

# **THE INTEGRATION OF WORK AND PARENTING: A COMPARATIVE LEGAL ANALYSIS**

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## DECLARATION

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Date: March 2018

## SUMMARY

Given the importance of parental care to children, parents and broader society and the apparent conflict between work and adequate parental care, this study evaluates the legal facilitation of the integration of work and care across nine countries, including South Africa. The study recognises that legal operationalisation of the integration of work and care primarily takes place at domestic legislative level and shows that this happens against the backdrop of widespread recognition of the importance of the family and care at the international, regional and constitutional levels. The study builds on the reality that domestic legislation in this context consists of (a combination of) equality law and specific rights contained in employment standards legislation. The comparative review of equality law as applied in the area of the work-care conflict shows that, despite the potential and promise that equality law holds to facilitate the integration of work and care, this potential has not been realised and probably will not be in future. This necessarily shifts the focus to an approach founded on the extension of specific rights related to time off or leave, as well as flexible working, to employees in order to enable them effectively to combine work and caregiving. The comparative review of specific rights in this area leads to the conclusion that South Africa lags far behind certain developed and comparable developing countries in its legislative recognition of the importance of caregiving and in its subsequent level of employment rights extended to caregivers. Given the ample room for improvement, suggestions for legislative reform are made based on the comparative experience of other countries.

## OPSOMMING

Gegewe die belangrikheid van ouerlike sorg vir kinders, ouers en die breë gemeenskap, asook die oënskynlike konflik tussen werk en voldoende ouerlike sorg, evaluateer hierdie studie die regsfasilitering van die integrasie van werk en sorg in nege lande, insluitend Suid-Afrika. Hierdie studie dui aan dat die regsoperasionalisering van die integrasie van werk en sorg primêr op individuele basis in verskillende lande plaasvind, en wys dat dit gebeur teen die agtergrond van wydverspreide erkenning van die belang van die familie en sorg op internasionale-, streek- en grondwetlike vlakke. Hierdie studie bou op die realiteit dat wetgewing in hierdie konteks bestaan uit ('n kombinasie van) gelykheidswetgewing en spesifieke regte vervat in wetgewing gemik op die verbetering van indiensnemingstandaarde. Die vergelykende oorsig van gelykheidswetgewing, soos toegepas in die area van werk-sorg konflik, toon dat, ten spyte van die potensiaal en belofte wat gelykheidswetgewing inhou om die integrasie van werk en sorg te faciliteer, hierdie potensiaal nog nie gerealiseer het nie en moontlik ook nie in die toekoms gaan gebeur nie. Die fokus skuif dus noodwendig na 'n benadering gegrond op die uitbreiding van spesifieke regte verbonde aan vrye tyd of verlof, asook fleksi-werk, om werknemers in staat te stel om werk en sorg effektief te kombineer. Die vergelykende oorsig van spesifieke regte in hierdie area lei tot die gevolgtrekking dat Suid-Afrika ver agter sommige ontwikkelde en vergelykbare ontwikkelende lande is vir sover dit wetlike erkenning van die belang van sorg en die vlak van indiensnemingsregte verleen aan versorgers, betref. Gegewe dat daar beduidende ruimte vir verbetering bestaan, word voorstelle vir wetgewende hervorming gemaak wat gebaseer is op die ervarings van ander lande.

## LIST OF ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
ARLS	Act Respecting Labour Standards
BCEA	Basic Conditions of Employment Act
BFC	Brazil Federal Constitution
BFOQ	<i>Bona fide</i> occupational qualification
BRICS	Brazil, Russia, India, China and South Africa
CCMA	Commission for Conciliation, Mediation and Arbitration
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CHRA	Canadian Human Rights Act
CLC	Canada Labour Code
CLT	Consolidated Labor Law ( <i>Consolidação das Leis do Trabalho</i> )
EAT	Employment Appeal Tribunal
ECHR	European Court for Human Rights
EEA	Employment Equity Act
EEAA	Employment Equity Amendment Act
EEOC	Equal Employment Opportunity Commission
EI	Employment Insurance
ERA	Employment Rights Act
ESA 2000	Employment Standards Act
EU	European Union
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
FRD	Family responsibility discrimination
HRC	Human Rights Committee
HRTO	Human Rights Tribunal of Ontario
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
MPLR	Maternity and Parental Leave (Amendment) Regulations
NBCRFLI	National Bargaining Council for the Road Freight and Logistics Industry

OECD	Organization for Economic Cooperation and Development
PEPUDA	Prevention of Unfair Discrimination Act 4 of 2000
QPIP	Quebec Parental Insurance Plan
SARPBAC	South African Road Passenger Bargaining Council
UDHR	Universal Declaration of Human Rights
UIF	Unemployment Insurance Fund
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child
USA	United States of America
CHRC	Canadian Human Rights Commission
LRA	Labour Relations Act
CSW	Council on the Status of Women
SSW	Secretariat on the Status of Women
HYRC	Human Rights and Youth Rights Commission

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## CHAPTER 1: AN INTRODUCTION TO THE COMPARATIVE STUDY OF THE REGULATION OF THE INTEGRATION OF WORK AND PARENTING

### 1 Introduction to and aim of the study

The point of departure of this research is that economic, social and demographic changes over the last few decades have contributed to the need to consider the integration of work and care as an issue of serious concern for individuals, societies, organisations, governments and families.<sup>1</sup> The basic aim of this research will be to evaluate the contribution or otherwise of legal regulation to this integration.

Immediately it must be recognised that such a study faces conceptual difficulties around the meaning of “family”, “parenting” and “care”. It is submitted, however, that while the concept of “family” to some extent is amorphous due to societal, cultural and developmental differences between and even within countries, it may be accepted that at the heart of the concept and at the heart of its importance in society is the idea of “parenting”. Moreover, while “parenting” is also a concept that sometimes defies precise definition, it is submitted that at the heart of the concepts of “family” and “parenting” is care for children.<sup>2</sup> Seen thus, it becomes easy to see how society and

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<sup>1</sup> L Dancaster & M Baird “Workers with Care Responsibilities: Is Work-family Integration Adequately Addressed in South African Labour Law” (2008) 29 *ILJ* 22 22. These changes include an increase in the number of women in the labour force and of mother-headed families, greater family instability and single parenting, changing workplaces, rural to urban migration, the breakdown of extended family and community support networks, and aging societies with a reduced proportion of the population being of working age. See S Bianchi “Changing Families, Changing Workplaces” (2011) 21 *The Future of Children (Work and Family)* 15 15 and 18 and S Allen “Working parents with young children: cross-national comparisons of policies and programmes in three countries” (2003) 12 *Int J Soc Welf* 261 261.

<sup>2</sup> One of the aims of the proposed research will be to consider the concepts of “family”, “parenting” and “care”, their interrelationship and also importance to society. As mentioned in the text, it would seem that the decisive concept is that of “care”. In this regard, a good point of departure is the definition of “care” in section 1 of the Children’s Act No 38 of 1995. According to this definition “care “includes, where appropriate -

- “(a) within available means, providing the child with -
  - (i) a suitable place to live;
  - (ii) living conditions that are conducive to the child’s health, well-being and development; and
  - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;

parenting (in the sense of provision of care to children) reciprocally influence each other.<sup>3</sup> Society depends upon parents who competently rear their children.<sup>4</sup> Although parents are not the only agents contributing to the socialisation<sup>5</sup> of children, they provide a major – perhaps *the* major – context for socialisation.<sup>6</sup> It is through committed, sacrificial parenting that children become productive, informed citizens necessary for a democratic society.<sup>7</sup> It has been said that the aim of parenting is to help children develop into independent, autonomous, responsible, and self-directed adults.<sup>8</sup> In turn, because rearing children is the foundation of society, society has to support parenthood.<sup>9</sup> One aspect of this obligation is to recognise that work and

- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have; and
- (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child."

<sup>3</sup> J Westman "Children's Rights, Parents' Prerogatives, and Society's Obligations" (1999) 29 *Child Psychiatry Hum Dev* 315 326.

<sup>4</sup> 326.

<sup>5</sup> (Primary) socialisation generally occurs in families or other care relationships when children are infants. It involves the "internalisation of norms and expectations and the acquisition of the behaviours necessary to function as a member of society". See J McCarthy & R Edwards *Key Concepts in Family Studies* (2011) 184.

<sup>6</sup> E Maccobie "The Role of Parents in the Socialization of Children: An Historical Overview" (1992) *Developmental Psychology* 1006 1006.

<sup>7</sup> Westman (1999) *Child Psychiatry Hum Dev* 323.

<sup>8</sup> J Brooks *The Process of Parenting* (1981) 13.

<sup>9</sup> Westman (1999) *Child Psychiatry Hum Dev* 327.

parenting are unable to operate in isolation from one another<sup>10</sup> and that the demands of paid work should successfully be integrated with the demands of parental care. At a first level, this means government should provide an appropriate legal basis for such integration.

In this regard, one immediate (and perhaps the most important) challenge to work-care integration arises from unequal gendered behaviour (which may or may not be voluntary): women have entered the labour market to a much greater extent than men have increased their household work.<sup>11</sup> Furthermore, the “ideal worker” norm – long working hours, availability to work overtime and to travel for work and unbroken tenure – reflects a traditional male role of breadwinner, unencumbered by the often unpredictable and time-consuming demands of care responsibilities.<sup>12</sup> As such, work-care conflict reflects gender differentiation in the workplace – the constitution and reconstitution of an ideal worker.<sup>13</sup> Many men and women do not fit these traditional roles, and most women, participating in increasing numbers in the paid workforce, continue to undertake the bulk of care responsibilities.<sup>14</sup> The conflict arises out of “practices and cultures reflecting and reinforcing assumptions about traditional gender roles and competencies, the prioritisation of paid work over unpaid caring labour, and work and family occupying separate spheres”.<sup>15</sup>

The successful integration of work and parenting warrants constant consideration because of its importance to the democratic health of society, the levels of equity and equality within that society and, of course, to the individuals concerned. Existing regulation, which will briefly be discussed below and which consists of a combination of equality legislation and specific care-related rights contained in employment standards legislation (referred to as “specific rights regimes”), constantly needs to be

<sup>10</sup> L Dancaster & T Cohen “Workers with Family Responsibilities: a Comparative Analysis for the Legal Right to Request Flexible Working Arrangements in South Africa” (2010) 34 SAJLR 31 31.

<sup>11</sup> J Lewis “Employment and Care: The Policy Problem, Gender Equality and the Issue of Choice” (2006) JCPA 103 103.

<sup>12</sup> 104.

<sup>13</sup> 104.

<sup>14</sup> B Smith “Not the Baby and the Bathwater: Regulatory reform for Equality Laws to Address Work-Family Conflict” (2006) 28 Syd Law Rev 689 690.

<sup>15</sup> 690.

subjected to a fundamental and critical evaluation to test for its appropriateness in contributing to the integration of work and parenting.

Broadly speaking, the research will first consider the importance and dimensions of parenting, also in an attempt to provide a description of the phenomenon of parenting (in the sense of care) in the modern context. This is premised on the assumption that any attempt to regulate the integration of work and care demands a fundamental understanding of the phenomena to be regulated – as they exist today. Secondly, the research will provide a comprehensive analysis of the strength and weaknesses of existing modes of regulation of the interaction between work and parenting on a comparative basis. Thirdly, it is envisaged that proper consideration of the phenomena of parenting and work as well as proper appreciation of the strength and weaknesses of existing modes of regulation will lead to recommendations for legal change to the betterment of society and the individuals concerned.

## 1.1 A note on terminology

As discussed in chapter 2 below, the term used in this study to encompass the combination of paid work and the provision of (parental) care by employees, is “work-care integration”. As explained by Dancaster, the term “work-care” must be distinguished from commonly used terms such as “work-life” and “work-family”.<sup>16</sup> “Work-life” is considered too broad a term for this study as it extends to include other life activities like study, exercise, community work, hobbies and care of the elderly.<sup>17</sup> This study focuses on employees’ care activities in relation to their children and not on those activities that are undertaken by an employee outside of employment that are unrelated to the provision of (parental) care.<sup>18</sup> Due to South Africa’s diverse family structures and untraditional conceptions of “family”, the term “work-care” is also, in the context of this study, preferred above “work-family”.<sup>19</sup> The term “work-family” is

<sup>16</sup> L Dancaster *State and Employer Involvement in Work-Care Integration in South Africa* PhD thesis University of Sydney Business School (2012) 22.

<sup>17</sup> S Singh “Measuring work life balance in India” (2014) *International Journal of Advance Research in Computer Science and Management Studies* 35 35; Dancaster *State and Employer Involvement* 22.

<sup>18</sup> Dancaster *State and Employer Involvement* 22.

<sup>19</sup> See text to ch 2 part 4 below.

however retained in circumstances where reference is made to studies that have used that particular term and where the concept of “family” is specifically discussed.

## **2 Rationale for the study: juxtaposing the recognition of the importance of care and work with existing modes of regulation in South Africa**

As alluded to in the introduction, the rationale for this research is to be found in the joint consideration of the nature and importance of parenting in modern society and (the deficiencies of) existing modes of regulation of the interaction between work and parenting. Although these topics are discussed in more detail in the course of this study, it is useful at this stage briefly to consider each one below.

### **2.1 Recognition of the nature and importance of parenting in the context of the need to work**

Families exist in all societies and in this sense are global phenomena.<sup>20</sup> At international level, there is widespread recognition of the importance of the “family” and, by implication and sometimes in express terms, parenting and care as part of family life. The “family” is entitled to special protection under several international and regional legal instruments. For example, article 16 of the Universal Declaration of Human Rights of 1948 (“UDHR”)<sup>21</sup> and Article 23 of the International Covenant on Economic, Social and Cultural Rights 1966<sup>22</sup> (“ICESCR”) stipulate that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. The International Covenant on Civil and Political Rights 1966<sup>23</sup>

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<sup>20</sup> A Diduck & F Raday “Introduction: family – an international affair” (2007) 8 *Int J Law Context* 187187.

<sup>21</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III). As a resolution, the UDHR does not, despite common assumptions to the contrary, have formal legal binding power. A number of its provisions have, however, become part of customary international law. See Human Rights Education Associates “The right to family” (2003) *Human Rights Education Associates* <[http://archive.hrea.net/wv/index.php?base\\_id=158](http://archive.hrea.net/wv/index.php?base_id=158)> (accessed 27-11-2013) and MA Glendon “The Rule of Law in the Universal Declaration of Human Rights” (2004) *Nw.U.L Rev.* 67 71-72.

<sup>22</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3. Ratified by South Africa in 2015.

<sup>23</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171. Ratified by South Africa in 1998.

(“ICCPR”) states that “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”<sup>24</sup> Focusing specifically on child care, the Convention on the Rights of the Child 1990<sup>25</sup> provides in article 5 that:

“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

The protection of the family and the idea of care are also found at regional level in, for example, article 18 of the African Charter on the Rights and Welfare of the Child 1990<sup>26</sup>, article 18 of the African Charter on Human and People’s Rights 1981<sup>27</sup> and article 8 of the African Youth Charter 2006<sup>28</sup>.

At domestic level in South Africa, express recognition and support of the importance of the family and parenting has recently shown renewed impetus with the approval in September 2011 of the Green Paper on Families (Promoting Family Life and Strengthening Families in South Africa)<sup>29</sup> and government approval of the Draft White Paper on Families in South Africa.<sup>30</sup> The Green Paper has the stated aim to “promote family life and strengthen families in South Africa”<sup>31</sup> and aims to put forward proposals

<sup>24</sup> Art 10.

<sup>25</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. Ratified by South Africa in 1995.

<sup>26</sup> African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/153/Rev.2 (1990). Ratified by South Africa in 2000.

<sup>27</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (“ACHPR”). Also known as the Banjul Charter. It was ratified by South Africa in 1996.

<sup>28</sup> African Youth Charter (adopted on 2 July 2006, entered into force 8 August 2009). Ratified by South Africa in 2009.

<sup>29</sup> GN 756 in GG 34692 of 19-10-2011.

<sup>30</sup> Department of Social Development *Draft White Paper on Families* (2012) 1-64. This draft was approved by Cabinet on 26 June 2013.

<sup>31</sup> GN 756 in GG 34692 of 19-10-2011 21.

on how families should be supported in order to flourish and function optimally. One of the Draft White Paper's<sup>32</sup> recommended strategies is to support the family in its caregiving functions through mechanisms and policies such as paternity and parental leave, the facilitation of a balance between work and family responsibilities and the promotion of "equal parenting care and responsibility between fathers and mothers (gender equality in parenting)".<sup>33</sup> It is documented that the family has been and continues to be the principal institution in society, playing a vital role in socialisation, nurturing and care, as well as determining the conditions of social reproduction, due to the family being both a biological and a social unit.<sup>34</sup> Both the Green and (Draft) White Papers recognise that the family is under threat and unable to play its critical roles of socialisation, nurturing, care and protection effectively due to various societal forces, of which gender inequality is one.<sup>35</sup>

Parents have responsibilities towards their children. Section 28(1)(c) of the Constitution of the Republic of South Africa, 1996 ("Constitution") enshrines the child's right to "basic nutrition, shelter, basic health care services and social services". In order for parents to meet these basic needs, they must have the financial capability to do so. The average parent will only have the financial means to support their child(ren) if he or she is employed and generates an income. Apart from these core (material, safety and health) responsibilities, parents also have more intangible nurturing and caregiving responsibilities, for example to be spontaneously available when their children need them and to attend school and sports events. The responsibilities of parents go beyond what they are obliged to do, to doing their best to secure the best outcomes for the child.<sup>36</sup> As such, achieving a balance between work and parenting is

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<sup>32</sup> 40.

<sup>33</sup> 41.

<sup>34</sup> 4. Also see Department of Social Development *Draft White Paper on Families* 8 where the family is viewed as "a key development imperative" and seeks to mainstream family issues into government-wide, policy-making initiatives in order to foster positive family well-being and overall socio-economic development in the country. Two of the three specific objectives are to (1) enhance the socialising, caring, nurturing and supporting capabilities of families so that their members are able to contribute effectively to the overall development of the country and (2) to empower families and their members by enabling them to identify, negotiate around, and maximize economic, labour market, and other opportunities available in the country.

<sup>35</sup> Department of Social Development *Draft White Paper on Families* 23.

<sup>36</sup> K Bartlett "Re-Expressing Parenthood" (1988) *Yale LJ* 293 299.

extremely important for both individuals and society because an appropriate balance between work and family life may help to achieve government's objectives: "to improve outcomes for family members, to improve equity and to improve society".<sup>37</sup>

At the same time, men and women seeking to balance work and family life today face increasing challenges.<sup>38</sup> The challenge involved in striking the right balance between work and family responsibilities is changing as the nature of families (as well as parenting and care) and its relationship with the economy evolves.<sup>39</sup> What parents are able to do, the extent to which they can fulfil their responsibilities, is affected by external factors that may be beyond their control.<sup>40</sup> Long and/or inflexible working hours are among these factors and may constrain parents' ability to fulfil the full array of caregiving responsibilities. Furthermore, even with high and rising employment rates, women remain the primary caregivers. As mentioned above, women have increased their labour force participation, but men's contribution to work in the home has not increased at a corresponding rate. There has also been little change in labour market policies and workplaces, which continue to be based on the presumption of an "ideal worker" with little domestic responsibilities, full-time work and little or no time off to attend to caregiving demands of the family.<sup>41</sup> Women, much more than men, now juggle dual responsibilities in the home and the workplace.<sup>42</sup>

## 2.2 Existing modes of regulation

Given these remarks, it is not surprising that in several countries there is a progressive trend towards state intervention in the labour market to assist workers to balance work and family life and to enable employers to attract and retain suitable employees to meet the needs of the enterprise.<sup>43</sup> However, as rightly stated by Cohen and

<sup>37</sup> Her Majesty's Government "Building on progress: Families" (2007) *HM Government* <[http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.cabinetoffice.gov.uk/policy\\_review/documents/families.pdf](http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.cabinetoffice.gov.uk/policy_review/documents/families.pdf)> (accessed 11-11-2013) 28.

<sup>38</sup> Bianchi (2011) *The Future of Children (Work and Family)* 28.

<sup>39</sup> Her Majesty's Government "Building on progress: Families" (2007) *HM Government* 31.

<sup>40</sup> Bartlett (1988) *Yale LJ* 299.

<sup>41</sup> S Charlesworth "Managing Work and Family in the 'Shadow' of Anti-discrimination Law" in Murray J (eds) *Work, Family and the Law* (2005) 95.

<sup>42</sup> J Gornick & M Meyers *Families That Work* (2003) 7; Department of Social Development *Draft White Paper on Families* 22.

<sup>43</sup> Dancaster & Baird (2008) *ILJ* 24.

Dancaster, both the South African government and employers have been slow to respond to the needs of employees<sup>44</sup> as caregivers and to prioritise the accommodation of employees with family responsibilities.<sup>45</sup>

An initial comparative survey shows that, at domestic level across countries, attempts at reconciling work and parenting have a fairly settled look and exists in a combination of (possible) constitutional protection (or at least a constitutional statement of intent) and, at the level of subordinate legislation, a combination of the use of equality legislation and minimum standards legislation. It is trite, however, that the primary legal operationalisation of the integration of work and care happens – and should happen – at the level of subordinate legislation: either through equality law or specific rights in employment standards legislation or both.

### *2.2.1 Constitutional protection*

In South Africa there is no specific provision protecting family life and care giving responsibilities – also in its relationship with the workplace – in the Constitution.<sup>46</sup> However, the rights to equality,<sup>47</sup> dignity<sup>48</sup>, freedom of association,<sup>49</sup> fair labour practices<sup>50</sup> and, arguably, privacy<sup>51</sup> may be interpreted to afford protection to the institution of family life (and parental care) as such, and also in the context of the workplace. This is reinforced by section 28 of the Constitution, which enshrines the

<sup>44</sup> In the case of *Kylie v CCMA* 2010 4 SA 383 (LAC) the Labour Appeal Court held that the wording of the definition of employee in the LRA is certainly wide enough to encompass those without a valid contract of employment and that constitutional rights, including the right to fair labour practices, vest in everyone, even if no formal contract of employment is concluded and even if the work is illegal. Also see *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 71999 where Justice O'Regan decided that members of the SANDF could be seen as "workers" as used in section 23 of the Constitution (the section pertaining to labour relations). This gave these members the constitutional right to form and join trade unions.

<sup>45</sup> T Cohen & L Dancaster "Family Responsibility Discrimination – a Non-starter?" (2009) 20 *Stell LR* 221 222.

<sup>46</sup> S 28(2) of the Constitution.

<sup>47</sup> S 9.

<sup>48</sup> S 10 and *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).

<sup>49</sup> S 18 of the Constitution.

<sup>50</sup> S 23(1).

<sup>51</sup> S 14.

child's right to, at least, basic nutrition, shelter, basic health care services and social services.<sup>52</sup> The identification of even an implied constitutional imperative to protect the family and parenting is important, as it may and should serve as catalyst for development of the (subordinate) legal integration of work and parenting. What matters on a day-to-day basis is how the integration of work and care actually is operationalised at subordinate level through legislation.

## 2 2 2 *Legislation*

Legislation aimed at reconciling work and parenting, or which may be used to reconcile work and parenting, comes in two forms: equality legislation and what may be called employment standards legislation (or “specific rights”, typically contained in employment standards legislation).

### 2 2 2 1 Equality legislation

As mentioned, one of the immediate challenges to the integration of work and parenting is underlying gender inequality. This means that at face value, equality legislation seems an obvious choice to facilitate the integration of work and parenting.

In the South African context, the Employment Equity Act 55 of 1998 (“EEA”) was enacted to give effect to section 9 of the Constitution and is the primary statute that regulates equality in employment.<sup>53</sup> If one takes a broad and also comparative view of anti-discrimination legislation it becomes clear that there are different legislative mechanisms through which the integration of work and care may be promoted based on considerations of equality. At a first level, most countries prohibit direct and indirect discrimination based on pregnancy, gender and sex. A prohibition on pregnancy discrimination protects women during the first steps towards and of caregiving. To the extent that women remain primary caregivers after birth, it is a small step to argue that workplace prejudice based on caregiving responsibility may constitute sex (or gender) discrimination. Secondly, there are those countries, such as South Africa, which go a step further and also prohibit discrimination on the basis of family responsibility or status, defined, in the South African context as the “responsibility of employees in

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<sup>52</sup> S 28(1)(c).

<sup>53</sup> O Dupper “Equality in the workplace” in AJ van der Walt, R le Roux & A Govindjee (eds) *Labour Law in Context* (2012) 53.

relation to their spouse, partner, dependent children or members of their immediate family that need their care or support".<sup>54</sup> Thirdly, there is the elevation of a prohibition on discrimination to a duty on employers to accommodate employees with caregiving responsibilities. In the South African context, section 5 of the EEA states that "[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice". This may be interpreted to mean that, because of recognition of family responsibility as a listed ground of discrimination, there is a direct duty on employers to accommodate employees with family responsibilities and that the absence of such accommodation will constitute discrimination. Fourthly, perhaps in a more indirect way, and to the extent that caregiving remains a gender issue and women are a designated group for purposes of affirmative action in the South African context, the EEA advocates that steps (as part of affirmative action) must be taken to "reasonably accommodate" women through a modification or adjustment to a job or working environment to promote equal opportunity and treatment in the workplace. As such, the EEA seems to recognise that in order for employees in general, and women in particular, to combine their work and care responsibilities successfully, baseline protection against discrimination should be augmented by proactive measures to reduce the conflict inherent in their dual roles.<sup>55</sup>

What this calls for is proper consideration of the success or otherwise of equality legislation to contribute to the integration of work and care. Intuitively – at least in the South African context – the feeling persists that the promise of equality law to promote the integration of work and parenting is a hollow one. There may be many reasons for this. As stated by Garbers, the concept of discrimination itself is fraught with difficulties – "all of which combine to act as a barrier to effective enforcement of anti-discrimination protection through litigation".<sup>56</sup> No judgment regarding family-responsibility discrimination matters, brought by employees with childcare

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<sup>54</sup> S 1 of the EEA.

<sup>55</sup> T Cohen & L Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in O Dupper O & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2010) 211.

<sup>56</sup> C Garbers "The prohibition of discrimination in employment: Performance and prognosis in a transformative context" in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 18.

responsibilities, has been delivered by the labour courts in the 19 years since the EEA's enactment.

Moreover, to the extent that South African discrimination legislation expressly calls for accommodation, the EEA is "silent on the extent of accommodation required and the determination of reasonableness".<sup>57</sup> Furthermore, it is generally acknowledged that legislation has not been successful in effecting gender transformation of workplaces at especially higher levels of employment (in terms of both competing and progressing in the workplace).<sup>58</sup>

#### 2 2 2 2 Employment standards legislation and specific rights

An initial comparative survey shows that many countries have provisions in employment standards legislation to provide to a greater or lesser extent for the integration of work and caregiving responsibilities. The two main areas of regulation relate to time off or leave to care for dependents (leave entitlements for caregivers) and flexibility with regards to work arrangements as longer-term measures to accommodate employees who provide ongoing care.<sup>59</sup> At the same time, it must be recognised that there may be overlap between the two approaches – sufficient time off may provide a good measure of flexibility in working.

Cohen and Dancaster distinguish between four types of time off/leave provisions:

- 1 time off for mothers (maternity leave) at the time of the birth of a child;
- 2 time off for fathers (paternity leave) at the time of the birth of a child;
- 3 time off to provide care during the early years of a child's development (parental leave); and
- 4 emergency leave covering situations such as the sudden illness of a child or the last-minute unavailability of a substitute caregiver.<sup>60</sup>

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<sup>57</sup> Cohen & Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in *Equality in the Workplace: Reflections from South Africa and Beyond* (2010) 211.

<sup>58</sup> Cohen & Dancaster (2009) *Stell LR* 227.

<sup>59</sup> Dancaster & Cohen (2010) *SAJLR* 33.

<sup>60</sup> 33.

In the South African context, the regulation of the integration of work and care also exists through the impact of contractual arrangements and collective agreements – particularly collective agreements concluded at the level of bargaining councils.<sup>61</sup> It is true that legislation such as the BCEA limits the employer's freedom to impose its own terms and conditions of employment – a contract may not include terms less favourable to the employee than the relevant provisions of the BCEA.<sup>62</sup> At the same time, however, the contract of employment is the result of an inherently unequal bargaining relationship and one can reasonably expect, in the absence of a benevolent employer, no more than minimum compliance with legislation. In contrast, collective agreements, particularly bargaining council agreements, are the result of a much more equalised bargaining power between employers and employees.

A first reading of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") already makes it clear that the specific rights providing a basis for integration of work and care are weak. Maternity leave is limited in duration and unpaid.<sup>63</sup> Paternity, parental and emergency care leave are all, unsatisfactorily, combined in one section<sup>64</sup> and limited to three days. As far as flexibility is concerned, the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies<sup>65</sup> and the Code of Good Practice on the Arrangement of Working Time<sup>66</sup> provide "a measure of appreciation for flexibility, but only serve as non-binding guidelines".<sup>67</sup> The combination of limited provision for maternity leave, restrictive provision for family responsibility leave and weak provision for broad flexibility in working arrangements seems to make it clear that the accommodation of care responsibilities in South African workplaces is largely perceived as an exception to the rule (as opposed to the integration of work and care). Other legislative options, such as provision for parental

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<sup>61</sup> Also see section 31 of the Labour Relations Act 66 of 1995 ("LRA").

<sup>62</sup> A van Niekerk, N Smit, MA Christianson, M McGregor & BPS van Eck *Law@work* 3 ed (2014) 5.

<sup>63</sup> An employee is entitled to at least four consecutive months' maternity leave (see s 25 of the BCEA). Employees on maternity leave are able to claim up to 17, 32 weeks' payment from the UIF with the percentage payment related to earnings.

<sup>64</sup> S 27 of the BCEA.

<sup>65</sup> GN 1358 in GG 27866 of 04-08-2005.

<sup>66</sup> GN 1440 in GG 19453 of 13-11-1998.

<sup>67</sup> T Cohen "The Efficacy of International Standards in Countering Gender Inequality in the Workplace" (2012) 33 *ILJ* 19 29.

and other family leave, flexible working arrangements and part-time work are required in South Africa to ensure that employees with caregiving responsibilities are not forced, through lack of choice, to give up their employment in order to attend to their care demands.<sup>68</sup> Family-friendly initiatives have the potential to address the assumption that work and care constitute two different spheres and should be occupied by different genders.<sup>69</sup>

An initial reading and comparative analysis of employment standards legislation shows a variety of different solutions and sometimes big differences in the scope and levels of protection afforded caregiving employees through specific rights in developing and developed countries. What it also shows is that South Africa seems to lag behind in employment standards legislation. At the same time, it has to be accepted that differences in the scope and level of protection may be due to a variety of reasons, such as a country's socio-economic history, legal tradition, and level of economic development as well as the affordability of different measures. In this regard, part of the study will be devoted to a broad survey of work-care legislation in both developed and developing countries. The aim and value of such a comprehensive comparative study will be in the search for trends and possibilities and the evaluation of their possible application in the South African context.<sup>70</sup> Particular attention will be

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<sup>68</sup> Dancaster & Baird (2008) *ILJ* 42.

<sup>69</sup> Smith (2006) *Syd Law Rev* 692.

<sup>70</sup> Multiple global trends have converged through the 1990's and into the 21<sup>st</sup> century to put pressure on governments to help meet the needs of families with young children – see Allen (2003) *Int J Soc Welf* 261. While many of these trends are similar across countries, different countries also have their own realities. In South Africa, mainly as a result of the care demands arising from the impact of HIV/AIDS, there are more concerns and challenges relating to care than many of those countries currently addressing work-family integration in national policy: see Dancaster & Baird (2008) *ILJ* 23. Home-based care for people with AIDS has increased the physical, emotional, financial and time burdens of families, with women carrying a disproportionate share of these burdens. The unequal sharing of AIDS caring responsibilities affect women in the labour market negatively because they are significantly more likely to take (usually unpaid) leave from work to provide care and for longer periods. They are not always able to take leave to provide care and often have to quit or lose their jobs involuntarily. See O Akintola "Towards equal sharing of AIDS caring responsibilities: learning from Africa" (2008) *United Nations Expert Group Meeting on 'The equal sharing of responsibilities between women and men, including caregiving in the context of HIV/AIDS'*, 6-9 October 2008, Geneva, Switzerland <<http://www.un.org/womenwatch/daw/egm/equalsharing/Olagoke%20Akintola%20EGM-ESOR-2008-EP.5.pdf>> (accessed 25-05-2017) 4.

paid to a comparison of South Africa with the other members of the BRICS-association: Brazil, Russia, India and China. These countries, like South Africa, are all recognised to have large, fast-growing and (at least regionally) influential economies. Initial research shows that most of these countries provide for a much higher level of maternity benefits than South Africa – both in terms of the period of leave and level of benefits, in most instances on full pay by either the employer or the state. However, these countries, like South Africa, have weak levels of protection for paternity leave and the extended notion of parental care.<sup>71</sup> Such a comparison might be useful to control for the possibility that differences or similarities in regulation between South Africa and other countries are the result of developmental levels. Such a comparative survey of work-care legislation – both broad and focused – becomes even more significant if one accepts that anti-discrimination legislation has largely proved itself to be ineffective in facilitating the integration of work and care in South Africa.

### **3 Research questions and outline of the study**

The central research question which this thesis will seek to address is how, if at all, South African legislation should be adapted to cater for the integration of the demands of modern parental caregiving with work.

Before further addressing the research question, it must be noted that the informal economy accounts for a large part of the economy in South Africa.<sup>72</sup> These workers in

<sup>71</sup> See ch 7 below. Only Brazil and India (in the case of Central Government employees) provide for paternity leave and only Russia and India (in the case of Central Government employees) for parental leave. For India, see the Central Civil Services (Leave) Rules; for the other countries see B Sorj “Brazil” (2017) *International Review of Leave Policies and Research* <[http://www.leavenetwork.org/fileadmin/Leavenetwork/Country\\_notes/2017/Brazil\\_2017\\_final.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Country_notes/2017/Brazil_2017_final.pdf)> (accessed 19-08-2017); O Sinyavskaya “Russian Federation” (2016) *International Network on Leave Policies & Research* <[http://www.leavenetwork.org/fileadmin/Leavenetwork/Country\\_notes/2014/Russian\\_Federation.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Country_notes/2014/Russian_Federation.pdf)> (accessed 19-08-2017) and F Wu “China” (2017) *International Review of Leave Policies and Research* <[http://www.leavenetwork.org/fileadmin/Leavenetwork/Country\\_notes/2017/China\\_2017\\_FINAL.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Country_notes/2017/China_2017_FINAL.pdf)> (accessed 19-08-2017)

<sup>72</sup> International Labour Office “Transitioning from the informal to the formal economy Report V(1)” (2014) *International Labour Office* <[http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiL0OPw1sLXAhUkL8AKHQ3nChQQFggIMAA&url=http%3A%2F%2Fwww.skillsforemployment.org%2Fwcmstest4%2Fidcplg%3FIdcService%3DGET\\_FILE%26dID%3D181570%26dDocName%3DWCMSTEST4\\_123048%26allowInterrupt%3D1&usg=AOvVaw101U4FTO9MrxtMsSMpbq2H](http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiL0OPw1sLXAhUkL8AKHQ3nChQQFggIMAA&url=http%3A%2F%2Fwww.skillsforemployment.org%2Fwcmstest4%2Fidcplg%3FIdcService%3DGET_FILE%26dID%3D181570%26dDocName%3DWCMSTEST4_123048%26allowInterrupt%3D1&usg=AOvVaw101U4FTO9MrxtMsSMpbq2H)> (accessed 15-11-2017) 1.

the informal economy are not “employees” who are recognized, registered, regulated or protected under labour legislation and social protection, for example, when their employment status is ambiguous, and are therefore not able to enjoy, exercise or defend their fundamental rights.<sup>73</sup> Although these workers are particularly vulnerable to various risks and contingencies and therefore most in need, most have little or no social protection and receive little or no social security, either from their employer or from the government.<sup>74</sup> Beyond traditional social security coverage, workers in the informal economy are without social protection in such areas as education, skillbuilding, training, health care and childcare, which are particularly important for women workers. The lack of social protection is a critical aspect of the social exclusion of workers in the informal economy.<sup>75</sup> These workers need to be included in some kind of social protection scheme and existing legal protection needs to be extended to cover these vulnerable category of workers so that they can, *inter alia*, benefit from work-care legislative provisions.<sup>76</sup>

In addressing the research question, a number of related research questions will be considered, questions also related to the sequence of chapters of this study. In chapter 2 below, the enquiry will be into the importance of care and a description of and distinction between the concepts of “family”, “parenting” and “care”. Specific questions that will be considered include the following: If the “family” is seen as the cornerstone of society, how does this concept relate to the concepts of “parenting” and “care”? What are the dimensions of parenting and care, in terms of content and in terms of duration (the different stages of development)? What is the importance of care in and to society, in terms of a multi-disciplinary evaluation? What are the structures of care in modern society in general, and in South African society in particular? What are the

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<sup>73</sup> International Labour Office “Transitioning from the informal to the formal economy Report V(1)” *International Labour Office* 10, 31 and E Fourie “Exploring innovative solutions to extend social protection to vulnerable women workers in the informal economy” (2016) 37 *ILJ* 831 831, 840.

<sup>74</sup> International Labour Office “Transitioning from the informal to the formal economy Report V(1)” *International Labour Office* 4, 68 and Fourie (2016) 37 *ILJ* 831, 840.

<sup>75</sup> International Labour Office “Transitioning from the informal to the formal economy Report V(1)” *International Labour Office* 69 and Fourie (2016) 37 *ILJ* 831, 840

<sup>76</sup> International Labour Office “Transitioning from the informal to the formal economy Report V(1)” *International Labour Office* 31, 33 and Fourie (2016) 37 *ILJ* 831, 840.

reasons, if any, for changes in the structure of care in South Africa? In terms of the broad goal of this study, which is about the appropriate regulation of the integration of work and care, it is submitted that these questions are of vital importance: the appropriate regulation of any phenomenon in society depends, in the first instance, on a proper appreciation of what you are trying to regulate.

After chapter 2, the focus will be on the evaluation of existing modes of regulation of the integration of work and care on a comparative basis. Chapter 3 will provide the baseline and consider the extent to which the need for the integration of work and care has been recognised at international, regional and constitutional level. However, as mentioned above, the true domestic operationalisation of the integration of work and care happens within countries through equality legislation and/or specific rights contained in employment standards legislation. From chapter 4 onwards, the focus be on a comparative analysis of such domestic operationalisation. In doing so, a comparison will be made between South Africa and four developed and four developing countries. The developed countries are the United Kingdom (“UK”) and Sweden (in the European context), as well as Canada and the United States of America (“USA”). The developing countries, chosen for the reasons mentioned earlier and explained more fully later, are Brazil, Russia, India and China. In this regard, it is important to note that the goal of this study is not to provide a comprehensive comparative analysis of the integration of work and care. Rather, the goal is to provide a representative comparative analysis inclusive of both developed and developing countries. It is submitted that a sample of nine countries across the developmental divide is not only sufficient to draw valid insights and comparisons about the legal regulation of the integration of work and care, but also to control for the possible impact of developmental levels on the level of benefits in different societies.

This in mind, chapter 4 will consider the effectiveness of equality legislation to promote the integration of work and care. Its focus will primarily be on South Africa. A number of underlying questions – especially as far as South Africa is concerned – guides this chapter and include the following: What has been the experience in South Africa with discrimination litigation? Has the express recognition of “family responsibility” (apart from pregnancy, sex and gender discrimination) as a ground of discrimination made any significant difference to the integration of work and caregiving? Can it be said that recognition of a duty to accommodate in the EEA and the phenomenon of gender based affirmative action have made a significant difference

to the integration of work and care? In addition, to the extent that discrimination law has been a failure in facilitating the integration of work and caregiving – what are the essential reasons for this and can anti-discrimination law and its enforcement be adapted to make such a contribution?

Chapters 5 to 8 will consider the specific rights regimes on the integration of work and care of the different countries that form part of this study. In chapter 5 the focus will be on the UK and Sweden in the European context, chapter 6 will be devoted to Canada and the USA, chapter 7 to the BRIC countries and chapter 8 to South Africa. In doing so, and in line with the comments made earlier about the structure of specific rights regimes across countries, specific attention will be paid to the legal regulation of time off/ leave provisions in these countries, as well as the legal approach to the broader concept of flexible working while doing permanent work. This comparison will provide answers to different questions: What are the worldwide trends in employment standards legislation to provide for the integration of work and caregiving – in terms of both content and levels of protection? Are these trends the same across developed and developing countries? How does South African standards legislation compare in light of these trends? What are the possibilities of adapting existing standards in South Africa to provide for increased integration of work and caregiving?

Chapter 9 will summarise the findings of the study and make recommendations on the way forward for South Africa as to appropriate regulation of the integration of work and care. At this early stage, it may be submitted that perhaps the real value of this research will be at a more fundamental level. As the preceding discussion shows, the search for practical recommendations about the integration of work and care will, in effect, address three fundamental concerns:

- (1) proper recognition and preservation of the family, parenting and care as the cornerstone of the long-term health of a democratic society;
- (2) the promotion of equality in the South African society through the provision of solutions catering for the effective integration of women as primary care-givers into the workplace;
- (3) in general, and at the individual level, the promotion and preservation of the fundamental human rights of all workers as persons.

## CHAPTER 2: THE IMPORTANCE AND NATURE OF PARENTAL CAREGIVING IN SOCIETY

"The family is the place where we care for each other, where we practice consideration for each other. Caring families are the basis of a society that cares." <sup>77</sup>

### 1 Introduction

This chapter aims to describe the importance and nature of parental caregiving as preconditions for the further consideration of appropriate regulation of the integration of work and parental care. In doing so, three topics will be addressed.

First, the chapter will illustrate the importance of (adequate) parental caregiving, both to children and to society. It will be shown that caregiving is a universally inevitable part of the human condition<sup>78</sup> and caring for babies and young children is one of the most important functions in all societies and cultures.<sup>79</sup> In most societies, the family is the major unit in which care-based socialisation happens and no society is possible without adequate socialisation of its young,<sup>80</sup> the benefits of which, in turn, are the social and economic empowerment of individuals and societies.<sup>81</sup> Enabling parents, specifically women, to fulfil their caregiving responsibilities, is essential<sup>82</sup> and has far-reaching benefits for employers, parents, children, the economy and society as a whole<sup>83</sup>. Caregiving maintains social stability and keeps a society working.<sup>84</sup> The

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<sup>77</sup> This much quoted statement about the nature of family life comes from a speech made by James Callaghan when he was Labour Prime Minister of the United Kingdom in 1978. DHJ Morgan *The Family, Politics and Social Theory* (1975) 59.

<sup>78</sup> N Busby & G James "Introduction" in N Busby & G James (eds) *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (2011) 2.

<sup>79</sup> H O'Connell *Women and the family* (1994) 38.

<sup>80</sup> SE Barkan & S Foundation *Social problems: continuity and change* (2013) 503.

<sup>81</sup> V Hildebrand *Parenting and Teaching Young Children* (1990) 370; B Turner *Classical Sociology* (1999) 241 and J Muncie, M Wetherell, M Langan, R Dallos & A Cochrane *Understanding The Family* 2 ed (1999) 23.

<sup>82</sup> Busby & James "Introduction" in *Families, Care-giving and Paid Work* 2.

<sup>83</sup> 3.

<sup>84</sup> Barkan & Foundation *Social problems: continuity and change* 105; Hildebrand *Parenting and Teaching Young Children* 370; Turner *Classical Sociology* 241 and Muncie et al *Understanding The Family* 23.

need to work and its associated demands creates a continuous challenge to adequate parental caregiving.<sup>85</sup>

Secondly, the gender dimension of parental caregiving will be considered. It will be shown that although parents are entrusted with the primary responsibility for the care of children,<sup>86</sup> women are the primary carers of children in every society.<sup>87</sup> Busby and James note that the social construction of caregiving is primarily a female concern and gender remains a central issue at the heart of the consideration of the integration of work and care.<sup>88</sup> Working women, despite their progressive entry into the labour market, devote themselves to their family and caregiving responsibilities<sup>89</sup> and continue to be primarily responsible for the care of minor children in their households and families.<sup>90</sup> The burden of childcare responsibilities creates a “motherhood penalty.”<sup>91</sup> This “penalty” may be characterised by “overt denials of promotion to women following childbirth or rejections for new jobs due to a perceived inverse relationship between work productivity and motherhood”.<sup>92</sup> A woman’s caregiving responsibilities are therefore determining factors with respect to whether and how she participates in the labour market.<sup>93</sup> Given the fact that women tend to devote more time to unpaid caregiving work, childcare tends to affect their decision to participate in the labour market as well as the number of hours they work, negatively.<sup>94</sup> This means the general under-representativeness of females in the labour market and their exclusion from higher levels of employment and from certain occupations are all the result of their caregiving responsibilities. While females are now a strong presence in the workplace, Collins remarks that “women’s biological role in procreation continues

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<sup>85</sup> Busby & James “Introduction” in *Families, Care-giving and Paid Work* 2.

<sup>86</sup> J Bridgeman “Accountability, Support or Relationship? Conceptions of Parental Responsibility” (2007) 58 *NILQ* 307 307.

<sup>87</sup> O’Connell *Women and the family* 38.

<sup>88</sup> Busby & James “Introduction” in *Families, Care-giving and Paid Work* 5.

<sup>89</sup> A Bosch *The SABPP Women’s Report* (2011) 22.

<sup>90</sup> UNECA *5 years after Beijing: Assessing women and poverty and the economic empowerment of women* (2001) 5.

<sup>91</sup> RDSD Alwis “Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation” (2011) 18 *Duke J Gender L & Pol'y* 309 309.

<sup>92</sup> 309.

<sup>93</sup> Bosch *The SABPP Women’s Report* 22.

<sup>94</sup> 22.

to disadvantage both their ability to break the glass ceiling and men's ability to fully participate in child rearing and other care-work in the home".<sup>95</sup> For many women, workplace opportunities are limited because of childcare responsibilities and their role as primary carer for the family.<sup>96</sup> As far as regulation of work and care is concerned, it may already be said that the gender dimension of caregiving – as will be discussed in chapter 4 below – creates the constant risk of falling into the "discrimination-trap": the almost inevitable idea that discrimination law is the most appropriate area of our law to locate effective regulation of the integration of work and care as opposed to a possible tailor-made regime of specific rights.

Thirdly, this chapter will consider the changing nature of and the different structures within which parental caregiving takes place. The premise here is that sensible regulation has to start with a proper understanding of the social phenomenon one is attempting to regulate. The ideas of "family" and "parenting" in the twenty first century have changed from what existed in past generations.<sup>97</sup> Current societal challenges are more pervasive<sup>98</sup> and the evolution of the "family" – the traditional structure within which parental caregiving takes place – seems widespread across many countries and happens irrespective of culture and religion.<sup>99</sup> Families, both in structure and content, continue to change and evolve<sup>100</sup> and parenting has adapted accordingly.<sup>101</sup> Various "new" forms of family have come into being as a result of demographic, social,

<sup>95</sup> CG Collins "Home Alone: Is This the Best We Can Do? A Proposal to Amend Pending Parental Leave Legislation" (2009) 29 *J L & Pol'y* 322 322.

<sup>96</sup> G James "Mothers and fathers as parents and workers: family friendly employment policies in an era of shifting identities" (2009) 31 *J Soc Wel & FamL* 271 273.

<sup>97</sup> A Brown, R Gourdine, S Waites & A Owens "Parenting in the Twenty-First Century: An Introduction" (2013) *J Hum Behav Soc Environ* 109 109.

<sup>98</sup> 109.

<sup>99</sup> P Galea "Cohabitation, single parenting, extended-family parenting, and the role of kinship and religion" (2011) *IJF* 163 176.

<sup>100</sup> J DeFrain, G Brand, J Friesen & D Swanson "Creating a Strong Family: Why Are Families So Important?" (2008) *Nebguide University of Nebraska* <<http://extensionpublications.unl.edu/assets/pdf/g1890.pdf>> (accessed 15-02-2014) 1.

<sup>101</sup> Brown et al (2013) *J Hum Behav Soc Environ* 109.

economic and ethnic changes and circumstances<sup>102</sup> and the "blended" family<sup>103</sup> is nowadays regarded as the norm more often than the exception.<sup>104</sup> These significant changes in the make-up of modern family life have led to the degeneration of the nuclear family<sup>105</sup> and, inevitably, to changes in parenting. Despite the frequent use of the concepts "family", "parenting" and "care" in (multidisciplinary) scholarly works, proper appreciation of the meaning of these phenomena remains deficient and a challenge to all researchers.<sup>106</sup> This inevitably raises the question – for purposes of determination of appropriate regulation – of how to define and describe the nature of parental care, the legitimate structures within which childcare takes and should take place, and what may legitimately be described as child "care".<sup>107</sup> At the outset, however, it may be said that this thesis focuses on the integration of parenting and work, where the word "parenting" is used in the sense of the provision of parental care to dependent children. As such, this thesis is not about "work-life" and "work-family" integration. The use of the term "parenting" – in the sense of dependent childcare – as opposed to "family", is a deliberate attempt to avoid the potential restrictions that traditional conceptions of "family" may have. This is specifically the case in the South African context where family configurations (as caregiving structures) are particularly varied.<sup>108</sup> The inherent "work-care" emphasis brings with it the questions of what the concept of "care" means and to whom a relationship of care ought to be recognised.<sup>109</sup> The concepts of "family", "parenting" and "care", their relationship and interdependence will be discussed. The relationship between these concepts will also be illustrated as the chapter progresses.

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<sup>102</sup> K Galvin, L Bylund & B B *Family communication: cohesion and change* 6 ed (2004) 6-7; F Rothenbacher "Social Change in Europe and its Impact on Family Structures" in Eekelaar J and Nhlapo TJ (eds) *The Changing Family. International Perspectives on the Family and Family Law* (1998) 5-10.

<sup>103</sup> See the text to part 4 1 3 below.

<sup>104</sup> M Pieterse "In Loco Parentis: Third Party Parenting Rights in South Africa" (2000) 11 *Stell LR* 324 329.

<sup>105</sup> Pieterse (2000) *Stellenbosch Law Review* 329.

<sup>106</sup> L Waite "The Family as a Social Organization: Key Ideas for the Twenty-First Century" (2000) 29 *Contemporary Sociology* 463 468.

<sup>107</sup> Galea (2011) *IJJF* 176.

<sup>108</sup> Dancaster *State and Employer Involvement* 22.

<sup>109</sup> 22.

## 2 Importance of caregiving

It is believed that the family performs very special functions that no other social unit can perform.<sup>110</sup> A large and established body of research has shown the significance of the family “as a major institution for carrying out various functions that are associated with the social and economic empowerment of individuals and societies”.<sup>111</sup>

As the seat of the first integration of individuals into social life, families are the major source of their members’ basic personal and social identity, and capacity for love and intimacy. The family environment in which children grow up has been considered a key predictor of their future outcomes.<sup>112</sup> Children are vulnerable and therefore need to grow up in a nurturing and secure family that can ensure their survival, development, protection and participation in family and social life. Families give their members a sense of belonging and are responsible for imparting values and life skills.<sup>113</sup> Furthermore, “[f]amilies create security; they set limits on behaviour; and together with the spiritual foundation they provide, instil notions of discipline. All these factors are essential for the healthy development of the family and of any society.”<sup>114</sup>

### 2.1 The importance of parental caregiving to children

One of the functions, believed to be the most important function of the family, is the childcare and child socialisation function.<sup>115</sup> This may also be called the parenting

<sup>110</sup> Hildebrand *Parenting and Teaching Young Children* 369.

<sup>111</sup> Z Mokomane “Role of Families in Social and Economic Empowerment of Individuals” (2012) *United Nations Expert Group Meeting on “Promoting Empowerment of People in Achieving Poverty Eradication, Social Integration and Full Employment and Decent Work for All” 10-12 September 2012, United Nations, New York* <<http://www.un.org/esa/socdev/gms/docs/2012/FamilyZithaMokomane.pdf>> (accessed 24-05-2017) 2.

<sup>112</sup> 2.

<sup>113</sup> Ministry for Welfare and Population Development *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa* (1997) ch 8, s 1, para 15.

<sup>114</sup> Ministry for Welfare and Population Development *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa* (1997) Ch 8, s 1, para 15.

<sup>115</sup> Hildebrand *Parenting and Teaching Young Children* 370; Turner *Classical Sociology* 241; Muncie et al *Understanding The Family* 23. Some of the other functions of the family are: providing basic resources, providing support and empathy, providing kinship maintenance,

function of the family.<sup>116</sup> Parenting shows different stages of development and parents may, with time, modify their parenting behaviours to meet their children's developing needs.<sup>117</sup> The care that children require depends on the age of the child, their needs and their physical and mental well-being.<sup>118</sup> Parenting starts during pregnancy and is a lifelong endeavour – one never ceases to be a parent once you have that status.<sup>119</sup>

### *2 1 1 The prenatal period*

During pregnancy, the unborn child is affected by many decisions his or her parents make, particularly lifestyle choices.<sup>120</sup> Although many people believe that parenting begins with birth, the mother begins raising and nurturing a child well before birth.<sup>121</sup> Scientific evidence shows that an unborn baby is able to hear sounds, becomes aware of motion and possibly forms short-term memory from the fifth month on.<sup>122</sup> Several studies<sup>123</sup> show evidence that the unborn baby can become familiar with his or her parents' voices.<sup>124</sup> Other research indicates that by the seventh month, external schedule cues influence the unborn baby's sleep habits.<sup>125</sup> Based on this evidence, parenting actually begins well before birth.<sup>126</sup>

recreation, providing for sexual identity and providing for individual development. See J Belcher, E Peckuonis & B Deforge "Family Capital: Implications for Interventions with Families" (2011) 14 *J Fam Soc Work* 68 71; W Horn *The Family, Civil Society, and The State* (1999) unpublished paper presented at the *World Congress of Families II*, Geneva, Switzerland 14-19 November 1999 (copy on file with author) 1; Hildebrand *Parenting and Teaching Young Children* 369-372 and Galvin et al *Family communication* 170-180.

<sup>116</sup> Hildebrand *Parenting and Teaching Young Children* 370.

<sup>117</sup> L Gutman & L Feinstein "Parenting behaviours and children's development from infancy to early childhood: changes, continuities and contributions" (2010) 180 *Early Child Dev Care* 535 535.

<sup>118</sup> Bridgeman (2007) *NILQ* 309.

<sup>119</sup> M Smith "Good parenting: Making a difference" (2010) *Early Human Development* 689 690.

<sup>120</sup> J Rummel *Basics of Life* (2010) 103.

<sup>121</sup> 103.

<sup>122</sup> 103.

<sup>123</sup> See for example B Kisilevsky, S Hains, K Lee, XXH Huang, H Ye, K Zhang & Z Wang "Effects of experience on fetal voice recognition" (2003) 14 *Psychol Science* 220 220-224.

<sup>124</sup> Rummel *Basics of Life* 103.

<sup>125</sup> 103.

<sup>126</sup> M Hoghugh & N Long *Handbook of Parenting: Theory and research for practice* (2004) 56.

## 2 12 Newborns and infants

It is generally accepted that the needs of children are the most intense in the first five years of life when they are at their most dependent on parent figures for physical and emotional nurture and protection.<sup>127</sup> Good parenting delivered consistently over this crucial period enables attachment<sup>128</sup> and fosters the child's sense of basic security, which is essential for subsequent mental health and self-esteem.<sup>129</sup> Once acquired, these attributes constitute a firm foundation for the rest of childhood and adult life.<sup>130</sup>

Infancy requires the highest level of parental interaction and is the time that the task of parenting is most demanding.<sup>131</sup> The baby's attachment to the mother begins in the early weeks of infancy, when the baby begins to distinguish her from all other persons.<sup>132</sup> The first relationship will probably be with the mother, but this pattern of developing relationships and interactions with the infant, and sense of competency and empowerment as a parent, will also apply to the father and other carers.<sup>133</sup> The forming of attachments is the foundation of the infant/child's capacity to form and conduct relationships.<sup>134</sup> The quality of the child's attachment to the mother (or primary caregiver) determines the capacity to relate to others and to discover the world.<sup>135</sup>

Parental time at home during infancy is expected to influence child health because certain health-promoting activities, for example breastfeeding, may be incompatible with employment.<sup>136</sup> Gornick and Meyers remark that although research on this association is limited, indications are that parental time at home, especially during the first year, is advantageous for children.<sup>137</sup> Child-development research suggests that

<sup>127</sup> M Hoghughi & A Speight "Good enough parenting for all children – a strategy for a healthier society" (1998) *Arch Dis Child* 293 294.

<sup>128</sup> Attachment is "an emotional tie that results in the child wanting to be with the parent (or other caregiver), seeking him or her out, and being upset at separation from that person". See J Brooks *The Process of Parenting* (1981) 155.

<sup>129</sup> Hoghughi & Speight (1998) *Arch Dis Child* 294.

<sup>130</sup> 294.

<sup>131</sup> Smith (2010) *Early Human Development* 691.

<sup>132</sup> Brooks *The Process of Parenting* 126.

<sup>133</sup> Smith (2010) *Early Human Development* 692.

<sup>134</sup> Hoghughi & Long *Handbook of Parenting* 60-61.

<sup>135</sup> Brooks *The Process of Parenting* 155.

<sup>136</sup> J Gornick & M Meyers *Families That Work* (2003) 242-243.

<sup>137</sup> 243.

policies that increase parental time with children in the months after childbirth may have positive benefits for child development, including children's cognitive development.<sup>138</sup> Although the effects of maternal time at home are still uncertain, many well-researched studies found evidence that children whose mothers are employed during the first year may fare worse than those with non-employed mothers – specifically if the employment is full-time or during nonstandard hours.<sup>139</sup>

### 2 1 3 *Toddlers*

Toddlers are much more active than infants and are challenged with learning how to do simple tasks by themselves.<sup>140</sup> Parents are now heavily involved in showing the child how to do things and the child will often mimic the parents.<sup>141</sup> Toddlers need help to build their vocabulary, increase their communication skills and manage their emotions.<sup>142</sup>

### 2 1 4 *School-age children*

In a report by the United Kingdom's Department for Education and Skills it was found that during the school years, parents remain a major influence on their children's success.<sup>143</sup> Parents continue to serve as models and children develop similar qualities.<sup>144</sup>

The role of the parent changes as children require less direct physical care.<sup>145</sup> Parents may assist their children by encouraging social interactions and modelling proper social behaviours.<sup>146</sup>

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<sup>138</sup> 243.

<sup>139</sup> 244.

<sup>140</sup> Anonymous "Learning, Play, and Your 1- to 2-Year-Old" (1995-2016) *KidsHealth* <<http://kidshealth.org/en/parents/learn12yr.html>> (accessed 19-08-2016).

<sup>141</sup> Brooks *The Process of Parenting* 154.

<sup>142</sup> 154.

<sup>143</sup> Department for Education and Skills "Every Parent Matters" (2007) *Department for Education and Skills* <<http://webarchive.nationalarchives.gov.uk/20130401151715/> <<http://www.education.gov.uk/publications/eOrderingDownload/DFES-LKDA-2007.pdf>> (accessed 15-02-2014) 18.

<sup>144</sup> Brooks *The Process of Parenting* 211.

<sup>145</sup> 210.

<sup>146</sup> Hoghughi & Long *Handbook of Parenting* 63-64.

Parenting styles<sup>147</sup> at this stage of development diverge greatly with some parents, most probably higher income/higher skilled parents, becoming heavily involved in arranging organised activities and early learning programmes.<sup>148</sup>

## 2 1 5 Adolescents

A distinct and unique stage of parenthood includes supporting teenagers in the transition to adulthood.<sup>149</sup> During adolescence, children are beginning to form their identity and are testing and developing the interpersonal and occupational roles that they will assume as adults.<sup>150</sup> Parents sometimes find it difficult to accept a limited role during teen years, when children's decisions may have serious consequences.<sup>151</sup> Rummel notes that although adolescents look to peers and other adults for guidance on how to behave, parents remain influential in their development.<sup>152</sup> Research indicates that the most efficient parenting of teenagers requires a fine balancing act between supporting the independence of young people and relaxing boundaries on the one hand, while maintaining warm and authoritative parenting support on other.<sup>153</sup>

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<sup>147</sup> A parenting style is the "overall emotional climate in the home". See N Darling & L Steinberg "Parenting Style as Context An Integrative Model" (1993) *Psychol Bull* 488 487-496. There are four parenting styles: authoritative parenting, the authoritarian parenting style, permissive parenting and uninvolved parenting. See D Baumrind "Child care practices anteceding three patterns of preschool behavior" (1967) *Genet Psychol Monogr* 43 43-88; D Baumrind "Current patterns of parental authority" (1971) *Dev Psychol Monogr* 1 1-103 and D Baumrind "Parental disciplinary patterns and social competence in children" (1987) *Youth and Society* 238 238-276.

<sup>148</sup> Hoghughi & Long *Handbook of Parenting* 63-64.

<sup>149</sup> Department for Education and Skills "Every Parent Matters" (2007) *Department for Education and Skills* 28.

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<sup>150</sup> Rummel *Basics of Life* 104.

<sup>151</sup> Brooks *The Process of Parenting* 242.

<sup>152</sup> Rummel *Basics of Life* 105.

<sup>153</sup> Department for Education and Skills "Every Parent Matters" (2007) *Department for Education and Skills* 28.

## 2 1 6 Adults

Parenting does not stop when children grow up and age.<sup>154</sup> Parents always remain parents even to older children<sup>155</sup> and parenting does not end when a child turns 18.<sup>156</sup> Support is needed in a child's life even if a child reaches adulthood. Parental support is essential in helping children figure out who they are and where they fit in the world.<sup>157</sup> Parenting is a lifelong process.<sup>158</sup>

## 2 2 Importance of caregiving to society

The family's affective role of nurturing and supporting its members includes to promote and safeguard children's health and to teach them moral and social values, with the overall goal to make sure that "the next generation is productive and socially responsible".<sup>159</sup> Good parenting and adequate care during the first few years of childhood also leads to huge economic benefits later on for both individuals and society as a whole.<sup>160</sup>

### 2 2 1 Procreation and socialisation

The family is the principal institution in society and derives its meaning from being both a biological and a social unit.<sup>161</sup> The two basic functions of a family, of importance to society, are (1) the procreation and protection of offspring and (2) socialisation of its members.<sup>162</sup>

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<sup>154</sup> Rummel *Basics of Life* 105.

<sup>155</sup> 105.

<sup>156</sup> Anonymous "Parenthood" (2016) *Boundless* <[https://www.boundless.com/sociology/text\\_books/boundless-sociology-textbook/socialization-4/socialization-throughout-the-life-span-48/parenthood-307-3420/](https://www.boundless.com/sociology/text_books/boundless-sociology-textbook/socialization-4/socialization-throughout-the-life-span-48/parenthood-307-3420/)> (accessed 19-08-2016).

<sup>157</sup> Anonymous "Parenthood" (2016) *Boundless*.

<sup>158</sup> Anonymous "Parenthood" (2016) *Boundless*.

<sup>159</sup> Mokomane "Role of Families in Social and Economic Empowerment of Individuals" 4.

<sup>160</sup> Department for Education "Supporting Families in the Foundation Years" (2011) *Department for Education* <<https://www.gov.uk/government/publications/supporting-families-in-the-foundation-years>> (accessed 15-05-2014) 2.

<sup>161</sup> Hildebrand *Parenting and Teaching Young Children* 368.

<sup>162</sup> Belcher et al (2011) *J Fam Soc Work* 71; Horn *The Family, Civil Society, and The State* 1 and Waite (2000) *Contemporary Sociology* 463.

Procreation is the “core, irreducible process necessary for the survival of the species (and society)”.<sup>163</sup> Survival is commonly accepted as the primary goal of behaviour.<sup>164</sup> However, procreation is useless if the offspring do not survive.<sup>165</sup> To ensure survival is the main task of parenting.<sup>166</sup> A human infant is a particularly vulnerable creature and not able to take care of itself until well into its middle childhood.<sup>167</sup> In complex modern societies, the need for parental protection and supported living is stretched beyond middle childhood.<sup>168</sup> There is, as ever, a strong case for considering both nature and nurture to be “interdependently implicated in the growth of infants into effective citizens”.<sup>169</sup> Parenting is the critical medium for this.<sup>170</sup> From the point of view of parent(s), the family’s goal is to produce, enculturate and socialise children.<sup>171</sup>

Through socialisation, “the foundation is laid for children to be tolerant of views other than their own and become active and responsible citizens in the future”.<sup>172</sup> Families make an essential contribution to society by socialising children.<sup>173</sup> Within the family, parents and siblings are often the primary socialising forces for children during their development<sup>174</sup> and parenting emerges as probably the most fundamental and universal concern of society.<sup>175</sup> It acts as the “connective tissue” – the most “prominent form of universal altruism, which joins up and cuts across nations, generations, social classes, ethnic groups and religious or political creeds, where commonalities are overwhelmingly greater than the differences”.<sup>176</sup> Parents have to nurture their children

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<sup>163</sup> Hoghughi & Long *Handbook of Parenting* 1.

<sup>164</sup> 1.

<sup>165</sup> 1.

<sup>166</sup> 1.

<sup>167</sup> 1.

<sup>168</sup> 1.

<sup>169</sup> 1.

<sup>170</sup> W Collins, E Maccoby, L Steinberg, E Hetherington & M Bomstein “Contemporary research on parenting: the case for nature and nurture” (2000) 55 *Am Psychol* 218.

<sup>171</sup> G Murdock *Social Structure* (1949) 13.

<sup>172</sup> Department of Social Development *Draft White Paper on Families* 9.

<sup>173</sup> Horn *The Family, Civil Society, and The State* 1.

<sup>174</sup> However, in multigenerational families socialising agents can also include grandparents, aunts, uncles, and cousins. See Belcher et al (2011) *J Fam Soc Work* 72.

<sup>175</sup> Hoghughi & Long *Handbook of Parenting* 6.

<sup>176</sup> 6.

by *inter alia* communication, because it is the main process used to convey parental caring, values, and a sense of community.<sup>177</sup> Advice, directives and answers to questions teach children what parents and society expect of them.<sup>178</sup>

Society depends upon families in which parents competently rear their children<sup>179</sup> because when families fail to socialise their children, civil society is not possible<sup>180</sup> and an uncivil society may present major difficulties for the individual, the family and the community.<sup>181</sup>

Society, in turn, has an inescapable responsibility to protect and support the family (and parenthood) because rearing children is the foundation of society and without the family, there would be no society.<sup>182</sup>

## 2 2 2 *Economy*

In general, families make important contributions to the economic life of their societies. They are important units of consumption and serve in their societies as a kind of “unplanned, decentralised system for the distribution of goods and economic services”.<sup>183</sup>

The International Labour Organisation’s (“ILO”) understanding of the term “work” includes unpaid work in the family and in the community, which is often ignored in current thinking about the economy and society.<sup>184</sup> Economic productivity is in fact indirectly subsidised by the social productivity of unpaid female work, which is also often carried out alongside paid female work.<sup>185</sup>

Research has shown that the accommodation of care in the workplace may have a positive effect on the productivity of employees.<sup>186</sup> Family-friendly policies, for instance

<sup>177</sup> Galvin et al *Family communication* 174.

<sup>178</sup> 174.

<sup>179</sup> Parenting is the critical medium for the growth of infants into effective citizens. See the text to n 164 above.

<sup>180</sup> Horn *The Family, Civil Society, and The State*1.

<sup>181</sup> R Smith “Total Parenting” (2010) *Educational Theory* 357 359.

<sup>182</sup> See the text to ch 1, part 1 above.

<sup>183</sup> DR Blitsten *The World of the Family* (1963) 17.

<sup>184</sup> ILO *Report VI - Gender equality at the heart of decent work* (2009) 5.

<sup>185</sup> 5.

<sup>186</sup> A Bassanini & D Venn “The impact of labour market policies on productivity in OECD countries” (2008) 17 *International Productivity Monitor* 3 9-10.

parental leave, could assist to improve parents' morale and work commitment, thus resulting in a positive influence on productivity by making it easier for parents to balance paid work with family responsibilities".<sup>187</sup> Conversely, working parents, and particularly women, would be more inclined to leave the workforce for prolonged periods where family-friendly working arrangements are absent. As a result hereof, the total work experience and accumulated job-specific human capital of these women are reduced.<sup>188</sup> Furthermore, firms and workers who are assured of a continuous employment relationship might also be more likely to invest in training. Alternatively, parental leave could hinder productivity by reducing parents' access to training and leading to human capital depreciation.<sup>189</sup> Where policies result in an increase in the cost to employers to employ parents, it can lead to discriminatory and inefficient hiring consequences, whereby highly-skilled women are concentrated in low-skilled jobs.<sup>190</sup> Moreover, new workers, who lack job-specific skills, could replace employees taking parental leave thus leading to a temporary decrease in productivity.<sup>191</sup>

### **3 Women as primary caregivers and their labour market participation**

#### **3 1 Increased participation, but the challenge remains**

Women's labour force participation increased sharply in the past few decades.<sup>192</sup> Male participation has also increased during the same period, but it was at a much slower pace, aiding the influx of women into the labour force.<sup>193</sup> Although women have increased their ties to the labour market, men's contributions to work in the home have not increased at a corresponding rate and women remain the primary caregivers for children.<sup>194</sup> This unpaid care provided by women to their children is one of the biggest barriers to equality and affects their ability to, *inter alia*, upgrade skills and find highly paid jobs.<sup>195</sup> One study used a panel of 97 countries over the period 1960–2000 to

<sup>187</sup> 9.

<sup>188</sup> 9.

<sup>189</sup> 10.

<sup>190</sup> 10.

<sup>191</sup> 10.

<sup>192</sup> Gornick & Meyers *Families That Work* 7; Bosch *The SABPP Women's Report* 22.

<sup>193</sup> Bosch *The SABPP Women's Report* 22.

<sup>194</sup> Gornick & Meyers *Families That Work* 7.

<sup>195</sup> ILO *Report VI - Gender equality at the heart of decent work* 125.

examine the effect of fertility on labour force participation by women during their fertile years.<sup>196</sup> It was estimated that, on average, a birth reduces a woman's labour supply by almost two years during a woman's reproductive years.<sup>197</sup>

### 3 2 Relative labour force participation

Families are inventing a variety of creative arrangements to reconcile employment with caregiving responsibilities.<sup>198</sup> Many families reduce the labour market attachment of one parent – usually the mother. Gornick and Meyers remark that a lot of mothers engage in various forms of underemployment, choose jobs that demand less of them than their skills would otherwise warrant or work part-time or intermittently (or both).<sup>199</sup>

Time-use surveys of 26 Organization for Economic Cooperation and Development (“OECD”) countries and three developing countries (China, India and South Africa) show that women devote, on average, more than twice as much time to household work, which includes caring for children, as men.<sup>200</sup> The greatest change in the time individuals devote to domestic work occurs when children are born. At the same time, traditional gender divisions of work in the home usually assert themselves, even if there was more equality up until then.<sup>201</sup> Women with a stronger support structure at home (for example grandparents looking after the children) may advance more rapidly in the employment sector. However, some women continue to prefer being the homemaker, and will therefore settle in a lower position or not participate in the labour market at all.<sup>202</sup>

### 3 3 Relative unemployment levels

Globally, women have a higher unemployment rate than men. One of the factors behind this is that women more often exit and re-enter the labour market as a result of

<sup>196</sup> D Bloom, D Canning, G Fink & J Finlay “Fertility, female labor force participation, and the demographic dividend” (2009) 14 *Journal of Economic Growth* 79 79-80.

<sup>197</sup> 79-80.

<sup>198</sup> Gornick & Meyers *Families That Work* 8.

<sup>199</sup> 8.

<sup>200</sup> OECD “Closing the Gender Gap: Act Now” (2012) *OECD Publishing* <<http://dx.doi.org/10.1787/9789264179370-en>> (accessed 22-10-2015) 200.

<sup>201</sup> OECD “Closing the Gender Gap: Act Now” (2012) *OECD Publishing* 201.

<sup>202</sup> Bosch *The SABPP Women’s Report* 22.

family responsibilities.<sup>203</sup> Career interruption for purposes of child rearing results in longer periods of unemployment, while men are more likely to move directly from one job to another.<sup>204</sup> Interruptions in participation in the labour market can lead to skills obsolescence and reduced employability.<sup>205</sup> In South Africa, the unemployment rates are higher for women than for men at all ages.<sup>206</sup> The difference in unemployment rates partly reflects women's caring responsibilities: women devote, on average, more than twice as much time to household work as men and constitute 97% of caregivers who qualify for the South African Child Support Grant.<sup>207</sup>

### 3.4 Gender segregation – employment levels, occupational categories, security of employment

The global female labour force participation rate in 2015 was 50% (of the economically active population) and the male labour force participation rate 77% (of the economically active population).<sup>208</sup> Although South Africa has, in line with global trends, shown a dramatic increase in women entering the labour market since mid-1990 and especially after the abolishment of Apartheid,<sup>209</sup> the labour force participation rate in South Africa in June 2015 was only 54.6% for women (and 66.6% for men).<sup>210</sup> Women in South Africa are underrepresented in management and leadership positions and still occupy lower skilled and lower paid jobs.<sup>211</sup> Males

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<sup>203</sup> ILO *Global Employment Trends for Women 2012* (2012) 5.

<sup>204</sup> 5.

<sup>205</sup> 5.

<sup>206</sup> The unemployment rates in South Africa are particularly acute for the youth (15-24 years): 54% for young women and 45% for young men. OECD "Closing the Gender Gap: Act Now (Country notes: South Africa)" (2012) *OECD Publishing* <<http://www.oecd.org/gender/Closing%20the%20Gender%20Gap%20-%20South%20Africa%20EN.pdf>> (accessed 22-10-2015).

<sup>207</sup> OECD "Closing the Gender Gap: Act Now (Country notes: South Africa)" (2012) *OECD Publishing*. Family and child allowances were never intended to pay for care. The idea, rather, was to assist families with some of the material costs of raising children.

<sup>208</sup> UN *The World's Women 2015: Trends and Statistics* 89.

<sup>209</sup> Bosch *The SABPP Women's Report* 22.

<sup>210</sup> Population 15-64 years. Statistics South Africa "Quarterly Labour Force Survey" (2017) *Statistics South Africa* <<http://www.statssa.gov.za/publications/P0211/P02111stQuarter2017.pdf>> (accessed 16-11-2017) 22-23.

<sup>211</sup> Bosch *The SABPP Women's Report* 22.

continue to dominate at the top management level with 78% (versus 22% females)<sup>212</sup> and occupy double the positions occupied by females at senior management level (66.7% versus 33.3%).<sup>213</sup> 45.6% of employees who are professionally qualified, are females.<sup>214</sup> Women are most likely to be domestic workers, clerks and sales and services workers and most unlikely managers, plant and machinery operators or involved in the skilled agriculture sector, elementary work or craft and related trade.<sup>215</sup> Globally, gender stereotyping explains why women and men are over-represented in particular types of jobs.<sup>216</sup> Women dominate in “care” occupations such as nursing, teaching, social care and especially childcare while men tend to be concentrated in construction and management – areas associated with physical strength, risk-taking, or decision-making.<sup>217</sup> Such gender biases are also reflected in organisational practices. Male-dominated sectors are more unionised and men are more likely to be

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<sup>212</sup> Compared to the CEE Annual Report of 2012-2013, there has been progress in this regard: women now occupy 22% of the workforce profile at top management compared to 19.1%. See Department of Labour “Commission for Employment Equity, Annual Report” (2012-2013) *Department of Labour* <<http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/commission-for-employment-equity-annual-report-2012-2013/cee13report.pdf>> (accessed 11-02-2015) 10, 51 and Department of Labour “Commission for Employment Equity, Annual Report” (2016-2017) <[http://www.labour.gov.za/DOL/documents/annual-reports/employment-equity/20162017/17th%20CEE%20Annual%20Report.pdf](http://www.labour.gov.za/DOL/documents/annual-reports/Commission%20for%20Employment%20Equity%20Report/2016-2017/downloads/documents/annual-reports/employment-equity/20162017/17th%20CEE%20Annual%20Report.pdf)> (accessed 11-11-2017) 13.

<sup>213</sup> There has also been progressive change here: women now occupy 33.3% of the workplace profile at senior management level compared to the 30.7% as stated in the CEE Annual Report of 2012-2013. See Department of Labour “Commission for Employment Equity, Annual Report” (2012-2013) *Department of Labour* 11, 51 and Department of Labour “Commission for Employment Equity, Annual Report” (2016-2017) *Department of Labour* 18 and ILO *Global Employment Trends for Women 2012* 27.

<sup>214</sup> Although male representation is still dominant at the professionally qualified level, it has been decreasing over the years (from 57.8% in 2012 to 54.4% in 2016). See Department of Labour “Commission for Employment Equity, Annual Report” (2012-2013) *Department of Labour* 11, 51 and Department of Labour “Commission for Employment Equity, Annual Report” (2016-2017) *Department of Labour* 22.

<sup>215</sup> Statistics South Africa “Quarterly Labour Force Survey” (2015) *Statistics South Africa* 45.

<sup>216</sup> ILO *Global Employment Trends for Women 2012* 27.

<sup>217</sup> 27.

employed in managerial positions because they are perceived to be “more willing to work longer hours and supervise others”.<sup>218</sup>

Occupational, sectoral, or time-related segregation can be explained by women’s preferences for job security or the way in which societies compel them to balance work and family responsibilities.<sup>219</sup> These factors, which include structural and legal context, possibly explain the over-representation of women in public sector jobs and/or part-time work.<sup>220</sup>

During the last decades, there has been an increase in non-standard forms of work, resulting in more part-time and temporary employment in advanced economies and more informal employment in developing countries.<sup>221</sup> There is a clear link between this type of work and income inequality.<sup>222</sup> Women trying to balance paid work and household work (and particularly the care of children) typically perform part-time employment.<sup>223</sup> Part-time work can provide increased flexibility and bring more women into the labour force but it tends to involve lower earnings, fewer benefits and protections, and less career mobility.<sup>224</sup>

The incidence of part-time employment in industrialised countries is much higher for women than for men.<sup>225</sup> Most part-time employment in developed countries is reported to be voluntary, particularly among women.<sup>226</sup> This may result from a choice to “maintain a balance between work and family or from the absence of any viable alternatives such as institutional support, affordable, quality childcare and limits on regular working hours”.<sup>227</sup> The incidence of part-time work remains low in most developing countries.<sup>228</sup> In common with many other countries in the world, the majority of part-time workers in South Africa are women who often switch to part-time

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<sup>218</sup> 27.

<sup>219</sup> 27.

<sup>220</sup> 27.

<sup>221</sup> 27.

<sup>222</sup> ILO Report VI - *Gender equality at the heart of decent work* 114.

<sup>223</sup> D Posel & C Muller “Is there evidence of a wage penalty to female part-time employment in South Africa?” (2008) 76 *S Afr J Econ* 466 467.

<sup>224</sup> L Chioda, R Verdu & AM Muñoz *Work and Family: Latin American Women in Search of a New Balance* (2011) 133-134.

<sup>225</sup> ILO Report VI - *Gender equality at the heart of decent work* 115.

<sup>226</sup> 115.

<sup>227</sup> 115.

<sup>228</sup> 115.

employment because of family responsibilities.<sup>229</sup> The incidence of women's share in part-time employment in 2015 in South Africa was 64.6%.<sup>230</sup>

What this discussion shows is that, while the participation of women in the labour market has increased, women remain the primary caregivers in society. Compared to the male population, the unemployment rate of women remains high. Furthermore, the realities of caregiving have contributed to gender-based occupational segregation as well as "gender-based segregation in job security" (that is, the disproportionate employment levels of women in precarious or atypical employment). As such, one of the challenges for the appropriate regulation of work and care is how best to account for the gender dimension inherent in care. In particular, the question is whether a proper and comprehensive solution to the challenge is to be found in discrimination law, or whether a tailor-made regime of specific rights is preferable. The effectiveness of discrimination law in regulating the integration of work and care is discussed in chapter 4 below and specific rights from chapter 5 onwards.

#### **4      The structures and changing nature of the family as the primary location of parental caregiving**

Over the course of history, families have taken many forms<sup>231</sup> and are in a constant state of flux.<sup>232</sup> Today there are different types and structures of families that are products of various cultures and social contexts.<sup>233</sup> Demographic, social, economic, cultural and technological factors are, *inter alia*, responsible for the emergence and changing nature of families.

The structures of the family in modern society, in general, as well as in South African society in particular, will be discussed as precursor for the discussion about the reasons for the changing nature of these structures.

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<sup>229</sup> C Fagan, C Lyonette, M Smith & A Saldana-Tejeda *The influence of working time arrangements on work-life integration or "balance": A review of the international evidence* (2012) 23; Posel & Muller (2008) *S Afr J Econ* 478.

<sup>230</sup> OECD *OECD Employment Outlook 2016* (2016) 227.

<sup>231</sup> L McKie & S Callan *Understanding families* (2012) 16.

<sup>232</sup> 6.

<sup>233</sup> Department of Social Development *Draft White Paper on Families* (2012) 9.

## 4 1 Structures of the family in general

The family demography of modern society shows an increasing variation in household types and more complex family-life courses compared to a few decades ago.<sup>234</sup> Families are formed in multiple ways<sup>235</sup> and there are too many types of family structures to try to name and discuss them all.<sup>236</sup> These structural forms may also overlap due to family diversity.<sup>237</sup> The following section describes some of these family structures.

### 4 1 1 Nuclear family

The nuclear family consists of (married) heterosexual parents and at least one child.<sup>238</sup> It was referred to as a traditional or typical family in the past but no longer represents the most common family form.<sup>239</sup>

### 4 1 2 Single/lone parent family

A single/lone-parent family consists of one parent and one or more children.<sup>240</sup> Most of these families are headed by mothers.<sup>241</sup>

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<sup>234</sup> R Cliquet "Major trends affecting families in the new millennium: Western Europe and North America" in United Nations (ed) *Major Trends Affecting Families: a Background Document* (2003) 25.

<sup>235</sup> Galvin et al *Family communication* 6-7.

<sup>236</sup> DF Halpern "Psychology at the Intersection of Work and Family: Recommendations for Employers, Working Families, and Policymakers" (2005) 60 *Am Psychol* 397 398.

<sup>237</sup> Galvin et al *Family communication* 6-7.

<sup>238</sup> Hildebrand *Parenting and Teaching Young Children* 369; Galvin et al *Family communication* 5.

<sup>239</sup> Hildebrand *Parenting and Teaching Young Children* 369.

<sup>240</sup> 369.

<sup>241</sup> 369.

#### 4 1 3 *Blended family*

The blended family consists of two adults and their children, not all of whom may be from the union of their relationship.<sup>242</sup> Most are families blended through remarriage that brings two previous systems into new family ties.<sup>243</sup>

#### 4 1 4 *Extended family*

The extended (or intergenerational) family usually refers to several related families living together or near each other and includes a family with members of several generations living together.<sup>244</sup>

#### 4 1 5 *Voluntaristic family*

The voluntaristic family involves “a pair or a group of people, some or all of whom are unrelated biologically or legally, who share a commitment to each other, may live together, and consider themselves to be a family”.<sup>245</sup> These relationships are sometimes referred to as fictive kin.<sup>246</sup>

#### 4 1 6 “New” family forms

Reference in scholarly articles is often made to “new” family forms. The formation and increase of these “new” family forms is paralleled by the decline or substitution of traditional family forms.<sup>247</sup> “New” family forms refer to persons living alone, lone parents, and persons cohabiting while unmarried.<sup>248</sup> Families reconstituted after divorce are also to be subsumed under the heading “new” family types.<sup>249</sup> All these family forms are in actual fact not “new” family types, because they already existed in

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<sup>242</sup> Galvin et al *Family communication* 7. The blended family therefore consists of members of the nuclear family, the extended family and some outsiders. See Pieterse (2000) *Stell LR* 329.

<sup>243</sup> Galvin et al *Family communication* 8.

<sup>244</sup> Hildebrand *Parenting and Teaching Young Children* 369.

<sup>245</sup> Galvin et al *Family communication* 9.

<sup>246</sup> 9.

<sup>247</sup> Rothenbacher “Social Change in Europe and its Impact on Family Structures” in *The Changing Family. International Perspectives on the Family and Family Law* 15.

<sup>248</sup> 16.

<sup>249</sup> 16.

the first half of the previous century or even earlier.<sup>250</sup> Cohabitation as a form of living together by unmarried adults existed in earlier times, although it was not as common as it is today.<sup>251</sup> Lone parents were also already rather common by the second half of the nineteenth century as evidenced by the high illegitimacy rate.<sup>252</sup> Reconstituted families are also not a new phenomenon; divorce, as their major cause, simply became more prevalent since the middle of the nineteenth century. However, in the past mortality was the main reason for family disruption and reconstitution.<sup>253</sup> The dominant family type – the nuclear family – has thus undergone major structural changes but continues to be the normative ideal although, according to Rothenbacher, in social reality the personal relationship between partners has become more fragile and a system of “successive monogamy” originated in the last decades.<sup>254</sup>

#### 4.2 Structures of the family in South Africa

There are different types and structures of families in South Africa that are the products of various cultures and social contexts.<sup>255</sup> The South African society has a multicultural nature and therefore no single definition of “family” is comprehensive enough to cover various kinds of families in the country.<sup>256</sup>

Although the nuclear family is the most common type of family in South Africa,<sup>257</sup> evidence shows that the percentage of households that were made up of nuclear families decreased from 46% to 40% between 1996 and 2001, while the percentage of households made up of extended families increased from 32% to 36% over that period.<sup>258</sup> This pattern is consistent with a 2008 report by the Department of Social Development based on the analysis of data from the 2005 General Household Survey.<sup>259</sup> Defining the family as “any set of individuals within a household who are related by blood or marriage”, the report suggested that there were 13 million families

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<sup>250</sup> 16.

<sup>251</sup> 16.

<sup>252</sup> 16.

<sup>253</sup> 15.

<sup>254</sup> 16.

<sup>255</sup> 9.

<sup>256</sup> 16.

<sup>257</sup> 17.

<sup>258</sup> 17.

<sup>259</sup> 17.

in South Africa (8.5 million in urban areas and 4.5 million in rural areas) categorised into 14 groups.<sup>260</sup> In 2005, the most common types of family were the nuclear family (23.2%), the single-adult family<sup>261</sup> (20.4%) and the three-generation family<sup>262</sup> (16.1%).<sup>263</sup>

Approximately a third (34.9%) of children consistently lived with both their parents in 2014, while one fifth (20.9%) lived with neither their biological parents.<sup>264</sup> Children were far more likely to live with only their mothers (40.6%) than their fathers (3.7%).<sup>265</sup> The approach of Statistics South Africa differs from the Department of Social Development report by distinguishing only four categories of households<sup>266</sup>: extended (consisting of skip generation-, three and more generation-, two generation-, single generation- and other -households), nuclear, single-person and complex households<sup>267</sup>. 58.2% of South Africans lived in extended households in 2014, 32.2%

<sup>260</sup> Namely: skip-generation, nuclear, single parent (unmarried), single parent (absent spouse), elderly only, one adult only, child(ren) only, married couple only, married couple with adopted child(ren), one adult with adopted child(ren), siblings only (all adults), siblings (adults and children) and other (such as the extended family). See Department of Social Development *Draft White Paper on Families* 17.

<sup>261</sup> Which is composed of only one member, who is an adult. See GN 756 in GG 34692 of 19-10-2011 29.

<sup>262</sup> Grandparent with parent(s) and child(ren). See GN 756 in GG 34692 of 19-10-2011 28.

<sup>263</sup> Department of Social Development *Draft White Paper on Families* 17.

<sup>264</sup> Statistics South Africa “General Household Survey 2015” *Statistics South Africa* <<https://www.statssa.gov.za/publications/P0318/P03182015.pdf>> (accessed 12-11-2017); K Hall & W Sambu “Demography of South Africa’s children” in A Delany, S Jehoma & L Lake (eds) *South African Child Gauge* (2016) Children’s Institute, University of Cape Town 107.

<sup>265</sup> Statistics South Africa “General Household Survey 2015” *Statistics South Africa*; Hall & Sambu “Demography of South Africa’s children” in *South African Child Gauge* (2016) 107.

<sup>266</sup> It seems as if “households” and “families” are used as synonyms in the Draft White Paper (see pages 9, 30, 65 and 94 where “families” is used instead of “households” in comparison with the rest of the document). This is not entirely correct because “a household can contain a family, but household members do not necessarily have to be a family. The household performs the functions of providing a place of dwelling and of sharing resources; these functions can be performed among people who are related by blood and people without any such relationship”. See Department of Social Development *Draft White Paper on Families* 11.

<sup>267</sup> Complex households are households with members who are not related to the household head. See Statistics South Africa “Vulnerable Groups Series I:The Social Profile of the Youth, 2009-2014” *Statistics South Africa* <<http://www.statssa.gov.za/publications/Report-03-19-01/Report-03-19-012014.pdf>> (accessed 12-11-2017) 21.

in nuclear households, 6% in single person households and 3.6% in complex households.<sup>268</sup>

#### 4 3 Reasons for the changing nature of the family in general

The twentieth century has witnessed remarkable changes in family structures and dynamics.<sup>269</sup> The family continues to be subjected to numerous demographic, social, economic, cultural and technological forces that shape it<sup>270</sup> and these trends may be interpreted in different ways.<sup>271</sup>

##### 4 3 1 Demographic and other social trends

A reduction in marriage rates, an increase in cohabitation outside marriage, postponement of parenthood, a greater proportion of births outside marriage, higher divorce rates, growth in the proportion of children living in lone-parent families, more mothers in paid work;<sup>272</sup> and an increase in professed homosexuality as well as in extended families are amongst the key demographic and social trends and indicators leading to the changing nature of the family.

The increase in divorce, separation and births outside marriage has led to an increase in the proportion of families headed by a lone parent.<sup>273</sup> Factors such as divorce, separation, absent fathers and long working hours undermine the family unit and weaken the basis from which children secure moral and developmental guidance.<sup>274</sup>

Although research figures regarding the abovementioned demographic and other social trends and indicators shift constantly and various sources provide slightly

<sup>268</sup> 21.

<sup>269</sup> Cliquet "Major trends affecting families in the new millennium: Western Europe and North America" in *Major Trends Affecting Families: a Background Document* 1.

<sup>270</sup> See for example GS Bernard *Major Trends Affecting Families in Central America and the Caribbean* (2003) 1.

<sup>271</sup> N Finch *Demographic Trends in the UK* (2003) 42.

<sup>272</sup> Hoghughi & Long *Handbook of Parenting* 23; Galvin et al *Family communication* 13; Social Issues Research Centre SIR Centre *Childhood and family life socio-demographic changes* (2008) 7, 14.

<sup>273</sup> Finch *Demographic Trends in the UK* 31.

<sup>274</sup> V Gillies "Meeting parents' needs? Discourses of 'support' and 'inclusion' in family policy" (2005) 25 *Critical Social Policy* 70 75.

different numerical data, there is no doubt that the family continues to undergo dramatic changes into the twenty-first century.<sup>275</sup>

These demographic and social trends are intertwined with economic realities.

#### 4.3.2 Economic realities

The economic organisation of the family has changed frequently during the past two hundred years and particularly dramatically in recent decades.<sup>276</sup> Changing economic conditions have increased the number of working mothers while their children are small.<sup>277</sup> Two-income couples have become the norm<sup>278</sup> and a dual income is seen as necessary, if not desirable, by most couples.<sup>279</sup> Increased participation in the labour force is likely to expose greater proportions of women to new roles and caused responses to social stimuli that conflict with the prospect of childbearing and childrearing.<sup>280</sup>

Because the industrial context of women's work most often precludes taking children with them, children have to be cared for by nurseries, relatives, friends and others.<sup>281</sup> Exposure to care outside the family need not be negative, since a stable adult figure outside the family can increase the child's psychological security.<sup>282</sup> The nuclear family in this way comes to resemble an extended family and the child has an added source of adult warmth and security.<sup>283</sup>

Another economic reality that impacts directly on family life is poverty.<sup>284</sup> Poverty prevents the family from playing its various roles in society and hinders its members from meeting their needs.<sup>285</sup> In Central America and the Caribbean, and probably in most other countries, households below the poverty line, generally, are larger, headed by females who are often single mothers with dependent children, or contain at least

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<sup>275</sup> Galvin et al *Family communication* 11.

<sup>276</sup> Gornick & Meyers *Families That Work* 25.

<sup>277</sup> Brooks *The Process of Parenting* 12.

<sup>278</sup> Galvin et al *Family communication* 15.

<sup>279</sup> 15.

<sup>280</sup> Bernard *Major Trends Affecting Families in Central America and the Caribbean* 9.

<sup>281</sup> Hoghughi & Long *Handbook of Parenting* 14.

<sup>282</sup> Brooks *The Process of Parenting* 260.

<sup>283</sup> 260.

<sup>284</sup> Galvin et al *Family communication* 15.

<sup>285</sup> GN 756 in GG 34692 of 19-10-2011 37.

one elderly person living alone or in an extended family setting sometimes having responsibility for the entire household.<sup>286</sup>

#### *4.3.3 Culture/ethnicity*

Increased ethnic diversity in society is reflected in more diverse patterns of family construction<sup>287</sup> Young Muslim adults are, for example, more likely to be married than young people from any other cultural background,<sup>288</sup> and those from Indian and Pakistani background tend to have considerably larger families compared to those from white backgrounds.<sup>289</sup> While African women often continue full-time employment throughout family formation, white and Indian women tend to be in part-time employment.<sup>290</sup> In addition, the numbers of mixed-ethnicity marriages have also increased.<sup>291</sup>

#### *4.3.4 Technology and science*

A number of scientific and technological innovations have played an important role in recent demographic and family changes.<sup>292</sup> Cliquet remarks that the massive spread of technical innovations such as television, the Internet, and faster and more affordable travel have significantly increased the physical and mental horizons of people and may have affected their behaviour in the domain of family building.<sup>293</sup>

Modern medical technology is involved in developing methods to limit fertility and to enhance fertility.<sup>294</sup> Considered in its broad sense, medically assisted fertility is a phenomenon which developed gradually with modernisation.<sup>295</sup>

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<sup>286</sup> Bernard *Major Trends Affecting Families in Central America and the Caribbean* 6.

<sup>287</sup> Department for Education and Skills “Every Parent Matters” (2007) *Department for Education and Skills* 3.

<sup>288</sup> 3.

<sup>289</sup> 3.

<sup>290</sup> 3.

<sup>291</sup> Department for Education and Skills “Every Parent Matters” (2007) *Department for Education and Skills* 3; Galvin et al *Family communication* 17.

<sup>292</sup> Cliquet “Major trends affecting families in the new millennium: Western Europe and North America” in *Major Trends Affecting Families: a Background Document* 17.

<sup>293</sup> 17.

<sup>294</sup> 18.

<sup>295</sup> 18.

Whereas medical interventions nowadays cover the whole process of childbearing, conception-related interventions are still quite rare.<sup>296</sup> However, it can be observed that increasing numbers of couples who experience difficulties in getting pregnant turn to these techniques to fulfil their family building desires.<sup>297</sup>

#### 4.4 Reasons for the changing nature of the family in South Africa

The same reasons discussed above<sup>298</sup> are responsible for the changing nature of the family in South Africa<sup>299</sup>, but South Africa is also notable for having the highest HIV/AIDS prevalence rate in the world.<sup>300</sup> The HIV epidemic is forcing a re-definition of the concepts “family”, “parenting” and “motherhood” beyond the traditional boundaries of age, sex and gender.<sup>301</sup> De la Porte remarks that childcare roles are changing in response to the HIV/AIDS epidemic and the conceptualisation of kin is also being redefined, “with the idiom of fictive kinship becoming a notable community-based support structure”.<sup>302</sup> Care and support of orphaned and vulnerable children<sup>303</sup> have shifted from a core kin-group to individual carers, as traditional family structures are denuded in a socio-economic climate characterised by HIV/AIDS and other factors, such as migration, urbanisation and poverty.<sup>304</sup>

Today various people are regarded as each other's family in various contexts and children grow up in diverse family arrangements.<sup>305</sup> Although skip-generation households are becoming more common in South Africa, sisters are increasingly seen as the natural response to soaring care needs.<sup>306</sup> Rules of patrilineality have stated

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<sup>296</sup> 18.

<sup>297</sup> 18.

<sup>298</sup> See the text to part 4.3 above.

<sup>299</sup> See for example Pieterse (2000) *Stellenbosch Law Review* 329-330.

<sup>300</sup> S de la Porte “Redefining childcare in the context of AIDS: the extended family revisited” (2008) *Agenda: Empowering women for gender equity* 129 129.

<sup>301</sup> T Meyiwa “Constructing an alternative family unit: families living with HIV/AIDS redefine African traditional parenting patterns” (2011) *Social Dynamics: A Journal of African studies* 165 165.

<sup>302</sup> De la Porte (2008) *Agenda: Empowering women for gender equity* 137.

<sup>303</sup> As a direct result of HIV / AIDS. See Meyiwa (2011) *Social Dynamics: A Journal of African studies* 25.

<sup>304</sup> De la Porte (2008) *Agenda: Empowering women for gender equity* 131.

<sup>305</sup> Pieterse (2000) *Stell LR* 328.

<sup>306</sup> De la Porte (2008) *Agenda: Empowering women for gender equity* 138.

that, in Black South African communities, a father's brother and his wife were the most obvious choice of alternative caregiver.<sup>307</sup> In contexts where the extended family has been eroded and there is no paternal nuclear household willing or able to support children, this role often falls to sisters to care for their siblings.<sup>308</sup> Children too have become vital caregivers who assume responsibility for younger children and household chores.<sup>309</sup>

## 5 Challenges regarding terminology: family, parenting and care

From the preceding discussion, it should be clear that the identification of appropriate terminology to accurately describe the nature of the concepts of "family", "parenting" and "care" is challenging. Variations in terminology are a function of the nature of the studies undertaken and dependent on context.<sup>310</sup> Given the importance of parental care and the changing nature of the "family" (as the primary caregiving structure) we need clarity about the core concepts underlying this study.

### 5 1 Family

The discussion thus far has shown that family is a difficult, if not impossible, concept to define.<sup>311</sup> Essentially, there is no single, widely agreed-upon definition of the term "family".<sup>312</sup> The main reason for this is that families continue to change and evolve.<sup>313</sup> The nature and perception of "family" change from place to place and from time to time, irrespective of culture and religion,<sup>314</sup> and are dependent on points of view as well as on social and cultural conditions.<sup>315</sup> This raises questions of how to define a

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<sup>307</sup> 138.

<sup>308</sup> 138.

<sup>309</sup> 139.

<sup>310</sup> Dancaster *State and Employer Involvement in Work-Care Integration in South Africa* 21.

<sup>311</sup> Pieterse (2000) *Stell LR* 328.

<sup>312</sup> Galvin et al *Family communication* 4.

<sup>313</sup> DeFrain et al "Creating a Strong Family: Why Are Families So Important?" (2008) *Nebguide University of Nebraska* 1.

<sup>314</sup> Galea (2011) *IJJF* 176.

<sup>315</sup> Y Merin "The right to family life and civil marriage under international law and its implementation in the state of Israel" (2005) 28 *BC Int'l & Comp L Rev* 79 88.

family, where to establish its contours, and by what standards to determine when it starts and when it ends.<sup>316</sup>

Historically, the family has been defined as a “permanent, monogamous, heterosexual institution based on marriage, including a clear division of gender roles”.<sup>317</sup> Determining who is a “family member”, who is a “spouse”, what is a “marriage”, and who is considered a “parent”, has long been based on widely accepted legal and social perceptions.<sup>318</sup> Nevertheless, these perceptions have been questioned – mostly in the past few decades – as a result of social, legal, and political changes.<sup>319</sup>

Families today are defining themselves, for themselves, through their interactions.<sup>320</sup> At the same time, “longevity, legal flexibility, personal choice, ethnicity, gender, geographic distance, and reproductive technology are affecting the traditional biological and legal concepts of family”.<sup>321</sup> In “Families in Focus: New Perspectives on Mothers, Fathers and Children” the authors often pause to wonder what “family” really means?<sup>322</sup> They conclude that it encompasses the primary relationships that we, as individuals, identify as those we rely upon for sharing and caring.<sup>323</sup>

In addition to the absence of a single, universally accepted definition of the term “family”, the legal definition of “family” is also unsettled.<sup>324</sup> Courts, and legislatures, have defined family in various ways, depending on the nature of the inquiry.<sup>325</sup>

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<sup>316</sup> Galea (2011) *IJJF* 176.

<sup>317</sup> Merin (2005) *BC Int'l & Comp L Rev* 88.

<sup>318</sup> 88.

<sup>319</sup> 88 and T Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* LLM thesis University of Cape Town (2007) 15.

<sup>320</sup> Galvin et al *Family communication* 4. “Families are as adaptable as they are diverse, re-configuring themselves over their life cycles and evolving to accommodate the myriad pressures of the external world”. See JBC Lloyd & A Leonard *Families in Focus: New Perspectives on Mothers, Fathers and Children* (1995) 1.

<sup>321</sup> Galvin et al *Family communication* 4.

<sup>322</sup> Lloyd & Leonard *Families in Focus* 113.

<sup>323</sup> 113.

<sup>324</sup> M Treuthart “Adopting a more realistic definition of “family” (1990) *Gonz L Rev* 96.

<sup>325</sup> 96 and 112. While a group of persons may be considered a family for purposes of zoning restrictions, this same group may not meet the criteria for a family established by workers' compensation dependency provisions, public entitlement regulations, or insurance laws.

There is also no international law definition of the concept of family.<sup>326</sup> The Human Rights Committee (“HRC”), responsible for monitoring the implementation of the ICCPR, has noted that a treaty definition of the concept of family at the international level would be inadequate given the variety of conceptions of family that exist throughout the world and even within a single given state.<sup>327</sup> Therefore, the traditional definition of family, which revolved around the marital union and blood relationships between husband and wife, parent and child, has been extended to other unconventional familial ties.<sup>328</sup>

Consequently, the HRC has noted that state parties are at liberty to recognise various conceptions of family<sup>329</sup> and that it is up to each state party to report on how the scope of family is defined in their own society and legal system.<sup>330</sup> The US Supreme Court adhered to that and has defined the family in three ways, namely:

- 1 a traditional “nuclear family” of two parents and their children where the parents are presumed to be acting in the best interests of their children. In this family, there is no need to give the children their own voice – even when parents do such things as institutionalise their children;
- 2 an extended-kind model of family consisting of a community of parents, siblings, grandparents and other relatives which should be recognised as a primary family, even if the blood-ties are not as strong as a nuclear family; and

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<sup>326</sup> Moyo *The relevance of culture and religion to the understanding of children’s rights in South Africa* 15. Also see ch 3 below for a discussion on the legal regulation of family.

<sup>327</sup> UNHRC “CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses” (1990) *UN Human Rights Committee* <<http://www.refworld.org/docid/45139bd74.html>> (accessed 24-06-2014) para 2.

<sup>328</sup> Moyo *The relevance of culture and religion to the understanding of children’s rights in South Africa* 15. See part 4 1 6 above.

<sup>329</sup> Such as nuclear, extended, single parent and cohabiting families. Moyo *The relevance of culture and religion to the understanding of children’s rights in South Africa* 15.

<sup>330</sup> UNHRC “CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses” *UN Human Rights Committee* para 2. However, the definition has to be “without discrimination” – see GV Bueren “The International Protection of Family Members’ Rights as the 21st Century Approaches” (1995) 17 *Hum Rts Q* 732 735.

3 an individualist model where family members are equally independent and where individuality should be respected.<sup>331</sup>

There is also no specific definition of the family in South African law.<sup>332</sup> The Constitutional Court has stated that:

"[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."<sup>333</sup>

Relying on this dictum, Cronjé and Heaton have defined the concept of family as "including all people who are blood relations or have become related through adoption or marriage, or marriage-like relationships".<sup>334</sup> This definition corresponds with the definition of "the family" in the Draft White Paper:

"a societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and go beyond a particular physical residence".<sup>335</sup>

## 5.2 Parenting (including parenthood and parents)

Concepts centred on the reproduction and care of infants and young people point to a cluster of terms around categories of people, established social forms, and activities in relation to children:<sup>336</sup>

"Parenthood concerns the process of identification of individual adults (parents) who are considered to have particular connections with individual children, with associated

<sup>331</sup> J Dolgin "The Constitution As Family Arbiter: A Moral in the Mess?" (2002) *Colum L Rev* 337 379-383.

<sup>332</sup> Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 19.

<sup>333</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 31.

<sup>334</sup> D Cronjé & J Heaton *South African Family Law* 2 ed (2004) 3.

<sup>335</sup> Department of Social Development *Draft White Paper on Families* 3, 11.

<sup>336</sup> McCarthy & Edwards *Key Concepts in Family Studies* 141.

expectations for their care (parenting) and social positioning. As a term, parenthood is gender neutral.”<sup>337</sup>

“Parent” refers to a particular status, or category of person, of unspecified gender, who is identified as standing in a special relationship with an individual child or related children.<sup>338</sup> In other words, individuals with a special responsibility for the care of children may be known as parents.<sup>339</sup> In modern parlance, however, “parent” denotes the biological relationship of a mother and father to a child.<sup>340</sup> Hoghughi and Long qualify the term by such words as “adoptive” or “foster” parents, “parent surrogates” or “carers” to keep the biological relationship distinct.<sup>341</sup> Austin defines a parent as “someone who stands in a certain kind of relationship to another person”.<sup>342</sup> This definition also includes “non-biological” parents.<sup>343</sup> In most parts of the world the term “parent”, irrespective of its traditional dictionary definition, has come to be largely associated with caregiving.<sup>344</sup>

<sup>337</sup> 141.

<sup>338</sup> 141.

<sup>339</sup> 145.

<sup>340</sup> Hoghughi & Long *Handbook of Parenting* 5.

<sup>341</sup> 5. Also see the inclusion of “adoptive parent” in the definition of “parent” in section 1 of the Children’s Act 38 of 2005. The notion of “biological” parenthood suggests that “parenting is supposed to be a natural phenomenon, based on biological ties, the sentiments of which are largely beyond rational planning and control”. In terms of this discourse, biological parents are favoured above all others in matters regarding parental authority and responsibility, solely by virtue of the genetic ties between them. The notion of “social” or “psychological” parenthood on the other hand, “places greater emphasis on the actual relationship between child and adult (whether biological ties are present or not) in the context of the family as a social unit”. Any person can in principle be a “psychological” parent, depending on the nature of the bond and quality of the interaction between the adult and child in question. A child may therefore, in certain circumstances, have a number of psychological parents, all of whom have relationships with the child which are important for its physical or psychological well-being. See Pieterse (2000) *Stell LR* 331-332.

<sup>342</sup> M Austin *Conceptions of Parenthood: Ethics and the Family* (2007) 4.

<sup>343</sup> See UK Department for Education “Parenting and Family Support: Guidance for Local Authorities in England” (March 2013) UK Department for Education <<http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/DCSF-00264-2010.PDF>> (accessed 15-02-2014) 9 where “parents” describes mothers, fathers, carers and other adults with responsibility for caring for a child, including families and friends, carers and those caring for looked-after children.

<sup>344</sup> Meyiwa (2011) *Social Dynamics: A Journal of African studies* 167

“Parenting” may be defined as purposive activities aimed at ensuring the survival and development of children.<sup>345</sup> It is usually done by the biological parents of the child in question, although government and society may also play a role.<sup>346</sup> Parenting derives from the Latin verb *parere* – to bring forth, develop, or educate.<sup>347</sup> The word “parenting”, from its root, is more concerned with the activity of developing and educating than who actually does it.<sup>348</sup> The verb “to parent” (or, more commonly, “parenting”) means a process, an activity and an interaction, usually by adults with children, but not necessarily or exclusively their own.<sup>349</sup>

McCarthy and Edwards describe “Parenthood” as the identification of individuals occupying the category of “parent” – an ascribed status – regardless of activities with children.<sup>350</sup>

### 5.3 Care

It should be reiterated that the term “care” in this study refers to (unpaid) parental care in relation to dependent children. Parents are entrusted with the primary responsibility for the care of children<sup>351</sup> and it is therefore unsurprising that, in the light of the fact that the concepts of family, parenting and care are intertwined and function in conjunction with each other, “parental care” redirects to “parenting” on the internet.<sup>352</sup>

Jeanne Altman describes “parental care” as “....a term that most people would probably understand to mean any behaviour that is performed by a parent and that benefits its offspring”.<sup>353</sup> “Care”, in respect of a child, therefor comprises a cluster of

<sup>345</sup> Hoghughi & Long *Handbook of Parenting* 5.

<sup>346</sup> Rummel *Basics of Life* 98.

<sup>347</sup> Hoghughi & Long *Handbook of Parenting* 5.

<sup>348</sup> 5. What a parent does to fulfil the “duties” (to provide safety, security, nurturance, love and a supportive environment) of his or her role is in other words termed “parenting”. See R Lerner, A Brennan, E Noh & C Wilson “The Parenting of Adolescents and Adolescents as Parents: A Developmental Contextual Perspective” (1998) *Parenthood in America* <<http://parenthood.library.wisc.edu/Lerner/Lerner.html#top>> (accessed 15-11-2013) 6.

<sup>349</sup> Hoghughi & Long *Handbook of Parenting* 6.

<sup>350</sup> McCarthy & Edwards *Key Concepts in Family Studies* 143.

<sup>351</sup> Bridgeman (2007) *NILQ* 307.

<sup>352</sup> Wikipedia “Parenting” (2014) *Wikipedia, the free encyclopedia* <<http://en.wikipedia.org/wiki/Parenting>> (accessed 03-04-2014) 1.

<sup>353</sup> J Lancaster, J Altmann, A Rossi & L Sherrod *Parenting Across the Life Span: Biosocial Dimensions* (1987) 15

activities aimed at meeting the survival needs of children.<sup>354</sup> These encompass the physical, emotional and social needs at different developmental stages.<sup>355</sup> Bridgeman states that “caring about, taking care of and giving care to a child” include “feeding, clothing, providing a home, nursing through sickness, securing medical treatment, making decisions about the child’s upbringing, ensuring the child is educated, providing appropriate moral guidance and discipline, protecting from harm, promoting physical and mental well-being, and nurturing social and intellectual development.”<sup>356</sup>

It has been stated that “... children have a legitimate interest in general physical, intellectual and emotional care within the confines of the capabilities of their care givers.”<sup>357</sup> In some countries, many of these legitimate interests in care are incorporated into laws regarding protection of children and promotion of their welfare,<sup>358</sup> because to care for a child is included in the parental responsibilities and rights that a person may have in respect of a child.<sup>359</sup> Whilst the language of law employs the gender-neutral term “parental” responsibility, mothers are in practice mostly the primary providers of care.<sup>360</sup>

Care also appears to fall into one of three groups of core activities that are necessary and sufficient for “good enough parenting”.<sup>361</sup> Thus, “care” can best be seen as being concerned with factors that increase the child’s “resilience in the face of adversity and promote positive development”<sup>362</sup> and anyone concerned with the care

<sup>354</sup> Hoghughi & Long *Handbook of Parenting* 7. Also see the definition of “care” in section 1 of the Children’s Act in ch 1, n 2 above.

<sup>355</sup> 7. Also see *Jooste v Botha* 2000 2 SA 199 (T) para 201F where Van Dijkhorst J remarked that:

“There are two aspects of a parent-child relationship. The economic aspect of providing for the child’s physical needs and the intangible aspect of providing for his or her psychological, emotional and developmental needs. The best interests of the child demand an environment of love, affection and consideration.”

<sup>356</sup> Bridgeman (2007) *NILQ* 309.

<sup>357</sup> *Jooste v Botha* 2000 2 SA 199 (T) para 207G.

<sup>358</sup> Hoghughi & Long *Handbook of Parenting* 7.

<sup>359</sup> Hoghughi & Long *Handbook of Parenting* 7; McCarthy & Edwards *Key Concepts in Family Studies* 145.

<sup>360</sup> Bridgeman (2007) *NILQ* 309.

<sup>361</sup> Hoghughi & Long *Handbook of Parenting* 7. The other two groups are control and development.

<sup>362</sup> 7.

of a child can be seen as part of the parenting process.<sup>363</sup> In turn, parenting is the major function of the family<sup>364</sup> and the family is the site of caregiving.<sup>365</sup>

## 6 Conclusion

The purpose of this chapter was to describe the importance and nature of parental care as preconditions for consideration of the appropriate regulation of the integration of work and care.

This chapter first highlighted the importance of the family, parenting and child care in any society. The family is society's primary institution for bringing children into the world and for supporting their growth and development throughout childhood.<sup>366</sup> It is essential for families to fulfil their caregiving responsibilities. Sufficient parental care provides the most fundamental expression of a decent and civilised society<sup>367</sup> and is beneficial to employers, parents, children (through all stages of their development) and the economy. However mundane and menial the associated task may be, the giving of care is vital for the individual well-being of dependent children and, in the collective sense, to achieve and maintain a just community.<sup>368</sup>

Parents are their children's first and most important caregivers, teachers, and providers<sup>369</sup> and society benefits from families' caregiving work.<sup>370</sup> At the same time, this chapter showed the subsequent inequalities in the workplace between men and women as a result of the devotion of mothers, as primary caregivers, to their children's needs. The complete dependency of children on women in prenatal life and infancy predisposes most mothers to care for their children.<sup>371</sup> Whether mothers are in full-time or part-time charge of their children, their lives are likely to be dominated by the

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<sup>363</sup> Hoghugh & Speight (1998) *Arch Dis Child* 294.

<sup>364</sup> Lerner et al "The Parenting of Adolescents and Adolescents as Parents: A Developmental Contextual Perspective" *Parenthood in America* 6.

<sup>365</sup> S Macpherson "Reconciling employment and family care-giving: a gender analysis of current challenges and future directions for UK policy" in N Busby & G James (eds) *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (2011) 25.

<sup>366</sup> Horn *The Family, Civil Society, and The State* 2.

<sup>367</sup> Busby & James "Introduction" in *Families, Care-giving and Paid Work* 193.

<sup>368</sup> 193.

<sup>369</sup> Horn *The Family, Civil Society, and The State* 2.

<sup>370</sup> Gornick & Meyers *Families That Work* 8.

<sup>371</sup> Blitsten *The World of the Family* 7.

welfare of their children.<sup>372</sup> It is clear that, in relation to men, there is a “considerable asymmetry in the roles and responsibilities of women and in the energy, time and income they expend to the overall benefit of their children”.<sup>373</sup> This unequal distribution of caregiving responsibilities flows over to the workplace. The differences in labour force participation rates, unemployment levels, occupational and level segregation, and atypical and precarious employment between males and females confirm gender as a determinant factor in the delineation of care roles. We need both genders present in both the workplace and in the family in order to move closer to the deconstruction of gendered patterns of care.

Lastly, this chapter investigated the meaning and different dimensions of “family”, “parenting” and “care”, which served to illustrate the difficulties of creating a proper understanding of these social phenomena as a precondition for effective and appropriate regulation of the integration of work and parenting. “Family”, “parenting” and “care” are difficult to define and cannot be seen as independent of one another. These phenomena, apart from their own changing natures, are intertwined and function in conjunction with each other. Parenting is the major function of (very different kinds of) the family, and the family, despite the enormous variety of constantly evolving family structures, functions as the primary institution within which parental care is provided to children. The absence of a clear, standard definition of “family”, the diversity of family structures and the growing social acceptability of formerly discouraged or prohibited types of family units remain challenging and also impact on who may rightfully be recognised as a “parent”. In this thesis – as the title suggests – the focus is on “parenting” and the nature of care typically provided by parents during the different stages of child development as discussed in part 2 1 above (that is “parental care”). Where issues arise as to the rightful recognition of persons as “parents” (in the sense of persons providing parental care), perhaps in view of doubts about the social structure behind such parenting, or the rightful recognition of the specific type of care involved, this will be discussed in the pages to follow.

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<sup>372</sup> 8.

<sup>373</sup> O’Connell *Women and the family* 75.

## CHAPTER 3: LEGAL RECOGNITION OF THE IMPORTANCE OF PARENTAL CARE AT THE INTERNATIONAL, REGIONAL AND CONSTITUTIONAL LEVEL

### 1 Introduction

As a first step towards consideration of the actual regulation of the integration of work and care at domestic level, which will follow in later chapters, this chapter provides an overview of the international, regional and constitutional recognition of the importance of parenting. As such, this chapter provides an overview of the broad legal foundations of the regulation of parental care as the basis for work-care regulation at domestic level.

As discussed earlier, a number of economic, social and demographic changes over the past decades have contributed to the emergence of work and family integration as an issue of serious concern for individuals, societies, organisations and governments. This, in turn, has contributed to the fact that today various international, regional and constitutional instruments and provisions guarantee and reaffirm the family as the essential unit of society and its entitlement to protection. By implication – as explained in chapter 2 – these instruments and provisions guarantee and reaffirm the importance of parental care. At the same time, a few of these legislative measures also specifically aim to enable employees to care for their children and engage in employment without conflict with their other responsibilities.

As the later discussion will show, effective recognition of family and parenting eventually depend on domestic operationalisation through one or a combination of equality law and a regime of specific rights. Even so, international and constitutional law provides guidance and a potentially definite and important foundation for such operationalisation.

According to Dancaster, international standards have the potential to impact directly on domestic laws and have often served as the incentive for much of the legislative reform regarding work-care integration in other (primarily European) countries.<sup>374</sup> In South Africa, the influence of international agreements on domestic law is regulated in the Constitution. Section 231 of the Constitution makes international agreements binding on South African law when the National Assembly and the National Council of Provinces have approved them and section 233 states that:

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<sup>374</sup> Dancaster *State and Employer Involvement* 33.

"When interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."<sup>375</sup>

Legislative measures regulating work-care integration in different countries are gradually developing as a result of international obligations created by instruments acknowledging and protecting the family as the fundamental unit of society.<sup>376</sup> This is mainly true of the European Union ("EU"), where directives regulating work and care are well developed. Seeing that South Africa is a non-EU country, it does not experience the same pressure from specific international standards to enact legislative measures to reconcile work and care.<sup>377</sup> There are, however, a few international instruments dealing with the aspects of work-care integration to which South Africa is or could be a signatory as a result of membership of the relevant international organisations.<sup>378</sup>

At domestic level – and this is especially true of South Africa – constitutions usually provide the domestic framework and imperative for the regulation of societal realities, such as the importance of the family, parental care and the integration of work and care. Any consideration of "ordinary" domestic law, or the operationalisation of domestic law, thus requires consideration of applicable constitutional provisions. For example, the previous chapter showed that the social construction of caregiving is a predominantly female concern and that unpaid care provided by women to their children is one of the biggest barriers to gender equality in employment. In this context, it is therefore essential to consider our Constitutional background, which provides for a substantive approach to equality<sup>379</sup> and asserts the centrality of equality as a

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<sup>375</sup> 47. Also see section 39(1)(b) of the Constitution which states that a court, tribunal or forum must, when interpreting the Bill of Rights, consider international law.

<sup>376</sup> *Dancaster State and Employer Involvement* 47.

<sup>377</sup> 47.

<sup>378</sup> 47.

<sup>379</sup> A substantive interpretation of the right to equality recognises the inequalities of past discrimination and allows positive discrimination or affirmative action measures to achieve equality. T Deane *Affirmative Action: A comparative study* LLD thesis University of South Africa (2005) 287. Also see the text to ch 4, part 2 1 below; S Fredman "Facing the Future: Substantive Equality Under the Spotlight" in O Dupper O & C Garbers (eds) *Equality in the*

fundamental right<sup>380</sup>, a core value of our society<sup>381</sup> and an interpretive tool in consideration of the meaning of any legislation or development of the law in general<sup>382, 383</sup>

These remarks in mind, the discussion below will first provide an overview of Human Rights instruments, which reflect the international community's concern with the provision of "protection for families through their guaranteed and decent existence in keeping with humanity's progress".<sup>384</sup> This will be followed by a discussion of the regional instruments which recognise and protect the family as the fundamental group unit of society and which aim at some provision for the integration of work and care without conflict. The last part of this chapter will be devoted to a comparative overview of the legal recognition of family and parental care at the constitutional level, including South Africa.

## 2 Human rights instruments

International human rights law is a "soft" but powerful instrument of change. Over the last decades, international human rights law has had an increasingly creative role in "shaping the public agenda, framing the nature of the family members' rights discourse, and creating an embryonic culture of rights within the family structure".<sup>385</sup>

*Workplace Reflections from South Africa and Beyond* (2010)15 and C Albertyn "Substantive equality and transformation in South Africa" (2007) 23 SAJHR 253 254.

<sup>380</sup> S 9 of the Constitution. S 9 contains three substantive provisions – equality before the law [s 9(1)), affirmative action, s 9(2)) and protection against unfair discrimination, s 9(3)-(5)].

<sup>381</sup> S 1(a) of the Constitution declares (among others) that "[t]he Republic of South Africa is one, sovereign, democratic state founded on the ... values [of] ... [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms."

<sup>382</sup> S 39(2) of the Constitution states that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights" of which, as illustrated above, equality is one of the core principles.

<sup>383</sup> O Dupper "The current legislative framework" in O Dupper & EML Strydom (eds) *Essential Employment Discrimination Law* (2004) 16.

<sup>384</sup> United Nations *The Family in International and Regional Human Rights Instruments* (1999) 3.

<sup>385</sup> Van Bueren (1995) *Hum Rts Q* 738.

All the major international human rights instruments provide for the protection of the family.<sup>386</sup> International human rights instruments may be divided into global instruments and regional instruments, which are restricted to states in a particular region of the world.

## 2 1 Global human rights instruments

### 2 1 1 *International Bill of Human Rights*

“[T]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”<sup>387</sup>

This first assertion of the rights of the family, taken from the UDHR, is reiterated in similar terms in at least two other instruments – article 23 of the ICCPR<sup>388</sup> and article 10 of the ICESCR<sup>389</sup>. Last-mentioned provides that “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”<sup>390</sup> To date, more than 160 states have ratified the ICCPR and the ICESCR.<sup>391</sup> Together with the UDHR, these three instruments are usually regarded and described as the “international bill of rights”.<sup>392</sup>

### 2 1 2 *Instruments emanating from the United Nations*

A number of conventions, recommendations and declarations falling under the auspices of the United Nations pertain to work-care integration, either through a direct acknowledgment and protection of the family (as the basis for parental care), or

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<sup>386</sup> A van Wyk “Safeguards for the family: A South African perspective” (1990) 2 *Stell LR* 186 189.

<sup>387</sup> Art 16 of the UDHR. Also see article 3 of this Declaration.

<sup>388</sup> South Africa ratified the ICCPR in 1998. Also see art 1 of the ICCPR.

<sup>389</sup> Ratified by South Africa on 12 January 2015.

<sup>390</sup> United Nations *The Family in International and Regional Human Rights Instruments* 3.

<sup>391</sup> Office of the High Commissioner for Human Rights “Status of Ratification Interactive Dashboard” (2017) *Office of the High Commissioner for Human Rights* <<http://indicators.ohchr.org/>> (accessed 15-11-2017).

<sup>392</sup> 16.

indirectly through their prohibition of discrimination based on family responsibilities and/or gender.

## 2 1 2 1 Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”)<sup>393</sup> is a human rights treaty for women.<sup>394</sup> CEDAW is one of the most highly ratified international human rights conventions, having the support of 188 States parties.<sup>395</sup> Since the UN General Assembly’s adoption of the CEDAW Convention on 19 December 1979, it is continually updated to include new insights and new issues that are brought to the CEDAW Committee’s attention, through the formulation of General Recommendations by the committee.<sup>396</sup>

The Preamble of CEDAW recognises that at the heart of women’s unequal social status lies the unequal burden on women in terms of childcare and domestic responsibilities. It recognises that men, women and society should share responsibility for the upbringing and care of children.<sup>397</sup>

When South Africa ratified this Convention in 1995, it acquired the obligation to prevent discrimination against women on the grounds of marriage or maternity and also to ensure their effective right to work. This, in turn, requires “appropriate measures to encourage the provision of supporting social services to enable parents to combine family and work responsibilities and participate in public life”.<sup>398</sup> This must be done through the promotion, establishment and development of a network of childcare facilities.<sup>399</sup>

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<sup>393</sup> Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>394</sup> International Womens’ Rights Action Watch Asia Pacific “CEDAW Principles” (2016) *International Womens’ Rights Action Watch Asia Pacific* <<http://www.iwraw-ap.org/cedaw/what-is-cedaw/cedaw-principles/>> (accessed 20-08-2016).

<sup>395</sup> International Womens’ Rights Action Watch Asia Pacific “CEDAW Principles” (2016) *International Womens’ Rights Action Watch Asia Pacific*.

<sup>396</sup> International Womens’ Rights Action Watch Asia Pacific “CEDAW Principles” (2016) *International Womens’ Rights Action Watch Asia Pacific*.

<sup>397</sup> Dancaster State and Employer Involvement in Work-Care Integration in South Africa 53.

<sup>398</sup> Art 2(c) of CEDAW.

<sup>399</sup> Art 2(c).

## 2 1 2 2 United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child ("UNCRC")<sup>400</sup>, ratified by South Africa in 1995, is the most comprehensive statement of children's rights ever produced and is the most widely-ratified international human rights treaty in history.<sup>401</sup> The UNCRC changed the way children are viewed and treated – in other words, "as human beings with a distinct set of rights instead of as passive objects of care and charity".<sup>402</sup>

The Preamble of the UNCRC recognises the family as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children. It also states that the family should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

More to the point, article 18(3) of this convention requires states parties to take "all appropriate measures to ensure that children of working parents have the right to benefit from childcare services and facilities for which they are eligible". This has been interpreted to mean that:

"States should create employment conditions within business enterprises which assist working parents and caregivers in fulfilling their responsibilities to children in their care such as: the introduction of family-friendly workplace policies, including parental leave; support and facilitate breastfeeding; access to quality childcare services; payment of wages sufficient for an adequate standard of living; protection from discrimination and violence in the workplace; and, security and safety in the workplace."<sup>403</sup>

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<sup>400</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>401</sup> UNICEF United Kingdom "What is the UNCRC?" (28-08-2016) *UNICEF United Kingdom* <<http://www.unicef.org.uk/UNICEFs-Work/UN-Convention/>> (accessed 20-08-2016).

<sup>402</sup> UNICEF United Kingdom "What is the UNCRC?" (28-08-2016) *UNICEF United Kingdom*.

<sup>403</sup> UN Committee on the Rights of the Child General comment 16 "State obligations regarding the impact of the business sector on children's rights" (2013) CRC/C/GC/16 para 54.

2 1 2 3        United Nations Convention on the Rights of Persons with Disabilities

In 2007 South Africa ratified the United Nations Convention on the Rights of Persons with Disabilities<sup>404</sup>, a ground breaking treaty, which promotes and protects the rights and dignity of persons with disabilities. It is the first human rights treaty of the 21st century.<sup>405</sup>

The Preamble of this convention again declares “that the family is the natural and fundamental group unit of society” and is entitled to protection by society and the State.<sup>406</sup>

2 1 2 4        International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>407</sup> is one of the most recent of the main United Nation’s human rights treaties.<sup>408</sup> This Convention explicitly refers to migrant workers and “members of their family”<sup>409</sup> and recognises that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.”<sup>410</sup> South Africa has not yet ratified this Convention.

<sup>404</sup> Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

<sup>405</sup> Ubuntu Centre South Africa “Convention on the Rights of Persons with Disabilities” (21-12-2012) *Ubuntu Centre South Africa* <<https://ubuntucentre.wordpress.com/crpd/>> (accessed 20-08-2016).

<sup>406</sup> Also see art 23 of this Convention regarding respect for home and the family.

<sup>407</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 2.

<sup>408</sup> Health and human rights “Protection of the Rights of Migrant Workers” (28-10-2013) *World Health Organisation* <<http://www.who.int/hhr/Migrants.pdf>> (accessed 20-08-2016) 2.

<sup>409</sup> “Members of their family” are defined in article 4 as “persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.”

<sup>410</sup> Art 44(1).

## 2 1 2 5 United Nations Declaration on Social Progress and Development

The United Nations Declaration on Social Progress and Development<sup>411</sup> aims to promote, *inter alia*, full employment and conditions of economic and social progress and development. Article 4 of this Declaration focuses on assistance and protection for the family by stipulating that “[t]he family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community.”

## 2 1 2 6 Copenhagen Declaration on Social Development

At the World Summit for Social Development, held in March 1995 in Copenhagen, the Copenhagen Declaration on Social Development and the Programme of Action<sup>412</sup> was adopted. It was agreed, among other things, that “[t]he family is the basic unit of society, and [it is acknowledged] that it plays a key role in social development and as such should be strengthened, with attention to the rights, capabilities and responsibilities of its members. In different cultural, political and social systems, various forms of the family exist. It is entitled to receive comprehensive protection and support.”<sup>413</sup>

## 2 1 3 *The Beijing Platform for Action*

The Beijing Platform for Action<sup>414</sup> is an agenda for women's empowerment, with the purpose to promote gender equality and to empower women in all spheres of public and private life.

In 1995, the South African government committed itself to this Platform for Action which states the following with regard to women as caregivers and the role that they play in the family:

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<sup>411</sup> United Nations Declaration on Social Progress and Development (11 December 1969) UNGAR 2542 (XXIV).

<sup>412</sup> Copenhagen Declaration on Social Development and the Programme of Action (14 March 1995) A/CONF.166/9.

<sup>413</sup> Part B 26 (h) of the Declaration.

<sup>414</sup> Beijing Platform for Action (15 September 1995, endorsed by GA Resolution 50/203 on 22 December).

"Women play a critical role in the family. The family is the basic unit of society and as such should be strengthened. It is entitled to receive comprehensive protection and support. In different cultural, political and social systems, various forms of the family exist. The rights, capabilities and responsibilities of family members must be respected. Women make a great contribution to the welfare of the family and to the development of society, which is still not recognized or considered in its full importance. The social significance of maternity, motherhood and the role of parents in the family and in the upbringing of children should be acknowledged. The upbringing of children requires shared responsibility of parents, women and men and society as a whole. Maternity, motherhood, parenting and the role of women in procreation must not be a basis for discrimination nor restrict the full participation of women in society. Recognition should also be given to the important role often played by women in many countries in caring for other members of their family."<sup>415</sup>

## 2 1 4 *The International Labour Organisation Conventions*

The Workers with Family Responsibilities Convention<sup>416</sup> is the only ILO Convention dealing directly with the combination of work and care. There are, however, a number of ILO Conventions and Recommendations prohibiting discrimination based on family responsibilities and gender and which require members to accommodate workers with family responsibilities.

### 2 1 4 1 The Workers with Family Responsibilities Convention

The Workers with Family Responsibilities Convention and the Workers with Family Responsibilities Recommendation<sup>417</sup> are the main international standards addressing issues and concerns surrounding the integration of work and family life.<sup>418</sup> They provide extensive guidance on policies and measures needed to assist employees with family responsibilities and to reduce work-family conflict.<sup>419</sup> The foundation of both the Convention and Recommendation is the principle of the need for equality of

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<sup>415</sup> Para 29.

<sup>416</sup> Workers with Family Responsibilities Convention (adopted 23 June 1981, entered into force 11 August 1983) 362 UNTS 32.

<sup>417</sup> Workers with Family Responsibilities Recommendation (adopted 23 June 1981) No.156.

<sup>418</sup> International Labour Organisation "International labour standard instruments on work and family" (2009) *International Labour Organisation* <[http://www.ilo.org/travail/aboutus/WCMS\\_19237/lang--en/index.htm](http://www.ilo.org/travail/aboutus/WCMS_19237/lang--en/index.htm)> (accessed 13-06-2014).

<sup>419</sup> ILO "International labour standard instruments on work and family" (2009) *International Labour Organisation*.

opportunity and treatment in employment between male and female workers with and without family responsibilities.<sup>420</sup>

The Workers with Family Responsibilities Convention, which South Africa has not yet ratified, applies to all branches of economic activity and all categories of workers.<sup>421</sup> Countries that ratify this Convention aim in their national policies to enable persons with family responsibilities to exercise their right to obtain or engage in employment without discrimination and, to the extent possible, without conflict between their employment and family responsibilities.<sup>422</sup> It also provides that all measures compatible with national conditions shall be taken to enable employees with family responsibilities to exercise free choice in employment;<sup>423</sup> to provide vocational training and guidance to help workers with family responsibilities get into and remain in the labour force;<sup>424</sup> to promote information and education that contribute to a broader public understanding of the principle of equality of opportunity and treatment for men and women employees with family responsibilities<sup>425</sup> and to protect employees from termination of employment on the basis of family responsibility<sup>426</sup>.

The Workers with Family Responsibilities Recommendation supplements The Workers with Family Responsibilities Convention by stating more concrete steps that countries may take in order to improve the integration of work, family life and care.<sup>427</sup> It confirms the importance of the integration of work and care and fair treatment of employees with family responsibilities.<sup>428</sup>

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<sup>420</sup> ILO “International labour standard instruments on work and family” (2009) *International Labour Organisation*.

<sup>421</sup> ILO “International labour standard instruments on work and family” (2009) *International Labour Organisation*.

<sup>422</sup> Art 3 of the Workers with Family Responsibilities Convention.

<sup>423</sup> Art 4.

<sup>424</sup> Art 7.

<sup>425</sup> Art 6.

<sup>426</sup> Art 8.

<sup>427</sup> International Labour Organisation “International labour standard instruments on work and family” (2009) *International Labour Organisation*.

<sup>428</sup> International Labour Organisation “International labour standard instruments on work and family” (2009) *International Labour Organisation*.

## 2 1 4 2 Discrimination (Employment and Occupation) Convention

Apart from prohibiting discrimination, also based on gender and family responsibility, the Discrimination (Employment and Occupation) Convention<sup>429</sup> provides that Member States may “determine that special measures designed to meet the particular requirements of persons who for reasons of family responsibilities are generally recognised to require special protection or assistance, shall not be deemed to be discrimination”.<sup>430</sup>

South Africa ratified this Convention in 1997. In the interest of protection of family responsibilities it is therefore required to “declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”.<sup>431</sup> Dancaster remarks that statutory measures for work-care integration are therefore required in furtherance of this convention if there is to be adequate acknowledgement of the importance of parental care and equality of opportunity and treatment of women in the workplace.<sup>432</sup>

## 2 1 4 3 Part-Time Work Convention

Articles 9(1) and (2)(c) of the Part-Time Work Convention<sup>433</sup> states that measures shall be taken to facilitate access to part-time work which meets the needs of employers and employees and that these measures shall include special attention, in employment policies, to the needs and preferences of specific groups such as workers with family responsibilities.

South Africa has not yet ratified this Convention.

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<sup>429</sup> Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31.

<sup>430</sup> Art 5(2).

<sup>431</sup> Art 2. Dancaster *State and Employer Involvement in Work-Care Integration in South Africa* 52.

<sup>432</sup> Dancaster *State and Employer Involvement in Work-Care Integration in South Africa* 52.

<sup>433</sup> Part-Time Work Convention (adopted 24 June 1994, entered into force 28 February 1998) 2010 UNTS 51.

## 2 1 4 4 Night Work Convention

The Night Work Convention<sup>434</sup> requires that specific measures, required by the nature of night work, shall be taken for night workers in order to, *inter alia*, assist them to meet their family and social responsibilities.<sup>435</sup>

## 2 2 Regional human rights instruments

The term “regional” might, at first sight, appear misleading because in international law a region is usually thought of as being the “political, economic or judicial analogue of what a continent is to geographers”.<sup>436</sup> However, Mubangizi explains that, in international human rights parlance, the term “regional system” refers to the continental arrangements in Europe, the Americas and Africa.<sup>437</sup> To these may be added the Arab States and the Asia-Pacific/Southeast Asian Regions.<sup>438</sup>

### 2 2 1 *The European system*

The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>439</sup>, commonly known as the European Convention on Human Rights, guarantees the right to marry and found a family to men and women of marriageable age according to the national laws governing the exercise of this right.<sup>440</sup>

Article 16 of the European Social Charter<sup>441</sup> states that Contracting Parties undertake to promote the economic, legal and social protection of family life by

<sup>434</sup> Night Work Convention (adopted 26 June 1990, entered into force 4 January 1995) 1855 UNTS 305.

<sup>435</sup> Art 3(1).

<sup>436</sup> J Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 2 ed (2008) 19.

<sup>437</sup> 19.

<sup>438</sup> Although all these regions have some form of intergovernmental system of human rights protection, the human rights systems of the Arab states and Asia-Pacific regions are still in *statu nascendi*. See Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 19.

<sup>439</sup> European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950 entered into force 3 September 1953) 213 UNTS 221.

<sup>440</sup> Art 12.

<sup>441</sup> European Social Charter (adopted 18 October 1961 and entered into force on 26 February 1965, revised in 1996) 529 UNTS 89.

appropriate means to ensure the necessary conditions for the full development of the family, which is a fundamental unit of society.

The Charter of Fundamental Rights of the European Union<sup>442</sup> guarantees the right to found a family.<sup>443</sup> Article 33 stipulates that the family shall enjoy legal, economic and social protection<sup>444</sup> and that, in order to reconcile family and professional life, “[e]veryone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child”.

### *2 2 2 The inter-American system*

Article VI of the American Declaration on the Rights and Duties of Man<sup>445</sup> considers every person to have “the right to establish a family, the basic element for society, and to receive protection therefor”.

In 1978, after three decades, another human rights instrument entered into force in the inter-American system, namely the American Convention on Human Rights<sup>446</sup>. Sections 17(1) and (2) state “that the family is the natural and fundamental group unit of society” and is entitled to protection by society and the state and that the right of men and women to raise a family shall be recognised, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in the Convention.

### *2 2 3 The African system*

The African human rights system is the "youngest" regional system and derives its norms from various sources. Its founding instrument is the African Charter on Human

<sup>442</sup> Charter of Fundamental Rights of the European Union (adopted 7 December 2000 entered into force on 1 December 2009). 2012/C 326/02.

<sup>443</sup> Art 9. This right, together with the right to marry, “shall be guaranteed in accordance with the national laws governing the exercise of these rights”.

<sup>444</sup> Art 33(1).

<sup>445</sup> American Declaration on the Rights and Duties of Man, adopted at the 9th Annual International Conference of American States, Bogota (adopted 2 May 1948).

<sup>446</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143.

and Peoples` Rights ("African Charter")<sup>447</sup>, which intends to promote and protect human rights and basic freedoms in the African continent. South Africa ratified this Charter in 1996.

Article 18 of the African Charter stipulates that "[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health." The African Union Assembly adopted the African Charter on Human and Peoples Rights on the Rights of Women in Africa Protocol.<sup>448</sup> Article 13 applies to the combination of work and care in that it states that "[S]tates Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities".<sup>449</sup> It particularly notes that states shall recognise that both parents are primarily responsible for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility.<sup>450</sup>

The African Charter on the Rights and Welfare of the Child<sup>451</sup> states that families are the natural unit and basis for society and provides that families shall enjoy the protection and support of the State for [their] establishment and development".<sup>452</sup> The African Youth Charter 2006<sup>453</sup> includes a provision analogous to that of the African Charter on the Rights and Welfare of the Child.<sup>454</sup>

<sup>447</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (ACHPR). Also known as the Banjul Charter.

<sup>448</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6.

<sup>449</sup> Dancaster *State and Employer Involvement in Work-Care Integration in South Africa* 56.

<sup>450</sup> 56.

<sup>451</sup> African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/153/Rev.2 (1990). Ratified by South Africa in 2000.

<sup>452</sup> Art 18.

<sup>453</sup> African Youth Charter (adopted on 2 July 2006, entered into force 8 August 2009). Ratified by South Africa in 2009.

<sup>454</sup> Art 8 (1):

"The family, as the most basic social institution, shall enjoy the full protection and support of States Parties for its establishment and development noting that the structure and form of families varies in different social and cultural contexts."

Focusing on nine priority areas, the Plan of Action on the Family in Africa<sup>455</sup> is meant to serve as an advocacy instrument to strengthening family units, to address their needs, to improve their general welfare and to enhance the life chances of family members.<sup>456</sup> It furthermore aims to guide “African Union Member States, including South Africa, in designing, implementing, monitoring and evaluating appropriate national policies and programmes for the family on the basis of their specific requirements and needs”.<sup>457</sup>

#### 224 The Arab States

Article 33(1) of the Arab Charter on Human Rights<sup>458</sup> states, *inter alia*, that

“[T]he family is the natural and fundamental group unit of society; it is based on marriage between a man and a woman. Men and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage.”<sup>459</sup>

Subsection 2 confirms the state and society's duty towards the family:

“[T]he State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, older persons and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development.”

The Cairo Declaration on Human Rights in Islam<sup>460</sup> also confirms that the family is the foundation of society and that the State shall protect the family and safe-guard its welfare.<sup>461</sup>

<sup>455</sup> Plan of Action on the Family in Africa (adopted in 2004).

<sup>456</sup> Department of Social Development *Draft White Paper on Families* (2012) 32.

<sup>457</sup> 32.

<sup>458</sup> Arab Charter on Human Rights (adopted on 22 May 2004, entered into force on 15 March 2008).

<sup>459</sup> Ss 1.

<sup>460</sup> Cairo Declaration on Human Rights in Islam (adopted 5 August 1990) UNGA A/CONF.157/PC/62/Add.18.

<sup>461</sup> Arts 5 (a) and (b).

### 3 Legal recognition of family and care at constitutional level

Some countries' constitutions expressly defend the family and a right to create a family, while some constitutions do not.<sup>462</sup> The constitutional approach to protection of families also does not automatically correlate to the origin or history of that particular country - it is a choice that constitution makers have.<sup>463</sup> However, the majority of the 193 sovereign nations recognised by the United Nations that have written constitutions have specific provisions protecting parenting, parents, children, and parental-child relations.<sup>464</sup> At least 180 of these 193 sovereign nations (more than 93%) have written constitutions containing explicit provisions regarding parent-child relations in the form of special constitutional protection.<sup>465</sup> This written recognition signifies incredible international consensus that protection of parenting is "a universal, core value of international human rights and comparative global constitutional law".<sup>466</sup>

Although South Africa adopted and ratified several international and regional instruments confirming the family as the fundamental unit of society and its entitlement to protection, the South African Constitution does not contain an express provision protecting the family. However, South Africa is not the only exception, and possibly has a good reason for this omission. According to Justice Albie Sachs, the reason why some countries do not constitutionalise the family and family law is that the very nature of the family, particularly in multicultural and multi-faith societies, is so diverse that it is best to leave the fundamental rights and freedoms in relation to family life to the basic principles of freedom, security and choice.<sup>467</sup> The different forms of family life will then reveal itself and be appropriately protected through legislation, the development of precedent in the courts as well as social custom and practice.<sup>468</sup> He further states that once the family is constitutionalised, the courts are obliged to

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<sup>462</sup> J Eekelaar & T Nhlapo *The Changing Family: International Perspectives on The Family and Family* (1998) xii.

<sup>463</sup> xii.

<sup>464</sup> L Wardle "Dilemmas of Indissoluble Parenthood: Legal Incentives, Parenting, and the Work-Family Balance" (2012) 26 *BYU Educ & LJ* 265 274.

<sup>465</sup> 274.

<sup>466</sup> 274.

<sup>467</sup> Eekelaar & Nhlapo *The Changing Family: International Perspectives on The Family and Family* xii.

<sup>468</sup> xii.

establish a prototype of what is meant by the “family”. Families in South Africa take on such diverse forms that this could impose a restriction on future development.<sup>469</sup>

The last part of this chapter will provide a brief overview of the way in which countries do protect family and care at constitutional level. This will be followed by a brief consideration of the South African position – that is the extent to which it may be said that parenting and care enjoy constitutional protection in the South African context.

### 3.1 Specific constitutional recognition of family and care

A number of constitutional provisions relating to family and care show that protection of parenting is a universal human rights concern.<sup>470</sup> These provisions identify the profound state interest in parenting, family and family relations which forms the basis of society, social order, stability, and welfare in any nation.<sup>471</sup>

Wardle remarks that at least ninety national constitutions contain substantive protections for "mother", "motherhood", "father", "fatherhood" and "parents".<sup>472</sup> For example, the Constitution of Russia 1993 declares that maternity, childhood and family shall be protected by the State<sup>473</sup> and the Constitution of Poland 1997 specifically states:

"[m]arriage ... as well as the family, motherhood and parenthood shall be placed under the protection and care of the Republic ..." <sup>474</sup>

More than 150 nations have provisions specifically aimed at and protecting "child", "children" and "childhood".<sup>475</sup> The Constitution of the Republic of Armenia 2005, as well as the Constitution of Greece 1975, for example, provides that the state shall protect the family, motherhood and childhood. <sup>476</sup>

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<sup>469</sup> xii.

<sup>470</sup> Wardle (2012) *BYU Educ & LJ* 274.

<sup>471</sup> 275.

<sup>472</sup> 274.

<sup>473</sup> Art 38 of the Constitution of Russia; Wardle (2012) *BYU Educ & LJ* 275.

<sup>474</sup> Art 18 of the Constitution of Poland; Wardle (2012) *BYU Educ & LJ* 275.

<sup>475</sup> Wardle (2012) *BYU Educ & LJ* 275.

<sup>476</sup> Art 48(1) of the Constitution of the Republic of Armenia; Art 21 of the Constitution of Greece and Wardle (2012) *BYU Educ & LJ* 275.

In seventy national constitutions, parent-child relations and parenting are said to be the basis for pre-existing, natural, inherent rights prior to and superior to the state and its positive law.<sup>477</sup> Many constitutions use the term "natural right" to describe parental rights.<sup>478</sup> The Burkina Faso Constitution 1991 and the Basic Law for the Federal Republic of Germany 1949 provide, for example, that the family shall enjoy the protection of the state and that parents have the natural right and the duty to care and raise children.<sup>479</sup> The Constitution of the Central African Republic 2004 mentions parental rights as "natural" and "primordial" and states that the family constitutes the natural and moral basis of the human community and is protected by the State".<sup>480</sup>

The family is further identified as the foundation, cornerstone, or basic unit of society in several other constitutions.<sup>481</sup>

### 3.2 South Africa's constitutional recognition of family and care

Although the South African Constitution does not contain provisions directly protecting family and care, the Constitution affords indirect protection to the family without prescribing any particular format.<sup>482</sup> The diverse rights to equality,<sup>483</sup> dignity<sup>484</sup>,

<sup>477</sup> Wardle (2012) *BYU Educ & LJ* 275.

<sup>478</sup> 275.

<sup>479</sup> Art 23 of the Burkina Faso Constitution; Ss 6(1) & (2) of the Basic Law for the Federal Republic of Germany.

<sup>480</sup> Art 6 of the Constitution of the Central African Republic.

<sup>481</sup> Wardle (2012) *BYU Educ & LJ* 275. Wardle refers to art 36 of the Constitution of Kyrgyzstan 2010, art 51 of the Constitution of Costa Rica 1949, art 226 of the Constitution of the Federative Republic of Brazil 1998, arts 41.1.1 and 41.1.2 of the Irish Constitution (Bunreacht na hÉireann) 1937 and art L (1) of the Preamble of the Fundamental Law of Hungary 2011.

<sup>482</sup> Eekelaar & Nhlapo *The Changing Family: International Perspectives on The Family and Family* xiii. Also see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 96-103.

<sup>483</sup> S 9 of the Constitution.

<sup>484</sup> S 10; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 256. In *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) it was found that the dignity of the family unit was impaired. Para 35:

"It cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in s10. There is no specific provision protecting family life as there is in other constitutions and in many international human rights instruments".

freedom of association,<sup>485</sup> fair labour practices<sup>486</sup>, privacy<sup>487</sup>, freedom of movement and residence<sup>488</sup>, the right to a non-harmful environment<sup>489</sup>, the right to access to information<sup>490</sup> and the right to just administrative action<sup>491</sup> may be relevant, to a greater or lesser extent, in the “family context”<sup>492</sup> and be interpreted to afford protection to the institution of family life and parental care, also in the context of the workplace.

One of the provisions of the Constitution, referred to by the Constitutional Court in the context of “family”, is section 28, which concerns the rights of children.<sup>493</sup> The Constitutional Court in *Government of the Republic of South Africa v Grootboom*<sup>494</sup> noted that sections 28(1)(b) and (c) must be read together. Subsections 28(1)(b) and (c) provide

- “Every child has the right —
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services.”<sup>495</sup>

These sections ensure that parents or families properly care for children, and that, in the absence of parental or family care, children “receive appropriate alternative care”.<sup>496</sup> Sections 28(1)(b) and (c) encapsulate the “conception of the scope of care that children should receive in our society. Subsection (1)(b) defines those responsible for giving care while subsection (1)(c) lists various aspects of the care entitlement”.<sup>497</sup>

<sup>485</sup> S 18 of the Constitution.

<sup>486</sup> S 23(1).

<sup>487</sup> S 14.

<sup>488</sup> S 21.

<sup>489</sup> S 24(1).

<sup>490</sup> S 32(1).

<sup>491</sup> S 33(1).

<sup>492</sup> P Visser “Die moontlike uitdruklike erkenning en beskerming van fundamentele regte ten aansien van die huwelik en gesin (familie) in die finale Grondwet van Suid-Afrika” (1996) *De Jure* 351 354.

<sup>493</sup> Moyo *The relevance of culture and religion to the understanding of children’s rights in South Africa* 20.

<sup>494</sup> 2001 1 SA 46 (CC) para 76.

<sup>495</sup> Para 76.

<sup>496</sup> Para 76.

<sup>497</sup> Para 76.

Section 28(1)(b) contributed to the transformation of the South African constitutional jurisprudence on the family and children's rights.<sup>498</sup> For example, in *Du Toit v Minister for Welfare and Population Development*<sup>499</sup>, the Constitutional Court stated that it is clear from section 28(1)(b) that the Constitution recognises that family life is important to the well-being of all children and "that family care includes care by the extended family of a child, which is an important feature of South African family life".<sup>500</sup> It was confirmed by the Court "that the institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children".<sup>501</sup> The Court noted, however, "that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change".<sup>502</sup> Furthermore, in *MIA v State Information Technology Agency (Pty) Ltd*<sup>503</sup>, the Labour Court stated that the right to maternity leave in terms of the BCEA is an entitlement which is not solely linked to the welfare and health of the child's mother but also connected to the child's best interests and to disregard this duality would be to ignore section 28 of the Constitution.<sup>504</sup>

The Constitutional Court in *Hattingh v Juta*<sup>505</sup> referred to the Supreme Court of Appeal's earlier consideration of the concept of "family" and its conclusion that the word "family" was "incapable of having a precise legal connotation or definition".<sup>506</sup> Nevertheless, the Court expressed the view that a right to family life is inherent in the fundamental right to human dignity enshrined in the Constitution.<sup>507</sup>

In *S v M*<sup>508</sup> the Constitutional Court noted that there are two competing considerations which have to be weighed by the sentencing court when considering

<sup>498</sup> Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 20.

<sup>499</sup> 2003 2 SA 198 (CC).

<sup>500</sup> Para 18.

<sup>501</sup> Para 19.

<sup>502</sup> Para 19.

<sup>503</sup> 2015 6 SA 250 (LC). Para 13.

<sup>504</sup> Para 13.

<sup>505</sup> 2013 5 BCLR 509 (CC).

<sup>506</sup> Para 20. Also see *Hattingh v Juta* 2012 5 SA 237 (SCA).

<sup>507</sup> Para 20.

<sup>508</sup> 2007 ZACC 18.

whether to impose imprisonment on the primary caregiver of young children.<sup>509</sup> The first consideration is the importance of maintaining the integrity of family care and the second consideration is the duty on the State to punish criminal misconduct.<sup>510</sup> With regard to the first consideration, the Court referred to the White Paper for Social Welfare<sup>511</sup> which emphasis that “[t]he well-being of children depends on the ability of families to function effectively. Because children are vulnerable they need to grow up in a nurturing and secure family that can ensure their survival, development, protection and participation in family and social life. Not only do families give their members a sense of belonging, they are also responsible for imparting values and life skills. Families create security; they set limits on behaviour; and together with the spiritual foundation they provide, instil notions of discipline. All these factors are essential for the healthy development of the family and of any society”.<sup>512</sup>

The extent to which the law mirrors traditional gender roles and sometimes reflects gendered and harmful stereotypes surfaced in the early decision of *President of the Republic of South Africa and Another v Hugo*<sup>513</sup>.<sup>514</sup> The Constitutional Court held that the Presidential Act 17 of 1994, which provided for certain categories of prisoners to be granted a special remission of the remainder of their sentences, including “all mothers in prison on 10 May 1994 with minor children under the age of 12 years”, was not unconstitutional. The respondent, a male prisoner with a son under the age of 12 years, had successfully sought an order in the court *a quo* declaring the Presidential Act unconstitutional on the grounds that it discriminated unfairly against him on the basis of gender in terms of section 8(2) of the interim Constitution.<sup>515</sup> The Constitutional Court reversed the decision of the court *a quo* and held that the gender discrimination in the Presidential pardon was not unfair. The different treatment of

<sup>509</sup> Paras 1 and 37.

<sup>510</sup> Paras 38-40.

<sup>511</sup> Ministry for Welfare and Population *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa* (1997) ch 8 s 1 at para 15.

<sup>512</sup> Para 38.

<sup>513</sup> 1997 (6) BCLR 708 (CC).

<sup>514</sup> S Jagwanth & C Murray “No Nation Can Be Free When One Half of It Is Enslaved: Constitutional Equality for Women in South Africa” in B Baines & R Rubio-Marin (eds) *The Gender of Constitutional Jurisprudence* (2005) 245. Also see the text to ch 4, part 3 3 below.

<sup>515</sup> *Hugo v President of the Republic of South Africa* 1996 (4) SA 1012 (D).

mothers and fathers was justifiable because it reflected the unequal roles which men and women play in child-rearing. In arriving at this decision, the Court recognised that mothers are primarily responsible for the care of young children in South African society; although there are instances where fathers bear more childcare responsibilities than mothers, mothers generally bear an unequal burden of child-rearing, which requires great sacrifice.<sup>516</sup> The release of mothers therefore, in many cases, has been of real benefit to children (which was the primary purpose of the legislation). The impact of the release was to give an advantage to those mothers as members of a vulnerable group.<sup>517</sup> In the majority judgment, Goldstone J acknowledged that:

"[F]or many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment ... It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared."<sup>518</sup>

In a dissenting judgment, Kriegler J found that the exercise of the power was unfairly discriminatory in that the basis on which the President had exercised the power was founded in gender stereotyping. According to Kriegler J, the Presidential Act had, in effect, put a stamp of approval on a perception of gender typecasting which the Constitution prohibited.<sup>519</sup> Although the Presidential Act might have conferred a limited benefit on a number of children, this was outweighed completely by its more "diffuse disadvantage to society generally in perpetuating a stereotype which was at the root of women's inequality in our society".<sup>520</sup> Kriegler stated that the notion relied upon, namely that women are to be regarded as the primary care givers of young children, "is both a result and a cause of prejudice; a societal attitude which relegates women

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<sup>516</sup> Para 37.

<sup>517</sup> Para 47.

<sup>518</sup> Para 38.

<sup>519</sup> Para 85.

<sup>520</sup> Para 83.

to a subservient, occupationally inferior yet unceasingly onerous role".<sup>521</sup> To support the generalisation that women are the primary caregivers "is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely".<sup>522</sup>

Despite this difference of opinion, the preceding discussion shows that, although the South African Constitution is part of a small minority of national constitutions that do not contain explicit textual provisions regarding the protection of family and care (at least as viewed from the perspective of society), judicial decisions interpreting and applying the Constitution have confirmed the importance of family life and parental caregiving as part and parcel of our fundamental rights – whether it be in light of the rights of children, the right to dignity, or, as was the case in Hugo, as an extension of the right to equality.

#### 4 Conclusion

This chapter highlighted the protection provided to the family, as the natural and fundamental group unit of society and with the responsibility to provide care to dependent children, at international, regional and constitutional level. It is evident from the discussion that the protection and recognition of the family includes, *inter alia*, the right to be a parent and to care for your child; the right of children to family care or parental care and equality between the sexes within the family context.<sup>523</sup> It is also clear that the recognition of the family includes protection of the family as a single entity as well as protection of individual members within the unit.<sup>524</sup>

Although international and regional human rights instruments provide for the protection of the family, mere ratification of these instruments is not enough. Proper enforcement mechanisms are necessary to ensure adequate integration of work and care in the international and different domestic contexts. However, these international standards have at least the potential to play an important role in statutory interpretation on matters relating to work-care integration and to have an effect on domestic legislation and its application.<sup>525</sup>

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<sup>521</sup> Para 80.

<sup>522</sup> Para 80.

<sup>523</sup> Also see Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 19.

<sup>524</sup> 19.

<sup>525</sup> Dancaster *State and Employer Involvement in Work-Care Integration in South Africa* 47.

This chapter also showed that, although constitutional protection of family and care today is the global standard<sup>526</sup>, the absence of such an express provision does not necessarily mean that constitutional protection of caregiving does not exist. In South Africa, for example, several other constitutional rights may be and have been interpreted to afford protection to the family and parental care giving.

Even so, the true legal operationalisation of the integration of work and care happens – and should happen – at domestic level through legislation subordinate to international and constitutional protection, such as there may be. In this regard, one immediate challenge to the integration of work and care is the underlying gender inequality that many of these international and constitutional instruments already recognise. This means – as the attention is turned to existing modes of the domestic regulation of the integration of work and care – a logical point of departure would be to focus on the sufficiency of equality law to facilitate this integration. This is done in the next chapter.

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<sup>526</sup> Wardle (2012) *BYU Educ & LJ* 274.

## CHAPTER 4: EQUALITY LAW AS A MEANS TO EFFECT THE INTEGRATION OF WORK AND CARE

### 1 Introduction

The discussion in chapter 2 showed that in the majority of countries mothers do not have the opportunity to effectively undertake their caregiving roles and to perform and compete equally in the workplace. Women's unequal share of family and caregiving responsibilities relates directly to the discrimination they face in the labour market and the subsequent inequalities in their social and economic advancement.<sup>527</sup>

There are many examples of countries using law as a tool to address gender inequality and work-care conflict. The range of approaches reflects differences in how law is used to address the issue of work-care conflict and possibly also the extent to which gender equality is seen as an individual or social and structural matter associated with women's unequal caregiving responsibilities.<sup>528</sup> As mentioned in chapter 1, legislative measures to facilitate the integration of work and care generally exist in a combination of constitutional protection and, at subordinate level, equality legislation and the inclusion of specific rights in employment standards legislation.

This chapter considers equality law as a mode of regulation to reconcile work and care in South Africa as well as in the countries used in this study for comparative purposes (as explained in chapter 1). In South Africa, the EEA is the primary statute that regulates equality in employment.<sup>529</sup> It addresses gender inequality and protects women in the employment context by, firstly, prohibiting unfair discrimination<sup>530</sup> based

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<sup>527</sup> R De Silva De Alwis "Examining Gender Stereotypes in NewWork/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation" (2011) 18 *Duke J Gender L & Pol'y* 305 318.

<sup>528</sup> Smith (2006) *Syd L Re* 702.

<sup>529</sup> However, the EEA is supplemented by the Labour Relations Act 66 of 1995 ("LRA") (which regulates discriminatory dismissals) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA") (which addresses discrimination in spheres other than employment).

<sup>530</sup> In s 6(1).

on, among other grounds, sex, gender, pregnancy<sup>531</sup> and family responsibility.<sup>532</sup> Secondly, against the backdrop of section 9(2) of the Constitution, the EEA states its goal to include an obligation on designated employers to implement “affirmative action measures to redress the disadvantages in employment experienced by designated groups”, including women.<sup>533</sup>

In assessing the effectiveness of equality law in South Africa to reconcile work and care, this chapter, at a first level, will reveal the following important insights. First, protection against unfair discrimination is, to some extent, arbitrary, at least in the sense that the concept of “unfair discrimination” is a difficult one and depends on individual litigation for its enforcement. Although there were recent important amendments to the EEA, many of the reservations about the effectiveness of discrimination law remain.<sup>534</sup> Secondly, while the notion and pursuit of substantive equality is an important mechanism and yardstick for legal and social change, equality law has often not been applied in a manner that is fully “transformatory”,<sup>535</sup> but rather in a more “inclusionary” way.<sup>536</sup> Despite the comprehensive reach of the constitutional protection of equality (and subsidiary legislation), normative and traditional social and legal boundaries maintain conventional ideas of society, also in respect of women and family.<sup>537</sup> Equality law has accordingly enlarged the net of (social) ‘inclusion’ of selected groups, for example women, into existing institutions and norms, but the underlying social framework has not been dislodged. Thus, equality law has not transformed norms and institutions.<sup>538</sup> The judicial tendency towards a protective attitude concerning women’s disadvantage (the burdens of motherhood) illustrates the

<sup>531</sup> S 1 of the EEA defines pregnancy as to include “intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy”.

<sup>532</sup> S 1 of the EEA defines family responsibility to mean “the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support”.

<sup>533</sup> S 2(b). Also see Dupper “Equality in the workplace” in *Labour Law in Context* 65.

<sup>534</sup> C Garbers & E Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress*, 15 – 18 September 2015, Cape Town available at <<http://islssl.org/wp-content/uploads/2015/10/SouthAfrica-ChristophGarbers2.pdf>> (accessed 25-05-2017) 2.

<sup>535</sup> Albertyn (2007) *SAJHR* 273.

<sup>536</sup> 260.

<sup>537</sup> 254.

<sup>538</sup> 254, 272.

difficulties of articulating a more egalitarian world based on an assertion of gender difference, and therefore strengthens stereotypical ideas of women as mothers.<sup>539</sup> As far as affirmative action is concerned, the South African experience shows that it has largely collapsed into a system of demographically aligned appointment and promotion<sup>540</sup> and fails to adequately address the challenges women, as a group, face in order to balance work and caregiving responsibilities.<sup>541</sup>

Against this background, the chapter will show that the mere adoption of equality legislation does not necessarily facilitate equal participation of men and women in the workforce and women, as primary caregivers of children, must at least be reasonably accommodated in the workplace in order to effectively reconcile their work and caregiving responsibilities. The EEA advocates and acknowledges this idea of “accommodation” implicitly in sections 5 and 6 (in the context of discrimination) and explicitly in section 15 (in the context of affirmative action).<sup>542</sup> In the gender context, section 1 of the EEA also tells us that “reasonable accommodation” means “any modification or adjustment to a job or to the working environment that will enable [women] to have access to or participate or advance in employment”.<sup>543</sup> As such, it will be shown that “reasonable accommodation” is both the common denominator between and a requirement in order to (1) successfully protect female employees against unfair discrimination and to (2) effectively implement affirmative action.<sup>544</sup>

After assessing the effectiveness of South African equality law as a means to reconcile work and care, a comparative overview of the contribution (if any) that equality law across different jurisdictions, in both developed and developing countries, has made to employees trying to successfully combine their work and care responsibilities, will follow. The aim and value of this comparative overview is to

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<sup>539</sup> 274.

<sup>540</sup> Fredman “Facing the Future: Substantive Equality Under the Spotlight” in *Equality in the Workplace Reflections from South Africa and Beyond* 35.

<sup>541</sup> Fredman “Facing the Future: Substantive Equality Under the Spotlight” in *Equality in the Workplace Reflections from South Africa and Beyond* 35; Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 2.

<sup>542</sup> 2.

<sup>543</sup> 2.

<sup>544</sup> 3.

recognise trends and possibilities and to consider their possible application in the South African context.

## 2 Employment equality law in South Africa

### 2 1 Overview

The EEA seeks to regulate the right to employment equality through the twin measures of protection against unfair discrimination and the implementation of affirmative action. As such, the EEA embraces both a formal approach (equality in treatment and effect) and a substantive approach (equality in outcome) to equality.<sup>545</sup>

The EEA's purpose is, on the one hand, to eliminate unfair discrimination in the workplace and, on the other hand, to implement affirmative action measures to redress disadvantages in employment experienced by designated groups to ensure their equitable representation in the workplace.<sup>546</sup> Section 5 of the EEA places an obligation on all employers to "take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice" and section 6(1) prohibits unfair discrimination on the grounds of, *inter alia*, sex, gender, pregnancy and family responsibility. With regard to affirmative action, section 9(2) of the Constitution allows for "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination".<sup>547</sup>

The operation of the EEA, in general and also in the context of work and care, will be discussed in the following section. Reference and comments to the amendments to the EEA will, where applicable, also be made.

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<sup>545</sup> D Du Toit, S Godfrey, C Cooper, G Giles, T Cohen, B Conradie & A Steenkamp *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 656-657 and O Dupper & C Garbers "Affirmative action" in O Dupper & EML Strydom (eds) *Essential Employment Discrimination Law* (2004) 258 and Van Niekerk et al *Law@work* 155.

<sup>546</sup> S 2.

<sup>547</sup> S 2(b) of the EEA and A Basson, M Christianson, A Dekker, C Garbers, PI Roux, C Mischke & E Strydom *Essential Labour Law* 5 ed (2009) 233.

## 2.2 The prohibition of unfair discrimination

Section 6(1) of the EEA<sup>548</sup> provides:

"[N]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any other arbitrary ground."<sup>549</sup>

This provision mirrors the wording of the equality provision<sup>550</sup> of the Constitution, with the exception of the following grounds: family responsibility, HIV status, political opinion and "any other arbitrary ground". Four important elements of discrimination as a legal concept are immediately apparent:

1 Discrimination as such is not prohibited, only unfair discrimination. Understanding the concept "unfair discrimination" depends, in turn, on distinguishing between differentiation,<sup>551</sup> discrimination<sup>552</sup> and unfair discrimination.<sup>553</sup> The distinction between differentiation, discrimination and unfair discrimination has been explained as follows by the Constitutional Court in *Harksen v Lane NO ("Harksen")*:<sup>554</sup>

<sup>548</sup> Read in conjunction with the Employment Equity Amendment Act (EEAA) 47 of 2013 which came into effect on 1 August 2014.

<sup>549</sup> S 3 of the EEAA.

<sup>550</sup> S 9 and Dupper "The current legislative framework" in *Essential Employment Discrimination Law* (2004) 25.

<sup>551</sup> Differentiation means that an employer treats employees or applicants for employment differently or that policies or practices are used that exclude certain groups of employees. See Dupper "Equality in the workplace" in *Labour Law in Context* 55.

<sup>552</sup> Differentiation becomes discrimination when the differentiation is made for an unacceptable reason. These unacceptable reasons are all the grounds of discrimination listed in s 6(1) of the EEA, or it is possible that a reason not listed may be regarded as similar or comparable to the listed grounds and therefore provide the basis for a claim of discrimination. See Dupper "Equality in the workplace" in *Labour Law in Context* 55.

<sup>553</sup> O Dupper & C Garbers "The prohibition of unfair discrimination" in O Dupper & EML Strydom (eds) *Essential Employment Discrimination Law* (2004) 31. Discrimination is not necessarily unfair – it only becomes unfair in legal terms if there is no justification for the discrimination. See Dupper "Equality in the workplace" in *Labour Law in Context* 55.

<sup>554</sup> 1997 11 BCLR 1489 (CC) 1491-1492.

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two staged analysis:

(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounted to "discrimination", did it amount to "unfair discrimination"? If it had been found to have been on a specified ground, unfairness would be presumed. If on an unspecified ground, unfairness would have to be established by the complainant. The test of unfairness focused primarily on the impact of the discrimination on the complainant and others in his or her

situation. If the differentiation was found not to be unfair, there would be no violation of section 8(2).

(c) If the discrimination was found to be unfair then a determination would have to be made as to whether the provision could be justified under the limitations clause, section 33."

2 Both direct and indirect discrimination are prohibited. Although neither concept is defined by the EEA, the courts have given some content to the meaning of both.<sup>555</sup> Direct discrimination is when an employee is treated differently from others on the basis of their race, sex, gender, religion, sexual orientation or other protected trait and which puts that employee at a disadvantage in relation to the other. Stereotyping is an example of direct discrimination because it attributes certain generalised assumptions to individuals based on the group to which they belong (for example, all women need time off to have children).<sup>556</sup> Direct discrimination is usually easy to recognise.<sup>557</sup> Direct discrimination occurs where a differentiation or distinction between employees is

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<sup>555</sup> Van Niekerk et al *Law@work* 125; Dupper & Garbers "The prohibition of unfair discrimination" in *Essential Employment Discrimination Law* 39.

<sup>556</sup> Van Niekerk et al *Law@work* 125; Dupper "Equality in the workplace" in *Labour Law in Context* 59.

<sup>557</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 665 and Dupper "Equality in the workplace" in *Labour Law in Context* 60.

clearly based on one or more of the criteria listed in section 6(1) of the EEA, or otherwise, if the ground is not specifically mentioned in section 6(1), but passes the test in *Harksen*<sup>558</sup> – recently also held by the Labour Court to be applicable to the meaning of “arbitrary ground” in section 6(1) of the EEA. Indirect discrimination<sup>559</sup> refers to policies and practises that are apparently neutral and do not explicitly distinguish between people on the basis of any prohibited ground, but nonetheless have a discriminatory effect on certain individuals or groups.<sup>560</sup> Direct discrimination is thus about unequal treatment, while indirect discrimination is about equal treatment, but unequal effect.

3 The prohibition in the EEA aims primarily to protect employees against the policies and practices of employers and only prohibits employment discrimination.<sup>561</sup> The provision contains a list of grounds on the basis of which discrimination is prohibited, and whose meaning must be understood.<sup>562</sup>

4 The word “including” in section 6(1), just before the listed grounds, implies that a ground not listed (the so-called “unlisted grounds”) may also be the basis of discrimination.<sup>563</sup> This necessitates a consideration of the test that the courts have developed to identify the “unlisted grounds” and how the test has been applied in practice.<sup>564</sup> Furthermore, in 2014, the EEA inserted the words “any other arbitrary

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<sup>558</sup> Dupper “Equality in the workplace” in *Labour Law in Context* 60. If the differentiation is not on a specified ground, then whether or not discrimination occurred will depend upon whether, objectively, the ground “is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, or to affect them in a comparably serious manner.” See *Harksen v Lane* 1997 11 BCLR 1489 (CC) 1491.

<sup>559</sup> See the text to part 3 1 2 below.

<sup>560</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 666 and Dupper & Garbers “The prohibition of unfair discrimination” in *Essential Employment Discrimination Law* 45 and Van Niekerk et al *Law@work* 126.

<sup>561</sup> Dupper “Equality in the workplace” in *Labour Law in Context* 54.

<sup>562</sup> 54.

<sup>563</sup> Van Niekerk et al *Law@work* 127.

<sup>564</sup> Dupper “Equality in the workplace” in *Labour Law in Context* 54.

ground” into section 6(1), after the listed grounds.<sup>565</sup> It has been argued that the meaning of “arbitrary ground” is to be determined by reference to the preceding listed grounds.<sup>566</sup> These grounds are about dignity (not arbitrariness) which is what discrimination is about and as such the established test for unlisted grounds should continue to dominate.<sup>567</sup> This approach has now been accepted by the Labour Court in *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR)* (“*Pioneer Foods*”)<sup>568</sup> and *Ndudula v Metrorail PRASA (Western Cape)* (“*Ndudula*”).<sup>569</sup>

In *Pioneer Foods*, the Labour Court (against the backdrop of the 2014 amendments to the EEA) had to decide whether length of service as the basis for paying employees performing the same functions differently constituted unfair discrimination. The Commission for Conciliation, Mediation and Arbitration (“the CCMA”) had earlier found that the difference in remuneration was neither fair, nor based on rational grounds and in conflict with the requirement of equal pay for equal work. The court confirmed the test for unfair discrimination and for unlisted grounds laid down by the Constitutional Court in *Harksen* and stated that this test should be applied in determining whether a proffered unlisted ground actually constitutes an “other arbitrary ground”.<sup>570</sup> The court found that length of service with the employer concerned, as a factor affecting pay levels, is not an “other arbitrary ground”, as contemplated in section 6(1) or in the *Harksen*-test. Treating people differently in the workplace in accordance with their length of service with the employer does not impair their fundamental human dignity or affect them adversely in a comparably serious manner.<sup>571</sup>

*Ndudula* provided guidance to the question of whether the reference to “any other arbitrary ground” in section 6(1) refers to a new category of grounds of discrimination

<sup>565</sup> According to the Explanatory Memorandum to the 2012 Employment Equity Amendment Bill published in GG 35799 dd 19/10/2012 this was done for “clarification” and to bring section 6(1) of the EEA in line with section 187(1)(f) of the LRA.

<sup>566</sup> C Garbers & P le Roux “<http://islssl.org/wp-content/uploads/2015/10/SouthAfrica-ChristophGarbers1.pdf>” (2015) *ISLSSL Labour Law World Congress*, 15 – 18 September 2015, Cape Town available at <<http://islssl.org/wp-content/uploads/2015/10/SouthAfrica-ChristophGarbers1.pdf>> (accessed 25-05-2017) 22.

<sup>567</sup> Garbers & le Roux “Employment Equity into the Future” (2015) *ISLSSL Labour Law World Congress* 22.

<sup>568</sup> C 687/15, 19 April 2016.

<sup>569</sup> C1012/2015, 28 February 2017.

<sup>570</sup> Paras 22, 32, 55 and 56.

<sup>571</sup> Para 59.

over and above the listed grounds and the grounds analogous to the listed grounds. In this case one of the issues that the court had to consider was whether length of service is a justifiable reason for paying employees who perform the same functions differently. The applicants argued that the employer's conduct constituted unfair discrimination on an arbitrary ground and sought compensation (and did not rely on a ground listed in section 6(1) or on any ground analogous to the listed grounds). The Labour Court pointed out that the applicants were required to identify a specific ground on which the employer had differentiated against them. Instead, the applicants argued that there was differentiation, which was arbitrary, and because it was arbitrary it amounted to unfair discrimination and that it was not necessary to identify a particular arbitrary ground.<sup>572</sup> According to the applicants, the amendments to section 6 of the EEA introduced an additional category of grounds on which an employee could rely to claim unfair discrimination and that there are thus now three categories of grounds namely, (1) listed grounds (2) a ground analogous to a listed ground and (3) arbitrary grounds.<sup>573</sup> The employer argued that the reference to "any other arbitrary ground" did not create another category of grounds but merely allowed the applicants to base their claim of unfair discrimination on a ground which was unlisted, but still analogous to one of the listed grounds.<sup>574</sup> The court had to interpret the amended provisions of the EEA in order to determine whether a third category of grounds was introduced by the amendment and held that the phrase "or on any other arbitrary ground" did not create a third category of unfair discrimination. According to the court, the insertion of the phrase serves no other purpose than being synonymous with "one or more ground" or "unlisted grounds".<sup>575</sup> It was found that the applicants failed to plead or rely upon a listed or any other arbitrary ground and the application was dismissed.

## 2 3 The experience with the prohibition on pregnancy discrimination

Parenting begins before birth and protection against pregnancy discrimination protects women during the first steps towards and of caregiving. Discrimination based on the pregnancy of an employee may have serious consequences for an employer,

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<sup>572</sup> Para 19.

<sup>573</sup> Para 28.

<sup>574</sup> Para 37.

<sup>575</sup> Paras 54, 100, 101.

especially when the discrimination occurs within the context of an unfair dismissal.<sup>576</sup> Section 1 of the EEA defines pregnancy to include “intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy”. Section 187(1)(e) of the LRA determines that the dismissal of an employee on the basis of the employee’s “pregnancy, intended pregnancy or any reason related to her pregnancy is automatically unfair “and the employer will not be able to argue that the dismissal was fair.<sup>577</sup> In addition, section 187(1)(f) of the LRA states that the dismissal of an employee is automatically unfair if the reason for the dismissal is that “the employer unfairly discriminated against an employee, either directly or indirectly, on one or more of a number of non-exhaustive prohibited grounds”. A dismissal in terms of s 187(1)(f) may, however be justified in terms of 187(2).<sup>578</sup> Below, some examples of cases dealing with pregnancy discrimination are discussed.

The case of *De Beer v SA Export Connection CC t/a Global Paws*<sup>579</sup> illustrates that an employer has to make provision for an employee to care for her sickly children. In this case an employee gave birth to twins and took one month's maternity leave as agreed between herself and her employer. When the employee tried to apply for more leave in order to care for the twins to whom she gave birth, who was sickly and had colic, she was offered only two weeks, which she duly declined. Her employment was terminated two weeks later without a disciplinary hearing having been held. The employee referred the matter to the Labour Court claiming that the dismissal was automatically unfair because she had been dismissed for reasons related to her pregnancy. The court stated that section 187(1)(e) “must be seen as part of social legislation passed for the specific protection of women and to put them on an equal

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<sup>576</sup> L Ledwaba *Dismissal due to pregnancy* LLM thesis, Nelson Mandela Metropolitan University (2006) 3.

<sup>577</sup> Dismissal in this context includes a refusal by an employer to allow an employee to resume work after she has taken maternity leave.

<sup>578</sup> In *Woolworths (Pty) Ltd v Whitehead* 2000 21 ILJ 571 (LAC) the applicant unsuccessfully argued that the employer's refusal to offer her more than a temporary position, after she informed them about her pregnancy, constituted unfair discrimination. The Court found that there was no causal connection between her not being appointed and her pregnancy and that uninterrupted job continuity cannot be an inherent job requirement because it can never be guaranteed.

<sup>579</sup> 2008 29 ILJ 347 (LC).

footing with men"<sup>580</sup> and that the phrase "any reason related to her pregnancy" is not only related to pregnancy health problems but extends to the care of children.<sup>581</sup> Each case should, however, be considered on its own merits.<sup>582</sup> It was found that the employer had acted unlawfully in requiring the employee to agree to less maternity leave than she was legally entitled to<sup>583</sup> and, furthermore, that the dismissal was automatically unfair as it pertained to reasons related to her pregnancy.

In *Mnguni v Gumbi*<sup>584</sup> the applicant had been employed as a receptionist by the respondent and was eight months' pregnant at the time of her dismissal. The respondent failed to accommodate the employee in terms of her fatigue related to pregnancy and had summarily dismissed her. The court found that the dismissal was directly related to the fact that the employee was pregnant at the time and that such dismissal was automatically unfair. The respondent was ordered to pay the applicant compensation equivalent to 24 months' salary and costs.

The respondent terminated the applicant's services in *Wallace v Du Toit*<sup>585</sup> after discovering that she was pregnant. She then referred a dispute to the Labour Court claiming that she had been unfairly discriminated against on grounds of her pregnancy, and sought compensation under the LRA and also claimed damages under the EEA. The respondent claimed that during the pre-employment interview, an agreement with the applicant was reached that her services would be terminated if she fell pregnant. The applicant denied having entered into such agreement. The Labour Court held that it could not be accepted that not being pregnant or a parent was an inherent requirement of the work and that this is the kind of generalisation or stereotyping that evidences the unfairness of the discrimination. The dismissal constituted unfair discrimination and was an automatically unfair dismissal. The applicant was awarded compensation equivalent to twelve months' salary.

The applicant in *Heath v A & N Paneelkloppers*<sup>586</sup> brought a dispute to the Labour Court in which she contended that she was dismissed due to the fact that she was

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<sup>580</sup> Para 10.

<sup>581</sup> Para 23.

<sup>582</sup> Para 23.

<sup>583</sup> Four consecutive months unpaid maternity leave in terms of section 25 of the BCEA.

<sup>584</sup> 2004 25 ILJ 715 (LC).

<sup>585</sup> 2006 8 BLLR 757 (LC).

<sup>586</sup> 2015 36 ILJ 1301 (LC).

pregnant and that the dismissal was automatically unfair. The applicant did not seek reinstatement and only sought compensation as relief. The respondent contended that the applicant was never dismissed, but left of her own accord. The court considered, *inter alia*, the respondent's written reply to the applicant's letter of demand, sent by her lawyer, wherein he stated that he expressly asked the applicant if she intended to become pregnant in the next five years, because the workload simply did not allow any one of the women working in administration to be away from work. The court found that the applicant's dismissal constituted an automatically unfair dismissal as contemplated by section 187(1)(e) of the LRA and the respondent was ordered to pay compensation to the applicant.

In *Tabane / Impala Platinum Ltd*<sup>587</sup> four pregnant women referred a dispute to the CCMA after they were removed from their posts and placed on maternity leave because, according to the respondent, there were no suitable and safe alternative posts for them. The expectant mothers claimed that they had been unfairly discriminated against on the ground of pregnancy because other pregnant employees had been placed in alternative posts in the past. The employer's practice was regarded as discriminatory because the employees were not properly consulted about finding alternative employment even though they were paid in full during the maternity leave. The arbitrator found a failure to reasonably accommodate and recognise pregnancy and maternity – and in general, the reproductive role of women – may constitute discrimination. Damages were awarded to each pregnant employee who was forced to take early maternity leave.

With regard to the question of the onus of proof in dismissals with reasons related to pregnancy, the Labour Court held in *Mushava v Cuzen and Woods Attorneys*<sup>588</sup> that the onus on the employee to prove that the dismissal was based on her pregnancy. She only has to make out a *prima facie* case, the employer then has to prove that the dismissal was not automatically unfair.

These cases suggest that employers should steer clear of discrimination against employees based on their pregnancy and if there is any evidence of such discrimination (and/or related dismissal), arbitrators and courts have been quick to come to the assistance of employees.

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<sup>587</sup> 2015 8 BALR 873 (CCMA).

<sup>588</sup> 2000 6 BLLR 691 (LC) para 23.

## 2 4 The experience with family responsibility discrimination

Section 1 of the EEA defines family responsibility to mean “the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support”. In typical family-responsibility discrimination cases, an employer’s discriminatory action is based on stereotypes and assumptions of how an employee with caregiving responsibilities might act.<sup>589</sup>

Discrimination arises directly if an employee is dismissed or treated unfavourable due to her family responsibilities, for example an employer’s failure to promote an employee due to a stereotypical<sup>590</sup> assumption that she is not available to work overtime or to travel because of her family responsibilities or the dismissal of an employee who requires flexible working hours.<sup>591</sup> A request for flexible working hours is sometimes perceived by the employer as a sign that an employee is no longer in a position to perform her job<sup>592</sup> and seeking an advantage over other employees, rather than an entitlement to equal treatment.<sup>593</sup> While it may be possible for some families to have a member solely devoted to caregiving, it is not economically feasible for most to do this. Flexible working hours are not only of benefit to a privileged minority, but to

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<sup>589</sup> De Silva De Alwis (2011) *Duke J Gender L & Pol'y* 311.

<sup>590</sup> According to Williams and Segal, gender stereotyping can take three forms: prescriptive stereotyping where an employer makes assumptions about how female employees should behave due to the traditional perception of gender roles (for example, the assumption that a mother's place is at home); descriptive stereotyping or cognitive bias where an employer's perception is affected by stereotypical assumptions regarding a female employee's desires and requirements (for example, an employer's assumption that a working mother would not want to be promoted to a position that requires travelling); and competence assumptions where motherhood is regarded by an employer as rendering an employee less capable of performing competently. See J Williams & N Segal "Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job" (2003) *Harvard Women's Law Journal* 77 97.

<sup>591</sup> Cohen & Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in *Equality in the Workplace: Reflections from South Africa and Beyond* 209.

<sup>592</sup> J Murray "Work and Care: New Legal Mechanisms for Adaptation" (2005) *Labour & Industry* 66 81.

<sup>593</sup> B Gaze "Context and Interpretation in Anti-Discrimination Law" (2002) *Melbourne Univ Law R* 347.

all worker-carers that would otherwise be giving up work altogether in order to engage in caregiving.<sup>594</sup> Discrimination arises indirectly if apparently neutral provisions, criteria, or practices would cause a differential effect on employees with family responsibilities – compared with employees without family responsibilities.<sup>595</sup> Inflexible working hours and obligatory overtime demands might be responsible for the differential effect and would constitute indirect discrimination against women who are the primary caregivers in the majority of cases, unless the differential effect can be justified.<sup>596</sup> In addition, many women in South Africa take breaks in their careers, work reduced hours, or otherwise devote plenty of time to caregiving responsibilities.<sup>597</sup> They often do this mid-career and such breaks may prevent women from being seen as “ideal workers” and candidates for promotion.<sup>598</sup> These generally accepted norms of society also constitute indirect discrimination against women.<sup>599</sup>

The LRA also protects employees against discrimination on the grounds of family responsibility by stating that a dismissal of an employee for reasons related to their family responsibilities is automatically unfair.<sup>600</sup> This protection includes constructive dismissal of the employee, which arises when an employee has no other option than to resign because the employer made continued employment intolerable.<sup>601</sup> Consequently, inflexible working hours might cause unbearable working conditions for employees with family responsibilities and possibly constitute constructive dismissal.<sup>602</sup>

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<sup>594</sup> E Roush “Entering the Workforce: An Historical Perspective on Family Responsibilities Discrimination and the Shortcomings of Law to Remedy It” (2009) *Wash. U. J. L. & Pol'y* 221 247 and Cohen & Dancaster (2009) *Stell LR* 22.

<sup>595</sup> De Silva De Alwis (2011) *Duke J Gender L & Pol'y* 319 and Cohen & Dancaster “Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act” in *Equality in the Workplace: Reflections from South Africa and Beyond* 209.

<sup>596</sup> 209.

<sup>597</sup> K April, S Dreyer & E Blass “Gender impediments to the South African Executive Boardroom” (2007) 31 *SAJLR* 51 53.

<sup>598</sup> 53.

<sup>599</sup> 53.

<sup>600</sup> S 187(1)(f) of the LRA and Cohen & Dancaster (2009) *Stell LR* 232.

<sup>601</sup> S 186(1)(e) of the LRA and Cohen & Dancaster (2009) *Stell LR* 232.

<sup>602</sup> Cohen & Dancaster 232.

*Masondo v Crossway*<sup>603</sup>, a CCMA award, helped to create jurisprudence concerning family responsibility discrimination.<sup>604</sup> In *Masondo v Crossway*, the only reported CCMA award considering family responsibility discrimination relating to childcare, the CCMA found that an employee had been unfairly, constructively dismissed based on her family responsibilities and awarded 12 months' remuneration as compensation. This award was based solely on family responsibility discrimination and the fact that the employee was unfairly required to work night shifts, while other employees with newborn children were not required to do so.

Other cases have also crossed-over into the family responsibility domain, such as *Swart v Mr Video (Pty) Ltd*<sup>605</sup>.<sup>606</sup> Although this case was won on the basis of age discrimination, it was found that discrimination had also taken place on the basis of marital status and family responsibility. The respondent was reluctant to employ the applicant because she was too old, married and had children and therefore not suitable for the position.

Although *Hugo v eThekweni Municipality*<sup>607</sup> does not set a legal precedent on the issue of family responsibility discrimination (because the parties reached a settlement and hence no judgment was delivered), it will hopefully contribute to the development of how courts and arbitrators view family responsibility and also encourage employers to take into account their employees' family responsibilities, especially in respect of primary caregivers, when making decisions in the workplace.

The facts of the case were as follows. In 2011, Captain Suraya Hugo, a metro policewoman, represented by the Legal Resources Centre, challenged the conduct of her employer, the eThekweni Municipality's Metropolitan Police, in the Labour Court in Durban, for repeated unilateral, unreasonable and unlawful transfers over a period of one year, resulting in prejudice to the well-being of her minor son.<sup>608</sup> Captain Hugo

<sup>603</sup> 1998 19 *ILJ* 171 (CCMA).

<sup>604</sup> Also see K Miller *An evaluation of "work-life" legislation in South Africa* MPhil University of Cape Town (2012) 34.

<sup>605</sup> 1998 19 *ILJ* 1315 (CCMA).

<sup>606</sup> Miller *An evaluation of "work-life" legislation in South Africa* 34.

<sup>607</sup> D 18/11. This case was instituted in the Labour Court, but it is not a reported case because the parties reached a settlement.

<sup>608</sup> WA Holness "Statement of Claim" (2011) Legal Resources Centre <<http://lrc.org.za/lrcarchieve/judgements-texts/court-papers/item/suraya-hugo-vs-ethekwini-municipality-and-another-filing-notice-hc-2>> (accessed 22-09-2014) para 5.

was a single mother of a 5 year old child with autism. Her son could not cope with change and required a reasonably stable routine. Sudden transfers to other offices and unexpected and frequent changes in shifts adversely affected the emotional and physical well-being of her child.<sup>609</sup> Despite her requests that her family responsibility to her son required reasonable accommodation, the transfers continued without further consultation with her and failed to reasonably accommodate the special needs of her and her child.<sup>610</sup>

Captain Hugo alleged that her employer unfairly discriminated against her in terms of section 6(1) of the EEA, on the basis of both her gender and family responsibility. Her employer simply refused to consult with her prior to taking any decision to transfer her, in order to assess and reasonably accommodate her and her child's special needs. Her employer also did not take a decision that reasonably accommodated the special needs of her and her son and that would not unfairly discriminate against her on the grounds of gender and family responsibility.<sup>611</sup> When challenged in the Labour Court, her employer averred that "...it is the employer's prerogative as to the most efficient manner of deploying its human resources. It is not for the employee to dictate to the employer where the employee wishes to perform the services that are the subject of the contract of employment."<sup>612</sup>

An expert psychologist reported that Captain Hugo's child became highly distressed and experienced "meltdowns" that took the form of self-injurious behaviour. This behaviour would be ameliorated by Captain Hugo's proximity to the child's special school. She also reported that it would be in the best interests of the child that Captain Hugo work according to a regular shift system, consisting of day shifts, which would enable her to provide the necessary care for the child. In conclusion, she reported that it would be adverse to the child's best interests that his mother is transferred frequently or in circumstances that fail to take into account the impact of any disruptions to his condition.<sup>613</sup>

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<sup>609</sup> Holness "Statement of Claim" (2011) *Legal Resources Centre* para 9.

<sup>610</sup> W Holness "Family Responsibility in the Workplace" (2012) *Realising Rights* <<http://realisingrights.wordpress.com/2012/10/18/family-responsibility-in-the-workplace/>> (accessed 09-09-2014).

<sup>611</sup> Holness "Statement of Claim" (2011) *Legal Resources Centre* para 5.

<sup>612</sup> Holness "Statement of Claim" (2011) *Legal Resources Centre* para 43.

<sup>613</sup> Holness "Family Responsibility in the Workplace" (2012) *Realising Rights*.

A settlement was agreed to shortly after Captain Hugo finished her evidence in court. This settlement agreement was made an order of court. It provided that, in order to reasonably accommodate the family responsibility of Captain Hugo, the employer shall transfer her to a post at a particular station, for a fixed day shift from 07h00 to 16h00, Mondays to Fridays, as this station was close to the child's school. The employer was ordered to pay the costs of the court proceedings.<sup>614</sup>

Apparently, Captain Hugo's son has since adjusted well to his and his mother's stable work routine.<sup>615</sup> Unfortunately, the outcome of this case does not set a precedent other than being a useful example to prospective litigants in similar circumstances. Holness remarks that the individualistic nature of remedies means that each employee wanting to challenge the discriminatory conduct of their employer would have to go through the effort of, potentially costly, litigation unless a consultative approach with the employer is successful.<sup>616</sup>

The abovementioned cases demonstrate that family responsibility discrimination might be taking place in South Africa, but rarely come before the courts or tribunals. As such, it would seem important to investigate the causes of this state of affairs.<sup>617</sup>

## 2 5 Justifying unfair discrimination

The EEA states that "if unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination did not take place, or is rational and not unfair, or otherwise justifiable".<sup>618</sup> If discrimination is alleged on an arbitrary ground the complainant must prove that the conduct was not rational, amounts to discrimination and that the discrimination is unfair.<sup>619</sup>

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<sup>614</sup> Holness "Family Responsibility in the Workplace" (2012) *Realising Rights*.

<sup>615</sup> Holness "Family Responsibility in the Workplace" (2012) *Realising Rights*.

<sup>616</sup> Holness "Family Responsibility in the Workplace" (2012) *Realising Rights*.

<sup>617</sup> Miller *An evaluation of "work-life" legislation in South Africa* 35.

<sup>618</sup> S 11(1) of the EEAA.

<sup>619</sup> S 11(2).

In this regard, section 6(2) of the EEA mentions the following two possible defences to unfair discrimination:

- 1 affirmative action consistent with the purpose of the EEA;<sup>620</sup> and
- 2 distinguishing, excluding or preferring any person on the basis of an inherent requirement of the job<sup>621,622</sup>

The EEA does not, however, state that these are the only two reasons employers may advance to justify discrimination. Despite differences of opinion between academics on this issue, the courts have regarded it as axiomatic that employers may show the fairness of its (discriminatory) conduct – the so-called “general fairness” defence.<sup>623</sup> The use of this defence does not only examine the impact of the

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<sup>620</sup> In order for an employer to justify the selection of an employee on the ground of affirmative action, the measure taken by the employer must be lawful; in other words it must be consistent with the purpose of the EEA. An employer must thus promote equal opportunity and fair treatment in employment and implement measures to ensure equitable representation of designated groups in the workforce. See Dupper “Equality in the workplace” in *Labour Law in Context* 57.

<sup>621</sup> An inherent requirement is, in essence, a personal or physical characteristic that an employee needs to have in order to perform the necessary functions of the job. The inherent requirements of a particular job could justify distinctions made between employees, for example, in the interest of authenticity or privacy. The employer, in addition to the minimum skills and competencies required by the employee to perform the job, sets these requirements. See Dupper “Equality in the workplace” in Labour Law in Context 58 and O Dupper & C Garbers “Justifying discrimination” in O Dupper & EML Strydom (eds) *Essential Employment Discrimination Law* 70-85.

<sup>622</sup> S 187(2) of the LRA provides for the defence of “inherent requirement of the particular job” or “the normal or agreed to retirement age” in the context of discriminatory dismissal.

<sup>623</sup> Academics differ about this issue. Christoph Garbers and Ockert Dupper, for example [C Garbers “Proof and Evidence of Employment Discrimination under the Employment Equity Act 55 of 1998” (2000) SA Merc LJ 136 143; O Dupper & C Garbers “Employment Discrimination: A Commentary” in C Thompson & P Benjamin (eds) *South African Labour Law II* (2002) 30, 53 and 61 and Dupper & Garbers “Justifying discrimination” in *Essential Employment Discrimination Law* 87-95] advocate this defence, while D du Toit [“Protection against Unfair Discrimination: Cleaning up the Act?” (2014) 35 ILJ 2623 and his own earlier work he references at n 44] feels that it does not exist at all and must not be acknowledged.

discrimination on the dignity of the complainant. If an employer can show that the employment policy or practice has a legitimate object and proportional and reasonable means are used to achieve that object, the disputed discrimination may be found to be fair.<sup>624</sup>

### 2 5 1 Affirmative action

The EEA states its goal in section 2 to include an obligation on designated employers<sup>625</sup> to implement “affirmative action measures to redress the disadvantages in employment experienced by designated groups,<sup>626</sup> in order to ensure their equitable representation in all occupational levels in the workforce”.<sup>627</sup>

A broad definition of “affirmative action measures” is provided for in the EEA.<sup>628</sup> In general, it means any measure aimed at ensuring equal employment opportunities and equitable representation of people, who are suitably qualified, from designated

Also see *SA Airways v Jansen van Vuuren* (2014) 35 *ILJ* 2774 (LAC), *Mbana v Shepstone & Wylie* (2015) 36 *ILJ* 1805 (CC) and *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR)* case no: C 687/15, 19 April 2016.

<sup>624</sup> Garbers (2000) *SA Merc LJ* 143; Dupper & Garbers “Employment Discrimination: A Commentary” in *South African Labour Law II* 30, 53 and 61.

<sup>625</sup> S 1 of the EEA defines “designated employer” to mean-

- “(a) an employer who employs 50 or more employees;
- “(b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to the EEA;
- “(c) a municipality, as referred to in Chapter 7 of the Constitution;
- “(d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
- “(e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.”

<sup>626</sup> S 1 of the EEA defines “designated groups” to mean “black people, women and people with disabilities who are citizens of the Republic of South Africa by birth or descent or became citizens of the Republic of South Africa by naturalisation before 27 April 1994; or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies”.

<sup>627</sup> See s 2(b) of the EEA.

<sup>628</sup> S 15.

groups in all occupational levels in the workforce.<sup>629</sup> This goes further than mere preferential appointment of members of designated groups to vacant positions<sup>630</sup> and includes preferential treatment and numerical goals, measures to identify and eliminate employment barriers, measures designed to further diversity in the workplace, reasonable accommodation for people from designated groups and implementing appropriate training measures.<sup>631</sup>

While protection against unfair discrimination primarily is concerned with the status and recognition of protected groups, affirmative action is based on pre-existing recognition of the status of certain marginalised groups in society and reflects a concern for achieving an improvement in the status and participation of these groups in employment and occupation.<sup>632</sup> The underlying assumption of affirmative action is that abilities are distributed evenly between women and men and between dominant and minority racial groups.<sup>633</sup> Put differently, it is acknowledged that inter-group imbalances in labour market outcomes mirror the existence of structures of discrimination hindering members of particular groups opportunities in order to fully develop their potential.<sup>634</sup>

### **3 Difficulties and challenges with discrimination**

Discrimination law is controversial and a difficult legal concept which brings with it a number of challenges.<sup>635</sup> These challenges include uncertainty about the definition and meaning of the concept (of discrimination), the scope and meaning of the listed grounds of discrimination; uncertainty about the limits of protection against discrimination (available defences) and, lastly, who bears the onus of proving what in discrimination litigation.<sup>636</sup>

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<sup>629</sup> S 15 (1); Dupper & Garbers “Affirmative Action” in *Essential Employment Discrimination Law* 272.

<sup>630</sup> Basson et al *Essential labour Law* 235.

<sup>631</sup> Ss 15(2) and (3).

<sup>632</sup> M Tomei *Affirmative action for racial equality: features, impact and challenges* (2005) 7.

<sup>633</sup> 7.

<sup>634</sup> 7.

<sup>635</sup> T Khaitan *A theory of discrimination law* (2015) 1; Garbers & le Roux “Employment Equity into the Future” (2015) *ISLSSL Labour Law World Congress* 1.

<sup>636</sup> Garbers & le Roux “Employment Equity into the Future” (2015) *ISLSSL Labour Law World Congress* 2, 4.

Below, some of the difficulties in bringing a successful discrimination case to court – in general but also in the context of gender and family responsibility discrimination – will be discussed. The potential of the recent amendments to the EEA to address these difficulties will also be addressed.

### 3 1 Discrimination as a concept

#### 3 1 1 *Direct discrimination*

Despite the radical inroads the EEA makes on the freedom of employers to run their business as they see fit, the EEA itself tells us very little about discrimination as a legal phenomenon. As discussed above, although the EEA outlaws discrimination in the workplace, it does not define direct (or indirect) discrimination.<sup>637</sup>

Although it is not necessary to establish fault in order to prove discrimination, direct discrimination still requires some connection between the prohibited act or omission and the ground of discrimination.<sup>638</sup> Even then, difficulties arise and illustrate the restrictions of direct discrimination as a means to combat inequality.<sup>639</sup>

Firstly, “discrimination” requires a valid comparison (in most cases), the identification of a ground of discrimination and the applicability of that ground to the facts at hand, as well as a causal connection between the ground and the policy or practice in question.<sup>640</sup> In addition, in a case of discrimination on an unlisted or arbitrary ground, it should be clear that the ground is worthy of recognition in terms of the applicable test.<sup>641</sup> Furthermore, even if discrimination is established, employers are

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<sup>637</sup> Van Niekerk et al *Law@work* 1255 and Garbers (2000) SA *Merc LJ* 143-144.

<sup>638</sup> T Khaitan *A theory of discrimination law* 28, 197.

<sup>639</sup> R le Roux & A J Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 250; Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” *Labour Law into the Future: Essays in honour of D'Arcy du Toit* 20.

<sup>640</sup> Garbers & le Roux “Employment Equity into the Future” (2015) *ISLSSL Labour Law World Congress* 24; le Roux & Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 250.

<sup>641</sup> Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future: Essays in honour of D'Arcy du Toit* 21.

still able to justify it.<sup>642</sup> In short, an employer may prove that the alleged unfair discrimination did not take place; or is rational and not unfair, or is otherwise justifiable.<sup>643</sup>

Secondly, common, but difficult, evidentiary issues often arise in employment litigation.<sup>644</sup> In cases of direct discrimination, the fundamental difficulty has always been that comparator evidence (with other employees), as well as the reasons for the employer's conduct, remain in the domain of the employer and is not freely available to complainants.<sup>645</sup> Complainants therefor often have to rely on circumstantial and weak evidence and with the onus on the employee to prove "discrimination" (prior to the amendments), many direct discrimination claims in the past never progressed beyond a mere allegation of discrimination.<sup>646</sup>

### 3 1 2 *Indirect discrimination*

The prohibition of indirect discrimination – widely accepted today – is aimed at the equal application of apparently neutral policies and practices which have a disproportionate effect on a protected group. In light of the gender bias inherent in caregiving, it has particular potential to alleviate the plight of women as a group. However, the application of indirect discrimination raises difficult realities and challenges,<sup>647</sup> of which some will be discussed.

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<sup>642</sup> See the text to part 2 5 above. R le Roux & A J Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 250; Dupper & Garbers "Justifying discrimination" in *Essential Employment Discrimination Law* 96.

<sup>643</sup> S11 of the EEA.

<sup>644</sup> Dupper & Garbers "The prohibition of unfair discrimination" in *Essential Employment Discrimination Law* 42; P Eschels & M Gomsak "Defending Employment Cases: Pretrial Litigation Issues and Strategies" (2008) *American Bar Association* <<http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/101.pdf>> (accessed 26-05-2017)19.

<sup>645</sup> Eschels & Gomsak "Defending Employment Cases: Pretrial Litigation Issues and Strategies" (2008) 19; Garbers & le Roux "Employment Equity into the Future" (2015) *ISLSSL Labour Law World Congress* 24.

<sup>646</sup> See, however, the position concerning the onus of proof after the 2014 amendments in the text to part 3 1 4 below. Also see Garbers & le Roux "Employment Equity into the Future" (2015) *ISLSSL Labour Law World Congress* 24 and Dupper & Garbers "The prohibition of unfair discrimination" in *Essential Employment Discrimination Law* 43.

<sup>647</sup> Le Roux & Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 246.

Indirect discrimination is a statistical concept in a sense that a “disproportionate effect” usually requires a comparison and computation of compliance rates between different societal groups (where a ground of discrimination distinguishes these groups).<sup>648</sup> This leads to questions like how these groups should be identified, how and to what extend they should be compared with each other and what the meaning of “disproportionate” is.<sup>649</sup> In order to (attempt) to answer these questions and to support a case of indirect discrimination, statistical evidence, which is often difficult to gather (in the context of indirect discrimination), is required.<sup>650</sup> The statistical material relied on must also be relevant or significant and it must precisely be determined which figures must be taken into account in order to establish the disproportionate effect.<sup>651</sup> Statistics adds cost and time to any case, and the techniques used by statisticians to test for indirect discrimination are not fool proof and there is a risk of manipulation of data.<sup>652</sup>

The concept of indirect discrimination is also a difficult, confusing one which requires sometimes creative transformation of apparently neutral policies and practices into disproportionate effects between the different groups.<sup>653</sup>

Despite these remarks, the absence of a complicated statutory definition of indirect discrimination in South African law was meant to make it easier for applicants – at least before the amendments to the EEA – to prove a *prima facie* case of indirect

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<sup>648</sup> Dupper & Garbers “The prohibition of unfair discrimination” in *Essential Employment Discrimination Law* 46-47; Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future: Essays in honour of D’Arcy du Toit* 24 and le Roux & Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 246.

<sup>649</sup> Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future: Essays in honour of D’Arcy du Toit* 24.

<sup>650</sup> C Tobler *Limits and Potential of the Concept of Indirect Discrimination* (2008) 6, 41; le Roux & Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 246.

<sup>651</sup> Tobler *Limits and Potential of the Concept of Indirect Discrimination* (2008) 41.

<sup>652</sup> Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future: Essays in honour of D’Arcy du Toit* 26.

<sup>653</sup> Eschels & Gomsak “Defending Employment Cases: Pretrial Litigation Issues and Strategies” (2008) 10; Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future: Essays in honour of D’Arcy du Toit* 25.

discrimination and for the courts to give meaning to it.<sup>654</sup> Furthermore, as far as proof of indirect discrimination is concerned, it has been argued that South African courts are most probably not going to implement an overtly technical approach to indirect discrimination.<sup>655</sup> Even so, judged by the very few cases concerning indirect discrimination in our courts and tribunals, the concept has not yet established itself in South African law.<sup>656</sup> We have a long way to go before we can describe our law on indirect discrimination as "developed".<sup>657</sup> In the indirect cases we have seen, the discrimination was "either evident or poorly argued or not pursued by the applicants".<sup>658</sup> In addition, it seems like some arbitrators do not grasp the concept of indirect discrimination and consequently do not fully understand its meaning and how it must be proved.<sup>659</sup>

### 3 1 3 Grounds of discrimination

One aspect of South African workplace discrimination law distinguishing us from other jurisdictions is the number of grounds on which discrimination is prohibited.<sup>660</sup> Furthermore, there is the possibility of recognition of unlisted grounds or any other arbitrary ground. Of the grounds listed, only "pregnancy", "family responsibility" and "HIV" are defined in section 1 of the EEA. This section also contains a definition of "people with disabilities" which has been applied in the discrimination context, but

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<sup>654</sup> Dupper & Garbers "Employment Discrimination: A Commentary" in *South African Labour Law II* CC40.

<sup>655</sup> CC40.

<sup>656</sup> Dupper & Garbers "The prohibition of unfair discrimination" in *Essential Employment Discrimination Law* 49.

<sup>657</sup> KM Naidu *Discrimination against women in the workplace* LLM thesis, University of Natal (1997) 87.

<sup>658</sup> Dupper & Garbers "Employment Discrimination: A Commentary" in *South African Labour Law, Vol 2* CC42; Dupper & Garbers "The prohibition of unfair discrimination" in *Essential Employment Discrimination Law* 49.

<sup>659</sup> CC42 and Dupper & Garbers "The prohibition of unfair discrimination" in *Essential Employment Discrimination Law* 49.

<sup>660</sup> Garbers "The prohibition of discrimination in employment: Performance and prognosis in a transformative context" in *Labour Law into the Future: Essays in honour of D'Arcy du Toit* 27.

arguably should only apply in the context of affirmative action (where this phrase is actually used).<sup>661</sup>

Prior to the amendments to the EEA, for reasons including the visibility of certain personal attributes that activate infringements and ignorance of the wide range of other legal grounds for discrimination, discrimination litigation was dominated by race, sex and age.<sup>662</sup>

Reliance on unlisted grounds tends to be surprisingly common.<sup>663</sup> This suggests that discrimination, especially indirect discrimination, is not properly understood.<sup>664</sup> Also, with regards to unlisted grounds, the experience shows that the word “arbitrary”, earlier contained in Schedule 7 of the LRA, contributed to a misinterpretation of the concept of discrimination which caused, to a certain extent, a culture of reliance on unlisted grounds.<sup>665</sup>

### 3 1 4 *The onus of proof*

One generally accepted response to the difficulties of bringing a successful discrimination claim is to provide for a shifting onus.<sup>666</sup> The position before the 2014 amendments to the EEA was that the onus to show discrimination, in both the constitutional and employment contexts, rested on the applicant whereafter it shifted to the employer to establish that the discrimination, if on a listed ground, was not

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<sup>661</sup> Also see Garbers & le Roux “Employment Equity into the Future” (2015) *ISLSSL Labour Law World Congress* 4 n 15.

<sup>662</sup> O Dupper & C Garbers “The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace” (2012) *Acta Juridica* 244 251; le Roux & Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 247, 249.

<sup>663</sup> Le Roux & Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 249.

<sup>664</sup> 249.

<sup>665</sup> Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future: Essays in honour of D’Arcy du Toit* 33. It has been submitted that ‘arbitrary ground’ in terms of s 11 of the EEA means the same as the established meaning of ‘unlisted grounds’. See Garbers & le Roux “Employment Equity into the Future” (2015) *ISLSSL Labour Law World Congress* 20 and the text to part 2 2 above.

<sup>666</sup> Garbers “The prohibition of discrimination in employment: Performance and prognosis in a transformative context” in *Labour Law into the Future: Essays in honour of D’Arcy du Toit* 40.

unfair.<sup>667</sup> As stated, many (direct) discrimination claims in the past, where the employee bore the onus to prove “discrimination”, never proceeded beyond a mere allegation of discrimination.<sup>668</sup>

In this regard, the 2014 EEA amendments ostensibly removed one of the most serious barriers to successful discrimination litigation.

Section 11 now states:

- “(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-
- (a) did not take place as alleged; or
  - (b) is rational and not unfair, or is otherwise justifiable.
- (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
- (a) the conduct complained of is not rational;
  - (b) the conduct complained of amounts to discrimination; and
  - (c) the discrimination is unfair.”

The above section, which seems to impose an onus of persuasion on the employer in cases of discrimination on the basis of listed grounds, will hopefully reduce evidentiary challenges in discrimination cases.<sup>669</sup>

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<sup>667</sup> S 11 of the EEA provided (before the 2014 amendments) that “[w]henever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.”

<sup>668</sup> Garbers & le Roux “Employment Equity into the Future” (2015) *ISLSSL Labour Law World Congress* 24.

<sup>669</sup> Garbers & le Roux “Employment Equity into the Future” (2015) *ISLSSL Labour Law World Congress* 25. Also see *Bandat v De Kock and Another* 2015 36 ILJ 979 (LC) where it was explained that prior to the EEAA, where unfair discrimination was alleged, the duty was firstly on the complainant to establish the existence of discrimination, before the onus could shift to the employer to prove that the discrimination was fair. Following the enactment of the EEAA, all that the employee has to do is to allege that discrimination exists on one of the grounds specified in s6(1) of the EEA, and the onus would squarely be on the employer party to prove that it does not exist.

### 3 2 Discrimination litigation

#### 3 2 1 General remarks based on the position prior to 2014

Discrimination cases are difficult to win<sup>670</sup> and individuals are reluctant to engage in discrimination litigation.<sup>671</sup> Several reasons underlie the latter.

Apart from the possibility that uncertainty about the meaning of unfair discrimination, and its constituent elements, hamper litigation,<sup>672</sup> the high costs of litigation as well as the fact that it is time-consuming also dishearten employees to take action.<sup>673</sup> This was specifically the case in South Africa prior to 2014 when jurisdiction to hear and determine discrimination cases was reserved for the Labour Court.<sup>674</sup>

Employment discrimination litigation is also a system dominated by individual cases where employees are reluctant to engage in the “naming, blaming and claiming”<sup>675</sup> inherent in litigation and typically leave with a settlement they feel they must accept, even if it is not “just.”<sup>676</sup> Accordingly, in this system of individualised justice, individuals are left to enforce claims for discrimination alone and for individual compensation and not for systematic change to policies that have a disproportionate effect.<sup>677</sup>

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<sup>670</sup> Broadly discussed above – see the text to part 3 1 above.

<sup>671</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* (2012) 30 and M Selmi “Why are Employment Discrimination Cases So Hard to Win?” (2001) *La L Rev* 555 556.

<sup>672</sup> See the text to part 3 1 above.

<sup>673</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* (2012) 30.

<sup>674</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 12.

<sup>675</sup> Charlesworth “Managing Work and Family in the ‘Shadow’ of Anti-discrimination Law” in *Work, Family and the Law* 104.

<sup>676</sup> L Nielsen, R Nelson & R Lancaster “Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States” (2010) *J. Empirical Legal Stud* 175 194; Charlesworth “Managing Work and Family in the ‘Shadow’ of Anti-discrimination Law” in *Work, Family and the Law* 106.

<sup>677</sup> Smith (2006) *Syd Law Rev* 714; L Nielsen, R Nelson & R Lancaster “Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States” (2010) *J Empirical Legal Stud* 175; Dupper “The current legislative framework” in *Essential Employment Discrimination Law* 16.

Employees also fear being victimized or labelled trouble-makers and, in the light of high unemployment rates, are hesitant to risk existing employment relationships with a request that involve a reorganisation of standardised working arrangements.<sup>678</sup>

It is – and was for employees prior to 2014 – extremely difficult to prove discrimination as a legal concept.<sup>679</sup> Prior to the 2014 amendments to the EEA it could safely be said it was not easy for women with family responsibilities to prove that the employer did not reasonably accommodate them and that the absence of such accommodation constituted unfair discrimination (whether on the ground of gender or family responsibility).<sup>680</sup> An employee was required to discharge the burden of proof in respect of the existence of discrimination by causally linking the policy or practice complained of directly or indirectly to the employee's gender or family responsibilities.<sup>681</sup> In circumstances where decision-making is influenced by apparently reasonable factors based on gender assumptions and stereotyping, the employee faced the difficult task of linking the disparate treatment to a prohibited ground.<sup>682</sup> Also, specifically in the context of the accommodation of women, specific problems exist with identification of an appropriate comparator (to show differentiation) in the context of a search for, or expectation, of different possible forms of flexible working arrangements.<sup>683</sup> Cohen and Dancaster note that there is no general working arrangement that suits all employees aiming to balance work and family responsibilities and specific arrangements have to be adapted to the particular family responsibilities of an employee.<sup>684</sup> The identification of differential treatment of a group of employees would as a result often not be possible to identify and prove.<sup>685</sup>

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<sup>678</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* (2012) 30 and Cohen & Dancaster (2009) *Stell LR* 230.

<sup>679</sup> Garbers (2000) *SA Merc LJ* 136.

<sup>680</sup> Cohen & Dancaster (2009) *Stell LR* 230-231.

<sup>681</sup> Le Roux & Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 250.

<sup>682</sup> Cohen & Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in *Equality in the Workplace: Reflections from South Africa and Beyond* 209.

<sup>683</sup> 230.

<sup>684</sup> 230.

<sup>685</sup> 230.

Another difficulty is the evidentiary challenges associated with proof of discrimination claims.<sup>686</sup> In cases of direct discrimination, employers often do not provide reasons for their employment decisions, and even when reasons are given, the particular employee may not have access to the comparative information that would enable him or her to assess the merits of the claim.<sup>687</sup> In cases of indirect discrimination claims, there are sometimes even more acute evidentiary problems.<sup>688</sup> The disproportionate impact on a protected group (such as women) may be readily evident and a matter of common sense, but the evidence (or the raw statistics) about the effect of workplace policies or practices will often fall in the domain of the employer, or will only be available through sophisticated statistical impact analysis.<sup>689</sup>

The abovementioned leads to questions about the effectiveness of discrimination litigation. These reservations – also in the context of gender and family-responsibility discrimination litigation – are supported by the experience over the past two decades or so.<sup>690</sup> Sex/gender discrimination cases that came before the courts included a diverse combination of harassment,<sup>691</sup> the dismissal of transsexuals,<sup>692</sup> the dismissal of male correctional officers failing to cut their dreadlocks;<sup>693</sup> the dismissal of a female subordinate in the context of an affair at work<sup>694</sup> and isolated challenges to affirmative

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<sup>686</sup> See the text to part 3 1 4 above.

<sup>687</sup> M Selmi “Why are Employment Discrimination Cases So Hard to Win?” (2001) *La. L. Rev* 555 570.

<sup>688</sup> See the text to part 3 1 2 above.

<sup>689</sup> Fredman “Facing the Future: Substantive Equality Under the Spotlight” in *Equality in the Workplace Reflections from South Africa and Beyond* 34 and Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 13.

<sup>690</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 13.

<sup>691</sup> See for example *Potgieter v National Commissioner of the SA Police Service* 2009 30 *ILJ* 1322 (LC); *SAMWU obo Petersen v City of Cape Town & Others* 2009 30 *ILJ* 1347 (LC) and *Dial Tech CC v Hudson* 2007 28 *ILJ* 1237 (LC).

<sup>692</sup> *Atkins v Datacentrix (Pty) Ltd* 2010 31 *ILJ* 1130 (LC) and *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* 2010 31 *ILJ* 2383 (LC).

<sup>693</sup> *Department of Correctional Services & another v POPCRU & others* 2013 ZASCA 40.

<sup>694</sup> *Steynberg v Coin Security Group (Pty) Ltd* 1998 19 *ILJ* 304 (LC).

action based on sex discrimination<sup>695</sup>. These cases fail to reflect a fundamental change to the advantage of women brought about by discrimination law.<sup>696</sup>

Not one indirect discrimination case on the basis of sex or gender came before the Labour Court in the past two decades and no family responsibility discrimination matter, brought by employees with family responsibilities relating to children, has culminated in a judgment by the labour courts in the 19 years since the EEA's enactment.<sup>697</sup>

To all of the above may be added that employers ultimately have the power to regulate the operational needs of their business and to decide the working hours, shift times and workplace policies and if employees are not able or willing to comply with the operational needs of a business, they may be retrenched.<sup>698</sup> Proposed changes (proposed by employees) to terms and conditions of employment contracts, are regarded as matters of mutual interest which must be negotiated with the employer and, as remarked by Cohen and Dancaster, employers may probably, upon a request for flexible working arrangements, justify inflexible working arrangements by means of the perceived costs and expected disruption to ordinary operational systems.<sup>699</sup> And, to the extent that one seeks to rely on discrimination law to limit the operational needs of the employer, one should always bear in mind that our law does not prohibit discrimination, rather unfair discrimination.<sup>700</sup> In this regard, it is worth noting that both

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<sup>695</sup> *Willemse v Patelia NO & Others* 2007 28 ILJ 428 (LC).

<sup>696</sup> Garbers & Rossouw "Women in the Workplace: On 'unfair discrimination', 'affirmative action', 'reasonable accommodation' and 'special measures'" (2015) *ISLSSL Labour Law World Congress* 13.

<sup>697</sup> 13.

<sup>698</sup> Cohen & Dancaster (2009) *Stell LR* 230. An employee can only be retrenched if the employer can prove that the dismissal is operationally justifiable and complies with sections 189 and 189A of the LRA (despite the new section 187(1)(c) in the LRA). See for example *Fry's Metals Pty Ltd v NUMSA* 2003 24 ILJ 133 (LAC) 147, which decision has now been overtaken by the new section 187(1)(c). This section now provides that dismissal on the basis of 'a refusal by employees to accept a demand in respect of any matter of mutual interest' is automatically unfair. However, this does not eliminate the possibility that changes to working conditions may be raised (and lead to dismissal) as an alternative to contemplated retrenchments in the context of sections 189 and 189A of the LRA.

<sup>699</sup> 231.

<sup>700</sup> Garbers & Rossouw "Women in the Workplace: On 'unfair discrimination', 'affirmative action', 'reasonable accommodation' and 'special measures'" (2015) *ISLSSL Labour Law World Congress* 15.

the Constitutional Court<sup>701</sup> and the Labour Appeal Court<sup>702</sup> recently were prepared to factor the real and legitimate operational needs of an employer into the question to determine if the discriminatory conduct of an employer was fair or not.<sup>703</sup> In this sense, an employee who, for example, requests flexible working arrangements to devote time to family responsibilities may find it extremely difficult to succeed with his or her request due to the operational requirements of the employer and can at best hope that the employer will agree to the proposed arrangement.<sup>704</sup>

### 3.2.2 The 2014 Amendments to the EEA

The amendments to the EEA referred to and discussed throughout this chapter, address many of the reservations expressed above about the effectiveness of discrimination litigation to also improve the plight of women in the workplace. Firstly, the jurisdiction of the CCMA has been expanded to include sexual harassment cases

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<sup>701</sup> *Mbana v Shepstone & Wylie* 2015 36 *ILJ* 1805 (CC). In this case, a law firm had an employment policy for candidate attorneys that, barring any exceptional circumstances, only candidates who had completed their LLB degrees would commence employment as candidate attorneys in January after their year of completion. Ms Mbana, a black female, failed to complete her degree at the end of 2008 as expected and would only do so in June 2009. She wanted to start employment in January 2009 whilst completing her outstanding module but in terms of its policy, the law firm informed her she could only start in January 2010. After starting in January 2010, she discovered that two other candidate attorneys had been allowed to start before completing their degrees. The Constitutional Court found that the law firm did not unfairly discriminate against Ms Mbane on the grounds of race and social origin when it refused to deviate from its policy to accommodate her and that the other two candidate attorneys' situations could be distinguished from Ms Mbana's situation.

<sup>702</sup> *SA Airways v Jansen van Vuuren* 2014 35 *ILJ* 2774 (LAC). SA Airways ("SAA") paid their older pilots less than their younger counterparts and the Labour Appeal Court undertook an in-depth enquiry into the provisions of s 6 of the EEA and s 9 of the Constitution. The Labour Court's finding was endorsed, namely that SAA's actions constituted unfair discrimination based on age in terms of the EEA, even though the practice was sanctioned by a collective agreement.

<sup>703</sup> Garbers & Rossouw "Women in the Workplace: On 'unfair discrimination', 'affirmative action', 'reasonable accommodation' and 'special measures'" (2015) *ISLSSL Labour Law World Congress* 15.

<sup>704</sup> Cohen & Dancaster (2009) *Stell LR* 231.

(harassment as unfair discrimination)<sup>705</sup> and all unfair discrimination cases where applicants earn below the threshold.<sup>706</sup> Access to speedy and relatively cheap litigation has thus significantly been enhanced.<sup>707</sup> Statistics from the CCMA, from 1 April 2016 until 31 March 2017, indicate that the total number of referrals was 3 426. “Equal pay” cases amounted to 806 (23.5%), sexual harassment cases to 227 (6.6%), “arbitrary ground” cases to 2 542 (74% of total referrals), equal pay arbitrary ground cases to 712 (88% of equal pay referrals), other “arbitrary ground” cases to 1830 (70% of cases other than equal pay). Other notable grounds (35 or more cases) consisted of race (220); age (97); colour (59); disability (48); sexual orientation (38) and gender (35). There was a sprinkling of cases dealing with belief, birth, culture, HIV, language, marital status, political opinion, and sex but not a single pregnancy or family responsibility case. Of these 3 426 cases, 73 were dismissed (for non-attendance), in 518 cases the CCMA did not have jurisdiction, 745 cases were withdrawn and 691 settled (by the CCMA). This means there were, in effect, 1 399 “real cases” resulting in 129 arbitration awards (although in many cases possible referral to arbitration was pending) and 13 pending Labour Court appeals.<sup>708</sup>

Secondly, the amended section 11 now provides in cases based on listed grounds such as sex, gender, pregnancy, or family responsibility that the full onus of ‘*sion* to prove both the absence of discrimination as well as its fairness is on the employer. As indicated earlier<sup>709</sup>, most discrimination cases prior to 2014 failed because the employee could not prove the existence of discrimination (as opposed to its fairness or justification) to begin with. Section 48 of the EEA, read with section 50(2), now also

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<sup>705</sup> Instances of harassment may give rise to different types of cases and different causes of actions. The CCMA’s jurisdiction is limited to harassment as discrimination in terms of section 6(3) of the EEA.

<sup>706</sup> S 10(6)(aA) of the EEA now makes it possible for employees to refer discrimination disputes to the CCMA for arbitration (even in the absence of consent by the employer) “if (i) the employee alleges unfair discrimination on the grounds of sexual harassment; or (b) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.”

<sup>707</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 15.

<sup>708</sup> Personal communication (via email 02-06-2017) with Ms Anthea Edwards, business analyst, CCMA head office, Johannesburg.

<sup>709</sup> See the text to part 3 1 4 and n 669 above.

gives commissioners the power to award compensation and damages, in the case of unfair discrimination, and to grant an order directing the employer to take steps to prevent the same discrimination in respect of other employees.<sup>710</sup> The EEA amendments have ostensibly removed two of the most serious obstacles to discrimination litigation, namely the jurisdiction of the Labour Court and an onus on the employee. These amendments have, at the same time, created the opportunity for awards to be a force for transformation based on systemic change and accommodation, rather than being limited to individual relief in the form of compensation and/ or damages.<sup>711</sup>

While the amendments to the EEA are welcome, the statistics in the previous paragraph show that it does not address all the reservations expressed earlier effectively – particularly the factors militating against identification of gender and family responsibility discrimination (stereotyping) and the use of litigation. It also fails to address the potential impact the approach of commissioners to the fairness of discrimination may have on the outcome of litigation. However, these amendments have created the potential that protection against unfair discrimination may prove much more of a factor in the protection and advancement of women in the workplace in future.<sup>712</sup>

### 3.3 The transformative potential of substantive equality is limited by “inclusionary” approaches and remedies

In South Africa substantive equality, as a means to address systemic and firmly established inequalities, is essential for the idea of social and economic “transformation” and the role of the law in accomplishing this.<sup>713</sup> However, the idea of transformation is a politically and legally challenged space in which the possibilities of substantive equality are limited by “inclusionary” methods and remedies or reinforced

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<sup>710</sup> S 48 of the EEA read with s 50(2)(c) and Du Toit et al *Labour Relations Law: A Comprehensive Guide* 720-721.

<sup>711</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 16.

<sup>712</sup> 16.

<sup>713</sup> Albertyn (2007) *SAJHR* 255, 259.

by those that are truly “transformatory”.<sup>714</sup> Albertyn explains that an inclusive approach to equality would support the unconventional idea of inclusion of outsider groups into the *status quo* through the extension of legal rights, protections, benefits and so forth. Although this extends the umbrella of social recognition, it does not address the structural conditions that generate and preserve systemic inequalities.<sup>715</sup> In contrast with this, Albertyn states that the aim of a transformatory approach is to address such inequalities, and to accordingly shift the power relations that maintain the *status quo*. A transformatory approach would locate an understanding of women's disadvantage within these systemic inequalities, and then try and disassemble them through new prescriptive interpretations of equality and through remedies confirming a more equal and flexible set of gender roles. It thus removes the underlying standards and structures creating and reinforcing an inflexible and hierarchical *status quo*.<sup>716</sup>

An inclusionary approach to women would recognize the disadvantage that they suffer as mothers and accommodate this without shifting the original ideas of gender giving rise to different, unequal and static roles and conventional positions for women and men as parents, employees and members of the society. While courts can be powerful institutions for achieving social inclusion, their pursuit of substantive equality has tended to occur within clearly defined conventional, doctrinal and normative restrictions that limit the potential of fundamental shifts in power relations in society.<sup>717</sup> Gender equality cases specifically suggest that courts' portrayal of the context from which it will assess the equality problem is limited by its reference to traditional ideas of, *inter alia*, gender roles.<sup>718</sup> This gave rise to instances where the courts ignored a contextual analysis, or applied it incompletely, or applied it in an abstract or socially conventional manner.<sup>719</sup>

The influential tug of formal equality and social inclusion of selected groups into the existing institutions and norms are confirmed by court cases. These cases are, therefore, successful in extending rights but tend to be more inclusive than

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<sup>714</sup> 257.

<sup>715</sup> 256, 273.

<sup>716</sup> 256.

<sup>717</sup> 273.

<sup>718</sup> 274.

<sup>719</sup> 274.

transformatory.<sup>720</sup> *President of the Republic of South Africa and Another v Hugo* is an example of the legal application of substantive equality where stereotypical ideas of women as mothers were reinforced, rather than transformed.<sup>721</sup> The transformative possibilities of this case were limited by the Court's inability to resolve the tension between the need to address women's current conditions of inequality and the need to transform their situation through a practical recognition of disadvantage, coupled with a normative assertion of a more equal society in which women and men are free to make choices about their lives and are not subordinated by patriarchal gender roles.<sup>722</sup> As such, this case does not improve or encourage the dismantling of existing disadvantage and the establishment of the terms for a more egalitarian society. In its competing judgments, the court treats the need to protect women in their gender roles and the need to transform these roles as exclusive.<sup>723</sup> It accordingly ends up protecting women within the *status quo*, and normatively affirms their traditional, stereotypical gender roles as mothers.<sup>724</sup>

It is not sufficient for courts to expose systemic inequalities and extend legal rights and protections to vulnerable and/or excluded groups. Cases like *President of the Republic of South Africa and Another v Hugo* – dealing with the concrete realities of women's lives (motherhood) which go to the core of gender (in)equality – need to find ways of recognising structural inequalities and seeking to transcend them.<sup>725</sup> For equality jurisprudence to reach its full transformative potential, rather than being merely "inclusionary", the legal application of substantive equality needs to be more conceptually consistent.<sup>726</sup> This requires it to be entrenched in a broader transformative jurisprudence that is better able to understand systemic inequalities (social context) and to overcome legal formalism, especially the unsettling effect of

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<sup>720</sup> Albertyn (2007) SAJHR 233, 272; Fredman "Facing the Future: Substantive Equality Under the Spotlight" in *Equality in the Workplace Reflections from South Africa and Beyond* 21.

<sup>721</sup> Albertyn (2007) SAJHR 261, 263 and 274; Jagwanth & Murray "No Nation Can Be Free When One Half of It Is Enslaved:' Constitutional Equality for Women in South Africa" in *The Gender of Constitutional Jurisprudence* 245. Also see the text to part 3 2 above.

<sup>722</sup> Albertyn (2007) SAJHR 263.

<sup>723</sup> 263.

<sup>724</sup> Albertyn (2007) SAJHR 263 and Fredman "Facing the Future: Substantive Equality Under the Spotlight" in *Equality in the Workplace Reflections from South Africa and Beyond* 24.

<sup>725</sup> Albertyn (2007) 264.

<sup>726</sup> 254.

traditional legal concepts and principles on transformative outcomes.<sup>727</sup> It is, however, essential to pursue a society in which power and subordination are delinked from gender – which might have been achieved through a more positive affirmation of parenting roles in *President of the Republic of South Africa and Another v Hugo*.<sup>728</sup>

#### **4 The EEA and “reasonable accommodation” in the context of unfair discrimination and affirmative action**

The EEA’s mandate to employers “to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice”<sup>729</sup> may be interpreted to mean that the recognition of family responsibility as a listed ground of unfair discrimination gives rise to a direct duty on employers to accommodate employees with such responsibilities. Employers who do not reasonably accommodate employees with caregiving responsibilities may be found to have unfairly discriminated. Also, in a more indirect way, and because caregiving remains a gender issue and women are a designated group for purposes of affirmative action regulated in the EEA, the EEA states that steps must be taken to “reasonably accommodate” women through a modification or adjustment to a job or working environment to promote equal opportunity and treatment in the workplace. The EEA therefore seems to recognise that in order for employees in general, and women in particular, to combine their work and family responsibilities successfully, proactive measures are necessary to balance these roles.<sup>730</sup>

Precedent discussed below arguably shows that the idea of reasonable accommodation is part and parcel of the general duty to eliminate unfair discrimination (not being limited to disability discrimination).

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<sup>727</sup> 254; Fredman “Facing the Future: Substantive Equality Under the Spotlight” in *Equality in the Workplace Reflections from South Africa and Beyond* 53-54.

<sup>728</sup> Albertyn (2007) SAJHR 264; Fredman “Facing the Future: Substantive Equality Under the Spotlight” in *Equality in the Workplace Reflections from South Africa and Beyond* 29.

<sup>729</sup> S 5 of the EEA.

<sup>730</sup> Cohen & Dancaster “Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act” in *Equality in the Workplace: Reflections from South Africa and Beyond* 211.

#### 4.1 Judicial guidance on reasonable accommodation

An increasingly important aspect of discrimination law is the requirement of reasonable accommodation. This concept is generally associated with disability discrimination—also in South Africa.<sup>731</sup> In the constitutional context, the duty of reasonable accommodation has been primarily developed in the context of religion in *MEC for Education, Kwazulu-Natal, and others v Pillay*<sup>732</sup>.<sup>733</sup> After stating that “[t]he concept of reasonable accommodation is not new to our law”<sup>734</sup> and part and parcel of the Constitution, the EEA and PEPUDA<sup>735</sup>, the court explained the content of the principle of reasonable accommodation as follows:

“At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.”<sup>736</sup>

And further:

“[E]xclusion is inflicted on all those who are excluded by rules that fail to accommodate those who depart from the norm. Our society which values dignity, equality and freedom must therefore require people to act positively to accommodate diversity. Those steps

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<sup>731</sup> See item 6 of the Code of Good Practice on the Employment of People with Disabilities GN 1345 in GG 23702 of 19-08-2002 as corrected by GN 1064 in GG 23718 of 19-08-2002. S Fredman *Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India* (2012) 55.

<sup>732</sup> 2008 1 SA 474 (CC).

<sup>733</sup> Fredman *Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India* (2012) 57.

<sup>734</sup> Para 72.

<sup>735</sup> PEPUDA recognises (in s 9) that “failing to take steps to reasonably accommodate the needs’ of people on the basis of race, gender or disability will amount to unfair discrimination”. The Act (in s 25) also places a duty on the State to “develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation” and permits courts to order that a group or class of persons be reasonably accommodated. Section 14(3)(i)(ii) lists the question whether the applicant has taken reasonable steps to accommodate diversity as a factor for the determination of fairness of discrimination.

<sup>736</sup> Para 73.

might be as simple as granting and regulating an exemption from a general rule or they may require that the rules or practices be changed or even that buildings be altered or monetary loss incurred.”<sup>737</sup>

In respect of the scope of accommodation, the court stated that balancing the needs of the individual and those of society remains problematic and an approach which amounts to “more than mere negligible effort” is required to satisfy the duty to accommodate.<sup>738</sup> This approach is more in accordance with the spirit of our constitutional project which confirms diversity.<sup>739</sup> The court stated, however, that “[r]easonable accommodation is in a sense an exercise in proportionality that will depend intimately on the facts”.<sup>740</sup> The court also remarked that reasonable accommodation is appropriate in the workplace and that it will be particularly important in the context of allegations of indirect discrimination.<sup>741</sup>

Against this background, the Labour Appeal Court further emphasised and discussed the concept of reasonable accommodation in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi*<sup>742</sup>. In this case, the Labour Appeal Court had to consider the review of an arbitration award involving the fairness of dismissal (based on cultural beliefs) and remarked that our society is characterised by a diversity of cultures, traditions and beliefs which sometimes create challenges within our society, including the workplace.<sup>743</sup> Reasonable accommodation of each other is required to “ensure harmony and to achieve a united society” and “accommodating one another is nothing else but ‘botho’ or ‘Ubuntu’ which is part of our heritage as a society”.<sup>744</sup>

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<sup>737</sup> Para 75.

<sup>738</sup> Para 76.

<sup>739</sup> Para 76.

<sup>740</sup> Para 76.

<sup>741</sup> Para 78. Also see Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 8.

<sup>742</sup> 2012 33 *ILJ* 2812 (LAC).

<sup>743</sup> Para 26.

<sup>744</sup> Para 26.

The Labour Court dealt with the issue of accommodation in the context of discrimination on at least three occasions.<sup>745</sup> In *Dlamini v Green Four Security*<sup>746</sup> the court found that a rule within a workplace was an inherent requirement of the job and the employees were unable to prove that their dismissal was a result of their religious beliefs. The court accepted that even if an inherent requirement of a job is found to exist, the dismissal might still be discriminatory if “the impact is not ameliorated by a reasonable accommodation or modification of the rule, or an exemption from it”.<sup>747</sup> More to the point, in *Co-operative Workers Association v Petroleum Oil & Gas Co-operative of SA*<sup>748</sup> the court noted that South African courts apply a substantive approach to equality to redress imbalances and protect vulnerable groups.<sup>749</sup> The court further noted that the international community acknowledged the fact that workers with family responsibilities constituted a vulnerable group and that special measures must apply to these workers to adjust for the hardships of such responsibilities in order to establish equality amongst the workforce.<sup>750</sup> The court also stated that the responsibility for addressing the special needs of workers with family responsibilities does not only fall on the state but also on employers.<sup>751</sup>

The Labour Court in *Standard Bank of South Africa v CCMA*<sup>752</sup> discussed the content of an employer’s duty to reasonably accommodate, where needed, an employee or job applicant with a disability and held that the “[r]easonable accommodation of the employee and unjustified hardship to the employer operate as countervailing forces to balance the respective rights of the parties. If the employer cannot reasonably accommodate the disabled employee without unjustifiable hardship, the employer may dismiss the employee.”<sup>753</sup> Unjustifiable hardship offers

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<sup>745</sup> Also see Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 8.

<sup>746</sup> 2006 27 *ILJ* 2098 (LC).

<sup>747</sup> Para 13. Also see paras 31-32.

<sup>748</sup> 2007 28 *ILJ* 627 (LC).

<sup>749</sup> Para 48.

<sup>750</sup> Paras 36, 50.

<sup>751</sup> Para 50.

<sup>752</sup> 2008 4 *BLLR* 356 (LC).

<sup>753</sup> Para 371.

relief to an employer from the obligation to reasonably accommodate.<sup>754</sup> The effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business must be considered in determining whether a particular accommodation of a person with a disability, where needed, will impose unjustifiable hardship on the business of the employer.<sup>755</sup> The employer who has to provide reasonable accommodation must find an accommodation and prove that it is reasonable.<sup>756</sup> The employer also bears the onus of proving that reasonable accommodation is unjustifiable.<sup>757</sup>

What this brief overview shows is that “reasonable accommodation”, which is often associated with disability discrimination, is a versatile mechanism that facilitates equality.<sup>758</sup> Applied to gender, this then means our equality law recognises – and we can expect – that in order for women to combine their work and care responsibilities successfully, proactive measures are necessary to reduce the conflict inherent in their dual roles.<sup>759</sup> Cohen and Dancaster rightly remark that this includes measures such as leave arrangements and flexible working arrangements, which involve a “more permanent change to the working conditions of female employees”.<sup>760</sup> The EEA, however, is silent on the actual nature and extent of accommodation required and the determination of reasonableness<sup>761</sup> and the courts have not yet been faced with the need to provide judicial interpretation of the meaning of “reasonable accommodation”

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<sup>754</sup> Para 378.

<sup>755</sup> Cohen & Dancaster “Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act” in *Equality in the Workplace: Reflections from South Africa and Beyond* 211.

<sup>756</sup> *Standard Bank of South Africa v CCMA* 2008 4 BLLR 356 (LC) para 377.

<sup>757</sup> Para 377.

<sup>758</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 9.

<sup>759</sup> Cohen & Dancaster “Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act” in *Equality in the Workplace: Reflections from South Africa and Beyond* 211.

<sup>760</sup> 211.

<sup>761</sup> 211.

in the context of gender and family responsibility discrimination in the workplace.<sup>762</sup> However, we do know from *MEC for Education, KwaZulu-Natal, and others v Pillay* that there is no absolute standard which may be laid down for determining reasonableness – it should be done on a case by case basis. As stated by Garbers and Rossouw, this contextual proportionality analysis requires consideration of the impact of the workplace rule on women, the importance of this rule (in other words the legitimacy of the goal the employer wants to achieve), the link between the rule and the goal (whether they are rationally related) and whether this goal may reasonably be achieved by less invasive means – including accommodation.<sup>763</sup>

Applying the above to the imperative to accommodate women with family responsibilities, it should be seen as discriminatory for an employer to fail to reasonably accommodate these women, including a refusal of a request for flexible working arrangements, part-time or modified work schedules, unless the employer is able to justify its refusal by means of evidence of unjustified hardship to the operation of the business.<sup>764</sup> One other major challenge emerges from this insight, namely that reasonable accommodation in the current context ultimately depends for its development and enforcement on the implementation of affirmative action or discrimination litigation.<sup>765</sup>

## 4.2 Developing and enforcing “reasonable accommodation” through affirmative action and discrimination litigation

### 4.2.1 Affirmative action

The provisions of the EEA relating to affirmative action appears to have powerful potential to improve women’s position in the workplace by means of access to

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<sup>762</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 9.

<sup>763</sup> 10.

<sup>764</sup> Cohen & Dancaster “Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act” in *Equality in the Workplace: Reflections from South Africa and Beyond* 212.

<sup>765</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 10.

employment (preferential promotion or appointment) as well as the fact that affirmative action expressly includes the identification of barriers to employment and reasonable accommodation in employment.<sup>766</sup> In order to achieve these objectives, the EEA requires certain affirmative action measures to be taken, including guidelines for the formation and functioning of a consultation process<sup>767</sup>, the compilation of employment equity plans<sup>768</sup> and annual progress reporting to the Department of Labour<sup>769</sup>.

However, there are practical and legal deficiencies that may continue to hinder reasonable accommodation to operate successfully as part of affirmative action.<sup>770</sup> Firstly, affirmative action over the past two decades aimed more at racial representation (rather than gender) and less at a remedial cause.<sup>771</sup> Race is more about the quantitative, namely access to employment and numbers, while gender concerns the qualitative, namely the implementation of the full array of affirmative action measures – including removal of barriers and accommodation during employment.<sup>772</sup> In this sense, affirmative action does not truly address the challenges women face in the workplace, especially if you take into account that security and flexibility is necessary to improve the number of women and their position in employment over time. It is interesting and ironic that the Convention on Discrimination (Employment and Occupation), prohibits race discrimination but does not immediately identify race as a ground that might merit “special measures”, while it does so in

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<sup>766</sup> S 15 of the EEA; O Dupper & C Garbers “Affirmative action” in *Essential Employment Discrimination Law* 272 and Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 10.

<sup>767</sup> S 16.

<sup>768</sup> S 20.

<sup>769</sup> S 21.

<sup>770</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 10.

<sup>771</sup> GS Bosch “Restitution of Discrimination? Lessons on affirmative action from South African Employment Law” (2007) 4 *Web JCLI* 14; O Dupper “The Beneficiaries of Affirmative Action” in O Dupper O & C Garbers (eds) *Equality in the Workplace Reflections from South Africa and Beyond* 302.

<sup>772</sup> MS Mekwa *The Implementation of Employment Equity in the Public Service with specific reference to the Department of Justice and Constitutional Development* MPA UNISA (2012) 43.

respect of sex and family responsibilities.<sup>773</sup> In other words, although race based and sex based affirmative action may overlap, they ultimately each have their own demands.<sup>774</sup> Secondly, the obligation to implement affirmative action only applies to designated employers.<sup>775</sup> It needs to be kept in mind that section 5 of the EEA applies to all employers and arguably includes the obligation of reasonable accommodation as a general principle of anti-discrimination law.<sup>776</sup> Thirdly, affirmative action is administratively enforced.<sup>777</sup> This means a failure to implement affirmative action (for example, the failure of a designated employer to reasonably accommodate women as a designated group) cannot be brought to court as an unfair discrimination claim.<sup>778</sup> The current administrative approach to the enforcement of affirmative action is inadequate<sup>779</sup> and makes affirmative action less effective.<sup>780</sup> Although the EEA provides for monitoring,<sup>781</sup> undertakings to comply and compliance orders,<sup>782</sup> a review of the employer's progress in implementing affirmative action,<sup>783</sup> the possible imposition of substantial fines by the Labour Court<sup>784</sup> and loss of State contracts,<sup>785</sup> section 42(4) of the Act states that employers may raise any reasonable argument to

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<sup>773</sup> See arts 1(a) and 2.

<sup>774</sup> Garbers & Rossouw "Women in the Workplace: On 'unfair discrimination', 'affirmative action', 'reasonable accommodation' and 'special measures'" (2015) *ISLSSL Labour Law World Congress* 11.

<sup>775</sup> See the text to n 619 above and Dupper & Garbers "Affirmative action" in *Essential Employment Discrimination Law* 271.

<sup>776</sup> See text to part 4 above.

<sup>777</sup> See ch V of the EEA, Garbers & Rossouw "Women in the Workplace: On 'unfair discrimination', 'affirmative action', 'reasonable accommodation' and 'special measures'" (2015) *ISLSSL Labour Law World Congress* 11 and Du Toit et al *Labour Relations Law: A Comprehensive Guide* 760.

<sup>778</sup> *Dudley v City of Cape Town* (2004) 25 *ILJ* 305 (LC) and on appeal [2008] 12 BLLR 1155 (LAC).

<sup>779</sup> Bezuidenhout et al *Tracking Progress on the implementation and impact of the Employment Equity Act since its inception* (2008) 66.

<sup>780</sup> Bosch "Restitution of Discrimination? Lessons on affirmative action from South African Employment Law" (2007) 4 *Web JCL* 14.

<sup>781</sup> S 34 of the EEA.

<sup>782</sup> S 35-38.

<sup>783</sup> S 42-45.

<sup>784</sup> S 50(1)(g) read with Schedule 1.

<sup>785</sup> S 53.

justify their failure to comply with its affirmative action obligations.<sup>786</sup> This places the focus on the capacity of the Department of Labour to monitor affirmative action in a qualitative and substantive sense instead of focusing on quantity and procedure.<sup>787</sup> Any assessment of compliance by an employer will require appreciation of its individualised substantive (business) realities and the quality of its decision-making in that context.<sup>788</sup> While the EEA thus provides for easy formal policing (for example to monitor the submission of annual reports), proper substantive policing, namely policing the quality of affirmative action, is what is required.<sup>789</sup>

#### 4.2.2 *Discrimination litigation*

As discussed above,<sup>790</sup> discrimination litigation in South Africa – also in the context of gender and family responsibility – has not been effective in redressing the workplace inequalities associated with sex, gender and family responsibilities. However, the EEA amendments address some of the reservations expressed above about the effectiveness of discrimination litigation to (also) improve the plight of women in the workplace and have created at least the potential that protection against unfair discrimination may prove much more of a factor in the protection and advancement of women in employment in future.

### 5 Employment equality law in other jurisdictions

The next section will be devoted to a broad survey of equality law as a means to effect the reconciliation of work and care in other jurisdictions. Both developed and developing countries will be discussed and reference to case law will be made where applicable. The purpose of this overview is to assess the effectiveness of the equality

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<sup>786</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 11; Du Toit et al *Labour Relations Law: A Comprehensive Guide* 764.

<sup>787</sup> Bezuidenhout et al *Tracking Progress on the implementation and impact of the Employment Equity Act since its inception* (2008) 66.

<sup>788</sup> Garbers & Rossouw “Women in the Workplace: On ‘unfair discrimination’, ‘affirmative action’, ‘reasonable accommodation’ and ‘special measures’” (2015) *ISLSSL Labour Law World Congress* 11.

<sup>789</sup> 11.

<sup>790</sup> See the text to part 3.2 above.

law of these jurisdictions to facilitate the combination of work and care. Given the at best weak affirmative action provisions in some of these countries the focus will be on anti-discrimination law.

## 5.1 United Kingdom and Sweden in the European context

Facilitating the reconciliation of work and family responsibilities falls squarely within the EU's stated task of promoting equality between the sexes.<sup>791</sup> A complex array of primary (Treaty provisions) and secondary (mostly directives<sup>792</sup>) legislation has gradually been developed applicable in EU countries. This is augmented by several soft law<sup>793</sup> and political initiatives.<sup>794</sup> The case law of the Court of Justice of the European Union ("CJEU")<sup>795</sup> has also significantly contributed to the development of this area of law by, *inter alia*, providing a broad definition of the equality principle and clarifying difficult concepts such as indirect discrimination.<sup>796</sup> Member States are furthermore obliged to comply with EU standards and in addition often have their own equality framework, usually more refined than the EU's minimum framework, in place.<sup>797</sup>

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<sup>791</sup> Cohen & Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in *Equality in the Workplace: Reflections from South Africa and Beyond* 220.

<sup>792</sup> European Directives are addressed at the EU Member States who then have to implement them into to their national law within a specified time period. Although the result of a Directive is binding, the method of implementation is the choice of the individual Member State. See Euro Info Centre "EU Employment Law" (2006) *London Chamber of Commerce and Industry* <<http://www.londonchamber.co.uk/docimages/1154.pdf>> (accessed 02-06-2014) 2.

<sup>793</sup> "Soft law" refers to rules that are not strictly binding in nature or completely lacking legal significance. In the context of international law, soft law refers to "guidelines, policy declarations or codes of conduct which set standards of conduct". However, they are not directly enforceable. USLegal "Soft Law and Legal Definition" *USLegal* <<https://definitions.uslegal.com/s/soft-law/>> (accessed (13-03-2017)).

<sup>794</sup> A Masselot, E Caracciolo Di Torella & S Burri *Fighting discrimination on the grounds of pregnancy, maternity and parenthood. The application of EU and national law in practice in 33 European countries* (2012) 2.

<sup>795</sup> Previously European Court of Justice ("ECJ").

<sup>796</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* (2012) 2.

<sup>797</sup> 2.

Directive 2006/54/EC<sup>798</sup> (“Recast Directive”) on the implementation of the principle of equal opportunities and equal treatment between men and women consolidated earlier directives on gender equality.<sup>799</sup> The Directives that form part of this Recast Directive are the following: Directive 76/207/EEC<sup>800</sup> as amended by Directive 2002/73/EC<sup>801</sup> on equal treatment for men and women in the access to employment, vocational training and promotion and working conditions, Directive 86/378/EEC<sup>802</sup>, as amended by Directive 96/97/EC<sup>803</sup> on equal treatment for men and women in occupational social security schemes, Directive 75/117/EEC<sup>804</sup> on equal pay between men and women and Directive 97/80/EC<sup>8</sup> on the burden of proof in discrimination cases.<sup>805</sup>

In terms of article 21(2) of the Recast Directive, Member States shall encourage the social partners to promote equality between men and women as well as flexible

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<sup>798</sup> 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), OJ [2006] L204/23. The Recast Directive came into force on 15 August 2006 and all Member States were required to implement it by 15 August 2008.

<sup>799</sup> See the preamble of the Recast Directive point 1 and M Weiss “Unfair Discrimination Law – Developments at European Level (with specific reference to the new German Act on Equal Treatment” in O Dupper O & C Garbers (eds) *Equality in the Workplace Reflections from South Africa and Beyond* (2010) 65.

<sup>800</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14 February 1976.

<sup>801</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 5 October 2002, 15–20.

<sup>802</sup> Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 225, 12 August 1986.

<sup>803</sup> Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 46, 17 February 1997.

<sup>804</sup> Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 19 February 1975.

<sup>805</sup> S Burri & S Prechal *The Transposition of Recast Directive 2006/54/EC* (2009) 1.

working arrangements in order to enable the reconciliation of work and private life. Social partners should also be encouraged to conclude agreements through the process of collective bargaining laying down anti-discrimination rules.

For purposes of this Directive, the definition of discrimination includes “any less favourable treatment of a woman related to pregnancy or maternity leave”.<sup>806</sup> Article 28(1) states that the Recast Directive shall be without prejudice to provisions concerning the protection of women and in particular relating to pregnancy and maternity.<sup>807</sup> A woman on maternity leave (or a man on paternity leave in the Member States that recognise paternity leave) shall, in terms of this Directive, have the right to return to her or his job (or to an equivalent post) on terms no less beneficial to her or him and to benefit from any improvement in working conditions to which he or she would be entitled during her/her time on leave.<sup>808</sup> Article 26 encourages Member States to grant male employees “an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment”.

It is also provided that the suspension of the retention or acquisition of rights during legally granted, paid, maternity leave or leave for family reasons, will be contrary to the principle of equal treatment based on sex.<sup>809</sup>

The reconciliation of work and family life is also addressed in the Recast Directive. The preamble, point 11, states that Member States should continue to address the problem of continuing gender-based wage differentials and marked gender segregation in the labour market by way of flexible working time arrangements and appropriate parental leave arrangements. This will enable both men and women to reconcile family and work responsibilities more successfully.

The UK has taken no explicit steps to implement the Recast Directive.<sup>810</sup> Possible reasons for the lack of transposition<sup>811</sup> are, firstly, the assumption that the Recast

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<sup>806</sup> Art 2(2)(c) of the Recast Directive.

<sup>807</sup> Under Art 2(2) of the Recast Directive, “pregnant workers and workers on maternity leave are protected from dismissal during the period from the beginning of their pregnancy to the end of the maternity leave”.

<sup>808</sup> Arts 15 and 16.

<sup>809</sup> Art 9(1)(g).

<sup>810</sup> Burri & Prechal *The Transposition of Recast Directive 2006/54/EC* 101.

<sup>811</sup> Transposition, in EU law, is a process by which the Member States give force to a directive by passing appropriate implementation measures. Transposition is typically done by either primary or secondary legislation.

Directive is only a consolidation of legislation and does therefore not impose any new obligations on Member States.<sup>812</sup> Secondly, the Equality Act 2010<sup>813</sup> replaced all or most of the UK's previous anti-discrimination laws and is not designed to provide for "relatively trivial" matters which might emerge under the Recast Directive.<sup>814</sup>

In Sweden, the Discrimination Act of 2008 enacted the Recast Directive.<sup>815</sup>

## 5.2 Case law of the Court of Justice of the European Union

The CJEU has been responsible for important developments in the interpretation of EU protection against discrimination in employment during the last few years. These developments have affected protection against discrimination on, amongst other grounds, sex.

In *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus ("Dekker")*<sup>816</sup> and *Handels- og Kontorfunktionærernes Forbund i Danmark (Hertz) v Dansk Arbejdsgiverforening ("Hertz")*<sup>817</sup> the court held that the refusal to employ a woman because she is pregnant, or the dismissal of a pregnant woman as a result of her pregnancy or her maternity is direct discrimination on the ground of sex contrary to Articles 2(3) and 5(1) of Directive 76/207/EEC (now Article 2(2) of the Recast Directive).<sup>818</sup> Consequently, any unfavourable treatment directly<sup>819</sup> or indirectly<sup>820</sup> related to pregnancy or maternity amounts to direct sex discrimination.<sup>821</sup> The protection of pregnancy and maternity rights is aimed at promoting substantive gender

<sup>812</sup> Burri & Prechal *The Transposition of Recast Directive 2006/54/EC* 101.

<sup>813</sup> Equality Act 2010 c.15

<sup>814</sup> Burri & Prechal *The Transposition of Recast Directive 2006/54/EC* 101.

<sup>815</sup> entered into force in Sweden on 1 January 2009. See note 2 of the Act.

<sup>816</sup> Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941.

<sup>817</sup> Case C-179/88 *Handels- og Kontorfunktionærernes Forbund i Danmark (Hertz) v Dansk Arbejdsgiverforening* [1990] ECR I-3979.

<sup>818</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 6.

<sup>819</sup> Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567 para 19.

<sup>820</sup> Case C-421/92 *Habermann-Beltermann v Arbeiterwohlfahrt* [1994] ECR I-1657 paras 15-16.

<sup>821</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 6.

equality,<sup>822</sup> the relationship between the new mother and her newborn child<sup>823</sup> as well as between a father and his child<sup>824</sup>.<sup>825</sup>

In *Kathleen Hill and Ann Stapleton v the Revenue Commission and the Department of Finance*<sup>826</sup> the court held that protection of women and men within family life and in the course of their professional activities is a principle which is widely regarded in the legal systems of the Member States “as being the natural corollary of the equality between men and women” and recognised by EU law.<sup>827</sup> The court also stated that “Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities”.<sup>828</sup> The CJEU recognised that as a result of women having the responsibility of caring for children, they often only engage in flexible work arrangements such as job-sharing.<sup>829</sup> The CJEU deliberately suggested that women’s role within the family is the stereotypical one and did not provide an explanation of what the role of men would entail.<sup>830</sup>

The assumption that women should be the primary caregiver of children was again raised in *Abdoulaye v Renault*.<sup>831</sup> In this case, a group of male employees argued that an agreement which provided for payment to pregnant employees on maternity leave was discriminatory against men. By upholding the national legislation, the CJEU once

<sup>822</sup> Case C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549 para 26.

<sup>823</sup> See for example Cases C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549 para 21; C-421/92 *Habermann-Beltermann v Arbeiterwohlfahrt* [1994] ECR I-1657 para 21 and C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567 para 20.

<sup>824</sup> Cases C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661 and C-222/14 *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* [2015].

<sup>825</sup> See O Ajibade, H Johnson, R Sattar & A Wilson *Reconciling Work and Family Life within Labour Law* (2014) 34 and Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 6.

<sup>826</sup> Case C-243/95 *Kathleen Hill and Ann Stapleton v the Revenue Commission and the Department of Finance* [1998] ECR I-3739. See Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 6.

<sup>827</sup> Para 42.

<sup>828</sup> Para 42.

<sup>829</sup> Para 41.

<sup>830</sup> Caracciolo Di Torella (2014) *European Law Journal* 96.

<sup>831</sup> Case C-218/98 *Abdoulaye v Renault* [1999] ECR I-5723.

again accepted that, within the family, the role of men is that of the traditional breadwinner and the role of women that of caregiver.<sup>832</sup>

In contrast to the abovementioned case, the CJEU seemingly changed tack in *Griesmar v French Republic*.<sup>833</sup> In this case, Mr Griesmar argued that a French retirement pension scheme which granted service credits to female civil servants who are mothers regardless of any time away from the workplace, amounted to sex discrimination. He argued that he only received a retirement pension calculated on the basis of the years of service that he had actually completed and the service credit which female civil servants receive in respect of each child was not included in the calculation of his pension. The court agreed with Mr Griesmar and said that credits should be provided to both parents who have taken time off from work to undertake the task of bringing up their children.<sup>834</sup>

Notwithstanding the aforesaid, the court once again echoed the assumption that a woman has the primary responsibility of child care and is expected to relegate paid employment and career to second place behind her caregiving responsibilities<sup>835</sup> in the case of *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*.<sup>836</sup> The court considered a policy under which an employer provided female employees with access to nursery places for their children at work, but denied male employees with children the same facility except in cases of emergency. The CJEU ruled that the policy did not breach the Equal Treatment Directive and that men fulfilling a primary caring role (single parents) were not excluded from the policy. In this case, the CJEU applied available legislation (non-discrimination on grounds of gender) in a limited way, instead of promoting the idea that fathers may have caring responsibilities to ensure that women can successfully combine work and care responsibilities.<sup>837</sup> As a result, the two-sphere approach to work and care was firmly entrenched.<sup>838</sup>

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<sup>832</sup> Caracciolo Di Torella (2014) *European Law Journal* 96.

<sup>833</sup> Case C-366/99 *Griesmar v. French Republic* [2001] ECR I-9383.

<sup>834</sup> Paras 55 and 56.

<sup>835</sup> Caracciolo Di Torella (2014) *European LJ* 98.

<sup>836</sup> *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891.

<sup>837</sup> Caracciolo Di Torella (2014) *European LJ* 99.

<sup>838</sup> 99.

The recent case of *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*<sup>839</sup> again showed the deficient approach of the CJEU to parenting and the role of men and women when it comes to the care of children. This case considered Greek legislation which allowed for nine months parental leave for female civil servants. Fathers who were civil servants were only entitled to this parental leave if the mother of the child worked in, or exercised, a profession. A magistrate was turned down for parental leave in respect of his daughter because his wife was unemployed. The CJEU ruled that the Greek legislation contravened both the Parental Leave Directives and the Equal Treatment Directive and amounted to direct discrimination on the ground of sex.<sup>840</sup> The court further stated that rules such as those at issue “[are] liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties”.<sup>841</sup>

### 5.3 United Kingdom

The reconciliation of work and family is a matter, which affects a large percentage of the UK population, either directly or indirectly<sup>842</sup> and, during the last decade, the reconciliation of work and family has become an increasingly important topic on both domestic and international agendas.<sup>843</sup> The UK government has sought to promote a change of culture of relations in and at work with a view to achieving a society where it is possible to be a good parent and a good employee.<sup>844</sup> The UK's labour laws, mainly derived from EU Directives, support the reconciliation of work and family life and promote the balancing thereof.<sup>845</sup>

The family-friendly legislation available in the UK endorses the traditional roles of mothers as “encumbered workers” who will probably be absent on leave for one year

<sup>839</sup> Case C-222/14 *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* [2015].

<sup>840</sup> Para 52.

<sup>841</sup> Para 50.

<sup>842</sup> Ajibade et al *Reconciling Work and Family Life within Labour Law* 2.

<sup>843</sup> Masselot & Caracciolo Di Torella *Reconciling Work and Family Life in EU Law and Policy* 3.

<sup>844</sup> 4.

<sup>845</sup> Ajibade et al *Reconciling Work and Family Life within Labour Law* 2.

and, upon returning to work, continue to be responsible for the child's wellbeing.<sup>846</sup> This identifies the mother, as opposed to the father, as a potential "problem" for employers – whether or not this is the case in practice.<sup>847</sup> Such a social construction is damaging for new mothers and all women of childbearing age. It endorses high-profile views held by the likes of Lord Sugar and UKIP MEP Godfrey Bloom, who stated that "no self-respecting small businessmen with a brain in the right place would ever employ a lady of childbearing age".<sup>848</sup> This then contributes to the perpetuation of sex discrimination in the workplace against women on the grounds of pregnancy and childbirth. This should be seen in light of the fact that approximately 30,000 women a year already lose their jobs as a result of becoming pregnant.<sup>849</sup>

Seeing that working parents with caregiving responsibilities receive no specific protection under equality legislation in the UK (with the exception of mothers on maternity leave who are covered by the pregnancy and maternity leave discrimination provisions) they have to rely on indirect sex discrimination.<sup>850</sup>

### 5.3.1 Types of discrimination

The Equality Act replaced previous anti-discrimination laws with a single Act, making the law easier to understand and strengthening protection in some situations. It sets out the different ways in which it is unlawful to treat someone and extends protection to nine "protected characteristics", including pregnancy, maternity and sex.<sup>851</sup> The Act prohibits direct and indirect discrimination. Direct discrimination is when someone is treated less favourably than another person because of a protected characteristic they have or are thought to have (perceptive discrimination), or because they associate

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<sup>846</sup> G James "Mothers and fathers as parents and workers: family-friendly employment policies in an era of shifting identities" (2009) 31 *J Soc Wel & Fam L* 271 280.

<sup>847</sup> 280.

<sup>848</sup> 280.

<sup>849</sup> 280.

<sup>850</sup> R Horton "Care-giving and reasonable adjustment in the UK" in N Busby & G James (eds) *Families, Care-giving and Paid work: Challenging Labour Law in the 21st Century* (2011) 141.

<sup>851</sup> S 4. The other 7 attributes are age, disability, gender reassignment, marriage and civil partnership, race, religion or belief and sexual orientation.

with someone who has that characteristic (associative discrimination).<sup>852</sup> Indirect discrimination occurs when a rule, policy or practice is applied more widely but has a disproportionately adverse effect on particular groups of people and the rule policy or practice cannot be objectively justified.<sup>853</sup>

Section 18<sup>854</sup> of the Equality Act prohibits direct discrimination relating to the protected characteristic of pregnancy and maternity<sup>855</sup> and provides that a person discriminates against a woman if the latter is treated unfavourably because of her pregnancy, or because of illness suffered by her as a result of it, or because she is on compulsory maternity leave, or because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to maternity leave during the period of time she already is on maternity leave (or if she is not entitled to such leave, until two weeks after her pregnancy ends).

The Equality Act does not expressly regulate indirect discrimination related to pregnancy and maternity though it is, in any event, applicable.<sup>856</sup> Due to the persistent relationship between gender and care, and because women are still the primary caregivers of children, the prohibition of indirect sex discrimination has led to findings that workplace policies and practices which disadvantage those who fulfil a caregiving role are indirectly discriminatory on grounds of sex if the policy or practice cannot be justified.<sup>857</sup> Horton uses the example where employers require all employees to work long or inflexible hours. If it disadvantages those with childcare responsibilities, a female parent disadvantaged by this requirement may show that she has been subjected to indirect sex discrimination where the requirement cannot be justified by

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<sup>852</sup> S 13. Also see ACAS “Asking and responding to questions of discrimination in the workplace” (2014) ACAS <<http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf>> (accessed 22-06-2016) 1.

<sup>853</sup> S 19. ACAS “Asking and responding to questions of discrimination in the workplace” (2014) ACAS 2.

<sup>854</sup> Discrimination under s 18 does not include discrimination by association or discrimination by perception.

<sup>855</sup> Pregnancy and maternity discrimination was dealt with under the Sex Discrimination Act 1975 before the Equality Act came into effect.

<sup>856</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 267.

<sup>857</sup> Horton “Care-giving and reasonable adjustment in the UK” in *Families, Care-giving and Paid work: Challenging Labour Law in the 21st Century* 141.

the employer.<sup>858</sup> The same principles could apply where a female employee with childcare responsibilities requests flexible working<sup>859</sup> and it is refused, for example, because a workplace policy does not provide for employment on a flexible basis and the policy is not justified.<sup>860</sup>

### 5.3.2 Burden of proof and common defences

The Equality Act reverses the burden of proof in all cases except those that relate to a criminal offence.<sup>861</sup> The “reverse burden” means that the employer has to prove its innocence, and a failure to do so will lead to a finding of discrimination. If the claimant makes out a *prima facie* case, the burden of proof shifts to the employer to show it did not discriminate. If the employer fails to adequately explain the reason for the treatment, the employment tribunal may go on to draw an adverse inference that the reason for treatment is due to discrimination.<sup>862</sup>

Although employment tribunals look at the facts of each case individually when deciding whether indirect sex discrimination has taken place, the courts have developed some general principles in flexible working cases.<sup>863</sup> The employer must show that it has examined thoroughly whether the change is feasible and what problems an insistence on full-time work (for example) will cause. Inconvenience will

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<sup>858</sup> 141.

<sup>859</sup> If a female employee has been with her employer for 26 weeks, she has the right to ask to work flexibly in her current job, and her employer has a duty to consider her request seriously. Working flexibly include working less or different hours, working part-time, working job-share, starting later in order to take her child to school or nursery, taking time off for the child’s hospital appointments. See part 9 of the Children and Families Act 2014 as well as as text to ch 5 part 4 6 below.

<sup>860</sup> Citizens Advice “Discrimination at work – flexible working” (2016) *Citizens Advice* <<https://www.citizensadvice.org.uk/work/discrimination-at-work/common-situations/discrimination-at-work-flexible-working/>> (accessed 07=09-2016) and Horton “Care-giving and reasonable adjustment in the UK” in *Families, Care-giving and Paid work: Challenging Labour Law in the 21st Century* 141.

<sup>861</sup> S136.

<sup>862</sup> A Williams “Disproving discrimination – the burden of proof” (13-10-2011) *Lexology* <<http://www.lexology.com/library/detail.aspx?g=db2a6eaf-96db-4d8b-a41b-31c305db57bc>> (accessed 07=09-2016).

<sup>863</sup> Working Families “Flexible working and the law – a guide for employees” (2017) *Working Families* <<https://www.workingfamilies.org.uk/articles/flexible-working-and-the-law-a-guide-for-employees/>> (accessed 25-05-2017).

not normally be a good reason, nor added costs.<sup>864</sup> The employer must also show that it has considered the alternative work pattern the employee suggested and possibly any other arrangements which might help the employee.<sup>865</sup> The employer should also not rely on generalisations for rejecting the employee's proposal such as, for example, an assumption that flexible hours would not meet the need the business has for continuity, or a blanket policy that no flexible hours are allowed because it would set a bad precedent.<sup>866</sup>

### 5.3.3 Claims and remedies

The UK's legal system allocates the settlement of employment related disputes to employment tribunals or to alternative dispute resolution bodies and processes such as arbitration, conciliation and mediation, often via the Advisory, Conciliation and Arbitration Services ("ACAS")<sup>867</sup>.<sup>868</sup>

If an employee feels he or she has been discriminated against, a claim may be brought before an employment tribunal which has jurisdiction over an employer's breach of statutory rights and standards. However, before taking a claim to an employment tribunal or civil court, an employee or job applicant should normally use the employer's grievance procedure, or use some other available internal dispute resolution mechanism. If internal procedures do not result in an acceptable outcome in circumstances that might result in an employment tribunal claim, ACAS provide a free conciliation service - "Early Conciliation" – which may avoid the need to claim.<sup>869</sup> If "Early Conciliation" does not settle a matter, a certificate will be issued and the claimant will be able to lodge a tribunal claim if he or she wishes to.<sup>870</sup>

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<sup>864</sup> Working Families "Flexible working and the law – a guide for employees" (2017) *Working Families*.

<sup>865</sup> Working Families "Flexible working and the law – a guide for employees" (2017) *Working Families*.

<sup>866</sup> Working Families "Flexible working and the law – a guide for employees" (2017) *Working Families*.

<sup>867</sup> ACAS is a non-departmental public body of the government.

<sup>868</sup> Ajibade et al *Reconciling Work and Family Life within Labour Law* 26.

<sup>869</sup> ACAS "Asking and responding to questions of discrimination in the workplace" (2014) ACAS 4.

<sup>870</sup> ACAS "Asking and responding to questions of discrimination in the workplace" (2014) ACAS 4. Claimants who wish to bring a claim to the tribunal or appeal tribunal will have to pay

There is no statutory cap on the amount of compensation that may be awarded upon a finding of discrimination. A claimant may therefore recover the full extent of his or her economic losses as well as damages for "injury to feelings".<sup>871</sup> Employment tribunals have the authority to make recommendations in discrimination cases.<sup>872</sup> Since October 2015, the recommendation must be to counter the adverse effect on the claimant of any matter to which the proceedings relate. In practice, the change means that a recommendation will not normally be made if the claimant has resigned or been dismissed, which is often the case.

A tribunal is allowed to make a recommendation to employers to take certain steps within a specified period "for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate".<sup>873</sup> Recommendations may therefore help prevent similar types of discrimination occurring in future.<sup>874</sup> Unreasonable failure by the employer to comply with a recommendation as regards the claimant may result in increased compensation.<sup>875</sup>

#### 5.3.4 Case law: national courts

In *Cooper v House of Fraser (Stores) Ltd*<sup>876</sup> a full-time, senior female buyer in the womenswear department of the employer was refused part time working after returning from maternity leave. She was told that the only role available in her department was full time and involved extensive travelling. Ms Cooper felt unable to return to work, resigned and brought a claim of sex discrimination. The London Central

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a fee. The first fee will be paid to issue a claim and a further fee will be payable if the claim goes to hearing. There are two levels of fee which will depend on the type of claim. See ACAS "Sex discrimination" (27-08-2016) ACAS <<http://www.acas.org.uk/index.aspx?articleid=1814>> (accessed 07-09-2016).

<sup>871</sup> Ajibade et al *Reconciling Work and Family Life within Labour Law* 26.

<sup>872</sup> stammeringlaw "Employment remedies: Compensation and recommendations" (2017) [stammeringlaw.org.uk <http://www.stammeringlaw.org.uk/employment/remedies.htm>](http://www.stammeringlaw.org.uk/employment/remedies.htm) (accessed 05-05-2017).

<sup>873</sup> S 124 of the Equality Act.

<sup>874</sup> stammeringlaw (2017) "Employment remedies: Compensation and recommendations" [stammeringlaw.org.uk](http://www.stammeringlaw.org.uk)

<sup>875</sup> stammeringlaw (2017) "Employment remedies: Compensation and recommendations" [stammeringlaw.org.uk](http://www.stammeringlaw.org.uk)

<sup>876</sup> *Cooper v House of Fraser (Stores) Ltd* [2012] EqLR 991.

Employment Tribunal found that women are still the primary providers of childcare and that the requirement to work full time was a provision, criterion, or practice (“PCPs”) that put women at a particular disadvantage. The Tribunal also found that Ms Cooper had been put at a disadvantage because it felt it was not appropriate for her young daughter to spend five days a week, approximately eleven hours a day, in a nursery or with other carers. The employer was unable to justify the requirement of full-time work and Ms Cooper’s indirect sex discrimination claim succeeded (her claims of direct sex discrimination and constructive dismissal failed).

In *Crosse-Scrutton v Atos IT Services UK Ltd*<sup>877</sup> a tribunal found that a suggested change in the working pattern of a female employee who had childcare responsibilities amounted to indirect discrimination, although the employer was able to justify the need for the change in work patterns. The tribunal decided that section 19 of Equality Act does not require that PCPs be shown to be indirectly discriminatory by statistical evidence. The definition of indirect discrimination in the Equality Act requires only a particular disadvantage, taking account of facts associated with particular characteristics. It was found that it might often be unnecessary to have a pool for comparison in every case of this type.

In *Rouselle v Readers Offers Ltd*<sup>878</sup> it was held that an employer who changed a female employee’s shift without considering the difficulties around childcare that it would cause, indirectly discriminated on the basis of sex. The PCP in question – the employee’s shift change – was not justified by the employer as it provided no concrete evidence why it could not allow one employee out of 40 to switch back to a shift that would accommodate her childcare responsibilities.

In *Henary v Quoteline Insurance Service Ltd t/a Sureplan Insurance*<sup>879</sup> an employer insisted on part-time employees working three full days rather than spread the hours over more part-days. This was held to be discriminatory against a female employee who could not work the required hours because of childcare responsibilities. The employment tribunal did not accept that the requirement of three full days was a proportionate means of achieving a legitimate aim, adding that the fact that other

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<sup>877</sup> *Crosse-Scrutton v Atos IT Services UK Ltd* [2012] EqLR 840.

<sup>878</sup> *Rouselle v Readers Offers Ltd* ET/1500472/11, 20 Feb 2012.

<sup>879</sup> *Henary v Quoteline Insurance Service Ltd t/a Sureplan Insurance* [2014] EqLR 94.

female employees had agreed to the hours did not make the claimant's refusal unreasonable.

These cases illustrate that employers who do not grant part time working requests from female employees with caregiving responsibilities without a good reason may be exposed to claims of indirect sex discrimination. However, fewer and fewer people are taking their employers to the employment tribunal or making appeals to the Employment Appeal Tribunal in the wake of a government decision in July 2013 to introduce (upfront) fees of up to £1,200 for claimants to pay for tribunal hearings.<sup>880</sup> A TUC Report, "What Price Justice?" shows how, since the introduction of fees, there has been a 79% decline in overall claims taken to employment tribunals, with women and low-paid workers the worst affected. Women are among the biggest losers – there has been an 80% decline in the number of women pursuing sex discrimination claims. Just 1 222 women initiated claims between January and March 2014, compared to 6 017 over the same period in 2013. The number of women pursuing pregnancy discrimination claims has also declined by 26%.<sup>881</sup> It has always been expensive and daunting to lodge a claim with the tribunal and the introduction of hefty tribunal fees has contributed to further deter women with well-founded claims from taking legal action.<sup>882</sup>

### 5.3.5 Conclusion

Horton rightly states that "the piecemeal interaction between discrimination law and the realities of caregiving is unsatisfactory in the UK".<sup>883</sup> Although some aspects of the relationship between caring roles and disadvantage are recognised by the law (via

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<sup>880</sup> TUC "Tribunal fees have been a 'huge victory' for Britain's worst bosses, says TUC" (29-07-2014) *TUC* <<https://www.tuc.org.uk/workplace-issues/employment-rights/tribunal-fees-have-been-%e2%80%9chuge-victory%e2%80%9d-britain%e2%80%99s-worst-bosses>> (accessed 07-09-2016).

<sup>881</sup> TUC "Tribunal fees have been a 'huge victory' for Britain's worst bosses, says TUC" *TUC*.

<sup>882</sup> R Dunstan "Pregnancy & maternity discrimination: a manifesto for 2015" (02-10-2014) *Fawcett* <<http://www.fawcettsociety.org.uk/blog/pregnancy-maternity-discrimination-manifesto-2015/>> (accessed 07-09-2016). This is despite the fact that the employer will normally be ordered to pay back any fees paid by the employee.

<sup>883</sup> Horton "Care-giving and reasonable adjustment in the UK" in *Families, Care-giving and Paid work: Challenging Labour Law in the 21st Century* 144.

indirect sex discrimination), there is no general recognition through discrimination law of the disadvantage faced by those who care.<sup>884</sup>

The method of addressing discrimination in the UK is a reactive, complaints-led process under the formal equality approach.<sup>885</sup> This process by which discrimination is dealt with is not without glitches. The primary difficulty with the complaints-led model is its individualistic core. There must be an individual victim of discrimination and the onus is on that person to challenge the discrimination. It is also a time-consuming and emotional process to lodge a claim with an employment tribunal.<sup>886</sup>

A further difficulty arising from the complaints-led model is that the claimant must identify a specific perpetrator.<sup>887</sup> Discrimination is often not the fault of a specific individual, but rooted in the deep institutional structure of an organisation. This means that even in cases where an individual is successful with a claim at an employment tribunal, it will only give rise to a remedy for that individual and not address the systemic issues within the organisation.<sup>888</sup>

The complaints-led model also causes employers to view equality as motivation for conflict due to the adversarial nature of discrimination claims.<sup>889</sup> Employers may possibly fear claims from employees and instead of being motivated to improve their practices to achieve equality, become defensive and resilient to change of company policies and practices.<sup>890</sup>

The fees and possible expenses to be incurred is another factor which might discourage people from claiming and contributes to the low numbers of discrimination claims made to tribunals.<sup>891</sup>

Individuals complaining of discrimination may thus have great difficulty in establishing a clear case under equality legislation in the UK. This is specifically the case with indirect discrimination, where the law is complicated and proving facts often

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<sup>884</sup> 144.

<sup>885</sup> L Thwaites "The British Equality Framework is Incapable of Achieving Equality in the Workforce" (2004) 2 *NELR* 137 142.

<sup>886</sup> 143.

<sup>887</sup> 143.

<sup>888</sup> 143.

<sup>889</sup> 143.

<sup>890</sup> 143.

<sup>891</sup> See the text to part 5 3 4 above.

challenging.<sup>892</sup> Workers with caregiving responsibilities may, now more than ever – in the light of the upfront fees payable – be discouraged to use equality law as a means to reconcile work and care.

#### 5.4 Sweden

Swedish parents are among the EU's most successful in balancing work and family responsibilities<sup>893</sup> and the division of parental leave is one of the most quoted indicators of gender equality.<sup>894</sup> Sweden was the first country in the world to introduce paid parental leave, also to fathers in 1974, and the family policy has since continuously been reformed to strengthen the gender equality dimension.<sup>895</sup> The country's family policy is aimed at supporting the dual-earner family model<sup>896</sup> and ensuring the same rights and obligations regarding family and work for both women and men.<sup>897</sup> The overarching principle is that everyone, regardless of gender, has the right to work and support themselves and to balance career and family life.<sup>898</sup>

A new Discrimination Act 2008:567 entered into force in Sweden on 1 January 2009 and replaced a number of other acts with respect to discrimination in different areas. The new act prohibits discrimination in employment on, amongst other grounds, the basis of sex.<sup>899</sup> In addition, employers are obliged to take active measures necessary to allow both female and male employees to combine employment and parenthood.<sup>900</sup>

Current Swedish legislation such as the Equal Opportunities Act 1991:433, the Parental Leave Act 1995:584 and the Prohibition of Discrimination Act 2003:307 were

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<sup>892</sup> C O'Cinneide "Positive Action" (2012) *ERA* <[http://www.era-comm.eu/oldoku/SNLLaw/04\\_Positive\\_action/2012\\_Cinneide\\_EN.pdf](http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2012_Cinneide_EN.pdf)> (accessed 02-05-2017) 3.

<sup>893</sup> EU "Country profiles - Sweden" (2016) *European Union* <<http://ec.europa.eu/social/main.jsp?catId=1248&langId=en&intPageId=3658>> (accessed 27-05-2017).

<sup>894</sup> AL Almqvist & AZ Duvander "Changes in gender equality? Swedish fathers' parental leave, division of childcare and housework" (2014) 20 *J Fam Stud* 19 19.

<sup>895</sup> EU "Country profiles - Sweden" *European Union*.

<sup>896</sup> In the dual-earner model both parents are taxed individually and parental leave supports female paid work and male care work.

<sup>897</sup> EU "Country profiles - Sweden" *European Union*.

<sup>898</sup> Sweden Sverige "Gender Equality in Sweden" (2016) *Sweden Sverige* <<https://sweden.se/society/gender-equality-in-sweden/>> (accessed 22-08-2016).

<sup>899</sup> S 1.

<sup>900</sup> Ch 3 sec 5.

regarded as meeting the requirements of the Recast Directive already before the enactment of the Discrimination Act. The 1991 Equal Opportunities Act and the Prohibition of Discrimination Act were repealed, whereas the Parental Leave Act continues to apply along with the Discrimination Act.<sup>901</sup>

The purpose of the Act against Discrimination of Part-time Employees and Employees on Fixed-term Employment 2002:293 is to combat discrimination, direct and indirect, against part-time employees and employees on fixed term employment contracts where employers give these employees less favourable employment conditions than the employer gives or would have given employees that work full-time or are employed for an indefinite period.<sup>902</sup> The prohibition against discrimination does not apply if less favourable employment conditions are justified by objective grounds.<sup>903</sup>

In terms of section 16 of the Parental Leave Act, it is not permissible for an employer to disfavour job applicants or employees for reasons related to parental leave in respect of salary, benefits, promotion or training/education. The prohibition does not apply if the disadvantage is a necessary consequence of the parental leave.

#### 5.4.1 *Types of discrimination*

The Discrimination Act differentiates between direct and indirect discrimination. Direct discrimination is when “someone is disadvantaged by being treated less favourably than someone else is treated, has been treated or would be treated in a comparable situation and if this disadvantage is associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age”.<sup>904</sup> Indirect discrimination occurs when someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but may put people of a certain sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age at a particular disadvantage, unless the provision,

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<sup>901</sup> Burri & Prechal *The Transposition of Recast Directive 2006/54/EC* 98.

<sup>902</sup> Ss 1-4.

<sup>903</sup> S 3.

<sup>904</sup> Ch 1 Sec 4(1) of the Discrimination Act.

criterion or procedure has a legitimate purpose and the means to achieve the purpose are appropriate and necessary.<sup>905</sup>

#### *5.4.2 Burden of proof*

An employee who claims to have suffered discrimination must present basic facts showing that it is likely that the employer has committed a breach of the Discrimination Act.<sup>906</sup> The burden of proof then shifts to the employer to prove that no unlawful discrimination has taken place.<sup>907</sup> However, when this burden of proof is applied by the Swedish courts, instead of being viewed as a shifting burden of proof, it has been perceived as a shared burden of proof.<sup>908</sup>

#### *5.4.3 Claims and remedies*

The Equality Ombudsman may bring a court action on behalf of an individual who consents to this. The new Discrimination Act also gives non-profit organisations, whose statutes state that they are to look after their members, the right to bring actions on behalf of the individual concerned.<sup>909</sup> In discrimination cases based on sex, the Ombudsman's action is brought before the Labour Court.<sup>910</sup> Violation of the Discrimination Act by an employer may result in liability to pay damages.<sup>911</sup>

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<sup>905</sup> Ch 1 Sec 4(2).

<sup>906</sup> Ch 6 Sec 3.

<sup>907</sup> Ch 6 Sec 3.

<sup>908</sup> L Carlson, Ö Edström & B Nyström *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective* (2016) 156.

<sup>909</sup> Ch 6 sec 2 of the Discrimination Act.

<sup>910</sup> Ch 6 sec 2.

<sup>911</sup> Ch 5 sec 1.

#### 5 4 4 Case law

There are very few cases of employment discrimination law brought before the Labour Court.<sup>912</sup> This is mainly due to high costs of bringing a claim, low success rates of plaintiffs as well as low damages awarded in the few successful cases.<sup>913</sup>

There is a tendency, instead of reliance on the prohibition against sex discrimination in the Discrimination Act, rather to apply the Parental Leave Act prohibition against detrimental treatment when both these prohibitions simultaneously apply. This is illustrated in Labour Court Case 2009 No. 45 where a pregnant woman applied for study leave for a one-week course that would take place one week before the expected birth. Her employer refused the application and argued that it would be difficult to reap the benefits of the competence improvement due to her long absence (maternity leave). The Labour Court found this decision constituted detrimental treatment on the grounds of parental leave in terms of section 16 of the Parental Leave Act. Although the court referred to the CJEU Cases *Dekker, Webb v EMO Air Cargo*<sup>914</sup> and *Hertz*,<sup>915</sup> the Court did not consider the employer's conduct as possible sex discrimination, simply because the employer's decision was also found to be in breach of the Parental Leave Act.<sup>916</sup>

#### 5 4 5 Conclusion

Although Sweden maintains a high position with respect to sex equality internationally, high degrees of both vertical and horizontal occupational segregation between the sexes remain.<sup>917</sup> This conflict between success and persistent problems is reflected in the efforts that have been made to address this conflict, both historically and

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<sup>912</sup> L Carlson *Searching for Equality: Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law* (2007) 331.

<sup>913</sup> L Carlson "Sweden's Experience in Combating Employment Discrimination" (2007) *Stockholm Universitet* <<http://www.diva-portal.org/smash/get/diva2:305807/FULLTEXT01.pdf>> (accessed 07-09-2016) 42.

<sup>914</sup> Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567.

<sup>915</sup> See the text to part 5 2 above.

<sup>916</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 256.

<sup>917</sup> Carlson *Searching for Equality: Sex Discrimination, Parental Leave and the Swedish Model with Comparisons to EU, UK and US Law* 82.

currently.<sup>918</sup> In this regard, the main focus of Swedish legislation aiming to address the needs of women at work has been on the facilitation of women's work and not on discrimination *per se*.<sup>919</sup>

Several issues that need to be addressed have been identified in Swedish legislation concerning discrimination as applied by the Labour Court. Firstly, the individual plaintiff who has experienced discrimination faces the possibility of paying costs and fees for herself, and if unsuccessful, also for her employer. This is to be weighed, secondly, against the amounts of modest damages awarded by the Labour in the area of sex discrimination. Thirdly, the individual plaintiff also finds herself confronted with a statutory text that is difficult to understand, especially with regard to the applicable statute of limitations for discrimination claims.<sup>920</sup> In addition, this same statute of limitations, which has no exceptions, requires immediate action, which is not always within the power of an individual.<sup>921</sup> There are, fourthly, issues related to access to justice. The importance of the integration of procedural and substantive law – also in the area of discrimination law – is vital. This has not been seen as important in the Swedish system, which has led to stagnancy in exemplary damages awarded and a rapid increase in the attorney's fees that the unsuccessful party pays in the majority of cases. Carlson notes that "the desire for internal coherence has led to a norm for damages in sex discrimination cases, irrespective of the harm to the individual, but consistent with damages awards for discrimination on the basis of union membership".<sup>922</sup> Lastly, a fundamental deficiency of the Swedish legal approach to discrimination is its lack of focus on underlying structural discrimination.<sup>923</sup> The Swedish system has focused on the manifestations of discrimination by aiming to make women more economically independent and to ensure that men undertake a greater share of unpaid work.<sup>924</sup> A deeper analysis needs to be performed of the causes of discrimination, not only by parliament, but also by the social partners and

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<sup>918</sup> 82.

<sup>919</sup> 82.

<sup>920</sup> Carlson "Sweden's Experience in Combating Employment Discrimination" (2007) *Stockholm Universitet* 42.

<sup>921</sup> 42.

<sup>922</sup> 43.

<sup>923</sup> 46.

<sup>924</sup> 46.

the courts.<sup>925</sup> It has been said that equality legislation will only be partially successful “until issues of access to justice as well as true substantive justice are addressed by the Swedish legal system”.<sup>926</sup>

This paradox which results from, on the one hand, the intent of the Swedish legislature to provide legal protection against unlawful discrimination, but, on the other hand, the Swedish courts not finding unlawful discrimination to exist in cases before them, appears irreconcilable. The hope has been expressed that when the courts come to the same understanding as the legislature, provided the access to justice issues mentioned above are addressed, Sweden will be closer to achieving true protection against workplace discrimination.<sup>927</sup>

## 5 5 Canada and the United States of America

### 5 5 1 Canada

Canada is a federal country with legislative jurisdiction divided between the federal government, governments of the ten provinces and three northern territories. Although the Canadian Charter of Rights and Freedoms is a constitutional document that applies to all levels of government, there might be substantial differences between provinces and their courts in legislation and application of law.<sup>928</sup> For purposes of this research, and against the backdrop of a brief overview of federal legislation pertaining to quality legislation, the focus will fall on two Canadian provinces, namely Quebec<sup>929</sup> and Ontario. This may be motivated as follows: Quebec’s public policy related to work-care balance is distinct from those of other Canadian provinces and of the United States and concrete measures guided by principles of equity have been adopted to support families.<sup>930</sup> Québec has implemented family friendly policies over the past

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<sup>925</sup> 46.

<sup>926</sup> 46.

<sup>927</sup> 45-46.

<sup>928</sup> BM Rogers “Canada” in CJ Glasser (eds) *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers* 3 ed (2013) 39.

<sup>929</sup> Every province in Canada uses a common-law system except Quebec, which follows civil law. See Rogers “Canada” in *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers* 39.

<sup>930</sup> N St-Amour, J Laverdure, A Devault & S Manseau *The Difficulty of Balancing Work and Family Life: Impact on the Physical and Mental Health of Quebec Families* (2007) 2, 21 and Tremblay (2010) *Employ Responsib Rights* J 93.

decade, directly supporting working families in the combination of parental and employment responsibilities and these policies often serve as an example for the rest of Canada or North America.<sup>931</sup> Ontario, on the other hand, is Canada's most populous province and is the second largest province in total area. The problematic relationship between work and care has been widely recognised and major legislative changes were implemented in the last decade to assist employees in balancing their work and family responsibilities.<sup>932</sup>

At the federal level, both the Canadian Human Rights Act<sup>933</sup> ("CHRA") and the Canadian Charter of Rights and Freedoms ("Charter") prohibit discrimination.

The CHRA prohibits discriminatory practices by employers and/or service providers that fall within federal jurisdiction and the Canadian Human Rights Commission ("CHRC"), created by the CHRA, and is tasked to ensure both equal opportunity and non-discrimination in all areas under federal jurisdiction.<sup>934</sup> Sections 2 and 3(1) of the CHRA prohibit discrimination on the ground of, *inter alia*, family status.

Section 15 of the Charter, part of the Constitution of Canada,<sup>935</sup> states that "every individual has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". Section 28

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<sup>931</sup> Tézli (2009) *Can J Socio* 441 and Tremblay (2010) *Employ Responsib Rights J* 89.

<sup>932</sup> R Bothwell & N Hillmer "Ontario" (2007) *The Canadian Encyclopedia* <<http://www.thecanadianencyclopedia.ca/en/article/ontario/>> (accessed 01-09-2016) and Ontario Human Rights Commission "Employment" (26-05-2016) *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/human-rights-and-family-ontario/employment>> (accessed 01-02-2015).

<sup>933</sup> Original citation: SC 1976-77, c 33, s 1; current citation: RSC 1985, c H-6.

<sup>934</sup> Minken Employment Lawyers "Discrimination in the Workplace: When it's Prohibited and When it's Permitted" (2011) *Minken Employment Lawyers* <<http://www.minenemploymentlawyers.com/employment-law-issues/workplace-discrimination-when-it%E2%80%99s-prohibited-and-when-it%E2%80%99s-permitted/>> (accessed 04-03-2016). The CHRC is also responsible for enforcing the *Employment Equity Act* (S.C. 1995, c. 44). This Act applies to federal employers with over 100 employees and requires these employers to engage in proactive employment practices to increase the representation of four designated groups: women, people with disabilities, Aboriginal peoples and visible minorities (see s 2 of the Employment Equity Act).

<sup>935</sup> See the Constitution Act 1982.

states that, “notwithstanding other provisions of the Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”.

### 5 5 1 1      Quebec

For the most part, Québec’s initiatives to promote and reinforce equality were inspired by the Beijing Platform for Action 1995<sup>936</sup> and the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)<sup>937, 938</sup>

The foundations of the principle of gender equality are enshrined in the Quebec Charter of Human Rights and Freedoms (“Quebec Charter”) which was adopted in 1975. Section 10 of the Quebec Charter recognises that every person has a right to full and equal recognition and exercise of his or her human rights and freedoms, without discrimination or distinction based on, *inter alia*, sex, pregnancy<sup>939</sup> and civil status. Although the Quebec Charter does not use the term “family status”, protection against discrimination based on “civil status” has been interpreted by the Supreme Court of Canada<sup>940</sup> to include family status.<sup>941</sup> The Federal Court of Appeal examined the meaning and scope of family status as a prohibited ground of discrimination in

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<sup>936</sup> Beijing Platform for Action (15 September 1995, endorsed by GA Resolution 50/203 on 22 December).

<sup>937</sup> Convention on the Elimination of all Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>938</sup> Québec (Province), Secrétariat à la condition féminine Staff *Equal in Every Way!: Gender Equality in Québec* (2009) 10.

<sup>939</sup> Pregnancy includes the state of pregnancy (being pregnant), and everything encompassing it: maternity leave, return to work and complications related to pregnancy. See La Commission des droits de la personne et des droits de la jeunesse Quebec (03-12-2013) “Pregnancy” *La Commission des droits de la personne et des droits de la jeunesse Quebec* <<http://www.cdpdj.qc.ca/en/droits-de-la-personne/motifs/Pages/grossesse.aspx>> (accessed 21-01-2015).

<sup>940</sup> *Brossard v Quebec (Comm. des droits de la personne)* [1988] 2 SCR 279.

<sup>941</sup> Ontario Human Rights Commission “Family status and human rights in Canada” (30-05-2016) OHRC <<http://www.ohrc.on.ca/en/human-rights-and-family-ontario/family-status-and-human-rights-canada#fnB26>> (accessed 18-01-2015).

*Canada (Attorney General) v Johnstone (“Johnstone”)*<sup>942</sup> and found that it includes childcare obligations.<sup>943</sup>

It has, however, been argued that the Quebec Charter does not protect “parental situation/status” in Quebec.<sup>944</sup> According to Laporte, the protection of “civil status” does not extend to the protection of childcare obligations – especially since there is no legislative protection of “parental situation/status”.<sup>945</sup> The Québec Court of Appeal appears to take the same view, recalling in December 2013<sup>946</sup> a ruling it handed down in 2010.<sup>947</sup> The court stated that ... “[I]n law, it is relevant to note that neither the federal legislator in the Canadian Charter of Rights and Freedoms nor the provincial legislator

<sup>942</sup> *Canada (Attorney General) v Johnstone* 2014 FCA 110. In this case an employee returned from maternity leave and was unable to find a childcare provider that matched her or her husband’s availability based on their differing shift schedules. She requested to work three fixed 12-hour shifts per week so that she could arrange for childcare while she was at work. The employer’s accommodation policy required Johnstone to accept part-time employment in exchange for fixed shifts. The Federal Court of Appeal confirmed that the plaintiff had proved employment discrimination based on family status due to her parental obligations. Also see *Canadian National Railway Company v Seeley* 2014 FCA 111 where Ms Seeley was required by a collective agreement to temporarily relocate to cover a major staff shortage. She informed her employer that she was unable to immediately relocate because of her childcare obligations (her husband also worked irregular shifts for the same employer and could not provide childcare). She eventually requested to be exempted indefinitely from her collective agreement obligations for compassionate reasons. She was dismissed when she failed to relocate. The Federal Court held that Ms Seeley’s employer discriminated against her on the ground of family status and that she met the requirement of showing she had a substantial childcare obligation.

<sup>943</sup> However, it noted that the parental obligations protected by the *Canadian Charter of Rights and Freedoms* are those a parent cannot neglect without engaging liability toward his or her child. Voluntary activities such as family vacations or participation in sports activities are a parental choice rather than an obligation, and are therefore not protected by law.

<sup>944</sup> M Laporte “Duty to accommodate on the basis of family status” (2014) *Juriclip Labour and Employment, Cain Lamarre Casgrain Wells* <<http://edoctrine.caij.qc.ca/publications-cabinets/cain/2014/a83251/en/PC-ax84538-1>> (accessed 27-01-2015).

<sup>945</sup> Laporte “Duty to accomodate on the basis of family status” (2014) *Juriclip Labour and Employment, Cain Lamarre Casgrain Wells*.

<sup>946</sup> *Beauchesne v Syndicat des cols bleus regroupés de Montréal* (SCFP-301) 2013 QCCA 2069.

<sup>947</sup> *Syndicat des intervenantes et intervenants de la santé Nord-Est québécois (SIISNEQ) (CSQ) v Centre de santé et de services sociaux de la Basse-Côte-Nord* 2010 QCCA 497 (CanLII).

in Section 10 has ruled to make parental situation or parental status, and even less so parental leave, a fundamental right benefiting from protection under the charters [...].<sup>948</sup> Since the federal court system in Canada runs parallel to the provincial court system<sup>949</sup>, it is debatable whether or not the above ruling is correct. The Supreme Court of Canada<sup>950</sup> has interpreted “civil status” to include “family status” and the decisive question should therefore have been whether or not “family status” (and not “civil status”) may be extended to “parental situation/status”. Considering it this way one will probably agree with the Federal Court of Appeal that family status includes childcare obligations.

To guarantee exercise of the right to equality and to ensure the right to equality for all, the Quebec Charter makes it compulsory to follow-up on a request for reasonable accommodation in cases of discrimination based on any prohibited ground under Section 10 of the Charter.<sup>951</sup> The duty to accommodate applies in all situations of prohibited discrimination. Accommodating a person may involve adapting a practice or a general operating rule or granting an exemption to a person facing discrimination and who makes such a request. An example of this is where an employer allows a pregnant employee to work a day shift because her medical condition does not allow her to work at night.<sup>952</sup>

Section 50.1 of the Charter states that the rights and freedoms set forth in the Charter are guaranteed equally to women and men.

Other legislation has also been adopted that recognises and promotes equality between the sexes, such as the Pay Equity Act<sup>953</sup>. This act has had the most impact

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<sup>948</sup> Para 27; Laporte “Duty to accomodate on the basis of family status” (2014) *Juriclip Labour and Employment*, Cain Lamarre Casgrain Wells.

<sup>949</sup> Canadian Judicial Council “Canada’s court system” (2015) *Canadian Judicial Council* <[https://www.cjc-ccm.gc.ca/english/resource\\_en.asp?selMenu=resource\\_courtsystem\\_en.asp](https://www.cjc-ccm.gc.ca/english/resource_en.asp?selMenu=resource_courtsystem_en.asp)> (accesseed 30-01-2015).

<sup>950</sup> *Brossard v. Quebec (Comm. des droits de la personne)* [1988] 2 S.C.R. 279.

<sup>951</sup> La Commission des droits de la personne et des droits de la jeunesse Quebec “The duty to accommodate” (17-10-2013) *La Commission des droits de la personne et des droits de la jeunesse Quebec* <[http://www.cdpdj.qc.ca/en/droits-de-la-personne/droits-pour-tous/Pages/accordement\\_obligation.aspx](http://www.cdpdj.qc.ca/en/droits-de-la-personne/droits-pour-tous/Pages/accordement_obligation.aspx)> (accessed 22-01-2015).

<sup>952</sup> La Commission des droits de la personne et des droits de la jeunesse Quebec “The duty to accommodate” *La Commission des droits de la personne et des droits de la jeunesse Quebec*.

<sup>953</sup> Pay Equity Act SQ 1996, c 43.

on women's financial situation.<sup>954</sup> According to the principle of pay equity, employers must give equal pay not just for equal work, but also for similar work. In order to do so, they must use certain set criteria to compare female-dominated job categories to male-dominated ones. If the comparison reveals a gap in wages, they must take steps to correct the situation. The Pay Equity Act applies to any company with 10 employees or more.<sup>955</sup>

Two Québec government institutions – the Council on the Status of Women ("CSF") and the Secretariat on the Status of Women ("SCF") – are of importance. The CSF is a government consultation and study council with the aim to promote and defend the rights and interests of women in Québec.<sup>956</sup> The SCF was created in 1979 to assist and advise the Minister responsible for the status of women.<sup>957</sup>

##### 5 5 1 1 1 Types of discrimination

Direct, indirect, and systemic discrimination are prohibited under the Quebec Charter.<sup>958</sup> Direct discrimination occurs when the distinction, exclusion or preference is based on one of the grounds prohibited by the Québec Charter.<sup>959</sup> Indirect discrimination occurs when a seemingly neutral, universally applicable practice adversely affects groups defined on the basis of the grounds for discrimination prohibited by the Quebec Charter.<sup>960</sup> Systemic discrimination occurs when various

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<sup>954</sup> Québec (Province), Secrétariat à la condition féminine Staff *Equal in Every Way!: Gender Equality in Québec* 9.

<sup>955</sup> 32.

<sup>956</sup> 8.

<sup>957</sup> 8.

<sup>958</sup> La Commission des droits de la personne et des droits de la jeunesse Quebec "Discrimination" (08-10-2015) *La Commission des droits de la personne et des droits de la jeunesse Quebec* <<http://www.cdpdj.qc.ca/en/droits-de-la-personne/pratiques/Pages/discrimination.aspx>> (accessed 21-01-2015).

<sup>959</sup> See Gouvernement du Québec "Diversity: An Added Value, Government policy to promote participation of all in Québec's development" (2008) *Gouvernement du Québec* <[http://www.midi.gouv.qc.ca/publications/fr/dossiers/PolitiqueFavoriserParticipation\\_Synthese\\_en.pdf](http://www.midi.gouv.qc.ca/publications/fr/dossiers/PolitiqueFavoriserParticipation_Synthese_en.pdf)> (accessed 22-01-15) 5.

<sup>960</sup> See Gouvernement du Québec "Diversity: An Added Value, Government policy to promote participation of all in Québec's development" (2008) *Gouvernement du Québec* 5.

practices, decisions or behaviours combine with other practices within an organization or those of other social institutions and cause discrimination.<sup>961</sup>

#### 5 5 1 1 2 Burden of proof and common defences

The onus is on the complainant to provide *prima facie* proof that a protected right has been infringed.<sup>962</sup> Where a complainant has made out a *prima facie* case of discrimination, the respondent carries the burden of showing, on a balance of probabilities, that the measure is justified as a *bona fide* occupational requirement.<sup>963</sup>

#### 5 5 1 1 3 Claims and remedies

Any person who believes he or she is a victim of discrimination, according to the Quebec Charter, may file a complaint by phone or in writing (by mail, by fax or electronically), with the Human Rights and Youth Rights Commission (HRYRC).<sup>964</sup> If the complaint is accepted for possible investigation, the HRYRC will offer mediation.<sup>965</sup> If no agreement is reached during mediation, the HRYRC may conduct an investigation and bring the matter to the HRYRC or any other court.<sup>966</sup>

A complainant in a discrimination matter may be awarded compensation for the moral or material prejudice resulting therefrom. If the discrimination was unlawful and intentional, the tribunal may award punitive damages.<sup>967</sup>

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<sup>961</sup> See Gouvernement du Québec "Diversity: An Added Value, Government policy to promote participation of all in Québec's development" (2008) *Gouvernement du Québec* 5.

<sup>962</sup> Quebec (*Commission des droits de la personne et des droits de la jeunesse*) v Maksteel Québec Inc., [2003] 3 S.C.R. 228, 2003 SCC 68.

<sup>963</sup> B Vizkeley "Discrimination Law - The Canadian Perspective" (2008) *European Anti-discrimination Law Review* 23 29. For a definition and explanation of "bona fide occupational requirement", see M Bergeron & J Marcotte *The ABC's of the duty to accommodate* (2010) 6.

<sup>964</sup> S 74 of the Quebec Charter.

<sup>965</sup> S 78.

<sup>966</sup> S 80.

<sup>967</sup> S 49.

#### 5 5 1 1 4 Case law

In March 2010, the Quebec Court of Appeal delivered a decision on the disadvantages that could result from parental leave without pay.<sup>968</sup> In this case, the complainant, a nurse in a remote area, benefited (as part of her remuneration) from reduced housing rent under a collective agreement. She took maternity leave, followed by unpaid parental leave. During parental leave, the employer insisted that the employee pay the full amount of rent. The complainant argued that the employer's decision to stop subsidising the housing of an employee during her unpaid parental leave constitutes discrimination based on civil status. The Court of Appeal disagreed with the complainant and stated that, if a right stems from the "parenting situation", it does not constitute a "necessary consequence nor compulsory" element of it and that parental leave is still a choice for those who want to use it. The Court added that the disadvantages that may arise from a parental leave, in terms of the remuneration, could not constitute discrimination on one of the grounds prohibited by article 10 of the Quebec Charter.<sup>969</sup>

Although the decision in *Union of Environment Workers Godin – CSN and Environment Godin Inc. (Sébastien Patoine)*<sup>970</sup> was an arbitration award, it is worth mentioning. The complainant, an assistant operator on night call and weekends, cited difficulties related to the care of his child. He was in a joint custody arrangement which involved having custody of his young child during alternating weeks. Due to his lack of seniority he was often called upon to work evenings and nights. His work-life balance was satisfactory until his move to another town and the loss of his babysitter, after which he refused requests to work evenings on a number of occasions. The employer did not accept the employee's reason for refusing to work, and after several warnings and suspensions the complainant was dismissed. The complainant filed a grievance

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<sup>968</sup> *Union of Advocates of the Northeastern Quebec Health (SIIISNEQ) (CSQ) v. the Lower North Shore Health and Social Services Centre* DTE 2010T-215.

<sup>969</sup> F Rivard "Discrimination based on "civil status" under the Quebec Charter of Human Rights and Freedoms and prohibitions based on "family status" under the Canadian Human Rights" (2011) *La Société québécoise d'information juridique* <<http://translate.google.co.za/translate?hl=en&sl=fr&u=http://soquij.qc.ca/fr/ressources-pour-tous/articles/discrimination-basee-sur-le-tat-civil-prevue-a-la-charte-des-droits-et-libertes-de-la-personne-et-distinction-illicite-basee-sur-la-situation-de-famille-prevue-a-la-loi-canadienne-sur-les-droits-de-la-personne&prev=search>>

<sup>970</sup> TA (2008-02-22) SOQUIJ AZ-50475530, DTE 2008T-231, [2008] RJDT 573.

challenging the dismissal and argued that, in terms of the Quebec Charter, the employer had a duty to accommodate him. The arbitrator ruled that the employer had no obligation to accommodate him by allowing him to be available only every two weeks (when he does not have custody of his daughter). Due to the fact that the Quebec Charter does not include “family status” as a class protected from discrimination, the arbitrator decided that “in the present state of the law and in the absence of any agreement, the notion of work/life balance does not extend to working every other week in a position which requires availability for work on call and especially for evening and night work ...”. Therefore, since family status – in this case joint custody – is not an area of prohibited discrimination, the arbitrator concluded that the employer did not have a duty to accommodate.<sup>971</sup>

At the time of the arbitration, the arbitrator erred by stating that the Quebec Charter does not include “family status” as a prohibited ground of discrimination, because the Supreme Court of Canada interpreted “civil status” to include “family status” three decades ago.<sup>972</sup> Had the the arbitrator issued the award after the *Beauchesne v Syndicat des cols bleus regroupés de Montréal*<sup>973</sup> and *Syndicat des intervenantes et intervenants de la santé Nord-Est québécois (SISNEQ) (CSQ) v. Centre de santé et de services sociaux de la Basse-Côte-Nord*<sup>974</sup> judgments, and if one agrees with Laporte’s view that “civil status” does not extend to the protection of childcare obligations, the award would probably have been correct. This, however, does not mean that it would necessarily be fair and reasonable. Arronis concludes that “even if an employer in Quebec is not required to adjust hours of work to accommodate an employee’s unique family obligations such as joint custody, it should perhaps show greater than normal patience before discharging an employee whose absenteeism is directly attributable to his family obligations.”<sup>975</sup>

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<sup>971</sup> Rivard “Discrimination based on “civil status” under the Quebec Charter of Human Rights and Freedoms and prohibitions based on “family status” under the Canadian Human Rights” SOQUIJ.

<sup>972</sup> *Brossard v. Quebec (Comm. des droits de la personne)* [1988] 2 S.C.R. 279.

<sup>973</sup> (SCFP-301) 2013 QCCA 2069.

<sup>974</sup> DTE 2010T-215.

<sup>975</sup> B Arronis “The vicissitudes of family life under joint custody and the employer’s duty of reasonable accommodation” (2009) *Miller Thomson LLP* <[http://www.millerthomson.com/assets/files/newsletter\\_attachments/issues/Labour\\_and\\_Employment\\_Communiq233\\_-\\_Ontario\\_May\\_25\\_2009.pdf](http://www.millerthomson.com/assets/files/newsletter_attachments/issues/Labour_and_Employment_Communiq233_-_Ontario_May_25_2009.pdf)> (accessed 22-01-2015) 2.

## 5 5 1 2 Ontario

The Ontario Human Rights Code (“the Code”)<sup>976</sup> prohibits discrimination in employment based on a number of grounds. In particular, section 5 of the Code provides as follows:

“[E]very person has a right to equal treatment with respect to employment discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability”.

The Code defines “family status” as “the status of being in a parent and child relationship”.<sup>977</sup> In *York Condominium Corp. No. 216 v Dudnik (No. 2)*<sup>978</sup> an Ontario Board of Inquiry established that the definition of family status covers all those who are in a parent and child “type” of relationship:

“[S]omeone acting in the position of a parent to a child is, in our view, embraced by this definition; for example, a legal guardian or even an adult functioning in fact as parent. Occasionally, for example, due to death or illness of a relative or friend, someone will step in and act as parent to a child of the deceased or incapacitated adult. Thus, if a nephew were to reside with an aunt for an indefinite period, in our view their relationship would fall within the meaning of “family status” ...<sup>979</sup>

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<sup>976</sup> Ontario Human Rights Code R.S.O. 1990, c.H.19.

<sup>977</sup> S 10. According to the HRTO, tribunals and courts have taken a comprehensive and purposive approach to the interpretation of “family status” in line with human rights instruments. This approach protects non-biological parent and child relationships, for example families formed through adoption, step-parent relationships, foster families, and non-biological gay and lesbian parents. See OHRC “Policy and Guidelines on Discrimination because of Family Status” (2007) *Ontario Human Rights Commission* <[http://www.ohrc.on.ca/sites/default/files/attachments/Policy\\_and\\_guidelines\\_on\\_discrimination\\_because\\_of\\_family\\_status.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_discrimination_because_of_family_status.pdf)> (accessed 04-02-2015) 9. In *B v Ontario (Human Rights Commission)*, [2002] S.C.C. No. 66, the Supreme Court of Canada held that marital and/or family status discrimination includes discrimination that is directed at an individual’s membership in a particular group such as “married” or “single” (his or her “absolute status”) as well as discrimination based on the fact that the individual is married or related to a particular person (his or her “relative status”) and that both absolute status and relative status discrimination are prohibited.

<sup>978</sup> *York Condominium Corp. No. 216 v. Dudnik (No. 2)* (1990), 12 CHRR D/325 (Ont Bd Inq) (1991), 14 CHRR D/406 (Ont Div Ct).

<sup>979</sup> Para 165.

The ground of family status does therefore not only include blood or adoptive ties, but also relationships of care, responsibility and commitment that resemble a parent-child relationship.<sup>980</sup> Thus, numerous approaches to defining and identifying discrimination based on family status exist.<sup>981</sup> In order for an employee to prove that discrimination on the basis of family status occurred, the employee must meet a specific test. However, there is an ongoing debate over what test the employee is required to meet and the law on family status discrimination in Ontario remains somewhat unclear.<sup>982</sup>

Sections 9 and 11 of the Code, operate to prohibit discrimination as a result of requirements, qualifications or factors that may appear neutral but which have an adverse effect on persons identified by family status. Section 11 states that if the person responsible for accommodation can prove that the requirement, qualification or factor is reasonable and *bona fide*, by showing that the needs of the group to which the complainant belongs cannot be accommodated without undue hardship, it will not amount to discrimination.<sup>983</sup> Accommodation means making different arrangements for people protected by the Code in order for them to perform a job or have the same opportunities as everyone else.<sup>984</sup> In the context of family status, accommodation is usually associated with caregiving needs.<sup>985</sup> The Code outlines three areas that may be considered when determining whether an accommodation would cause undue hardship: cost, outside sources of funding and health and safety requirements.<sup>986</sup>

Ontario's Pay Equity Act ensures that male and females receive equal pay for performing jobs that may be very different but are of equal value<sup>987</sup> and the

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<sup>980</sup> OHRC "Policy and Guidelines on Discrimination because of Family Status" (2007) *Ontario Human Rights Commission* 10.

<sup>981</sup> 16.

<sup>982</sup> See the text to part 5 5 1 2 4 below.

<sup>983</sup> OHRC "Policy and Guidelines on Discrimination because of Family Status" (2007) *Ontario Human Rights Commission* 25.

<sup>984</sup> S 11(2) of the Code.

<sup>985</sup> OHRC "Policy and Guidelines on Discrimination because of Family Status" (2007) *Ontario Human Rights Commission* 25.

<sup>986</sup> S11(2) of the Code.

<sup>987</sup> S 6.

Employment Standards Act<sup>988</sup> has provisions that ensure women and men receive equal pay for performing substantially the same job<sup>989</sup>.

#### 5 5 1 2 1 Types of discrimination

Discrimination may take many forms. In some cases, discrimination may be direct and intentional, where an individual or organisation deliberately treats an individual unequally or differently because of, for example, family status.<sup>990</sup> Discrimination can also be more subtle or covert, such as indirect discrimination. It is sufficient if the conduct has a discriminatory effect and intent or motive to discriminate is not necessarily required.<sup>991</sup>

#### 5 5 1 2 2 Burden of proof and common defences

The burden of proof in discrimination cases rests on the employee to establish a *prima facie* case of discrimination. All that is required is a connection between the adverse treatment and the ground of discrimination. The ground of discrimination must somehow be a factor in the adverse treatment.<sup>992</sup>

Once the employee establishes a *prima facie* case of discrimination, an evidential burden, but not the burden of proof, shifts to the employer to provide an explanation.<sup>993</sup> Discrimination based on the prohibited grounds may be justifiable where there is a *bona fide* occupational requirement for particular characteristics. Discrimination will not be in violation of the Code if the employer can prove that the prohibited ground for discrimination is indeed an occupational requirement and that failure to meet such a requirement cannot be reasonably accommodated.<sup>994</sup>

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<sup>988</sup> Employment Standards Act of 2000.

<sup>989</sup>S 42.

<sup>990</sup> OHRC “Policy and Guidelines on Discrimination because of Family Status” (2007) *Ontario Human Rights Commission* 17.

<sup>991</sup> OHRC “Policy and Guidelines on Discrimination because of Family Status” (2007) *Ontario Human Rights Commission* 18.

<sup>992</sup> S Segal “The Ontario Court of Appeal clarifies the test for discrimination” (2013) *Lexology* <<http://www.lexology.com/library/detail.aspx?g=8363a30c-b163-4d99-934e-df83e25a184f>> (accessed 06-02-2015).

<sup>993</sup> Segal “The Ontario Court of Appeal clarifies the test for discrimination” (2013) *Lexology*.

<sup>994</sup> S 11 of the Code.

### 5 5 1 2 3 Claims and remedies

Employees who believe they have a complaint that falls under the Code may file their complaint with the Human Rights Tribunal of Ontario (“HRTO”).<sup>995</sup> If the application is accepted, the HRTO will send a copy of the application to the respondents in order for them to reply to the discrimination allegation(s).<sup>996</sup> The HRTO will send a copy of the respondent’s response to the applicant and if the respondent has raised any new matters, the applicant will have the opportunity to file a reply. If both parties agree to mediation, the HRTO will schedule it. If mediation is not successful, the tribunal will schedule a hearing.<sup>997</sup>

The HRTO may order the respondent to either pay monetary compensation or make restitution to the party whose right was infringed for loss arising out of the rights infringement. The HRTO may also do anything else necessary, in the opinion of the HRTO, to ensure that the Code is complied with.<sup>998</sup>

### 5 5 1 2 4 Case law

The case law on family status in Ontario is unsettled. Different courts and administrative decision-makers have applied different tests for family status discrimination and within that ground, different tests for childcare and eldercare.<sup>999</sup>

In *Byfield v. Fresh Start Foods Canada*<sup>1000</sup>, the applicant alleged that his employer refused to accommodate his childcare responsibilities. In this case the applicant took on an extra shift but then realised that it interfered with his childcare responsibilities. He accordingly requested Fridays off in order to spend weekends with his son (in terms

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<sup>995</sup> Part IV of the Code and Ontario's Women's Justice Network "How do I make a claim under the Ontario Human Rights Code?" (2013) *Ontario's Women's Justice Network* <<http://owjn.org/2015/07/how-do-i-make-a-claim-under-the-ontario-human-rights-code/>> (accessed 06-02-2015).

<sup>996</sup> Part IV of the Code and OWJN "How do I make a claim under the Ontario Human Rights Code?" (2013) *Ontario's Women's Justice Network*.

<sup>997</sup> Part IV of the Code and OWJN "How do I make a claim under the Ontario Human Rights Code?" (2013) *Ontario's Women's Justice Network*.

<sup>998</sup> S 45.2 of the Code.

<sup>999</sup> *Misetich v Value Village Stores Inc* 2016 HRTO 1229 para 35.

<sup>1000</sup> 2009 HRTO 817.

of an access agreement with his former spouse) but the employer denied this request. The employee felt he was being given an ultimatum to either pick up his son or leave his job. The HRTA dismissed the application and pointed out that an employee has an obligation to state any need for human rights-related accommodation, something the employee failed to do in this case. Because there was no request to accommodate, the employer had no duty to accommodate. Nevertheless, even if a clear request had been made, the Tribunal found that there would be no duty to accommodate because the employee's job duties did not interfere with his childcare responsibilities. The employee caused his own problems by taking on the extra shift he was offered, which he ought to have known would have caused difficulties in picking up his son.

In *McDonald v Mid-Huron Roofing*<sup>1001</sup> a newly appointed employee was absent for nineteen whole or partial days due to medical appointments and the hospitalisation of his wife who suffered severe pregnancy complications. On the date of termination of his employment, McDonald was required to take his prematurely born son to a medical appointment while his wife was taken by ambulance to the hospital. McDonald had previously been warned that he was to take no more time off. The Tribunal held that, given his family status (he had no extended family that could assist), the refusal to allow the applicant the time away from work needed for his son's medical appointment had an adverse effect on the applicant. The Tribunal found that there was indeed discrimination and reminded employers that superficial evidence regarding undue hardship would be unpersuasive. Full compensation for loss of wages until re-employment, as well as \$20,000 in general damages for infringement of McDonald's human rights, was awarded to him.

In the matter of *I.B.E.W., Local 636 v Power Stream Inc*<sup>1002</sup>, four employees were concerned that a schedule change might have a negative impact on their ability to attend their children's extracurricular activities and interfered with carefully crafted custody arrangements. The arbitrator held that not every conflict between a work obligation and a parental obligation gives rise to a finding of discrimination that must be accommodated by the employer. Only one of the four employees proved that the change in the work schedule caused serious interference with his parental obligations, namely his custody arrangement. The arbitrator concluded that the appropriate test is

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<sup>1001</sup> 2009 HRTO 1306.

<sup>1002</sup> 2009 OLAA No. 447, 186 LAC (4th) 180 [Re: Power Stream].

whether a change in circumstances (whether employer-initiated work changes or changes to family circumstances such as divorce or illness) creates serious interference with a substantial parental obligation.

The abovementioned approach was also adopted in *Alliance Employees Union, Unit 15 v. Customs and Immigration Union (Loranger Grievance)*.<sup>1003</sup> In this arbitration matter, Mr Loranger sought a blanket exemption from any travel outside of Ottawa, a city in Ontario, for the last five to six months of his wife's "high risk" pregnancy so that he could be available to provide assistance with childcare responsibilities for their special needs son. Mr Loranger's employer responded to his request by agreeing to accommodate him on a case-by-case basis, and offering to incur extra costs to allow him to travel back home to be with his family each day when he would need to travel. Mr Loranger deemed this arrangement unacceptable and filed a grievance alleging discrimination on the basis of family status. The arbitrator found that a *prima facie* case of discrimination on the basis of family status had not been established. Mr Lonranger specifically failed to establish that the probability of having to actually travel outside of Ottawa was high or that the travel could not be adjourned in any event. There was also no evidence to support the nature of the "high risk" pregnancy or the non-availability of child care or the degree of the child's disability. Consequently, the arbitrator concluded that the evidentiary basis necessary to establish a substantial interference with a parental obligation was not established and the discrimination claim was dismissed.

In *Wing v Niagara Falls Hydro Holding Corporation*<sup>1004</sup> the HRTO adopted the Court's decision in *Johnstone*<sup>1005</sup> and found that there was no discrimination against Ms Wing. The HRTO considered Ms. Wing's complaint that the requirement to attend board meetings at 3:30pm was discriminatory because it interfered with her parental obligations. She could not attend the meetings at that time because she had to pick her daughter up after school and then take her to swimming lessons. The Board ultimately changed its meeting time to 4:00pm. The HRTO found that members of corporate boards were not employees so she could not have been a victim of

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<sup>1003</sup> 2011 205 LAC (4th) 343.

<sup>1004</sup> 2014 HRTO 1472.

<sup>1005</sup> 2014 FCA 110. See the text to part 5 5 1 above.

workplace discrimination. She also chose not to put her child in aftercare and did not seem to have made any efforts to find alternatives.

The case of *Patridge v Botony Dental Corp.*<sup>1006</sup> demonstrates how the Code protects employees from discrimination on the ground of family status. Upon the plaintiff's return to work, after maternity leave, she was demoted and her working hours changed. This, however, posed significant challenges to the plaintiff's childcare obligations. After some time, the employer, due to escalating interactions and events between them, dismissed her. The plaintiff brought an action against her employer for wrongful dismissal which included a claim for damages resulting from discrimination based on family status under the Code. Her employer alleged that she was dismissed for just cause. In assessing her claim for Human Rights damages, the Court applied the analysis from *Johnstone*, namely that family status includes parental obligations such as childcare.<sup>1007</sup> *Johnstone* sets out the legal test to determine whether there is discrimination on a prohibited ground, comprised of two parts: a *prima facie* case of discrimination must first be made out by the complainant and the employer must secondly show that the policy or practice is a *bona fide* occupational requirement and that those affected cannot be accommodated without undue hardship. The Ontario Superior Court of Justice found that a *prima facie* case of discrimination was made out and that there was no reason why the plaintiff could not be accommodated without causing undue hardship to the employer.

In the recent decision of *Misetich v Value Village Stores Inc.*<sup>1008</sup> the HRTO appears to have rejected the Federal Court of Appeal's test for family status discrimination in *Johnstone* and has reopened the debate over which test courts and tribunals should apply to determine whether there is discrimination based on family status. In this case the HRTO stated that family status should not be treated differently than any other form of discrimination.<sup>1009</sup> An applicant must establish that he or she is a member of a protected group, has experienced adverse treatment, and the ground of discrimination was a factor in the adverse treatment.<sup>1010</sup> The HRTO also confirmed that the assessment of whether an applicant had made reasonable efforts to meet family status

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<sup>1006</sup> OJ No 226.

<sup>1007</sup> Paras 87-88.

<sup>1008</sup> 2016 HRTO 1229.

<sup>1009</sup> Para 43.

<sup>1010</sup> Para 52.

obligations by seeking out reasonable alternative solutions conflates the test for discrimination with the test for accommodation. In order to prove family status discrimination, an applicant is not required to self-accommodate the adverse impact caused by a workplace rule.<sup>1011</sup>

### 5.5.2 United States of America

Existing federal statutory law in the USA does not explicitly prohibit employers from discriminating against employees based on family responsibility, like it does based on other grounds, for example sex.<sup>1012</sup> Nevertheless, employees have successfully brought lawsuits for family responsibility discrimination ("FRD")<sup>1013</sup> using a variety of legal theories under existing federal law, including sex discrimination under Title VII of the Civil Rights Act of 1964 and violations of the Family and Medical Leave Act 1993 ("FMLA").<sup>1014</sup> The United States Equal Employment Opportunity Commission's ("EEOC") Enforcement Guidance<sup>1015</sup> provides guidance on family responsibility discrimination and classifies fact patterns that may be litigated under existing protected categories, for example discrimination against mothers and fathers on the basis of gender.<sup>1016</sup> Apart from family responsibility discrimination, employers generally cannot

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<sup>1011</sup> Para 48.

<sup>1012</sup> S Bornstein & R Rathmell *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination* (2009) 4.

<sup>1013</sup> FRD is "discrimination against employees based on their responsibilities to care for family members, including pregnancy discrimination, discrimination against mothers and fathers who actively participate in caring for their children, and discrimination against workers who care for aging parents or ill or disabled spouses or family members." See Bornstein & Rathmell *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination* 1.

<sup>1014</sup> Bornstein & Rathmell *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination* 4.

<sup>1015</sup> US Equal Employment Opportunity Commission "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" (23-05-2007) *US Equal Employment Opportunity Commission* <<http://www.eeoc.gov/policy/docs/caregiving.pdf>> (accessed 07-09-2016).

<sup>1016</sup> C Albiston, K Dickson, C Fishman & L Levy "Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence" (2007) 59 *Hastings LJ* 1285-1310 1290 - 1291.

discriminate against employees on the basis of, *inter alia*, sex and pregnancy under federal law in the USA.

The Equal Pay Act of 1963 requires that employers pay male and female employees the same wage for performing the same job. In short, the Act mandates "equal pay for equal work." It does not address pay equities with respect to other characteristics, such as race or religion, but applies only to gender.

Title VII of the Civil Rights Act prohibits employers from discriminating against employees on the basis of race, colour, national origin, religion, or gender in all aspects of employment. It applies to most employers engaged in interstate commerce with more than fifteen employees, labour organisations and employment agencies.

The federal Pregnancy Discrimination Act of 1987, amending Title VII of the Civil Rights Act, prohibits sex discrimination on the basis of pregnancy. The Act states that it is illegal to discharge or otherwise adversely affect an employee because she is pregnant, has an abortion, or gives birth to a child. It also requires employers to treat pregnancy-related disabilities and illnesses the same as it treats any other illness or temporary disability, for purposes of medical verification, availability of pay, accrual of seniority and other benefits, insurance coverage and entitlement to promotions.

Federal government workers are explicitly protected against discrimination based on parenthood through an Executive Order. Signed by President Clinton on May 2, 2000, Federal Executive Order 13152 amended federal equal employment opportunity law to prohibit employment discrimination against federal government employees on the basis of their "status as a parent" — including biological, adoptive, foster, or stepparent, a custodian or in *loco parentis*, or a person in the process of seeking custody or adoption.<sup>1017</sup> Remedies under this Executive Order are available but are more limited than under federal statutory law.<sup>1018</sup>

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<sup>1017</sup> Exec. Order No. 13152, 65 Fed. Reg. 26115 (May 2, 2000).

<sup>1018</sup> Bornstein & Rathmell *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination* 4.

### 5 5 2 1 Types of discrimination

The United States does not expressly define discrimination in their statute law. However, jurisprudence has developed a concept of discrimination which includes both direct and indirect discrimination.<sup>1019</sup>

### 5 5 2 2 Burden of proof and common defences

In cases where direct discrimination is alleged, the plaintiff must establish a *prima facie* case of discrimination.<sup>1020</sup> Proving FRD is no different than proving any other type of discrimination where a conclusion is drawn from all the circumstances presented.<sup>1021</sup>

After the plaintiff has established a *prima facie* case, the respondent must articulate a legitimate reason for the apparent difference in treatment. The plaintiff then has to prove that the reason given by the respondent is a mere pretext and that the real reason for the disparate treatment is discrimination.<sup>1022</sup>

In an alleged indirect discrimination case, the onus rests on the complainant to prove that a condition has been imposed, which has a disproportionate impact on a particular protected group.<sup>1023</sup> Once that has been established, the onus shifts to the respondent to show that the condition is consistent with business necessity.<sup>1024</sup>

In certain circumstances, it is possible for employers to claim that excluding pregnant or fertile women from certain jobs is lawful because non-pregnancy is a *bona fide* occupational qualification ("BFOQ").<sup>1025</sup> Berrien notes that the defence is,

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<sup>1019</sup> Human Rights and Equal Opportunity Commission "An International Comparison of the Racial Discrimination Act 1975 Background Paper No.1" (2008) *Human Rights and Equal Opportunity Commission* <[https://www.humanrights.gov.au/sites/default/files/content/racial\\_discrimination/publications/int\\_comparison/RDA\\_int\\_comparison.pdf](https://www.humanrights.gov.au/sites/default/files/content/racial_discrimination/publications/int_comparison/RDA_int_comparison.pdf)> (accessed 19-02-2015) 34.

<sup>1020</sup> Commission "An International Comparison of the Racial Discrimination Act 1975 Background Paper No.1" (2008) *Human Rights and Equal Opportunity Commission* 87.

<sup>1021</sup> Albiston et al (2007) *Hastings LJI* 1289.

<sup>1022</sup> Commission "An International Comparison of the Racial Discrimination Act 1975 Background Paper No.1" (2008) *Human Rights and Equal Opportunity Commission* 87.

<sup>1023</sup> S 2000e-2(k)(1)(A)(i) of Title VII of the Civil Rights Act.

<sup>1024</sup> S 2000e-2(k).

<sup>1025</sup> Berrien "Enforcement Guidance: Pregnancy Discrimination and Related Issues" (2014) *U.S. Equal Employment Opportunity Commission* (2014) *U.S. Equal Employment Opportunity Commission* <[https://www.eeoc.gov/laws/guidance/upload/pregnancy\\_guidance.pdf](https://www.eeoc.gov/laws/guidance/upload/pregnancy_guidance.pdf)> (accessed 25-05-2017) 25.

however, a very narrow exception to the general prohibition of discrimination on the basis of sex.<sup>1026</sup> An employer who wants to prove a BFOQ must show that pregnancy truly interferes with a female employee's ability to perform the job and the defence must be based on "objective, verifiable skills required by the job rather than vague, subjective standards".<sup>1027</sup>

Employers are seldom able to establish a pregnancy-based BFOQ and without proving a BFOQ, an employer may not require a pregnant worker, who is able to perform her job, to take leave until her child is born or for a fixed time thereafter.<sup>1028</sup>

### 5 5 2 3 Claims and remedies

Given the fact that caregivers are not currently a protected class at the federal level or in most states in the USA, there is no single "correct" way to bring a claim based on family responsibility discrimination.<sup>1029</sup> As an alternative, plaintiffs have used at least seventeen different causes of action to fight FRD in the court, including claims based on violation of Title VII, the Pregnancy Discrimination Act and the Family and Medical Leave Act.<sup>1030</sup> Legal claims have included disparate treatment, stereotyping and disparate impact and the legal claim a caregiver chooses will ultimately depend on a factual analysis of the case.<sup>1031</sup> The FMLA makes provision for actual damages in the form of lost wages and childcare costs if a court finds that rights under the FMLA have been violated.<sup>1032</sup>

An employee also has the right to file a charge of discrimination with the EEOC. In most cases, a charge of discrimination must be filed with the EEOC within 180 days of the discriminatory action in order to preserve the employee's legal rights. It is possible to file a charge even if the claimant does not work for the employer anymore and it is not necessary to hire a lawyer in order to file a charge. The EEOC may investigate and/or offer mediation services to help resolve the complaint. Additionally,

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<sup>1026</sup> 25.

<sup>1027</sup> 25.

<sup>1028</sup> 25.

<sup>1029</sup> S Eifler "Choosing Not to Choose: A Legislative Solution for Working Adults Who Wish to be Successful Employees and Successfull Caregivers" (2012) 60 *Drake L Rev* 1205 1213.

<sup>1030</sup> 1213.

<sup>1031</sup> 1213.

<sup>1032</sup> S 825.400(c).

most states and local governments have a human rights or civil rights office that can help.<sup>1033</sup>

Compensatory and punitive damages may be awarded in cases involving intentional discrimination based on sex (including pregnancy).<sup>1034</sup> Compensatory damages pay victims for expenses caused by the discrimination and compensate them for any emotional harm suffered.<sup>1035</sup> Punitive damages may be awarded to penalise an employer who has committed an especially malicious or reckless act of discrimination.<sup>1036</sup>

#### 5 5 2 4 Case law

Although the number of cases filed alleging discrimination based on family responsibilities has grown aggressively<sup>1037</sup> and FDR litigation has proven itself to be effective for some caregiver employees, the results have been unpredictable.<sup>1038</sup> Although several theories of liability have been used to battle FRD, the factual scenarios in certain cases simply do not fit available causes of action. This is mainly due to the fact that when FRD suits are brought as violations of the FMLA, it is strictly

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<sup>1033</sup> USEEO Commission “Filing A Charge of Discrimination” *U.S Equal Employment Opportunity Commission* <<http://www.eeoc.gov/employees/charge.cfm>> (accessed 19-02-2017).

<sup>1034</sup> There are limits on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer.

<sup>1035</sup> USEEO Commission “Remedies For Employment Discrimination” (13-04-2016) *USEEO Commission* <<http://www.eeoc.gov/employees/remedies.cfm>> (accessed 19-02-2015).

<sup>1036</sup> USEEO Commission “Remedies For Employment Discrimination” (13-04-2016) *USEEO Commission*.

<sup>1037</sup> The number of cases decided between 2006 and 2015 (3223 cases) is more than three times the number of cases decided in the prior decade (1996 – 2005, 873 cases), representing a 269% increase. See C Thomas Calvert “Caregivers in the workplace Family Responsibilities Discrimination Litigation Update 2016” (2016) *WorkLife Law* <[http://worklifelaw.org/pubs/FRD\\_update2016.pdf](http://worklifelaw.org/pubs/FRD_update2016.pdf)> (accessed 05-09-2016) 13 and J Williams & S Bornstein “The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias” (2008) 59 *Hastings LJ* 1311 1357.

<sup>1038</sup> Employees alleging family responsibilities discrimination succeeded in 52% of cases. See C Thomas Calvert “Caregivers in the workplace Family Responsibilities Discrimination Litigation Update 2016” (2016) *WorkLife Law* 21 and Eifler (2012) *Drake L Rev* 1229.

limited in its application.<sup>1039</sup> Courts are also often hesitant to find in favour of caregiver employees without a statutory public policy ground in place. Litigation has consequently left some caregiver employees without a job and without a remedy.<sup>1040</sup>

It is also economically and emotionally challenging to hire an attorney to file suit for what is, at best, an uncertain result.<sup>1041</sup>

Even if caregiver employees successfully sue their employers for FRD, litigation does not directly combat FRD because it does not prevent FRD; instead, it only mitigates the injuries already suffered by victims of FRD.<sup>1042</sup>

FRD lawsuits have, despite the limitations and challenges, successfully sought redress for caregivers from a very wide range of occupations. FRD cases have involved men and women, people of colour and white people and employees working part-time or flexibly as well as full-time.<sup>1043</sup> Most of the family responsibilities discrimination cases, reviewed in a recent study of 4400 such cases by the Centre for WorkLife Law, are related to pregnancy and maternity leave (67%).<sup>1044</sup> These cases, however, are predominantly from courts of individual states and counties and not the federal courts, which operate under the authority of the federal law.

*Young v. United Parcel Service*<sup>1045</sup> is a recent United States Supreme Court case where the Court evaluated the requirements for bringing a disparate treatment claim under the Pregnancy Discrimination Act. Young was employed as a delivery driver for the United Parcel Service (UPS) when she became pregnant in 2006. Her medical

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<sup>1039</sup> Eifler (2012) *Drake L Rev* 1214. For example, although the FMLA provides twelve weeks of unpaid leave for eligible employees, this entitlement to the leave is only mandatorily available if the employer employs 50 or more workers. Part-time employees are often excluded from this entitlement, because an employee is only eligible for the leave if she has worked for the employer for at least twelve months and has provided at least 1,250 hours of service in that period. Ultimately, as a result of these eligibility requirements, the majority of employers are not covered by the FMLA. See Eifler (2012) *Drake L Rev* 1215.

<sup>1040</sup> Eifler (2012) *Drake L Rev* 1229.

<sup>1041</sup> 1216.

<sup>1042</sup> 1216.

<sup>1043</sup> Williams & Bornstein (2008) *Hastings LJ* 1357.

<sup>1044</sup> Other common fact patterns include eldercare (11%), care for sick children (9%) or sick spouses (6%), association with a family member who has a disability (5%), and discrimination based on motherhood (5%). See C Thomas Calvert "Caregivers in the workplace Family Responsibilities Discrimination Litigation Update 2016" *WorkLife Law* 13-14.

<sup>1045</sup> 575 US (2015).

practitioners advised her not to lift more than twenty pounds while working. UPS's employee policy requires their employees to be able to lift up to seventy pounds.<sup>1046</sup> Due to Young's inability to fulfil this work requirement, as well as the fact that she had used all her available family/medical leave, UPS forced Young to take an extended, unpaid leave of absence.<sup>1047</sup> During this time, she eventually lost her medical coverage.<sup>1048</sup> Young gave birth in April 2007 and resumed working at UPS thereafter. Young sued UPS and claimed she had been the victim of gender- and disability-based discrimination under the Americans with Disabilities Act and the Pregnancy Discrimination Act. UPS argued that Young could not show that UPS's decision was based on her pregnancy or that she was treated differently than a similarly situated co-worker. Furthermore, UPS argued it had no obligation to offer Young accommodation under the Americans with Disabilities Act because Young's pregnancy did not constitute a disability. The district court dismissed Young's claim and the US Court of Appeals for the Fourth Circuit affirmed.

The Supreme Court vacated the Fourth Circuit's judgment and remanded the case for further proceedings. Justice Stephen G. Breyer delivered the opinion for the 6-3 majority. The Court held that an interpretation of the Act that requires employers to offer the same accommodations to pregnant workers as all others with comparable physical limitations would be too broad.<sup>1049</sup> Congress did not intend the Act to grant pregnancy such an unconditional most-favoured-nation status.<sup>1050</sup> The Court held that Young presented evidence that UPS treated some workers, whose situation cannot reasonably be distinguished from hers, more favourably, and thereby created a genuine issue of fact for trial.<sup>1051</sup> The Court did not, however, determine whether Young created a genuine issue of fact about whether UPS's reasons for treating Young less favourably than other non-pregnant employees were pretext. The Court left that issue for the Fourth Circuit to address on remand, specifically referring to the need to consider the combined effects of UPS's accommodation policies and the strength of UPS's justifications.<sup>1052</sup>

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<sup>1046</sup> 1.

<sup>1047</sup> 2.

<sup>1048</sup> 2.

<sup>1049</sup> 20-23.

<sup>1050</sup> 20-23.

<sup>1051</sup> 23.

<sup>1052</sup> 23-24.

In *Back v Hastings on Hudson Union Free School District*,<sup>1053</sup> a school psychologist received positive performance reviews and assurances over a period of two years, that she would receive tenure.<sup>1054</sup> Yet as her tenure decision approached in her third year, her supervisors repeatedly expressed concerns that it was not possible for Back to be a good mother and have the job. They questioned Back's commitment to the job, after receiving tenure, due to her having children at home.<sup>1055</sup> When Back was denied tenure, she sued for gender discrimination. The Second Circuit allowed Back's case to move forward, holding that stereotypes about mothers not being committed to or compatible with work were gender based and could support a gender discrimination claim, even without comparator evidence of a similarly-situated male employee.<sup>1056</sup> Although Back lost at trial, the holding remains: even without a comparator, a plaintiff may prove disparate treatment on the basis of stereotyping.<sup>1057</sup>

In another important case, a sales manager sued her employer for family responsibility discrimination when he failed to promote her. The plaintiff's supervisor admitted that she was qualified, but he did not consider her for the promotion because she had children and he assumed she did not want to relocate her family.<sup>1058</sup> She was awarded over a million dollars in damages which was later reduced.<sup>1059</sup>

An example of the unfortunate reality that maternal-wall<sup>1060</sup> stereotyping may show up as stereotyping of women by women, is *Walsh v. National Computer System, Inc.*<sup>1061</sup> In this case, a top sales person sued her employer for gender discrimination alleging that she experienced hostility from her manager when she returned from maternity leave. Amongst other things, her work hours were scrutinised and she was

<sup>1053</sup> 365 F.3d 107 (2 Cir. 2004).

<sup>1054</sup> 114.

<sup>1055</sup> 115.

<sup>1056</sup> 130.

<sup>1057</sup> J Williams & S Bornstein "Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination" (2006) 41 *USFL Rev* 171 175.

<sup>1058</sup> *Lust v Sealy, Inc.*, 277 F Supp 2d 973(WD Wis 2003), aff'd, 383 F 3d 580 (7th Cir. 2004) 15.

<sup>1059</sup> 39-46.

<sup>1060</sup> Meaning women cannot move forward in their employment because of their work-family conflicts. See Eifler (2012) *Drake LR* 1210.

<sup>1061</sup> 332 F 3d 1150 (8th Cir 2003).

not allowed to leave to pick up her sick child from daycare.<sup>1062</sup> The Plaintiff was awarded \$625,000 in damages, and the verdict was upheld on appeal.<sup>1063</sup>

Title VII disparate treatment claims have also been used to protect fathers' rights to engage in family caregiving. In *Schafer v. Board of Public Education of the School District of Pittsburgh*<sup>1064</sup>, a male plaintiff sought to take advantage of his employer's one-year childrearing leave policy. The employer denied his request stating that the policy applied only to female employees (in the form of sick leave). Schafer successfully brought a Title VII claim against his employer. Males, but not females, were required to demonstrate disability in order to qualify for the childrearing leave and the court held that the policy violated Title VII.

## 5 6 The BRIC countries

The BRICS members are all developing or newly industrialised countries, but they are distinguished by their large, fast-growing economies, their significant influence on regional and global affairs and all five are G-20 members.<sup>1065</sup> The BRIC<sup>1066</sup> countries seem to be characterised by a clear and distinct lack of focus on work and family research<sup>1067</sup> and particularly on equality law as a means to reconcile work and care. Part of the reason for this is a gender inegalitarian culture and the low status accorded to women and matters pertaining to women in some of these countries.<sup>1068</sup> It is also very difficult to access case law in the BRIC countries and the majority of cases are

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<sup>1062</sup> 4, 26.

<sup>1063</sup> 11, 35.

<sup>1064</sup> 903 F 2d 243 (3d Cir 1990).

<sup>1065</sup> Anonymous "G20 Summit in China will voice concerns of developing countries" (20-08-2016) *The BRICS Post* <<http://thebricspost.com/g20-summit-in-china-will-voice-concerns-of-developing-countries/#.V8QH1U1-PIU>> (accessed 29-08-2016).

<sup>1066</sup> South Africa is already discussed earlier in this chapter and therefore excluded from the discussion here.

<sup>1067</sup> U Rajadhyaksha & S Smita "Tracing a timeline of work and family research in India" (2004) 39 *Economic and Political Weekly* 1674 1674.

<sup>1068</sup> Rajadhyaksha & Smita (2004) *Economic and Political Weekly* 1674.

often not reported and published.<sup>1069</sup> In addition to this, language is a barrier due to the fact that, although the BRIC countries all include English as a national language, they are all primarily non-English speaking countries.

Employment discrimination in the BRIC countries is primarily the result of structural inequalities that assign a subordinate social status to women and disadvantaged minority groups.<sup>1070</sup> The equality legislation of most of the BRIC countries only applies to workers in regulated employment, which excludes the majority of workers from legally guaranteed benefits.<sup>1071</sup> In India, for example, the private and agricultural sectors have been left almost wholly unregulated.<sup>1072</sup>

No mention is made of “family responsibility discrimination” in equality legislation in the BRIC countries and the existing legal protection against employment discrimination include constitutional provisions mandating equality and a handful of scattered criminal statutes. In most of these countries, there is no umbrella employment discrimination statute to regulate private sector workplaces.<sup>1073</sup> The lack of a comprehensive legal framework to address employment discrimination in its various forms hinders the realisation of employment equality.<sup>1074</sup> In contrast, where a comprehensive enforcement procedure concerning employment discrimination exists, for example as in China, there is no independent monitoring body and employment discrimination complaints are mainly dealt with as general labour disputes.<sup>1075</sup>

Case law on equality discrimination is scarce and the absence of legal precedent discouraging to potential applicants. In conjunction with this reality, the lack of effective

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<sup>1069</sup> See, however, the discussion of *Konstantin Markin v. Russia* (application no. 30078/06, Judgment 7/10/2010, Strasbourg) and Russian Federation Constitutional Court Ruling No 28-P of 15 December 2011 on the Constitutionality of Article 261.4 of the Labor Code of the Russian Federation (petition of A. E. Ostayev) in ch 7, part 3 5 1 below regarding an example of how constitutional rights and policymaking commitment, via equality law, may lead to the extension of specific rights.

<sup>1070</sup> D Shenoy “Courting Substantive Equality: Employment Discrimination Law in India” (2013) 34 *J Int'l L* 611 612.

<sup>1071</sup> B Sorj *Reconciling work and family: Issues and policies in Brazil* (2004) 54.

<sup>1072</sup> Shenoy (2013) *J Int'l L* 622.

<sup>1073</sup> 614.

<sup>1074</sup> 621.

<sup>1075</sup> Y Hou *Means of Transformation?: The Role of Enforcement Mechanisms in Providing Protection against Pregnancy Discrimination in Employment* LLM thesis University of Oslo Faculty of Law (2012) 18-19.

remedies in employment discrimination litigation in most of these countries serves as a disincentive for people who would like to challenge discriminatory employment practices.<sup>1076</sup> In Russia, where discrimination cases are also limited, it would not matter if discrimination had taken place or not if an employee wants to prove that termination was unreasonable.<sup>1077</sup> If the employee is successful in proving that the termination was unreasonable, the employee is simply reinstated. Discrimination in such cases is just an extra unlawful motive of the employers' illegal conduct and proving discrimination does not benefit the employee in any way. As a result, protection from discrimination by the employer is almost practically unavailable for the employee.<sup>1078</sup>

The BRIC countries' equality legislation (or lack thereof) fails to address the needs of employees with family responsibilities and does not nearly provide sufficient choices to caregiving employees in the employment context to effectively combine work and care.

## 6 Conclusion

In this chapter the appropriateness of equality legislation (and its application) to facilitate the integration of work and care was considered on a comparative basis. The point of departure was that, due to the gender bias inherent in caregiving, equality law shows – at least superficially - a close and seemingly natural fit with any attempt to regulate the integration of work and care.

While the majority of the countries under review prohibit discrimination – on the basis of pregnancy, sex, gender and some on the basis of family responsibility – the South African experience confirms that equality law has two dimensions – a prohibition on (unfair) discrimination and affirmative action on the basis of sex or gender. The apparent fit between equality law and the integration of work and care is true of both the dimensions of equality law – especially direct discrimination on the grounds of pregnancy or family responsibility (especially in countries like South Africa where

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<sup>1076</sup> 18-19.

<sup>1077</sup> Information from personal communication (via email on 21-04-2015) with Ms Fatima Nogaylieva Saint-Petersburg State University (Law Faculty, Department of Labour Law).

<sup>1078</sup>Information from personal communication (via email on 21-04-2015) with Ms Fatima Nogaylieva Saint-Petersburg State University (Law Faculty, Department of Labour Law).

family responsibility is recognised as a ground of discrimination); indirect discrimination on the grounds of sex or gender; and recognition of the importance of accommodation as part of anti-discrimination law and as part of affirmative action.

Even so, the worldwide experience with anti-discrimination law has shown barriers to exist for the concept to flourish by means of (individualised) litigation. These barriers flow forth from both the meaning (often misunderstood) of discrimination and the fact that what is in effect systemic discrimination against caregivers has to be addressed and remedied on a confrontational and individualised basis through litigation.

Despite the existence of these barriers, it may be said that South African anti-discrimination law, especially after the 2014 amendments, is well positioned to make a substantial contribution to the facilitation of the integration of work and care. In this regard, the following important points stood out from a review of South African equality law: firstly, pregnancy, sex, gender and family responsibility are all listed as grounds of discrimination and family responsibility is given an open and fairly wide definition; secondly, fault is not a requirement in South African discrimination law; thirdly, a suitable comparator is not always a requirement for a successful claim of discrimination – just a link between the employer conduct complained of and the ground of discrimination (that is the effect on the complainant); fourthly, although South African courts have regarded it as axiomatic that discrimination may be ‘fair’ (over and above the express grounds of justification), the enquiry into fairness begins (and ends) with the impact on the dignity of the employee and includes considerations of legitimacy, rationality and proportionality (which means discrimination remains difficult to justify); fifthly, it is easy to argue – based on the test of the EEA and judicial support – that a duty to accommodate groups defined on the grounds of discrimination is part and parcel of our equality law (although the duty is in the process of being developed); sixthly, in discrimination cases based on pregnancy, sex, gender or family responsibility (as listed grounds), the full onus of persuasion (after the amendments) is on the employer to show both that the discrimination did not take place or that it is rational and fair or justified; seventh, the CCMA, as an inexpensive and quick dispute resolution body, now has jurisdiction to arbitrate all discrimination cases where the complaining employee earns below the threshold (this includes by far the majority of employees).

However, despite being so well-positioned, anti-discrimination law in the South African context has made little, if any actual contribution to the facilitation of the

integration of work and care. There has been virtually no reliance on family responsibility as a ground of discrimination (at least not by the real caregivers). South Africa has seen virtually no indirect discrimination cases, which would be the appropriate way sex and gender could be used as proxy grounds for caregiving responsibilities. Indirect discrimination remains a poorly understood concept which, in practice is non-existent. To date, there has been little guidance on the role of (reasonable) accommodation as part of South Africa's equality law – either in the context of discrimination law as such, let alone in the context of family responsibility or caregiving. A review of discrimination referrals to the CCMA shortly after the amendments confirms this state of affairs. While there were a large number of referrals, not one concerned family responsibility discrimination.

As far as affirmative action is concerned, South Africa is unique worldwide in the “aggressive” nature of affirmative action permitted by the EEA, also on the basis of sex/gender. In this regard, the chapter showed that affirmative action also requires accommodation of employees and the removal of barriers to (continued) employment, but that, despite this, female employees are not sufficiently represented at higher levels in organisations. This, in turn, is probably due to the focus in the practice of affirmative action on (superficial) appointment and promotion and also due to the fact that without true removal of workplace barriers (also caused by women’s caregiving responsibilities) over the course of employment of women, there is a failure to ensure a female talent pipeline from the start of employment to higher levels of employment.

It is submitted that there are at least two important insights to be gained from a comparative overview of discrimination legislation and litigation in other countries. Firstly, despite a much longer tradition of anti-discrimination legislation and litigation in especially developed countries, and despite the promise anti-discrimination legislation holds for the integration of work and care, it remains a haphazard and often unsuccessful way to pursue this goal. Secondly, it would seem that an administrative organisation (as we find, for example in the USA, the UK and Canada) to raise the profile and awareness of anti-discrimination law through, *inter alia*, advice and assistance in litigation (inclusive of bringing test cases) might be helpful and should strongly be considered as a possibility in other countries, including South Africa.

In short then, the potential for discrimination law to bring change in the area of the work-care conflict remains (especially, in the South African context), but to date this potential has not been realised and, for the reasons discussed in this chapter, it may

never happen. This means that the need arises to focus on the use of specific rights in employment standards legislation to facilitate the integration of work and care.

## CHAPTER 5: TWO APPROACHES TO SPECIFIC RIGHTS IN DEVELOPED ECONOMIES: THE UNITED KINGDOM AND SWEDEN IN THE EUROPEAN CONTEXT

### 1 Introduction

One of the premises of this thesis is that the domestic legal operationalisation of the integration of work and care is (and perhaps should be) found in one or a combination of equality law and focused specific rights. In chapter 4 the deficiencies of equality law were discussed. It was shown that globally, and in South Africa in particular, equality law has not been effective in comprehensively redressing the workplace inequalities associated with parental care. This is true of both anti-discrimination law and an obligation to implement affirmative action. It is true of anti-discrimination law despite a direct link between care and family responsibility as a ground of discrimination and despite the indirect link which exists between care and sex and gender (as two further grounds of discrimination). It is simply not enough to prohibit family responsibility discrimination, or to provide equal rights to women and to rely on anti-discrimination enforcement laws to regulate the integration of work and care. Chapter 4 also showed that even if one takes a broad, substantive view of gender equality supported by apparently broad and aggressive affirmative action – an approach of which South Africa is the prime example – the results are disappointing.

This already suggests that a more focused intervention is necessary to ensure equal opportunities for entry into and advancement in employment for women, the primary caregivers of children, to enable a successful combination of their work and family responsibility at all stages of their careers. It would seem that the simple reality is that true and reasonable accommodation of caregivers (and parental care) in the workplace – in terms of both access to employment as well as security and advancement over time – requires a focused legal facilitation of their (ongoing) family responsibilities and the flexibility of their working arrangements – either through appropriate time off (which still requires separation between care and work) or an even more flexible way of integration of care responsibilities with work.

Such a focused intervention is easily linked to and justified in terms of international law (as discussed in chapter 3 above). Provision for “special measures” is found in several treaties and is part and parcel of international human rights discourse. While it includes measures commonly referred to as “affirmative action”, the term “special

measures" is inclusive of a more focused intervention than either protection against discrimination or a broad obligation to implement affirmative action on the basis of gender.<sup>1079</sup>

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<sup>1079</sup> For example, art 5 of the Discrimination (Employment and Occupation) Convention 1958, was one of the first articles in an international treaty to permit the adoption of "special measures of protection or assistance to meet the particular requirements of people, who for reasons such as sex, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance". The Convention states explicitly that these measures shall not be deemed to be discrimination. More recently - in 2004 - the Committee on the Elimination of Discrimination against Women provided an example of a more focused approach to special measures through their general recommendation on art 4(1) of CEDAW (ratified by South Africa on 15 December 1995). The purpose of the recommendation was to clarify the meaning of 'temporary special measures' in article 4(1) of the treaty, which states:

"[A]doption by States parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

The recommendation mentions that the term "special" needs to be carefully explained because its use sometimes casts women and other groups who are subject to discrimination as weak, vulnerable and in need of extra or "special" measures in order to participate or compete in society. According to the recommendation the real meaning of 'special' in the formulation of article 4(1) is that the measures are designed to serve a specific goal. Furthermore, the term 'measures' encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems. The recommendation continues to state that the choice of a particular 'measure' will depend on the context in which article 4(1) is applied and on the specific goal it aims to achieve. (See The United Nations Committee on the Elimination of Discrimination against Women "General recommendation No. 25, art 4, para 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures" (2004) and M Tomei *Affirmative action for racial equality: features, impact and challenges* (2005) 5.) The Recommendation also uses the expression 'special temporary measures' instead of 'affirmative action measures' as the former is considered to be less ambiguous and more accurate than the latter. The Experts, who met in Maastricht in October 2002 to assist the CEDAW-Committee in its efforts to draft a General recommendation on art 4(1), used the term "special temporary measures" instead of "affirmative action" as they contended that terms such as "formal" and "substantive" equality had ambiguous meanings or terms, while terms such as "affirmative action" or "special rights" had different meanings in different legal

In this chapter, the specific rights regime as it exists in two developed economies, namely the UK and Sweden, will be evaluated against the backdrop of developments at European level (both countries are – still – Member States of the EU). This is done for four reasons. Firstly, the approach of these two countries already provides us with valuable examples of a specific rights approach to the integration of parental care and work. Secondly, a survey of these two countries establishes the baseline insight that specific rights in the context of the integration of work and care (necessarily) consists of one or a combination of (different types of) leave, on the one hand, and, on the other hand, flexible working arrangements. Thirdly, as will be shown below, the two countries provide us with examples of what are essentially two different (albeit overlapping) models of specific rights regimes: the leave or time off based approach of Sweden (which may be used in such a way as to provide some flexibility, but where there remains a measure of separation between work and care) and what may be called the “flexibility” approach of the UK (where an express right to request flexible working to enable integration of work and care exists on top of different types of leave).<sup>1080</sup> Fourthly, both countries are economically developed. As stated in chapter

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contexts. (See Report of the Expert Meeting *Building Blocks for a General Recommendation on Article 4(1) of the CEDAW Convention* (2002) and Tomei *Affirmative action for racial equality: features, impact and challenges* 5.

<sup>1080</sup> This is not to say there are no elements of both approaches in both systems. See the discussion below. As far as Sweden is concerned, there is, however, a highly developed and flexible parental leave scheme which allows and encourages both parents to spend time with their children. It also seeks to ensure greater equality both between different groups of economically active women and between men and women. The focus in Sweden, however, is on fulltime employment resulting in a highly segregated labour market, based on sex. [See European Union “Sweden: Successful reconciliation of work and family life” (2014) *European Union* <[http://europa.eu/epic/countries/sweden/index\\_en.htm](http://europa.eu/epic/countries/sweden/index_en.htm)> (accessed 27-11-2014) and H Stenmark *Gender segregation in the Swedish labour market, Historical, Sociological and Rational Choice institutionalism as tools for understanding inequality and why it still exists* Master thesis Linköping University (2010) 10-11.] A “Gender Equality Bonus” is offered as an economic incentive for families who divide parental leave more equally between the mother and the father (see the text to part 5 3 below). On gender based job segregation in Sweden see M Carlsson & D Rooth *An Experimental Study of Sex Segregation in the Swedish Labour Market: Is Discrimination the Explanation?* (2008) IZA Discussion Paper No. 3811 Germany: Institute for the Study of Labor 1 and European Commission *The current situation of gender equality in Sweden – Country Profile* (2013) 8-9, 11-14. As far as the UK is concerned, the focus will be on the UK’s so-called Right to Request flexible work. See A Hegewisch *Flexible Working Policies: A Comparative Review* (2009) iv, v and 5.

1, one of the areas of enquiry of this thesis is to reflect on the possible impact of economic development on the legal integration of work and care. For this purpose, this chapter serves as one of the “developed economy” yardsticks for purposes of comparison with the experience in developing economies (discussed in chapters 7 and 8 below). In this regard, it may be mentioned that the UK and Sweden rank in the top 25 gross domestic product (at purchasing power parity) per capita countries in the world.<sup>1081</sup>

## **2 Legislation at European level: Specific rights related to family responsibility and flexibility**

Traditionally, the reconciliation of work and family in the context of the EU has been addressed indirectly through secondary legislation, namely Directives. The original Equal Treatment Directive 2006/54/EC, Pregnant Workers Directive 92/85/EC, Parental Leave Directive 2010/18/EU, Working Time Directive 93/104/EC<sup>1082</sup>, Part-Time Work Directive 97/81/EC, Fixed-Term Work Directive 1999/70/EC and the recently adopted Recast Directive 2006/54/EC are of particular importance in this regard.<sup>1083</sup> These Directives are not all based on the same principles and their different objectives are reflected in their various legal bases,<sup>1084</sup> but the combined application of these Directives has created a minimum standard on which parents, and to a certain extent carers in general, may rely within the territory of the EU. Through their diversity all relevant matters related to reconciliation of work and family are considered and

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<sup>1081</sup> The World Bank “GDP per capita, PPP (current international \$)” (11-04-2016) *The World Bank*. <[http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?order=wbapi\\_data\\_value\\_2014+wbapi\\_data\\_value+wbapi\\_data\\_value-last&sort=desc](http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?order=wbapi_data_value_2014+wbapi_data_value+wbapi_data_value-last&sort=desc)> (accessed 26-04-2016).

<sup>1082</sup> Now Directive 2003/88/EC.

<sup>1083</sup> A Masselot & ECd Torella *Reconciling Work and Family Life in EU Law and Policy* (2010) 29.

<sup>1084</sup> The Equal Treatment Directive is based on Article 235 EC (now 308 EC) with an emphasises on its underlying economic rationale; the Pregnant Workers Directive is based on Article 118a EC, a health and safety provision, and the Parental Leave Agreement/Directive on Article 2 of the Social Policy Agreement (now 137 EC) annexed to the EC Treaty by the Treaty of Maastricht (now Article 138 EC) which confirms this measure as a socially-oriented one. To all of these the Recast Directive, based on Article 141 EC “which mirrors the general shift triggered by the Treaty of Amsterdam from non-discrimination to the promotion of equality of opportunities”, must be added. See Masselot & Torella *Reconciling Work and Family Life in EU Law and Policy* 29.

addressed.<sup>1085</sup> Masselot and Torella note that it is striking that, viewed in the context of the different available models of specific rights regimes (leave versus flexibility), leave provisions are the most developed at EU level.<sup>1086</sup>

## 2 1 Maternity leave and rights

The Pregnant Workers Directive's objective is to protect the health and safety of women in the workplace when pregnant, immediately after birth and when breastfeeding. It provides for health and safety measures and protection against unfavourable treatment. In terms of leave, this Directive provides for a number of specific types of leave for pregnant workers and women who have recently given birth:

- a) Article 5(3) of the Directive obliges employers "to grant a pregnant worker a leave of absence to protect her health and safety and that of the foetus if moving the worker to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds".<sup>1087</sup>
- b) [Member States must] "take the necessary measures to ensure that pregnant or breastfeeding workers are not obliged to perform night work during their pregnancy and for a period following childbirth, subject to submission of a medical certificate, by transferring them to daytime work where possible, or otherwise by excusing them from work or extending maternity leave".<sup>1088</sup>
- c) In terms of article 8, maternity leave must be for an uninterrupted period of at least 14 weeks before and/or after delivery and two of those weeks must occur before the delivery. Employees are entitled to receive payment or an allowance during the period of leave at a rate at least equivalent to sick pay. In almost all Member States the benefits are either partially or fully paid by some kind of social

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<sup>1085</sup> 30.

<sup>1086</sup> E Caracciolo di Torella "Is there a fundamental right to reconcile work and family life in the EU?" in N Busby & G James (eds) *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (2011) 52 59.

<sup>1087</sup> Art 5(4) of the Pregnant Workers Directive.

<sup>1088</sup> Art 5(4).

security fund – often also the public health insurance funds. Employers rarely pay the full contribution.<sup>1089</sup>

- d) Article 9 states that pregnant workers have the right to take paid leave from work to attend ante-natal examinations if these examinations take place during working hours.

Article 10 provides that Member States shall take the necessary measures to prohibit the dismissal of pregnant workers, workers who have recently given birth and workers who are breastfeeding, from the start of their pregnancy to the end of their maternity leave. Finally, article 11 addresses the rights connected with the employment contract and the right to the maintenance of payment and/or the entitlement to an adequate allowance during the period of maternity leave, which should not be set at a lower rate than the level of sickness benefits.<sup>1090</sup>

The European Commission proposed amendments to the Pregnant Workers Directive, including a number of proposed measures regarding the reconciliation of work and family life designed to modernise and rationalise reconciliation policies and to finally bring them in line with existing equality legislation and case law.<sup>1091</sup> These amendments comprise, *inter alia*, a longer period of paid maternity leave and a new period of paternity leave. However, due to the comprehensive diversity of maternity protection and social security amongst the Member States, as well as financial implications, Council did not adopt its first reading position.<sup>1092</sup> The European Commission has since announced a "New Start for Working Parents" in its Work Programme for 2016. This follows the publication of a Roadmap on Work-Life Balance in August 2015 for the initiative "A new start to address the challenges of work-life

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<sup>1089</sup> Eurofound "Maternity Leave Provisions in the EU Member States: Duration and Allowances" (2015) Cornell University ILR School <[http://digitalcommons.ilr.cornell.edu/cgi/vi  
ewcontent.cgi?article=1068&con\\_text=lawfirms](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1068&con_text=lawfirms)> (accessed 29-08-2017) 2.

<sup>1090</sup> Also see A Masselot, E Caracciolo di Torella, S Burri *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood – The application of EU and national law in practice in 33 European countries* (2012) 3.

<sup>1091</sup> 3.

<sup>1092</sup> 3; M Weldon-Johns "EU Work–Family Policies—Challenging Parental Roles or Reinforcing Gendered Stereotypes?" (2013) 19 Eur LJ 662 675-676.

balance faced by working families”, which will replace the 2008 Commission proposal to amend the Pregnant Workers Directive.<sup>1093</sup>

The original UK implementation of Directive 92/85/EEC is The Maternity and Parental Leave Regulations 1999 [amended by the Maternity and Parental Leave (Amendment) Regulations 2002].<sup>1094</sup>

Most parts of the Pregnant Workers Directive were transposed in Sweden without problems and approximately in time.<sup>1095</sup> However, one aspect – the introduction of two weeks’ compulsory maternity leave – was not implemented until August 2000; roughly six years after the end of the transposition period and after the European Commission had started an infringement procedure.<sup>1096</sup> This default is unlike Sweden as it has a good implementation record and the protection of pregnant workers is well developed.<sup>1097</sup> It is thus clear that Sweden opposed the transposition of the two weeks of compulsory leave.<sup>1098</sup>

## 2.2 Paternity leave and rights

At EU level, paternity leave has been recognised in the context of the Amended Equal Treatment Directive and the Recast Directive, but these Directives do not confer specific rights on fathers.<sup>1099</sup> Article 2(7) of the Amended Equal Treatment Directive states that it is the right of Member States to recognise distinct rights to paternity and/or adoption leave. Article 16 of the Recast Directive on paternity and adoption leave confirms the provisions of the amended Equal Treatment Directive for fathers on approximately the same terms.<sup>1100</sup>

<sup>1093</sup> European Commission “Professional, private and family life” (02-08-2016) *European Commission* <[http://ec.europa.eu/justice/gender-equality/rights/work-life-balance/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/rights/work-life-balance/index_en.htm)> (accessed 21-08-2016).

<sup>1094</sup> Euro Info Centre “EU Employment Law” (2006) *London Chamber of Commerce and Industry* <<http://www.londonchamber.co.uk/DocImages/1154.pdf>> (accessed 02-06-2014) 7.

<sup>1095</sup> Meaning no later than six months after the end of the transposition period.

<sup>1096</sup> G Falkner, M Hartlapp, S Leiber & O Treib “Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?” (2004) *West Eur Polit* 452 459.

<sup>1097</sup> 459.

<sup>1098</sup> 459.

<sup>1099</sup> E Caracciolo di Torella “Brave New Fathers for a Brave New World? Fathers as Caregivers in an evolving European Union” (2014) *Eur LJ* 88 106.

<sup>1100</sup> 106.

Caracciolo di Torella notes that, upon closer inspection, these Directives do not award positive rights to fathers, but they provide that the same level of protection as applies to maternity leave must be extended to cases of paternity and adoption, if Member States have already introduced such rules into national law. This means that the employment rights of workers who take paternity leave are only protected under EU law if the Member States have already introduced paternity leave provisions. This means fathers' rights are no more than an option for Member States to consider instead of an individual right and it also allows inconsistencies in treatment between the Member States.<sup>1101</sup>

At domestic level within Europe, not all of the paternity leave that does exist is paid. When it is paid, the level of pay might differ between full or a part of the normal salary and a flat rate. It is usually paid based on a statutory entitlement, but in certain cases left to collective agreements.<sup>1102</sup>

## 2 3 Parental leave and rights

The Parental Leave Directive supplements the Pregnant Workers Directive and aims to improve the reconciliation of work, private and family life for working parents.<sup>1103</sup> The Parental Leave Directive implements the Framework Agreement of the European social partners on parental leave and time off on grounds of force majeure and it repeals the Parental Leave Directive 96/34/EC. It states that Member States shall grant all employees a right, in principle non-transferable and unpaid, to four months' parental leave, which may be used until the child has reached the age of 8.<sup>1104</sup> The two most important changes introduced by the 2010 amendments to the current Parental Leave Directive are the extension of three to four months that parents may take off and, to encourage a more equal take-up of leave by both parents, the provision

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<sup>1101</sup> 106.

<sup>1102</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 23.

<sup>1103</sup> Para 8 of the Parental Leave Directive.

<sup>1104</sup> Although the precise age is to be determined by the Member States. Cl 2 of the Parental Leave Directive.

that at least one month shall be provided on a non-transferable basis between the parents.<sup>1105</sup>

Weldon-Johns is of the opinion that the Parental Leave Directive does not appear to be an improvement on previous attempts “to meet the key objectives of harmonisation, addressing the work-family conflict, challenging traditional gender roles and supporting shared parenting”.<sup>1106</sup>

These key objectives are not binding on Member States despite the Directive identifying the key issues that have to be addressed.<sup>1107</sup> The consequences are that “Member States may continue to adopt a light-touch implementation of these minimum standards and consequently fail to facilitate shared parenting, undermine equality between the sexes and fail to provide a clear and meaningful purpose for parental leave across Europe”.<sup>1108</sup> Another essential problem is that the right to take parental leave is still unpaid and thus a hefty deterrent, in particular for fathers.<sup>1109</sup>

Workers also have, in terms of clause 6, the right to request changes to their working hours for a limited period and employers must balance the needs of the workers and the company when they consider these requests. The Directive further provides a right to leave on grounds of force majeure for urgent family reasons.<sup>1110</sup>

The Employment Relations Act of 1999<sup>1111</sup> implemented the Parental Leave Directive in the UK in December 1999.<sup>1112</sup> There was no need for new legislation in Sweden to bring it in line with the Parental Leave Directive, because parental leave has been provided for in Sweden since 1973.<sup>1113</sup>

<sup>1105</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 3.

<sup>1106</sup> Weldon-Johns (2013) *Eur LJ* 675.

<sup>1107</sup> Annex to the Parental Leave Directive; Weldon-Johns (2013) *Eur LJ* 675.

<sup>1108</sup> 675. For example, the way of application of the non-transferable period is left to the Member States.

<sup>1109</sup> Weldon-Johns (2013) *Eur LJ* 675.

<sup>1110</sup> Cl 7 of the Parental Leave Directive.

<sup>1111</sup> Employment Relations Act (c 26).

<sup>1112</sup> O Ajibade, H Johnson, R Sattar & A Wilson *Reconciling Work and Family Life within Labour Law* (2014) 13.

<sup>1113</sup> S Clauwaert & S Harger “Analysis of the implementation of the Parental Leave Directives in the EU Member States” (2000) *European Trade Union Institute* <<http://library.fes.de/pdf-files/gurn/00325.pdf>> (accessed 22-08-2016).

## 2.4 Flexible working

The Part-Time Work Directive and the Fixed-Term Work Directive acknowledge in their preambles the role of flexibility so as to achieve reconciliation between work and care.<sup>1114</sup> These two Directives also advocate non-discrimination in matters related to terms and conditions of employment to part-time and fixed-term workers.

The objectives of the Part-Time Work Directive are to eliminate discrimination against part-time workers and to improve the quality of part-time work.<sup>1115</sup> The Directive provides that part-time workers shall not be treated in a less favourable manner than comparable full-time workers merely because they work part-time, unless different treatment is justified on objective grounds. Where justified by objective grounds, Member States, after consultation with the social partners, may make access to particular conditions of employment subject to a period of service, time worked or earnings qualification.<sup>1116</sup>

Clause 5 of the Framework Agreement on Part-Time Work addresses the promotion of flexible work. Member States and social partners, should identify, review and, where appropriate, eliminate legal or administrative hindrances to the opportunities for part-time work.

The main aim of the Fixed-Term Work Directive is to “improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination [and to] establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships”.<sup>1117</sup>

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations implemented the Part-Time Work Directive in UK law in 2000 and the Fixed-Term Work Directive was implemented in UK legislation on 1 October 2002.<sup>1118</sup> In Sweden, the Part-Time Work Directive and the Fixed-Term Work Directive were implemented

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<sup>1114</sup> Point 5 of the preamble of the Part-Time Work Directive 97/81/EC and points 5–7 of the preamble of the Fixed-Term Work Directive 99/70/EC. Also see Masselot & Torella *Reconciling Work and Family Life in EU Law and Policy* 123.

<sup>1115</sup> Cl 1 of the Part-time Work Directive.

<sup>1116</sup> Cl 4.1.

<sup>1117</sup> Cl 1, reiterated in cl 4 and 5 of the Framework Agreement attached to the Fixed-Term Work Directive. Also see Masselot & Torella *Reconciling Work and Family Life in EU Law and Policy* 111.

<sup>1118</sup> L Macdonald Tolley's *Managing Fixed-Term & Part-Time Workers: A Practical Guide to Employing Temporary & Part-Time Staff* 2 ed (2003) 142.

through the Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act 2002.<sup>1119</sup>

### 3 Jurisprudence at European level

The Court of Justice of the European Union (“CJEU”), formerly known as the European Court of Justice, was established in 1952 and consists of three courts: the Court of Justice, the General Court (created in 1988) and the Civil Service Tribunal (created in 2004).<sup>1120</sup> The CJEU interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.<sup>1121</sup>

The CJEU has developed the framework of legislative rights relating to pregnancy, maternity, parental and paternity leave by providing a comprehensive and liberal interpretation of these rights.<sup>1122</sup>

In the joined cases *Terveys- ja sosiaalialan neuvottelujärjestö TSN ry v Terveyspalvelualan Liitto ry* and *Ylemmät Toimihenkilöt YTN ry v Teknologiateollisuus ry and Nokia Siemens Networks OY*<sup>1123</sup>, two female employees were both on parental leave in respect of one child when they became pregnant with their next child. As a result, they switched from unpaid parental leave to paid maternity leave, as provided for in their respective national collective agreements. Their respective employers refused to pay their maternity remuneration. The clauses concerning remuneration in both collective agreements had been interpreted and applied by the employers to mean that the mother had to have returned to work before starting the new maternity leave in order to be entitled to the maternity leave remuneration. The CJEU was

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<sup>1119</sup> European Labour Law Network “ECJ Case C-393/10 (O’Brien) (07-05-2012)” *European Labour Law Network* <[http://www.labourlawnetwork.eu/national\\_labour\\_law/implications\\_of\\_ecj\\_rulings/\\_implications\\_of\\_ecj\\_rulings/prm/191/v\\_detail/id\\_2074/category\\_1/index.html](http://www.labourlawnetwork.eu/national_labour_law/implications_of_ecj_rulings/_implications_of_ecj_rulings/prm/191/v_detail/id_2074/category_1/index.html)> (accessed 21-08-2016).

<sup>1120</sup> Curia “General Presentation” (20-04-2016) *Curia* <[http://curia.europa.eu/jcms/jcms/Jo2\\_6999/](http://curia.europa.eu/jcms/jcms/Jo2_6999/)> (accessed 21-08-2016).

<sup>1121</sup> European Union “Court of Justice of the European Union (CJEU)” (2016) *European Union* <[https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en)> (accessed 21-08-2016)

<sup>1122</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 3.

<sup>1123</sup> Cases C-512/11 and C-513/11.

requested to consider whether the transfer of an employee from unpaid child care leave to maternity leave without paying remuneration, in accordance with a national collective agreement, is compatible with the Equal Treatment Directive and Pregnant Workers Directive. The court held that it was not.

The case of *Loredana Napoli v Ministero della Giustizia*<sup>1124</sup> also required interpretation of the Equal Treatment Directive, specifically with regard to the equal treatment of men and women in matters of employment and occupation and the prohibition of unfavourable treatment of women related to pregnancy or maternity. Ms Napoli was successful with her application for appointment as deputy commissioner in the prison service and admitted to a training course scheduled to start at the end of December 2011. However, she gave birth at the beginning of December and was placed on compulsory maternity leave for three months. She was then informed that she would be excluded from the course due to the fact that she was on maternity leave and the payment of her salary would be suspended. The CJEU had to decide whether Italian legislation excluding a woman on compulsory maternity leave from vocational training, which forms part of her employment and which she must attend in order to be able to be appointed to a post as a civil servant, was in breach of the Equal Treatment Directive. The CJEU found that this was indeed the case.

In other instances, the CJEU has held that no other interest can prevail over the protection of pregnancy and maternity leave.<sup>1125</sup> As a consequence, the refusal to employ a woman because she is pregnant cannot be justified on grounds of the financial loss the employer would suffer as a result of the maternity leave.<sup>1126</sup> In *Webb v EMO Air Cargo* the court held that pregnancy and maternity rights cannot be dependent on whether the employee's presence at work during the period of her maternity leave is crucial to the proper functioning of the business in which she is

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<sup>1124</sup> Case C-595/12.

<sup>1125</sup> See Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 7.

<sup>1126</sup> Cases C-177/88 *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941 and C-207/98 *Mahlburg v Land Mecklenburg-Vorpommern* [2000] ECR I-549 in para 29.

employed.<sup>1127</sup> The CJEU also stated that health and safety obligations cannot be taken into consideration in a disadvantageous way to pregnant employees.<sup>1128</sup>

#### **4 Specific rights related to family responsibility and flexibility in the UK**

Originating mainly from EU Directives, “the basis of maternity, paternity and flexible working laws in the UK are found primarily in the Employment Rights Act of 1996”,<sup>1129</sup> the Employment Relations Act, the Maternity and Parental Leave Regulations of 1999, Employment Act of 2002<sup>1130</sup> and the Work and Families Act of 2006<sup>1131, 1132</sup> However, there are numerous other regulations which add to these main laws, such as the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009<sup>1133</sup> and the Parental Leave (EU Directive) Regulations 2013<sup>1134, 1135</sup> In addition, the Children and Families Act 2014<sup>1136</sup>, given royal assent on 13 March 2014, came into force in 2014 and 2015, which might further help parents to balance work and family life.<sup>1137</sup>

Family responsibility discrimination is addressed in the UK primarily through the specific statutory “right to request” flexible working. Hegewisch remarks that the combination of this right and the legal principles established through indirect sex

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<sup>1127</sup> Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567 para 26.

<sup>1128</sup> *Mahlburg v Land Mecklenburg- Vorpommern* [2000] ECR I-549. See Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 7.

<sup>1129</sup> Employment Rights Act of 1996 (c 18).

<sup>1130</sup> Employment Act of 2002 (c 22).

<sup>1131</sup> Work and Families Act of 2006 (c 18).

<sup>1132</sup> Department for Education “Landmark Children and Families Act 2014 gains royal assent” (13-03-2014) *Department for Education* <<https://www.gov.uk/government/news/landmark-children-and-families-act-2014-gains-royal-assent>> (accessed 22-08-2016).

<sup>1133</sup> SI 2009/595.

<sup>1134</sup> SI 2013/283.

<sup>1135</sup> Department for Education “Landmark Children and Families Act 2014 gains royal assent” (13-03-2014) *Department for Education*.

<sup>1136</sup> Children and Families Act of 2014 (c 6).

<sup>1137</sup> Department for Education “Landmark Children and Families Act 2014 gains royal assent” (13-03-2014) *Department for Education*.

discrimination case law on the procedural aspect of this “right to request” has successfully strengthened women’s ability to request flexible working.<sup>1138</sup>

#### 4.1 Maternity leave and rights

Maternity leave is regulated by the Employment Rights Act (“ERA”) and associated Regulations. The Maternity and Parental Leave (Amendment) Regulations (“MPLR”) introduced new maternity leave rights for women as of 6 April 2003. Pregnant workers are entitled to 26 weeks’ ordinary maternity leave irrespective of how long they have worked for their employer.<sup>1139</sup> If a woman has worked for her employer for 26 weeks (continuous service) by the beginning of the 14th week before the expected week of childbirth<sup>1140</sup>, she can take additional maternity leave of up to 26 weeks, in other words a total of 52 weeks maternity leave.<sup>1141</sup> Additional maternity leave is normally unpaid, but women may have contractual rights to pay during their additional maternity leave.

The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amended) Regulations 2006 extended statutory maternity pay, paid by the government, to 39 weeks.<sup>1142</sup>

In order to qualify for statutory maternity pay (“SMP”), payable by the employer, employees must have been in continuous employment by the same employer for at least 26 weeks before the 15th week before her baby is due, and must have earned at least £112 a week in an eight-week relevant period.<sup>1143</sup> SMP for eligible employees may be paid for up to 39 weeks, usually 90% of their average weekly earnings (AWE) before tax for the first six weeks and for the remaining 33 weeks either £139.58 or 90% of their AWE (whichever is the lesser).<sup>1144</sup>

A woman who returns to work after maternity leave is entitled to the same job and the same terms and conditions as if she had not been away if she returns after the first

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<sup>1138</sup> Hegewisch *Flexible working policies: a comparative review* vi.

<sup>1139</sup> Reg 7(1) of the MPLR.

<sup>1140</sup> Reg 7(4).

<sup>1141</sup> Reg 6(3).

<sup>1142</sup> Para 3.

<sup>1143</sup> Gov.UK “Statutory Maternity Pay and Leave: employer guide” (25-05-2016) Gov.UK <<https://www.gov.uk/employers-maternity-pay-leave/eligibility-and-proof-of-pregnancy>> (accessed 22-08-2016).

<sup>1144</sup> Gov.UK “Statutory Maternity Pay and Leave: employer guide” (25-05-2016) Gov.UK.

26 weeks of leave (referred to as “ordinary maternity leave”). A woman returning after additional maternity leave enjoys the same rights unless the employer shows that it is not reasonably practical for her to return to her original job.<sup>1145</sup> If this is the case, the employee must be offered alternative work with terms and conditions as if she had not been away.<sup>1146</sup> A woman, who intends to return before the end of the 52-week period, must give at least eight weeks’ notice of her intention to do so.<sup>1147</sup>

Employees who exercise their rights to adoptive, paternity or parental leave are protected from dismissal and detriment in relation thereto by the ERA.<sup>1148</sup>

Furthermore, statutory rights to pregnancy, maternity, adoptive, parental and paternity leave do not differ according to sector or the size of the employer, but public-sector employers will most probably provide enhanced contractual entitlements.<sup>1149</sup>

#### 4.2 Leave for antenatal appointments

Pregnant employees are permitted paid time off for antenatal care. Prospective fathers or a mother’s partner may take unpaid time off to attend up to 2 antenatal appointments.<sup>1150</sup>

#### 4.3 Paternity leave and rights

In the UK, the right to paternity leave and pay was included in the Employment Act, but the specifics of what this entails are to be found in the Paternity and Adoption Leave Regulations 2002. All eligible employees are entitled to paternity leave for two weeks on a paid basis (statutory paternity pay at the statutory maternity rate), to be taken within 56 days of the birth of the child.<sup>1151</sup> To be eligible, the father must expect to have responsibility for the child's upbringing and be the biological father or partner

<sup>1145</sup> Ch 1 of Part 8 of the ERA and reg 18A of the Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amended) Regulations.

<sup>1146</sup> Ch 1 of Part 8 of the ERA and reg 18A of the Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amended) Regulations.

<sup>1147</sup> Ch 1 of Part 8 of the ERA.

<sup>1148</sup> Ch 1A of Part 8.

<sup>1149</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 268.

<sup>1150</sup> Part 8 of the Children and Families Act.

<sup>1151</sup> Reg 5(1) of the Paternity and Adoption Leave Regulations.

of the mother (male or female). He must also have worked continuously for his employer for 26 weeks, ending with the fifteenth week before the baby is due and remain employed at the time of the child's birth.<sup>1152</sup>

#### 4.4 Parental leave and rights

The MPLR allow employers and employees to reach a customised parental leave arrangement, which is incorporated into the contracts of employment of individual employees and corresponds to the key elements of the MPLR.<sup>1153</sup> Thus, the default parental leave provisions found within Regulations 13-16 of the MPLR are automatically triggered where a valid agreement was not reached.

Under these default provisions, an employee who has been continuously employed for a period of not less than a year, and who has, or expects to have, parental responsibility for a child is entitled to take eighteen weeks unpaid parental leave for the purpose of caring for a child under the age of 18 years.<sup>1154</sup> Only four weeks of leave may be taken in any one calendar year, unless an employer agrees otherwise, and the leave is non-transferable between parents.

The Children and Families Act introduced a new shared parental leave and pay system.<sup>1155</sup> New arrangements for shared parental leave in terms of this Act came into force in October and December 2014, with the key provisions applying to parents of children expected on or after 5 April 2015. Shared parental leave means that employed mothers can switch part of their statutory maternity leave and pay<sup>1156</sup> into shared parental leave and shared parental pay. Both the mother and partner must have worked for their employers continuously for at least 26 weeks up to the 15th week before the expected week of childbirth in order to qualify for shared parental leave.<sup>1157</sup> This leave must be taken between the baby's birth and first birthday (or within 1 year of adoption).

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<sup>1152</sup> Ch 3 of the ERA.

<sup>1153</sup> Reg 13 of the MPLR. Also see Ajibade et al *Reconciling Work and Family Life within Labour Law 14*.

<sup>1154</sup> Reg 13(2).

<sup>1155</sup>This section inserts a new Chapter 1B into Part 8 of the ERA.

<sup>1156</sup> Women continue to be eligible for maternity leave and statutory maternity pay or allowance in the same way as previously.

<sup>1157</sup> Part 7 of the Children and Families Act.

Some of the most important regulations are the following:

- For either parent to be eligible for shared parental leave, the mother must end her statutory maternity leave.
- Each parent must qualify for shared parental leave and shared statutory parental pay in his or her own right.
- In certain circumstances, only the father will qualify for statutory parental leave (for example, where the mother is self-employed).
- Shared statutory parental pay is paid at the same rate as statutory maternity pay.
- Current rights to statutory unpaid parental leave are unaffected by shared parental leave [18 weeks' leave until the child is 5 (or 18 if disabled)].<sup>1158</sup>

#### 4.5 Emergency Leave / Time off for Dependents

With reference to “time off for dependants”, the Parental Leave Directive is given statutory effect in the UK by the ERA which provides employees with an (unpaid) entitlement to “reasonable time off”<sup>1159</sup> during working hours to deal with unexpected or sudden emergencies affecting a dependant and to make necessary longer term arrangements. This includes steps necessary for family/care obligations to provide assistance when a dependant<sup>1160</sup> falls ill, gives birth or is injured or assaulted, the unexpected disruption or termination of arrangements for the care of a dependant; or to deal with an unexpected occurrence, which involves a child of the employee, while the child attends an educational establishment responsible for him or her.<sup>1161</sup> This right is only available to employees and there is no qualifying period of continuous employment for this right.<sup>1162</sup>

The Employment Appeal Tribunal (“EAT”) in *Qua v John Ford Morrison Solicitors*<sup>1163</sup> explained that only short periods of leave will be considered to be “reasonable” and

<sup>1158</sup> Part 7.

<sup>1159</sup> “Reasonable time off” is not defined in the Parental Leave Directive.

<sup>1160</sup> “Dependant” is defined as the worker’s spouse, child, partner “or a person who lives in the same household” (other than tenants, boarders or lodgers). See s 57(A)(3) of the ERA.

<sup>1161</sup> S 57A of the ERA.

<sup>1162</sup> S 57A and Ajibade et al *Reconciling Work and Family Life within Labour Law* 16.

<sup>1163</sup> [2003] IRLR 184.

longer periods may be taken as parental leave.<sup>1164</sup> In determining what constitutes “a reasonable amount of time off”, the EAT regarded the operational needs of the employer to be irrelevant.<sup>1165</sup> Although the employee must, as soon as reasonably practicable, notify the employer of the reason for the absence and its length, the employee is not obliged to continuously update the employer about the situation.<sup>1166</sup>

#### 4.6 Flexible working

Before 30 June 2014, Part 8A and section 47E of the ERA and associated regulations regulated the statutory right to request flexible working.<sup>1167</sup> The law provided that an employee who had been employed continuously for 26 weeks or more was entitled to apply in writing to his or her employer to require a change in hours, times or location of work. The application could be made if the employee had to care for a child under the age of 18 or an adult in need of care.<sup>1168</sup> An employee was allowed one application in any twelve-month period and the employer had to hold a meeting with the employee within 28 days of the application to discuss the request and notify him/her in writing of the outcome.<sup>1169</sup>

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<sup>1164</sup> H Collins, KD Ewing & A McColgan *Labour Law* (2012) 391 and Ajibade et al *Reconciling Work and Family Life within Labour Law* 17.

<sup>1165</sup> *Qua v John Ford Morrison Solicitors* [2003] IRLR 184; I Smith & A Baker *Smith & Wood's Employment Law* (2015) 286 and Ajibade et al *Reconciling Work and Family Life within Labour Law* 17.

<sup>1166</sup> S 57(A)(2) of the ERA; *Qua v John Ford Morrison Solicitors* [2003] IRLR 184 and Ajibade et al *Reconciling Work and Family Life within Labour Law* 17.

<sup>1167</sup> There is no legal definition of “flexible working” in UK employment law. The Chartered Institute of Personnel and Development define flexible working as “an arrangement that gives employees flexibility in terms of how, where and when they conduct their work”. For a discussion on the different types of flexible working, see Ajibade et al *Reconciling Work and Family Life within Labour Law* 20.

<sup>1168</sup> “An adult in need of care” is someone who is married to or the partner or civil partner of the employee, a near relative of the employee, or someone who does not fall into those categories but is living at the same address as the employee.

<sup>1169</sup> D Pyper “Flexible working” (2014) *Commons Library Standard Note* <<http://researchbriefings.files.parliament.uk/documents/SN01086/SN01086.pdf>> (accessed 08-09-2014) 3. There were only limited grounds on which an employer could refuse a request, namely:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to re-organise work among existing staff;

On 30 June 2014, Part 9 of the Children and Families Act 2014 came into operation and amended the law on flexible working contained in Part 8A of the ERA. It extends to all employees with 26 weeks' continuous employment the right to request flexible working from their employer, removes the procedural requirements for employers' responses to flexible working requests and replaces the procedural requirements with a requirement that the employer must deal with the application in a reasonable manner. It further requires employers to notify employees of its decision within three months (or a longer period agreed between the parties).<sup>1170</sup>

Following consultation, the Advisory, Conciliation and Arbitration Service ("ACAS") has published a Code of Practice on handling flexible working requests in a reasonable manner.<sup>1171</sup> This Code explains what the minimum requirements are in order to consider a request in a reasonable manner.<sup>1172</sup> The Code sets out an employer's obligations on receipt of a statutory flexible working request and outlines the procedure to be followed. When employers receive a request they should arrange to talk to the employee, accompanied or unaccompanied, as soon as possible, discuss the request with the employee, understand the change requested and consider the request carefully, weighing the benefits to business and/or the employee against any resulting costs. Employers should start from the presumption that the request will be granted

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- inability to recruit additional staff;
  - detrimental impact on quality;
  - detrimental impact on performance;
  - insufficiency of work during the periods the employee proposes to work; and
  - planned structural changes.

<sup>1170</sup> Pyper "Flexible working" (2014) *Commons Library Standard Note 5*.

<sup>1171</sup> ACAS "Draft Code of Practice on handling in a reasonable manner requests to work flexibly" (2014) ACAS <<http://www.acas.org.uk/media/pdf/n/b/DRAFT-Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf>> (accessed 08-09-2014) and ACAS "Code of Practice 5 – Handling in a reasonable manner requests to work flexibility" (2014) ACAS <<http://www.acas.org.uk/media/pdf/f/e/Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf>> (accessed 26-08-2016).

<sup>1172</sup> Examples of handling requests in a reasonable manner include assessing the advantages and disadvantages of the application and holding a meeting to discuss the request with the employee. See ACAS "Draft Code of Practice on handling in a reasonable manner requests to work flexibly" (2014) ACAS and ACAS "Code of Practice 5 – Handling in a reasonable manner requests to work flexibility" (2014) ACAS.

unless there is a business reason not to and must refrain from discrimination when considering requests.<sup>1173</sup>

If the request is accepted (as made or with modifications) the employer should discuss with the employee how and when changes will be implemented.<sup>1174</sup> If the request is not accepted it must be for one of the business reasons set out in the legislation, including the burden of additional costs, an inability to reorganise work or an inability to recruit additional staff.<sup>1175</sup> The employee should be given the right to appeal the decision.<sup>1176</sup>

#### 4.7 Enforcement of and remedies for infringement of individual employment rights

If an employee has suffered less favourable treatment due to requesting or taking time off for maternity, paternity or adoption leave or to assist a dependant (flexible working), he or she may approach the employment tribunal.<sup>1177</sup>

Where an employee is subjected to a detriment by his or her employer for taking or seeking to take any of the leave provisions mentioned above, or requesting or seeking to request flexible working arrangements, he or she may make a complaint to an employment tribunal before the end of the period of three months beginning with the date of the act or the last act (where there are a number of continuous acts).<sup>1178</sup> If the

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<sup>1173</sup> ACAS “Draft Code of Practice on handling in a reasonable manner requests to work flexibly” (2014) ACAS and ACAS “Code of Practice 5 – Handling in a reasonable manner requests to work flexibility” (2014) ACAS.

<sup>1174</sup> ACAS “Draft Code of Practice on handling in a reasonable manner requests to work flexibly” (2014) ACAS 3 and ACAS “Code of Practice 5 – Handling in a reasonable manner requests to work flexibility” (2014) ACAS 3.

<sup>1175</sup> ACAS “Draft Code of Practice on handling in a reasonable manner requests to work flexibly” (2014) ACAS 3 and ACAS “Code of Practice 5 – Handling in a reasonable manner requests to work flexibility” (2014) ACAS 3.

<sup>1176</sup> ACAS “Draft Code of Practice on handling in a reasonable manner requests to work flexibly” (2014) ACAS 3 and ACAS “Code of Practice 5 – Handling in a reasonable manner requests to work flexibility” (2014) ACAS 3.

<sup>1177</sup> L Furber “Employment tribunals – your rights” (26-04-2011) Crunch <<https://www.crunch.co.uk/blog/small-business-advice/2011/04/26/employment-tribunals-your-rights/>> (accessed 26-08-2016) and Gov.UK “Dismissal: your rights” (12-11-2014) Gov.UK <<https://www.gov.uk/dismissal/unfair-and-constructive-dismissal>> (accessed 26-08-2016).

<sup>1178</sup> Gov.UK “Make a claim to an employment tribunal” (16-08-2016) Gov.UK <<https://www.gov.uk/employment-tribunals/when-you-can-claim>> (accessed 26-08-2016).

complaint is substantiated, the tribunal shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the employee.<sup>1179</sup> The amount depends on the type of case, how much money the employee lost because of the employer's conduct, as well as the employee's age, length of service and salary.<sup>1180</sup>

An employee whose employer unreasonably postpones or prevents the rightful exercise of a leave provision may also make a claim to an employment tribunal within three months of the matter arising.<sup>1181</sup> Once again, if the claim is substantiated, the tribunal shall make a declaration and may make an award of compensation to be paid by the employer to the employee.<sup>1182</sup> In relation to a flexible working request application, an aggrieved employee faced with unreasonable rejection or a rejection based on incorrect facts, may also refer the matter to the employment tribunal within three months of the date of refusal.<sup>1183</sup> The tribunal shall make a declaration and may make an order for reconsideration of the application and make an award of compensation to be paid by the employer to the employee if the claim is substantiated. The maximum amount of compensation that may be awarded by the employment tribunal where the complaint is substantiated is equivalent to eight weeks' remuneration.<sup>1184</sup>

Interestingly, and as far as claims relating to the right to request flexible working are concerned, experience shows that the majority of cases lodged at tribunals do not state flexible working as a primary cause of complaint. An analysis of employment tribunal cases involving flexible working lodged in the first two years following the introduction of the right indicates that over half of all flexible working cases, and almost two-thirds of cases brought by women, involved a claim of flexible working combined with sex discrimination.<sup>1185</sup> The share of combined cases grew rapidly over the period examined. Women are able to rely on British and European case law, which

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<sup>1179</sup> Gov.UK "Make a claim to an employment tribunal" (16-08-2016) Gov.UK.

<sup>1180</sup> Gov.UK "Make a claim to an employment tribunal" (16-08-2016) Gov.UK.

<sup>1181</sup> Ajibade et al *Reconciling Work and Family Life within Labour Law* 28.

<sup>1182</sup> 28.

<sup>1183</sup> ACAS "The right to request flexible working" (06-05-2016) ACAS <<http://www.acas.org.uk/index.aspx?articleid=1616>> (accessed 26-08-2016).

<sup>1184</sup> ACAS "The right to request flexible working" (06-05-2016) ACAS.

<sup>1185</sup> Hegewisch *Flexible working policies: a comparative review* 35.

establishes that the withholding of alternative working patterns to mothers with caring responsibilities may constitute indirect sex discrimination.<sup>1186</sup> In a claim of indirect sex discrimination, the claimant is entitled to challenge the business reasons provided by the employer for refusing a request (an option not available under the right to request flexible working). The tribunals may award substantially higher damages in sex discrimination cases and an employee is protected from the first day of employment, while the right to request only applies to an employee after six months' tenure.<sup>1187</sup> At the same time, however, it is clear that the successful use of anti-discrimination law in these circumstances, require a strong tradition of anti-discrimination law – especially where reliance is placed on indirect discrimination.

Masselot points out that there are enormous difficulties associated with the enforcement of maternity/paternity and other employment rights in the UK.<sup>1188</sup> Employment tribunal proceedings are difficult, impose fees on users<sup>1189</sup> and it is very challenging to win a claim in a complex area such as pregnancy discrimination without expert (and expensive) assistance.<sup>1190</sup> Even if the claimant is successful he or she will usually not recover legal costs (although, on the other hand, unsuccessful claimants will not have to pay the costs of the other side).<sup>1191</sup> There is no financial support offered in such cases although trade unions will usually support their members and the EHRC may support and/or finance what are seen as important test cases.<sup>1192</sup>

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<sup>1186</sup> 35.

<sup>1187</sup> 35.

<sup>1188</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 273.

<sup>1189</sup> As from July 2013.

<sup>1190</sup> Masselot et al *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood - The application of EU and national law in practice in 33 European countries* 273.

<sup>1191</sup> 273.

<sup>1192</sup> 273.

## 5 Specific rights related to family responsibility and flexibility in Sweden

Sweden has one of the most generous parental leave systems in the world. In 1974, Sweden introduced cross-gender paid parental leave<sup>1193</sup> and maternity, paternity and parental leave are all part of the same system.<sup>1194</sup>

Sweden's extensive welfare system promotes a healthy work-life balance and played an important role in making Sweden a gender-egalitarian leader.<sup>1195</sup> It makes it possible for the parents of young children to take leave of absence from work or opt for shorter working hours as a means of reconciling employment with family responsibilities. It also seeks to ensure greater equality between men and women.<sup>1196</sup>

There are five rights to childcare leave contained within the Parental Leave Act 1995: (1) maternity leave; (2) whole-time leave of absence from work normally subject to the maximum of the child reaching the age of 18 months; (3) a time off entitlement to parental allowance in the form of a reduction in normal working hours of not more than 75% and not less than 25%; (4) time off without entitlement to parental allowance in the form of a 25% reduction in normal working hours until, usually, the child reaches the age of 8; and (5) time off with occasional entitlement to parental allowance primarily for occasional care of a child until, usually, the child reaches the age of 12.<sup>1197</sup>

### 5.1 Maternity leave<sup>1198</sup>

It is obligatory for female employees to take two weeks leave before or after the birth of her child.<sup>1199</sup> It is the employee's choice to take, or not take, part of the paid parental insurance benefit during this leave period.<sup>1200</sup>

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<sup>1193</sup> K Bennold "Paternity Leave Law Helps to Redefine Masculinity in Sweden" *The New York Times* (15-06-2010) A6.

<sup>1194</sup> L Addati, N Cassirer & K Gilchrist *Maternity and paternity at work - Law and practice across the world* (2014) 55.

<sup>1195</sup> Sweden Sverige "Gender Equality in Sweden" (2017) Sweden Sverige <<https://sweden.se/society/gender-equality-in-sweden/>> (accessed 22-05-2017).

<sup>1196</sup> See the text to part 5.3 below.

<sup>1197</sup> S 3 of the Parental Leave Act.

<sup>1198</sup> Maternity leave forms part of parental leave. See the text to part 5.3 below for a discussion on parental leave.

<sup>1199</sup> S 4 of the Parental Leave Act.

<sup>1200</sup> See ss 4-8 of the Parental Leave Act and the text to part 5.3 below.

Pregnant women may take indefinite leave, paid at 77.6% of earnings, if a job is a risk to the foetus and there is no alternative available. If a job is physically demanding and difficult for a pregnant woman to perform, she can, upon eligibility being granted by the Swedish Social Insurance Agency, take up to 50 days of leave during the last 60 days of her pregnancy paid at 77.6% of income.<sup>1201</sup>

## 5 2 Paternity leave<sup>1202</sup>

Fathers are, in addition to parental leave, entitled to ten working days paid paternity leave to be used to attend the delivery, to care for other children while the mother is in hospital, stay over in the hospital after the birth and/or to provide childcare when the mother comes home.<sup>1203</sup> Payments come from the Swedish Social Insurance Agency and amounts to 77.6% of earnings (up to an earnings ceiling).<sup>1204</sup>

This leave may be used at any time during the first 60 days after the child's birth and all employees, regardless of time in employment, are eligible.<sup>1205</sup> In the case of twins, fathers get 20 days.<sup>1206</sup>

## 5 3 Parental leave

Each parent is entitled to take full time leave from work until his or her child is 18 months old.<sup>1207</sup> Additionally, each family is afforded 480 calendar days of paid leave. For parents eligible<sup>1208</sup> for the wage-related benefit, 390 days of leave are paid at

<sup>1201</sup> A Duvander, L Haas & P Hwang "Sweden country note" (2016) in *International Review of Leave Policies and Research* <[http://www.leavenetwork.org/fileadmin/Leavenetwork/Country\\_notes/2016/Sweden.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Country_notes/2016/Sweden.pdf)> (accessed 22-05-2017) 340.

<sup>1202</sup> Literal translation of entitlement is "temporary leave in connection with a child's birth or adoption". See Duvander et al "Sweden" (2016) *International Review of Leave Policies and Research* 340.

<sup>1203</sup> 340.

<sup>1204</sup> 340.

<sup>1205</sup> 341.

<sup>1206</sup> Sweden Sverige "Gender Equality in Sweden" (2017) Sweden Sverige.

<sup>1207</sup> S 5 of the Parental Leave Act. Until a child is one year old, both parents can receive parental benefit for the same days. These days are called "double days". You can take up to 30 double days. After a child's first birthday, only one of the parents can receive parental benefit at a time.

<sup>1208</sup> Although all parents are entitled to paid parental leave, paid leave at 77.6% of earnings requires parents to have had an income of over SEK250 a day for 240 days before the

77.6% of earnings, up to an earnings ceiling of SEK445,000 per year. The remaining 90 days are paid at a flat-rate payment of SEK180 a day.<sup>1209</sup> Parents not eligible to wage-related leave receive a flat rate of SEK250 a day for 480 days.<sup>1210</sup>

For children born in 2016 or later, 90 of these days are allocated specifically to each parent and cannot be transferred to the other (also known as “mother’s quota” and “father’s quota”).<sup>1211</sup>

A “Gender Equality Bonus”<sup>1212</sup> offers an economic incentive for families to share parental leave more equally between parents.<sup>1213</sup> Parents who share the transferable leave allowance equally get a SEK 50 tax-free daily bonus for a maximum of 270 days.<sup>1214</sup>

Payments come from the Swedish Social Insurance Agency<sup>1215</sup> to which employers and the self-employed make contributions: employers pay 31.42% on all employees’ earnings, of which 2.2% is earmarked for “parental insurance” (consisting of pregnancy benefits, parental benefit and temporary parental benefit). Any shortfall is paid by the government.<sup>1216</sup>

#### 5.4 Family responsibility leave/ time off for the care of dependents

Parents are entitled to 120 working days' leave per year for temporary care of a child until the child is 12 years old<sup>1217</sup>. It is a family entitlement and it may be used if the child is ill, if the child's day care provider is ill or for visits to the child's school or pre-school.

expected date of delivery or adoption. See Duvander et al “Sweden” (2016) *International Review of Leave Policies and Research* 342.

<sup>1209</sup> 342.

<sup>1210</sup> 342.

<sup>1211</sup> 341; Sweden Sverige “Gender Equality in Sweden” (2017) Sweden Sverige.

<sup>1212</sup> Introduced in July 2008.

<sup>1213</sup> Duvander et al “Sweden” (2017) *International Review of Leave Policies and Research* 342.

<sup>1214</sup> Sweden Sverige “Gender Equality in Sweden” (2017) Sweden Sverige.

<sup>1215</sup> Social insurance covers the entire population and entitlement is based on residency in Sweden.

<sup>1216</sup> Duvander et al “Sweden” (2016) *International Review of Leave Policies and Research* 341.

<sup>1217</sup> For children between 12 and 15 a doctor's certificate is required.

Parents also receive a temporary parental benefit that may be delegated to other persons and is paid by the Swedish Social Insurance Agency.<sup>1218</sup>

## 5.5 Flexible working

Sweden's highly developed and flexible parental leave scheme allows and encourages both parents to spend time with their children.<sup>1219</sup> The rights to parental leave may be utilised in different ways to allow working parents to extend the length of the leave to suit their own preferences and/or responsibilities. It also enables both parents to care for their child at the same time.<sup>1220</sup> Parents have, for example, the right to decrease their working time by up to 25% without using parental benefit days until the child is 8 years old or finishes the first year of school.<sup>1221</sup> If both parents use their rights flexibly, they may care for their child at different times of the day or week enabling them to share the responsibility. Flexibility is further emphasised by the option to change the type of leave up to three times per year, enabling parents to adapt their circumstances if required.<sup>1222</sup>

Sweden is one of only two<sup>1223</sup> European countries which have never had policies aiming to decrease the relative costs of part-time jobs as a means of encouraging the growth of part-time employment.<sup>1224</sup> Policy priorities in Sweden<sup>1225</sup> have shifted from enabling part-time work to encouraging full-time work. This is in recognition of the unfavourable effect of a long period of part-time work on women's economic equality and as a way to increase the total numbers of hours worked in the economy. Tax and

<sup>1218</sup> Sveriges Ingenjörer "Parental leave" (05-04-2016) Sveriges Ingenjörer <[http://www.sverigesingenjorer.se/About-us/foraldrar\\_eng/](http://www.sverigesingenjorer.se/About-us/foraldrar_eng/)> (accessed 26-08-2016).

<sup>1219</sup> European Union "Sweden: Successful reconciliation of work and family life" (2014) European Union.

<sup>1220</sup> M Weldon-Johns "Comparative lessons on the work-family conflict - Swedish parental leave versus American family leave" in N Busby & G James (eds) *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (2011) 126.

<sup>1221</sup> European Union "Sweden: Successful reconciliation of work and family life" (2014) European Union <[http://europa.eu/epic/countries/sweden/index\\_en.htm](http://europa.eu/epic/countries/sweden/index_en.htm)> (accessed 27-11-2016).

<sup>1222</sup> Weldon-Johns "Comparative lessons on the work-family conflict - Swedish parental leave versus American family leave" in *Families, Care-giving and Paid Work* 127.

<sup>1223</sup> The other country is the Netherlands.

<sup>1224</sup> Hegewisch *Flexible working policies: a comparative review* 35.

<sup>1225</sup> And Denmark.

benefit policies, reducing penalties for caregiving activities and increasing incentives for full-time work, encourage these objectives.<sup>1226</sup> 45% of all Swedish women worked part-time in 1987, while this figure fell to 30% in 2013.<sup>1227</sup> Despite these decreasing numbers in part-time employment, Sweden's labour market is still highly segregated: women work to a great extent in the public sector and, in comparison to male employees, more often part-time.<sup>1228</sup>

## 6 Conclusion

Following on the exploration of the role of equality law in facilitating the integration of work and care in chapter 4, this chapter provided a first step to consideration of the way different countries use specific rights regimes to regulate the integration of work and care. The focus fell on two developed countries, the UK and Sweden against the backdrop of a relatively sophisticated and long history of developments at European level. This shared European history includes both legislation (focusing on time off and leave) and the clear statements of support for the importance of care in the workplace by the CJEU. It is submitted that a number of important insights were gained, not only in this chapter itself, but also when juxtaposed with chapters 2 and 4 where equality law and the gender bias inherent in care were discussed.

What the discussion showed was, firstly, that despite a shared European heritage, the two countries differ in their approaches to the integration of work and care. The specific rights regimes in use in these two countries consist of a leave based system in Sweden (which, while it allows for care, also allows for the flexible integration of work and care due to its generous provisions) or a flexibility based system like the UK (which expressly allows for the right to request flexible working and the flexible integration of work and care while, at the same time, providing for different types of leave).

Secondly, the discussion showed that even among developed countries, specific rights differ widely – not so much in terms of basic similarities (such as types of leave

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<sup>1226</sup> Hegewisch *Flexible working policies: a comparative review* 17.

<sup>1227</sup> European Parliament "A new strategy for gender equality post 2015" (2014) *European Parliament* <[http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509984/IPOL\\_STU%282014%29509984\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509984/IPOL_STU%282014%29509984_EN.pdf)> (accessed 26-08-2016) 10.

<sup>1228</sup> European Parliament "A new strategy for gender equality post 2015" (2014) *European Parliament* 17.

provided for, where there is uniformity due to European law) – but more in terms of the actual level of protection provided and who qualifies for such protection, both difficult policy questions ultimately dependent on the state of development, the wealth of countries and other policy priorities. In this regard, it is not surprising that despite Sweden's famously high income taxes, most Swedes are quite satisfied with what they get in exchange for their taxes, including extremely generous parental leave.<sup>1229</sup> Sweden's generous and flexible parental leave program is aimed at both parents and designed to promote equal sharing of employment and childcare responsibilities.<sup>1230</sup> It is possible for working parents to extend the length of the leave period to suit their needs and it is possible for both parents to care for their child at the same time.<sup>1231</sup> In contrast, leave for time off to attend family obligations and parental leave are unpaid in the UK, but provision is at least made for these types of leave and they are available to parents, specifically female employees, who are in a financial position to take time off from work to care for their children.

Thirdly, and flowing forth from the previous insight, the Swedish example shows that specific rights, given the deficiencies of anti-discrimination law, may also have the potential of contributing to true equality – with men and women sharing parental care. As such, with a shift from maternity care to parental care, specific rights (albeit a high level thereof) may assist in deconstructing the gender bias inherent in care, which was discussed in chapters 2 and 4. The regime of specific rights in Sweden, aimed as it is at both parents, is designed to promote equal sharing of breadwinning and childcare responsibilities.<sup>1232</sup> This approach has specifically supported female employees, as primary caregivers, since the 1970's and has been continuously reformed to

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<sup>1229</sup> D Wiles "Why Swedes are okay with paying taxes" (08-01-2016) *Sweden Sverige* <<https://sweden.se/society/why-swedes-are-okay-with-paying-taxes/>> (accessed 26-08-2016) and G Michael "What countries get for their high taxes" (16-12-2010) *Investopedia* <<http://www.investopedia.com/financial-edge/1210/what-countries-get-for-their-high-taxes.aspx>> (accessed 26-08-2016).

<sup>1230</sup> Weldon-Johns "Comparative lessons on the work-family conflict - Swedish parental leave versus American family leave" in *Families, Care-giving and Paid Work* 121; L Haas "Parental Leave and Gender Equality: Lessons from the European Union" (2003) 20 *Rev Policy Res* 89 90.

<sup>1231</sup> Weldon-Johns "Comparative lessons on the work-family conflict - Swedish parental leave versus American family leave" in *Families, Care-giving and Paid Work* 126.

<sup>1232</sup> Haas (2003) *Rev Policy Res* 90.

strengthen the gender equality dimension of care.<sup>1233</sup> In the UK context, the Children and Families Act shows a shift away from gender bias legislation, which provides limited rights for the partner of the mother, to “a system based on continuity, flexibility and choice [that] offers better outcomes and enables a cultural change in the way men and women are viewed in the workplace.”<sup>1234</sup> However, the Trade Union Congress stated that shared parental leave “will not lead to a substantial change in the number of fathers/partners taking time off work to care for children because it lacks sufficient incentive”.<sup>1235</sup> The UK Government predicted that only 4 – 8% of eligible people will take the leave.<sup>1236</sup> The reasons behind this figure are cultural, societal and financial. If workplace (and societal) attitudes are to change then this right should be extended to fathers as well with shared parental leave supported by adequate statutory pay.<sup>1237</sup>

Fourthly, the UK experience shows that a specific rights regime based on a direct right to request flexible working may be augmented by anti-discrimination law, but with the proviso that this, in turn, depends on the degree of sophistication of that discrimination law. Such sophistication requires at least true appreciation of the principle of indirect discrimination based on sex or gender, or, at least in the South African context, true appreciation of the meaning of family responsibility as a gender neutral ground of possibly direct discrimination claims and the possibility to enforce such claims.

Fifthly, and lastly, the UK experience with the right to request flexible working shows that any specific right is only as strong as its exceptions. Mention was made of the fact that in practice in the UK this right only features as an adjunct to discrimination claims, often as a result of a comparatively inadequate remedy or of available justifications for

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<sup>1233</sup> A Duvander *Family policy in Sweden: An overview* (2008) 1.

<sup>1234</sup> Her Majesty’s Government “Consultation on Modern Workplaces: Government Responses on Flexible Parental Leave” HM Government (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/82969/12-1267-modern-workplaces-response-flexible-parental-leave.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/82969/12-1267-modern-workplaces-response-flexible-parental-leave.pdf)> (accessed 05-06-2017) 3.

<sup>1235</sup> Parliament UK “TUC Response to Children and Families Bill Summary” (09-04-2013) Parliament UK <<https://www.publications.parliament.uk/pa/cm201213/cmpublic/childrenandfamilies/memo/cf80.htm>> (accessed 05-06-2017)

<sup>1236</sup> See E Clery “Will shared parental leave see men taking more time off?” (03-12-2013) *Personnel Today* <<http://www.personneltoday.com/hr/will-shared-parental-leave-see-men-taking-time/>> (accessed 26-08-2016).

<sup>1237</sup> Ajibade et al *Reconciling Work and Family Life within Labour Law* 32.

refusal (as compared to discrimination law). One would expect true accommodation of parental care through a right to flexibility to be a strong right that may be asserted with ease and confidence and proper recourse, not as an afterthought to the potential infringement of conceptually more difficult rights (such as the right to equality).

Ultimately, Sweden's generous and flexible parental leave policy may only make one convincing point – that the extent of family responsibility leave, parental leave and other types of flexibility to accommodate family responsibility is as much a function of what is fair (also in the context of equality) as it is of affordability. The level of accommodation has to be seen in the context of societal levels of development as well as the operational realities of employers. With this in mind, the next three chapters are devoted to an overview of the specific rights regimes on the integration of work and care of not only two other developed countries, but also a number of developing economies.

## CHAPTER 6: SPECIFIC RIGHTS ON THE INTEGRATION OF WORK AND CARE IN DEVELOPED ECONOMIES: CANADA AND THE UNITED STATES OF AMERICA

### 1 Introduction

In line with the theme introduced in chapter 5, this chapter will consider the specific rights regimes on the integration of work and care in two further developed economies, namely Canada and USA.

In the context of work-care integration models, Canada is often associated with the USA as representative of a non-interventionist model lacking any generalised state measures to adjust the work-family relationship.<sup>1238</sup> However, although both countries form part of the list<sup>1239</sup> of the top ten nations with the highest gross domestic product per capita income,<sup>1240</sup> this chapter will show that there are significant differences between these two countries with regard to the types of leave offered to working parents to care for their children.<sup>1241</sup> For example, the difference in paid parental leave policies is particularly striking: since 2001, Canadian employees have a right to one year paid parental leave,<sup>1242</sup> while the USA remains among the few industrialised countries where not all employees have a statutory right to paid parental leave.<sup>1243</sup>

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<sup>1238</sup> D Tremblay “Paid Parental Leave: an employee right or still an ideal? The situation in Québec and in Canada” (2010) 22 *Employ Responsib Rights J* 83 86.

<sup>1239</sup> C Harty “The 10 Nations with the Highest GDPs Par Capita” (05-14-2014) *The Richest* <<http://www.therichest.com/business/economy/the-10-nations-with-the-highest-gdp-per-capita/>> (accessed 31-08-2016).

<sup>1240</sup> Per capita gross domestic product (“GDP”) means a measure of the total output of a country that divides the GDP by the number of people in the country. The GDP is one of the primary indicators of a country's economic performance. The per capita GDP is especially useful when comparing one country to another because it shows the relative economic performance of the countries. A rise in per capita GDP signals growth in the economy and tends to translate as an increase in productivity. See Investopedia “Per Capita GDP” (2015) *Investopedia* <<http://www.investopedia.com/terms/p/per-capita-gdp.asp>> (accessed 18-01-2015).

<sup>1241</sup> Tremblay (2010) *Employ Responsib Rights J* 86.

<sup>1242</sup> 84.

<sup>1243</sup> 84.

Provinces in Canada vary greatly in their implementation of family-friendly policies.<sup>1244</sup> Quebec is, for example, the only province to have paternity leave. Every province has pregnancy and parental leave, but Quebec offers five weeks paternity leave specifically aimed at fathers.<sup>1245</sup> In Québec, family policy is largely the result of very strong mobilisation and capacity building on the part of social actors, including unions, women's groups and some family groups.<sup>1246</sup> Ontario, on the other hand, implemented major legislative changes through adoption of the Employment Standards Act of 2000 ("ESA 2000")<sup>1247</sup>, including the extension of pregnancy and parental leave provisions and the enactment of an emergency leave provision. In 2014, the Employment Standards Amendment Act (Leaves to Help Families) 2014<sup>1248</sup> expanded statutory types of leave available to employees under the ESA 2000 to include "family caregiver leave," "critically ill child care leave," and "crime-related death and child disappearance leave." Notably, these types of leave are in addition to "family medical leave" and "personal emergency leave."

Compared to Canada, none of the USA's 50 states' work-care balance legislation is particularly unique, remarkable, or distinct from the rest in order to enjoy separate consideration. Although many states have supplemented the federal provisions of the Family and Medical Leave Act of 1993 ("FMLA"), it remains to this day the only piece of federal legislation specifically focused on helping workers balance their work and family responsibilities.<sup>1249</sup> About 60% of employees are eligible for FMLA leave; the remaining 40% are excluded due to FMLA criteria which only covers eligible<sup>1250</sup>

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<sup>1244</sup> A Tézli "Balancing work and family in Canada. An empirical examination of conceptualizations and measurements" (2009) 34 *Can J Socio* 433 441. Also see text to ch 4, part 5 5 1 above for an explanation why the focus of this study falls on Quebec and Ontario.

<sup>1245</sup> A Doucet, D Lero & D Tremblay "Canada" (2013) *International Network on Leave Policies & Research* <[http://www.leavenetwork.org/fileadmin/Leavenetwork/Country\\_notes/2013/Canada.FINALcitation.28may.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Country_notes/2013/Canada.FINALcitation.28may.pdf)> (accessed 16-01-2015) 3.

<sup>1246</sup> Tremblay (2010) *Employ Responsib Rights J* 89.

<sup>1247</sup> Came into force on 4 September 2001.

<sup>1248</sup> Came into force on 29 October 2014.

<sup>1249</sup> SJ Glynn "The Family and Medical Leave Act at 20: Still Necessary, Still Not Enough" (05-02-2016) *The Atlantic* <<http://www.theatlantic.com/sexes/archive/2013/02/the-family-and-medical-leave-act-at-20-still-necessary-still-not-enough/272605/>> (accessed 31-08-2016).

<sup>1250</sup> The FMLA applies to all public employers and to private employers with fifty or more employees. Within covered establishments, the FMLA applies to workers who have been employed for at least twelve months and worked a minimum of 1 250 hours in the prior year.

employees.<sup>1251</sup>

In contrast to Canada, it is widely recognised that work-family or work-care policy in the USA is deficient and in need of reform. Recent studies suggest that these deficiencies, including a lack of generous, paid parental leave, cause undue financial and emotional stress for individuals and families, and have implications for gender inequality.<sup>1252</sup> Among all the developed economies, only the USA does not pay maternity benefits<sup>1253</sup> and is also the only industrialised nation not to guarantee some form of paid parental leave.<sup>1254</sup> Few families have a full-time caregiver and parents must perform dual, often conflicting, roles as caregivers and workers.<sup>1255</sup> The stereotyping of women as caregivers and men as breadwinners does not encourage policies and social expectations to assist workers who perform both roles. In fact, these policies and expectations hinder women's advancement in the workplace and prevent men from spending more family time.<sup>1256</sup>

This means that in the USA, employees feel the strain of work-care conflict more intensely than in other developed countries and this is primarily due to a combination of two factors. Firstly, employees work longer hours than workers in most other industrialised countries and, as mentioned above, policies in the USA provide inadequate support to families. Secondly, the current system leaves the interface between work and care to private negotiation and workplace structures and results in workplace discrimination and sex-segregated labour patterns, which eventually reinforce gender hierarchies and expectations.<sup>1257</sup> Women continue to define themselves in relation to their families and men by their work. This dichotomy will not change until proper policies, targeted at changing workplace structures and gender

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<sup>1251</sup> JA Klerman, K Daley & A Pozniak "Family and medical leave in 2012: Technical report" (2012) *US Department of Labour* <<https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>> (accessed 31-08-2016) i.

<sup>1252</sup> N Bhushan "Work-Family Policy in the United States" (2012) 21 *Cornell JL & Pub Pol'y* 677 677.

<sup>1253</sup> Addati et al *Maternity and paternity at work - Law and practice accross the world* 26.

<sup>1254</sup> Bhushan (2012) *Cornell JL & Pub Pol'y* 680.

<sup>1255</sup> 677.

<sup>1256</sup> 677.

<sup>1257</sup> 681, 682.

equality in the home, are implemented.<sup>1258</sup> The federal legislation of the USA, pertaining to the integration of work and parenting, will be discussed in this chapter.

## 2 Canada

The needs and rights of persons with familial responsibilities have been recognised in numerous international covenants to which Canada is a signatory.<sup>1259</sup> As a party to these international human rights instruments, Canada has recognised:

“that the family is a fundamental group unit of society, has committed [itself] to provide the widest possible protection and assistance to the family, has agreed to recognise the particular needs of families with young children, to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and to ensure the development of institutions, facilities and services for the care of children. A number of these covenants also [recognise] the unique role that women continue to play in providing care for families, and require states parties to ensure a proper understanding of maternity as a social function, to promote recognition of the common responsibility of men and women in the upbringing and development of their children, and to take steps to ensure that women are not prevented from reaching their full potential, particularly in the workplace, because of caregiving responsibilities”.<sup>1260</sup>

At federal level, the Canada Labour Code R.S.C., 1985, c. L-2 (“CLC”) provides for maternity-related reassignment and leave, maternity leave, and parental leave. Federal labour standards are established under Part III of the CLC, which sets out minimum standards that federally regulated employers and employees must follow. The exact amount of leave and type of leave that employees are entitled to may vary slightly by province or territory, but the CLC serves as a baseline.

These remarks in mind, and as mentioned in the introduction to this chapter, the different provinces in Canada show a variation in their implementation of family-

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<sup>1258</sup> 682.

<sup>1259</sup> including the UDHR, the ICCPR, the ICESCR, CEDAW and the CRC.

<sup>1260</sup> Ontario Human Rights Commission “Policy and Guidelines on Discrimination because of Family Status” (2007) *Ontario Human Rights Commission* <[http://www.ohrc.on.ca/sites/default/files/attachments/Policy\\_and\\_guidelines\\_on\\_discrimination\\_because\\_of\\_family\\_status.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_discrimination_because_of_family_status.pdf)> (accessed 04-02-2015) 7.

friendly policies. For the reasons explained earlier,<sup>1261</sup> specific attention will be paid to the specific rights regimes on the integration of work and care in Quebec and Ontario.

## 2 1    Quebec

The minimum conditions of employment of all Québec employees are set by the Act Respecting Labour Standards, CQLR c N-1.1 (“ARLS”). The ARLS establishes the foundations of a universal system of labour standards and regulates wages, types of leave and absences, notice of termination of employment and recourse available to employees in case of a complaint by an employee.<sup>1262</sup> The conditions of employment established between the employer and the employee must not be less favourable than those stipulated by these labour standards.<sup>1263</sup>

Quebec has taken various steps, since 1997, to adopt a parental leave plan that is distinct from that implemented at the federal Canadian level, following demands from the community, unions and women’s groups over the 1990s.<sup>1264</sup> In March 2005 the Canadian government made it (financially) possible for Quebec to withdraw from the federal employment insurance (“EI”) maternity and parental benefits programme and to create its own parental leave program and in January 2006, Québec implemented the Quebec Parental Insurance Plan (“QPIP”).<sup>1265</sup> The QPIP provides for the payment of benefits to eligible workers, including the self-employed, who take maternity, paternity, parental or adoption leave. In order to qualify for benefits, a person must have received work-income. It is obligatory for employers who have employees working in Quebec (regardless of the employee’s province or territory of residence) to deduct EI premiums as well as QPIP premiums.<sup>1266</sup>

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<sup>1261</sup> See text to ch 4, part 5 5 1 above.

<sup>1262</sup> The Quebec Association for Preschool Professional Development “Labour standards in Quebec for a better understanding” (2009) *Commission des normes du travail* <[http://www.qappd.com/cms/images/cms\\_images/cnt\\_quebec\\_labor\\_standards.pdf](http://www.qappd.com/cms/images/cms_images/cnt_quebec_labor_standards.pdf)> (accessed 01-09-2016) 3.

<sup>1263</sup> 3.

<sup>1264</sup> Tremblay (2010) *Employ Responsib Rights J* 94.

<sup>1265</sup> 94.

<sup>1266</sup> Canada Revenue Agency “What is the Quebec Parental Insurance Plan” (14-01-2015) *Canada Revenue Agency* <<http://www.cra-arc.gc.ca/tx/bsnss/tpcs/pyrll/clcltng/ei/qpip-rqap/whts-eng.html>> (accessed 01-09-2016).

## 2 1 1 *Maternity leave and rights*

Pregnant employees are entitled to maternity leave of a maximum duration of eighteen continuous weeks.<sup>1267</sup> Benefits of 70% of average weekly income up to an earnings ceiling are offered for these eighteen weeks.<sup>1268</sup> The maternity leave may be taken as the employee wishes before or after the expected date of delivery.<sup>1269</sup>

An employee may be absent from work, without pay, as often as is necessary for check-ups related to her pregnancy<sup>1270</sup> and the employee is entitled to a special maternity leave, without pay, where there is a risk of termination of pregnancy or a danger for the health of the mother or unborn child caused by the pregnancy. In these circumstances, the regular maternity leave begins four weeks before the expected date of delivery.<sup>1271</sup>

At the end of maternity leave, the employer must reinstate the employee in her former position and pay her wages and benefits that she would have been entitled to had she remained at work. If her position has been abolished, the employee retains the same rights and privileges as those that she would have enjoyed, had she remained at work.<sup>1272</sup>

## 2 1 2 *Paternity leave and rights*

An employee is entitled to five continuous weeks paternity leave at the birth of his child.<sup>1273</sup> Paternity leave may be taken either for three weeks at 75% of average weekly income or for five weeks at 70% (up to an earnings ceiling).<sup>1274</sup>

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<sup>1267</sup> S 84.1 of the ARLS.

<sup>1268</sup> Quebec Travail, Emploi et Solidarité sociale, Commission des normes du travail “Quebec Parental Insurance Plan: Maternity Benefits” (25-02-2015) *Quebec Travail, Emploi et Solidarité sociale* <[http://www.rqap.gouv.qc.ca/travailleur\\_salarie/types/maternite\\_en.asp](http://www.rqap.gouv.qc.ca/travailleur_salarie/types/maternite_en.asp)> (accessed 01-09-2016).

<sup>1269</sup> S 84.1 of the ARLS.

<sup>1270</sup> S 81.3.

<sup>1271</sup> S 81.5.1.

<sup>1272</sup> S 81.15.1.

<sup>1273</sup> S 81.2.

<sup>1274</sup> Quebec Travail, Emploi et Solidarité sociale, Commission des normes du travail “Quebec Parental Insurance Plan: Paternity Benefits” (25-02-2015) *Quebec Travail, Emploi et Solidarité sociale* <[http://www.rqap.gouv.qc.ca/travailleur\\_salarie/types/paternite\\_en.asp](http://www.rqap.gouv.qc.ca/travailleur_salarie/types/paternite_en.asp)> (accessed 01-09-2016).

Paternity leave may begin at the earliest during the week of the child's birth and must end no later than 52 weeks thereafter.<sup>1275</sup>

### *2 1 3 Parental leave and rights*

Each parent of a newborn or a newly adopted child is entitled to parental leave that may last up to 52 weeks.<sup>1276</sup> A basic entitlement of seven weeks is offered at 70% of average insured income, plus 25 weeks at 55% of income (up to an earnings ceiling).<sup>1277</sup> There is also a "special plan" offering a shorter period of leave, 25 weeks, with higher benefits of 75% of earnings.<sup>1278</sup>

Parental leave may be added to the eighteen-week maternity leave or the five-week paternity leave periods and may be shared between the father and the mother. This leave may not end later than 70 weeks after the birth or, in the case of adoption, 70 weeks after the child has been entrusted to the employee. This leave cannot be divided into different periods unless there is an agreement with the employer or in cases specified by law.<sup>1279</sup>

### *2 1 4 Time off for the care of dependents*

Employees are allowed ten working days of unpaid family responsibility leave per year to fulfil obligations related to the care, health, or education of their own children or spouse's children, or due to the state of health of the employee's spouse, father, mother, brother, sister, or grandparent.<sup>1280</sup> This type of leave may be divided into separate days or other shorter periods and even a day may be divided with the employer's authorisation.<sup>1281</sup>

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<sup>1275</sup> S 81.2 of the ARLS.

<sup>1276</sup> S 81.10.

<sup>1277</sup> Quebec Travail, Emploi et Solidarité sociale, Commission des normes du travail "Quebec Parental Insurance Plan: Parental Benefits" (25-02-2015) *Quebec Travail, Emploi et Solidarité sociale*.

<sup>1278</sup> Quebec Travail, Emploi et Solidarité sociale, Commission des normes du travail "Quebec Parental Insurance Plan: Parental Benefits" (25-02-2015) *Quebec Travail, Emploi et Solidarité sociale*.

<sup>1279</sup> Ss 81.11 and 81.11.13 of the ARLS.

<sup>1280</sup> S 79.7.

<sup>1281</sup> S 79.7.

Quebec has a distinct “compassionate care leave” provision that allows employees to take up to twelve weeks of unpaid leave per year to care for a seriously ill or injured family member.<sup>1282</sup> This leave may be extended to 104 weeks if the employee’s child is under 18 years of age and the child either (1) has a potentially fatal illness or (2) has suffered serious bodily injury during or resulting directly from a criminal offence that renders the child unable to carry on regular activities.<sup>1283</sup> In this regard, the Quebec Courts have established that an employee seeking compassionate care leave must prove that their presence is really necessary to their child. In *St-Vincent v. Industries V.M. Inc.*<sup>1284</sup> it was decided that an employee’s “comforting presence” to his wife and their sick child was not regarded as essential and necessary to qualify for compassionate care leave.<sup>1285</sup> The Quebec Labour Relations Board has also found that an employee should take all reasonable steps within his or her power to limit the length and duration of compassionate care leave.<sup>1286</sup>

## 2 1 5 Flexible working

There is currently no legislation in Canada explicitly giving employees a right to request flexible working hours and which requires employers to consider such requests. At both federal level and in Québec, pregnant women and nursing mothers may ask their employers to adjust their duties temporarily or to assign them to another position, if continuation of their present duties puts their health or that of their unborn child or nursing infant at risk.<sup>1287</sup>

## 2 2 Ontario

The ESA 2000 sets minimum requirements for employment standards in Ontario and delineates the rights and responsibilities of employees and employers in workplaces

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<sup>1282</sup> S 79.8.

<sup>1283</sup> S 79.9.

<sup>1284</sup> D.T.E 2001T-209.

<sup>1285</sup> See C Andree, J Vermiere & ML François “Family Status: Evolving Trends and the Need for Novel Accommodation” (2010) *Gowlings* <<http://www.gowlings.com/courses/ELLSeries2010/pdfs/van/Family%20Status%20Pape.pdf>> (accessed 25-01-2015) 13.

<sup>1286</sup> 13.

<sup>1287</sup> S 132 of the CLC and Doucet et al “Canada” *International Network on Leave Policies & Research* 6.

in Ontario. The changes introduced by the ESA 2000 were the first attempt at modernising employment standards law in Ontario in two decades and were designed to enhance flexibility for employers and employees by establishing work arrangements accommodating business, family, and health needs.<sup>1288</sup> In addition, the recent amendments introduced by the Employment Standards Amendment Act (Leaves to Help Families), significantly expand potential care-related leave entitlements under the ESA 2000.<sup>1289</sup>

### 22.1 Maternity leave and rights

A female employee who has been employed for at least thirteen weeks prior to her due date,<sup>1290</sup> is entitled to seventeen weeks of unpaid maternity leave.<sup>1291</sup> Eligible employees<sup>1292</sup> may receive fifteen weeks of EI maternity benefits at 55% of average insured earnings up to an earnings ceiling. Low-income families may qualify for a higher benefit rate.<sup>1293</sup> Maternity benefits are funded from the federal EI fund, which is financed by contributions from employers and employees.<sup>1294</sup>

Employees on pregnancy leave have, on their return to work, the right to be reinstated in the same position or if that job no longer exists, in a comparable job.<sup>1295</sup> In either case, the employer must pay the employee at least as much as she was

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<sup>1288</sup> A Riddel & A Jones “Pregnancy, parental and emergency leave under the new ESA 2000” (2003) *SolowayWright LLP* <[http://www.solowaywright.com/sites/default/files/PUBLICATION\\_Pregnancy\\_Parental\\_Emergency.pdf](http://www.solowaywright.com/sites/default/files/PUBLICATION_Pregnancy_Parental_Emergency.pdf)> (accessed 01-09-2016) 2.

<sup>1289</sup> 2.

<sup>1290</sup> S 46. In order for a female employee to qualify for maternity leave, she must have commenced employment at least thirteen weeks before the baby is expected to be born.

<sup>1291</sup> S 46.

<sup>1292</sup> Employees must, *inter alia*, prove that they are losing 40% or more of their weekly income and that they have worked 600 hours or more during the last 52 weeks or since their last claim. See Government of Canada “EI Maternity and Parental Benefits – Eligibility” (07-06-2016) *Government of Canada* <<https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental/eligibility.htm>> (accessed 01-09-2016).

<sup>1293</sup> Government of Canada “EI Maternity and Parental Benefits – How much could you receive” (30-07-2016) *Government of Canada* <<https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental/benefit-amount.html>> (accessed 01-09-2016).

<sup>1294</sup> Ss 68 and 82(1) of the Employment Insurance Act 1996 and Doucet et al “Canada” *International Network on Leave Policies & Research* 2.

<sup>1295</sup> S 53 of the ESA 2000.

earning before maternity leave. If the wages for the job increased while the employee was on leave, or would have increased if she had not been on leave, the employee must be paid the higher wage on her return.<sup>1296</sup> An employer may not penalise an employee in any way because the employee is or will be eligible to take maternity leave, or for taking or planning to take maternity leave.<sup>1297</sup>

Employees on maternity leave have a right to continue to take part in certain benefit plans, such as pension plans, life insurance plans, accidental death plans, extended health plans and dental plans that their employer may offer.<sup>1298</sup> The employer must continue to pay its share of the premiums for any of these plans that were offered before the leave, unless the employee informs the employer in writing that he or she will not continue to pay his or her own share of the premiums. Generally, employees must continue to pay their share of the premiums in order to remain on these plans.<sup>1299</sup> Employees continue to earn credits toward length of employment, length of service, and seniority during periods of maternity leave.<sup>1300</sup>

## 2 2 2 *Paternity leave and rights*

No provision is made for paid paternity leave in Ontario,<sup>1301</sup> but both new parents have the right to take unpaid parental leave of up to 35 or 37 weeks.<sup>1302</sup>

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<sup>1296</sup> S 53.

<sup>1297</sup> S 74.

<sup>1298</sup> Ontario Ministry of Labour “Pregnancy and Parental Leave” (20-11-2015) *Ontario Ministry of Labour* <<http://www.labour.gov.on.ca/english/es/pubs/guide/pregnancy.php#parental>> (accessed 01-09-2015).

<sup>1299</sup> Ontario Ministry of Labour “Pregnancy and Parental Leave” (20-11-2015) *Ontario Ministry of Labour*.

<sup>1300</sup> Ontario Ministry of Labour “Pregnancy and Parental Leave” (20-11-2015) *Ontario Ministry of Labour*.

<sup>1301</sup> Andree et al “Family Status: Evolving Trends and the Need for Novel Accommodation” (2010) *Gowlings* 15.

<sup>1302</sup> S 49(1) of the ESA 2000. Also see the text to part 2 2 3 below.

### 2 2 3 Parental leave and rights

Women taking maternity leave are entitled to up to 35 weeks unpaid parental leave. Birth mothers as well as all other new parents who do not take maternity leave are entitled to up to 37 weeks unpaid parental leave.<sup>1303</sup>

Parental leave does not form part of maternity leave. A birth mother may take both maternity and parental leave. In addition, the right to parental leave is independent of the right to maternity leave. A birth father could, for example, be on parental leave at the same time the birth mother is on either her maternity leave or parental leave.<sup>1304</sup>

Parental benefits may be claimed for up to 35 weeks per family at the same rate as maternity benefits.<sup>1305</sup> Low-income families<sup>1306</sup> are eligible for a family supplement up to a maximum of 80% of insurable earnings.<sup>1307</sup>

Employees on parental leave enjoy the same protection as employees on maternity leave.<sup>1308</sup>

### 2 2 4 Time off for the care of dependants

Employees are entitled to unpaid, job-protected family medical leave of up to eight weeks<sup>1309</sup> in a 26-week period, which may be taken to provide care or support to certain family members and people who consider the employee to be like a family member.<sup>1310</sup> However, this is only possible where a qualified health practitioner has

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<sup>1303</sup> Ss 48 and 49(1) of the ESA.

<sup>1304</sup> Ontario Ministry of Labour “Pregnancy and Parental Leave” (20-11-2015) *Ontario Ministry of Labour*.

<sup>1305</sup> See the text to part 2 2 1 above.

<sup>1306</sup> Less than CAN\$25,921 per annum.

<sup>1307</sup> See Government of Canada “EI Maternity and Parental Benefits – How much could you receive” (30-07-2016) *Government of Canada* and Doucet et al “Canada” *International Network on Leave Policies & Research* 4.

<sup>1308</sup> See the text to part 2 2 1 above.

<sup>1309</sup> “Week” is defined for family medical leave purposes as a period of seven consecutive days beginning on a Sunday and ending on a Saturday.

<sup>1310</sup> Including step-parent or foster parent of the employee or the employee's spouse, step-child or foster child of the employee or the employee's spouse step-brother or step-sister of the employee, step-grandparent of the employee or of the employee's spouse, step-grandchild of the employee or of the employee's spouse, brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee, son-in-law or daughter-in-law of the employee or of the employee's spouse, uncle or aunt of the employee or of the employee's spouse, nephew or

issued a certificate indicating that the family member has a serious medical condition with a significant risk of death occurring within a period of 26 weeks or such shorter period as may be prescribed.<sup>1311</sup>

Employees are also entitled to eight weeks unpaid family caregiver leave to provide care or support to a spouse, parent, child (including step or foster parents and children), grandparent or step-grandparent, siblings or a relative of the employee who is dependent on the employee for care or assistance. This type of leave is available if a qualified health practitioner has issued a certificate stating the individual has a serious medical condition.<sup>1312</sup>

Individuals who have been employed for at least six consecutive months will be entitled to up to 37 weeks of unpaid leave to provide care or support to their critically ill child.<sup>1313</sup> Similar to family caregiver leave, employees are not required to take critically ill child care leave in continuous periods of entire weeks. Employers must be advised of an employee's intention to take this leave in writing, and a medical certificate attesting to the illness of the child and outlining the period during which the child requires care or support must be issued by a qualified health practitioner and provided to the employer.<sup>1314</sup> Employees eligible for critically ill child care leave may be entitled to EI for the duration of their leave.<sup>1315</sup>

Employees of employers with 50 or more employees are also entitled to ten days unpaid personal emergency leave. It may be taken in the case of personal illness,

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niece of the employee or of the employee's spouse, spouse of the employee's grandchild, uncle, aunt, nephew or niece or a person who the employee considers to be like a family member. See s 49(1) ESA 2000.

<sup>1311</sup> S 49(1).

<sup>1312</sup> S 49(3).

<sup>1313</sup> S 49(4) of the ESA 2000. The definition of "critically ill child" refers to a child, "whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury." A "child" is broadly defined as a "child, step-child, foster child or child who is under legal guardianship and who is under 18 years of age."

<sup>1314</sup> S 49(4) ESA 2000.

<sup>1315</sup> Government of Canada "EI benefits for Parents of Critically Ill Children – Overview" (07-06-2016) *Government of Canada* <<https://www.canada.ca/en/services/benefits/ei/ei-critically-ill-children.html>> (accessed 01-09-2016).

injury, or medical emergency and the death, illness, injury, medical emergency of or urgent matter relating to certain family members and dependent relatives.<sup>1316</sup>

Eligible<sup>1317</sup> employees, who have to be away from work temporarily to provide care or support to a family member who is gravely ill and who has a significant risk of death, may be entitled to compassionate care EI benefits for a maximum of 26 weeks, at 55% of average insured earnings up to an earnings ceiling.<sup>1318</sup>

## 2 2 5 *Flexible working*

As stated,<sup>1319</sup> there is currently no legislation in Canada which explicitly gives employees a right to request flexible working hours and which requires that employers consider such requests. However, in recent years, many employers have been implementing “family-friendly” or “flexible workplace” policies, including policies and programs related to flexible hours, telecommuting, job-sharing, part-time work and leaves of absence.<sup>1320</sup> In some cases, these programs have been implemented to address specific equity issues and in other cases, the programs are based on the principle that flexibility benefits all employees.<sup>1321</sup> The Ontario Human Rights Commission states that these programs are laudable attempts in order to make the

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<sup>1316</sup> Ss 50(1) and (2) of the ESA 2000. Spouse (including both married and unmarried couples, of the same sex or the opposite sex), parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse; spouse of the employee's child; a brother or sister of the employee; or a relative of the employee who is dependent on the employee for care or assistance.

<sup>1317</sup> To be eligible for compassionate care benefits, an employee must be able to show that his/her regular weekly earnings from work have decreased by more than 40%; and that he/she have accumulated 600 insured hours of work in the last 52 weeks, or since the start of his/her last claim (this period is called the qualifying period). See Government of Canada “EI compassionate care benefit – Eligibility” (07-06-2016) *Government of Canada* <<http://www.esdc.gc.ca/en/ei/compassionate/eligibility.page>> (accessed 01-09-2016).

<sup>1318</sup> Government of Canada “EI compassionate care benefit – Overview” (07-06-2016) *Government of Canada* <<http://www.esdc.gc.ca/en/ei/compassionate/index.page>> (accessed 01-09-2016).

<sup>1319</sup> See the text to part 2 1 5 above.

<sup>1320</sup> Ontario Human Rights Commission “Employment” (30-03-2005) *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/human-rights-and-family-ontario/employment>> (accessed 01-09-2016).

<sup>1321</sup> Ontario Human Rights Commission “Employment” (30-03-2005) *Ontario Human Rights Commission*.

workplace more flexible and accommodating and are aimed at setting a “positive example of how employers may promote the equality of persons with caregiving responsibilities, and move towards compliance with the requirements of the Ontario *Human Rights Code* as well as improve employee retention, performance, and morale”.<sup>1322</sup>

### **3 United States of America**

At federal level, the FMLA requires of employers to whom the Act applies to provide employees job-protected and unpaid leave for qualified medical and family reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The purpose of the FMLA is, *inter alia*, to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, to promote national interests in preserving family integrity”,<sup>1323</sup> to minimise the potential for employment discrimination on the basis of sex by ensuring that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis,<sup>1324</sup> and to promote the goal of equal employment opportunity for women and men.<sup>1325</sup>

#### **3.1 Maternity, paternity, parental and family responsibility leave and rights**

It is convenient, in the USA context, to deal with all the specific types of leave under one heading as this is also the approach of the FMLA.

The FMLA applies to all public employers and to private employers with fifty or more employees. Within covered establishments, the FMLA applies to employees who have been employed for at least twelve months and worked a minimum of 1 250 hours in the prior year.<sup>1326</sup> Section 102(a)(1) of the FMLA provides up to twelve weeks of unpaid leave to eligible employees for, *inter alia*, the birth of a child and in order to care for

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<sup>1322</sup> Ontario Human Rights Commission “Employment” (30-03-2005) *Ontario Human Rights Commission*.

<sup>1323</sup> S 2 (b)(1) of the FMLA.

<sup>1324</sup> S 2 (b)(4).

<sup>1325</sup> S 2 (b)(5).

<sup>1326</sup> S 101(2)(A).

the child or “to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition”.<sup>1327</sup> This may be taken by either parent at any time during the first year after the child is born.<sup>1328</sup>

FMLA leave may be taken in one continuous period or divided into several blocks of time for pregnancy complications and/or for recovery from childbirth.<sup>1329</sup>

Section 102(f)(1) states that spouses employed by the same employer are only entitled to twelve weeks leave in total and not twelve weeks each.

When an employee returns from FMLA leave, he or she must be restored to the same job or to an "equivalent job". The employee is not guaranteed the actual job held prior to the leave. An equivalent job means a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location).<sup>1330</sup> The taking of leave under section 102 shall also not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.<sup>1331</sup>

Despite its gender-neutral language and lofty goals, the FMLA has done little to advance gender equality or help balance work and family responsibilities.<sup>1332</sup> The fact that only “eligible employees” are entitled to the leave in section 102 of the FMLA, precludes a large number of employees, particularly part-time workers, from making use of these leave provisions.<sup>1333</sup> The FMLA also only provides three months of leave, which may not be enough in certain circumstances. Where, for example, a child is born with a disability, the worker may not be able to take enough time off to provide adequate care.<sup>1334</sup> Time may only be taken off for a “serious health condition”, meaning that a worker cannot take time off to care for a child if the child has, for example, an ear infection. Another problem is that the FMLA does not provide for any paid leave time, causing many eligible workers not to take leave due to financial

<sup>1327</sup> S 101(11) defines a “serious health condition” as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.

<sup>1328</sup> S 102(a)(2).

<sup>1329</sup> S 102(b)(1).

<sup>1330</sup> S 104(a)(1).

<sup>1331</sup> S 104(a)(2).

<sup>1332</sup> Bhushan (2012) *Cornell JL & Pub Pol'y* 686.

<sup>1333</sup> Addati et al *Maternity and paternity at work - Law and practice across the world* 43.

<sup>1334</sup> Bhushan (2012) *Cornell JL & Pub Pol'y* 688.

constraints.<sup>1335</sup> The act is also inflexible.<sup>1336</sup> This is evidenced, *inter alia*, by the act's narrow approach to "family". The leave provision that allows time off for a new child covers a biological, adopted, and foster child, as well as a stepchild and legal ward.<sup>1337</sup> However, it does not guarantee time off to care for the child of a non-marital partner and consequently cannot be utilised by gay and cohabiting couples. This provision also fails to cover families where the legal parent of the child is not the child's primary caregiver.<sup>1338</sup>

### 3.2 Flexible working

The Fair Labor Standards Act of 1938 ("FLSA") does not address flexible work schedules for employees with family responsibilities and alternative work arrangements such as flexible work schedules are a matter of agreement between the employer and the employee.<sup>1339</sup>

There was, however, a legislative initiative to cater for work flexibility in 2013 when the US House of Representatives passed the Working Families Flexibility Act of 2013<sup>1340</sup>, but the Senate did not pass it. This legislation would have amended the FLSA to allow private-sector employees the choice of paid time off in lieu of cash wages for overtime hours worked. It was designed as a piece of pro-family, pro-worker legislation that would have given workers the flexibility to, *inter alia*, spend time with family, stay home with a newborn, or to attend to other family needs that may arise.<sup>1341</sup> The proposed legislation provided for the introduction of a national paid family and medical leave insurance programme enabling workers to take up to 12 weeks' paid leave to recover from childbirth, to care for a sick family member or to bond with a new

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<sup>1335</sup> 689.

<sup>1336</sup> 688.

<sup>1337</sup> 688.

<sup>1338</sup> 688.

<sup>1339</sup> United States Department of Labour "Work Hours: Flexible Schedules" *United States Department of Labour* <<https://www.dol.gov/general/topic/workhours/flexibleschedules>> (accessed on 08-01-2016).

<sup>1340</sup> Working Families Flexibility Act of 2013 (HR 1406).

<sup>1341</sup> Education & the Workforce Committee "H.R. 1406, The Working Families Flexibility Act of 2013" (2013) *Education & the Workforce Committee* <<https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=327098>> (accessed 13-02-2015).

baby.<sup>1342</sup> The Act would have covered almost all workers, and employees would have been provided with 66% of previous earnings, up to a ceiling of US\$ 4,000 per month. These benefits would have been entirely funded by contributions from employers and employees<sup>1343</sup> and administered through a new Office of Paid Family and Medical Leave within the Social Security Administration.<sup>1344</sup> It is, however, unlikely that the amendment will be enacted into law any time soon.<sup>1345</sup>

#### 4 Conclusion

This chapter provided an overview of the specific rights regimes on the integration of work and care of two further developed countries – Canada (with the emphasis on Quebec and Ontario) and the USA.

As far as Quebec is concerned, the discussion showed that Québec's labour legislation assists employees with parental caregiving responsibilities to maintain a balance between the numerous, and sometimes contradictory, demands of work and family life. Quebec successfully changed its legislation over the years to keep pace with societal changes<sup>1346</sup> and has introduced a number of family-friendly policies over the past decades.<sup>1347</sup> In comparison to the other provinces and territories of Canada, more Quebec parents are eligible<sup>1348</sup> for leave, leave is more generous and flexible<sup>1349</sup> and three to five weeks of the entire leave period<sup>1350</sup> are reserved for fathers.<sup>1351</sup>

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<sup>1342</sup> Education & the Workforce Committee "H.R. 1406, The Working Families Flexibility Act of 2013" *Education & the Workforce Committee*.

<sup>1343</sup> 0.2% of wages; 0.4% for self-employed.

<sup>1344</sup> Addati et al *Maternity and paternity at work - Law and practice accross the world* 28.

<sup>1345</sup> K Taylor "It's Still Pay As You Go: No Comp Time Allowed" (2013) *The National law Review* <<http://www.natlawreview.com/article/it-s-still-pay-you-go-no-comp-time-allowed>> (accessed 08-01-2017).

<sup>1346</sup> Secrétariat à la condition féminine *Equal in Every Way!: Gender Equality in Québec* (2009) 9.

<sup>1347</sup> Tézli (2009) *Canadian Journal of Sociology/Cahiers canadiens de sociologie* 455.

<sup>1348</sup> It no longer requires individuals to have worked 600 hours over the previous 52 weeks, but simply to have earned an insurable income of CAN\$2,000. See Doucet et al "Canada" *International Network on Leave Policies & Research* 5.

<sup>1349</sup> The employee has a choice between shorter leave with a higher income replacement rate or longer leave with a lower income replacement rate.

<sup>1350</sup> Of almost one year.

<sup>1351</sup> Tremblay (2010) *Employ Responsib Rights J* 95.

Furthermore, the benchmark set by the Quebec courts for employees who seek compassionate care leave, namely to prove that their presence is really necessary to their child, is fair and reasonable and may serve as a point of reference for other jurisdictions dealing with the essentiality of compassionate leave. Lastly, and even in the absence of legislation explicitly giving employees a right to request flexible working hours and requiring employers to consider such requests, parents at least have some measure of flexibility as to how<sup>1352</sup> and when<sup>1353</sup> they want to use their maternity, paternity and parental leave. The availability of adequate leave with benefits, coupled with the fact that parents may choose how and when they want to use this leave in order to spend time with their child(ren) does, to some extent, mitigate the lack of specific legislation granting employees a right to request flexible working hours.

In Ontario, the significant legislative amendments to the ESA 2000 to expand family-related leave entitlements is evidence of the government's attempt to address the challenging relationship between work and family. Not only does Ontario provide generous family related leave, specifically parental leave and time off to care for dependents, but the extensive scope of "family" is remarkable and exceptional. Not many countries include step-parents, step- and foster children, step-siblings, step grandchildren, step-in-laws, uncles and aunts, nephews and nieces and, on top of this, the broad range of "a person whom the employee considers to be like a family member", in their definition of "family". This definition is in line with a 21<sup>st</sup> century society with fractured families and extremely varied family configurations as discussed in chapter 2. This will hopefully serve as an example to other countries and encourage them to rethink and expand their definition of "family", or at least the varied relationships within which "parental care" (as discussed in chapter 2) is provided to dependents. However, Ontario also does not have provision for flexible working in their legislation. Flexible working will contribute to the accommodation of employees with

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<sup>1352</sup> Paternity leave may be taken for three weeks at 75% of average weekly income or for five weeks at 70% up to an earnings ceiling. Parents can choose between a longer or shorter period of parental leave with respectively lower and higher benefits, parental leave may be shared between the father and the mother, parental leave may be added to maternity/paternity leave.

<sup>1353</sup> Maternity leave may be spread out as the employee sees fit before or after the expected date of delivery. Paternity leave can begin at the week of the child's birth and must be taken within 52 weeks thereafter and parental leave must be taken within 70 weeks after the birth/adoption of a child.

parental caregiving needs and the integration of work and parenting. Accommodation of caregiving needs is most often neither burdensome nor costly - it simply is a matter of flexibility. Therefore, "a flexible and accommodating approach is ultimately a significant advantage to employers in attracting and maintaining good employees, and to service providers and landlords in expanding their potential markets".<sup>1354</sup>

In the USA, current federal work-family legislation and policies fail to provide adequate support to families due to their limited applicability and, where they apply, they fail to account for individuals' dual identities as workers and caregivers.<sup>1355</sup> There is a need for comprehensive policy reform in order to remedy the inadequacies of USA's current work-care laws<sup>1356</sup> – policy reform that would address both the problems individuals face on a routine basis, as well as overall gender inequality issues arising from the deficiencies of its work-family policy regime.<sup>1357</sup> As chapter 4 showed, anti-discrimination protection is important as a basis on which to protect employees from the biases, prejudices, stereotypes and concomitant barriers flowing forth from and created by caregiving. However, for a variety of reasons, anti-discrimination legislation cannot guarantee that this will happen on a systemic basis. A more direct intervention is necessary: it will take time for employers to internalise the reality that caregiver employees – especially mothers – are capable of working and caring well at the same time. A more direct intervention will be the foundation of a shift in workplace policies which will allow individuals to successfully combine the demands of employment and caregiving.<sup>1358</sup>

In final conclusion to this chapter, it may be said that both Canada and the USA focus on time off/ leave provisions to provide measures (often extensive – especially in Canada) of accommodation of the combination of work and parental care. At the same time, the experience of especially the USA shows that the scope of application and eligibility requirements associated with leave may undermine the effectiveness of

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<sup>1354</sup> Ontario Human Rights Commission "Policy and Guidelines on Discrimination because of Family Status" (2007) *Ontario Human Rights Commission* 25.

<sup>1355</sup> Bhushan (2012) *Cornell JL & Pub Pol'y* 682.

<sup>1356</sup> 690.

<sup>1357</sup> 680; S Eifler "Choosing Not to Choose: A Legislative Solution for Working Adults Who Wish to be Successful Employees and Successful Caregivers" (2012) 60 *Drake L Rev* 1205 1229.

<sup>1358</sup> 1230.

the accommodation of work and care. There is no direct legislative support for the idea of ongoing accommodation through flexibility in the workplace – although, admittedly, the extent of leave does create a measure of flexibility [as in Canada and Sweden (discussed in the previous chapter)]. This, in itself, already works against a true notion of the integration of work and care – by definition, time off and leave implies a separation between work and care. While this often is an inevitability associated with care, one may legitimately question its use as the foundation on which accommodation of care in the context of work is based.

## CHAPTER 7: THE APPROACH TO SPECIFIC RIGHTS ON THE INTEGRATION OF WORK AND CARE IN THE BRIC COUNTRIES: BRAZIL, RUSSIA, INDIA AND CHINA

### 1 Introduction

The preceding two chapters were devoted to a consideration of the specific rights regimes on the integration of work and care in four developed economies – the UK, Sweden, the USA and Canada. This chapter is the first of two chapters to consider the specific rights approaches to work and care in the so-called BRICS countries.

BRICS is the acronym for an association of five major emerging national economies: Brazil, Russia, India, China, and South Africa. The grouping was originally known as "BRIC" before the inclusion of South Africa in 2011.<sup>1359</sup> In this chapter, the focus is on Brazil, Russia, India and China. The position in South Africa is considered separately in chapter 8 below.

As mentioned in chapter 1, one of the stated aims of this study is to enquire whether the difference in the scope and level of protection of caregiving across countries may be due to a country's level of economic development and the affordability of different measures. Given the ineffectiveness of anti-discrimination legislation in South Africa as a developing country, the need arises for a representative survey of work-care legislation in both developed *and developing* countries. This will not only enable comparison between developed and developing economies, but also between developing economies themselves. This will aid in a search for trends and possibilities and the evaluation of their potential application in the South African context. As this chapter will show, for example, most of the BRIC countries provide for a much higher level of maternity benefits than South Africa (both in terms of the period of leave and level of benefits, in most instances on full pay by either the employer or the state), but (like South Africa) relatively weak levels of protection for paternity leave and the extended notion of parental care.

When juxtaposed with the experience of the developed countries (discussed in chapters 5 and 6), these cross comparisons might be useful in guiding future South African specific rights initiatives on the integration of work and care.

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<sup>1359</sup> Anonymous "About BRICS" (2016) *BRICS* <<http://brics5.co.za/about-brics/>> (accessed 20-08-2016).

At the outset, it should also be mentioned that the BRICS countries seem to share a lack of focus on research on the integration of work and care,<sup>1360</sup> especially on equality law as a means to reconcile work and care. One reason for this is a shared gender egalitarian culture and the low status accorded to women and women's issues in some of the BRICS countries.<sup>1361</sup> Apart from the absence of existing research on the integration of work and care, language, as previously mentioned, creates a significant barrier to the accessibility of primary sources (also in the area of specific rights): although the BRIC countries all include English as a national language, they are all primarily non-English speaking countries. It is submitted, however, that the responsible use of the secondary sources that do exist, augmented by other research techniques, does create a sound basis on which to provide an overview of the specific rights regimes of these countries for purposes of comparison with developed economies and with South Africa.<sup>1362</sup>

## 2 Specific rights on work and care in Brazil

There is little available research and few publications on leave and other employment related policies in Brazil. The main reason for this is that the reconciliation of work and care has not been properly recognised as a social problem or priority.<sup>1363</sup> Although women in general continuously have been increasing their participation in the labour

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<sup>1360</sup> U Rajadhyaksha & S Smita "Tracing a timeline of work and family research in India" (2004) 39 *Econ Polit Wkly* 1674 1674.

<sup>1361</sup> 1674.

<sup>1362</sup> In April 2015, I visited India, Russia and China as part of a research visit (to different universities and institutions) in order to obtain information for this chapter. In India, I met with Prof Jaivir Singh from the Centre for the Study of Law and Governance: Jawaharlal Nehru University (New Delhi); Prof Ashwani Kumar Bansal, Mr Chanchal Singh and Ms Meena Panicker of the Faculty of Law: University of Delhi and Drs Manoj Sinha and Jyoti Dogra Sood from the Indian Law Institute: New Delhi. In Russia, Ms Fatima Nogaylieva, a postgraduate student at Saint-Petersburg State University (Law Faculty, Department of Labour Law), facilitated a meeting and acted as interpreter between myself and Prof Khokhlov Evgeniy Borisovich, Prof Ivankina Tatyana Vasilevna, Dr Dobrokhотова Elena Nikolaevna, Dr Filippova Marina Valentinovna, Dr Lavrikova Marina Yurevna and Dr Zavgorodniy Aleksandr Vasilievich. In China, I met with Ms Qun Huang, Senior Programme Assistant at the ILO Country Office for China and Mongolia, and Prof LI Jianfei of the Renmin University of China Law School.

<sup>1363</sup> Sorj "Brazil" (2017) *International Review of Leave Policies and Research* 4.

market,<sup>1364</sup> the same cannot be said of women with children. This is mainly due to the fact that, historically, these women were predominantly poor and did not have access to child care facilities.<sup>1365</sup> In addition, the support provided by members of extended families, by networks of solidarity and the large contingent of domestic workers (18% of the female labour force) created the idea that the integration of work and family responsibilities is a private issue and not a matter of great public concern.<sup>1366</sup> However, as stated by Sorj, recent changes in the labour market (including a significant increase in labour force participation by mothers with dependent children) and family structures (including an increase in female one-parent families) require that the integration of work and care should be regarded as an important issue for purposes of social policy-making in the future.<sup>1367</sup> It must also be noted that the labour market in Brazil is mainly divided into two sectors: public and private and the specific rights afforded to employees in these two sectors generally differ.

The Brazil Federal Constitution 1998 (“BFC”) contains an entire chapter dealing with “social rights” (employees’ rights), which elevates rights such as the right to maternity and paternity leave to the constitutional level.<sup>1368</sup> The provisions of the BFC and of the Consolidated Labor Law (*Consolidação das Leis do Trabalho*) 1943 (“CLT”), which is also a federal law, apply, in principle, to all employees.<sup>1369</sup> The BFC and the CLT provide for a series of minimum benefits that must be granted by the employer to its employees during the employment relationship.<sup>1370</sup>

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<sup>1364</sup> The female labor force between 2011 and 2015 was 43.8% of the total labour market. See The World Bank “Data, Labor force, female (% of total labor force)” (26-04-2016) *The World Bank* <<http://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS>> (accessed 29-08-2016).

<sup>1365</sup> NM Filho & L Scorzaface *Employment and inequality outcomes in Brazil* (2016) Paper prepared for the OECD International Seminar on Employment and Inequality Outcomes, Paris (8-04-2009) <<https://www.oecd.org/employment/emp/42546065.pdf>> (accessed 29-08-2016) 7.

<sup>1366</sup> Sorj “Brazil” (2017) *International Review of Leave Policies and Research* 4.

<sup>1367</sup> 4.

<sup>1368</sup> Ch 2, arts 7 XVIII and XIX.

<sup>1369</sup> B McKenzie *Overview of Labor & Employment Law in Latin America* (2014) 33. “Employees” meaning “employees with regular work contracts or those that contribute to the Social Security Institute (INSS)”.

<sup>1370</sup> McKenzie *Overview of Labor & Employment Law in Latin America* 34. However, only 50% of the Brazilian labour force works in the formal job sector and thus entitled to the benefits. See B Sorj *Reconciling work and family: Issues and policies in Brazil* (2004) 39

## 2.1 Maternity leave, benefits and protection

Female employees in Brazil are entitled to 120 calendar days fully paid<sup>1371</sup> maternity leave<sup>1372</sup> in the private sector, which may be extended to six months if the employer voluntarily adheres to the Company-Citizen Programme (*Programa Empresa Cidadã*).<sup>1373</sup> This may be taken from the eighth month of pregnancy.<sup>1374</sup> Female employees in the federal public sector are entitled to six months' maternity leave. At state and municipal levels, entitlement to the extension depends on the approval of the authorities. Although most state authorities approve this extended leave, only a minority of municipalities do.<sup>1375</sup> In specific situations, for example when the mother or the baby's life is at risk, the mother has the right to another fifteen days' leave.<sup>1376</sup> In case of miscarriage or legal abortion, maternity benefits are paid for two weeks.<sup>1377</sup> No minimum period of employment or minimum contribution levels to qualify for cash maternity benefits exists. All women who work, as an employee with a signed work card, as a temporary employee or self-employed, and contribute to Social Security, are eligible for cash maternity benefits.<sup>1378</sup> Housewives or students who do not earn a salary, but who pay monthly optional Social Security contributions to maintain coverage, enjoy the same benefit after contributing for at least ten months.<sup>1379</sup>

Maternity benefits payment is funded from contributions [to] a Social Security fund paid by employers and employees: employers pay 20% of their salary bill and

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<sup>1371</sup> In the case of a variable salary (i.e because of commission, gratuity, overtime, bonus pay), the payment is equivalent to the average of the last six months of work.

<sup>1372</sup> In case of adoption of a child of up to 1 year old, maternity leave is 120 days. For adoption in the age range 1 to 4 years, the leave is 60 days and from 4 to 8 years, 30 days.

<sup>1373</sup> Benefits are paid by the costs covered by fiscal rebates if leave is extended to sixth months.

<sup>1374</sup> However, women may continue with paid work until birth if they explicitly declare that it is their personal decision to do so.

<sup>1375</sup> Sorj "Brazil" (2017) *International Review of Leave Policies and Research* 1.

<sup>1376</sup> 2.

<sup>1377</sup> Addati et al *Maternity and paternity at work - Law and practice accross the world* 44

<sup>1378</sup> Sorj "Brazil" (2017) *International Review of Leave Policies and Research* 2.

<sup>1379</sup> 2.

employees pay on a sliding scale according to their salary. Self-employed workers and business owners are funded entirely by own contributions.<sup>1380</sup>

According to the CLT, an employer may not dismiss pregnant employees from the confirmation date of the pregnancy up to no less than five months following birth. The purpose of the CLT is to protect the pregnant employee and her child, granting the employee the right to continue working during the pregnancy period and, subsequently, to sustain herself and her child.<sup>1381</sup>

The employee's salary and rights are guaranteed during pregnancy. The employee may be provided an alternative job due to health conditions, with assured reinstatement upon post-natal return to work.<sup>1382</sup>

Upon presentation of a doctor's note, the expectant mother may break any commitment contained in a work contract if it places the pregnancy at risk.<sup>1383</sup> An alternative job may be offered in circumstances where the workplace is unhealthy or harmful to the pregnancy, where an activity entails risk, where working conditions are incompatible with the pregnancy, or where there is a limitation of a physical nature impairing performance of the job.<sup>1384</sup>

Pregnant women may take time off for six medical consultations<sup>1385</sup> and the CLT makes provision for two 30-minute breaks for breast-feeding during a working day, until the child is six months old.<sup>1386</sup>

## 2.2 Paternity and parental leave

Brazil was one of first countries to introduce paternity leave in 1943.<sup>1387</sup> Fathers are entitled to five consecutive days' paid<sup>1388</sup> leave in the private sector for birth or adoption of a child and twenty calendar days in the Federal public sector.<sup>1389</sup> In the

<sup>1380</sup> 2.

<sup>1381</sup> McKenzie *Overview of Labor & Employment Law in Latin America* 38.

<sup>1382</sup> Art 392(4) of the CLT. See Sorj *Reconciling work and family: Issues and policies in Brazil* 35.

<sup>1383</sup> Art 394 of the CLT. See Sorj *Reconciling work and family: Issues and policies in Brazil* 35.

<sup>1384</sup> Sorj *Reconciling work and family: Issues and policies in Brazil* 35.

<sup>1385</sup> Addati et al *Maternity and paternity at work - Law and practice across the world* 90.

<sup>1386</sup> Sorj "Brazil" (2017) *International Review of Leave Policies and Research* 4.

<sup>1387</sup> Addati et al *Maternity and paternity at work - Law and practice across the world* 65.

<sup>1388</sup> This leave is paid by the employer under the provisions of labour legislation.

<sup>1389</sup> Sorj "Brazil" (April 2017) *International Review of Leave Policies and Research* 3.

private sector the five days may be extended to twenty days if the employer voluntarily adheres to the Company-Citizen Programme (*Programa Empresa Cidadã*).

There is no statutory provision for parental leave in Brazil.<sup>1390</sup>

### 2 3 Family responsibility leave

Firstly, it must be noted that the term “family responsibility leave” is not really recognised in Brazil. The term “time off to care for dependants” is more common, but not extensively mentioned in legislation or existing research.

Paid leave of up to two consecutive days is allowed in the case of the death of a spouse, ascendant, descendant, sibling, or a person declared in the employee’s work card and, for the purposes of social security, classified as financially dependent on the employee.<sup>1391</sup> Leave is granted in the public sector to care for a sick spouse or companion, parent, child, stepfather or stepmother, stepchild or dependent, subject to approval by an official medical board. Leave may be approved for up to 60 days at 100% of earnings and after that a further 90 days of unpaid leave is possible. In the private sector, leave to care for a sick dependent may be part of a collective agreement.<sup>1392</sup>

### 2 4 Flexible working

As mentioned, any justification for an improvement in the quality of the integration between work and care, commonly cited in European documents and discussed in chapters 2 and 5 above, is practically absent from the discussion in the Brazilian business community.<sup>1393</sup> This already means that there is a weak basis for any consideration of a legal right to flexitime or flexible working hours. The main resistance to the introduction of flexible hours came and still comes from the trade union movement. According to Sorj, unions argued and continue to argue that a decrease in working hours is a better alternative than flexibility in combating unemployment, which is a constant challenge and priority in any developing economy, including Brazil.<sup>1394</sup>

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<sup>1390</sup> 3.

<sup>1391</sup> 3.

<sup>1392</sup> 3.

<sup>1393</sup> Sorj *Reconciling work and family: Issues and policies in Brazil* 39.

<sup>1394</sup> 40.

Despite the opposition to flexible hours by trade unions, the recessive economic situation of the 1990's forced trade unions and the government to reconsider their approach to flexible working hours.<sup>1395</sup> Sorj states that this, however, resulted in an approach to the regulation of flexible working hours, which was not to change the legal labour framework, but an approach where the use or operationalisation of flexible working was made dependent on and subject to collective bargaining, where the specific characteristics of each sector are taken into account.<sup>1396</sup>

### 3 Specific rights in Russia<sup>1397</sup>

Research on the integration of work and care is still sparse in Russia, mostly due to lack of survey data or statistics.<sup>1398</sup> However, the integration of work and care does not seem to be a major concern – if viewed from the perspective of the participation of women in the labour market and if compared to other developing countries. In fact, the Russian Federation ranks above the average of 36 OECD countries in the dimensions of work-life balance.<sup>1399</sup> In line with prevailing trends in most European countries, the Russian experience shows an ever-increasing share of mothers who prefer to combine home making activities with work outside the family.<sup>1400</sup> The female share of employment increased to 48.8% by 2015.<sup>1401</sup>

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<sup>1395</sup> 40.

<sup>1396</sup> 40.

<sup>1397</sup> The correctness of the information in this section was confirmed by Ms Fatima Nogaylieva (Saint-Petersburg State University Law Faculty, Department of Labour Law) via email on 02-06-2017.

<sup>1398</sup> Sinyavskaya "Russian Federation" (2016) *International Network on Leave Policies & Research* 7.

<sup>1399</sup> OECD Better Life Index "Russian Federation?" *OECD Better Life Index* (2015) <<http://www.oecdbetterlifeindex.org/countries/russian-federation/>> 3 (accessed 29-08-2016).

<sup>1400</sup> A Borodaevskiy "Families under strain: realities in post-socialist Russia" (2012) United Nations Expert Group Meeting on "Good Practices in Family Policy Making: Family Policy Development, Monitoring and Implementation: Lessons Learnt", held in New York on 15-17 May 2012 available at <<http://www.un.org/esa/socdev/family/docs/egm12/PAPER-BORODA-AEVSKIY.pdf>> (accessed 24-05-2017) 1.

<sup>1401</sup> The World Bank "Data, Labor force, female (% of total labor force)" (26-04-2016) *The World Bank*.

The constitutional principle of state protection of the family, motherhood, fatherhood and childhood is implemented in Russian legislation<sup>1402</sup> and confirmed in the Family Code of the Russian Federation 1995. The purpose of this policy is, *inter alia*, to improve the quality of family life.<sup>1403</sup> According to a Decree of the President of the Russian Federation 1996,<sup>1404</sup> one stated goal is to provide favourable conditions for workers with children to enable them to reconcile their work and family responsibilities.<sup>1405</sup>

The most important piece of Russian legislation governing labour relations is the Labour Code of the Russian Federation 2001 ("Labour Code")<sup>1406</sup>.<sup>1407</sup> In addition, the Law of the Russian Federation "On Trade Unions and their Rights, and Guarantees of their Activities" 1996<sup>1408</sup>, Russian legislation on labour safety, as well as other laws and numerous regulations regulates labour relations.<sup>1409</sup> The Labour Code sets minimum employment standards, which may not be derogated from by agreement between the parties to the employment relationship and any provision in an employment contract that negatively affects an employee's entitlement to these minimum employment standards is unenforceable.<sup>1410</sup>

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<sup>1402</sup> The Government of Russian Federation "Report on observance of human rights of children, families and migrants (European Social Charter, Articles 7, 8, 16, 17, 19, 27)" *Council of Europe* (01-12-2014) <<https://rm.coe.int/1680488931>> (accessed 29-08-2016) 66.

<sup>1403</sup> 66.

<sup>1404</sup> Decree of the President of the Russian Federation 1996 No 712 "On main directions of the state family policy".

<sup>1405</sup> The Government of Russian Federation "Report on observance of human rights of children, families and migrants (European Social Charter, Articles 7, 8, 16, 17, 19, 27)" (01-12-2014) *Council of Europe* 68.

<sup>1406</sup> Adopted on 30 December 2001 and it has been in force since 1 February 2001. Amended in 2008.

<sup>1407</sup> Baker & McKenzie "Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws" (2006) *DigitalCommons @ILR* <<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1068&context=lawfirms>> (accessed 15-19-2014) 199.

<sup>1408</sup> As amended in 2005.

<sup>1409</sup> Baker & McKenzie "Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws" (2006) *DigitalCommons @ILR* 199.

<sup>1410</sup> Baker & McKenzie "Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws" (2006) *DigitalCommons @ILR* 199.

### 3.1 Maternity leave, benefits and protection

A female employee is entitled to take 70 calendar days' maternity leave before (84 days in case of multiple pregnancy) and 70 calendar days after childbirth (86 calendar days in case of complications during childbirth, 110 calendar days in case of the birth of two or more children).<sup>1411</sup> The employee is entitled to full pay, calculated based on employment during the 24 months which preceded the leave.<sup>1412</sup> There is, however, a ceiling for maternity benefits based on the ceiling on earnings for social insurance contributions<sup>1413</sup> established by the state on an annual basis, the actual number of days worked and the length of the leave.<sup>1414</sup>

All insured women (including registered self-employed women) and military personnel are eligible for maternity benefits.<sup>1415</sup> Regional authorities may introduce additional payments during the period of maternity leave. Sinyavskaya provides the example that, in Moscow, for instance, the authorities increase benefits for pregnant and officially registered unemployed mothers who were discharged on the grounds of the closing down of a business during the twelve months before they were registered at the unemployment office.<sup>1416</sup>

In addition, women with dependent children under 3 years of age, single mothers with children under 14 years of age (18 years of age if the child is handicapped), as well as other persons raising children of these ages without the assistance of their mother may not be dismissed by the employer except for the cases set out in Article 81 (iii- a), (v) - (vii), (x) and (xi) of the Labour Code.<sup>1417</sup>

Article 64 of the Labour Code provides that "an employer is prohibited from refusing work to an employee on the basis that she is pregnant or has a child under the age of

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<sup>1411</sup> Art 255 of the Labour Code.

<sup>1412</sup> Sinyavskaya "Russian Federation" (2016) *International Network on Leave Policies & Research* 1 and Baker & McKenzie "Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws" (2006) *DigitalCommons@ILR* 204.

<sup>1413</sup> Funded by the Social Insurance Fund, which is largely financed from employers' contributions, supplemented by transfers from the federal budget.

<sup>1414</sup> Sinyavskaya "Russian Federation" (2016) *International Network on Leave Policies & Research* 1-2.

<sup>1415</sup> 2.

<sup>1416</sup> 2.

<sup>1417</sup> Baker & McKenzie "Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws" (2006) *DigitalCommons@ILR* 202.

three".<sup>1418</sup> If she is not appointed, she has a right to request the company to provide her with written reasons as to why she was not hired.<sup>1419</sup> Article 253 of the Labour Code "prohibits women from being hired to perform arduous work, to work under harmful conditions, or to work underground". The many positions that fall into these categories are listed by additional legislation and includes, for example, that a pregnant women may not be asked to work overtime, at night or on days off and may not be sent on business trips.<sup>1420</sup> Women who have children under the age of three may only be asked to work overtime, on days off or sent on business trips if they consent and if the work is not harmful in terms of medical advice.<sup>1421</sup>

Women with children up to one and a half years of age are entitled to take additional breaks to feed their child. These breaks are granted every three hours and must not be less than thirty minutes in duration. In the event of two or more children up to the age of 18 months, the child-feeding interval shall be no less than one hour.<sup>1422</sup>

### 3.2 Paternity and parental leave

There is no provision for paternity leave in Russian legislation.

Employees are entitled to parental leave until the child reaches the age of three. One of a child's parents or the child's primary caregiver may use it.<sup>1423</sup> Payment amounts to 40% of average earnings during the two years preceding birth, paid until a child is 18 months old<sup>1424</sup> and is funded by the Social Insurance Fund and for those

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<sup>1418</sup> 203.

<sup>1419</sup> 204.

<sup>1420</sup> Art 259 of the Labour Code and Baker & McKenzie "Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws" (2006) *DigitalCommons@ILR* 204.

<sup>1421</sup> Baker & McKenzie "Worldwide Guide to Termination, Employment Discrimination, and Workplace Harassment Laws" (2006) *DigitalCommons@ILR* 204.

<sup>1422</sup> Art 258 of the Labour Code.

<sup>1423</sup> Art 256.

<sup>1424</sup> A payment of RUB50 [€0.68] per month is also provided to employed parents with children between 18 and 36 months. For unemployed people, who have lost their jobs during parental leave due to their employer closing down during the twelve months prior to them registering as unemployed, parental leave benefit is calculated on basis of their earnings during twelve months before their unemployment. These unemployed people must choose either to receive unemployment benefit or Parental leave benefit. See Sinyavskaya "Russian Federation" (2016) *International Network on Leave Policies & Research* 3.

who are not insured (for example the unemployed), from the federal budget.<sup>1425</sup>

In rural areas, one of the parents (or a guardian or foster parent) shall, upon their request, be granted four additional paid days off per month in order to care for a disabled child. These days may be used by one of the indicated persons or divided between them at their discretion. Payment for each additional day off shall be made in the amount and under the procedures established by federal law.<sup>1426</sup>

The 85 regional governments may increase the federal level of parental leave benefits within the minimum and maximum levels set by the central government.<sup>1427</sup> Regional governments are also encouraged to introduce additional payments for care of a child between 18 and 36 months.<sup>1428</sup>

From 1 January 2015, four periods of leave up to eighteen months each (six years in total) may be included in the length of insurance seniority (that is, employment records for the period when contributions to the state pension fund has been made) used for calculating pension benefits. This is instead of the two periods (three years in total) provided for previously.<sup>1429</sup>

### 3.3 Family responsibility leave

In terms of article 128 of the Labour Code, a worker may, on application and with the authorisation of the employer, be granted unpaid leave for family-related circumstances and other justifiable reasons. The length of the unpaid leave shall be determined by an agreement between the worker and the employer.

Paid leave is provided to care for a sick child under the age of 15 years. The length of the leave varies according to the previous employment record of a parent/carer and the age of the child. Leave to take care of a sick child may be taken by any relative. For a child under the age of 7 years, up to 60 days' leave may be taken per year, with 45 days for a child aged 7 to 14 years old (up to 15 days per time). Payments, by the

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<sup>1425</sup> Sinyavskaya "Russian Federation" (2016) *International Network on Leave Policies & Research* 4.

<sup>1426</sup> Art 262.

<sup>1427</sup> Sinyavskaya "Russian Federation" (2016) *International Network on Leave Policies & Research* 4.

<sup>1428</sup> 4.

<sup>1429</sup> This is in line with new pension laws adopted in 2013. See Sinyavskaya "Russian Federation" (2016) *International Network on Leave Policies & Research* 6.

Social Insurance Fund, are made in accordance with the employee's employment record as follows: 60% of average earnings with an employment record under five years, 80% with an employment record of five to eight years and 100% with an employment record over eight years, under a ceiling for social insurance contributions for a selected two-year period.<sup>1430</sup>

### 3 4 Flexible working

Article 102 of the Labor Code provides an opportunity, subject to agreement between the employer and employee, for the employee to work flexible operating hours. The beginning, end or total length of the working day (shift) shall be agreed upon between the parties and the employer may expect the employee to work the total number of required working hours within respective registered periods (working day, week, month or other).

Working parents also have some privileges in respect of working times. An employer shall be obliged to set an incomplete working day (shift) or incomplete working week (that is, part-time work) at the request of, *inter alia*, an expectant mother or one of the parents with a child up to fourteen years of age.<sup>1431</sup> With a part-time work arrangement, the earnings of the employee are paid in proportion to the working time or depending on the fulfilled volume of work. Work under a part-time arrangement does not incur any restrictions on the length of the main annual paid leave, calculation of the length of service and other labour rights of the employee.

Despite these provisions in legislation, it is unusual for employees to work at home, especially in cities where a company office exists.<sup>1432</sup> Overall, Russian managers prefer to have their staff being present in the office or working "within a zone of their effective control."<sup>1433</sup> This philosophy is especially prevalent in Russian-owned companies and one of main reasons why flexible work arrangements are not

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<sup>1430</sup> Sinyavskaya "Russian Federation" (2016) *International Network on Leave Policies & Research* 5.

<sup>1431</sup> Art 93 of the Labour Code.

<sup>1432</sup> R Engle, L Usenko & N Dimitriadi "Work-life in Russia" (2010) *Boston College Center for Work & Family* <[http://www.bc.edu/content/dam/files/centers/cwf/research/publications/executivebriefingseries/Executive%20Briefing\\_Work-Life%20in%20Russia](http://www.bc.edu/content/dam/files/centers/cwf/research/publications/executivebriefingseries/Executive%20Briefing_Work-Life%20in%20Russia)> (accessed 30-08-2016) 7.

<sup>1433</sup> 7.

widespread in Russia.<sup>1434</sup> However, parents taking parental leave may work part time.<sup>1435</sup>

### 3.5 Case law: the interaction of a constitutional commitment and the extension of specific rights

In the Russian context, the following two cases serve as examples of how constitutional rights and policymaking commitment, via equality law, may lead to the extension of specific rights (although ad hoc and subject to the limitations discussed in Chapter 4).

#### 3.5.1 *Konstantin Markin v Russia*

In the case of *Konstantin Markin v Russia*<sup>1436</sup>, the European Court for Human Rights (“ECHR”) and Russia’s Constitutional Court clashed directly on what fundamental rights actually mean and who has priority in expressing it. The ECHR was confronted with and had to consider gender roles and non-discrimination in childcare and parental leave.

The applicant, a radio intelligence operator in the Russian armed forces, was a divorced father of three minor children, including a newborn baby. He requested permission to take leave of three years in order to care for the children. His request was rejected because the relevant legislation only entitled female military personnel to such leave. Instead, as the sole caregiver for his children, Markin was allowed three months’ leave as provided for by the same legislation.

Markin challenged the decision in Russia’s military courts<sup>1437</sup> on the basis, *inter alia*, that the provisions of the Military Service Act concerning parental leave were incompatible with the equality clause in the Constitution of the Russian Federation 1993 (“Constitution”). Although his application was unsuccessful, the military unit granted him approximately two years’ parental leave and financial aid of about 5,900

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<sup>1434</sup> 7.

<sup>1435</sup> See the text to part 3.2 above and Sinyavskaya “Russian Federation” (2016) *International Network on Leave Policies & Research* 3.

<sup>1436</sup> Application no. 30078/06, JUDGMENT 7/10/2010, STRASBOURG.

<sup>1437</sup> Military Court of the Pushkin Garrison and the Military Court of the Leningradskiy Command.

Euros. Markin then applied unsuccessfully to the Constitutional Court, followed by an application to the ECHR. On 7 October 2010, a Chamber of the First Section of the Court found that there had been a violation of Article 14<sup>1438</sup> and Article 8<sup>1439</sup> of the European Convention on Human Rights.<sup>1440</sup> In its judgment the ECHR seriously criticised the approach of the Russian courts and instructed Russian authorities to change Russian legislation to put an end to the discrimination against male military personnel with regards to their right to parental leave.<sup>1441</sup>

*3.5.2 Russian Federation Constitutional Court Ruling No 28-P of 15 December 2011 on the Constitutionality of Article 261.4 of the Labor Code of the Russian Federation (petition of A. E. Ostayev)*

Ostayev, a father of three minors, one of whom was under 3 years old and another disabled, challenged the constitutionality of article 261.4 of the Labour Code.<sup>1442</sup> He argued that, despite the fact that the Constitution grants parents equal rights and assigns equal duties to them regarding care for children and their upbringing; Article 261.4 does not provide the same guarantees against dismissal to both mothers and fathers of children under the age of three. Ostayev was dismissed from his position under article 81<sup>1443</sup> of the Labour Code (redundancy). His wife did not work and took care of the children. The Savelovsky District Court of Moscow and Moscow Municipal Court found the dismissal legal. Ostayev appealed to the Constitutional Court and stated that the deprivation of equal rights causes gender discrimination and puts large

<sup>1438</sup> Prohibition of discrimination.

<sup>1439</sup> Right to respect for private and family life.

<sup>1440</sup> European Human Rights Advocacy Centre “Konstantin Markin v Russia” (07-10-2010) *European Human Rights Advocacy Centre* <<http://ehrac.org.uk/resources/konstantin-markin-v-russia/>> (accessed 30-08-2016).

<sup>1441</sup> S Huntley “Konstantin Markin threw a military court into a dilemma: to side with the ECHR or to support the Constitutional Court of the Russian Federation” (26-08-2012) *ECHR Russia* <<http://echrrussia.blogspot.com/2012/08/konstantin-markin-threw-military-court.html>> (accessed 30-08-2016).

<sup>1442</sup> Art 261.4 prohibits employers from terminating an employment contract (except upon liquidation of an organization, a sole proprietor ceasing its business activities, or for cause) of (1) women with children under the age of three, and (2) other persons raising children of the same age without the mother.

<sup>1443</sup> Item 2, s 1.

families, where mothers are caring for kids under three years of age and are not in an employment relationship, at a disadvantage. He argued that the Constitution, the Family Code of the Russian Federation and the Convention on the Rights of the Child<sup>1444</sup> all state that care for children and their upbringing is the shared responsibility (that is, equal right and duty) of both parents.

The Russian Constitutional Court declared the provision of Article 261.4 of the Labour Code unconstitutional to the extent that it does not allow a father who is the sole breadwinner in a family with children under three years of age, where the mother is not employed and takes care of the children, to enjoy the same guarantee against dismissal offered to mothers of children of the same age.<sup>1445</sup>

#### **4 India<sup>1446</sup>**

Perhaps the main feature of India's labour market is its division into a formal (organised) and informal (unorganised) sector. The proportion of employment in the formal sector is low, compared to that in the informal sector.<sup>1447</sup> Policies on work-care integration are limited to the formal sector.<sup>1448</sup> The majority of workers in the informal sector are women, where they are either self-employed or where wages and working conditions are inferior, to a large extend unsecured and often lacking social security benefits.<sup>1449</sup>

The female labour force participation rate between 2011 and 2015 was 24.2%.<sup>1450</sup> However, only about 7% of workers (male and female) actually receive the protection

<sup>1444</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>1445</sup> Salans Russian Practice Group "Major Russian Legislation Changes for 2011" (2012) *Salans Russian Practice Group* <<http://www.dentons.com/~/media/Salans%20Import/insights/2012/march/12/Major%20Russian%20Legislation%20Changes%20for%202012%20pdf.ashx>> (accessed 30-08-2016) 29.

<sup>1446</sup> The correctness of the information in this section was confirmed by Prof Manoj Sinha of the Indian Law Institute, New Delhi via email on 05-06-2017.

<sup>1447</sup> F Cooke "Women's participation in employment in Asia: a comparative analysis of China, India, Japan and South Korea" (2010) 21 *Int J Hum Resour Man* 2249 2255.

<sup>1448</sup> E Samantroy *Reconciling Work and Family Life: A Study of Women's, Time use Patterns, Unpaid Work and Workplace Policies* (2015) 83.

<sup>1449</sup> Cooke (2010) *Int J Hum Resour Man* 2255.

<sup>1450</sup> The World Bank "Data, Labor force, female (% of total labor force)" (26-04-2016) *The World Bank*.

and benefits available in terms of the various provisions contained in labour legislation. The remaining 93% of the workforce (who work in the informal sector) are either not eligible for protection in terms of legislation or the legislation is not implemented for their benefit. As a result, these workers have insecure employment and low incomes.<sup>1451</sup> Labour legislation in India also only applies to those workers who have a clear employer-employee relationship. In India, the majority of workers are self-employed, for example as small and marginal farmers, artisans and street vendors.<sup>1452</sup> Many workers work for contractors or do not have an employer (like agricultural labourers and home-based workers). In addition, employers have been decentralising, hiring contract labour and divesting themselves of responsibility.<sup>1453</sup> This means even formal employment is becoming informal and that employees in formal employment have poor bargaining power.<sup>1454</sup> Consequently, even where laws exist, workers lack bargaining power and are too weak and too disorganised to demand implementation of and adherence to those laws.<sup>1455</sup> The Indian experience already shows that any law (and, for present purposes, any specific rights regime on the integration of work and care), should be seen subject to the practical limitations on its implementation.

#### 4.1 Maternity leave, benefits and protection

In India, provisions relating to care, specifically maternity leave and child care leave, are managed by the employer.<sup>1456</sup> In terms of the Maternity Benefit (Amendment) Act

<sup>1451</sup> Planning Commission of India "Labour Laws and Other Labour Regulations" (2007) *The Government of India* <[http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11\\_rp\\_labr.pdf](http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_rp_labr.pdf)> (accessed 30-08-2016)

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<sup>1452</sup> Government of India Labour "Report on the Fifth Annual Employment-Unemployment Survey (2015-2016) Volume 1" (2016) Labour Bureau <[http://labourbureaunew.gov.in/UserContent/EUS\\_5th\\_1.pdf](http://labourbureaunew.gov.in/UserContent/EUS_5th_1.pdf)> (accessed 14-11-2017) vi, 36; National Sample Survey Office "Key Indicators of Employment and Unemployment in India" (June 2013) *National Sample Survey Office* <<http://www.indiaenvironmentportal.org.in/files/file/key%20indicators%20of%20employment%20and%20unemployment%20India%202011-12.pdf>> (accessed 30-08-2016) 18.

<sup>1453</sup> Samantray *Reconciling Work and Family Life: A Study of Women's, Time use Patterns, Unpaid Work and Workplace Policies* 34, 72.

<sup>1454</sup> 34, 72.

<sup>1455</sup> 34, 72.

<sup>1456</sup> 122.

2017, the length of maternity leave is 26 weeks.<sup>1457</sup> In case of miscarriage or medical termination of pregnancy, an employee is entitled to six weeks of paid maternity leave.<sup>1458</sup>

The employer is responsible for providing benefits to workers in terms of the Maternity Benefit Act 1961. The maternity leave is awarded with full pay and the maternity benefit is awarded at the rate of the average daily wage for the period of an employee's actual absence from work.<sup>1459</sup> A worker is entitled to maternity benefits only if she has worked at least 80 days in an establishment in the 12 months prior to her expected date of delivery.<sup>1460</sup> Female employees are also entitled to a medical bonus of 3,500 Indian rupees if the employer provides no prenatal confinement and post-natal care free of charge.<sup>1461</sup>

Central government employees<sup>1462</sup> are entitled to 180 days fully paid maternity leave.<sup>1463</sup> The employer, being the central government, funds the maternity benefits. The private sector has its own leave rules, which vary from one organisation to another (and which are implemented against the backdrop of minimum standards in legislation).<sup>1464</sup>

The law further requires employers to provide fully paid nursing breaks of prescribed duration for new mothers in order to express breast milk for nursing until a child reaches the age of 15 months. The duration of these prescribed breaks is not provided for under the Maternity Benefit Act.<sup>1465</sup>

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<sup>1457</sup> S 3(A) of the Maternity Benefit (Amendment) Act. For women who are expecting another child after having 2 children, the duration of paid maternity leave shall be 12 weeks.

<sup>1458</sup> S 9 of the Maternity Benefit Act.

<sup>1459</sup> S 5(1) of the Maternity Benefit Act.

<sup>1460</sup> S 5(2).

<sup>1461</sup> S 8.

<sup>1462</sup> These employees are governed by the Central Civil Services (Leave) Rules 1972. Adoptive mothers who are Central Government employees are also entitled to 180 days of maternity leave but only if they have less than two surviving children at the time of adoption and if they adopt a child who is below 1 year of age. See Central Civil Services (Leave) Rules 43B.

<sup>1463</sup> Central Civil Services (Leave) Rules 43(1) and (2).

<sup>1464</sup> Samantroy *Reconciling Work and Family Life: A Study of Women's, Time use Patterns, Unpaid Work and Workplace Policies* 68.

<sup>1465</sup> S 11.

When a worker is on maternity leave, it is unlawful for her employer to dismiss her during or on account of such absence or to give notice of dismissal or to vary (to her disadvantage) any of the conditions of her employment.<sup>1466</sup>

No pregnant woman may, on a request made by her in this respect, be required by her employer to do any work during the ten weeks before her expected delivery if that work is of an arduous nature, involves long hours of standing, is likely to interfere with her pregnancy or the normal development of the foetus, or is likely to cause her miscarriage or otherwise to adversely affect her health. An employer is also required not to employ a woman during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.<sup>1467</sup>

#### 4.2 Paternity and parental leave

Male employees of the Central Government with less than two surviving children are entitled to fifteen calendar days fully paid leave to take care of their wife and new born child.<sup>1468</sup> This paternity leave may be taken fifteen days before or within six months from the date of delivery of child. If such leave is not taken within this period, it shall be treated as lapsed.<sup>1469</sup> Following this approach by the Indian Central Government, many companies and State governments have implemented similar provisions for its own employees.<sup>1470</sup>

With regard to parental leave, a female Central Government employee who has minor children below the age of 18 years, may take fully paid child care leave up to a maximum period of two years.<sup>1471</sup> This may be used for purposes of taking care for up to two children and for any reason – whether for rearing or to look after any of their

<sup>1466</sup> S 12.

<sup>1467</sup> S 4.

<sup>1468</sup> Central Civil Services (Leave) Rules 43-A(1) and (2).

<sup>1469</sup> Central Civil Services (Leave) Rules 43-A (5).

<sup>1470</sup> M Pathak & P Das “India - Employment & Labour Law 2014” (2014) *International Comparative Legal Guides* <<http://www.iclg.co.uk/practice-areas/employment-and-labour-law/employment-and-labour-law-2014/india>> (accessed 08-10-2014).

<sup>1471</sup> Central Civil Services (Leave) Rules 43-CGovernment of India “Office Memorandum: Recommendations of the 6th Central Pay Commission relating to the enhancement of the quantum of Maternity Leave and introduction of Child Care Leave in respect of Central Government employees” (11-09-2008) *Government of India* <[http://www.delhi.gov.in/DoIT/DTC/PDF/6PCR/maternity\\_leave.pdf](http://www.delhi.gov.in/DoIT/DTC/PDF/6PCR/maternity_leave.pdf)> (accessed 30-08-2016).

needs like school examination, illness, et cetera.<sup>1472</sup> As far as the provision of child care leave in the Indian public service is concerned, it is noteworthy that the Supreme Court of India recently passed a judgment in favour of uninterrupted childcare leave for 730 days to a female public servant to ensure the success of her son in his secondary/senior examinations.<sup>1473</sup> The Court held that since Rule 43-C allows for a total of 730 days of childcare leave in respect of the entire period of employment, it may be taken for reasons wider than child rearing and may be combined with other types of leave. There was no reason to disallow a continuous uninterrupted childcare leave of 730 days to the employee.

#### 4.3 Family responsibility leave

There is no express recognition of family responsibility leave in India. Employees often apply for casual leave for certain unforeseen situations or where they are required to go on leave to attend to personal matters. The employee must have permission from the employer to take casual leave. Casual leave is not a recognised type of leave<sup>1474</sup> and is not subject to any rules made by the Government of India. A Government servant on casual leave is not treated as absent from duty.

For administrative reasons and in order to ensure uniformity of treatment, a few instructions have been (almost universally) laid down by different organisations. These include that casual leave be granted only if it is without inconvenience to the public or the administration.<sup>1475</sup> Casual leave is also limited to a maximum of eight working days in a calendar year. The number of days specified is a guideline about the maximum only and no employee may claim eight days as a matter of right.<sup>1476</sup>

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<sup>1472</sup> Government of India "Office Memorandum: Recommendations of the 6th Central Pay Commission relating to the enhancement of the quantum of Maternity Leave and introduction of Child Care Leave in respect of Central Government employees" (11-09-2008) *Government of India*.

<sup>1473</sup> *Kakali Ghosh v Chief Secretary, Andaman & Nicobar Administration And Ors.* (Supreme Court), Civil Appeal No. 4506 of 2014.

<sup>1474</sup> See the explanation below Rule 11 of the Central Civil Services (Leave) Rules, 1972.

<sup>1475</sup> Anonymous "Year Book 4 Central Govt. Employees: Fundamental & Supplementary Rules + Central Civil Services Rules: Casual Leave" *Year Book for Central Government Employees* <<http://yearbook4goviemployees.weebly.com/casual-leave-cl.html>> (accessed 30-08-2016).

<sup>1476</sup> Anonymous "Year Book 4 Central Govt. Employees: Fundamental & Supplementary Rules + Central Civil Services Rules: Casual Leave" *Year Book for Central Government Employees*.

#### 4 4 Flexible working

In terms of S 3(B)(5) of the Maternity Benefit (Amendment) Act, an employer may permit a woman to work from home, if the nature of work assigned permits her to do so. The employer and the woman may mutually agree upon this. In addition, the Sixth Central Pay Commission of the Government of India recommended the introduction of the concept of staggered working hours for women employees as it would give flexibility to employees to either work early or late depending on their responsibilities at home.<sup>1477</sup> Under this proposed scheme, 11 AM to 4 PM will be core hours during which all women employees will necessarily need to be present in the office.<sup>1478</sup> They will, however, have the option of either coming up to one and a half hours earlier or leaving up to two hours later depending upon the actual time they have clocked in.<sup>1479</sup> This time may be adjusted in case the office follows different work hours. For this arrangement to succeed, biometric entry/exit would be required.<sup>1480</sup>

#### 5 China<sup>1481</sup>

In line with current policies, laws and regulations in China, the foremost types of leave include bereavement leave and maternity leave. These days off work are targeted at urban labourers and do not include rural labourers.<sup>1482</sup>

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<sup>1477</sup> Government of India “Report of the Sixth Central Pay Commission” (2008) *Ministry of Finance, Government of India* <<http://mof.gov.in/6cpc/6cpcreport.pdf>> (accessed 30-08-2016) 277-279.

<sup>1478</sup> Government of India “Report of the Sixth Central Pay Commission” (2008) *Ministry of Finance, Government of India* <<http://mof.gov.in/6cpc/6cpcreport.pdf>> 277-279.

<sup>1479</sup> Government of India “Report of the Sixth Central Pay Commission” (2008) *Ministry of Finance, Government of India* <<http://mof.gov.in/6cpc/6cpcreport.pdf>> 277-279.

<sup>1480</sup> Government of India “Report of the Sixth Central Pay Commission” (2008) *Ministry of Finance, Government of India* <<http://mof.gov.in/6cpc/6cpcreport.pdf>> 277-279.

<sup>1481</sup> The correctness of the information in this section was confirmed by Prof LI Jianfei of the Renmin University of China Law School) via email on 05-06-2017.

<sup>1482</sup> The World Bank “Data, Labor force, female (% of total labor force)” (26-04-2016) *The World Bank*.

The female labour force participation rate in China in 2016 was 63%<sup>1483</sup> and rural women form the largest group of female workers in China.<sup>1484</sup>

## 5 1 Maternity leave, benefits and protection

According to the Labour Law of the People's Republic of China,<sup>1485</sup> as well as the Regulations governing Labour Protection for Female Staff Members and Workers,<sup>1486</sup> a female worker employed by any enterprise or organisation has the right to fully paid maternity leave for 98 calendar days, including fifteen days before childbirth. Female workers who experience a difficult delivery may have an additional fifteen days maternity leave.<sup>1487</sup> Women giving birth to two or more children may also have an additional fifteen days maternity leave for each additional baby.<sup>1488</sup> Maternity leave benefits are funded by the Maternity Insurance Fund<sup>1489</sup> for employees included in maternity insurance and/or by work units. Work units cover the gap if the maternity allowance is higher than the female worker's salary and they also pay the full benefit if the female worker did not contribute to maternity insurance.<sup>1490</sup>

In addition to the nationally applicable maternity leave provisions, local governments normally set regulations to encourage maternity leave and the period of maternity leave differs from location to location.<sup>1491</sup>

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<sup>1483</sup> The World Bank "Labor force participation rate, female (% of female population ages 15+)" (2016) *The World Bank* <<http://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS>> (accessed 24-05-2017).

<sup>1484</sup> J Lin "Chinese women under economic reform: Gains and losses" (2003) 7 *Harv Asia Pac Rev* 88-90.

<sup>1485</sup> Dated 5 July 1994 and became effective 1 January 1995.

<sup>1486</sup> Adopted by the State Council on 28 June 1988 and promulgated on 21 July 1988.

<sup>1487</sup> F Wu "China country note" (2017) *International Review of Leave Policies and Research* <[http://www.leavenetwork.org/fileadmin/Leavenetwork/Country\\_notes/2017/China\\_2017\\_FIN\\_AL.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Country_notes/2017/China_2017_FIN_AL.pdf)> (accessed 28-08-2017) 2.

<sup>1488</sup> Wu "China country note" (2017) *International Review of Leave Policies and Research* 2.

<sup>1489</sup> Employers make contributions at rates determined by individual local governments: usually equivalent to between 0.5 and 1% of employee's salary. Employees do not contribute to the Fund.

<sup>1490</sup> Wu "China country note" (2017) *International Review of Leave Policies and Research* 1.

<sup>1491</sup> Bohong et al "Reconciling work and family: Issues and policies in China" (2009) *International Labour Organisation* 57; Wu "China country note" (2017) *International Review of Leave Policies and Research* 2.

Although there is a maternity insurance system in China, many enterprises are unwilling to pay maternity insurance fees or a childbirth allowance and the medical fees according to government regulations.<sup>1492</sup> Although a few social security schemes provide maternity protection successfully at the county level, such good practices are not common.<sup>1493</sup>

Hou remarks that protection for pregnant women at the workplace is not sufficient in China. Although the Labour Contract Law of the People's Republic of China<sup>1494</sup> and the Law on Protection of Women's Rights and Interests<sup>1495</sup> clearly state that female workers may not be dismissed during pregnancy, maternity leave and breastfeeding periods, there are some exceptions.<sup>1496</sup> In order to make pregnant employees resign, employers may "produce" evidence by putting pressure on employees so that it results in misconduct by the employee or incompetent behaviour and the pregnant employee may then be "legally" dismissed. The current enforcement mechanisms accordingly treat discrimination against pregnant employees as pure labour disputes and this places employees in a very unfavourable position.<sup>1497</sup>

The Regulations governing Labour Protection for Female Staff Members and Workers provides two nursing breaks (including artificial feeding) of 30 minutes each for a female employee with a baby younger than 1 year old. A woman who has polycystic ovary syndrome will have an additional 30-minute feeding time for each additional baby.<sup>1498</sup> The two feeding times may be merged into one hour and the feeding time and the time spent on the way to and back from home are counted as work time.<sup>1499</sup>

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<sup>1492</sup> Bohong et al "Reconciling work and family: Issues and policies in China" (2009) *International Labour Organisation* 58.

<sup>1493</sup> 59.

<sup>1494</sup> Came into effect on 1 January 2008.

<sup>1495</sup> Came into effect on 1 October 1992.

<sup>1496</sup> Hou *Means of Transformation?:The Role of Enforcement Mechanisms in Providing Protection against Pregnancy Discrimination in Employment* 18.

<sup>1497</sup> 18.

<sup>1498</sup> Bohong et al "Reconciling work and family: Issues and policies in China" (2009) *International Labour Organisation* 60.

<sup>1499</sup> 60.

## 5 2 Paternity and parental leave

There are no national laws providing for parental or paternity leave, but local labour regulations in most provinces do provide for fully paid paternity leave ranging from seven days to 30 days, with fifteen days in most areas.<sup>1500</sup> The Maternity Insurance Fund funds the paternity leave benefits. .

## 5 3 Family responsibility leave

There is no specific provision for family responsibility leave regarding childcare obligations in Chinese legislation.

## 5 4 Flexible working

Flexible schedules were introduced from abroad and in China it is also known as the “elastic work hour system”.<sup>1501</sup> According to Bohong the elastic work hour system in China is currently just a matter of discussion and advocated by scholars and human resource management experts.<sup>1502</sup> Practically, some international enterprises have taken the lead, and some large Chinese enterprises are also following the example and adopting some flexible schedules.<sup>1503</sup> Some enterprises, especially large enterprises which are properly managed, have adopted measures to reconcile family and work.<sup>1504</sup>

## 6 Conclusion

This chapter provided an overview of the specific rights regimes relating to work and care in four influential developing economies – Brazil, Russia, India and China – for purposes of juxtaposition with both the approaches in developed economies and with the experience in South Africa.

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<sup>1500</sup> Wu “China country note” (2017) *International Review of Leave Policies and Research* 2-3.

<sup>1501</sup> Bohong et al “Reconciling work and family: Issues and policies in China” (2009) *International Labour Organisation* 55.

<sup>1502</sup> 55.

<sup>1503</sup> 55.

<sup>1504</sup> 56.

As far as Brazil is concerned, the overview showed that specific rights on the integration of work and care afforded to employees in the private sector lag behind the public sector. Furthermore, Brazil's labour legislation only applies to workers in regulated employment, which excludes the majority of workers from legally guaranteed benefits, in particular low-income earners. Lastly, labour legislation focuses on benefits during the reproductive phase and does not facilitate the balance between work and the family throughout working life.<sup>1505</sup> Even so, Brazil's adequate maternity leave provisions, paternity leave provisions and provisions about leave to care for a sick child are impressive for a developing country. Current consideration of the extension of statutory paternity leave, together with the generous maternity leave and time off to care, provide a further example of a step in the right direction regarding the reconciliation of family responsibilities with employment duties in developing countries.

Russia seems to be the most successful BRICS's country when it comes to the integration of work and parental care. This may be attributed to, among other factors, the constitutional principle of state protection of the family, motherhood, fatherhood and childhood; adequate maternity, parental and family responsibility leave as well as the option of flexible working hours. The extended category of people to whom parental leave and leave to take care of a sick child is available, probably also contributes to the fact that Russia ranks above the average in appreciation and operationalisation of the work-care balance.

In contrast, India's specific rights regime fails to address the needs of employees with family responsibilities and does not provide sufficient choices to caregiving employees in the employment context. There is no express recognition for family responsibility leave and female employees only qualify for maternity benefits if they have worked at least 80 days in an establishment in the 12 months prior to their expected date of delivery. Furthermore, since the provision of maternity, paternity, parental and child care leave in India is not universally applicable to the public and private sectors, there is marked discrepancy with regard to extension of benefits across sectors. The majority of workers, specifically part-time and contract workers, are more vulnerable and remain excluded from policies on maternity and childcare. For India, the challenge remains to adopt an inclusive approach that protects the rights of all workers and brings them within the purview of an adequate policy framework.

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<sup>1505</sup> Sorj *Reconciling work and family: Issues and policies in Brazil* 54.

China's individual employment rights regarding leave for workers with children are inadequate and insufficient. Even though a maternity insurance system exists in China, many enterprises do not pay maternity insurance fees, a childbirth allowance or the medical fees according to government regulations.<sup>1506</sup> There is no uniform parental, paternity or family-responsibility leave system in place in China to provide time for parents to spend on care and no statutory provision for flexible working. Sufficient, uniform maternity leave, adequate paternity, parental and family responsibility leave, together with the option of flexible working, should be introduced in order to alleviate the work-family conflicts of female (and male) employees with family responsibilities and to incorporate the awareness of gender equality into the mainstream of policy-making.<sup>1507</sup>

In summary, it is submitted that the approaches and experience of the BRIC countries provide at least the following five important insights:

- (1) Given the fact that specific rights regimes about the integration of work and care may be seen as a combination of time off/leave and flexible working, these developing countries (apart from Russia) show little formal recognition of the importance of flexible working;
- (2) Approaches to time off/leave differ between these countries, with the emphasis being on maternity leave provisions with relatively little emphasis on the accommodation of ongoing care responsibilities of parents.
- (3) The provisions that do exist for time off/leave suffer from at least one marked deficiency, namely that the application of these provisions often are subject to the formal/ informal divide in developing economies.
- (4) To the extent that these provisions do find application in the formal economy, its application is also irregular in the sense that there tends to be more generous provisions in the public sector as opposed to the private sector.
- (5) Lastly, the Russian experience tends to show that adequate legal accommodation and regulation of the integration of work and parental care is, in the first place, dependent on a clear recognition of the challenge posed by the

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<sup>1506</sup> Bohong et al "Reconciling work and family: Issues and policies in China" (2009) *International Labour Organisation* 58.

<sup>1507</sup> 83.

need to integrate work and care and a clear policymaking (and, possibly, constitutional) commitment properly to address that challenge.

## CHAPTER 8: SPECIFIC RIGHTS ON THE INTEGRATION OF WORK AND CARE IN THE SOUTH AFRICAN CONTEXT

### 1 Introduction

In chapter 4 it was illustrated that the promise of discrimination litigation combined with rather superficial attempts at the recruitment of women (flowing forth from employers' affirmative action obligations) are not enough to redress the workplace inequalities arising from parental care and based on sex, gender and family responsibilities in South Africa. This inevitably requires a more focused intervention through the adoption of specific rights properly to accommodate parental care in the context of paid work. Chapters 5 to 7 provided a comparative view of the specific rights regimes in this area in eight countries, chosen because of their different levels of economic development. In doing so, the focus was on what may be called "abstracted law" – that is, the principles ensconced in legislation which are generally applicable throughout the economy and irrespective of who the employer may be. This in mind, the primary purpose of this chapter is to describe and analyse South African legislation and legislative instruments for purposes of juxtaposition with the experience of other countries and thus to enable the drawing of valid conclusions about the appropriateness of South African specific rights legislation.

What was also clear about the research conducted into the comparative experience of other countries, is that inaccessibility due to language barriers creates a significant difficulty not only in respect of access to primary sources of law, but also to a deeper analysis of the operationalisation of "abstracted" law through what may be termed "living law". By "living law" – especially in the employment context – is meant the freedom of the parties to the employment relationship to regulate their own relationship through the individual contract of employment or through collective agreements concluded between trade unions and employers.

This obstacle, evident in chapters 5, 6 and 7 (in respect of Sweden, Canada and the BRIC countries) may be mitigated to a large extent, at least as far as the provisions of abstracted law are concerned, through the responsible use of available secondary sources and other research techniques. Unfortunately, as far as the so-called "living law" is concerned, the study was hampered by the unavailability of research (compounded by the language barrier) addressing this dimension of the integration of work and care. It is submitted, though, that this is not fatal to this study. In the South

African context, access does exist to sources on the “living law”, particularly collective agreements concluded at the level of bargaining councils. While the contract of employment is the foundation of the relationship between the employee and his or her employer,<sup>1508</sup> and thus the first manifestation of “living law” in the sense used above, the contract of employment suffers from a fundamental deficiency. This deficiency becomes apparent if one considers two realities. It is true that legislation such as the BCEA limits the employer’s freedom to impose its own terms and conditions of employment – a contract may not include terms less favourable to the employee than the relevant provisions of the BCEA.<sup>1509</sup> At the same time, however, the contract of employment is the result of an inherently unequal bargaining relationship and one may reasonably expect, in the absence of a benevolent employer, no more than minimum compliance with legislation. In contrast, collective agreements, particularly bargaining council agreements, are the result of a much more equalised bargaining power between employers and employees. Thus one may expect, should true appreciation and accommodation of the integration of work and care exist in the South African workplace, that it will be reflected in these agreements. If not, it will provide yet another reason for a more universal and generous specific rights intervention at legislative level.

The second main aim of this chapter, then, is to reflect on the operationalisation of South African legislative provisions through the so-called living law, specifically in the form of bargaining council collective agreements. As will be illustrated, this shows interesting insights into the interaction between abstracted law and living law – that is the influence of legislative provisions on actual terms and conditions of employment. These insights are important for reflection back onto the content of abstracted law and the need to adapt or change existing legislation as basis for future and appropriate accommodation of the integration of work and care.

In short, then, the principal sources of specific individual employment rights regulating work and care in the South African context are legislation, collective agreements and the contract of employment. As point of departure, and although there are various labour statutes covering different aspects of the world of work, this chapter

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<sup>1508</sup> A Basson, M Christianson, A Dekker, C Garbers, P le Roux, C Mischke & E Strydom *Essential Labour Law* 5 ed (2009) 21 and Van Niekerk et al *Law@work* 5.

<sup>1509</sup> Van Niekerk et al *Law@work* 5.

focuses on statutory employment rights regulating work and care – particularly those established by the BCEA and related legislative instruments such as Sectoral Determinations and Codes of Good Practice.<sup>1510</sup> After this, the attention will shift to how these provisions have been operationalised in the context of bargaining council collective agreements.

## **2 Employment standards legislation regulating work and care in South Africa**

The principal statute giving effect to statutory terms and conditions of employment is the BCEA.<sup>1511</sup> The stated purpose of the BCEA is to advance economic development and social justice by establishing and enforcing minimum conditions of employment and by defining the circumstances in which these minimum standards may be varied.<sup>1512</sup> Some of the prescribed terms and conditions of employment may be varied by agreement between the employer and employee, other provisions may be varied by collective agreement and some provisions only by way of a collective agreement concluded in a bargaining council.<sup>1513</sup> The BCEA also contains a default set of terms and conditions of employment. If a wage-regulating measure (for example a sectoral determination or a bargaining council agreement) provides more favourable terms and conditions, it will trump any minimum condition set by the BCEA.<sup>1514</sup>

By virtue of the authority given to the Minister of Labour in terms of the BCEA, minimum wages and other terms and conditions of employment are set for certain sectors or areas of the economy that are considered vulnerable (so-called Sectoral Determinations). The Minister is advised in this regard by the Employment Conditions Commission, which is established in terms of the BCEA. Vulnerable sectors or areas are those with no unions or very little union activity and where wages tend also to fall

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<sup>1510</sup> Issued by the Minister in terms of a specific section(s) of an Act.

<sup>1511</sup> S 2; Van Niekerk et al *Law@work* 3 ed 100.

<sup>1512</sup> 101.

<sup>1513</sup> K Calitz “Basic conditions of employment” in AJ van der Walt, R le Roux & A Govindjee (eds) *Labour Law in Context* (2012) 39 40 and see the text to part 3 below.

<sup>1514</sup> Van Niekerk et al *Law@work* 101.

on the low end.<sup>1515</sup> These determinations operate as employment standards legislation (replacing the BCEA), are published as subordinate legislation and compliance thereof is monitored and enforced by the Department of Labour. A number of these Sectoral Determinations have been issued to cater for the unique circumstances of these so-called vulnerable sectors or areas, namely: forestry,<sup>1516</sup> farm workers,<sup>1517</sup> domestic workers,<sup>1518</sup> hospitality,<sup>1519</sup> children in performing arts,<sup>1520</sup> learners employed on a learnership agreement in terms of the Skills Development Act 75 of 1997,<sup>1521</sup> wholesale and retail,<sup>1522</sup> private security,<sup>1523</sup> contract cleaning,<sup>1524</sup> civil engineering<sup>1525</sup> and the taxi sector<sup>1526</sup>.<sup>1527</sup> Already – for purposes of the analysis of provisions affecting work and care – it may be said that the majority of these agreements' leave provisions are identical to those in the BCEA.<sup>1528</sup>

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<sup>1515</sup> See AH Borat & N Mayet "The impact of sectoral minimum wage laws in South Africa" (10-03-2013) *Econ 3x3* <<http://www.econ3x3.org/article/impact-sectoral-minimum-wage-laws-south-africa>> (accessed 27-08-2016).

<sup>1516</sup> Sectoral determination 12: Forestry Sector (GN R219 in GG 28598 of 17-03--2006).

<sup>1517</sup> Sectoral determination 13: Farm worker sector (GN R149 in GG 28518 of 17-02-2006).

<sup>1518</sup> Sectoral determination 7: Domestic worker sector, South Africa (GN R1068 in GG 23732 of 15-08-2002).

<sup>1519</sup> Sectoral determination 14: Hospitality section, South Africa (GN R437 in GG 29885 of 15-05-2007)

<sup>1520</sup> Sectoral determination 10: Children in the performance of advertising, artistic and cultural activities, South Africa (GN R882 in GG 26608 of 29-07-2004)

<sup>1521</sup> Sectoral determination 5: Learnerships (GN 519 in GG 22370 of 15-06-2001)

<sup>1522</sup> Sectoral determination 9: Wholesale and retail sector, South Africa (GN R162 in GG 39671 of 09-02-2016)

<sup>1523</sup> Sectoral determination 6: Private security sector, South Africa (GN R1250 in GG 22873 of 30-11-2001).

<sup>1524</sup> Sectoral determination 1: Contract cleaning sector, South Africa (GN 622 in GG 20064 of 14-05-1999).

<sup>1525</sup> Sectoral determination 2: Civil engineering sector, South Africa (GN 204 in GG 22103 of 02-03-2001).

<sup>1526</sup> Sectoral determination 11: Taxi sector (GN R409 in GG 27530 of 28-04-2005).

<sup>1527</sup> Borat & Mayet "The impact of sectoral minimum wage laws in South Africa" (10-03-2013) *Econ 3x3*; L Dancaster & T Cohen "South Africa country note" (2015) *International Review of Leave Policies and Research* <[http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual\\_reviews/2015\\_full\\_review3\\_final\\_8july.pdf](http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2015_full_review3_final_8july.pdf)> (accessed 03-03-2017) 291.

<sup>1528</sup> Dancaster & Cohen "South Africa country note" (2015) *International Review of Leave Policies and Research* 291.

## 2.1 Maternity leave, benefits and related provisions

Section 25 of the BCEA provides for a minimum period of four consecutive months' unpaid maternity leave<sup>1529</sup> with job security guaranteed through the provisions regulating automatically unfair dismissals in the Labour Relations Act 66 of 1995 ("LRA")<sup>1530</sup>.

Miller notes that, in stating that an employee is entitled to "at least" four consecutive months' leave, the BCEA allows for maternity leave to be extended beyond this minimum period, but only by agreement between the employer and employee, if the employer is open to allowing more time to be taken in this regard and if the employee could afford to take this leave, because there is a financial implication in doing so. Although this provision is very accommodating, it is not realistic, as often the employee's maternity benefits are less favourable than those she would have been receiving if she was at work and that means that employees often opt to work as long as possible, until very close to their due dates, and often return back to work earlier than the end of the four-month period. The BCEA does not oblige the employee to take the full four months' leave and an employee is entitled to return to work as soon as six weeks after the birth if she feels fit to do so. This flexibility is only restricted by the requirement for certification by a medical doctor or midwife to permit the employee to resume work any time prior to six weeks after the birth of her child.<sup>1531</sup>

An employee may commence her "maternity leave at any time from four weeks before the expected date of birth, or from a date that a medical practitioner or midwife certifies that it is necessary either for the health of the employee or her unborn child".<sup>1532</sup>

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<sup>1529</sup> In terms of the BCEA, an employee must be working 24 hours a month to be eligible for statutory maternity leave. Maternity leave is highlighted as one of the core basic conditions of employment that may not be altered even by collective agreement:

"A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not ... reduce an employee's entitlement to maternity leave ..."

See s 49(1)(d) of the BCEA.

<sup>1530</sup> S 187.

<sup>1531</sup> K Miller *An evaluation of "work-life" legislation in South Africa* 37.

<sup>1532</sup> S 25(2) of the LRA.

An employee may not work for six weeks after the birth of her child unless she obtains a medical certificate.<sup>1533</sup> An employee who miscarries in the third trimester of her pregnancy or who has a still born child is also entitled to six weeks' leave after the miscarriage or stillbirth.<sup>1534</sup>

The BCEA does not impose any obligation on employers to pay an employee her remuneration during any period of maternity leave.<sup>1535</sup> The only statutory right to income during maternity leave is that provided by the Unemployment Insurance Act 63 of 2001<sup>1536</sup> and the Unemployment Insurance Contributions Act 4 of 2002. This is for contributors only.<sup>1537</sup> These two Acts "apply to all employers and employees, but not to employees working less than 24 hours a month for an employer, members of parliament, cabinet ministers, deputy ministers, members of provincial executive councils, members of provincial legislatures and municipal councillors."<sup>1538</sup> In terms of section 24(6) of the Unemployment Insurance Act, a contributor is not entitled to benefits unless she was in employment, whether as a contributor or not, for at least thirteen weeks before the date of application for maternity benefits. Payment for maternity leave may be claimed for 17.32 weeks<sup>1539</sup> and benefits are paid at a rate of 66% of a (female) contributor's earnings up to a maximum of R17 712.00 per month.<sup>1540</sup> Application for benefits must be made at any time before or after the birth of the child.<sup>1541</sup> Compensation in respect of maternity benefits does not reduce the amount of payment of other benefits that an employee is entitled to claim from the Unemployment Insurance Fund ("UIF") (namely illness, unemployment and death benefits)<sup>1542</sup> and "unemployment insurance benefits for maternity leave are not subject

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<sup>1533</sup> S 25(3).

<sup>1534</sup> S 25(4).

<sup>1535</sup> Van Niekerk et al *Law@work* 106.

<sup>1536</sup> As amended by Amendment Act 32 of 2003 and Amended Act 10 of 2016.

<sup>1537</sup> Employers and employees are compelled to make monthly contributions, each 1% of the employee's earnings.

<sup>1538</sup> S 3 of the Unemployment Insurance Act.

<sup>1539</sup> S 24(4).

<sup>1540</sup> S 12 and GN 231 in GG 40691 of 17-03-2017.

<sup>1541</sup> Provided that the application shall be made within a period of 12 months after the date of childbirth. S 25(1) of the Unemployment Insurance Act.

<sup>1542</sup> S 13 of the Unemployment Insurance Act.

to taxation".<sup>1543</sup> Contributors are also entitled to full maternity benefits in the event of a miscarriage or stillborn child in the third trimester.

These principles already raise a number of concerns in relation to UIF benefits and eligibility for those benefits. Firstly, it is for contributors only. It is the duty of employers to register themselves and their employee(s) with the UIF and thereafter contribute monthly. If the employer does not register or contribute, which is often only discovered when an employee wants to claim UIF, he or she faces UIF arrears to be settled before the employee may claim any benefits from the UIF.<sup>1544</sup> This may take months to resolve and in the interim the employee is left with no income for the period that she is on maternity leave. The average South African employee cannot make ends meet without four months' income – especially not with the addition of an extra family member.

Secondly, the latest amendments to the Unemployment Insurance Act introduces a qualifying period of thirteen weeks applicable only to maternity benefits and not to other categories of benefits (for example unemployment benefits). It is argued that this provision is discriminatory against women and without justification.

Finally, section 13(5) of the Unemployment Insurance Act does not provide for female claimants to have an unrestricted entitlement to maternity benefits if they already have used their days of benefits claimed in terms of other categories of benefits (unemployment, illness or adoption benefits). As noted by Olivier and Govindjee, access to these other categories of benefits, however, is not affected by maternity benefits that have already been claimed and therefore amounts to a form of discrimination against females (as only they, and not males, could fall foul of this form of disparate treatment), and in fact between various categories of female beneficiaries.<sup>1545</sup>

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<sup>1543</sup> S 34.

<sup>1544</sup> See Anonymous "Domestic Workers & UIF" (2013) *Payroll 4 SA* <<http://www.payroll4sa.co.za/domestic-workers-uif/>> (accessed 18-10-2014) and Anonymous "Maternity benefit applications" (2010) *UIF 4 U* <[http://www.uif4u.co.za/index.php?option=com\\_content&view=article&id=39&Itemid=41](http://www.uif4u.co.za/index.php?option=com_content&view=article&id=39&Itemid=41)> (accessed 18-10-2014).

<sup>1545</sup> MP Olivier & A Govindjee "A critique of the Unemployment Insurance Amendment Bill" (2015) *PER* <[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812015000700011&lng=en&nrm=is0](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000700011&lng=en&nrm=is0)> (accessed 04-05-2017) 2747.

## 2.2 Accommodation of family responsibility

Section 7 of the BCEA states that “working time must be regulated by every employer with due regard to the family responsibilities of employees”. Section 27 provides paid family responsibility leave to an employee who has been in employment for more than four months and who works for an employer for at least four days per week<sup>1546</sup>. Such an employee is entitled to three working days<sup>1547</sup> family responsibility leave during every twelve months of continuous service for the following events: the birth of the employee’s child, if the employee’s child is sick, or in the event of death of the employee’s child, spouse, life partner, parent, grandparent or grandchild.<sup>1548</sup>

At the end of the leave cycle the employee’s unused entitlement to family responsibility leave lapses.<sup>1549</sup> An employer may require proof of the event for which leave is claimed.<sup>1550</sup> A collective agreement may vary the number of days and circumstances under which leave is to be granted.<sup>1551</sup>

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<sup>1546</sup> Dancaster and Baird note that no such qualification exists for other leave provisions, such as sick leave or annual leave. Also, for other leave provisions in the BCEA, such as sick leave or annual leave, the qualification for utilization is not nearly as restrictive. For employees to qualify for those two types of leave they must be working more than 24 hours a month. This is far less than the four-day restriction for family responsibility leave. Furthermore, sick leave and annual leave are not prohibited during an initial period of employment although there are restrictions on the number of days of sick leave that can be utilized by an employee during the first six months of employment. In Dancaster and Baird’s view, a blanket exclusion on the use of family responsibility leave during the first four months is not consistent with the utilization of other leave provisions in the BCEA. See L Dancaster & M Baird “Workers with Care Responsibilities: Is Work-family Integration Adequately Addressed in South African Labour Law” (2008) 29 *ILJ* 22 32.

<sup>1547</sup> Five days in the case of domestic workers. See Sectoral Determination 7: Domestic Worker Sector, 2002. Dancaster and Baird explains that the different duration of this leave for domestic workers and ‘other’ employees appears to have arisen from a concern that live-in domestic workers spend more time on travel to and from work and therefore require a longer period of leave. The provision does, in any case, not distinguish between live-in domestic workers and other domestic workers’ so the logic becomes doubtful. See Dancaster & Baird (2008) *ILJ* 32.

<sup>1548</sup> S27 of the BCEA.

<sup>1549</sup> S 27(6).

<sup>1550</sup> S 27(5).

<sup>1551</sup> S 26(7). See the text to part 3 below.

Dancaster and Cohen remark that this provision is “extremely limited in terms of duration and access”.<sup>1552</sup> Three days per year (five days for domestic workers) is “arguably not even enough to provide for the limited care – including the birth or sickness of a child and/or the death of a family member – the section does provide for”.<sup>1553</sup> If one compares the range of care provided for by the section with the different dimensions of parental care discussed in Chapter 2, the extremely narrow scope of the section, despite the promise of its heading, becomes readily apparent. Furthermore, employees such as domestic workers who find themselves in “shared employment” would have no access to this leave should they work for more than one employer during a week, like they often do.<sup>1554</sup> South Africa has no specific paternity leave legislation, but only allows paternity leave within the narrow ambit of “family responsibility” leave.<sup>1555</sup> Apart from the legislative absence of specific provision for paternity leave, there is also no allowance in South Africa for parental leave for fathers (and mothers, after the period of maternity leave). Parents who wish to take additional leave (once family responsibility leave and maternity leave have been exhausted) will have to use their annual leave or ask their employer to grant some type of special, often unpaid, leave.<sup>1556</sup>

Section 27 is restricted to employees who work at least four days per week and who have been employed for more than four months. This precludes a large number of employees, specifically part-time workers, from making use of family responsibility leave.<sup>1557</sup> The circumstances in which family responsibility leave may be used and the persons in respect of whom this leave may be granted are also too narrow.<sup>1558</sup> In view of the different dimensions of parental care identified in chapter 2, section 27 fails to

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<sup>1552</sup> See L Dancaster & T Cohen “Workers with Family Responsibilities: a Comparative Analysis for the Legal Right to Request Flexible Working Arrangements in South Africa” (2010) 34 SAJLR 31 33.

<sup>1553</sup> Dancaster & Cohen (2010) SAJLR 33.

<sup>1554</sup> Miller *An evaluation of “work-life” legislation in South Africa* 33.

<sup>1555</sup> 33.

<sup>1556</sup> Unless the goodwill of such an employer extends to an ex gratia payment, but the employee has no entitlement to payment under labour legislation. The employee may probably take paid annual leave as well, but the BCEA only provides for fifteen working days paid annual leave.

<sup>1557</sup> S 27(1) of the BCEA and Dancaster & Cohen (2010) SAJLR 33.

<sup>1558</sup> S 27 (2) of the BCEA and Dancaster & Cohen (2010) SAJLR 34.

address leave for employees to attend to unexpected emergency situations such as an injury sustained by the employee's child (or a dependant in his/her care) at school or during sport practice or, for example, if the au pair/nanny does not show up for work.

Given these apparent deficiencies and the need to address them, one starting point could be to consider the definition of "family responsibility" in section 1 of both the EEA and PEPUDA: "... the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support". Even though, as was shown in chapter 4, this definition promises more than it achieves in the context of anti-discrimination litigation, it does at least show a measure of legislative recognition and possible basis for a broader approach to the idea of family responsibility, and by implication parental care, when compared to section 27 of the BCEA. The definition contains no apparent limitations as to its application to specific types of care – it uses care or support in a broad sense. Even so, should one focus on a possible literal adaptation of this definition for purposes of future legislative regulation, two immediate changes may be suggested. The omission of "immediate" will extend the scope of care to be more accommodating of all the different dimensions of parental care, especially the evolving structures within which parental caregiving takes place. As discussed in chapter 2, this evolution is particularly evident in South Africa where there is a changing nature of "the family" (especially in the light of the HIV/AIDS epidemic in our country and the high number of orphans taken care of by family members).<sup>1559</sup> If there is to be a real focus on the nature and importance of parental care, without undue restrictions on the structures within which such care or support is provided, it becomes important to remove unnecessary restrictions on who the person(s) is or are who provide parental care. Another suggested amendment pertains to including the words "and/or are dependent on" in the definition quoted above after the word "need". This will, if such a definition is used in the context of family responsibility leave, still prevent abuse of family responsibility leave and still restrict it to dependants who really do not have anyone else to care for them. At the same time, it will broaden the scope of protected parental caregiving beyond the confines of structures not in line with the realities of our society. These and other suggestions as to how to amend and/or extend current employment standards

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<sup>1559</sup> See the text to ch 2, part 4 4 above.

legislation in the South African context in order to regulate and promote a more appropriate integration of work and parental care will be discussed in Chapter 9.

## 2.3 Codes of Good Practice

The Minister of Labour and the National Economic Development and Labour Council have the authority, in terms of legislation, to issue, change, or replace a Code of Good Practice.<sup>1560</sup> Codes of Good Practice are discretionary guides to what is "good" and "bad" practice in the workplace and any person interpreting or applying a relevant Act, must take into account any relevant Code of Good Practice. Codes of Good Practice, however, do not have the status of legislation.

The Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child<sup>1561</sup> provides that "employers must consider granting rest periods to employees who experience tiredness associated with pregnancy and should also consider that tiredness associated with pregnancy may affect an employee's ability to work overtime".<sup>1562</sup> The Code also suggests two breaks of 30 minutes during the working day for employees who are breastfeeding or expressing milk, limited to the first six months of the child's life.<sup>1563</sup> The Code further provides that employers should allow employees to attend antenatal and postnatal clinics, but does not specify how much time should be allowed for this and whether or not it is limited in any other way.<sup>1564</sup>

The Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices<sup>1565</sup> requires employers to endeavour to provide "an accessible, supportive and flexible environment for employees with family responsibilities", including "considering flexible working hours and granting sufficient

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<sup>1560</sup> See for example s 87 of the BCEA and s 203 of the LRA.

<sup>1561</sup> GN 1441 in GG 19453 of 13-11-1998.

<sup>1562</sup> Para 7.6 of the Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child.

<sup>1563</sup> Para 7.6.

<sup>1564</sup> Para 5.12 and Miller *An evaluation of "work-life" legislation in South Africa* 38.

<sup>1565</sup> GN 1358 in GG 27866 of 04-08-2005. This code provides guidelines on the elimination of unfair discrimination and the implementation of affirmative action measures in the context of key human resource areas.

family responsibility leave for both parents".<sup>1566</sup> In a sense, this seems to provide an admission that the family responsibility leave provisions of the BCEA are inadequate.<sup>1567</sup> Unfortunately, no further guidance is provided on the way in which these working arrangements could and should be structured and implemented.<sup>1568</sup>

Additionally, the Code of Good Practice on Arrangement of Working Time<sup>1569</sup> states that "working arrangements should be considered to accommodate the special needs of workers such as pregnant and breastfeeding workers, and workers with family responsibilities".<sup>1570</sup> The Code continues by requiring that relevant information be obtained by the employer by means of employee questionnaires, consultations, and negotiations.<sup>1571</sup> Although provisions like these emphasise the importance of family and care to the employee, one can only wonder how well and how often employers in fact implement this.<sup>1572</sup>

Despite the progressive approaches evidenced by the three Codes of Good Practice discussed above, the reality remains that they are merely guidelines for employers and do not have the status of legislation. Due to their content and weak enforceability, they do not afford significant additional rights to employees with caregiving responsibilities.<sup>1573</sup>

Perhaps the best that may be said about the content of these Codes, is that they do provide some form of progressive basis to sensitise employers and employees and to justify future amendments of the law, even if only to show that contemplated amendments are not too radical a departure from the existing state of affairs.

## 2 4 Flexible working and the possible enforcement of such a right

In South Africa, no separate legislative right for employees to request flexible working arrangements as, for example, in the UK, exists.<sup>1574</sup> As mentioned before, section 7(d)

<sup>1566</sup> Para 11.3.5 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices.

<sup>1567</sup> Miller *An evaluation of "work-life" legislation in South Africa* 22.

<sup>1568</sup> 63.

<sup>1569</sup> GN 1440 in GG 19453 of 13-11-1998.

<sup>1570</sup> Para 5.6 of the Code of Good Practice on Arrangement of Working Time.

<sup>1571</sup> Para 5.6.

<sup>1572</sup> Miller *An evaluation of "work-life" legislation in South Africa* 21.

<sup>1573</sup> Cohen & Dancaster (2009) *Stell LR* 237.

<sup>1574</sup> Dancaster & Baird (2008) *ILJ* 40. As to the UK, see the discussion in ch 5 above.

of the BCEA requires every employer to regulate the working time of each employee with due regard to the family responsibilities of employees.<sup>1575</sup> As also mentioned, the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices “requires employers to attempt to provide employees with family responsibilities an accessible, supportive and flexible environment” which includes “considering flexible working hours”.<sup>1576</sup> Miller remarks that at least these provisions point to recognition of the imperative to address the need for flexible working arrangements, which is an avenue open for the integration of work and care and in desperate need of exploration in South Africa.<sup>1577</sup> At face value, the provisions of the Code are impressive and underpinned by a clear statement of support for the idea of an accessible, supportive and flexible workplace environment within which parental care may be appropriately recognised and provided for.<sup>1578</sup> However, as mentioned, these provisions do not provide any guidance to employers on how working arrangements should be arranged or implemented. Given the fact that employers are not obliged, and only required to “endeavour”, to “consider” flexible working hours, it will be easy for employers to argue that they did consider it, that accommodation was impractical, or, for example, that the operational requirements of the undertaking do not allow for flexibility of the employee’s working hours.

Given these reservations, it is submitted that South Africa, along the lines of the Code, need, at the very least, the development of specific legislative rights to oblige employers to provide employees with parental care responsibilities with a generally, and not only incident-based, accessible, supportive and flexible workplace environment. This could, along the lines of the UK, but also mindful of the limitations experienced in the UK, include at least the duty of employers to consider a request for flexible working hours in a reasonable manner with a concomitant requirement that employers should provide (written) reasons to the employee if the request is denied. Furthermore, as far as possible rejection of such a request is concerned, our law needs a carefully circumscribed set of circumstances justifying such a rejection. Lastly, an

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<sup>1575</sup> See the text to part 2 2 above.

<sup>1576</sup> See the text to part 2 3 above.

<sup>1577</sup> Miller *An evaluation of “work-life” legislation in South Africa* 22.

<sup>1578</sup> 23.

effective system of dispute resolution should be available in case of disputes about the denial of such a request to work flexible hours.

In this regard, the (at least, in principle) quick, cheap and efficient dispute resolution machinery provided by bargaining councils and the CCMA seems an obvious solution. In this context, the standard two-stage model of dispute resolution entails conciliation and arbitration.<sup>1579</sup> In particular, conciliation (a guided attempt to settle a dispute) has proved itself very effective in the quick resolution of disputes, also in the context of an ongoing relationship between employer and employee. However, as the discussion in chapter 4 on anti-discrimination litigation after the EEA amendments showed, the availability of an effective and cheap dispute resolution system is no guarantee for a right to flourish (at least as far as family responsibilities are concerned). Ultimately, enforcement and resolution also depends on the content of the right itself, conceptual difficulties associated with the right and proper appreciation of that right.

In any event, the model of enforcement discussed in the previous paragraph may be contrasted with the current model of enforcement adopted for breaches of the BCEA. The Department of Labour is responsible for enforcing the BCEA.<sup>1580</sup> The Department appoints inspectors who have wide powers to make sure employers comply with the Act.<sup>1581</sup> An employee whose employer is not complying with the BCEA may complain to the Department of Labour.<sup>1582</sup> A labour inspector “who has reasonable grounds to believe that an employer has not complied with any provision of [the BCEA] must endeavour to secure a written undertaking by the employer to comply with the provision”.<sup>1583</sup> The inspector may issue a “Compliance Order” to employers who do not obey the BCEA.<sup>1584</sup> If the employer ignores the compliance order, the Department of Labour must refer the matter to the Labour Court to force the employer to comply.<sup>1585</sup> Employers are also entitled to appeal against compliance orders to the Director General of Labour or the Labour Court.<sup>1586</sup> The fundamental

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<sup>1579</sup> S 115 of the LRA.

<sup>1580</sup> S 63 of the BCEA.

<sup>1581</sup> Ss 65 and 66.

<sup>1582</sup> S 64(1)(c).

<sup>1583</sup> S 68(1).

<sup>1584</sup> S 69(1).

<sup>1585</sup> S 73.

<sup>1586</sup> S 72.

problem envisaged with such a system of enforcement of a possible right to request flexible working hours simply is that the identification and appreciation of possible breaches of such a right (given possible grounds of justification available to employers) might be difficult, time consuming and beyond the capacity of the Department's labour inspectorate. It might also need an environment (such as conciliation at a council or the CCMA under the guidance of a trained commissioner) conducive to creative problem-solving for the effective resolution of the dispute and, concomitantly, the effective accommodation of the integration of work and care in the workplace.

### **3 Provision of collective agreements concluded in a bargaining council**

The first part of this chapter addressed the specific rights provisions contained in legislative and related instruments in South Africa, which – through their provisions around time off and leave, as well as flexible working – have a bearing on the integration of work and care in the South African workplace. As discussed earlier, the leave provisions in the BCEA and sectoral determinations are minimum standards that may be improved upon through collective bargaining or contract<sup>1587</sup>. One specific type of collective agreement – concluded at the level of a bargaining council – sets out terms and conditions of employment for a particular industry in a particular area. Such an agreement typically covers aspects such as minimum wages and conditions of work in that particular industry and area. The LRA confers binding force on collective agreements (also bargaining council agreements), and provides that their terms vary, where applicable, any contract of employment between an employer and an employee who are bound by the agreement.<sup>1588</sup>

Thus, one of the ways in which these legislative work and care provisions are operationalised in South African workplaces is through collective agreements

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<sup>1587</sup> "A bargaining council is an organisation made up of employers' organisations and trade unions, established for a certain area and sector, with the purpose of reaching enforceable agreements on conditions of employment and other matters of mutual interest." See Calitz "Basic conditions of employment" in *Labour Law in Context* 39 40. Ss 27 – 24 (Part C) of the LRA regulates Bargaining Councils and ss 35-38 (Part D) Bargaining Councils in the Public Service.

<sup>1588</sup> Van Niekerk et al *Law@work* 110. This consequence is reinforced by section 199 of the LRA, which states that an employee may not, in terms of a contract of employment, be paid less remuneration or treated less favourably than prescribed by a collective agreement. Any term of a contract of employment that waives these protections is invalid.

concluded at the level of bargaining councils. One of the aims of this chapter is to provide an overview of how work and care provisions have been operationalised at bargaining council level. At the outset, it is important to recognise that such an overview is, to some extent, limited. First, information on leave provisions in bargaining council agreements remains difficult to obtain, because there is not an accessible database with the agreements of all the bargaining councils in South Africa.<sup>1589</sup> Secondly, bargaining council agreements are also not necessarily a perfect indicator of actual employment (or work and care) provisions across the economy, because bargaining councils do not exist in respect of all sectors. Thirdly, even in the sectors that do have bargaining councils, all employers are not necessarily members of the bargaining council or covered by the scope of the collective agreements reached at that bargaining council.<sup>1590</sup> Lastly, even employers bound by bargaining council agreements, may actually provide for better terms and conditions of employment than those provided for in the bargaining council agreement. Despite these reservations, this study analysed agreements concluded in thirty registered bargaining councils<sup>1591</sup> to determine whether these agreements provide more favourable leave provisions and flexible work arrangements compared to basic standards legislation and sectoral determinations discussed earlier in this chapter. It is submitted that this sample is large enough to give a reliable indication of any sensitivity shown for the integration of work and care in addition to the basic provisions of legislation. This, in turn, might be reflected back onto current provisions in legislation and their effectiveness in promoting a culture of accommodation of the integration of work and care.

27 out of the 30 bargaining councils reviewed are private sector bargaining councils<sup>1592</sup> (and of these thirteen are national bargaining councils) while three

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<sup>1589</sup> Dancaster & Cohen “South Africa” (2015) *International Review of Leave Policies and Research* 1.

<sup>1590</sup> 1.

<sup>1591</sup> Out of 47 registered bargaining councils in South Africa. The South African Labour Guide “Bargaining Councils” (June 2016) *The South African Labour Guide* <<http://www.labourguide.co.za/bargaining-councils>> (accessed 27-08-2016).

<sup>1592</sup> Collective agreements in the following private sector bargaining councils were analysed: Bargaining Council for the Building Industry (Cape of Good Hope); Bargaining Council for the Building Industry (Kimberley) Collective agreement; Bargaining Council for the Canvas Goods Industry (Witwatersrand & Pretoria); Bargaining Council for the Contract Cleaning Services Industry (Kwazulu-Natal); Bargaining Council for the Civil Engineering Industry; National

councils are registered local government and public service bargaining councils.<sup>1593</sup> 24 different industries were studied. The study includes distinctive chambers of the bargaining councils for the chemical industry (chemicals, fast moving consumer goods, glass, and pharmaceutical), leather industry (tanning and footwear) and the wood and paper industry (pulp and paper, particle and tissue, sawmilling and fibre). In some instances, bargaining councils in the same industry have different agreements for different geographical areas.<sup>1594</sup> This study includes a number of these variations.

### 3 1 Maternity leave

A review of these agreements show firstly, that, as far as the duration of maternity leave is concerned, approximately 63% of the agreements mirror the four consecutive months stipulated in the BCEA.<sup>1595</sup> About 6% provide for five months, approximately 26% for six months and approximately 6% for more than six months' maternity leave (up to a maximum of 184 unpaid calendar days in addition to the four months' maternity

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Bargaining Council for the Chemical Industry; National Bargaining Council for Clothing Manufacturing Industry; Bargaining Council for the Diamond Cutting Industry (SA); National Bargaining Council for the Electrical Industry of South Africa, Bargaining Council for the Fishing Industry (National); Bargaining Council for the Food Retail, Restaurant, Catering & Allied Trades; Furniture Bargaining Council; Bargaining Council for the Furniture Manufacturing Industry Western Cape; Bargaining Council for the Furniture Manufacturing Industry Kwazulu Natal; National Bargaining Council for the Hairdressing, Cosmetology, Beauty and Skincare Industry; Bargaining Council for the Laundry, Cleaning and Dyeing Industry (Cape); Bargaining Council for the Laundry, Cleaning and Dyeing Industry (Kwazulu-Natal); National Bargaining Council of the Leather Industry of South Africa; Metal and Engineering Industries Bargaining Council (National); Motor Industry Bargaining Council (National); Motor Ferry Industry Bargaining Council of South Africa (National); Bargaining Council for the New Tyre Manufacturing Industry (National); National Bargaining Council for the Road Freight and Logistics Industry ("NBCRFLI"); National Bargaining Council for the Sugar Manufacturing and Refining Industry; South African Road Passenger Bargaining Council ("SARPBAC"); National Textile Bargaining Council and the National Bargaining Council for the Wood and Paper Sector.

<sup>1593</sup> The following statutory bargaining councils were used for the study: the Public Service Co-ordinating Bargaining Council; the Safety and Security Sectoral Bargaining Council and the South African Local Government Bargaining Council.

<sup>1594</sup> See for example the Clothing Manufacturing Industry, the Furniture Manufacturing Industry, the Laundry and the Cleaning and Dyeing Industry.

<sup>1595</sup> S 49(1)(d) of the BCEA states that a collective bargaining agreement may not reduce an employee's entitlement to maternity leave to less than four consecutive months.

leave<sup>1596</sup>). Just over 50% of the agreements provides for unpaid maternity leave, approximately 45% provides for payment (ranging from 10% to 100% and on average 50%) and about 3% specifically provides for additional unpaid maternity leave of about ten weeks (in addition to four months paid maternity leave). It must be noted that about 15% of the agreements requires a female employee to be employed for a prescribed minimum period (ranging from six months to two years) in order to receive maternity benefits. About 3% of the agreements also requires that the employee must remain in service, on average for one year, after the birth of the child in order to qualify for the benefit. Approximately 9% of the agreements provides for a “Plan” or “Fund” (to which the employee is obliged to contribute each month) and the maternity benefits are then paid from this plan (often called a “Family Medical Crisis Plan”, “Sick Pay Fund”, etcetera). Only 9% of the agreements provides leave (ranging from one to eight days) to attend prenatal check-ups.

This suggests that while the maternity leave provisions in the bargaining council agreements largely mirror the BCEA, there is evidence of a modest upward variation from the standards laid down in the BCEA. At the same time, it is evident that very little provision is made for female employees to spend more than the statutory four months with their babies to enable and strengthen attachment and to be actively involved in the crucial first year(s) of their development.<sup>1597</sup> Working women are furthermore likely to utilise sick leave or annual leave for prenatal check-ups if the employer is not willing to give time off and to also experience a substantial reduction in income during maternity leave.

### 3.2 Family responsibility leave

With regard to family responsibility leave, some agreements provides a “catch-all” family-responsibility leave provision, including paternity and/or compassionate leave. Others treat paternity, child care and compassionate leave independently and under

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<sup>1596</sup> The 184 days’ unpaid leave is not an automatic entitlement and available upon application. See the Public Service Co-ordinating Bargaining Council agreement and the Safety and Security Sectoral Bargaining Council agreement. Opposed to this, SARPBAC makes provision for an entitlement (at the option of the employee) for ten weeks unpaid leave after the sixteen weeks maternity leave.

<sup>1597</sup> See discussion in ch 2 above.

different headings (compared to “family responsibility leave”) in the agreement. The studied agreements do not approach these leave categories in a uniform way.

In respect of paid family responsibility leave, approximately 34% of the agreements under review provides for three days leave, about 6% provides for four days leave, approximately 23% provides for 5 days leave<sup>1598</sup> and about 6% provides for six days leave. Almost 31% of the agreements makes provision for a “catch-all” leave provision under the heading(s) “family responsibility leave” and/or paternity leave<sup>1599</sup> and/or child care leave<sup>1600</sup> and/or compassionate leave<sup>1601</sup>. The duration of the leave in these agreements range from eight to fourteen days (averaging eleven days) and almost all of the agreements make provision for paid leave. More days are granted for compassionate leave compared to paternity and child care leave. It must be noted that almost half of the agreements require employees to be employed for a prescribed minimum period (predominantly four months) and to work for a minimum number of days per week (predominantly four days) in order to utilise family responsibility leave.

Although around a third of the agreements restate the BCEA’s three days family responsibility leave provisions, the majority of the agreements provide more favourable leave provisions for family responsibility. It seems as if employees benefit more if family responsibility leave is divided into independent “categories” such as paternity, child care and compassionate leave.

Only two statutory bargaining council agreements, those concluded in the Public Service Co-ordinating Bargaining Council and the Safety and Security Sectoral Bargaining Council, make provision for parental leave for male and female employees. These two agreements state that employees who have used all their family responsibility leave may, subject to the approval of the Head of Department, apply to use up to 184 calendar days of unpaid leave. The Road Passenger Industry’s agreement only provides for ten weeks unpaid leave for female employees after the

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<sup>1598</sup> It must be noted that about 20% of the 24% provides for three days paid and two days unpaid family responsibility leave.

<sup>1599</sup> Paternity leave is mainly available to employees when their child is born.

<sup>1600</sup> Mainly to be utilised to care for a sick child or if the employees spouse is ill (and cannot look after the child). Paternity and child care leave are combined (included in one heading) in some of the agreements.

<sup>1601</sup> Mainly available in case of the death of an immediate family member (this includes, in the majority of agreements, the employee’s spouse, life partner, child, parents, siblings and grandparents).

sixteen weeks' maternity leave. Although the provision(s) of parental leave is welcome, it is only manifest in a (very) small percentage of the agreements and it is doubtful whether employees will be able to afford to take unpaid leave.

### 3 3 Flexible working

Only 6% of the studied collective bargaining agreements make provision for flexible working hours subject to the employer's consent.

### 3 4 Impressions on the operationalisation of the integration of work and care through bargaining council agreements

Many bargaining council agreements simply refer to the BCEA provisions or simply restate certain conditions contained in the BCEA verbatim. Here, of course, one should always bear in mind the deficiencies already contained in the approach of the BCEA to the integration of work and care as discussed earlier. On balance though, it may be concluded that bargaining council agreements do provide more favourable leave provisions compared to basic standards legislation and sectoral determinations. The same is not true in respect of flexible work arrangements. The few agreements that do make provision for flexible working hours, specifically state that adoption or extension of a right to flexible working hours remains subject to the employer's consent. Nothing prohibits the employer to simply deny such a request. Presumably, any dispute about flexible working hours might be referred as a dispute about the interpretation or application of such a bargaining council agreement and be resolved in terms of the dispute resolution procedures of the council.<sup>1602</sup> This, however, will depend on the wording of the agreement and the scope, if any, for an interpretation around the fairness of the employer's conduct and how difficult it is for an employer to justify the refusal. It will undoubtedly be easy for an employer to prove that flexible working is not practical or that the operational requirements of the undertaking do not allow for flexibility of the employee's working hours.<sup>1603</sup>

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<sup>1602</sup> In terms of section 24 of the LRA.

<sup>1603</sup> See the text to part 2 4 above.

#### 4 Conclusion

The purpose of this chapter was twofold. Firstly, it provided an overview and analysis of existing legislative instruments containing provisions catering for the integration of work and parental care in South Africa. Secondly, it extended the approach of previous comparative chapters to include the impact of “living law” on the regulation of work and parental care. For the reasons provided in the introduction, and despite reservations about such a methodology, this was done by focusing on a representative sample of bargaining council collective agreements where it would be most likely to find an extended commitment to proper regulation of work and parental care.

The chapter showed that in South Africa both types of specific rights legislative intervention evidenced by the international comparative experience discussed in chapters 5 to 7 – time off or leave as well as flexible working options – are extremely limited and deficient. As far as time off and leave are concerned, the discussion showed that maternity, paternity, parental and family responsibility leave (especially the last three) are catered for at very low levels. There is also no express provision for flexible working options as longer-term measures to accommodate employees who provide ongoing care. As such, existing provisions in South African law – also given the deficiencies associated with the anti-discrimination litigation experience – are simply not sufficient to cater for parental care in all its different dimensions. South African law does not provide employees with sufficient family responsibility choices to ensure that they are able to care for their children in a manner that best suits their circumstances. The combination of limited provision for maternity leave, restrictive provision for family responsibility leave and weak provision for broad flexibility in working arrangements seems to make it clear that “accommodation of care responsibilities largely is perceived as an exception to the rule (as opposed to the integration of work and care)”.<sup>1604</sup> The current inadequate and ineffective employment standard legislation means that “employees with caregiving responsibilities have no choice but to rely on the generosity of their employers to implement work measures accommodating their family responsibilities or to use their own resources to pursue unfair discrimination claims based on family responsibilities”.<sup>1605</sup> As chapter 4 showed, however, last mentioned possibility is more apparent than real.

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<sup>1604</sup> Dancaster and Baird 2008 *ILJ* 42. Also see Smith (2006) *Syd Law Rev* 689 692.

<sup>1605</sup> Cohen & Dancaster (2009) *Stell LR* 239.

These insights are largely confirmed and compounded by the survey of bargaining council collective agreements conducted in this chapter. In the context of bargaining councils, where there is a fair measure of equalised bargaining power (at least compared to the contract of employment), one would expect a real extension of the integration of work and care against the backdrop of minimum standards legislation. In this regard, the chapter showed that many bargaining councils do show – at least to some extent – an upward variation of the leave provisions of the BCEA. This is true in respect of the duration of leave, as well as the types of leave typically associated with parental care. As mentioned, however, bargaining council agreements are of limited application and are a poor predictor of the real state of affairs for the many employees who work under individual contracts of employment not influenced by collective bargaining. Furthermore, the review of bargaining council agreements showed that flexible work arrangements are barely addressed. The mere fact that some bargaining council agreements make provision for more favourable leave provisions – and this is compared to the already deficient provisions of the BCEA – hardly is a sufficient basis on which to say that work and parental care are or will be successfully integrated in South Africa through societal processes such as collective bargaining.

This raises the possibility of legislative amendment properly to provide an adequate platform for the integration of work and parental care in South Africa. In this regard, the discussion showed that there is, at least, a measure of recognition for a broader approach to the different dimensions of parental care as an ongoing concern, what the demands of providing such care on employees are and how best to accommodate it. This recognition is found in a relatively broad (though currently ineffectual) definition of “family responsibilities” in the EEA and at least some recognition for the importance of flexibility in section 7 of the BCEA and the (non-binding) Codes of Good Practice discussed in this chapter.

In conclusion, it may be said that labour legislation should view work-care integration as an objective important enough to provide broader access to time off for purposes of parental care and also to provide for broader workplace flexibility. The basis for this already exists. As far as family responsibility and associated types of leave are concerned, the discussion showed that a review is required. Specific consideration should be given to the prerequisites to take this leave, the circumstances for which it may be used, the duration thereof and the definition of dependants,

preferably in light of the view of family responsibility already established in the EEA. As far as flexible working is concerned, there is, for example, no reason why aspects of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices could not be incorporated into legislation to oblige employers to provide employees with family responsibilities an accessible, supportive and flexible environment. Along the lines of the UK experience, this could include the duty of employers to consider a request for flexible working hours in a reasonable manner. Employers could be required to provide (written) reasons to the employee if the request is denied and disputes may be subjected to an effective dispute resolution procedure. These issues and proposals are explored in more detail in chapter 9 below.

## CHAPTER 9: SUMMARY OF FINDINGS AND RECOMMENDATIONS

### 1 Introduction

The point of departure of this research was a combination of three realities: Firstly, the importance of parenting to children, parents, families, employers and broader society; secondly, the importance of work to individuals and families to provide the means to participate as best they can in all the processes that make up any society; and, thirdly, the need for appropriate legal regulation to facilitate the integration of work and care to the benefit of all concerned. While agreements – individual or collective, form part and parcel of that legal regulation – the focus of this study was on how legislation is used to contribute to the integration of work and care. Furthermore, a fundamental premise of this study was the possibility of integrating care with what could be described as full-time work (as opposed to atypical types of employment). While the focus of this study was largely on the provisions of law that support work-care integration of “employees”, the rights of all workers, including the multitude of workers in the informal economy who are often not recognized and protected under legal and regulatory frameworks, need to be acknowledged, considered and addressed. Although this is an area for future research, it necessitates to be mentioned here that these workers are characterized by a high degree of vulnerability and poverty and are therefore even more in need of legislative support for work-care integration. The prevalence of informal employment in many parts of the world not only affects the current living standards of the population but is also a severe constraint that prevents households and economic units trapped in the informal economy from increasing productivity and finding a route out of poverty. It is therefore necessary to facilitate transitions from the informal economy to the formal economy.<sup>1606</sup> To ensure that labour legislation affords appropriate protection for all workers, governments should be encouraged to review how employment relationships have been evolving and to identify and adequately protect all workers.<sup>1607</sup>

As far as legislation is concerned, the focus was on the two recognised types of legislation – equality legislation and employment standards legislation (also referred to in the study as specific rights) used to facilitate the integration of work and care. The

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<sup>1606</sup> International Labour Office “Transitioning from the informal to the formal economy Report V(1)” *International Labour Office* 4.

<sup>1607</sup> 71.

South African approach to the legislative facilitation of the integration of work and care was measured against a representative sample of developed and developing countries. The key findings and recommendations for the way forward for South Africa are summarised below.

## **2 The nature and importance of parenting in the context of the need to work**

As a precondition for committed and successful regulation of the integration of work and care, the study first investigated the importance and nature of parenting. In this regard, the following findings were made:

2 1 Sufficient parental care provides the most fundamental expression of a decent and civilised society<sup>1608</sup> and is beneficial to employers, parents, children (through all stages of their development), the economy and society. Any committed attempt at appropriate regulation of the integration of work and care should embrace this fundamental insight.

2 2 Although society benefits from families' and women's caregiving work<sup>1609</sup>, inequalities still exist in the workplace between men and women as a result of the devotion of mothers, as primary caregivers, to their children's needs. Appropriate regulation should recognise the gender dimension inherent in caregiving.

2 3 The protection and recognition of the family, as the natural and fundamental group unit of society and with the responsibility to care for dependent children, includes, *inter alia*, the right to be a parent and to care for your child, the right of children to family care or parental care and equality between the sexes within the family context.<sup>1610</sup>

2 4 "Family", "parenting" and "care" are difficult to define and cannot be seen as independent of one another. These phenomena, apart from their own changing

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<sup>1608</sup> Busby & James "Introduction" in *Families, Care-giving and Paid Work* 193.

<sup>1609</sup> Gornick & Meyers *Families That Work* 8.

<sup>1610</sup> Also see Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 19.

natures, are intertwined and function in conjunction with each other. Parenting is the major function of (very different kinds of) the family, and the family functions as the primary (although not necessary) institution within which parental care is provided to children. The absence of a clear, standard definition of "family", the diversity of family structures and the growing social acceptability of formerly discouraged or prohibited types of family units remain challenging and also impact on who may rightfully be recognised as a "parent". This means that any attempt at regulating the integration of work and care should be flexible enough to accommodate the variety of structures within which caregiving takes place.

2 5 Parental caregiving takes place over the lifetime of a child although the emphasis shifts as a child grows older. General consensus exists that the most acute need for caregiving exists during the first few years after a child is born – especially during the first year. Appropriate regulation should recognise these core periods during the development of all children.

2 6 Parental caregiving (especially during a child's first years) may require separation between the caregiver (as employee) and the workplace. However, the goal should always be the facilitation of integration (flexible accommodation) rather than mere separation.

### **3 International, regional and constitutional recognition of the importance of parenting**

As a first step to evaluate the legal regulation of the integration of work and care, the study investigated recognition of the importance of the "family" and, by implication and sometimes in express terms, parenting and care as part of family life at international, regional and constitutional level. The study showed:

3 1 The existence of widespread recognition of the importance of the family, parenting and care at international and regional level. While the primary focus in this context is on the family, it is evident from the research that protection and recognition of the family include, *inter alia*, the right to be a parent and to care for your child; the right of children to family care or parental care and equality between the sexes within

the family context.<sup>1611</sup> It is also clear that the recognition of the family entails protection of the family as a single entity as well as protection of individual members within the unit.<sup>1612</sup>

3 2 Although international and regional human rights instruments provide for the protection of the family, mere ratification of these instruments is not enough. Proper enforcement mechanisms are necessary to ensure adequate integration of work and care in the international and different domestic contexts. However, as stated by Dancaster, “there is scope for these international standards to play an important role in statutory interpretation on matters relating to work-care integration and for these international standards to become binding at a domestic level”.<sup>1613</sup>

3 3 Although constitutional protection of family and care is the global norm, the absence of an express constitutional provision to this effect does not necessarily mean that constitutional protection is absent. In South Africa, specifically, several other constitutional rights may be and have been interpreted to afford protection to the family.

3 4 The true legal operationalisation of the integration of work and care happens – and should happen – at domestic level through legislation subordinate to international and constitutional protection, such as there may be.

#### **4 The experience with equality law as a mode of regulation of the integration of work and care**

The appropriateness of equality legislation (and its application) to facilitate the integration of work and care was considered on a comparative basis, which led to the following key insights:

4 1 Because of the gender bias inherent in caregiving, equality law shows a close and seemingly natural fit with any attempt to regulate the integration of work and care.

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<sup>1611</sup> 19.

<sup>1612</sup> 19.

<sup>1613</sup> Dancaster *State and Employer Involvement in Work-Care Integration in South Africa* 47.

4 2 Equality law has two dimensions – a prohibition on (unfair) discrimination and (especially in the South African context) affirmative action on the basis of sex or gender. The remark in 4 1 is true of all the dimensions of equality law – specifically with regards to direct discrimination on the grounds of pregnancy or family responsibility (and especially in countries like South Africa where family responsibility is recognised as a ground of discrimination); indirect discrimination on the grounds of sex or gender; and recognition of the importance of accommodation as part of anti-discrimination law and as part of affirmative action.

4 3 Even so, the worldwide experience with anti-discrimination law has shown barriers to exist for the concept to flourish by means of (individualised) litigation.

4 4 Despite these barriers, South African anti-discrimination law, especially after the 2014 amendments, is well positioned to make a substantial contribution to the facilitation of the integration of work and care. In particular:

4 4 1 Pregnancy, sex, gender and family responsibility are listed as grounds of discrimination and family responsibility is given an open and fairly wide definition;

4 4 2 Fault is not a requirement in South African discrimination law;

4 4 3 A suitable comparator is not a requirement for a successful claim of discrimination – just a link between the employer's conduct complained of and the ground of discrimination;

4 4 4 Although South African courts have regarded it as axiomatic that discrimination may be “fair”, the enquiry into fairness begins (and ends) with the impact on the dignity of the employee. This means not only that it is easy to argue that attempts by employers to accommodate a complaining employee is part and parcel of the enquiry into fairness, but also that discrimination remains difficult to justify;

4 4 5 In discrimination cases based on pregnancy, sex, gender or family responsibility (as listed grounds), the full onus of persuasion (after the amendments)

is on the employer to show either that the discrimination did not take place or that it is rational and fair or justified;

4 4 6 After the amendments to the EEA, the CCMA now has jurisdiction to arbitrate all discrimination cases where the complaining employee earns below the threshold (this includes by far the majority of employees). Access to the CCMA is inexpensive and its procedures quick.

4 5 Despite being so well-positioned, anti-discrimination law in the South African context has not delivered on its promise as far as its potential facilitation of the integration of work and care is concerned:

4 5 1 There has been no reliance on family responsibility as a ground of discrimination (at least not by the real caregivers);

4 5 2 There have been virtually no indirect discrimination cases – it remains a poorly understood concept which, in practice, is non-existent;

4 5 3 There has been very little guidance on the role of (reasonable) accommodation as part of discrimination law – both in the context of discrimination law as such, and also in the specific context of family responsibility or caregiving.

4 6 As far as affirmative action is concerned, South Africa is unique worldwide in the “aggressive” nature of affirmative action permitted by the EEA, also on the basis of sex or gender. In this regard, the study showed:

4 6 1 that affirmative action also requires accommodation of employees and the removal of barriers to (continued) employment;

4 6 2 despite this, female employees are comparatively sparse at higher levels in organisations;

4 6 3 that this, in turn, may well be due to two interlinked factors:

4 6 3 1 the focus in the practice of affirmative action on (rather superficial) appointment and promotion; and

4 6 3 2 the absence of the removal of hidden barriers (caused by female caregiving responsibilities) over the course of employment in order to ensure a female talent pipeline, inclusive of participation in employment and progression to higher levels of employment.

4 7 Perhaps the biggest insights to be gained from a comparative overview of discrimination legislation and litigation are:

4 7 1 the use of anti-discrimination litigation to facilitate the integration of work and care has been limited, haphazard and often yields to other, more applicable and accessible remedies;

4 7 2 the need for an administrative organisation (as we find, for example in the USA, the UK and Canada) to raise the profile and awareness of anti-discrimination law through, *inter alia*, advice and assistance in litigation (inclusive of bringing test cases); and

4 7 3 the reminder that the potential for discrimination law to bring change is huge (especially, in the South African context, seen in light of the remarks in 4 4 above).

## 5 Specific rights in developed economies

Given the reservations about the success of equality law to facilitate the integration of work and care, the study shifted attention to a comparative overview of so-called specific rights legislation (employment standards legislation). The focus was on the time off/leave provisions in the legislation of the countries reviewed, as well on whether and to what extent provisions are made for flexible working. Attention was first paid to four developed countries – the UK and Sweden (in the European context), Canada and the USA. The key findings of the review of these developed countries were:

5 1 The UK and Sweden share a European history which includes both legislation (focusing on time off and leave) and the clear statements of support for the importance of care in the workplace by the CJEU.

5 2 Despite this shared European heritage, these two countries differ in their approaches to the integration of work and care. The specific rights regimes consist of a leave based system in Sweden (which, while it allows for care, also allows for the flexible integration of work and care due to its generous provisions) or a flexibility based system like the UK (which expressly allows for the right to request flexible working and the flexible integration of work and care while, at the same time, providing for different types of leave).

5 3 Even among developed countries like the UK and Sweden, specific rights differ widely. There are basic similarities (such as types of leave provided), but real differences in the actual level of protection provided and also who qualifies for such protection.

5 4 The Swedish example shows that specific rights, given the deficiencies of anti-discrimination law, may also have the potential of contributing to true equality – with men and women sharing parental care (this despite the high level of gender segregation that persists in Sweden). As such, with a shift from maternity care to parental care, specific rights (albeit a high level thereof) may assist in deconstructing the gender bias inherent in care.

5 5 The UK experience shows that a specific rights regime based on a direct right to request flexible working may be augmented by anti-discrimination law, but with the proviso that this, in turn, depends on the degree of sophistication of that discrimination law and its application. Such sophistication requires at least true appreciation of the principle of indirect discrimination based on sex or gender, and, at least in the South African context, true appreciation of the meaning of family responsibility as a gender neutral ground for possible direct discrimination claims.

5 6 The UK experience with the right to request flexible working shows that any specific right is only as strong as its scope of application and its exceptions. One would

expect appropriate regulation of the integration of work and care to include true accommodation of parental care through a right to flexibility as a strong right that may be asserted with ease and confidence and with proper recourse if infringed.

5 7 Sweden's generous and flexible parental leave policy also raises the issue that the level of specific provision for parental care is as much a function of what is fair (also in the context of equality) as it is of affordability. The level of such rights has to be seen in the context of societal levels of development as well as the operational realities of employers.

5 8 The experience of Quebec showed that, even in the absence of legislation explicitly giving employees a right to request flexible working hours and requiring employers to consider such requests, parents at least have some measure of flexibility as to how<sup>1614</sup> and when<sup>1615</sup> they want to use their maternity, paternity and parental leave. The availability of adequate leave with benefits, coupled with the fact that parents may choose how and when they want to use this leave in order to spend time with their child(ren) does, to some extent, mitigate the lack of specific legislation granting employees a right to request flexible working hours.

5 9 Similarly, the experience in Ontario shows generous family related leave as well as an extensive scope of "family". Not many countries include step-parents, step- and foster children, step-siblings, step grandchildren, step-in-laws, uncles and aunts, nephews and nieces and, on top of this, the broad range of "a person who the employee considers to be like a family member", in their definition of "family". This definition is in line with a 21<sup>st</sup> century society with fractured families and extremely varied family configurations.

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<sup>1614</sup> Paternity leave may be taken for three weeks at 75% of average weekly income or for five weeks at 70% up to an earnings ceiling. Parents can choose between a longer or shorter period of parental leave with respectively lower and higher benefits, parental leave may be shared between the father and the mother, parental leave may be added to maternity or paternity leave.

<sup>1615</sup> Maternity leave may be spread out as the employee sees fit before or after the expected date of delivery. Paternity leave may be taken in the week of the child's birth and must be taken within 52 weeks thereafter and parental leave must be taken within 70 weeks after the birth or adoption of a child.

5 10 The USA, despite its advanced levels of development, shows inadequate support to families because of the limited applicability of legislation and, even to the extent that legislation does apply, its failure to account for individuals' dual identities as workers and caregivers. In short, the experience of the USA shows that a country's level of development is no guarantee of appropriate regulation of the integration of work and care.

## **6 Specific rights in developing economies – the BRIC countries**

This study also focused on the specific rights regimes on the integration of work and care in four developing countries – Brazil, Russia, India and China – for purposes of juxtaposition with both the approaches in developed economies and with the experience of South Africa. Below is a summary of the key findings of this part of the study:

6 1 The overview of the experience in Brazil, introduced a new dimension: namely that specific rights on the integration of work and care afforded to employees in the private sector lag behind the public sector (this is also true of India).

6 2 Furthermore, a theme common to some of these countries (notably Brazil and India) is the difficulties associated with the division of the economy into formal and informal sectors. For example, Brazil's labour legislation only applies to workers in regulated employment, which excludes the majority of workers from legally guaranteed benefits, in particular low-income earners.

6 3 Given the fact that specific rights regimes about the integration of work and care may be seen as a combination of time off/leave and flexible working, these developing countries (apart from Russia) show little formal recognition of the importance of flexible working.

6 4 Labour legislation (to the extent that it provides for time off/ leave) tends to focus on benefits during the reproductive phase and does not facilitate the balance between work, the family and caring throughout the different stages of parental care.

6 5 Russia seems to be the most successful BRICS country when it comes to the integration of work and parental care. This may be attributed to, among other factors, the constitutional principle of state protection of the family, motherhood, fatherhood and childhood; adequate maternity, parental and family responsibility leave as well as the option of flexible working hours. The extended categories of people to whom parental leave and leave to take care of a sick child is available, probably also contributes to the fact that Russia ranks above the average in appreciation and operationalisation of the work-care balance.

## 7 Specific rights in South Africa

This study also provided an overview of the South African experience with specific rights in order to compare it with the countries mentioned earlier. In the South African context, it was also possible to extend the approach of previous comparative chapters to include the impact of “living law” on the regulation of work and parental care through consideration of a representative sample of bargaining council collective agreements. It was submitted that it is in these types of collective agreements where it would be most likely to find any indication of an extended commitment to proper regulation of work and parental care. The following were the key insights:

7 1 In South Africa both types of specific rights legislative intervention evidenced by the international comparative experience – time off or leave as well as flexible working options – are extremely limited and deficient.

7 2 As far as time off and leave are concerned, the discussion showed that maternity, paternity, parental and family responsibility leave (especially the last three) are catered for at very low levels.

7 3 There is also no express and binding provision for flexible working options as longer term measures to accommodate employees who provide ongoing care. Admittedly, the comparative review shows that there is limited support for this type of intervention in other countries as well – with the UK, Quebec and Russia the notable exceptions.

7 4 This means it may safely be said that existing provisions in South African law – also given the deficiencies associated with the anti-discrimination litigation experience – are simply not sufficient to cater for parental care in all its different dimensions. A combination of limited provision for maternity leave, restrictive provision for family responsibility leave and weak provision for broad flexibility in working arrangements seems to make it clear that accommodation of care responsibilities largely is perceived as an exception to the rule.

7 5 These insights are confirmed by the survey of bargaining council collective agreements in South Africa. At bargaining council level, where there is a fair measure of equalised bargaining power, one would reasonably expect a real extension of the integration of work and care against the backdrop of minimum standards legislation. Some bargaining council agreements do show an upward variation of the leave provisions of the BCEA. At the same time, bargaining council agreements are of limited application and are a poor predictor of the real state of affairs for the many employees who work under individual contracts of employment not influenced by collective bargaining. The review of bargaining council agreements showed that flexible work arrangements are barely addressed.

7 6 This means that the mere fact that some bargaining council agreements make provision for more favourable leave provisions – and this is compared to the already deficient provisions of the BCEA – hardly is a sufficient basis on which to say that work and parental care are or will be successfully integrated in South Africa through societal processes like collective bargaining (as an extension of legislation).

## **8 Recommendations for change**

The findings of this study raise the question whether proper legislative amendment will provide an adequate platform for the integration of work and parental care in South Africa. In this regard, the discussion showed that there is, at least, a measure of recognition for a broader approach to the different dimensions of parental care as an ongoing concern, what the demands of providing such care on employees are and how best to accommodate it. This recognition is found in a number of areas – recent

governmental initiatives around the importance of the family in society, the relatively broad (though currently ineffectual) definition of “family responsibilities” in the EEA and at least some recognition for the importance of flexibility in section 7 of the BCEA and the (non-binding) Codes of Good Practice discussed in chapter 8.

What is clear from the discussion is that any consideration of legislative intervention should focus on both equality law and employment standards legislation. With regard to employment standards legislation, the focus should furthermore be on both time off/leave provisions and on provisions around flexible working. In this regard, it is submitted that the immediate focus should be on the time off or leave provisions currently in place in South Africa.

This does not mean that equality law no longer is important, nor that flexible working is no longer a core goal to ensure the integration of work and care over time. As mentioned, South African equality law says everything it has to say – on paper it is extremely progressive and provides a sound basis for a contribution to the integration of work and care in our society. The problem is its application in practice. As suggested by this research, the solution to this may well be outside the actual provisions of our equality law, perhaps in the institution of a proper administrative organisation to drive awareness of equality and litigation around equality in our society. Whether this will happen due to the realities of combining caregiving with work is doubtful. At the same time, the UK experience tells us that a right to flexible working is only as strong as its exceptions – often easily defeated by the employer’s arguments around operational realities.

It is, however, submitted that the primary and immediate focus should be on the woefully inadequate time off/leave provisions of our law to exercise parental caregiving responsibilities. There is ample room for a change and/or extension of the current provisions of the BCEA relating to family responsibility leave. Without dictating what exactly such a provision should entail, it is submitted that such a change should incorporate at least the following seven principles:

- 8 1 Recognition of the central importance of parental caregiving to society;
- 8 2 Accommodation of parental caregiving either as such (that is in addition to, or as a specific subset of the idea of family responsibility) or expressly as part of family responsibility;
- 8 3 Recognition that parental caregiving takes place within a variety of structures and accommodation of all those structures – that is, the focus should be on the nature of the care, not so much on who gives the care;
- 8 4 Recognition that parental caregiving is an ongoing concern that extends beyond birth, with its most acute phase during the first five years of a child's development;
- 8 5 Recognition that adequate parental care is about a child's full development (in all its dimensions) – it is not only about the physical health of a child;
- 8 6 Recognition that parental caregiving is, and should be, a shared concern (that is an equality component should be built into regulation);
- 8 7 The elimination of monetary penalties associated with caregiving. In this regard, mention may be made of the very low levels of contributions to the Unemployment Insurance Fund. These contributions could easily be increased – or similar, relatively low, but separate contributions could be levied - to provide for financial cover during periods of parental leave.

It is submitted that the easiest way to achieve all of this – or at least a good starting point - is to provide for sufficient, shared (one parent at a time) and paid parental leave over at least the first years after childbirth. The sufficiency of the leave will serve to mitigate concerns over flexibility as a precondition to integrate work and care. At the same time, the shared nature of the leave will, to some extent, promote equality. In both cases compensation will address any immediate monetary penalty associated with caregiving.

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