures or actions to improve working conditions and OSH in the workplace.

5.2. CONSTITUTIONALITY AND APPLICATION OF INTERNATIONAL LAW

Questions asked for the constitutionality review: What are the legitimate aims and constitutionality of the law – to what degree the law reflects the fundamental values and principles of a democratic society or principle of equality? What is the conformity to relevant international treaties and decent work principles?

The law is formulated in gender-neutral language, specifically referring to employees. Discussion on the use of terms in previous sections indicates a requirement to clarify application of OSH provision to workers in employment relations.

The constitutional principle (Art.3) and values (Art.7) of equality, further defined in LGE and LPD is partially fulfilled. Moreover, Article 5 defines general principles for employers and includes “[...]4. Employer is obliged to be led by the principle of equal treatment when taking safety and health measures for all employees.” This further highlights the need to clarify core terms used in the law: employee or worker, employment relationship, employer.

- The law defines its scope (purpose): for **improving the level of safety and health**. It sets minimum standards and its application should include employees, thus meaning men and women.
- Article 2 specifies coverage for some vulnerable situations: interns, students during practical work as part of schooling, persons serving sentences engaged in work, visitors, business partners, users of services and persons attending vocational training.
- Definition of employee presumes a labour contract, therefore unpaid work (family, domestic, non-contractual) is formally excluded from the coverage of the law.

- Furthermore, Article 2 excludes specific groups: Provisions of this Law are not applied in sectors whose activity is regulated by special Laws, such as: the Kosovo Security Force, police, firefighting service and protection and rescue services. All these groups involve male-dominated employment and the scope of exemption from minimum requirements of OSH needs to be defined. There is an objective need and legitimacy to have special regulations. However, minimum standards and principles have to be respected, while allowing for more specific and detailed regulation for certain professions.
- Special measures are adopted for pregnant and breastfeeding women.
- Unclear application of the law leaves some groups potentially unprotected: the self-employed – would they be considered business partners? More men than women register as self-employed, so there will be a negative impact on safety at work for men.
- Exclusion of specific sectors that are male dominated: review of the respective laws regulating specific services would be required to ensure protection measures are not less than for an ordinary citizen. Review has to include assessment of exclusion - objective, reasonable.

The draft OSH law aims to remedy partial compliance with core equality provisions.

- Exclusion of certain groups from minimum OSH standards 19.03.2021. Draft law table indicates proposals that may include: self-employed persons who have employed someone else. The provisions of this Law also apply to persons who perform activities with personal work for legal entities when they use the work of other persons. This formulation considers the self-employed only as the employer. However, from the contractual relationship point of view, and from assessment of the situation with risks of fake self-employment (see more in [8.5 Atypical or vulnerable employment situations](#)) the duties of an employer towards a self-employed service provider to some degree have to be considered, linking protection of the worker to the place of performance of work.

- Draft law tables (19.03.2021 and 22.04.2021) define a domestic servant and presume blanket exclusion of domestic servants from the regulation. The EU framework directive does not presume blanket exemption, but Article 13 requires defining areas of exclusion from protection.

Improvements are required for core terms used in the law, as it impacts coverage of working relationships. Taking the approach of EU case law, the definition of worker can be used for minimum standards, while maintaining employee/ employer additional administrative duties that derive from employer responsibilities. That way, the individual worker will receive minimum protection without heavy gender impact because of types of work in certain sectors, and the administrative burden – like training or internal work organization – for certain actions will remain with employers rather than individuals using services.

Particular areas of segregated work have to be analysed from a gender perspective: domestic work/ domestic servants, the agriculture sector with family type businesses and work. The challenge is to secure minimum protection for family and individual type work. This does not include family life, such as unpaid care work, while the policy on OSH may include special elements that would support health and safety in unpaid care work.

Blanket exemptions in principle are not consistent with Art. 55 of the Constitution and all exemptions from application of minimum health and safety provisions to all employees, or workers, requires assessment of objectives, needs and proportionality as per the Constitution.

5.3. OBJECTIVES OF THE LAW

Questions asked for the review of objectives of the law include: whether the objective or purpose of the law is set to continue or change existing inequalities between men and women (and groups of men and women) and patterns of gender relations; and determining whether and to what degree proposed laws/policies enhance women and men's democratic rights.

The purpose and scope of the law is defined in Article 1:

“1. The purpose of this Law is to set measures for improving the level of safety and health of employees at work.

2. This Law contains general principles for prevention of occupational hazards, elimination of hazardous and accidents factors, information, consultation, balanced participation in improving the level of safety and health at work, treatment of employees, their representatives and general guidelines for implementing such principles”.

The purpose is formulated in a neutral and equitable way. There is a need to link with other laws to indicate the requirement of implementing LGE and LPD principles for all parties to the law. Further, the purpose of the law is derived from the definition of safety and health at work (OSH). Gender-equality aspects in the OSH definition given by the law include:

- Work processes – imply employer responsibility to design processes; and applicable to all employees and others who participate in work processes.
- Prevention with regard to:
- improved working conditions
- health damage: the impact of work on health through both accidents and occupational disease
- working environment
- protection of physical and mental health of men and women.

An improved purpose of the law **could reflect gender equality goals** of designing OSH measures to take into account segregation in the labour market, unequal time distribution between men and women, and different impacts that OSH measures may have.

The law is intended for public and private sector employees and employers, and their representatives. The scope of the article also covers business partners, visitors (see Art.2). Assumption of minimum health and safety norms to be applied to any individual visiting the place of employment and setting employer accountability is clear. However, there is no further clarification on scope.

Employer definition is gender-neutral; however, it implies that all legal and natural persons – thus also the self-employed – are subject to the same conditions of OSH. Both the law in force and the draft proposals leave the definition unchanged. While socio-economic impact assessment should consider various types and size of companies, gender impact assessment in particular will be relevant for “natural persons” as employers and resulting obligations of OSH law. In particular two groups need to be considered with regard to the employer-employee relationship:

- Households: individual employers of domestic service: OSH Law in force in May 2021 in theory does not exclude domestic work from OSH coverage, while draft OSH law does envisage its exclusion. Domestic work is clearly a gendered relationship – women being employees, and household men or women as employers. By excluding domestic workers from any minimum OSH protection as workers, law risks being discriminatory.
- Self-employed individuals hiring other people for work.

Choice of definitions (English text taken as reference): Framework Directive⁸⁵ defines **workers**, whereas the law is using the translation **employees**. A person performing work may not be an employee of the enterprise, thus potentially excluding the self-employed or other temporary workers providing services to the enterprise.

⁸⁵ Enforcement of Fundamental Worker's Rights, Study, 2012, EC, DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01989L0391-20081211&qid=1621004921881&from=en>

Under the principle of equal treatment and corresponding EU law on temporary work, posted workers presume equal working conditions; however, these can be restricted with regard to full application of health and safety consequences – insurance, responsibility to cover injury costs, etc.

5.4. BENEFICIARIES

A political choice of exemption has to be made in line with constitutional requirements and preventing different treatment of groups representing men and women in different occupations:

The EU directive on Predictable and transparent working conditions provides examples how to ensure that exemptions are formulated clearly and limited to objectively relevant aspects. Similarly, these can be applied to the domestic workers, the mining sector, or the public sector, for example, exempting employers from certain aspects of OSH provisions, while maintaining minimum protection.

The Directive states that “*Member States may provide, on objective grounds, that the provisions laid down in Chapter III are not to apply to civil servants, public emergency services, the armed forces, police authorities, judges, prosecutors, investigators or other law enforcement services*” and “Member States may decide not to apply the obligations set out in Articles 12 and 13 and in point (a) of Article 15(1) to natural persons in households acting as employers where work is performed for those households.” These are not blanket exemptions, but require:

- objective grounds, whereby objectivity has to be assessed in context and therefore also gender impact will have to be evaluated;
- being limited to certain provisions – these are clearly defined, limited, and linked to objective grounds, while maintaining protection of workers’ fundamental rights and the minimum standards required by law.

Draft law (22.04.2021) proposes to clarify exemptions:

“In the mining sector, the provisions of this law are applied to the extent that is not provided by the Law in force for the working sector in the mining sector

[...]

In the public sector, the armed forces, the police and the civil defence, the provisions of this law shall be applied to the extent that it is not contrary to the objectives and principles of this law, unless regulated by special laws. If special laws regulate the safety and health of employees in these sectors, then the level of their protection should not be lower than the general principles of this law.⁸⁶ The improved formulation may refer to ensuring minimum standards for all, setting limits of exemptions on certain aspects of OSH regulation, requiring those to be detailed in special laws.

Careful formulation of cross-referencing to special laws needs to be assessed to ensure the principle of minimum standards is applied at all times, stating clear, objectively justified exemptions for specific provisions, and design of special laws/regulations that set terms more favourable to the employee. Role of special laws is to ensure adjustment and, usually, more stringent measures and therefore higher protection for workers, with regard to any given profession. Gender mainstreaming in the design of these special measure bears particular relevance because of segregation of the labour market and professions.

The goal of OSH provisions is improved work safety, disregarding the sector of employment. Any exemptions therefore have to be defined in a way that they are objectively justified, limited to certain provisions without jeopardising the objectives of the law, based on careful socio-economic impact assessment, including gender analysis.

5.5. BENCHMARKING EFFECTIVENESS: SOLUTIONS PROPOSED BY THE LAW

Benchmarking section assesses impact of the law on men and women in short, medium and long term with regard to essential working conditions and OSH. The following key areas are reviewed:

- Safe and decent working conditions: including gender equality questions: Does the impact of the law on mental and physical health or well-being differ between women

and men? Are differences in risk factors for the health and well-being of women and men accounted for? Does the law reduce health discrepancies between women and men or within the respective group? Basic working conditions include aspects of working time: Are structural segregation issues and unpaid care work taken into account for risk assessments? Does the law have different effects on safety as experienced by women and men?

- Equal pay.
- Contracting and dismissal conditions.
- Vacations.⁸⁷
- Violence at work.

5.5.1. Employer perspective

From the perspective of the employer, the law applies to both public and private sectors. The majority of private sector enterprise owners are men; women participate at a very low rate in setting up and managing businesses. The OSH Profile indicates there is no functioning system of OSH employees at work. Therefore, OSH measures will be influenced by the perspective of the owners – men – and crucial aspects of representing men and women in assessing risks, setting up OSH systems in the workplace will be extremely relevant.

Article 5 gives the framework for employer responsibility detailed by other measures of the law: employers' responsibility to ensure preventive and implementation measures of OSH, implement risk assessments, cover medical treatment for injury at work or work-related disease, applying the principle of equal treatment when taking safety and health measures for all employees. On the one hand this demonstrates a mainstreaming approach, and follows the principles of adjusting work to the worker. By definition this should mean a positive short- and long-term impact since it presumes a human-centred approach, and requirement of OSH policy in the workplace (Article 7.1.9.) states a duty to include assessment of social factors. Labour law

⁸⁷ Also through EU developments on transparent and predictable working conditions, Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, general information available at <https://ec.europa.eu/social/main.jsp?langId=en&catId=1313>, directive text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1152>

⁸⁶ Draft law comparative table 19.03.2021

(see [Section on LL](#)) draft requires employers to provide yearly updates on gender equality measures at the enterprise, and cross reference with LL or repeated information provision clause in OSH law may support increased gender awareness of OSH issues in the workplace.

It is recommended in developing the draft law, the specific components of hazard identification, risk assessment, implementation measures and prevention measures could further use gender-specific language to highlight the need for focused action where relevant.

Preventive measures are detailed in Article 6 “ [...] *for the prevention of professional hazards, information, training of employees for safe work, provision of proper instructions for the use and maintenance of machinery, tools, and equipment, measures for proper organizing of the workflow.*” Article 7 further details preventive measures to include risk assessment, information, and training.

Preventive measures are based on the core principles of adapting the work environment and conditions to the worker, assessing and developing a comprehensive preventive policy regarding technology, work organizing, working conditions, social relations and impact of factors related to the working environment (Article 7.1.9), ensuring each employee is assigned tasks appropriate for their skills (Article 7.4). This, in principle, presumes a very individual approach and should ensure furthering equal opportunities.

Preventive measures strongly depend on gendered risk assessment, so use of gender-specific language in points of risk assessment may improve the outcomes of health and safety for men and women. This can be streamlined through definitions of implementation measures in specific articles. Alternatively, more explicit mention of human factors / a human-centred approach, providing a definition of the approach that includes gender equality considerations, may strengthen prevention efforts. Gender mainstreaming should be highlighted as part of the overall approach, to ensure gender analysis requirements are applied at all stages of risk assessment, thus securing gender equality rights for both men and women in a segregated occupational environment.

Compensation for injury is a duty of the employer. This should be linked with “equal pay” principles to ensure that compensation mecha-

nisms and criteria established by the employer do not discriminate between men and women. This includes access to compensation mechanisms, criteria for determining scope of coverage and compensation, conditions of payment.

Risk assessment

All certification, training and licensing measures will also have to include gender equality measures to ensure those are implemented in risk assessment. The draft law sets the principle of equality in Article 5, so equality is mainstreamed into the requirements of the law. Risk assessment conditions are further assessed with regard to regulation (6.2 Regulation (MLSW) No.02/2021 on workplace risk assessment).

Direct link between natural and legal persons defined in OSH Law and subject to risk assessment regulation requires clarification of exemptions defined in OSH Law – what minimum requirements apply to these groups and to what extent exempt groups are subject to requirements of risk assessment regulation.

OSH law should **make gender and diversity principles for risk assessment more explicit**. For example, Regulation provides some key principles of risk assessment and methods (Articles 6 and in Article 7). To ensure uniform application of these two articles, OSH law could determine that a workplace risk assessment has to be carried out securing **representative participation** of all people affected by OSH measures at the enterprise, at all levels of the enterprise. This will be affected by the chosen definition of worker or affected persons and the definition of employment or working relationships. Likewise, all testing carried out during the risk assessment has to reflect the results of a diverse group of employees representing men, women, different age groups and abilities – defining the diversity principle at each step of the risk assessment process.

Training and information applies to all employees. Equal representation is presumed through the choice of scope of application to all employees. Article 7.1.11 requires information to be accessible. Implementation and monitoring of measures will have to follow the requirement of gender equality to reduce work-related risks. Information through visual material, text, choice of headings is a strong tool for fostering reduction of gender stereotypes.

Articles 12 and 13 of the law offer an opportu-

nity to include more explicit references to gender equality obligations when determining measures for prevention of accidents at work and professional illnesses. For example, Article 12 obliges the employer to develop certain documents and explicit references to needs assessment taking into account diversity of employees and structural discrimination issues would be possible. Employer responsibilities extend to contracted workers (Article 20.2.) with regard to workers being properly informed and instructed of OSH measures at the place of contract work.

Draft law proposals to eliminate obligations of employer. Such a change should be considered so as to allow the opportunity of explicit obligations to ensure gendered measures in corresponding articles of the new law. The purpose should be to make gender analysis and consideration inclusion an explicit part of employer obligations.

Balanced use of explicit gender references in the law will lead to better design and implementation of OSH measures.

5.5.2. Worker perspective

Deriving from the obligations of the employer, employees therefore have the right to safe working conditions, information, consultation with their representatives, and compensation for injury caused.

A definition of workers becomes essential with regard to the self-employed. Article 8.4 and 8.5 presumes responsibility of the employer who hires individual service providers, unless responsibilities for safety and health at work are distributed differently in a contract with the service provider and its sub-contractors.

From the EU law transposition perspective, consideration for temporary agency workers and posted workers requires further assessment with regard to responsibility of covering OSH. For correct application of responsibility for work safety these categories of workers depend on the definitions of core concepts of employment relations, worker, employer, and delimitation of responsibility between contracting companies.

The draft law⁸⁸ includes reference to informal employment under the definitions – “Employees engaged in the informal employment sec-

tor - employees who work for the employer and are paid, but who are not formalized or who are not declared by the employer to the relevant authorities” - and with regard to Labour inspectorate functions to investigate accidents at work. As data demonstrates, informal or family work differs by industry for men and women and women are represented in the informal sector to a greater degree (KAS and LFTUS data) therefore by not clarifying the full scope of employer responsibility (formal or informal) may lead to greater exposure of women to OSH risks. Moreover, these risks differ in sectors they are representing – agriculture: in addition to physical injuries includes extensive use of chemicals and their impact on men and women; compare the construction sector where men are exploited posing different systemic organization risks.

Employee duties are defined in section III of the law. These are definitions with explicit reference to men/women by use of combined pronouns.

All health measures are directly linked to the employee right to privacy (Constitution, Article 26 on personal integrity and health measures and Article 36 Right to privacy). Employee duties to present health certificates are formulated neutrally, and derive from the quality of health check requirements not reviewed within this report. This has special implications from the perspective of protection of women’s reproductive rights. Discrimination based on pregnancy is direct discrimination as defined in LGE and LPD and special measures are in place to protect the health of pregnant women.

5.5.3. Social dialogue and freedom of association

Workers’ representatives are involved in OSH measures and are entitled to attend relevant training, are assigned working time for OSH work and training. The law does not have direct gender impact, but the quality of gender-sensitive OSH work on behalf of employee representatives will derive from thorough training they receive (employer duty, training received under certification), ensuring balanced gender representation and organization by workers representatives. Therefore, the impact of the law can be considered neutral and gender focus has to be ensured in related activities that impact quality of participation of workers’ representatives.

Article 19 gives an explicit right for consultations

⁸⁸ Document of 22.04.2021.

and employees' participation in the OSH system. The concept of consultations derives from LL (see section on [LAW ON LABOUR, decent work and equality](#)) and relevant international treaties. Securing the right to be consulted provides indirect gender impact, ensuring employee voices are heard.

5.5.4. Violence at work

Definitions include physical and psychological aspects of health protection (Article 1.1.3.), whereas hazard definition may be interpreted more narrowly as it focuses on the result of exposure to a working environment containing hazardous physical, chemical and biological elements, exposure to technology or work organization (Article 1.1.4.).

The draft law proposes a more inclusive definition of hazard: **1.4. Workplace hazard - any source of potential damage an employee can be exposed at work which can cause harm or adverse effects on employee's health.** (Draft 22.04.2021) This definition also refers to the **workplace: 1.8. Working places – include all places and spaces under direct and indirect supervision of employers, where employees should carry out work activities and stay during the work process.** By definition this should include any place where the employee is under the control of or in contact with the employer for performing duties, including the online environment.

ILO Convention No 190⁸⁹ defines when violence or harassment will be considered as a work-related occurrence: violence and harassment in the world of work occurring in the course of, linked with, or arising out of work:

- (a) in the workplace, including public and private spaces where they are a place of work;
- (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;
- (c) during work-related trips, travel, training, events or social activities;
- (d) through work-related communications, including those enabled by information and communication technologies;
- (e) in employer-provided accommodation; and

- (f) when commuting to and from work.

Harassment is defined as discrimination in LGE and LPD, includes definition of diverse forms of harassment where common points include unwanted conduct, between people in employment relationships, whether superiors or co-workers, or clients, and with the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment based on the grounds of LPD, including gender.

The ILO⁹⁰ adds elements of the definition of harassment or violence being single or recurring behaviour or practice, threat with the aim of resulting or likely resulting in physical, psychological, sexual or economic harm. Gender-based violence accordingly refers to violence directed at the victim because of sex or gender, or violence causing disproportionate impact on a particular sex or gender.

National definition can be further improved to include elements of threat and recognition of systemic and disproportionate nature of gender-based harassment that falls within the OSH principles of recognizing and assessing potential hazards and preventing them.

The LGE requires the employer to provide a system of complaints and ensure a non-punitive approach to a person reporting harassment (LGE Article 17.1.14) and the LPD accordingly in Article 4 sets similar conditions for the employer. Harassment therefore should also be considered a health issue and require clearer OSH law references.

As demonstrated by the IKS report, harassment affects all employees, but women are more exposed to sexual harassment. Gender aspects therefore have to be considered in designing preventive measures of OSH, assessing risks, including harassment and psychological work environment.

Better cross-reference to the LGE and LPD, as well as definition of psychological health and harassment types in OSH system could be included in OSH law.

89 ILO Convention No. 190 Article 3.

90 ILO Convention No. 190 Article 1.

5.6. SPECIAL MEASURES

With regard to risk assessment, Article 18. 1.3. requires the employer to assess risks and take relevant preventive and mitigating measures to protect the safety and health at work of employees, children, youth, pregnant women, breastfeeding women and persons with disabilities. (see LL [Special groups](#))

5.7. COMPLIANCE MECHANISMS AND ENFORCEMENT

The rights perspective to OSH can be linked to the principles of the State's duty to protect (through laws and control measures), the business duty to respect the rights of the parties involved, and need for effective remedies. Remedies can be state-granted and company-based.

State duty to protect

OSH law provides that workers' rights should have a mechanism for complaints within the company, and includes obligation of workers to report possible OSH violations. Likewise, an obligation to report if the employer does not implement OSH requirements.

OSH Law mandates LI to monitor its implementation. Similarly, certain aspects of criminal law can be applied to OSH (see section on [Criminal code and responsibility](#)).

Business duty to respect

The duty to respect the rights of employees' mandates the employer to set up a system whereby violations can be reported and addressed. These systems should be non-punitive and are formulated as gender-neutral.

LGE and LPD require employers and the State to set up relevant mechanisms, and the law applies to OSH systems, which by definition require monitoring, reporting to be included. Considering that sexual harassment disproportionately affects women, internal complaint processes should be designed to respect dignity, privacy of victims and a non-punitive system of reporting and investigation.

5.8. CONCLUSIONS

[Conceptual agreement on concepts of worker, employer, employment relations](#) is required to ensure clarity over in which situations and who is covered by OSH provisions in full or in part. This issue is also linked to exemptions of the groups covered by OSH provisions and protection.

With regard to [employment relations](#), clarity is required with regard to the above concepts and scope of coverage of self-employed, domestic workers, and scope of limitations to these groups. Simple, blanket exemptions may lead to disproportionate impact on men and women both in setting obligations for employers as self-employed, and negative implications on women by not covering domestic service workers.

[Exemptions](#) to the law should be formulated in the context of gender impact assessment that take into account structural inequalities and impact of direct discrimination on individuals. Exemptions are also linked to the purpose of the law and the new structure of the OSH system; [therefore equality considerations have to be made for all planned exemptions from the law](#). The principle of the minimum protection by OSH law and special measures covered in special law norms should be followed.

[Harmonization of provisions on violence at work](#) with the LGE and LPD on violence at work could improve health and safety provisions in case of violence at work. LGE and LPD provide detailed definitions, to include various forms of harassment. By providing clear cross-reference to non-discrimination provisions, the legislator can harmonise decent work and OSH specifics provided in GLE and LPD with OSH Law. This will clearly mandate LI to investigate violence as OSH incidents. Currently, LI will refer harassment cases to other institutions. However, this falls within the mandate of OSH with regard to mental and physical health.

[Special norms](#) on protection of employees in vulnerable situations are mostly covered within the scope of non-discrimination principles. However, discussion under labour law analysis on application of special measures to pregnant women and breastfeeding women should be reviewed for OSH law, clarifying the purpose of the provisions.

[Employer duties](#) can be made more specific

with regard to explicit gender equality considerations to be included in assessing workplace risks, measures to address those, in the view of vertical and horizontal segregation among employees at the enterprise.

6. OSH REGULATION

6.1. LAW NO. 05/L-023 ON THE PROTECTION OF BREASTFEEDING

Allowing special measures for protection of specific groups stems from Article 55 of the Constitution. The purpose of this law (Article 1) is primarily designated towards promotion of breast-feeding; however, it includes two specific provisions related to labour relations:

- Article 5: the right of women employees to breastfeed
- Article 6: prohibition of exposure to unfavourable conditions

The special measures require the employer to ensure paid breaks for breastfeeding depending on the child's age. The provisions are reflected in the draft labour law (22.04.2021 document) and require written information from the employee to the employer about her desire to use these rights, accompanied by a doctor's certificate. Article 5 unnecessarily stipulates when a woman can request a break during working time – the beginning, middle, or end of a work shift. On the one hand the law provides general minimum time, and requires the employee to inform the employer and coordinate use of the right, so it may be left for that agreement to ensure that the timing is adjusted to the needs of the child, considering each child's and family's choice of how to manage this process. Moreover, the feeding pattern of each child also differs with regard to the length of each breastfeeding occurrence.

Article 6 in turn is directly linked to OSH Law and provisions, where safety considerations bear clear gender-specific implications – prohibition of employment of breastfeeding woman in conditions that may harm her and therefore the child. In this case the interests are both the specific gendered health interests of the woman, and the impact that would leave on her breast milk and therefore the child, thus addressing the best interests of the child as well.

Thus, revision of the labour law is recommend-

ed to consider more child-centred provisions and review of this law. To ensure that the primary interests of the child are considered, it is sufficient to define the right of the woman, determining the maximum scope (e.g., 1, 2 hours) of employer obligations to pay for the break, and leaving freedom to the breastfeeding employee to determine the needs of her child and coordinate with the employer the manner in which this right will be used.

6.2. REGULATION⁹¹ (MLSW) NO.02/2021 ON WORKPLACE RISK ASSESSMENT

Risk assessment is one of the core building blocks in any OSH system. OSH Law sets clear duties for employers to develop relevant policies on risk assessment that are equitable (OSH Law, Article 5). The employer is obliged to carry out periodical risk assessments. An OSH risk assessment according to OSH Law⁹² describes:

- characteristics of the work,
- identifies the risk source,
- determines who may be at risk,
- determines what is at risk and how,
- assesses risk to health at work,
- assesses risk to safety at work, and
- determines required and necessary actions to improve such measures. The employer is obliged to carry out periodical assessments.

Proposed changes to the Law⁹³ split the current definition into process and content requirements, suggesting the following components:

- workplace risk assessment: procedure for how the risk level is determined; the risk

⁹¹ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=37746>

⁹² Law No. 04/L-161 ON SAFETY AND HEALTH AT WORK, Article 3.1.9.

⁹³ Draft OSH Law of 22.04.2021

level is a result of a combined indicator – the likelihood that injury or health impact can happen, and the severity of the consequences that take different forms (injury, occupational disease, and other health effects);

- workplace risk assessment document: a document that describes hazards, risk level, required preventive measures.

In both the current law and the draft law the following gender aspects have to be considered in the key stages of the risk assessment process, and policy makers have the opportunity to make the new system language more gender-sensitive.

New regulation No. 02/2021 on Workplace Risk Assessment was adopted at the time of preparation of the review and entered into force on April 1, 2021.

6.2.1. Objective of the Regulation and beneficiaries

Regulations are adopted to define the procedure for and essential elements of workplace risk assessment (Article 1). This derives from the OSH Law and therefore key concepts and principles determination in OSH Law affect implementation of the Regulation: definitions, affected groups of employers and workers (Article 2), involvement of employee representatives and other business partners and contractors directly affected by OSH measures.

Direct link of natural and legal persons defined in OSH Law and subject to this regulation requires clarity on exemptions (see exemptions comments [under OSH Law](#)). Currently, exempt groups are not subject to this regulation, while the draft law changes the approach, whereas regulation can specify certain aspects of risk assessment carried out by different types of employers. For example, all groups affected by exemption may require more specific laboratory measurements in addition to minimum requirements, or adjust the specific list of Hazards as in Annex 1.

6.2.2. OSH BENCHMARKING

Five core elements are defined for effective risk assessment, including specific gender aspects.

Step 1: Identify the hazards: Hazard identification leads to acknowledgement that a hazard exists and describes characteristics of hazards. Inherently, this requires identification of groups affected, or defining the demographics of the workforce affected. Identification requires collection of information and therefore information flows or systems of the enterprise are to be used effectively; reaching all affected groups and giving them voice means listening to the experiences and needs of a diverse workforce. In essence this means awareness of gender and broader diversity aspects in the workforce, as well as surrounding socio-economic conditions that may impact perception of hazards. Identification of hazards therefore will only be successful if different voices are heard, acknowledged, and recorded.

The process requires recognizing the role of men and women in information flows which in turn may indicate systemic segregation of positions occupied by men and women in the workplace, leading to different perceptions of risks, recognition of different types of risks and omission of others.

Reasons for unreported incidents have to be analysed, as in itself this poses a workplace hazard. For example, in the 1st quarter of 2021 LI recorded workplace incidents where victims were men only. In itself, lack of national data on workplace incidents experienced by women raises questions as to why they are not reported: are injuries to women perceived as of lesser severity, are there behavioural reasons for non-existing incidents? Likewise at the enterprise level any areas of non-events require analysis either for learning experiences and transfer, or recognition of reasons for not reporting incidents and adjusting the system accordingly.

Consultations with different workers and their representatives will provide access to data. Workers' representatives can also indicate information and reporting flow issues. Finally, to assess gender impact on particular issues, the latest scientific findings need to be consulted, sex-segregated data collected.

Step 2: Who is at risk?

To assess clarity of the law involves determining whether the requirements for risk assessment are such that they would lead to the employer identifying who is at risk and to what degree in similar situations men and women perceive and experience the risk.

Even when women and men perform exactly the same tasks they may still be exposed to different risks. Differences in shape and average body dimensions between the sexes mean that work equipment and tools that are designed for men's bodies are often unsuitable for women. For example, hand tools and workstation heights are often uncomfortable for workers who are smaller or taller and larger than the 'standard' worker. For instance, the average woman has a hand length about 2cm shorter than a man's hand, so tools such as pliers can have too thick a grip, inappropriate placement and loss of functionality.⁹⁴ Likewise, awareness of other aspects, like temperature in offices, impacts health. Most offices are five degrees too cold for women, because the formula for determining their temperature was developed in the 1960s based on the metabolic resting rate of a 40-year-old, 70kg man; women's metabolisms are slower.⁹⁵ Industry-specific list of hazards: some of these standards are continuously set and thus gender inequality and negative impact on men or women health and safety continues.

Article 6 determines scope of the regulation, and includes a requirement in point 3 to identify who may be harmed at work: employees and other persons present in the workplace. The purpose of this approach is to identify all affected individuals, a stakeholder list for interviews. This is a positive step, as it requires listing everyone related to the workplace, disregarding their position and time spent at the workplace.

Adding requirements for data collection – sex, age, position in the workplace, time spent at the workplace – will provide better data and use of data for impact assessment and enable distinguishing who and how perceives and experiences risks.

Point 4 or Article 6 further draws attention to "vulnerable groups", and includes women, preg-

nant women and women who are breastfeeding, young employees, older employees, employees with a disability, employees with pre-existing health conditions. The way the article is drafted poses a direct discrimination risk and raises various questions.

- As in the practice of moving away from gender-linked limits of weight or other safety provision – protective, limiting – provisions should be designed in a way that allows men and women among the group to act according to their abilities. As Kosovo data demonstrate, the vulnerability of men and women depends on the situation – thus, the situation makes them vulnerable, not their sex. Unpaid agricultural workers (women) or construction workers (men) will both be vulnerable because of the risk of exploitation. Each may perceive and experience different types of risks.
- Age will be a factor that may affect certain risks; however, age limits are not defined. Likewise, young women may experience harassment, while young men higher pressure for overtime, posing different types of risks. Or older and more experienced workers may have a low risk level because of experience in the job, while new employees, disregarding age, may experience higher risks.
- A disability may be unknown to the employer unless employee needs to disclose it.

In determining special groups that require either limitations of certain rights or, on the contrary, higher protection, an assessment against Article 55 of the Constitution should be made.

To **avoid stereotyping**, revision of Article 6 could include a clear requirement for data collection to achieve a result of full demographic overview that can be linked to the perception and experience of risks, and data on injuries. This may include indications of a minimum set of data that policy makers consider relevant for national policy making purposes on health and safety, while employers together with employee representatives could have the obligation to assess further against a list of hazard potential in other industries, regions, and demographic relevant data.

⁹⁴ Page 6; <https://www.tuc.org.uk/sites/default/files/PPEand-womenguidance.pdf>

⁹⁵ Example from article about Caroline Criado Perez, invisible women, <https://www.theguardian.com/books/2019/feb/28/invisible-women-by-caroline-criado-perez-review>

Pregnancy and breast feeding⁹⁶ provisions primarily have to be understood in the context of their purpose: to protect a woman who is pregnant and to protect a child, and to foster gender equality and prevent discrimination because of reproductive function. For that purpose, including special assessment of reproductive hazards as something that may cause harm or damage to human reproduction at any stage, including harm to men's, women's and children's reproductive health at any stage⁹⁷ is justifiable and proportionate, it is a question of making it about reproductive hazard, rather women in general.

Step 3: Evaluate the risk: Identify and decide on safety and health risk control measures. This includes assessing the probability of the risk, severity of the impact if it occurs, to include gender aspects of the causes of the risk (e.g., the social context of not wearing safety equipment) and different impact on health of men and women. Systems should be in place that guide risk assessment specialists explicitly towards industry/enterprise/sector specific gender risks. Policy documents should therefore include gender impact assessments to identify hazards and reflect on the perceptions of how we perceive risk and what is taken as a reference point to determine severity of risk. Different perceptions of risks and their impact may lead to underreporting and, once reported – refusal to recognize the impact.

Step 3: risk assessment – Article 9 of the regulation sets uniform criteria of probability and severity of harm and defines scope of workplace analysis. Article 9.2. states:

“probability of occurrence of occupational injuries, health damage or employee illnesses cause by workplace hazards is assessed based on previous analysis, which takes into account the frequency and duration of employees exposure, already taken technical and other measures for avoiding or limiting risk level.”

While deriving from OSH law Article 5 the principle of equality, opportunity to mandate gender and diversity analysis with regard to workplace risk perception, experience, reporting culture and non-reporting reasons is missed.

⁹⁶ J. Paul, Healthy beginnings. Guide on healthy maternity at work; International Labour Organization 2004; https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_66.pdf

⁹⁷ J. Paul, Healthy beginnings. Guide on healthy maternity at work; International Labour Organization 2004

This can be secured by setting minimum principles in OSH law – defining participation, representation, equality requirement in risk [assessment, including principles for such analysis. \(see section on LAW ON SAFETY AND HEALTH AT WORK\)](#)

Step 4: Systems in place to assign responsibility for health and safety and data collection: include representation of men and women in OSH systems and securing accountability and traceability of incidents for analysis and evaluation.

Principles of diversity in data collection and identification of risks based on the perspective of a diverse group of affected persons in the workplace should be among key principles in the regulation. Article 11 further lists workplace document minimum content, and this list offers the opportunity with minor changes to integrate gender and diversity thinking:

- Article 11.2.7. may include addition of ‘experienced by (list sex, occupation/position, **and enterprise defines relevant criteria**)
- **Article 2.8.** amending with [exposure] to men and women [to each identified hazard.

Step 5: Action and procedures to minimize risks and monitor and evaluate progress. The twofold approach to consider representation of men and women in systems and decision-making; and the content of the actions and functions – how and where gender aspects are considered in the design, implementation and monitoring of the action and systems.

While the proposal makes the OSH system more streamlined and harmonized with EU Law, the existing law makes certain components more explicit as a legal reference. It requires the employer to assess and describe more explicitly the groups at risk, the reasons why the risk occurs, requires two minimum elements – safety and health – to be evaluated, indirectly requiring gender analysis.

Article 10 explores Prevention Measures, requiring:

- to determine necessary measures to avoid, reduce, eliminate risks;
- to identify the most appropriate measures **based on general principles of prevention described in [OSH Law].**

Further, prevention plan requirements are listed in Article 12 and while formulated in a gender-neutral way pose a potential risk of not maintaining awareness to ensure that preventive measures take into account different needs of men and women and diversity of age, experience and other relevant factors. Similar to Article 11, adding the principle that a preventive plan is based on assessment of gender-based risks and adjusted to the needs of workers.

7. CONCLUSIONS AND RECOMMENDATIONS

Conceptual agreement on concepts of worker, employer, employment relations is required to ensure clarity over in which situations and who is covered by OSH provisions in full or in part. This issue is also linked to exemptions of groups covered by OSH provisions and protection.

With regard to employment relations, clarity is required with regard to above concepts and scope of coverage of self-employed, domestic workers, and scope of limitations to these groups. Simple, blanket exemptions may lead to disproportionate impact on men and women both in setting obligations for employers as self-employed, and negative implications on women by not covering domestic service workers.

7.1. LABOUR LAW

From the perspective of law drafting a clearer purpose of the law that includes reference to the values of the employment relationship may improve the later application and interpretation of LL. Currently the scope and purpose is defined in terms of harmonization of EU law and to what part of labour relations the law applies. A purpose reflecting equality values in employment relations, power positions of parties could improve protection of rights.

The labour law defines discrimination. The draft law overall is well developed and up to date with regard to harmonization with EU law. LL in its definition of grounds for discrimination limits its scope, at the same time cross-referencing LPD with a non-exclusive list of grounds. To avoid the need for legal arguments over application of one or another law, the definitions between LGE, LPD and LL on discrimination should be harmonised.

It could be acceptable to have certain areas where the list of different treatment grounds is limited. However, this remains a political decision and should appear under discussion in core concept and policy documents, to ensure any exclusion is constitutional, objective and justified.

Essential working conditions are formulated by using his/her pronouns (in English text), making the language neutral where possible and therefore the overall design is intended to be gender-neutral. Avoiding binary references and using gender-neutral expressions – employees, their or other – may be suggested.

Exemptions and special groups affected by the night work, overtime work rules demonstrate a protective attitude, rather than full assessment of gender impact on women. These include prohibition of work while pregnant (last two weeks of pregnancy prior to due date), rights of fathers or children under age 3 are restricted, and indirectly the care responsibility is transferred to women as parents, not allowing men to use these rights. These measures are to be reconsidered from the perspective of:

- **Interests of the child**, which are at the heart of social measures for night work, overtime work, dismissal measures. When considering such measures, the Child rights convention and encouraging the bond with parents, or in certain cases caregivers, not just mothers, are essential for the wellbeing of the child. Therefore, adjusting the formulation to *parents of children under age of 3* will have a positive gender equality impact, allowing men and women to be part of a child's life in the essential first years.
- **Protective prohibition** of work in the last two weeks of pregnancy prior to the expected due date can be formulated as a right rather than a prohibition, and it will prevent unnecessary requirements to share personal data (like due date of birth) with the employer if someone does not want to use the right. It is recommended to consider how such measures will diminish gender stereotypes that otherwise will be reinforced. Care work as women's prerogative is a gender stereotype that limits the rights of fathers and changes to labour rights to increase parental – men's and women's – rights will increase the use of these rights, if accompanied by policy measures and coop-

eration with employers on execution of the employer's duty to foster gender equality.

Equal pay measures are well developed in the Draft LL and likewise other working conditions do not observe any direct or indirect discrimination measures.

Violence at work is mostly defined through LPD and cross reference in Labour law Article 5. It is recommended to consider a more specific cross reference to harassment provisions, to ensure it is an unquestionable part of labour relations and under monitoring and supervision of the Labour Inspectorate.

Collective rights are addressed in a gender-neutral way and provide equal access to employee representation and protection. A positive observation is protection of trade union members from dismissal, requirements to negotiate working conditions, and the right to collective labour agreement talks.

The draft law sets limits to the validity of a collective labour agreement and this may be considered an infringement of the right to a collective labour agreement (CLA). The purpose should be to protect employee representatives and thus the law can be formulated so as to provide minimum guarantees, e.g., if there is no date for the validity of the CLA in the document, it is presumed to be valid until conclusion of a new CLA, or similar neutral provision.

7.2. OSH LAW AND REGULATIONS

Purpose of the law: An improved purpose of the law **could reflect gender equality goals** of designing OSH measures to take into account segregation in the labour market, unequal time distribution between men and women and different impacts that OSH measures may have. OSH law relates to work processes where men and women should have an equally prominent place to participate and express their needs and perspectives, prevention that takes into account gender aspects, the actual working environment that is a safe place for all employees and takes gendered aspects of violence at work into account, and protection of mental health where different cultural expectations and stereotypes, attitudes at work may create different mental wellbeing consequences for men and women.

Beneficiaries

The purpose of the new OSH system and the law is to set minimum criteria for protection of affected workers. With the approach of minimum standards for all, any exemptions should be formulated with clear use of principles of objective reasons that are seen in the context of a segregated labour market; and more precise scope of the limitations. Blanket exemptions of certain professions or sectors should not be practised, or if practised are clearly linked to more favourable and special provisions in the given industry without undermining some minimum OSH standards of the general law.

For the purpose of clarity of exemptions or limitations for application of OSH provisions, there is a need to define more precisely the application towards vulnerable employment situations of the self-employed, domestic service workers, unpaid family work and undeclared work.

State responsibility to design a system whereby unpaid family workers and undeclared workers are guaranteed some minimum protection in case of accidents and occupational diseases should be clarified, as this impacts the health and wellbeing of men and women in different sectors and thus their exposure to different types of harm.

Gender equality and OSH

The labour law draft (April 2021) requires employers to provide a yearly update on gender equality measures at the enterprise, and cross reference with LL or repeated information provision clause in OSH law may support increased gender awareness on OSH issues in the workplace.

Further gender equality goals can be supported through gendered language and a requirement for gender analysis of the specific components of hazard identification, risk assessment, implementation measures and prevention measures.

Preventive measures strongly depend on gendered risk assessment, so use of gender-specific language in points of risk assessment may improve the outcomes of health and safety for men and women. This can be streamlined through definitions to implementation measures in specific articles. Alternatively, more explicit mention of human factors / human-centred approach, providing a definition of the approach that in-

cludes gender equality considerations, may be used.

Injury compensation is a duty of the employer. This should be linked with “equal pay” principles to ensure that compensation mechanisms and criteria established by the employer do not discriminate between men and women. This includes access to compensation mechanisms, criteria for determining scope of coverage and compensation, conditions of payment.

Balanced use of explicit gender references in the law will lead to better design and implementation of OSH measures. More explicit gender equality analysis can be required through clear language within the risk assessment part of the law and employer obligation to decide on prevention measures.

- OSH law should make gender and diversity principles for risk assessment more explicit. This can be achieved through including representative participation as one of the principles to ensure participation and representation of needs and perspectives of all people affected by OSH measures at the enterprise, at all levels of the enterprise. This will be affected by the chosen definition of worker or affected persons and the definition of employment or working relationships. Likewise, all testing carried out during risk assessment has to reflect the results of diverse group of employees representing men, women, different age groups and abilities – defining the diversity principle at each step of the risk assessment process.
- Include more explicit references to gender equality obligations, when determining measures for prevention of accidents at work and professional illnesses. For example, Article 12 obliges the employer to develop certain OSH action documents and explicit references to needs assessment taking into account diversity of employees and structural discrimination issues is a minor adjustment that will lead to potentially extensive impact on OSH professionals and employers.

Draft law proposals to eliminate obligations of employer. Such a change should be considered so as to allow the opportunity of explicit obligations to ensure gendered measures in corresponding articles of the new law. The purpose

should be to make gender analysis and consideration inclusion an explicit part of employer obligations.

Violence at work

LGE and LPD define harassment at work. While a cross reference to LPD is made in OSH Law, considering transfer of definition or a clear cross reference to LGE and LPD, as well as definition of psychological health and harassment types in OSH system, could be included in OSH. This will ensure health and safety aspects of violence at work and sexual harassment becomes more present.

7.3. ENFORCEMENT

Enforcement of the law allows for resolution of conflicts through internal company mechanisms involving trade unions and employer responsibilities to review internal complaints, and external out of court settlement systems, like mediation. These were not analysed in detail in this review.

The main labour and OSH monitoring and control institution is the Labour Inspectorate. LI has an extensive mandate to monitor labour relations with regard to labour law and deriving from LL cross reference to other laws – also LPD and less clearly – LGE. With clearer cross-references LI mandate in reviewing labour law conditions in line with LGE and LPD will be improved, to avoid referral of labour cases mentioning these laws to respective institutions and ensure monitoring and control at LI and through appropriate penalties.

7.3.1. Access to court

The main challenge in labour relations for employees is the short timeframes defined in the LL for claims in court. In light of international treaties, this may be considered a violation of fair trial – or access to the court. This may be particularly relevant in cases of discrimination and mobbing or negative consequences. Certain events are not singular, but will take place in a continuity of actions by the employer and this has to be reflected in the labour law provisions on the right to bring complaints to court.

Disciplinary action resolution with LI and prevention of a legal claim in competent court has to be considered unconstitutional. Appropriate changes have to be made to ensure the individual right to resolve disputes through courts and not only through administrative proceedings.

7.3.2. Criminal code⁹⁸ and responsibility

Criminal liability is foreseen only for those actions that infringe and violate freedoms, human rights and other rights and social values guaranteed and protected by the Constitution of the Republic of Kosovo and international law to the extent that is not possible to protect these values without criminal sanctions. It applies to two core violations:

- the right to employment under equal conditions; and
- the right to strike

The right to strike and protection from negative consequences derives from international human rights treaties, but the content on “equal working conditions” requires further specification, potentially in labour law.

7.4. SPECIAL GROUPS

Special norms of protection for employees in vulnerable situations are mostly covered within the scope of non-discrimination principles. However, discussion under labour law analysis on application of special measures to pregnant women and breastfeeding women should be reviewed, clarifying the purpose of the provisions.

Pregnancy protection provisions should be considered from the perspective of the rights of the woman to maintain security in employment, rather than as a protective measure because of her perceived weakness, and formulated accordingly.

Breastfeeding protection includes two goals: the health of the employee and specific conditions of her reproductive function, that make her needs unique in the workplace; and the interests of the child who is breastfed. All laws should consider the duality of goals and avoid an overprotective approach that leads to reinforcement of stereotypes.

Vulnerability of atypical employees in enjoying essential labour rights and OSH protection requires conceptual discussion of policy makers and is linked to the definition of core concepts, exemptions and recognition of strong gender segregation. The status of the self-employed and determination of such status requires clarification to avoid bogus self-employment as abuse of employee rights. Criteria for distinguishing the status of employees and the self-employed may be included in the Labour law.⁹⁹ The status and rights of other workers in vulnerable employment situations will also require clarification based on discussion and agreement on core concepts.

98 CODE NO. 06/L-074 CRIMINAL CODE OF THE REPUBLIC OF KOSOVO, <https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf>

99 Example of Spain, Labour code Article 43, used in the March 2021 cases against Ryanair can be used as example. Sentencia No 40/2021, Date 17.03.2021, Collective complaint, Audiencia Nacional, Sala de lo Social, Madrid.

8. ANNEXES

8.1. ANNEX 1: INTERNATIONAL TREATIES

	UDHR	ECHR	ICCPR	CERD	CEDAW	CRC	FCPNM	EU Charter
Gender equality principles	Article 2	Article 14	Article 3		Article 5 Article 7 Article 8 Article 9 Article 11 Article 12 Article 13 Article 14 Article 15 Article 16	Article 2		Article 21 Article 23
Gender mainstreaming principles					Article 2 Article 3			
Labour related social security issues	Article 23							Article 34
Safe and decent working conditions								Article 31
Equal pay	Article 23 2.							
Contracting and dismissal conditions								Article 30
Working time and rest time	Article 24							Article 31
Vacations								
Freedom of association (trade unions): including collective bargaining and strike	Article 23	Article 11	Article 22	Article 5			Article 7	Article 12 Article 28
Freedom of expression in labour relations								
Privacy (health, personal data)	Article 12	Article 8	Article 17					Article 7 Article 8
Enforcement/complaint mechanisms for the rights (fair trial or administrative procedures clauses)	Article 7 Article 8	Article 6	Article 14	Article 5				Article 47 Article 49
Limitations of the rights above - clauses								

- Universal Declaration of Human Rights UDHR <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- European Convention on Human Rights ECHR https://www.echr.coe.int/documents/convention_eng.pdf
- International Covenant on Civil and Political Rights ICCPR <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>
- International Convention on the Elimination of All Forms of Racial Discrimination CERD <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>
- Convention on the Elimination of All Forms of Discrimination against Women CEDAW <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>
- Convention on the Rights of the Child CRC <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>
- Framework Convention for the Protection of National Minorities FCPNM <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cdac>
- Charter of Fundamental Rights of the European Union EU Charter <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>

8.2. ANNEX 2: ATYPICAL OR VULNERABLE EMPLOYMENT SITUATIONS

Work arrangements that fall outside the realm of the standard employment relationship are understood as work that is full-time and of indefinite duration, as well as part of a subordinate, but bilateral, employment relationship.¹⁰⁰ Labour statistics are generally weak in identifying and describing 'atypical' forms of employment. Women are more likely than men to be found in such 'atypical' work situations, and, as a result, their situation is often underestimated and less well-described than that of men.

The forms of atypical work identifiable through statistics are "self-employed" and this is a prominent feature in all European legal systems, built around the concepts of 'subordination' and 'autonomy' to assist in identifying false and true self-employment¹⁰¹.

A2.1: SELF-EMPLOYMENT

Certain occupations are historically or by nature self-employment domains. Professions such as lawyers, auditors, tax advisors, notaries, dentists, pharmacists and medical specialists can be referred to as 'liberal professions'. Often self-employment is abused to avoid employment relationships.

Bogus self-employment results in a situation of factual subordination and dependence, which is not recognised legally or institutionally recognized in terms of employment and social rights, nor in terms of employers' liability and responsibility towards their employees. Thus, workers must comply with employers' working methods, but are deprived of the various rights associated with employee status (such as severance pay in the case of dismissal, access to unemployment benefits, and health and safety protection) and therefore suffer negative consequences.¹⁰²

¹⁰⁰ <https://eige.europa.eu/thesaurus/terms/1044>

¹⁰¹ <https://www.eurofound.europa.eu/publications/information-sheet/2017/fraudulent-contracting-of-work-bogus-self-employment-czech-republic-spain-and-uk>

¹⁰² P.2; <https://www.eurofound.europa.eu/publications/infor->

Impact of fraudulent practices:

- For the state: employers are not contributing to sick leave, pension benefits and these costs are partially transferred to the State.
- Workers have limited social security benefits: unemployment benefits, pensions, sickness
- Workers have limited rights: protection from dismissal, regulation of working time, collective bargaining coverage, holiday pay, or are exempt from labour laws altogether.
- "While all rural workers endure long hours, low incomes, and exposure to occupational safety and health hazards, women often bear the brunt of these conditions because of their greater concentration in occasional and seasonal work".¹⁰³

KAS data indicates that more men are registering as self-employed with and without employees at around 25% of employment share vs around 10% for women,¹⁰⁴ while women's employment is predominantly as employees at 83% vs men at 69%. Through the rise of the gig economy and through freedom of movement of services in the EU it is observed that bogus forms of employment increase as contracting work is used to replace employees, thus changing employee protection levels. Men will be exposed to higher risks of bogus self-employment compared to women. On the other hand, women carry the burden and risks of unpaid family work. Segregation of the labour market is demonstrated through employment of women in education, the service sector, health care and social work, and men in services, construction work, administration and catering and agriculture or fisheries. Moreover, segregation continues in vulnerable employment. Unpaid share of work by women is highest in agriculture (43%) and for men in services and sales (20%). In informal employment (undeclared work, domestic work), the unpaid share of work is strongly gendered.

[information-sheet/2017/fraudulent-contracting-of-work-bogus-self-employment-czech-republic-spain-and-uk](https://www.eurofound.europa.eu/publications/information-sheet/2017/fraudulent-contracting-of-work-bogus-self-employment-czech-republic-spain-and-uk)

¹⁰³ ABC of women workers' rights and gender equality, Geneva, International Labour Office, 2000, P. 19

¹⁰⁴ Data on: Employment status by gender by employment status, year, period and gender. Q3, 2020 https://askdata.rks.gov.net/PXWeb/pxweb/en/askdata/askdata_Labour%20market_01%20Quarterly%20labour%20market_Pun%3%absimil/tab1.4.px/table/tableViewLayout1/?rxid=c3e44c2e-1aff-4e4a-b55b-2ca64a485a50

A 2.2. UNDECLARED AND UNPAID WORK: CARE WORK AND AGRICULTURE

Unpaid family work statistics are related not to the time share of women spending more time on care work at home, and as unpaid workers in family businesses.

By embedding domestic care work in the Law on Gender Equality, Article 18 recognizes unpaid care work of women as a contribution to social wellbeing, but it also mentions dealing with agriculture and family economy (Point 1.4). Thus, LGE mandates creating systems where “*Subjects specified in paragraph 1 of this Article shall benefit from community services, labour policies and employment, and vocational training based on the legislation in force.*” Legal review concludes that these aspects are not integrated into the OSH system or Labour law.

For labour system purposes it has to be established whether unpaid family workers are to be considered as workers and how are they may benefit from protection of labour law and established national social security systems. Labour law defines the *employment relationship as an agreement or contractual arrangement between an employer and an employee for the performance of specified functions or tasks by the employee under the supervision of the employer in return for an agreed remuneration, normally in the form of money*. By fulfilling the criteria of the employment relationship: agreement, clear tasks under guidance, for remuneration, these types of employment should be considered as covered by the Labour Law and the Law on Health and Safety at work.

A 2.3. Domestic service workers

During reform and review of labour law and the OSH system, policy makers have an opportunity to integrate latest EU developments. The new [Directive 2019/1152 on Transparent and Predictable Working Conditions](#) is a direct follow-up to the [proclamation of the European Pillar of Social Rights](#). This Directive defines essential working conditions and will apply to every *paid employee having a contract or employment relationship* defined by the law in force in a MS and/or governed by the law in force in a MS in the EU. Domestic workers, on-demand workers, intermittent workers, voucher-based workers, platform workers, trainees and apprentices could come within scope of this Directive, if they

fulfil the criteria for determining the status of a worker.¹⁰⁵ Genuine self-employed persons are excluded. However, bogus self-employed occurs when a person is declared to be self-employed while fulfilling the conditions characteristic of an employment relationship, in order to avoid certain legal or fiscal obligations. As recital 8 of the Directive proposes, these persons should fall within the scope of the Directive. Determining the existence of an employment relationship should be guided by the facts relating to actual performance of work and not by the parties’ description of the relationship.

The draft OSH Law (April 2021) presumes blanket exclusion of domestic service workers from its application and it is recommended to determine the conceptual framework for understanding the concept of worker, and its application to employment relations. The minimum standards of the law should be no less favourable than to workers in general, but any exemptions should be defined in line with the Constitution Article 55 – defining objective reasons for exclusion, setting clear limits on what is not applied to this category of workers, and with what aim.

Laws and policies, however, should take into account the peculiarities of domestic work linked to live-in arrangements, including the need to ensure decent living conditions, transparent and fair working time arrangements, and freedom of movement and communication. The physical proximity of domestic workers to household members poses a heightened risk of abuse and harassment. This risk is further heightened for live-in domestic workers, present in the household all the time, and for migrant domestic workers, whose legal status of residence is often inextricable from the employment relationship and who are therefore highly dependent on their employer.”¹⁰⁶

105 Judgments of the Court of Justice of 3 July 1986, *Deborah Lawrie-Blum v Land Baden-Württemberg*, C-66/85, ECLI:EU:C:1986:284; 14 October 2010, *Union Syndicale Solidaires Isère v Premier ministre and Others*, C-428/09, ECLI:EU:C:2010:612; 9 July 2015, *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH*, C-229/14, ECLI:EU:C:2015:455; 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, ECLI:EU:C:2014:2411; and 17 November 2016, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, C-216/15, ECLI:EU:C:2016:883.

106 <https://www.itcilo.org/sites/default/files/media/documents/DW-Training%20module%20IV%20for%20print%20low%20res.pdf>

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