

Discussing the fundamental principles inherent to effective systems of caregiving leave

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SUMMARY

Achieving a healthy work-family life balance is becoming increasingly difficult and is generally dependent on a combination of factors. Such factors include the nature and intensity of work engaged in, available legislative or employer provided leave and time-off for caregiving (family) responsibilities, and organisational and home support towards carrying out caregiving duties. A largely female focussed approach towards available caregiving leave must also be addressed. A truly effective system of caregiving leave should be sensitive towards a number of issues, most notably: job security and availability, and sufficiency and practicality of available caregiving leave. With the aforesaid as background, the aim of this contribution is to highlight those fundamental or core principles arguably inherent to any effective system of caregiving leave.

1 Introduction

“We need to give working families a break ... We know that the cost of the American dream must never come at the expense of the American family. You're working longer hours. More families have two parents working. Meanwhile, it's hard to get a hand. It's even harder to get a break. I'll be a president who stands up for working parents... We'll enforce laws that prohibit caregiver discrimination. And we'll encourage flexible work schedules to better balance work and parenting for mothers and fathers. That's the change that working families need.” [Barack Obama – Former President of the United States of America].¹

Achieving a proper work-family life balance² appears to be more difficult than ever. A 2016 study conducted in the United States of America (USA) indicated that two-parent families earning the median income, on average, worked 700 more hours annually compared to hours worked by

1 Barack Obama http://www.barackobama.com/2007/11/07/remarks_of_senator_barack_obam_31.php (accessed 2014-03-28); see also Garvey and Mitchell “Who’s your daddy? A proposal for paid family leave to promote the growth of families” 2009 *Hofstra Lab. & Emp. L. J.* 221.

2 The term *work-life balance* is often used, though this article finds the term *work-family life balance* to be better suited to the discussion at hand. For a general discussion on the concept *work-life balance* see Cohen and Gosai “Making a Case for Work-life Balance for the South African Employee” 2016 *ILJ* 2237-2250.

two-parent families during the 1970s.³ Increased working hours are often associated with decreasing physical and mental health of workers, lower job satisfaction and productivity, and an increase in staff turnover.⁴ Achieving a healthy work-family life balance is generally dependent on a combination of factors, most notably, the nature and intensity of work engaged in, available legislative or employer provided leave and time-off for caregiving (family) responsibilities, and organisational and home support towards carrying out caregiving duties.⁵ Consequently, a healthy work-family life balance is not only premised on (reducing) the number of hours individuals work, but also the availability of adequate leave entitlements to carry out caregiving responsibilities (hereafter referred to as caregiving leave).⁶

Whilst caregiving leave policies have traditionally focussed on maternity leave and associated benefits for women, the focus has in recent years broadened to include caregiving leave for both men and women.⁷ This shift in focus is to a large extent contributed to a change in society's view on traditional caregiving responsibilities of men and women, together with increased female participation in formal employment.⁸ Progressive caregiving leave policies support egalitarian relationships, which is representative of shared domestic responsibilities, within which a more active role by men is encouraged.⁹ Similar to arguments advanced in the context of maternity leave,¹⁰ this article proceeds on the basis that any effective system of caregiving leave should cater for at least the following elements: *job security* during, and upon the return from, any period of caregiving leave; *access to* (that is, the availability of) periods of caregiving leave; and available *benefits* (of a sufficient nature) during periods of caregiving leave.¹¹ The discussion in this article mainly concerns the latter two elements and their constituting principles.

With the above as background, the aim of this contribution is to highlight those fundamental or core principles (five in total) arguably inherent to any effective system of caregiving leave. The discussion will commence with a brief overview of changing societal perceptions around the traditional caregiving responsibilities of men and women

3 Albiston and Trimble O'Connor "Just Leave" 2016 *Harvard Journal of Law & Gender* 15.

4 Albiston and Trimble O'Connor 2016 *Harvard Journal of Law & Gender* 17.

5 Cohen and Gosai 2016 *ILJ* 2237.

6 Caregiving leave is used as a wide term, inclusive of all leave systems typically associated with family responsibility duties, most notably, maternity-, paternity-, adoption-, parental-, family responsibility- and commissioning parental leave; see also Cohen and Gosai 2016 *ILJ* 2238.

7 Cohen and Gosai 2016 *ILJ* 2239.

8 See discussion under para 2 below.

9 Rycroft and Duffy "Parental rights: Progress but some puzzles" 2019 *ILJ* 25.

10 Refer to discussion of *maternity rights* in Rycroft and Duffy 2019 *ILJ* 15-17.

11 Rycroft and Duffy 2019 *ILJ* 15-17; see also Field, Bagraim and Rycroft "Parental leave rights: have fathers been forgotten and does it matter?" 2012 *SAJ of Labour Relations* 3041.

respectively, increased female participation in formal employment, and the ongoing struggle by families towards achieving a healthy work-family life balance. The discussion will thereafter turn to discussing the five fundamental principles as mentioned above. Lastly, the article will conclude with a brief overview of the current legislative scheme providing for caregiving leave in SA. The methodology adopted in writing this article was primarily that of a desktop study through reviewing literature published in both primary and secondary sources.

2 Factors which impact the nature of caregiving leave systems

Historically men have always been regarded as inferior to women when it came to issues of caregiving and other family responsibilities.¹² During the 19th century the so-called *ideal worker* was held to be male, with a wife at home who managed all caregiving and other family responsibilities on a full-time basis.¹³ This ideal worker was seen as fully devoted to his career, free of any distractions from competing responsibilities, such as, caregiving and other family issues.¹⁴ Women were in turn perceived as being more committed towards raising children than pursuing a career, thus rendering them less dependable and competent than their male colleagues.¹⁵ Consequently, few women pursued long-term formal careers¹⁶ and workplace policies providing

12 Ali "Bringing Down the 'Maternal Wall': Reforming the FMLA to Provide Equal Employment Opportunities for Caregivers" 2009 *Law and Inequality* 201.

13 Anthony "Tradition, Conflict & Progress: A Closer Look at Childbirth and Parental Leave Policy on University Campuses" 2011 *Geo. J. Gender & L.* 93; also see Dancaster and Baird "Workers with Care Responsibilities: Is Work-Family Integration Adequately Addressed in South African Labour Law" 2008 *ILJ* 28; Young "Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms" 2008 *Yale L. J.* 1185.

14 Anthony 2011 *Geo. J. Gender & L.* 93-94; see also Collins "Home Alone: Is This the Best We Can Do? A Proposal to Amend Pending Parental Leave Litigation" 2009 *Wash. U. J. L. & Pol'y* 302, in which the *ideal worker* was held to work both full time and overtime, taking no or little time off from work for childrearing or childbearing purposes; see also Jablczynski "Striking a Balance Between the 'Parental' Wall and Workplace Equality: The Male Caregiver Perspective" 2009 *Women's Rts. L. Rep.* 310-311; Williams, Bornstein, Reddy and Williams "Law Firms and Defendants: Family Responsibilities Discrimination in Legal Workplaces" 2006 *Pepp. L. Rev.* 400.

15 Ali 2009 *Law & Inequality* 199. The American Supreme Court previously characterised women as having a "natural and proper timidity and delicacy which...[renders them] unfit for many of the occupations of civil life" - *Bradwell v Illinois* 83 U.S. 130, 141 (1872) as discussed in Collins 2009 *Wash. U. J. L. & Pol'y* 301. In this case it was held by the majority of the court that practising law was not available to women.

16 Anthony 2011 *Geo. J. Gender & L.* 94; see also Jablczynski 2009 *Women's Rts. L. Rep.* 309-336.

men with some form of caregiving leave were uncommon and widely regarded as unnecessary.¹⁷

Against the background of a globalised world however,¹⁸ an increased focus on gender equality and, consequently, a general increase in women's rights, have contributed towards a growth in the rate of female participation in long-term employment. The global female labour force participation rate in 2015 was estimated at around 50% of the economically active population,¹⁹ with 2018 statistics for South Africa (SA) specifically estimating that women accounted for approximately 44% of the country's total employment rate in the formal sector.²⁰ A large percentage of women nowadays also enrol for further education, particularly tertiary education, with the aim of establishing a competitive edge in the labour market and obtaining long-term employment.²¹ In fact, according to a 2012 World Bank report women remain more likely than men to complete tertiary education.²² Apart from its impact on female participation in employment, globalisation has also been said to have a definitive impact on the family environment,²³ with workers, both male and female, increasingly required to work for longer hours and away from home.²⁴ Not surprisingly therefore, the International Labour Organisation (ILO) views access to some form of caregiving leave as an important aspect in effectively integrating work and family responsibilities.²⁵

All of the above issues have played a role in changing societal perceptions on gender and caregiving responsibilities, with child care no longer viewed as the sole, or even primary, responsibility of women alone. Child care is increasingly viewed as a social issue based on a

17 Anthony 2011 *Geo. J. Gender & L.* 94.

18 *Globalisation* is the term broadly used to describe an economic process in which capital seeks to be unencumbered by national borders - see Calder "Recent Changes to the Maternity and Parental Leave Benefits Regime as a Case Study: The Impact of Globalization on the Delivery of Social Programs in Canada" 2003 *Can. J. Women & L.* 344.

19 Rossouw *The Integration of Work and Parenting: A Comparative Legal Analysis* (2018) 33; United Nation's Statistics Division *The World's Women 2015: Trends and Statistics* <https://unstats.un.org/unsd/gender/worldswomen.html> (accessed 2019-06-04) at 89.

20 Stats SA *How do women fare in the South African labour market* <http://www.statssa.gov.za/?p=11375> (accessed 2018-09-13).

21 Dancaster and Baird 2008 *ILJ* 24.

22 World Bank Group *World Development Report 2012: Gender Equality and Development* <https://openknowledge.worldbank.org/handle/10986/4391> (accessed 2019-06-04); also see Stoneman "International Economic Law, Gender Equality, and Paternity Leave: Can the WTO be Utilized to Balance the Division of Care Labor Worldwide?" 2017 *Emory Int'l L. Rev.* 58.

23 For a detailed discussion of some of the dangers faced by families in a globalised world see Dau-Schmidt and Brun "Protecting Families in a Global Economy" 2006 *Ind. J. Global Legal Stud.* 165-205.

24 Dau-Schmidt and Brun 2006 *Ind. J. Global Legal Stud.* 167, 177.

25 Stoneman 2017 *Emory Int'l L. Rev.* 72-73.

collective responsibility,²⁶ which in turn has contributed towards a renewed interest in available systems of caregiving leave. Support for leave systems which enable, perhaps even encouraging, both men and women to equally carry out caregiving responsibilities are widespread.²⁷ The most commonly encountered leave systems catering for such caregiving responsibilities are that of maternity, paternity, and parental leave systems.²⁸

Maternity leave refers to a period of leave which is exclusively available to mothers following the birth of a child. Such periods of leave are generally intended to protect the health and economic opportunities of women in the labour force.²⁹ Paternity leave conversely is generally understood as “[a] period of absence from work granted to a father after or shortly before the birth of his child”.³⁰ And lastly, parental leave encompasses a inherently gender neutral policy of specialised leave that is available to parents to divide between them and to use as they see fit,³¹ for purposes of “[taking] time off work to look after a child or make arrangements for the child’s welfare.”³² Whereas some period of maternity leave is fairly standard in most countries, paternity and parental leave provisions remain comparatively uncommon.

In considering available caregiving leave systems (specifically parental leave) internationally,³³ two main systems emerge. The first is one in terms of which parental leave is granted as a single, shared, entitlement available to both parents. Within this shared system of parental leave parents have access to a single, specified, period of leave which they can share as they wish. It remains at the discretion of the parents to decide how, how much, and when each of them wishes to utilise the available leave.³⁴ The full period of parental leave does not have to be taken in one increment and may thus be divided into shorter periods, available to any

26 Campbell “Proceeding with ‘care’: Lessons to be learned from the Canadian parental leave an Quebec daycare initiatives in developing a national childcare policy” 2005 *Can. J. Fam. L.* 175.

27 Anthony 2011 *Geo. J. Gender & L.* 92.

28 Feldman and Gran “Is What’s Best for Dads Best for Families? Paternity Leave Policies and Equity Across Forty-four Nations” 2016 *J. Soc. & Soc. Welfare* 101–102.

29 Stoneman 2017 *Emory Int’l L. Rev.* 73.

30 Oxford Languages http://oxforddictionaries.com/definition/american_english/paternity%2Bleave?region=us (accessed 2012-07-10); see also Stoneman 2017 *Emory Int’l L. Rev.* 73.

31 Stoneman 2017 *Emory Int’l L. Rev.* 72-73.

32 Oxford Brookes University http://www.brookes.ac.uk/services/hr/handbook/family/parental_leave_guidance.html#definition (accessed 2012-07-10).

33 In countries such as Belgium, Denmark and New Zealand. For a comprehensive list of the various leave systems of different countries - see International Labour Organization *Maternity at Work: A review of National legislation* https://www.ilo.org/global/publications/books/WCMS_124442/lang-en/index.htm (accessed 2019-06-04) at 52.

34 International Labour Organization *Maternity at Work: A review of National legislation* https://www.ilo.org/global/publications/books/WCMS_124442/lang-en/index.htm (accessed 2019-06-04) at 52. New Zealand is one country which uses such a shared entitlement scheme.

parent at any time. The second system is a dual system of parental leave, within which each parent has an individual entitlement to a specified period of parental leave. The entitlements may not be transferred between parents and will be forfeited if not used.³⁵ Again, such leave can be taken by any parent at any time, or even at the same time, as long as reasonable notice was given to the respective employers.

3 Fundamental principles inherent to effective systems of caregiving leave

Whilst challenges to balance work and family life are traditionally primarily associated with women,³⁶ men are increasingly faced with similar challenges. Despite the documented increase in male participation in caregiving duties³⁷ and female participation in fulltime employment, the number of workers, particularly men, who make use of available periods of caregiving leave remains relatively low. Many reasons have been advanced for this. With reference to men specifically, such reasons include the (perceived) reluctance by society in accepting the increased role played by modern-day men in household activities, together with questions around masculinity.³⁸ The view has in fact been expressed that “men would rather work than change diapers, or because there is social pressure on men to work rather than to change diapers”.³⁹ Reasons of relevance to both men and women include: no or inadequate income protection during any periods of parental leave,⁴⁰ being viewed as lazy or unprofessional when taking leave, losing a competitive edge in the business environment, and being subjected to discrimination in the workplace.⁴¹ Accordingly, in the absence of adequate caregiving leave systems, impediments towards obtaining a proper work-family balance are set to continue. To this extent parents who wish to place caregiving responsibilities first might have little choice but to have one parent resign from full-time employment. In fact, statistics indicate that women still remain twice as likely as men to resign from employment for caregiving reasons.⁴²

From the above discussion, and against the background what has already been discussed in as far as changing societal perceptions and

35 International Labour Organization *Maternity at Work: A review of National legislation* https://www.ilo.org/global/publications/books/WCMS_124442/lang-en/index.htm (accessed 2019-06-04) at 52.

36 Ali 2009 *Law & Inequality* 189.

37 Ali 2009 *Law & Inequality* 196.

38 Garvey and Mitchell 2009 *Hofstra Lab. & Emp. L. J.* 208; Campbell 2005 *Can. J. Fam. L.* 187.

39 Suk “From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe” 2012 *Am. J. Comp. L.* 80.

40 Albiston and Trimble O’Connor 2016 *Harvard Journal of Law & Gender* 1.

41 Garvey and Mitchell 2009 *Hofstra Lab. & Emp. L. J.* 208; Campbell 2005 *Can. J. Fam. L.* 187.

42 Dancaster and Baird 2008 *ILJ* 37.

increased female participation in employment, it emerges that an effective system of caregiving leave cannot be focussed towards any single factor, but should be reminiscent of a combination of identified inherent fundamental or core principles. It is to the discussion of these principles that the discussion turns next.

3 1 The best interest of the child

Article 3(1) of the United Nations Convention of the Rights of the Child (CRC),⁴³ stipulates that in all actions concerning children, the best interests of the child shall be a primary consideration.⁴⁴ Similarly, section 28(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) states that “[a] child’s best interests are of paramount importance in every matter concerning the child”. In the matter of *MIA v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC), the Labour Court held that the right to maternity leave under the BCEA is an entitlement 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.⁴⁵

In discussing caregiving leave within the context of *the best interest of the child*,⁴⁶ three primary objectives in providing caregiving leave present themselves: first, providing birth giving mothers with sufficient time to physically recover, not only for their own benefit, but so as to adequately care for the child; secondly, providing for a period of bonding with a child immediately after birth or adoption (this also provides parties with the opportunity to get accustomed to the new family environment);⁴⁷ and thirdly, the period of ongoing care of a child during the remainder of childhood.⁴⁸

43 The United Nations Convention of the Rights of the Child was adopted by the United Nations General Assembly in 1989 and came into force during 1990. South Africa ratified the convention in 1995.

44 See also Reyneke “Realising the Child’s Best Interests: lessons from the Child Justice Act to Improve the South African Schools Act” 2016 *PELJ* 4.

45 *MIA v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC) para 13; also see discussion in Botes and Fourie “Werknemers as Lasgewende Ouers in Surrogasie-Aangeleentheid: Die Geboorte van Nuwe Verlof-behoefes in Suid-Afrika” 2017 *PELJ* 1-39.

46 The *best interest of the child* principle is a field of study on its own, with an abundance of literature being available on the topic. As example, see Sloth-Nielsen “Gender normalisation surgery and the best interest of the child in South Africa” 2018 *Stell LR* 48-72; Kalverboer, Beltman, van Os and Zijlstra “The Best Interests of the Child in Cases of Migration Assessing and Determining the Best Interests of the Child in Migration Procedures” 2017 *International Journal of Children’s Rights* 114-139; Reyneke 2016 *PELJ* 1-29; Nevondwe, Odeku and Raligilia “Reflection on the Principle of Best Interests of the Child: An Analysis of Parental Responsibilities in Custodial Disputes in the South African law” 2016 *Bangladesh e-Journal of Sociology* 101-114.

47 Garvey and Mitchell 2009 *Hofstra Lab. & Emp. L. J.* 199.

48 Also see discussion in Rodriguez “EU Directives on maternity leave: A misleading social risk approach and its unsatisfactory effects on both mothers and fathers” 2018 *European Labour Law Journal* 172.

While caregiving takes place during the whole of childhood (typically from birth to 18 years of age),⁴⁹ the nature and extent of such care requirements changes as a child grows older. Appropriate regulation of caregiving leave should therefore recognise the different needs of a child during the various developmental stages of childhood,⁵⁰ and in this way further safeguard the best interest of the child.

3 2 Protecting the family unit

The preamble to the CRC holds that the family unit is the fundamental group of society and should be afforded the necessary protection and assistance so as to fully assume its responsibilities within the community.

Legislative reforms at the end of the apartheid era in SA were primarily focussed towards transformation at institutional level, with few policies at the time considering and providing for the protection of the family unit specifically.⁵¹ Within the South African context a wide array of diverse family structures are encountered, all of which are equally deserving of protection.⁵² In terms of labour law, protecting the family unit is, at least indirectly so, provided for in the EEA. Section 1 of the EEA defines family responsibility as “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”. It has however been argued that this definition promises more than it actually achieves in the context of employment discrimination in SA.⁵³ Similarly, the LRA also, indirectly at least, provide the family unit with some protection. This is done within the Act’s automatically unfair dismissal provisions, which holds that such dismissal occurs where the reason for the dismissal is that the employer unfairly discriminated against an employee on, amongst others, the ground of family responsibility.⁵⁴ Unlike the EEA, the LRA does not however define the term *family responsibility*.

More recently, protecting the family unit was also to some extent recognised in the wording of the Memorandum on the Objectives of the Labour Laws Amendment Bill 29 of 2017 (preceding the enactment of the Labour Laws Amendment Act 10 of 2018 (LLAA)). In terms of the Memorandum it was held that “[f]athers play an important role in the upbringing of their children. The ACDP is of the opinion that such a provision would facilitate early bonding between fathers and their

49 Both S 28(3) of the Constitution of the Republic of South Africa, 1996 and Art 1 of the United Nations Convention of the Rights of the Child provide that *child* means a person under the age of 18.

50 Rossouw 273.

51 Behari “The Effect of the Labour Laws Amendment Bill 2017 on Shared Parental Responsibilities” 2018 *ILJ* 2149.

52 For an overview of different family structures see Rossouw 36-41.

53 Rossouw 257.

54 S 187(1)(f) of the Labour Relations Act 66 of 1995; also see discussion under para 4.3 below.

children and that *stronger and healthier families would be one of the many potential benefits for society as a whole.*"⁵⁵ [own emphasis added]

3 3 Gender equality

Despite substantial social and legal reforms over the past two decades, inequality between men and women still present itself in many areas of life.⁵⁶ In the South African employment context the gap in gender inequality has however significantly decreased, with the number of women entering, and remaining in, long term formal employment constantly on the rise.⁵⁷ One needs however be mindful that gender-based transformation in employment, in line with the transformative nature of the Constitution,⁵⁸ has to date largely been focussed towards increasing the rights of women, with comparatively little attention having been given to the disadvantaged position of men when it comes to family responsibilities and related issues.

The impact of paternity leave provisions specifically on issues of gender equality and work-family life balance has been a popular research trend over the past 15 years. The benefits of men making use of such leave entitlements are well documented in social science research and include an increased participation and involvement of men in caregiving responsibilities; men feeling more psychologically attached to their families; improved family relationships; and established norms of sharing family responsibilities.⁵⁹

With the above as background, it is argued that, as a minimum, any leave system providing for caregiving responsibilities should be accessible to both men and women on an equal basis. Ideally, a gender neutral system of parental leave should equally equip both parents to take leave in such a manner that is most suitable towards the family unit.⁶⁰ Gender neutral parental leave systems are furthermore paramount in ensuring that men and women have access to equal career opportunities and career prospects.⁶¹ Gender neutral leave schemes also stand to play a pivotal role in continuing to encourage equal family

55 Para 1.1 of the Memorandum on the Objectives of the Labour Laws Amendment Bill B29 of 2017.

56 Stoneman 2017 *Emory Int'l L. Rev.* 51.

57 For a detailed list of the percentage of women who formed part of the labour force of various countries during the period 1990 to 2017 see Worldbank <https://data.worldbank.org/indicator/sl.tlf.totl.fe.zs> (accessed 2019-09-13).

58 Phooko and Radebe "Twenty-Three Years of Gender Transformation in the Constitutional Court of South Africa: Progress or Regression" 2016 *Const. Ct. Rev.* 307-308.

59 Rycroft and Duffy 2019 *ILJ* 14.

60 Pesonen "Encouraging Work-Family Balance to Correct Gender Imbalance: A Comparison of the Family And Medical Leave Act and the Iceland Act on Maternity/Paternity and Parental Leave" 2015 *Hous. J. Int'l L.* 2015 178.

61 Collins 2009 *Wash. U. J. L. & Pol'y* 303.

involvement by parents, consequently guarding against a reinforcement of outdated gender stereotypes around caregiving responsibilities.⁶²

Formally providing men and women with equal access to caregiving leave, such as parental leave, is however only one side of the proverbial coin. The other side is ensuring that, in particular, men, actually utilises available parental leave periods, without any fear of ridicule, discrimination and the like. Parental leave patterns indicate that women still remain far more likely than men to make use of such provisions.⁶³ As discussed previously, societal pressures and stigma continue to impact on the number of men making use of available parental leave.⁶⁴ One way of possibly increasing the number of men who make use of available caregiving leave benefits is by incentivising the use of such benefits. As example, in Italy men who take their full periods of provided parental leave are rewarded by being awarded an additional month of leave.⁶⁵ In Sweden a quota system has been introduced in terms of which fathers must take the full two months of paid paternity leave in order to receive the full government parenting benefits.⁶⁶ Swedish parents also receive financial incentives for sharing available leave on an equal basis.⁶⁷ In the Scandinavian nations of Finland, Iceland and Norway, financial bonuses and extended leave periods are also available to fathers who utilise available parental leave periods.⁶⁸

3 4 Adequacy (length of caregiving leave)

While providing a gender neutral system of caregiving leave is important, the success of any system also largely depends on the adequacy of available leave provisions, that is, the length of leave periods provided. Below are a few examples of the periods of leave provided for at the international level.

Under the Canadian Federal Employment Insurance Scheme, parents in Canada are entitled to approximately 50 weeks of partially compensated leave after the birth or adoption of a child. The first 15 of these weeks are considered as maternity leave and thus only available to birth mothers. The remaining 35 weeks are considered as parental leave which may be taken up by either parent, and is available in the case of

62 Anthony 2011 *Geo. J. Gender & L.* 115.

63 Collins 2009 *Wash. U. J. L. & Pol'y* 301.

64 Collins 2009 *Wash. U. J. L. & Pol'y* 313.

65 Dancaster and Baird 2008 *ILJ* 37. For a detailed discussion on the benefit of providing incentives in a parental leave scheme see Ayanna "Aggressive Parental Leave Incentivizing: A Statutory Proposal Toward Gender Equalization in the Workplace" 2006 *U. PA. Journal of Labor and Employment Law* 293-324. For further suggested incentives see Collins 2009 *Wash. U. J. L. & Pol'y* 314.

66 Feldman and Gran 2016 *J. Soc. & Soc. Welfare* 97.

67 Feldman and Gran 2016 *J. Soc. & Soc. Welfare* 109.

68 Feldman and Gran 2016 *J. Soc. & Soc. Welfare* 109.

adoption as well. The benefits can be taken by one parent only, or shared between parents.⁶⁹

Iceland's Act on Maternity/Paternity Leave and Parental Leave of 2000 generally provides for five months' leave for each parent, as well as an extra two months of jointly shared leave that parents may allocate between them as they wish.⁷⁰ Parents can choose to take available leave all at once, or to spread it out over a period of 24 months, with the provision that scattered periods of leave must be at least two consecutive weeks each time.⁷¹

In the European Union, working mothers are eligible for 52 weeks of maternity leave, with up to 39 of those weeks being paid.⁷² In the first six weeks of maternity leave, mothers can receive up to 90 percent of their average pre-tax weekly earnings. Employees may also qualify for shared parental leave, in terms of which parents can choose how to split such leave period.⁷³

3.5 Financial affordability and job protection

Lastly, the effectiveness of any system of caregiving leave is also largely dependent on the affordability for workers to actually take such periods of leave.⁷⁴ For instance, where parental leave is provided for on an unpaid basis, even if for an extended period of time, few workers would financially be able to utilise the provided leave period. Consequently, the affordability of any system of caregiving leave will be determined by the proportion of regular wages covered during the leave period, which of course raises the question as to who funds such payments.⁷⁵

Being a third-world economy, one of the biggest, if not the biggest, impediments towards an effective system of caregiving leave in SA is the issue of financial affordability. While the LLAA,⁷⁶ provides for some paid parental, adoption and commissioning parental leave in the case of surrogacy, maternity leave (which continues to be the most comprehensive caregiving leave provision in SA as far as adequacy is concerned) is unpaid unless otherwise agreed with the employer. In the case of unpaid maternity leave, workers will have to rely on wage replacement payments under the Unemployment Insurance Act 63 of

69 Campbell 2005 *Can. J. Fam. L.* 182.

70 Pesonen 2015 *Hous. J. Int'l L.* 175.

71 Pesonen 2015 *Hous. J. Int'l L.* 177.

72 Wenger "Should I Stay or Should I Go: The Effects of Brexit On Family Leave Laws in the United Kingdom" 2017 *Duq. Bus. L. J.* 137; GOV.UK *Statutory Maternity Leave* <https://www.gov.uk/employersmaternity-pay-leave/entitlement> (accessed 2016-05-27).

73 Wenger 2017 *Duq. Bus. L. J.* 137; UK Government Shared Parental Leave and Pay available at GOV.UK <https://www.gov.uk/shared-parental-leave-and-pay-employer-guide> (accessed 2016-05-27).

74 León and Millns "Parental, Maternity and Paternity Leave: European Legal Constructions of Unpaid Care Giving" 2007 *N. Ir. Legal Q.* 351.

75 Stoneman 2017 *Emory Int'l L. Rev.* 71.

76 See discussion under paragraph 4.4 below.

2001 (UIA). Payment in terms of the UIA is however only available to contributors to the Unemployment Insurance Fund (UIF). It is the duty of employers to register themselves and their workers with the UIF and to make the required monthly contributions to the fund. Should an employer however fail to do so, a worker could potentially be unable to claim income replacement from the fund, unless the worker first settles all arrear payments.⁷⁷

Evidence suggests that there are a number of ways of financing paid periods of caregiving leave. The most common methods are contributory schemes (where either workers or employers, or both together, are responsible for payment of contributions) and non-contributory schemes (social assistance provided for at government level).⁷⁸ With reference to maternity leave specifically, the ILO advocates for systems of compulsory social insurance, or similar public funds, as opposed to individual employee and/or employer liability.⁷⁹

In addressing the issue of affordability various role-players, most notably employers, workers and governments, should all play a part and work together to find ways to provide for wage replacement during periods of caregiving leave. Typical employer actions could include partially paid leave, or fully paid leave in the case of shorter periods of leave.⁸⁰ In countries such as Iceland, payment during leave periods is funded by both employers and the domestic social security system.⁸¹ As example, the Maternity/Paternity Leave Fund is administered by the government and financed through the collection of an insurance levy paid by employers.⁸²

Where providing workers with wage replacement during caregiving leave periods is unachievable, employers should investigate alternatives such as having workers become members of some form of private contributory (insurance) fund from which workers can then claim income replacement during any period of caregiving leave. The question of who pays the contributions to such private funds must be determined between the employer and worker, though, ideally, employers should stand in for contributions as far as possible. Should workers be solely responsible for such payments, it is argued that worker salaries will simply be redistributed elsewhere, effectively leaving workers with less disposable income.⁸³

77 Rossouw 254.

78 Stoneman 2017 *Emory Int'l L. Rev.* 77.

79 Stoneman 2017 *Emory Int'l L. Rev.* 77.

80 Dickens "Equality and Work-Life Balance: What's Happening at the Workplace" 2012 *ILJ* 448.

81 Karr "Where's My Dad? A Feminist Approach to Incentivized Paternity Leave" 2017 *Hastings Women's L.J.* 241.

82 Pesonen 2015 *Hous. J. Int'l L.* 176.

83 Garvey and Mitchell 2009 *Hofstra Lab. & Emp. L.J.* 225.

4 The legislative framework in SA providing for caregiving leave

Under common law principles workers could be dismissed for being absent from work without the employer's permission,⁸⁴ despite the reasonableness of a request for leave. This was often the case where a woman's request for maternity, or another form of family responsibility leave, was denied by the employer. The position however changed with the adoption of the Constitution, and the enactment of dedicated employment legislation. Legislation remains crucial in breaking down barriers, such as gender inequality and stereotypes, in workplaces.⁸⁵

4 1 International obligations

SA has ratified various international instruments which all, to some extent, provide for the integration of work and family life. Apart from the CRC (discussed earlier), SA also signed and ratified the United Nations Convention on the Elimination of all Forms of Discrimination Against Women of 1979 (CEDAW) during 1995.⁸⁶ In doing so, the South African government committed itself to take the necessary steps to facilitate and ensure that women enjoy political, social, and economic equality in society. The preamble of CEDAW recognises that at the heart of women's unequal social status lies the unequal burden they carry in respect of child care and domestic responsibilities. CEDAW recognises that there should be a shared responsibility amongst men and women towards the upbringing and care of children.

During 1997 SA ratified the ILO Discrimination (Employment and Occupation) Convention no 111 of 1958.⁸⁷ In terms of the convention ratifying states should "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".⁸⁸ The EEA stipulates that the Act must be interpreted in compliance with the country's international obligations, particularly those contained in Convention 111.

At the 2004 session of the African Union (AU), SA became a signatory to the Solemn Declaration on Gender Equality in Africa. By signing the Declaration, the South African government reaffirmed its commitment to

84 Grogan *Workplace Law* (2009) 189.

85 Dau-Schmidt and Brun 2006 *Ind. J. Global Legal Stud.* 196.

86 Adopted in 1979 by the United Nations General Assembly, United Nations <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 2018-11-21).

87 International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 (accessed 2018-11-21).

88 Art 2 of ILO Discrimination (Employment and Occupation) Convention no 111 of 1958.

continue, expand and accelerate efforts to promote gender equality at all levels.⁸⁹

To date SA has yet to ratify the ILO's Workers with Family Responsibilities Convention no 156 of 1981,⁹⁰ together with its accompanying Workers with Family Responsibilities Recommendation no 165 of 1981,⁹¹ as well as the Maternity Protection Convention no 183 of 2000.⁹² These conventions address the policies and measures that ratifying states should implement to, amongst others, integrate work and family responsibility.

4 2 The Constitution of the Republic of South Africa, 1996 (Constitution)

The adoption of the Constitution at long last signalled the end of apartheid in SA.⁹³ The Constitution is the supreme law of the country, which means that there is no single area of law in SA that remains unaffected by constitutional principles. All labour laws and employment related issues must therefore be considered in light of constitutional principles, particularly those entrenched in chapter 2 of the Constitution (known as the Bill of Rights).⁹⁴ The Bill of Rights contains the very minimum, or basic, human rights to which all individuals within SA are entitled. Of particular importance to employment is the right to equality (section 9) and the right to fair labour practices (section 23).

In terms of section 9 everyone is equal before the law and enjoys the right to equal protection and benefit of the law.⁹⁵ No person may be unfairly discriminated against, whether directly or indirectly, on any of the grounds listed in section 9, which includes the grounds of gender, sex, or pregnancy.⁹⁶ National legislation must be enacted to prevent or prohibit unfair discrimination.⁹⁷ Section 23 in turn holds that everyone has the right to fair labour practices. It is generally understood that *everyone* and *fair labour practices* in constitutional terms are to be given

89 Department: Justice and Constitutional Development http://www.justice.gov.za/docs/other-docs/2004_AUdeclaration.pdf (accessed 2018-11-21).

90 International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312301:NO (accessed 2018-11-21).

91 International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312503:NO (accessed 2018-11-21).

92 International Labour Organization https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C183 (accessed 21-11-2018).

93 The Constitution was the successor to the Interim Constitution Act 200 of 1993.

94 Huysamen "The future of legislated minimum wages in South Africa: Legal and economic insights" 2018 *De Jure* 288.

95 S 9(1) of the Constitution.

96 Ss 9(3) & (4) of the Constitution.

97 S 9(4) of the Constitution.

broad interpretations.⁹⁸ A broad interpretation of *everyone* provides for the inclusion of all workers, that is, both employees as defined in labour legislation as well as independent contractors. *Fair labour practices* in the context of section 23(1) is much broader than the more limited meaning of *unfair labour practices* as provided for in section 186(1)(b) of the LRA, and, amongst others, includes protection against actions such as abuse and discrimination.⁹⁹

4 3 Legislation

The most relevant legislation in labour law which gives effect to constitutional principles are the Labour Relations Act 66 of 1995 (LRA), Basic Conditions of Employment Act 75 of 1997 (BCEA) and Employment Equity Act 55 of 1998 (EEA).

The LRA contains a comprehensive definition of what constitutes a dismissal.¹⁰⁰ The Act also provides that dismissals must be both substantively (fair reason)¹⁰¹ and procedurally fair. A dismissal will, amongst others, occur where an employer refuses to allow a female worker to resume work after she took a period of maternity leave in terms of any law, collective agreement or her contract.¹⁰² No similar provision is however available for men or workers in the case of adoption or surrogacy. The LRA further holds that a dismissal will be regarded as automatically unfair (that is, it cannot be justified as being fair)¹⁰³ where the reason for the dismissal is “the employee’s pregnancy, intended pregnancy, or any reason related to her pregnancy”¹⁰⁴ or where the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including family responsibility.¹⁰⁵

98 See discussion in Huysamen “An Overview of Fixed Term Contracts of Employment as a Form of Atypical Employment in South Africa” 2019 *PELJ* 5-6.

99 See Halton Cheadle’s interpretation of *everyone* and *fair labour practices* in Cheadle and Davis *South African Constitutional Law: The Bill of Rights* (2005) chapter 18; see also *Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 ILJ 2120 (LC) paragraph 63 where the court held “[t]he Constitution provides that everyone and not just employees have a right to fair labour practices. Consequently, even though a person may not be regarded by the law as an employee of the client but of the labour broker, the client still has a legal duty to do nothing to undermine an employee’s right to fair labour practices unless the limitation is justified by national legislation”.

100 See section 186(1) of the Labour Relations Act 66 of 1995.

101 S 188(1) of the Labour Relations Act 66 of 1995 provides that dismissals may only be based on grounds of misconduct, the capacity of the employee, and operational reasons.

102 S 186(1)(c) of the Labour Relations Act 66 of 1995.

103 The only defences to an automatically unfair dismissal are that the reason for the dismissal was based on an inherent requirement of the job, or in the case of an age dismissals, that the employee had reached the agreed or normal retirement age – see section 187(2) of the Labour Relations Act 66 of 1995.

104 S 187(1)(e) of the Labour Relations Act 66 of 1995.

105 S 187(1)(f) of the Labour Relations Act 66 of 1995.

In similar terms to that of section 187(1)(f) of the LRA, section 6(1) of the EEA provides that “[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including ... pregnancy, ... family responsibility, ... or on any other arbitrary ground”.¹⁰⁶ The Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, issued under the EEA, requires employers to “provide reasonable accommodation for ... parents with young children ...”,¹⁰⁷ as well as endeavouring to provide “accessible, supportive and flexible environment for employees with family responsibilities”, including “considering flexible working hours and granting sufficient family responsibility leave for both parents”.¹⁰⁸ Unfortunately no further guidance is provided for in either the Code or the EEA on how working arrangements could, or should, be structured and implemented in line with the above.¹⁰⁹

As suggested by its name, the BCEA provides for the very basic conditions of employment to which all employees are entitled. Pending enforcement of the provisions of the LLAA (see discussion below), the BCEA currently provides women with four consecutive months of maternity leave per confinement.¹¹⁰ Unless otherwise agreed with an employer, any period of maternity leave is unpaid, with employees having to claim benefits under the UIA. No similar period of leave is available to men. The BCEA also fails to explicitly provide for leave in the case of adoption or surrogacy births. While also available to women, men only have access to three days’ family responsibility leave per annum.¹¹¹ Family responsibility leave may be taken in the event of the birth, illness or death of a child. Save for the aforesaid maternity and limited family responsibility leave provisions, and pending the implementation of the below LLAA, no further caregiving leave is available to parents.

4 4 Labour Laws Amendment Act 10 of 2018 (LLAA)

The Memorandum on the Objectives of the Labour Laws Amendment Bill of 2017 confirmed that fathers play an important role in the upbringing of children and, as such, the Bill (and subsequently the Act) set out to

106 The concern has however been raised that although family responsibility discrimination in all probability occurs in South Africa, such matters rarely come before the courts or other dispute resolution forums – see Rossouw 94.

107 Clause 11.3.4 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices.

108 Clause 11.3.5 of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices.

109 Rossouw 258-259.

110 S 25(1) of the Basic Conditions of Employment Act 75 of 1997.

111 S 27(1) of the Basic Conditions of Employment Act 75 of 1997 states that family responsibility leave is only available to employees who have been in the employ of the employer for more than four months, and who work for at least four days a week for that employer.

facilitate early bonding between fathers and their children.¹¹² The LLAA was signed into law by President Ramaphosa on 23 November 2018. Save for sections 9 and 10 of the Act¹¹³ which came into operation on 1 March 2019, the remainder of the Act's provisions will only come into effect on a date yet-to-be-fixed by the President.

Apart from maternity leave which is already provided for under the BCEA, the LLAA introduces further caregiving leave in the form of parental leave, adoption leave and commissioning parental leave in the case of surrogacy. In terms of the parental leave provisions parents will be entitled to 10 days continuous leave in the case of adoption or birth of a child.¹¹⁴ Adoption leave and commissioning parental leave provisions allow for a continuous period of 10 weeks leave being available to adoptive and commissioning parents. In the case of two-parent adoptions or surrogate agreements with two commissioning parents,¹¹⁵ only one of the parents will qualify for adoption or commissioning parental leave. The other parent will then have access to the 10 days parental leave provisions.¹¹⁶ The LLAA will repeal the current three days family responsibility leave available under the BCEA, but only in cases of the birth of a child.¹¹⁷

4 5 The effectiveness of the system of caregiving leave in SA

Whilst the aim of this article is not to comprehensively consider the adequacy or otherwise of the current legislative regime providing for caregiving leave in SA, particularly in light of the five principles identified earlier, the following few observations may be made at this stage.

While the protective provisions of the LRA and EEA in as far as family responsibility, gender and pregnancy could be regarded as preventative in nature (i.e. prohibiting certain conduct by employers), reality is that available remedies provide for relief after-the-fact only, that is, only after discrimination or dismissal has already occurred. Furthermore, despite the progress that have been made since the adoption of the Constitution to address issues of gender equality and work-family life integration, the transformative focus of the Constitution has traditionally been towards increasing the rights of women specifically, with dedicated policies

112 Paragraph 1.1 of the Memorandum on the Objectives of the Labour Laws Amendment Bill B29 of 2017.

113 Ss 9 and 10 deal with amendments to sections 13 and 24 of the Unemployment Insurance Act 63 of 2001 (as amended), the discussion of which however falls beyond the scope of this article.

114 S 3 of the Labour Laws Amendment Act 10 of 2018 which inserts section 25A into the Basic Conditions of Employment Act 75 of 1997.

115 In terms of the Children's Act 38 of 2005 a commissioning parent is defined as "... a person who enters into a surrogate motherhood agreement with a surrogate mother".

116 S 3 of the Labour Laws Amendment Act 10 of 2018 which inserts sections 25B and 25C into the Basic Conditions of Employment Act 75 of 1997.

117 S 4 of the Labour Laws Amendment Act 10 of 2018.

providing for increased rights for men as caregivers, and safeguarding the family unit in general, largely remaining absent.

Subsequent to the recently introduced parental, adoption and commissioning parental leave provisions of the LLAA, maternity leave under the BCEA was effectively the only provision made in legislation towards integrating work and family life. Since maternity leave provisions were predominantly drafted with birth mothers in mind, fathers (and also adoptive or commissioning parents in the case of surrogacy) received very little, if any, legislative protection. While caregiving leave for men (in the form of parental leave), adoptive parents and commissioning parents in surrogacy agreements are now provided for in the LLAA, there still remain a number of shortcomings. A detailed discussion of these shortcomings will not be undertaken in this article,¹¹⁸ with only a few brief comments to be made at this stage. Identified shortcomings mainly centre around the *nature* and *implementation* of the newly introduced caregiving leave provisions.

Adoption leave will only be available to parents where the child adopted is below the age of two. This raises a concern as to the *appealability* of adopting older children in a country where the number of older children in need of adoption is alarmingly high. Furthermore, the parental, adoption and commissioning parental leave provisions of the LLAA only remains available for a limited period, that is, immediately following the birth or adoption of a child. Leave that might be required to take care of a sick child seemingly remains limited to only three days per year (per parent) as per the existing family responsibility leave provisions of the BCEA. Lastly, when compared to periods of caregiving leave in other countries (see discussion under 3.4 above), it seems as if SA is still lacking in the *adequacy* of leave department.

It is thus submitted that the current system of caregiving leave under South African labour laws, while showing signs of progress, cannot be argued as being an effective system when measured against the five fundamental principles identified earlier in this article.

5 Conclusion

There are many issues that continue to hinder the progressive realisation of a proper work-family life balance, not only in the South African context, but at an international level. These include the socio-economic situations in countries, high unemployment and poverty rates in particularly third-world countries, outdated gender stereotypes on the caregiving roles of men and women, and individual career aspirations. Since there is no biological reason which prevents men and women from

118 For a more detailed critique of the provisions of the Labour Laws Amendment Act 10 of 2018 see Rycroft and Duffy 2019 *ILJ* 12-25, as well as Botes and Fourie 2017 *PELJ* 1-39.

being equally responsible for caregiving responsibilities,¹¹⁹ it is argued that an effective system of caregiving leave should provide both genders with an equal opportunity to advance their professional careers, while also actively taking part in the care of the family.¹²⁰ Yet, social science research suggests that inequality in the workplace continues to be influenced, though perhaps to a lesser extent, by outdated gender stereotypes on caregiving responsibilities,¹²¹ with the pay gap between men and women generally increasing with each child added to the household.¹²²

While achieving proper work-family life integration through the provision of adequate caregiving leave might seem aspirational in many countries, particularly in developing nations such as SA,¹²³ attempts towards realising such balance should not simply be forego. Given the need for effective systems of caregiving leave, this article argues that caregiving leave policies should be based on five fundamental or core principles: the best interest of the child; protecting the family unit; gender equality; adequacy (length of caregiving leave); and financial affordability and job protection.

Providing increased substantive rights for workers with caregiving responsibilities should remain high on any government's agenda. In the South African context, available protection should not only be viewed in terms of anti-discrimination provisions or preventative measures (such as those under the EEA and LR), but also in terms of adequate leave periods being available to parents. Caregiving leave provisions should furthermore be aimed at providing parents with periods of leave for purposes of caregiving responsibilities throughout the period of childhood, and not only the period immediately following the birth or adoption of a child.

The author accepts that it is perhaps idealistic to expect there to be a perfect one-size-fits-all system of caregiving leave. Consequently, the aim of the article was not to arrive at such a conclusion. What the article however sought to achieve was to identify the fundamental principles that should form the basis of any system of caregiving leave. What will hopefully emanate from this article is further research and discussion on how the current system of caregiving leave in SA can be amended so as to be representative of the five fundamental principles identified.

119 Stoneman 2017 *Emory Int'l L. Rev.* 52.

120 Ayanna 2006 *U. PA. Journal of Labor and Employment Law* 293.

121 Farrell and Guertin "Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status" 2007 *Hastings L. J.* 1473.

122 Guo "What is the best paid parental leave arrangement to promote gender-balanced caregiving in the home, and gender equality in the workplace in New Zealand?" 2017 *NZWLJ* 66.

123 Cohen and Gosai 2016 *ILJ* 2238.