Working families and the UK: An examination of the development of work-family typologies underpinning UK labour law

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This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

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Contents Page

Tables

Abstract

Work-family rights have received increased attention since the election of the New Labour government in the UK in 1997. The package of work-family rights in the UK has subsequently extended to include new rights for working mothers, parents, fathers and other carers. This development of the package of work-family rights appears to mark a departure from the UK's traditional liberal roots and commonality with the US, as identified within the welfare state regime literature, towards a Swedish-style approach towards the work-family conflict. This research critically examines this development of rights in the UK using the work-family typology classification model. This model, drawn from the welfare state regime, gender and family literature, examines the family care model, the working family model and the division of gender roles within the package of rights. In doing so it distinguishes between three idealised models: the maternity to motherhood typology, the extended motherhood typology and the family typology. Comparisons are also made with Swedish and US legislation to identify and locate the extent of the development of work-family rights in the UK.

Chapter One – Introduction

> *"It is time that policy-making enabled men to play an equal part in parenting, while not detracting from mothers' rights. We need to rethink the current construction of leave for new mothers and fathers … the ultimate goal should be a 'gender-neutral' model of leave that gives both parents genuine choice in striking the balance between working and caring."*[1]

These are the comments made by the Equality and Human Rights Commission (EHRC) in March 2009 regarding amending the package of work-family rights in the UK. They recognise that it should address equally the rights of all working parents, and in particular ensure equal participation for working fathers. This suggests a notable difference from the original work-family rights in the UK which focused primarily on working mothers.[2] Over the past ten years or more, particularly since the election of New Labour in 1997,[3] work-family legislation in the UK has evolved markedly and

[1] Equality and Human Rights Commission (EHRC), *Working Better: Meeting the changing needs of families, workers and employers in the 21st century*, (Equality and Human Rights Commission, March 2009), p.22

[2] This will be explored in depth in Chapter Seven: Mothers' Work-family Rights in the UK

[3] See impetus for change in the Labour Party Manifesto, (1997), *new Labour because Britain deserves better*, Head: Work and family, [WWW Document] URL: http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml (Last accessed: Sept 2009). See also DTI, *Fairness at Work*, White Paper, Cm 3968, (London: The Stationery Office, 1998), which brought these issues onto the agenda: Conaghan, J., 'Work, Family, and the Discipline of Labour Law', in J. Conaghan and K. Rittich, (Eds), *Labour Law, Work, and Family. Critical and Comparative Perspectives*, (Oxford: Oxford University Press, 2005), p.23; See also: MacLean, M., 'The Green Paper Supporting Families, 1998', in A.H. Carling, S. Duncan, and R. Edwards, (Eds), *Analysing Families: Morality and rationality in policy and practice*, (London: Routledge, 2002), p.65; Bleijenbergh, I., Bussemaker, J., and de Bruijn,

often with this or similar aims in mind. It has been concerned, particularly latterly with enabling both parents to combine their work and family commitments.[1]

Over this period of time the package of work-family rights has developed from mother-only rights to a relatively short period of paid maternity leave,[2] to the proposed introduction of specific rights for working fathers,[3] which has the potential to enable both parents to share caring responsibilities. In addition, the rights have also expanded to encompass a broader notion of caring responsibilities from early childcare to the care of older children and other dependent persons.[4]

These changes suggest that the UK is now adopting an evolved work-family model regarding working families and the work-family conflict from its origins in mothers' rights. The aim of this thesis is to critically analyse the development of work-family legislation in the UK and the work-family model underpinning it, comparing the experiences of the US and Sweden. These

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J., 'Trading Well-Being for Economic Efficiency: The 1990 Shift in EU Childcare Policies', in L. Haas and S.K. Wisendale, (Eds), *Families and Social Policy National and International Perspectives*, (London: The Haworth Press Inc., 2006), pp.326-327. See also Lewis, J., and Campbell, M., 'Work/Family Balance Policies in the UK since 1997: A New Departure?', 2007 Vol.36(3) *Journal of Social Policy* 365, for their perceptions on the changes that New Labour has made in the context of work-family policy.

[1] EHRC, (2009), *op. cit.*; Work and Families Act 2006, c.18, (WFA 2006); DTI, *Work and Families: Choice and Flexibility, Additional Paternity Leave and Pay*, (London: DTI, March 2006), (2006b); DTI, *Work and Families: Choice and Flexibility, A Consultation Document*, (London: DTI, February 2005), (2005a)

[2] Employment Protection Act 1975, c.71: See Chapter Seven: Mothers' Work-family Rights in the UK for more details

[3] WFA 2006 and EHRC, (2009), *op. cit.* See Chapter Nine: Fathers' Work-family Rights in the UK for more details

[4] See for instance the extensions of the right to request flexible working to persons caring for dependent adults and to parents of older children, as detailed in Chapter Eight: Parents'

comparators have been chosen because they represent distinctive welfare state regime classifications,[1] suggesting divergent approaches towards working families and the work-family conflict. This is further supported in the overview of work-family legislation available in each state in Table 1.1.

[1] See Chapter Three: Welfare State Regimes and the Work-family Conflict, Table 3.1, p.106

Table 1.1: Overview of work-family legislation in the UK, US and Sweden[1]

Countries/ Rights	***UK***	***US***	***Sweden***
Type of rights	Maternity leave	Family leave (ML) Medical leave (possibly ML for pregnancy-related illness)	Maternity leave
	Parental leave	Family leave (PL)	Parental leave
	Dependant Care leave	Family leave (DCL)	Temporary parental leave (care of ill children or care of terminally ill person)
	Paternity leave		Temporary parental leave (PL)
	Rights to request flexible working		Partial parental leave with/out parental benefit
Coverage	Mothers, Fathers, Parents, Other Carers	Parents, Other carers	Mothers, Fathers, Parents, Other Carers
Duration *Maternity leave*	52 weeks, 39 paid (6@90% and 33@SMP)	Could take family or medical leave at this time – 12 weeks unpaid	480 days leave, (390@80% and 90@ 180SEK)
Parental leave	13 weeks unpaid, can be taken until child 5/18 if disabled	12 weeks unpaid leave to be used during first year	As above
Paternity leave	1/2 weeks paid (SPP)	N/A	10 days leave @80% of earnings
Flexible working	Can be requested until child 17/18 if disabled or in respect of an adult in need of care	N/A	Can be taken with partial parental benefit or unpaid
Dependant care leave	Reasonable time off to deal with emergencies	12 weeks medical leave	120 days @180SEK for children 60 days @80% of earnings for ill persons

[1] UK: Employment Rights Act 1996, c.18 (ERA 1996); Maternity and Parental Leave etc. Regulations 1999, S.I. 1999/3312 (MPLR 1999); WFA 2006. US: Family and Medical Leave Act, Public Law 103-3, (FMLA 1993). Sweden: Parental Leave Act 1995, SFS 1995:584 (PLA 1995); National Insurance Act 1962:381 (NIA 1962), Care Leave Act 1988:1465, (CLA 1988).

These packages of rights suggest that work-family legislation within these states corresponds with the distinct welfare state regime classifications, each offering divergent rights for working families. In spite of the apparent differences between work-family legislation in each state, the UK has also displayed similarities with both the US and Sweden in the past.[1] By analysing the work-family model inherent within each state, this research challenges some of the common perceptions of the work-family conflicts within these states and the position of the UK in comparison.

Chapter outlines

In order to critically analyse the development of the work-family ideologies underpinning UK labour law, an analytical framework must be devised and the comparative situations in Sweden and the US must be identified. The structure of the thesis reflects this, which is divided into three distinct parts. The first comprised of chapters Two, Three and Four, presents the theoretical perspectives on welfare states and the work-family conflict which will be drawn upon to critically analyse the legislation. Chapter Two critically analyses the current conceptualisations of the conflict between work and family responsibilities and questions whether or not the commonly used terms “work-life balance” and “family-friendly” are appropriate in this context. The work-family conflict is instead advanced as a more appropriate

[1] See Chapter Three: Welfare State Regimes and the Work-family Conflict, generally and Table 3.1, p.106 for an overview

conceptualisation of the competing commitments facing working families. Chapter Three examines the welfare state regime classification methods of analysing welfare states, their policies and legislation, enabling the pre-1997 classification of the UK to be established.[1] In addition, criteria that can be used to critically analyse work-family legislation will also be identified. Chapter Four develops on from this, focusing on the specific work-family conflict and tailoring the classification criteria to it. In doing so, the chapter will identify and present the work-family model classification model. This model distinguishes between three work-family models using criteria developed from the welfare state regime, family and work-life balance literature. The three models represent a spectrum from the maternity to motherhood model at one end, through the extended motherhood model at the mid-point, to the family model at the other end.

The second part, encompassing Chapters Five and Six, applies this model to the US and Sweden work-family legislation. This analysis will not only test the strength of this classification model, it will also facilitate the classification of the UK by comparing and contrasting the conclusions drawn in these chapters with the subsequent analysis of work-family legislation in the UK.

The final part, Chapters Seven to Nine, critically analyses the development of UK work-family legislation. Each chapter represents a different stage in that

[1] This corresponds not only with the data sets used in the welfare state regime classification models (see Chapter Three: Welfare State Regimes and the Work-family Conflict, pp.55-105), but also with the election of the New Labour government, and increasing work-family policies, in the UK.

development. Chapter Seven focuses on mothers' work-family rights, while Chapter Eight concentrates on parents' rights and Chapter Nine on fathers' rights. This represents the chronological development of such rights in the UK. One may expect these changes to reflect different ideological approaches towards the work-family conflict, and this thesis will examine the extent to which this is the case.

The final chapter will present the conclusions drawn from this analysis. In particular it will address the question of the extent to which the work-family typology underpinning work-family legislation has developed over time. In doing so it will question the extent to which the UK reflects the experience of the US and/or Swedish work-family legislation. Conclusions will also be drawn about the interrelationship of these three apparently distinct work-family states and the ideologies underpinning their work-family legislation.

Chapter Two – The Work-family Conflict

The analysis of the development of work-family rights within this thesis is concerned with the way in which the legislation enables working families to address the conflict they experience between their labour market and their family care commitments. In order to be able to examine this it is necessary to first determine what the family represents and why the work-family concept has been chosen. The chapter will begin by examining the concept of the family and the working family within the relevant literature, and then by considering the type of family care it encompasses. It will then consider whether or not current conceptualisations of the conflict reflect the balancing of these two spheres, and whether the work-family concept is appropriate.

The family

For some, the notion of the family has been easy to define in terms of the traditional nuclear family model.[1] This family model is often associated with the family of the 1950s.[2] However, it has a much longer history with its roots being found in Engels' analysis of Morgan's anthropological research on the family.[3] This research analysed the development of family and marital

[1] Silva, E.B., and Smart, C., 'The 'New' Practices and Policies of Family Life', in E.B. Silva and C. Smart (Eds), *The New Family?*, (London: Sage Publications, 1999), p.1
[2] Nicholson, L., 'The Myth of the Traditional Family', in H.L. Nelson (Ed), *Feminism and Families*, (New York and London: Routledge, 1997), p.35
[3] Engels, F., *The Origin of the Family, Private Property, and the State*, (New York: Pathfinder Press, 1972); Morgan, L.H., *Ancient Society or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization*, (London: MacMillan and Co., 1877)

groups primarily considering the experiences of Native Americans and other tribal groups and latterly various European civilisations.[1] The latest stage of family development identified within this research was the monogamous family model.[2] While this work has been subjected to criticism,[3] other examinations of the family have identified similar family groups and forms of marriage.[4] In addition, this examination of the family is viewed as the *"best-known discussion of the gender division of labour in classical Marxism"*,[5] with the interpretation of the monogamous family model presenting the foundation of the most classical interpretation of the family in the twentieth century, namely the nuclear family model.[6]

Parsons' definition of the nuclear family model is useful since it is generally reflected in other understandings of this family model.[7] It is identified as comprising a married couple and their dependent children who all live

[1] Engels, (1972), *ibid*, pp.44-89
[2] Prior to this were group marriages common in savagery times; pairing marriages which were prevalent in barbarism; finally developing towards monogamous marriages typical of civilisation: Engels, (1972), *op. cit.*, p.82
[3] Speculative: Mackinnon, C.A., Toward a Feminist Theory of the State, (Cambridge; Harvard University Press, 1989), pp.19-36; Lack of explanation for development: Flax, J., 'The Family in Contemporary Feminist Thought: A Critical Review', in J.B. Elshtain (Ed), *The Family in Political Thought*, (Sussex: The Harvester Press Limited, 1982), pp.233-234; Engels, F., 'Engels on the Origin and Evolution of the Family', 1988 Vol.14(4) *Population and Development Review* 705, p. 706
[4] Goode, W.J., *The Family*, (New Jersey: Prentice-Hall Inc., 1965), p.45; Cheal, D., *Sociology of Family Life*, (New York: Palgrave, 2002), pp.4-5 – with reference to polygamous family groups
[5] Wright, E.O., *Class Counts. Comparative Studies in Class Analysis*, (Cambridge: Cambridge University Press, 1997), p.284
[6] Cheal, (2002), *op. cit.*, p.4; Henwood, M., 'Introduction', in M. Henwood, L. Rimmer and M. Wicks, *Inside the Family: changing roles of men and women*, Occasional Paper No.6 (Family Policy Studies Centre, 1987), pp.3-4; McKie, L., and Cunningham-Burley, S., McKendrick, J.H., 'Families and Relationships: boundaries and bridges', in L. McKie and S. Cunningham-Burley (Eds), *Families in Society: Boundaries and Relationships*, (Bristol: The Policy Press, 2005), p.10
[7] This model is perceived to be the *"conventional family"*: Cheal, D., 'The One and the Many: Modernity and Postmodernity', in G. Allan, (Ed), *The Sociology of the Family: A Reader*,

together.[1] The presence of dependent children, in particular, is viewed as a defining characteristic of the family.[2] This is reflected in the notion of the family traditionally adopted within social and family policy in the UK.[3]

This model is based upon the traditional sexual division of labour within the family.[4] This is evident in the privileging and strengthening of the role of husbands and fathers within the family, while at the same time weakening the role of wives and mothers, making them economically dependent on their partner.[5] Inherent within the nuclear family model is the division of parent and child relationships from those of other extended family members.[6] Later examinations of the work-family legislation tend to display a similar division between those familial relationships that are afforded rights.[7] While Parsons' model has been criticised for focusing on the American middle-class family,[8] this understanding of the nuclear family model has been upheld by many other family academics, which all recognise the importance of these relationships in constituting this model of the family.[9]

(Oxford: Blackwell Publishing Ltd, 1999), p.59

[1] Parsons, T., 'The American Family: Its Relations to Personality and to the Social Structure', in T. Parson and R.F. Bales, (Eds), *Family, Socialization and Interaction Process*, (New York: The Free Press, 1955), p.10

[2] Hantrais, L., *Family policy matters: Responding to family change in Europe*, (Bristol: Policy, 2004), p.45

[3] Weeks, J., Donovan, C., and Heaphy, B., 'Everyday Experiments: Narratives of Non-heterosexual Relationships', in E.B. Silva and C. Smart (Eds), *The New Family?* (London: Sage Publications, 1999), p.86; Wasoff, F., and Hill, M., 'Family Policy in Scotland', 2002 Vol.1(3) *Social Policy and Society* 171, pp.172-173

[4] Hantrais, L., and Letablier, M-T., *Families and Family Policies in Europe*, (London and New York: Longman, 1996), p.71

[5] Creighton, C., 'The rise and decline of the 'male breadwinner family' in Britain', 1999 Vol.23(5) *Cambridge Journal of Economics* 519, p.523

[6] Nicholson, (1997), *op. cit.*, p.31

[7] These tend to focus on the parental-child relationship

[8] Hantrais and Letablier, (1996), *op. cit.*, p.70

[9] Goode, (1965), *op. cit.*, p.45; Minow, M., and Shanley, M.L., 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law', 1996 Vol.11(1)

However, in spite of the dominance of this model within the literature and the apparent universalism that this has implied, others have found it difficult to determine what the notion of the family should represent.[1] This is further supported by those who argue that the notion of the family is in the process of significant change.[2] In addition, it has been argued that there has never been a universal model of the family.[3] These assertions are reflected in the composition of working families in the UK. While the nuclear family model continues to dominate thinking on the family, it does not represent the reality of family life for many people.[4] The percentage of married or cohabiting households with dependent children decreased from 31% in 1979 to 21% in 2002.[5] While this category includes cohabiting couples, the data which is available specifically for married couples confirms this trend. The number of households with married couples and dependent children also decreased from 23% to 18% between 1996 and 2002.[6] In contrast, the number of households with cohabiting couples and dependent children remained consistent during that same period, while the number of lone parent

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Hypatia 4, p.6 **–** considering liberals such as Locke, J., *The Second Treatise of Government*, (1690), edited by T. P. Peardon, (New York: The Bobbs-Merrill Company, Inc., 1952), para.78, p.44; and Mill, J.S., *The Subject of Women*, (1869) introduced by Carr W.R., (Cambridge: The M.I.T. Press, 1974); Nicholson, (1997), *op. cit.*, pp.28-29; Muncie, J., and Sapsford, R., 'Issues in the Study of 'the Family'', in J. Muncie, M. Wetherell, M. Langan, R. Dallos and A. Cochrane (Eds), *Understanding the Family*, (London: Sage Publications, 1997), p.10; Cheal, (2002), *op. cit.*, p.4

[1] Silva, E.B., and Smart, C., 'The 'New' Practices and Policies of Family Life', in E.B. Silva and C. Smart (Eds), *The New Family?*, (London: Sage Publications, 1999), p.1

[2] Esping-Andersen, G., *Social Foundations of Post-Industrial Economies*, (Oxford: Oxford University Press, 1999), p.49

[3] Nicholson, (1997), *op. cit.*, p.29

[4] Rothenbacher, F., 'Social Change in Europe and its Impact on Family Structures', in J. Eekelaar and T. Nhlapo (Eds), *The Changing Family: Family Forms and Family Law*, (Oxford: Hart Publishing, 1998), pp.15-16

[5] Rickards, L., Fox, K., Roberts, C., Fletcher, L., and Goddard, E., (National Statistics), *Living in Britain: Results from the 2002 General Household Survey*, No.31, (London: The Stationery Office, 2004), Table 3.5, p.21

[6] *ibid*

households increased between 1979 and 2002 from 4-8%.[1] While the nuclear family model remains the most common type of household,[2] it is clear that various alternative family forms are increasing in number.

This research reflects the debate that has surrounded the concept of the family within family literature with some arguing that 'the traditional family model', whatever that may represent, does not in fact exist.[3] This diversity is consistent within the literature which recognises that the family is a changing, fluid concept and not a statically determined construct.[4] This suggests that what constitutes the family changes over time. This could be interpreted in two ways. In the first instance, it could refer to the dominant understanding of the family at different points in time.[5] Alternatively, it could refer to the changes for persons that occur throughout their lives.[6] Using this latter notion of fluidity, which is of particular relevance to the conflict between working and caring responsibilities, a family group may be comprised of parents and young children, which will eventually become one with parents and older children. This may subsequently lead to a group consisting of parents with adult children, or an adult child living together with their own

[1] Rickards et al., (2004), *op. cit.*, Table 3.5, p.21: cohabiting couples with children consistent at 3% between 1996-2002
[2] 73% of households with dependent children were headed by a married or cohabiting couple in 2002 (down from 92% in 1979): *ibid*, Table 3.6, p.22
[3] Nicholson, (1997), *op. cit.*, p.28
[4] McKie, et al., (2005), *op. cit.*, pp.12-14; Hantrais, (2004), *op. cit.*, pp.1-2 and p.38; Smart, C., Neale, B., and Wade, A., *The changing experience of childhood: families and divorce*, (Cambridge: Polity, 2001), pp.16-17; Neale, B., 'Theorising Family, Kinship and Social Change', Workshop Paper 6, ESRC Research Group on Care, Values and the Future of Welfare, (Leeds, UK: University of Leeds, 21 January 2000), pp.1-3. [WWW Document] URL: http://www.leeds.ac.uk/cava/papers/wsp6.pdf (Last Accessed: Sept 2009); Silva and Smart, (1999), *op. cit.*, p.1; Hantrais and Letablier, (1996), *op. cit.*, pp.63-79.
[5] Nicholson, (1997), *op. cit.*, p.28
[6] Smart, et al., (2001), *op. cit.*, p.17

partner and children and elderly parents, or a whole host of countless other possibilities. Each of these models of the family represent different relations between the family members and obligations of care and support, albeit that they potentially involve the same group of persons. This underscores the diversity and changing nature of what constitutes a family, even for the same persons. It recognises that any concept of the family and family care within the legislation must recognise this diversity in order to enable all working families to address their various caring commitments.

However, this is not the only form of diversity that can be found within the notion of the family. The family is also recognised as being diverse within itself,[1] representing various different types of relationships. These may extend beyond the traditional heterosexual familial relationships and encompass similar same sex relationships; lone parent families; extended or inter-generational family groups; friendships as family groups;[2] and other variations of these groupings.[3] Some of these family models will encompass analogous caring and support commitments to the nuclear family model,[4] while others will represent rather different caring obligations that exist between such persons, such as intergenerational families. In fact, studies have shown that what the family popularly represents is much wider than the

[1] Smart, et al., (2001), *op. cit.*, pp.16-17
[2] This has particularly been the case for homosexuals who describe their families in this way: Weeks, et al., (1999), *op. cit.*, pp.86-90
[3] Rapoport, R., 'Ideologies about Family Forms: Towards Diversity', in K. Boh, M. Bak, C. Clason, M. Pankratova, J. Qvortrup, G.B. Sgritta, K. Waerness (Eds), *Changing Patterns of European Family Life. A Comparative Analysis of 14 European Countries*, (London: Routledge, 1989), p.56; Hantrais and Letablier, (1996), *op. cit.*, pp.73-77
[4] Such as cohabiting homosexual partnerships

traditional nuclear family model,[1] however, it has been argued that this continues to represent the most common perception of the family model.[2]

The significance and centrality of this nuclear family image is underscored by the fact that it underpins many social structures.[3] The main social structure that is arguably underpinned by this model of the family, and the consequent division of gender roles it implies, is law. This is supported by both O'Donovan and Stang Dahl who argue, respectively, that the law is constructed around this family model and the male norm, which underpins it.[4] The nuclear family model is, consequently, often presented as, and understood to be, the traditional model of the family that is inherent within the legal system.

However, the other main understanding of the family is a wider concept encompassing all of an individual's relations,[5] which may usefully be understood as the extended family model.[6] This moves beyond the traditional parental-child focus and recognises the other family and familial care commitments that working families may experience. These two dominant understandings of the family are significant because, as will become evident in subsequent analyses of the legislation in the US and the

[1] Hantrais and Letablier, (1996), *op. cit.*, p.64
[2] Nicholson, (1997), *op. cit.*, pp.28-29
[3] *ibid*, p.40
[4] O'Donovan, K., *Family Law Matters*, (London: Pluto Press, 1993), p.30; Stang Dahl, T., *Women's Law: An Introduction to Feminist Jurisprudence*, (Norwegian University Press, 1987), pp.12-13
[5] Nicholson, (1997), *op. cit.*, pp.28-29
[6] *ibid*, p.29; Goode, (1965), *op. cit.*, p.44; Parsons, (1955), *op. cit.*, p.10 – although he argues that this type of family is atypical

UK,[1] they reflect the types of family care situations that are inherent within the legislation.

This examination has shown that the nuclear family model is not the reality for many people. It does not reflect the reality of family life for many people who may live in very different family groups, nor does it encompass the various caring responsibilities of working families. In order to fully understand the caring commitments of working families, a wide notion of family care must be adopted.

Family care

The previous examination of the family has advanced a number of alternative family models. What is of particular importance here is the way in which these models address the issue of family care. This is significant because the legislation is concerned with enabling working families to balance their work and their caring responsibilities: consequently it is necessary to identify the types of caring commitments that working persons and families have.

While some of the models identified above adopt similar family relationships to the traditional nuclear family model, others include alternative and/or additional caring responsibilities and diverse relationships. These various

[1] See Chapter Five, and Chapters Seven to Nine below for further discussions of work-family rights in the US and the UK respectively

family forms represent very different groups of relationships and caring commitments to those found within the nuclear family model. Within this family model, it has been argued that adults will feel under an obligation to care and support each other and their children.[1] This understanding reflects a very narrow interpretation of the family and family care. In doing so, it does not appreciate all of the family care responsibilities that working families have. For instance, this can be compared with the extended family model, which encompasses a wider range of relationships and caring responsibilities.

While this family model has sometimes been viewed as extension of the nuclear family model,[2] it has also been interpreted as encompassing other members of their extended family group who generally live together,[3] but could also include persons who live independently of the working carer. In this sense, the family and family care models are inter-generational and could be comprised of elderly parents living with their children and their grandchildren, or other relatives living with the family group or with respect to whom the family is responsible. In addition to the child caring responsibilities that the working family may have, this family model emphasises and encompasses other family commitments. This understanding of the family recognises that family members may also feel obliged to care for their older

[1] Dallos, R., and Sapsford, R., 'Patterns of Diversity and Lived Realities', in J. Muncie et al., (1997), *op. cit.*, p.162
[2] *ibid*, p.162; Nicholson, (1997), *op. cit*, p.29
[3] Goode, (1965), *op. cit.*, p.45

relatives or other family members or other persons who are in need of care.[1] In this respect, the extended family model includes not only persons who live together, but also those who rely upon working family members for care and support.

This extended model of the family and the caring responsibilities that working persons have is reflected in research published in 2000, which showed that 16% of adults 16 years old and over were carers.[2] While the majority of carers did not combine work with caring commitments,[3] 13% worked full-time and 17% worked part-time.[4] This further reinforced the diversity of family care responsibilities that working families' experience. The majority of carers cared for someone outside their immediate nuclear family.[5] This was mainly their parent, or parent–in–law, but was also often another relative or friend/neighbour.[6] This shows that working persons have a number of caring commitments other than for children. In addition, these commitments do not necessarily reflect the understandings of the extended family model, but also encompass other caring responsibilities.

This understanding of the family and family care displays similarities with Fineman's conceptualisation of the family.[7] Writing from a feminist

[1] Dallos and Sapsford, (1997), *op. cit.*, p.162
[2] Maher, J., and Green, H., (National Statistics), *Carers 2000*, (London: The Stationery Office, 2002), Table 2.1, p.6
[3] *ibid*, Table 2.4, p.8: 15% unemployed and 21% economically inactive
[4] *ibid*
[5] *ibid*,, Table 3.6, p.13
[6] 38%, 14%, 21% and 21% respectively: *ibid*
[7] Fineman, M., *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies*, (New York: Routledge Press, 1995)

perspective, Fineman argues that the concept of the family should be based on the care giving relationship.[1] Consequently, instead of fixating on the familial relationships, Fineman concentrates on the caring relationships and responsibilities that exist between persons. In doing so, she focuses on the caring relationship between 'mothers' and their 'children'. However, this conceptualisation of the family is not necessarily underpinned by a gendered care concept, nor does it necessarily reflect the nuclear model of the family and family care. Instead, Fineman views the role of the 'mother' as one which either parent or carer can undertake. In other words, it is not specifically related to the sex of the parent or carer, but the gendered nature of the role that they adopt, in this instance care giving.[2] Consequently, mothering is viewed as a gendered activity, but being a mother in this context is not. In spite of this, this understanding of the family is highly gendered. The focus on mothers reinforces women's role as primary caregiver. While this model is useful, the gendered connotations that it produces must be modified to avoid reproducing and reinforcing these gender stereotypes.

The role of the 'child' is similarly wider than first appears. It covers all dependants, thus, extending to elderly parents or other persons in need of care and not solely young children.[1] This understanding of persons in need of care is useful because it focuses on the caring responsibilities of family members and not the familial relationships. In doing so, it focuses on the extended model of the family and recognises the diversity of family and

[1] Fineman, (1995), *op. cit.*, pp.230-232
[2] *ibid*, pp.234-235

caring commitments that working persons have, and thus the reality of caring responsibilities for working families. However, the reference to the child reinforces parent-child relationships in this context to the possible detriment of other dependants. Again, the diverse caring roles must be reflected within the concept of the family adopted here to ensure that it addresses the needs of all working families. The family care model must focus on all of the caring responsibilities that working families may experience, ranging from the care of very young children, to the care of older children, and to the care of various other persons in need of care.

Working families

While this overview of the family and family care is useful to identify the changing nature of this concept and composition of persons and their caring commitments, what is also relevant in this context is the notion of the working family. This is more useful for this thesis than the focus on the family itself because it is more reflective of the conflicts that are experienced between work and family life and the arrangements that families make in this regard.

The working family model can be interpreted and applied in a number of ways in this context. In the first instance, it can be used statistically to analyse the composition of working families and determine the various forms of working families that are present within different countries. In other words,

[1] Fineman, (1995), *op. cit.*, p.235

to determine the types of working families that are prevalent within any given country at any given time. Alternatively it could be used to consider the ways in which families organise caring and working responsibilities between different family members, i.e. the (gendered) division of familial roles. It can also be used to analyse the way in which working families are able to engage with the work-family conflict, i.e. what working family model does the legislation support? It is this latter analysis of working family models that will be focused upon here. The gendered division of caring responsibilities is also a relevant factor that could be used to analyse the practical implications of the legislation, but this will be considered later.[1]

Working families have a range of different attachments to work and care with different family members giving greater priority to work or caring commitments than others. Various different working family models have been advanced ranging from (male) breadwinner working families, which underpin the traditional nuclear family model;[2] to dual earner-carer working families, which represent shared responsibility for earning and caring responsibilities.[3] This section will analyse the different working family models that have been advanced with reference to the work-family conflict. In order to do so, three different types of labour market/caring arrangements can be identified. These are: the separation of caring and earning commitments;

[1] See Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.118-135
[2] Creighton, (1999), *op. cit.*, p.522; Hantrais, (2004), *op. cit.*, pp.3-4
[3] Crompton, R., (Ed), *Restructuring Gender Relations and Employment: The Decline of the Male Breadwinner*, (Oxford University Press: Oxford, 1999), Figure 10.1, pp.204-205 and p.206; Leira, A., *Working Parents and the Welfare State, Family Change and Policy Reform in Scandinavia*, (Cambridge: Cambridge University Press, 2002), pp.15-23

combining earning and caring responsibilities; and the equal sharing of earning and caring responsibilities. These three different family models are similar to those identified by Leira,[1] representing alternative combinations of work and family responsibilities.[2] In doing so, they represent a continuum of approaches from that which reinforces the traditional separation of these commitments, to a re-negotiation and integration of these spheres. Adopting this approach is useful because it focuses on the same issues being discussed here, namely the relationship and conflict between working and family commitments.

The separation of caring and earning commitments

At one end of the working family model spectrum is the separation of caring and earning commitments. The working family model that represents this division of responsibilities is the male breadwinner working family. Crompton classifies this model as the male breadwinner-female carer family, and identifies that it is composed of one full-time breadwinner and one primary caregiver, with the division of roles being based on gendered grounds.[3] This understanding of the male breadwinner working family model is typical within

[1] Leira, (2002), *op. cit.*
[2] Advanced by Parsons, (1955), *op. cit.*; Myrdal, A., and Klein, V., *Women's Two Roles*, (London: Routledge and Kegan Paul, 1956); and Liljeström, R., 'Sweden', in S.B. Kamerman and A.J. Kahn, (Eds), *Family Policy: Government and Families in Fourteen Countries*, (New York: Columbia University Press, 1978), respectively: Leira, (2002), *op. cit.*, pp.15-23
[3] Crompton, (1999), *op. cit.*, p.205; Gornick, J.C., and Meyers, M.K., *Families that Work: policies for reconciling parenthood and employment*, (New York: Russell Sage Foundation, 2003), pp.90-91

the literature.[1]

This model suggests a clear division between work and earning commitments, with those in the labour market being viewed as *"unencumbered workers"* with no caring responsibilities.[2] Care is, therefore, viewed as something which is undertaken by persons outwith the paid labour market. This could be a stay at home parent, as Crompton suggests, but could also represent other care providers. In particular, it could refer to market or state providers, which also enable workers to enter the labour market unencumbered by caring commitments. The inclusion of other care providers here is inconsistent with Crompton's model. It instead displays similarities with her dual earner-state or marketized carer models, which refer to those families where both parents work full-time and care is provided by an external source, either the state or the market.[3] Crompton places these models further along her family model continuum,[1] but in terms of the conflict between work and care it is arguably similar to the understanding of the male breadwinner working family model adopted here.

This understanding of the male breadwinner working family model focuses on the way in which the legislation enables the family to address their work-family conflicts. If it is underpinned by the male breadwinner working family

[1] Bradshaw, J., and Hatland, A., 'Introduction', in J. Bradshaw and A. Hatland (Eds), *Social Policy, Employment and Family Change in Comparative Perspective*, (Northampton: Edward Elgar Publishing, 2006), p.3; Finch, N., 'Gender Equity and Time Use: How Do Mothers and Fathers Spend their Time?', in J. Bradshaw and A. Hatland (Eds), (2006b), *ibid*, p.255
[2] James, G., *The Legal Regulation of Pregnancy and Parenting in the Labour Market*, (Oxon: Routledge-Cavendish, 2009), pp.17-18
[3] Crompton, (1999), *op. cit.*, pp.205-207; Gornick and Meyers, (2003), *op. cit.*, p.91

model the focus is on the individual as a worker without reference to their caring commitments. This is true of both Crompton's male breadwinner-female carer model and the dual earner-state or marketized carer models. In both instances it is only the individual's role as worker that is addressed, in the labour law context, with regards to the work-family conflict. In this respect the male breadwinner working family model does not necessarily reflect the actual traditional division of earning and caring roles, with fathers as breadwinners and mothers as caregivers, but the ideological division of these responsibilities in terms of their legislative recognition and protection. With regard to the ex-state-socialist countries, such as Sweden, which fell within the category of dual earner/state carer, a similar outcome was achieved because this model failed to challenge gender roles, reinforcing this (gendered) interpretation of these models.[2] Nevertheless, it remains somewhat incompatible with Crompton's model since it is also argued that this dual earner/state carer model has challenged these traditional roles within the Scandinavian states.[3] This reflects the importance of gender roles and how these are reinforced or challenged within states,[4] particularly as regards care.[5]

With this in mind, the same is also true of the gendered nature of this model. While it has been referred to as the male breadwinner working family model,

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[1] Crompton, (1999), *op. cit.*, Figure 10.1, p.205
[2] *ibid*, pp.205-206
[3] *ibid*, p.206
[4] *ibid*
[5] See Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.118-135 for more on this

it is not necessarily the case that breadwinning is undertaken by men. Research undertaken in 2004 showed that 23% and 3% of working families were, respectively, single male and single female breadwinner working families.[1] While the numbers of female breadwinner working families were relatively small, it nevertheless showed that they do represent a proportion of such family models. Nevertheless, the tentative reference to the male breadwinner working family is retained because the concept of breadwinning itself is gendered.[2] As will be discussed in greater detail in Chapter Nine, it is viewed as an important feature of masculinity, with many men considering it to be an essential characteristic of being a man.[3] This is supported by men's identities within the family continuing to be linked to their earning role.[4] This point is further supported by the fact that fathers are more likely to be in work than men without children,[5] and also more likely to work longer hours.[6] Fathers, consequently, have a much greater attachment to the labour market than working mothers, and breadwinning tends to reflect this.

[1] Walling, A., ' Families and work', July 2005 Vol.113(7) *Labour Market Trends* 275, (Office for National Statistics), p.275, Table 1, p.276
[2] Warren, T., 'Conceptualising breadwinning work', 2007 Vol. 21(2) *Work, Employment and Society* 317, pp.321-322
[3] *ibid*
[4] Collier, R., *Masculinity, Law and the Family*, (London; New York: Routledge, 1995), p.193; Lupton, D., and Barclay, L.,, *Constructing Fatherhood: discourses and experiences*, (London: Sage Publications, 1997), p.2; Warin, J., Solomon, Y., Lewis, C., and Langford, W., *Fathers, Work and Family Life*, (Joseph Rowntree Foundation: Family Policy Studies Centre, June 1999), pp.9 and 10; Lewis, C., *A man's place in the home: Fathers and families in the UK*, (Joseph Rowntree Foundation: Foundations, April 2000), p.6; See Chapter Nine: Fathers' Work-family Rights in the UK, pp.426-430 for more details
[5] Burghes, L., Clarke, L., and Cronin, N., *Fathers and Fatherhood in Britain*, (London: Family Policy Centre, 1997), Table 4.1, p.43: 84% of fathers employed in 1993; O'Brien, M., and Shemilt, I., *Working fathers: earning and caring*, (Manchester: EOC, 2003), Table 2.1, p.8: 89% of fathers employed in 2001 compared with 76% of men without children
[6] Burghes, et al., (1997), *ibid*, Table 4.1, p.43: 82% of fathers worked full-time and 2% worked part-time in 1993

The gendered nature of breadwinning is further reinforced by the way in which it has been conceptualised. The notion of breadwinning has rarely been theorised and is instead treated as a universally accepted notion.[1] The most common understanding of the concept is the objective classification of someone as a breadwinner. This conceptualisation considers who in fact earns the most money in the family, and is coupled with the assumption that the breadwinner is the sole or main financial provider in the family.[2] These understandings are based on the presumption that the breadwinner has a direct connection with the paid labour market.[3] All of these features of breadwinning focus on full-time continuous labour market participation. This further reinforces the gendered nature of this role since it is based on the male worker model. The male worker model recognises that the worker is understood in male gendered terms. He enters the labour market without the need or concern for family or caring responsibilities because there is a full-time carer within the home to support him and undertake this role. This model, thus, represents a clear distinction between both of these commitments and spheres of life.[4]

The male breadwinner working family model, consequently is not restricted to the traditional male worker-female carer division of roles, but instead reflects the separation of caring and earning commitments. Those who participate in the labour market, both men and women, do so on male terms with no

[1] Warren, (2007), *op. cit.*, p.318
[2] *ibid*, pp.319-320
[3] *ibid*, pp.320-321
[4] Pateman, C., *The Sexual Contract*, (Cambridge: Polity, 1988), pp.131 and 135

reference to their caring commitments. The male breadwinner working family model, therefore, is principally undefined and based on the separation of earning and caring commitments.

Combining earning and caring roles

The second type of working family model that engages with the work-family conflict is that which enables working families to combine earning and caring commitments. This model does not represent family members fully sharing earning and caring commitments, but does recognise the sharing of these two roles. This model is reflective of Crompton's dual earner-female part-time carer model.[1] In this respect, this family model is a form of dual earning working family.

The dual earner working family model has increased in visibility and in number over the years because of the rise in female employment rates.[2] Between 1973 and 1995 the number of dual earning families rose from 47% to 62%.[3] However, the emergence of this model of the family has distinct ideological and historical origins in different countries. For instance, in the Scandinavian states it has been argued that the dual earner working family

[1] Crompton, (1999), *op. cit.*, p.205
[2] Rimmer, L., 'Paid Work', in M. Henwood, L. Rimmer, and M. Wicks, (Eds), *Inside the Family: Changing roles of men and women*, (Occasional Paper No.6, Family Policy Studies Centre, 1987), p.40
[3] Burghes, et al., (1997), *op. cit.*, Figures 4.2 and 4.3 and Table 4.3, pp.46-47; Rowlands, O., Singleton, N., Maher, J., Higgens, V., *Living in Britain: Results from the 1995 General Household Survey*, (London: The Stationery Office, 1997), Table 4.12, p.57: 62% dual-

has developed as a consequence of the focus on equality between the sexes.[1] In countries like the UK, however, it has been argued that this model has emerged as a consequence of their focus on individual rights.[2] Arguably these aims are focused on similar goals, namely to ensure equal treatment between the sexes, either through extending rights to both men and women to achieve equality in both the labour market and the family,[3] or by providing them with individualised rights to provide equal treatment without redressing the work-family conflict.[4] Nevertheless, the history of the dual earner working family may be important since these differing origins could represent different gender roles underpinning these family models. For instance, a dual earner working family model underpinned by the aim of achieving gender equality may encourage a greater division of earning and caring roles within the family. A model which is instead based on individualism may not challenge these gender roles and may continue to be underpinned by the traditional sexual division of earning and caring roles.

The notion of the dual earner working family encompasses a variety of different working and caring arrangements. In the first instance, the reference to the dual earner working family has been interpreted as referring to all dual earning working families irrespective of the labour market

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earner, 40% one and a half earner, 22% dual-earner in 1995

[1] Rapoport, (1989), *op. cit.*, p.57; Drew, E., 'Re-conceptualising families', in E. Drew, R. Emerek, E. Mahon, (Eds), Women, Work and the Family in Europe, (Routledge, 1998), (1998a), p.22

[2] Rapoport, (1989), *op. cit.*, p.57

[3] As will be shown to have been the case with regards to parental leave in Sweden: see Chapter Six: The Swedish Welfare State and the Work-family Conflict for more details

[4] As will be shown to have been the case with regards to family and medical leave in the US: see Chapter Five: The US Welfare State and the Work-family Conflict for more details

attachments of the various members.[1] However, this does not enable the way in which the legislation affects the conflict between work and caring responsibilities to be analysed. Consequently, two such dual earning working family models have been identified. The one and a half earner-carer working family model will be adopted here, and the dual earner-carer working family model will be discussed in the next section.

The one and a half earner-carer working family model combines elements of both the previous model and the dual earner-carer working family model discussed in the following section. With respect to the first model it is similarly based on the same division of roles. One partner is assumed to be the primary earner, while the other is the main caregiver.[2] However, it is also reflective of the dual-earner-carer working family model, discussed below, because it recognises the need for working families to be able to organise and divide earning and caring commitments.

The one and a half earner-carer working family model, consequently, recognises that both working parents are engaged in the paid labour market.[3] However, the partners have different labour market attachments with one partner adopting a full-time continuous employment role and the other a part-time earning and caring role. The legislation, thus, begins to recognise the competing commitments of working families, but presumes that these will be

[1] Rapoport, (1989), *op. cit.*, p.58
[2] Crompton, (1999), *op. cit.*, p.205; Gornick and Meyers, (2003), *op. cit.*, p.91
[3] Bonney, N., 'Dual Earning Couples: Trends of Change in Great Britain', 1988 Vol.2(1) *Work, Employment and Society* 89, p.90

undertaken primarily by one family member.

The equal sharing of earning and caring roles

The final working family model, and the opposite end of the spectrum from the separation of earning and caring responsibilities, is that which recognises the equal sharing of earning and caring roles.[1] This model is comparable with Crompton's dual-earner/dual-carer working family model, which exemplifies a re-negotiation of gender and earning and caring roles.[2] This is the dual earner-carer working family model.

This model is based on two distinct features. In the first instance there is the sharing of earning responsibilities. This assumes that both working parents are equally engaged in the labour market. Traditionally the dual earner working family model, in contrast to the one and a half earner-carer working family model, has represented those families where both partners are employed full-time. However, distinctions have also been made within the literature with reference to the labour market commitments of both partners. Dual-career working families, for instance, have been identified as a sub-division of the dual earner working family model.[3] In most conceptualisations

[1] Rapoport, R., and Rapoport, R.N., 'The Dual Career Family: A Variant Pattern and Social Change', 1969 Vol.22(1) *Human Relations* 3, p.7; Rapoport, R., and Rapoport, R.N., *Dual-Career Families Re-examined: New Integrations of Work and Family*, (London: Martin Robertson, 1976), p.9 and p.14; Gornick and Meyers, (2003), *op. cit.*, p.12

[2] Crompton, (1999), *op. cit.*, pp.205 and 207; Gornick and Meyers, (2003), *op. cit.*, pp.91-92

[3] Hardill, I., 'A tale of two nations? Juggling work and home in the new economy', (Paper prepared for the ESRC Seminar Series *'Work life balance in the new economy'*, Seminar 3:

of the dual-career working family both partners in the couple are actively pursuing a career.[1] Rapoport and Rapoport define a career as a job which involves significant commitment and which enables the worker to continually advance within the occupation.[2] This is contrasted with the notion of work more generally, which is understood in broader terms to refer to all forms of paid labour market participation.[3] Although Rapoport and Rapoport do recognise that people in non-career jobs may undertake the same commitment to their job without the same rewards, they distinguish careers on the basis that they *"have an intrinsically demanding character."*[4] In contrast, Bonney classifies dual-career partnerships as those where both partners are in full-time continuous employment.[5] Given that the focus here is on the conflict between working and caring commitments and the equal engagement in both the labour market and the family, Bonney's focus on the labour market attachment is more appropriate than Rapoport and Rapoport's career focused approach.

The second feature is the equal division of caring responsibilities, with both working parents being assumed to equally share the responsibilities for childcare. It has been argued by Segal that the dual earning working family

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Social and spatial divisions, May 30th 2003, LSE, London), [WWW Document] URL: http://www.lse.ac.uk/collections/worklife/Hardillpaper.pdf (Last Accessed: Sept 2009), p.2

[1] *ibid*, p.2; Rapoport, R., and Rapoport, R.N., 'Further considerations on the Dual Career Family', 1971 Vol.24(6) *Human Relations* 519, p.519; Rapoport and Rapoport, (1976), *op. cit.*, p.9; Mundlak, G., 'Working Hours of 'Line-ins', in J. Conaghan and K. Rittich, (Eds), *Labour Law, Work, and Family. Critical and Comparative Perspectives*, (Oxford: Oxford University Press, 2005), p.144

[2] Rapoport and Rapoport, (1971), *ibid*, p.519; Rapoport and Rapoport, (1976), *op. cit.*, p.9

[3] Rapoport and Rapoport, (1971), *op. cit.*, p.519

[4] Rapoport and Rapoport, (1976), *op. cit.*, p.9

[5] Bonney, (1988), *op. cit.*, p.90

framework provides the best environment for shared caring responsibilities, because fathers are most likely to share childcare and domestic responsibilities in this type of working family.[1] This model of the working family is, consequently, underpinned by the notion of shared gender roles, which marks a distinct departure from the previous two working family models. This interpretation of the division of these responsibilities suggests that this family model is based on gender-neutral and shared earning and caring roles. Legislation based on this notion of the working family would either facilitate or support the sharing of both of these roles.

Working family models

This examination of the working family has identified a spectrum of models which each represent different relationships between earning and caring responsibilities. At one end of the spectrum is the (male) breadwinner working family model, which is based on the traditional division of earning and caring roles. At the mid-point is the one and a half earner-carer working family model, which is based on a dual earning working family model but is still to an extent underpinned by the division of roles with only one person being facilitated in the combination of such responsibilities. At the opposite end of the spectrum is the dual earner-carer working family, which is centred on shared earning and caring roles.

[1] Segal, L., 'A Feminist Look at the Family', in Muncie et al., (1997), *op. cit.*, p.307

These models represent theoretical understandings of how the legislation may facilitate working families to address the conflicts they experience between work and family life. To this end, they may never reflect the reality of family life for all working persons within the states examined. The importance of this model is instead the extent to which these working family models are inherent within the legislation.

This examination of the working family has centred on dual partnered working family models. While this is reflective of the majority of working families,[1] it excludes other family models such as lone parent families. However, it is necessary to focus on these family models in order to analyse the relationship between work and care and the division of family responsibilities that it upholds. Nevertheless, this will lend itself to a discussion of alternative family models, which will be considered where relevant throughout the thesis.

Families and the conflict between work and family life

This examination of the family, family care model and working family models has reinforced the importance of the family in this context. It has identified that the family is not a predetermined concept, but is instead one which is constantly changing and evolving. This has led to the conclusion that it is more appropriate to focus on and examine the issue of family care in this

context because it is directly related to the conflict between work and caring responsibilities. The focus on family care shifts the emphasis to the caring commitments working persons have. In doing so, it reinforces the variety of caring commitments that persons have throughout their lives and defines the concept of the family in the broadest terms. As opposed to focusing on childcare, this understanding of the family also includes the care of other family members or persons who rely on the employee for care.

This examination of the family has also recognised that the focus of the analysis should be on working families with caring commitments, consequently, the family should be analysed in the context of the working family model. This brings together the two key components of this conflict, namely the relationship between labour market participation and caring commitments outside of the labour market.

The conflict between work and family life

The preceding analysis of the family, family care and working family models raises the question of the relevance of the current understandings of the conflict between work and caring commitments, namely work-life balance and family-friendly policies. While these concepts are frequently used to refer to the competing work and family commitments that working persons' experience, there are no generally acceptable definitions of either of these

[1] Rickards et al., (2004), *op. cit.*, Table 3.5, p.21

concepts within the literature.[1] Those understandings that are available are at times conflicting and not necessarily compatible with this broad notion of the family.[2] This section will, consequently, critically analyse these with a view to determining whether or not they are appropriate in this context and if not how should this conflict be defined. In order to do so effectively this examination will focus on the two central competing features that have been identified concerning this conflict, namely work and family/caring commitments.

Work

All of the current understandings of this conflict adopt a narrow definition of work as paid labour market participation.[3] Work, however, can be interpreted more broadly to include all *"obligated time"*.[4] This understanding of work includes participation in the paid labour market, and unpaid care work outwith the market. In doing so, this interpretation of work moves away from the paid nature of work and focuses instead on the time and labour commitment that an activity involves. The result is that the same degree of value and

[1] Hyman, J., Baldry, C., Scholarios, D., and Bunzel, E.W., 'Work-Life Imbalance in Call Centres and Software Development', 2003 *British Journal of Industrial Relations* 215, p.215
[2] As will be shown below, pp.45-54
[3] Morgan, D.H.J., *Family Connections. An Introduction to Family Studies*, (Cambridge: Polity Press, 1996), p.16; Williams, F., 'In and Beyond New Labour: Towards a New Political Ethics of Care', 2001 Vol.21(4) *Critical Social Policy* 467, p.488; Guest, D., 'Perspectives on the Study of Work-Life Balance', 2002 Vol.41(2) *Social Science Information* 255, pp.261-262; Ungerson, C., and Yeandle, S., 'Care Workers and Work-Life Balance: The Example of Domiciliary Careworkers', in D.M. Houston, (Ed), *Work-Life Balance in the 21st Century*, (New York: Palgrave Macmillan, 2005), pp.246-247
[4] Lewis, S., 'The integration of paid work and the rest of life. Is post-industrial work the new

recognition given to paid labour market participation is afforded to other labour intensive activities such as caring responsibilities,[1] whether they are for children or other persons in need of care.[2]

While there are valid justifications for adopting this wider notion of work, not least of all the implications it has for the recognition of unpaid care work,[3] it is not particularly useful in this context. This understanding of work does not enable the tensions and conflicts between labour market and caring commitments to be analysed. Instead it subsumes them into one category. The narrow interpretation of work, on the other hand, more usefully distinguishes between the two competing commitments that underpin this conflict, by separating labour market and other activities.[4] It is this understanding of work, which is inherent within the current conceptualisations of the conflict,[5] which should be adopted here.

Family/Caring commitments

While the understanding of work has been consistent throughout the definitions of the conflict, the scope of the family and the caring commitments

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leisure?', 2003 Vol.22(4) *Leisure Studies* 343, pp.344-345
[1] Morgan, (1996), *op. cit.*, pp.16-17
[2] Lewis, (2003), *op. cit.*, pp.345-346; McDonald, P., Brown, K., and Bradley, L., 'Explanations for the provision-utilisation gap in work-life policy', 2005 Vol.20(1) *Women in Management Review* 37, p.48
[3] Lewis, (2003), *op. cit.*, pp.344-345
[4] This also reflects the separation of spheres discussed below in Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.125-129
[5] As noted above, p.44

that it entails has been interpreted more diversely, yet inconsistently.[1] This may be attributable to the lack of universal understandings of these concepts,[2] which have led to varying interpretations. Three such interpretations of the scope of the family and their caring, or other, commitments can be identified: families with childcare responsibilities; families with various caring commitments; or all persons with non-labour market commitments. It is this feature of these understandings of the conflict that has truly challenged their relevance in this context.

Childcare

The first, most common, understanding of the family/caring sphere is that it refers to childcare commitments. The childcare focus of these understandings of the conflict is not necessarily surprising considering the context in which they entered into family and employment policy. Their emergence is often associated with increased female labour market participation, including that of working mothers. It has been argued, in the UK context, that the increasing numbers of mothers in the labour market exposed the gaps in UK law and practice with regards to balancing work and care.[3] The conflict and tensions between competing labour market and childcare commitments were, therefore, uncovered. As a consequence,

[1] As will be shown below
[2] Hyman, et al., (2003), *op. cit.*, p.215
[3] Crompton, R., *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies*, (Cambridge: Cambridge University Press, 2006), p.7

these concepts have traditionally been associated with the conflicts experienced by working mothers regarding the care of young children. This childcare focus is reflected in the literature on work-life balance and family-friendly policies.

The most common family/care commitment interpretation is this narrow childcare understanding as exemplified by MacInnes who argues that:

> *"Within the work-life balance ... debate it is frequently assumed or implied that the major issue to be addressed is that of combining paid work with childcare, particularly care for young infants ..."*[1]

MacInnes here notes that the conflict is primarily presumed to be centred on working families with child caring responsibilities. In particular, it is the care of very young children which this conflict has traditionally been centred upon. While this interpretation of the work-life conflict may represent the primary competing commitments that working families face, it presents a limited understanding of all of the caring commitments that they may have. For instance, working parents of older children are excluded from this

[1] MacInnes, J., 'Work-Life Balance and the Demand for Reduction in Working Hours: Evidence from the British Social Attitudes Survey 2002', 2005 Vol.43(2) *British Journal of Industrial Relations* 273, p.273; also adopted by Organisation for Economic Co-operation and Development, *Families and Children*, [WWW Document] URL: http://www.oecd.org/department/0,2688,en_2649_34819_1_1_1_1_1,00.html (Last Accessed: Sept 2009)

interpretation, as are working persons with other caring responsibilities, such as for elderly parents, or ill or disabled family members. This interpretation not only does not recognise all of the caring responsibilities that working persons may have, but also does not appreciate that these may change throughout their lives.[1]

This understanding of the conflict is also potentially gendered. While these definitions do not refer specifically to working mothers, the focus on early childcare is suggestive of maternal care. This reflects the way in which the conflict emerged, and reinforces mothers' caring role in this context to the detriment of working fathers, other working carers and working mothers.

This understanding of the conflict and the caring responsibilities of working families is furthermore inconsistent with the earlier analysis of the family care model.[2] While this analysis identified that the care of children is an important aspect of the family care commitments of working families, it is not the only caring demands that they may face.[1] This narrow focus within these understandings, consequently, insufficiently addresses this conflict.

Various caring commitments

The narrow childcare focus can be contrasted with the broader interpretation

[1] Ungerson and Yeandle, (2005), *op. cit.*, p.246
[2] See above pp.25-29

of care adopted within other understandings of these concepts. This is the understanding which often appears to be advanced by the government and conceptualises the conflict as being between work and home commitments,[2] thus suggesting a greater recognition of the caring responsibilities of working families. However, closer analysis suggests that they largely continue to adopt the same focus on childcare responsibilities, despite the potentially wider definitions that this suggests.[3] In spite of this, there have been some wider interpretations of the conflict which do appreciate the other family care situations that face working families. In 1998 Margaret Hodge, The (then) Parliamentary Under-Secretary of State for Education and Employment stated, during a debate on work-life balance, that:

> *"Work-life balance is not only about mothers and children. It is also important for fathers who should be able to spend more time with their children, and for the changing circumstances in which people find themselves: for example, increasing numbers of people have to look after elderly, sick and disabled relatives, and need time in which to do so."*[4]

This understanding of the conflict represents two main departures from the

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[1] See above pp.25-29
[2] House of Commons Hansard, *Fairness at Work Debate*, (21 May 1998), Col.1103, Margaret Beckett, Col.1105; DTI, (1998), *op. cit.*, para.1.9
[3] House of Commons Hansard, (1998), *ibid*, Margaret Beckett, Col.1105; DTI, (1998), *op. cit.*, Chapter 5; See also examinations of work-family rights in the UK in Chapters Seven to Nine
[4] House of Commons Hansard, *Work-Life Balance*, (9 March 2000), Col.231WH, Margaret

previous one. In the first instance, it attempts to relocate the conflict from the gendered focus on the female caregiver to recognise the caring commitments of both men and women. Secondly, it also attempts to expand the boundaries of care from childcare to the broader notion of family care noted above.[1] By doing so this understanding of the conflict has the potential to recognise the various caring commitments that working persons may experience throughout their lives.

This second interpretation of family/care commitments is more consistent with the family care model and the understanding of family that must be recognised within this thesis. This suggests that the current concepts have the potential to fully appreciate and recognise the scope of this conflict.

Non-labour market commitments

The final interpretation of the conflict relates to the division between labour market and all non-labour market commitments. This understanding of the conflict may include caring responsibilities, but it is much wider and also includes leisure and other non-labour market activities. This understanding of work-life balance has also been adopted throughout the literature,[2]

Hodge, at Col.231WH

[1] See pp.25-29 above

[2] Edgar, D., 'The Future of Work and Family', 1999 Vol.25(3) *Australian Bulletin of Labour* 216; Lewis, S., and Cooper, C.L., 'The Work-Family Research Agenda in Changing Contexts', 1999 Vol.4(4) *Journal of Occupational Health Psychology* 382; Williams, (2001), *op. cit.*; Hogarth, T., Hasluck, C., Pierre, G., Winterbotham, M., and Vivian, D., *Work-Life Balance 2000: Results from the Baseline Study*, Research Report RR249, (Department for

including government documents,[1] which reinforce the notion that the issue of work-life balance is aimed at all working persons irrespective of their caring or other commitments.[2] For instance, in 2001 the DTI noted that:

> *"Work-life balance isn't only about families and childcare. Nor is it about working less. It's about working 'smart'. About being fresh enough to give you all you need for both work and home, without jeopardising one for the other. And it's a necessity for everyone, at whatever stage you are in your life."*[3]

This understanding of the conflict again reflects two fundamental shifts from the previous interpretations. In the first instance, the conflict is viewed not only from the perspective of working carers but from that of all working persons.[4] Secondly, this interpretation is, consequently, not limited to families or those with caring responsibilities, but also applies to all working persons who want to balance work with other non-labour market commitments.[5] In this context, the concept of family-friendly policies and the

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Education and Employment, 2001); Hyman, et al., (2003), *op. cit.*; Lewis, (2003), *op. cit.*; Ungerson and Yeandle, (2005), *op. cit.*

[1] House of Commons Hansard, (2000), *op. cit.*, Margaret Hodge, at Col.231WH; Department for Trade and Industry, UK, (2001) in D.M. Houston, (Ed), *Work-Life Balance in the 21st Century*, (New York: Palgrave MacMillan, 2005), p.1

[2] Hogarth, et al., (2001), *op. cit.*, p.2

[3] Department for Trade and Industry, (2001) in D.M. Houston, (2005), *op. cit.*, p.1

[4] White, M., Hill, S., McGovern, P., Mills, C., and Smeaton, D., ''High-performance' Management Practices, Working Hours and Work-Life Balance', 2003 Vol.41(2) *British Journal of Industrial Relations* 175, p.176

[5] Edgar, (1999), *op. cit.*, p.216, and pp.217-218; Lewis and Cooper, (1999), *op. cit.*, pp.382-384; House of Commons Hansard, (2000), *op. cit.*, Margaret Hodge, at Col.231WH; Williams, (2001), *op. cit.*, p.488; Hogarth, et al., (2001), *op. cit.*, p.3; Hyman, et al., (2003), *op. cit.*, p. 221; Lewis, (2003), *op. cit.*, p.345 and p.346; MacInnes, (2005), *op. cit.*, p.275;

related focus on family/care commitments are sometimes perceived as merely aspects of work-life balance,[1] which is understood in these much broader terms.

This fundamental shift within the understandings of the conflict witnessed an evolution from one concerned with balancing competing commitments, to one about the quality of life that working persons' experience,[2] and the various competing life commitments that they have.[3] This adopts a broad interpretation of the scope of the conflict since it not only includes all working persons, but also all non-working activities.[4]

Interpretations like these move the debate beyond working families and family care. It instead refers to all of those persons with caring responsibilities, and also those who wish to balance work with leisure pursuits. While some view this as a welcome move since it recognises all of the commitments that working persons have,[1] there is an inherent danger within this approach, namely that it ignores the specific problems facing, and the unique experiences of, working families with caring responsibilities.[2] For this reason this interpretation cannot be said to examine the family/care

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Ungerson and Yeandle, (2005), *op. cit.*, pp.246-247

[1] White, et al., (2003), *op. cit.*, p.176; Crosbie, T., and Moore, J., 'Work-life Balance and Working from Home', 2004 Vol.3(3) *Social Policy and Society* 223, p.223

[2] House of Commons Hansard, *Work-Life Balance*, (25 June 2005), Col.942, Andy Reed, at Col.942; Employers for Work-life Balance/The Work Foundation, *Jargon buster*, [WWW Document] URL: http://www.theworkfoundation.com/difference/e4wlb/jargonbuster.aspx#W (Last Updated: 2008) (Last Accessed: Sept 2009), work-life balance; Shaw, J., and Perrons, D., *Making Gender Work: Managing Equal Opportunities*, (Philadelphia: Open University Press, 1995), pp.100 and 104

[3] Guest, (2002), *op. cit.*, p.262

[4] Employers for Work-life Balance/The Work Foundation, *op. cit*, work-life balance

commitment perspective, and thus the work-family conflict in broader terms.

Work-life balance, family-friendly and family/care commitments

This analysis of current understandings of the conflict between work and family care commitments has shown that they have been interpreted in a number of ways. Most of these continue to centre on care, but others equally extend beyond this focus. The previous examination of family care identified that the family must be interpreted broadly and understood in terms of the caring commitments that family members may experience throughout their lives. The second understanding of this competing sphere reflected this interpretation by focusing on family care in these broad terms. However, the alternative interpretations that have also been recognised in this context suggest that work-life balance and family-friendly may not be appropriate ways of understanding the conflict. This is further reinforced by the final interpretation which adopts an even wider notion of family commitments that places no specific emphasis on care.

Consequently, while these interpretations represent a broad spectrum of these understandings of the conflict, ranging from a narrow focus on early childcare, to an expansive understanding of the conflict encompassing all workers and all forms of work-life imbalance, this marks the inadequacies of

[1] Lewis, (2003), *op. cit.* , p.346; Ungerson and Yeandle, (2005), *op. cit.*, p.247
[2] Edgar, (1999), *op. cit.*, p.218

using these terms. The difficulties in identifying what these concepts actually represent make them unsuitable for defining all the conflicts that working families experience and for critically analysing the relevant legislation. It is, therefore, necessary to identify an alternative conceptualisation of the conflict which clearly encapsulates both of these competing activities and the diversity of family care.

Work-family

Throughout this analysis of family care and the conflict between work and caring commitments, two competing spheres and commitments have remained in opposition, namely work and family care. With this in mind, and given the identified inadequacies of current conceptualisations, the alternative understanding of the conflict that is advanced here is work-family.

This understanding of the conflict very simply places labour market commitments in opposition with family care responsibilities. This represents the notion of balance inherent within work-life balance by identifying the tension between these two competing life commitments. However, unlike work-life balance there is not the same degree of ambiguity as to what is included within the competing sphere. It is not all life activities outwith the labour market, but is instead specifically those relating to care, which the current understandings do not necessarily reflect. The reference to the

family is also useful because it has the scope to encompass the broad notion of the family and related caring responsibilities encompassed within the family care model discussed above. Indeed, it is this broad notion of the family, which extends from early childcare to the care of older children and other family members or persons who rely on the family for care, which is encapsulated within this notion of the conflict.

Chapter Three – Welfare State Regimes and the Work-family Conflict

It has been argued that there is a relationship between welfare state regimes and the work-family conflict. This line of argument is based on the premise that different working family models and welfare histories of states produce different work-family cultures.[1] Examining the work-family dichotomy underpinning UK labour law requires an analytical model that enables distinctions to be drawn between different arrangements of work and family life. Given this suggested connection, welfare state regime classification models will be taken as the starting point for developing this model. These classification models are useful because they similarly adopt investigative models and apply these to the categorisation of welfare states. In doing so, they refer to a variety of indicators.[2] These indicators, and the models they produce, reflect the two main strands of this literature, namely mainstream and gendered. This chapter seeks to determine the extent to which there is a relationship between these models and the work-family conflict. In doing so, it will endeavour to identify those elements of the models that enable such insights to be drawn, with a view to developing a specific work-family classification model.

[1] Repo, K., 'Combining Work and Family in Two Welfare State Contexts: A Discourse Analytical Perspective', 2004 Vol.38(6) *Social Policy and Administration* 622, p.623
[2] For an overview see Arts, W., and Gelissen, J., 'Three worlds of welfare capitalism or more? A state-of-the-art report', 2002 Vol.12(2) *Journal of European Social Policy* 137

The welfare state regime literature

There are two main strands to the welfare state regime literature: mainstream and gendered. The mainstream models have focused on indicators such as: social policy programmes,[1] the provision of welfare benefits including the providers of such benefits and services and/or the levels and distributions of welfare expenditure.[2] In doing so, they have tended to focus on the interrelationship between the state, the market and the family as providers of welfare. This is particularly evident in Esping-Andersen's research.[3] For the purposes of the present research, the necessary enquiry is whether or not they offer any insights into the role of the work-family conflict, and thus the work-family model, within these states. These indicators and their focus on the state-market-family nexus suggest that these models could be relevant to analysing the model underpinning work-family legislation. When examining these models it will be necessary to consider the legislation provided by the state to enable working families to address their conflicting commitments, thus focusing on the state-family relationship. The role of the market and their provision of work-family benefits and services, e.g. childcare, is also an important consideration, although one that will not be focused on fully in this

[1] Korpi, W., and Palme, J., 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries', 1998 Vol.63(Oct) *American Sociological Review* 661

[2] E.g. Esping-Andersen, G., *The Three Worlds of Welfare Capitalism*, (Cambridge: Polity Press, 1990); Castles, F.G., and Mitchell, D., 'Worlds of Welfare and Families of Nations', in F.G. Castles (Ed), *Families of Nations, Patterns of Public Policy in Western Democracies*, (Dartmouth Publications Company, 1993); Bonoli, G., 'Classifying Welfare States: a Two-dimension Approach', 1997 Vol.26(3) *Journal of Social Policy* 351

[3] Esping-Andersen, G., (1990), *ibid*; Esping-Andersen, G., *Social Foundations of Post-Industrial Economies*, (Oxford: Oxford University Press, 1999)

examination of UK labour law.[1]

In spite of the references to the family within the mainstream literature, the gendered models have argued that women and gender issues are absent or invisible within these models.[2] The gendered models, in an attempt to redress this perceived imbalance, have focused on more visibly incorporating women into the analysis of welfare states. In order to do so, these models have included the sexual division of labour and the division of gender roles within the family in their analyses.[3] These factors recognise women in their roles as wives and mothers and carers more generally and attempt to expose the male conceptualisation of workers and benefit recipients found within the mainstream literature.[4] The gendered literature appears to offer more insights into the work-family conflict than the mainstream classifications. The focus on the division of roles within the family is particularly relevant to the work-family conflict, which is necessarily concerned with the organisation and division of responsibilities within these competing spheres.

[1] See Table 1.1, p.14 above for an overview of the package of rights examined within this thesis

[2] Sainsbury, D., 'Introduction', in D. Sainsbury (Ed), *Gendering Welfare States*, (Sage Publications Limited, 1994), (1994a), pp.1-2; Daly, M., 'Comparing Welfare States: Towards a Gender Friendly Approach', in D. Sainsbury (Ed), (1994), *ibid*, pp.107-108; Lewis, J., 'Introduction: Women, Work, Family and Social Policies in Europe', in J. Lewis (Ed), *Women and Social Policies in Europe. Work, Family and the State*, (Edward Elgar Publishing Limited, 1994), p.14; Sainsbury, D., 'Gender and Social-Democratic Welfare States', in D. Sainsbury (Ed), *Gender and Welfare State Regimes*, (Oxford: Oxford University Press, 1999), pp.76 and 77; Christopher, K., 'Welfare State Regimes and Mothers' Poverty', 2002 Vol.9(1) *Social Politics* 60, p.62; León, M., 'Welfare State regimes and the social organization of labour: Childcare arrangements and the work/family balance', 2005 Vol.53(2) *Sociological Review* 204, p.205

[3] Lewis, J., 'Gender and the Development of Welfare Regimes', 1992 Vol.2(3) *Journal of European Social Policy* 159; Sainsbury, (1994), (1996) and (1999), *ibid*

[4] Sainsbury, (1994), *op. cit.*, pp.150-154; Sainsbury, (1996), *op. cit.*, pp.1-2, Chs.3-5

This brief overview of the welfare state regime models suggests that they will be instrumental in the development of a critical work-family model. However, the indicators used in order to distinguish between regimes are not the only valuable features of these models. They are also useful methods of identifying the characteristics that defined welfare states within the time periods examined. Consequently, welfare state regime models offer two important contributions to this critical analysis of the development of the work-family model underpinning UK legislation. In the first instance, the models and their indicators can be critically analysed with a view to determining the insights that they produce with regard to the work-family conflict. Secondly, they can facilitate the identification of the indicators characterising the UK pre-1997. This is necessary in order to determine whether or not the model underpinning UK work-family legislation has developed over time.

Welfare state regimes and the work-family conflict

The previous section has suggested that both the mainstream and gendered welfare state literature can offer insights into the work-family conflict and the model underpinning work-family legislation. This analysis will begin by focusing on three welfare state regime models which in some way touch upon this issue, and represent contributions from both strands of this

literature. Esping-Andersen's model offered a mainstream contribution,[1] while Sainsbury and Lewis presented gendered welfare state regime models in critique of this and other mainstream models.[2] This examination will begin by considering Esping-Andersen's model, principally because the gendered literature critiques this model, but also because this model has influenced much subsequent debate on welfare state regimes and their classifications.[3]

Esping-Andersen's welfare state regimes

Esping-Andersen's classification model was the first attempt, at a detailed level, to systematically examine welfare states.[4] This model focused on two specific indicators which examined: the range, availability and extent of welfare benefits and services, combined with the universality and generosity of coverage; and the types of social and class hierarchies that they produced.[5] These indicators essentially assessed the extent to which individuals were dependant upon the market (including the labour market) to maintain an acceptable standard of living.[6] This could range from: individuals being wholly dependant on the (labour) market because welfare benefits and

[1] Esping-Andersen, G., (1990), *op. cit.*
[2] Lewis, (1992), *op. cit.*; Sainsbury, (1994), (1996) and (1999), *op. cit.*
[3] Sykes, R., 'Studying European social-policy-issues and perspectives', in R. Sykes and P. Alcock (Eds), *Developments in European Social Policy: Convergence and Diversity*, (Bristol: Policy Press, 1998), p.24; Wincott, D., 'Reassessing the Social Foundations of Welfare (State) Regimes', 2001 Vol.6(3) *New Political Economy* 409, p.409; Arts and Gelissen, (2002) *op. cit.*, p.138
[4] Sykes, (1998), *ibid*, p.24
[5] These indicators were referred to by Esping-Andersen as de-commodification and social stratification. Esping-Andersen, (1990), *op. cit.*, pp.23, 47-49 and 55
[6] *ibid*, pp.23 and 37

services were low paid, means tested and/or linked to previous earnings; to individuals being supported outwith the (labour) market through universal, adequate state benefits and/or services, enabling individuals, for instance, to leave the labour market to provide personal care for children or other dependents. While these indicators are not directly focused on labour law, and consequently the work-family conflict, they are relevant to the framework which underpins such rights.

Using these indicators, Esping-Andersen identified three welfare state regime models representing three clusters of welfare states. This tripartite model has been the subject of sustained criticism by many other mainstream scholars who have argued that they fail to encapsulate the divergences between certain groups of states, and who instead advance alternative models with four or five different clusters of states.[1] Nevertheless, most classifications remain consistent throughout and continue to broadly represent Esping-Andersen's original tripartite classification[2] of liberal, social democratic and conservative welfare state regimes.[3]

[1] Arts and Gelissen, (2002), *op. cit.*, pp.142-146; Korpi and Palme, (1998), *op. cit.*; Bonoli, (1997), *op. cit.*, p.352; Castles and Mitchell, (1993), *op. cit.*; Leibfried, S., 'Towards a European Welfare State?, On Integrating Poverty Regimes into the European Community', in Ferge and Kolberg (Eds), *Social Policy in a Changing Europe, (European Centre for Social Welfare Policy and Research*, Campus/Westview, 1992)
[2] For an overview see: Arts and Gelissen, (2002), *op. cit.*
[3] Esping-Andersen, (1990), *op. cit.*, pp.26-29

Three worlds of welfare

While Esping-Andersen did not directly address the issue of the work-family conflict within his analysis, each of the regimes represents a different relationship between the state, the market and the family with regard to the provision of welfare.[1] However, as some gendered critiques have claimed, the family strand was not adequately addressed, nor was the position of women within welfare states.[2] Nevertheless, the focus on the state-market-family nexus enables some work-family insights to be drawn.

Within the *liberal welfare state regime* welfare benefits and services were based on low levels of state intervention, characterised by minimal state benefits and stringent qualifying conditions.[3] This was coupled with the strong role of the market,[4] which in many ways supplemented the state by providing alternative private welfare schemes.[5] The implication of this was that individuals were encouraged to participate in the labour market and to also rely on the private market for welfare support. This approach was based on the male model of working life. It focused on and encouraged labour

[1] Esping-Andersen, (1990), *op. cit.*, pp.26-28
[2] Leira, A., 'Mothers, Markets and the State: A Scandinavian 'Model'?', 1993 Vol. 22(3) *Journal of Social Policy* 329, pp.330-331; Orloff, A.S., 'Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States', 1993 Vol.58(3) *American Sociological Review* 303, p.312; Sainsbury, (1994a), *op. cit.*, pp.1-2; Daly, (1994), *op. cit.*, pp.107-108; Lewis, (1994), *op. cit.*, p.14; Sainsbury, (1996), *op. cit.*, p.37; Sainsbury, (1999), *op. cit.*, p.76; Christopher, (2002), *op. cit.*, p.62; León, (2005), *op. cit.*, p.205
[3] Esping-Andersen, (1990), *op. cit.*, p.26; Blunsdon, B., and McNeil, N., 'State Policy and Work-Life Integration: Past, Present and Future Approaches', in P. Blyton, B. Blunsdon, K. Reed, and A. Dastmalchian, (Eds), *Work-Life Integration. International Perspectives on the Balancing of Multiple Roles*, (Hampshire and New York: Palgrave MacMillan, 2006), p.69
[4] Esping-Andersen, (1990), *op. cit.*, pp.26-27
[5] den Dulk, L., van Doorne-Huiskes, A., and Schippers, J., 'Work-family arrangements and

market participation, with no consideration of the other life commitments that working persons may have.[1] This was evident in the limited welfare and caring role attributed to the state and the family within this regime. In addition to the minimal welfare benefits, there were few or no rights or supports provided by the state that would have enabled working families to take paid leaves of absence from work.[2] Working families were consequently deemed to be responsible for their own welfare needs. The liberal welfare state was, thus, characterised by a laissez faire attitude towards addressing the work-family conflict.

The relative absence of work-family considerations was also apparent within the *conservative welfare state regime*. Within this regime the market played a much more marginal role in the provision of welfare benefits and services. The state, drawing from the influence of the church with its traditional family views, relied upon the family to provide for its own welfare and care, only intervening when it was absolutely necessary.[3] Consequently, the family was the primary site of welfare and support within this regime.[1] This factor, coupled with the influence of traditional family values, reflected the traditional

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gender inequality in Europe', 1996 Vol.11(5) *Women in Management Review* 25, p.31

[1] See Chapter Two: The Work-family Conflict for a discussion of family models, pp.29-43. The (male) breadwinner family model, as discussed above in Chapter Two, pp.31-36 is distinct from the male breadwinner working family model despite the similarities between the two. The (male) breadwinner working family model recognises that the worker may be male or female; nevertheless, they adopt the male model of work and family responsibilities. The male breadwinner working family model is different. While it is similarly based on persons with no childcare commitments, it does so by reinforcing traditional gender roles, with men as workers and women as carers.

[2] Esping-Andersen, (1990), *op. cit.*, pp.153-157 – primarily in the context of sickness absence

[3] *ibid*, p.27. Similar religious influences were found in Siaroff's work: Siaroff, A., 'Work, Welfare and Gender Equality: a New Typology', in Sainsbury, (1994), see especially pp.94-96

male breadwinner family model within this regime.[2] This was evidenced by the reinforcement of wives' and mothers' child-caring and family roles through lack of state support for working families and working mothers in particular.[3] In addition, the state upheld status and class hierarchies by basing welfare benefits on those characteristics, for instance, by making benefits earnings related or by linking them to a particular profession.[4] This again reinforced the traditional male breadwinner working family model by supporting those families who most closely adhered to it. States corresponding with this regime, consequently, provided even less support for the work-family conflict than the liberal welfare state regime.

In contrast with the previous two the *social democratic welfare state regime* more closely, albeit indirectly, addressed the work-family conflict. This regime was underpinned by high levels of state intervention in welfare benefit and service provision. This was evident in the universality of state benefits and extensive state supports in relation to the work-family conflict, such as childcare leave and day-care provision.[5] The market adopted a very limited role in this regime, having been displaced as service provider by the state.[6] In terms of the role of the family, it could be argued that the regime was underpinned by the notion of work-family choice. The state undertook responsibility for the care of vulnerable groups, such as children and the

[1] Blunsdon and McNeil, (2006), *op. cit.*, p.70
[2] *ibid*; See pp.31-36 for more details
[3] Esping-Andersen, (1990), *op. cit.*, p.27
[4] *ibid*, p.27; Blunsdon and McNeil, (2006), *op. cit.*, p.70
[5] Esping-Andersen, (1990), *op. cit.*, p.28; Blunsdon and McNeil, (2006), *op. cit.*, p.72
[6] *ibid*

elderly,[1] thus, providing working families with the choice to care or work, or combine the two. States classified as social democratic, consequently, indirectly addressed the relationship between family responsibilities and working commitments, thus offering working families some support with regard to the work-family conflict.

The worlds of welfare and the work-family conflict

While Esping-Andersen's model was not specifically concerned with the work-family conflict, it is apparent that it did offer some insights into this issue. For instance, the model was concerned with the role and relationship between the state and the family regarding the provision of welfare. This is relevant to the work-family conflict because it too involves a consideration of the relationship between the state and the family, in the context of the responsibility and arrangement of caring commitments. With regard to this issue, the regimes can be placed along a spectrum of work-family considerations. The conservative regime representing one end of the spectrum with little or no consideration of the work-family conflict coupled with the reinforcement of traditional gender roles. At the mid-point of the spectrum would be the liberal welfare state regime, which also shows minimal support for the conflict, but which does support a more gender-neutral working family model, albeit one based on the male model of work. The opposite end of the spectrum would be occupied by the social

[1] Esping-Andersen, (1990), *op. cit.*, p.28

democratic welfare state regime, which offers a much more apparent attempt to engage with the work-family conflict, but does not explicitly address the issue of gender roles. This reflects the absence of gender within the analysis and supports the critique in the gendered literature.

While these regimes appear to represent differing approaches towards the work-family conflict, it is necessary question how they do so. In other words, are there any characteristics within and across these regimes that enable these conclusions to be drawn. One possible feature of these regimes is that efforts to enable persons to combine work and caring responsibilities appear to coincide with more gender-neutral approaches towards the work-family conflict and vice versa. The conservative regime showed that the more gendered familial welfare responsibilities were, the less likely the state was to engage with work-family considerations. The opposite could also be said to be true of the social democratic regime. Within this regime the division of gender roles was less pronounced, while work-family issues were more evident. This could suggest that the division of gender roles inherent within a policy or legislation is an important consideration in examining the work-family conflict and the ideologies underpinning the legislation.

Nevertheless, it should be borne in mind that this model has limited effect with regards to the work-family conflict. The focus of the analysis within this model has been welfare benefits and services, and so the work-family indicators can only be inferred from it. In order to determine whether or not

these indicators are appropriate in this context, other models that more clearly include these features should be analysed. To this end, the gendered welfare state classifications may be useful.

In their criticism of the mainstream models the gendered literature maintains that there is a lack of gender, families and women within mainstream analyses.[1] Their additional claim to redress this issue suggests that they may offer a clearer analysis of the relationship between work and caring responsibilities within the states. Two such gendered models were presented using broadly comparable data to Esping-Andersen. These were Sainsbury's gender policy regime models,[2] and Lewis' breadwinner family models.[3]

Sainsbury's gender policy regimes

Sainsbury's gendered critique of the mainstream literature, particularly Esping-Andersen's model, led to the development of the gender policy regime model. This model initially included two regimes, later increasing to three,[4] which were used to distinguish between a specific set of welfare states. The four welfare states that were originally examined were the UK,

[1] Sainsbury, (1994a), *op. cit.*, pp.1-2; Daly, (1994), *op. cit.*, pp.107-108; Lewis, (1994), *op. cit.*, p.14; Sainsbury, (1996), *op. cit.*, p.37; Sainsbury, (1999), *op. cit.*, p.76; Christopher, (2002), *op. cit.*, p.62; León, (2005), *op. cit.*, p.205
[2] Sainsbury, (1994b), (1996) and, (1999), *op. cit.*
[3] Lewis, (1993), *op. cit.*
[4] Sainsbury, (1999), *op. cit.*, pp.77-80

the USA, Sweden and the Netherlands.[1] This model, consequently, did not offer the same broad brush and extensive welfare state analysis as Esping-Andersen. On the other hand, it offered a more specific and detailed analysis of these four states: one of which had posed classification problems for Esping-Andersen, namely the UK; and two of which represented ideal-types, Sweden and the USA.[2]

As this model was primarily presented as an alternative to Esping-Andersen's mainstream model, Sainsbury used data from the same time period, thus presenting an alternative classification of these states, which placed gender at the forefront of the analysis. In order to do so, the examination focused on women's entitlements to welfare benefits and rights as mothers, workers and wives.[3] The focus on these alternative roles has potential relevance for the work-family conflict. This conflict is similarly concerned with these roles and the relationships between the competing commitments that they represent. This focus on women's alternative roles was also distinct from the mainstream analysis, which tended to focus on individuals/groups as welfare recipients and workers in general, and in male gendered, terms and not with reference to these competing identities.[4]

[1] Sainsbury, (1994b) and (1996), *op. cit.*
[2] Esping-Andersen, (1999), *op. cit.*, pp.27, 87, and 143. The Netherlands was the fourth state examined
[3] Sainsbury, (1994b), *op. cit.*, pp.155-166; Sainsbury, (1996), *op. cit.*, Chs.3-5
[4] Sainsbury, (1994b), *op. cit.*, p.166; Sainsbury, (1999), *op. cit.*, p.77

The gender policy regimes

Applying a matrix of criteria relating to women's roles as workers, mothers and wives,[1] the gender policy regimes, like Esping-Andersen's regime, represented ideal models[2] and the original two were presented as contrasting types.[3] These were the breadwinner and the individual gender policy regimes.[4] This bipolar distinction, however, proved to be problematic because it did not offer adequate classifications of the states examined.[5] It was apparent that something which included elements of both regimes was necessary. In response to these classification difficulties two additional variants were added to the analysis to distinguish between different aspects of the breadwinner model, namely breadwinner and traditional roles variants.[6] This led to the emergence of the revised model,[7] which included three distinct regimes. To the original two renamed categories of male breadwinner and individual earner-carer regimes was added the separate gender roles regimes, which represented the mid-point between the two.[8] These models reflected different versions of women's alternative roles, which

[1] Sainsbury, (1994b), *op. cit.*, Table 10.1, pp.152-154; Sainsbury, (1996), *op. cit.*, Table 2.1, pp.40-44

[2] The focus on the 'ideal' has been criticised for failing to take into account the realities of how both men and women interact with state policies: Haney, L., 'Engendering the Welfare State. *A Review Article*', 1998 Vol.40(4) *Society for Comparative Study of Society and History* 748, p.755. Nevertheless, this is a common method used throughout this literature to enable comparisons such as these to be drawn.

[3] Sainsbury, (1994b), *op. cit.*, p.152

[4] *ibid*, pp.152-154

[5] *ibid*, pp.166-167; Sainsbury, (1996), *op. cit.*, pp.70-72. This was evident in the classification of the UK and US examined below, and also that of Sweden (see *ibid*, p.167 for details of these classifications).

[6] *ibid*, p.167

[7] This latter model focused on the Scandinavian states, and did not include a re-examination of the UK or the US

[8] Sainsbury, (1999), *op. cit.*, pp.78-79

in turn reflected varying familial caring relationships and family models.

The *(male) breadwinner regime* was, as its name suggests, characterised by the traditional sexual division of labour, which was reinforced through the private and unpaid nature of care work and through welfare, tax, and employment legislation.[1] Within this regime, women were primarily characterised through their roles as mothers and wives. It was these roles that were reinforced and supported and not the female worker with caring responsibilities. The work-family conflict does not appear to have been a consideration within this regime. Family care responsibilities were undertaken by wives and mothers outside of the labour market, thus, causing no or few conflicts between work and family life. Those who did enter the labour market would have done so on male terms, thus perpetuating the absence (and lack of requirement for) the work-family conflict.

The *separate gender roles regime*, like the male breadwinner regime, was based on the traditional sexual division of labour, which was also reinforced through state legislation.[2] The main distinction between the separate gender roles and (male) breadwinner regimes was the recognition of women's caring role. In the male breadwinner regime, women were not directly benefited from undertaking the responsibility for care. Either the father benefited through the receipt of welfare benefits, or the family was penalised if both

[1] Sainsbury, (1994b), *op. cit.*, pp.152-153; Sainsbury, (1996), *op. cit.*, pp.41-42; Sainsbury, (1999), *op. cit.*, pp.77-78
[2] Sainsbury, (1999), *op. cit.*, pp.78-79

worked full-time through prohibitive taxation.[1] In contrast, in the separate gender roles regime, care-giving activities were reflected in welfare benefits, taxation and in the addition of a paid element corresponding with caring work,[2] thus, not only recognising their caring responsibilities, but also according some value to their care giving role. This regime began to address the work-family conflict with the state undertaking a limited role in this context. However, the conflict was viewed as a woman's issue and so caring remained a deeply gendered activity.

The *individual (earner-carer) regime* took the recognition of care-giving even further. It was characterised by shared gender roles, which was again reinforced within the legislation.[3] This represented a distinct change from the previous two models, which were underpinned by traditional gender roles. By focusing on shared gendered roles, this regime acknowledged both men's and women's dual roles as workers and carers. To this end, care was accorded a greater value, being financially compensated and coupled with the state adopting a more active role in this area. In doing so, this regime recognised the work-family conflict and the roles of the state and the family, and both parents, in this context.

[1] Sainsbury, (1999), *op. cit.*, Table 3.1 and pp.78-79
[2] *ibid*
[3] Sainsbury, (1994b), *op. cit.*, p.153; Sainsbury, (1996), *op. cit.*, pp.42-43; Sainsbury, (1999), *op. cit.*, pp.78 and 79

The gender policy regimes and the work-family conflict

In contrast with Esping-Andersen's model, the gender policy regimes offer a somewhat clearer picture of the relationship between welfare state regime models and the work-family conflict. The role of the state, through legislation, and its importance for the conflict, is more evident when focusing on women's welfare state experience, particularly in their roles as mothers and workers. The role of women and their caring responsibilities within the family is particularly significant because it reflects the division of these responsibilities between the genders and the way in which this is reinforced within the legislation. This reflects not only the balancing of work and caring responsibilities within the working family model, but also the gendered nature of these activities.

Another notable aspect of this model is the emphasis placed on small distinctions which differentiate between the three models. This is evident in the first two models which are both underpinned by traditional gender roles. Despite the similarities, the value afforded to care represents important distinctions between the two. The same is also true of the second two, this time the similarity is the greater recognition and support for caring activities. Whereas in the second model this is gendered, in the third it is underpinned by shared gender roles. These nuances are as significant with regards to the work-family conflict as they are in this context. For instance, work-family legislation may be afforded to both working parents on a gender-neutral

basis, suggesting an underpinning aim of shared gender roles. However, it may also be presented in such a way as to encourage mothers to utilise the rights; for instance, it may replace traditional maternity leave. In this instance, the rights do not necessarily encourage shared parenting, but may instead be based on traditional presumptions about gender roles. This suggests that a closer analysis of work-family rights using a similar nuanced approach is required to determine their potential impact on the work-family conflict.

Lewis' male breadwinner family models

While Sainsbury's model presented a clearer indication of the relationship between welfare state regimes and the work-family conflict, it was not the only model to offer alternative classifications that offered insights in this context. Lewis' male breadwinner family model offered another alternative gendered examination of welfare states from the same time period. This research was focused on the extent to which the male breadwinner family model was inherent within the different states examined, with a view to locating women's position within the state and the labour market.[1] Lewis' analysis focused on four states, namely the UK, Ireland, France and Sweden. The focus on a small number of states reflected the small-scaled detailed analysis approach adopted by Sainsbury and not the wide-scale approach more consistent with the mainstream models.

This approach and the classification criteria used by Lewis were not without its critics, particularly since the examination focused solely on one issue, namely the extent to which the male breadwinner family model was inherent within the state.[2] Despite its narrow focus, this classification model engaged with an issue that is central to the work-family conflict and thus it offered some useful insights. By focusing on the male breadwinner family model, the examination concentrated on the division of roles adopted within the family towards work and care. This brought the issue of family care to the forefront of the examination and in doing so identified issues that were central to the work-family conflict. In the context of the analysis of the UK, these included examining: the provision of maternity leave; women's working patterns; entitlements to welfare benefits; and the provision of services such as childcare.[3] Consequently, while the classification criteria were focused on the male breadwinner family model, the factors taken into account in determining it were more varied. In addition, each model represented a different gendered division of labour which either served to reinforce or erode this family model. This resulted in the identification of three male breadwinner family model variations, ranging from 'strong', to 'modified' to 'weak' male breadwinner states.

The *'strong' male breadwinner* model most closely endorsed the male breadwinner family model, upholding the traditional sexual division of earning

[1] Lewis, (1992), *op. cit.*, pp.160-162
[2] Sainsbury, (1994b), *op. cit.*, p.168
[3] Lewis (1992), *op. cit.*, pp.163-164

and caring roles through legislation and policies.[1] Legislation was, consequently, based on the *"separate spheres ideology"*,[2] with the location of caring responsibilities clearly located in the feminised private family sphere with no systematic state supports.[3] Nevertheless, while this strict division of roles underpinned the legislation, it did not prevent women from entering the labour market. What it did do, however, was ensure that they did so on male terms,[4] in other words, on the assumption that they had no familial responsibilities.[5] In doing so, these states failed to recognise and appreciate the work-family conflict, since they were underpinned by the presumption that these two spheres did not overlap.

The *'modified' male breadwinner* model, also endorsed the traditional sexual division of labour within legislation and policies, but in contrast to the 'strong' model it made some efforts to move away from the male breadwinner family model.[6] This was achieved by focusing primarily on compensating and

[1] *ibid*, pp.162-165
[2] Classification of division given by: Hervey, T., and Shaw, J., 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', 1998 Vol.8(1) *Journal of European Social Policy* 43, p.50; McGlynn, C., 'Ideologies of Motherhood in European Community Sex Equality Law', 2000 Vol.6(1) *European Law Journal* 29, p.37; See Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.125-129 for more on this division
[3] Crompton, R., *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies*, (Cambridge: Cambridge University Press, 2006), p.2; Bottomley, S., and Bronitt, S., *Law in Context*, (Annandale, N.S.W.: Federation Press, 3rd Ed 2006), p.253; Bridgeman, J., and Millns, S., *Feminist Perspectives on Law: Law's engagement with the female body*, (London: Sweet and Maxwell, 1998), p.24; Whelehan, I., *Modern Feminist Thought: From the Second Wave to 'Post-Feminism'*, (Edinburgh: Edinburgh University Press, 1995), p.29; Reskin, B., and Padavic, I., *Women and Men at Work*, (London: Pine Forge Press, 1994), p.22-23; Thornton, M., 'The Public/Private Dichotomy: Gendered and Discriminatory', 1991 Vol.18(4) *Journal of Law and Society* 448, p.449; O'Donovan, K., *Sexual Divisions in Law*, (London: Weidenfeld and Nicolson, 1985), p.12
[4] Lewis, (1992), *op. cit.*, p.164
[5] The influence of the male norm in this respect was noted by Fredman, S., *Women and the Law*, (Oxford: Oxford University Press, 1997), p.197
[6] Lewis, (1992), *op. cit.*, pp.165-168

rewarding caring activities, thus according a higher value to familial responsibilities than was recognised in the 'strong' model.[1] Within this model there was greater recognition of the work-family conflict, albeit in gendered terms.

Within the *'weak' male breadwinner* states there was a move towards dual earning and caring roles, thus challenging the male breadwinner family model and the traditional sexual division of labour underpinning it.[2] This was achieved by facilitating female labour market participation and extending caring rights to working fathers.[3] In doing so, these types of states began to recognise the earning and caring responsibilities of both working parents and address the work-family conflict.

Despite its perceived narrow focus this model presents clear insights into the work-family conflict. While it focused solely on the working family model inherent within the legislation, it reinforced the importance that this has with regards to the policies and the legislation adopted within each state. There was a clear correlation between the strength of support for the male breadwinner model and the extent to which the state recognised and addressed the work-family conflict. This correlation, in practice, represents a similar spectrum of state models to that advanced by Sainsbury.[4] Lewis' model also starts at one end with a model which reinforces traditional gender

[1] Lewis, (1992), *op. cit.*, p.165
[2] *ibid*, pp.168-169
[3] As was the case in the example given of the Swedish welfare state, *ibid*, p.169
[4] See above for details, pp.67-73

roles and the presumption of maternal care.[1] It then progresses to a mid-point model which reflects attempts to challenge the undervaluation of care, but still reinforces the maternal care model.[2] Finally, the opposite end of the spectrum represents a more concerted effort to challenging gender roles with shared earning and caring roles being actively supported.[3]

Welfare state regime models and the work-family conflict

At this stage it is necessary to return to Repo's claim at the beginning of the chapter, namely that there is a relationship between welfare state regimes and the work-family conflict.[4] The preceding work-family investigation of selected welfare state regime models has, to a degree, reinforced this assertion. It has identified that the models present a number of relevant and important issues regarding the analysis of the work-family model underpinning the legislation.

In the first instance, they identified certain indicators that could be used to distinguish between different theoretical approaches towards the work-family conflict.[5] One of the main indicators that was consistent within the three

[1] The 'strong' male breadwinner model
[2] The 'modified' male breadwinner model
[3] The 'weak' male breadwinner model
[4] Repo, (2004), *op. cit.*, p.623
[5] Such models focused on indicators such as the family, the working family model and the division of gender roles that were supported by the state: Lewis, (1992), *op. cit.*; Sainsbury, (1994b), (1996), and (1999), *op. cit.*; Hantrais, L., *Family Policy Matters: Responding to Family Change in Europe*, (Bristol: Policy, 2004), pp.199-206

models was the way in which the state reinforced who provided care.[1] This was either indirectly inferred from the role attributed to/between the family and the state with regards to care,[2] or more specifically with reference to the working family model inherent within the legislation and/or policies.[3] From this it is clear that the working family model underlying the legislation is an important indicator that must be taken into account when attempting to analyse the ideology underpinning it. What is also evident is that a variety of understandings of the working family model and the way in which working families are facilitated to organise care is also a necessary consideration.[4]

Another notable indicator is the division of gender roles. This is again predominant in the gendered literature.[5] This indicator, along with the working family model, has formed part of the basis of distinction between models within the gendered welfare state regime literature. In doing so, it emphasises the importance of critically analysing the practical implications that the legislation has in terms of the gender roles that it supports.

The second issue that these models identify relates to the practicalities of creating a work-family classification model. Both of the gendered models present small scaled focused welfare state analyses.[6] This corresponds with

[1] See above sections on Esping-Andersen, Sainsbury and Lewis, pp.60-77
[2] As per Esping-Andersen's model, see above pp.60-67
[3] As per Sainsbury and Lewis, see above pp.67-77
[4] See Chapter Two: The Work-family Conflict above for further analysis of this indicator, pp.29-43
[5] As per Sainsbury and Lewis, see above pp.67-77
[6] As noted above, *ibid*, Sainsbury's model focuses on four states and women's roles as mothers, workers and wives, while Lewis' model also focuses on four states and the extent to which the male breadwinner model is inherent within the state.

the analysis of the work-family model underpinning UK, Swedish and US legislation undertaken here. These models, and other similar small scaled examples,[1] reinforce that this method of analysis can be appropriate. Not only with regards to the number of states used, but also in relation to the subject matter of the analysis.

This analysis has identified that the welfare state regime literature can be drawn from in order to analyse the work-family model underpinning legislation. Presenting a new classification model is preferred as opposed to using one of the existing models because none of them explicitly address, nor focus upon, the work-family conflict. In order to ensure a thorough and rigorous critique of the legislation a more specific and focused approach must be adopted here. Nevertheless, the welfare state regimes models and the classifications that they produce are useful in this context. They can facilitate the classification of the UK welfare state during the periods of analysis, thus, providing a point of reference for the work-family classification model. The remainder of this chapter will focus on identifying the classification of the UK within welfare state regime literature. The relevant work-family indicators and the influence of the welfare state regimes literature in this context will be further developed in the next chapter.[2]

[1] For instance, León, (2005), *op. cit.*, also conducted a similar small scale investigation of the childcare arrangements and their effect on work/family balance using data from the UK and Spain.
[2] Chapter Four: The Work-family Conflict and the Work-family Classification Model

The development of the welfare state classification of the UK

The welfare state regime literature can be divided into three distinct time periods in terms of the classification of the UK: the period between the 1960s-1980s,[1] the 1980s,[2] and the period between 1990 and 1997.[3] These data periods are useful because not only do they provide a relatively long period of time over which the classification of the UK can be identified, they also provide classifications of the UK prior to the introduction of new work-family rights post-1997. This provides a neat division between these classifications and the work-family classifications of these rights discussed in later chapters.

1960s-1980s: Social democratic to liberal

The welfare state regimes discussed in the previous section all used data from the period including the 1960s to the 1980s.[4] This data period, consequently, encompasses classifications from the mainstream and the gendered literature and has the potential to offer differing insights into the classification of the UK, and possibly diverging classifications. This analysis will begin with the mainstream offerings of Esping-Andersen as before.

[1] Models presented by Sainsbury, (1994b) and (1996), *op. cit.*; Lewis, (1992), *op. cit.*; and Esping-Andersen, (1990), *op. cit.*
[2] Models presented by Castles and Mitchell, (1993), *op. cit.*; and Leibfried, (1992), *op. cit.*
[3] Models presented by Esping-Andersen, (1999), *op. cit.*; and Korpi and Palme, (1998), *op. cit.*
[4] Sainsbury, (1994b) and (1996), *op. cit.*; Lewis, (1992), *op. cit.*; Esping-Andersen, (1990), *op. cit.*

Esping-Andersen's classification of the UK welfare state

Esping-Andersen's welfare state regime model, as noted above, identified three welfare state regimes: liberal, conservative and social democratic.[1] Before classifying the states examined, Esping-Andersen noted that these regimes were ideal-types, recognising that individual welfare states may display elements of the different regimes, although they predominately corresponded with a particular model.[2] In spite of this he was able to clearly classify the majority of the eighteen states examined into the three clusters.[3] Other mainstream models, however, have criticised the clustering of certain states, with alternative models advancing different classifications.[4] Nevertheless, as noted above, most of these classifications remain consistent.[5]

Within Esping-Andersen's model Sweden was identified as the ideal-type social democratic welfare state,[6] while the US was similarly acknowledged as the ideal-type liberal welfare state.[7] The UK, however, posed greater classification problems than these other states. This was also reflected in subsequent mainstream models and critiques.[8]

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[1] See above pp.60-67 for a discussion of these regimes
[2] Esping-Andersen, (1990), *op. cit.*, pp.28-29
[3] *ibid*, pp.47-54, 69-77 and 82-88
[4] Korpi and Palme, (1998), *op. cit.*; Bonoli, (1997), *op. cit.*, p.352; Castles and Mitchell, (1993), *op. cit.*; Leibfried, (1992), *op. cit.*
[5] See Arts and Gelissen, (2002), *op. cit.*, Table 2, pp.149-150, for an overview
[6] Esping-Andersen, (1990), *op. cit.*, p.143
[7] *ibid*
[8] See for instance: the alternative mainstream model presented by Castles and Mitchell, (1993), *op. cit.*, examined below, pp.96-99; and the gendered model advanced by Sainsbury, (1994b) and (1996), *op. cit.* also discussed below, pp.87-90

In the first instance, the UK is generally perceived as having been classified as a liberal welfare state regime under this model.[1] This categorization was, to a degree, later validated by Hicks and Kenworthy, although they did argue that the liberal and social democratic regimes were two ends of the same spectrum.[2] However, the liberal classification of the UK has been criticised because some of the features of the UK welfare state are inconsistent with this classification, and consequently, the classification indicators do not robustly support this clustering.[3] These criticisms of the liberal classification of the UK are valid. The liberal classification of the UK is not entirely accurate, at least with respect to Esping-Andersen's model. While Esping-Andersen had noted that states may, at times, correspond with divergent regimes, which will not affect their overall regime classification, the example of the UK here was slightly different. According to Esping-Andersen, the UK was an example of a *"mixed case"*.[1]

The UK welfare state regime: A "Mixed Case"?

The identification of the UK welfare state as a mixed case recognised not only the evidence of characteristics of two separate regimes within the UK welfare state, but also the significance of these classifications. The mixed classification of the UK acknowledged that certain characteristics of the UK

[1] Arts and Gelissen, (2002), *op. cit.*, Table 2, pp.149-150
[2] Hicks, A., and Kenworthy, L., 'Varieties of welfare capitalism', 2003 Vol.1(1) *Socio-Economic Review* 27, pp.31, 32-34 and 51
[3] Sainsbury, (1996), *op. cit.*, p.13

welfare state displayed similarities with the liberal regime,[2] while others corresponded with the social democratic regime.[3]

The UK's liberal classification related to the state-market relationship and the extent to which rights and welfare benefits were dependant on labour market participation.[4] This aspect of the UK classification focused on entitlements to welfare benefits and identified the UK as displaying a medium level of welfare support.[5] This reflected the universality of welfare benefits in the UK, coupled with low levels of income replacement and the stigmatisation which surrounded use of these rights. The implication of this was that individuals had to participate in the labour market in order to achieve an acceptable standard of living. Leaving the labour market, either temporarily or permanently, for whatever reason was not supported in this welfare state. This could include not only those persons unable to participate in the paid labour market and in receipt of welfare benefits, the main focus of Esping-Andersen's research, but also, focusing more closely on the work-family conflict itself, those persons leaving the labour market to care for children or other dependent family members.

The previous analysis of the liberal welfare state regime identified that it did not appear to adequately address the work-family conflict;[6] and this

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[1] Esping-Andersen, (1990), *op. cit.*, p.87
[2] Esping-Andersen, (1990), *op. cit.*, Table 2.2, p.52
[3] *ibid*, Table 3.3, p.74
[4] *ibid*, pp.21-22
[5] *ibid*, pp.48-54
[6] See pp.62-63 above

consideration of the classification of the UK supports these conclusions. Low income replacements and limited rights to leave the labour market are inconsistent with enabling working families to combine work and care. In order to be meaningful and facilitate familial care, such rights would have to adequately compensate for loss of income and enable working families to balance their labour market and caring commitments.[1] Despite the limitations of this model with regard to the work-family conflict, it can be inferred that these aspects of the classification of the UK welfare state display characteristics inconsistent with addressing the conflict.

The UK welfare state of the 1960s-1980s, however, also displayed similarities with the social democratic regime. This liberal/social democratic classification of the UK related to the relationship between social class and citizenship in terms of the types of class structures the welfare state reinforced.[2] This indicator was related to the combination of universal, low paid, and means tested benefits provided by the UK welfare state. The means testing and low levels of income support again reflected the liberal model, which was characterised by providing assistance only to those most in need thereby creating a division between those receiving benefits and those not.[3] The universal nature of benefits, on the other hand, corresponded with the social democratic indicators.[4]

[1] This is evident in the subsequent discussions of various work-family rights
[2] Esping-Andersen, (1990), *op. cit.*, p.23
[3] *ibid*, pp.61-65, 70-72 and 74
[4] *ibid*, pp.65-72 and 74

In this context, the social democratic model was underpinned with the desire to eradicate class hierarchies by promoting equality through uniform and universal welfare benefits.[1] Esping-Andersen noted that this latter model was only effective where the population was relatively homogeneous and low earning, where this was not the case it would again reinforce a two-tier hierarchy since the level of welfare benefit would be inadequate for higher earners.[2] The classification of the UK reflected this situation. A two-tier class structure was created with the very poor relying on welfare state benefits and the rest of the population turning to the market to meet their needs.[3] In the work-family context one example of this dualism could be access to quality childcare or unpaid childcare leave, which was only available to those who could afford to access it. The UK, thus, displayed elements of both of these regime models, making classification particularly difficult.

From these classifications it is not difficult to see why the UK is generally accepted as a liberal welfare state. These classifications predominately reflect liberal characteristics, with a few indicating the social democratic regime in contrast. Given the preponderance of liberal features, this classification of the UK would be more appropriate. Another possible way of reconciling this classification is to accept Hicks' and Kenworthy's liberal/social-democratic spectrum,[4] thus recognising the similarities between

[1] Esping-Andersen, (1990), *op. cit.*, pp.25-26, 65-75
[2] *ibid*, p.25
[3] *ibid*, p.25
[4] Hicks and Kenworthy, (2003), *op. cit.*, pp.31, 32-34 and 51

these regimes and the possibility for overlap between them. Nevertheless, these classifications support the notion that the UK was in a state of flux at this time.

Welfare State Development

Esping-Andersen's mixed classification of the UK recognised one additional important feature of this welfare state, namely that it was an example of welfare state mutation.[1] Prior to these welfare state classifications, the UK was considered to be closer to the social democratic welfare state regime model.[2] This was reflected in the universal provision of various welfare benefits and services, for example the NHS. Esping-Andersen's classification, however, represents a move away from that regime type and a move closer towards the liberal welfare state regime.[3]

The factors underpinning this change could be many and varied. For instance, it could reflect changes in government, policies and/or attitudes towards the roles of the state, the market and the family. In the context of this research, the reasons for the change are not as significant as the implications of the change in terms of the work-family conflict. The development of the classification of the UK welfare state thus far suggests a

[1] Esping-Andersen, (1999), *op. cit.*, p.87
[2] *ibid*, pp.53-54; Also noted by Ginsburg, N., *Divisions of Welfare: A critical introduction to comparative social policy*, (London: Sage Publications, 1992), p.30
[3] Esping-Andersen, (1990), *op. cit.*, pp.53-54

trend that is at odds with the current advances in work-family legislation. However, it should be recalled that this classification represents a time period prior to the expansion of work-family rights in the UK, and consequently subsequent shifts in the UK welfare state classification may be shown over time. What this model does confirm is that the classification of states is not necessarily rigid, and that the UK may continue to be an example of welfare state mutation.

Sainsbury's gender policy regime classification of the UK

Despite the alternative gendered approach offered by Sainsbury, the gender policy regime classification of the UK encountered similar problems to those experienced by Esping-Andersen. This could further reinforce his interpretation of the UK welfare state as an example of a state in flux or mutation. Another possible reason for the difficulties experienced in classifying the UK here could be that it was classified using the original dual breadwinner regime, and not the expanded tripartite regime, classification model.[1] The strength of this argument is evident in the classification of the UK which encompassed certain features of the breadwinner regime, while other characteristics suggested an alternative classification, i.e. neither the breadwinner nor the individual regime.[2]

[1] Sainsbury, (1994b) and (1996), *op. cit.*
[2] Sainsbury, (1994b), *op. cit.*, pp.158-160; Sainsbury, (1996), *op. cit.*, pp.55-58

The UK, and the US, welfare states were characterised by legislation and policies that were based on the male model of work and caring responsibilities.[1] Certain welfare policies reinforced and rewarded the (male) breadwinner family model, such as the national insurance scheme, as did employment and tax legislation.[2] The male model of working and caring responsibilities was also evident in the reinforcement of private responsibility for care and the provision of (limited) maternity rights that were based on employment status.[3] The former was further reflected in the limitation of public care facilities, and family services and benefits, to those in need.[4] The private nature of care underpinning these policies and legislation was consistent with the (male) breadwinner regime. Families were largely left to arrange their own work and family commitments.

However, the presence of the rights to maternity leave and pay, albeit limited rights, was not entirely consistent with the (male) breadwinner regime. The introduction of these rights in the UK signified the recognition and support of the caring responsibilities of working families (specifically working mothers). In addition, other welfare benefits, such as family allowances, were paid directly to women.[1] These characteristics suggest a weakening of the (male) breadwinner model and a move towards individual rights. However, the limited nature of the rights in terms of length of maternity leave and the level of financial supports rendered them inconsistent with the individual (earner-

[1] Sainsbury, (1996), *op. cit.*, pp.116-120
[2] *ibid*, pp.69-70
[3] *ibid*, pp.92-93,95-96,97-98 and 100-101
[4] *ibid*, pp.92-93, 95 and 100-101

carer) regime.

The resulting classification of the UK, and that of the US,[2] reflected the varying characteristics inherent within these states. It identified that the (male) breadwinner regime, and the underpinning ideology, had had a significant influence on the policies of these welfare states. However, it was also apparent that they did not entirely correspond with this model,[3] nor were they more consistent with the individual (earner-carer) regime. These conclusions mirrored the difficulties that Esping-Andersen found in attempting to classify the UK welfare state at this period of time.[4] A more appropriate classification of the UK may have been the separate gender roles regime since the state endorsed legislation that enabled women to address the work-family conflict either by supporting care outside of the labour market, or by enabling working mothers to combine work and leave. In doing so, it appears to have reinforced the traditional division of gender roles by giving working mothers' enhanced rights but continuing to ignore the role of the working father. This corresponds with the middle position reflected within this regime, which accords some value to care albeit on gendered grounds.[5]

The classification of the UK within this model in some ways reinforced Esping-Andersen's conclusions.[6] While Sainsbury did not explicitly argue

[1] Sainsbury, (1996), *op. cit.*, p.56; Sainsbury, (1994b), *op. cit.*, p.159
[2] Sainsbury, (1994b), *op. cit.*, pp.160-162
[3] *ibid*, p.166
[4] See section above on Esping-Andersen's model, pp.81-87
[5] Sainsbury, (1999), *op. cit.*, pp.78-79
[6] See section above, pp.81-87

that the UK welfare state was in the process of change, or had been, she did argue that while the UK may have been classified alongside Sweden in some of the mainstream literature, this analysis showed that they were underpinned by different approaches and underlying aims,[1] particularly regarding the work-family conflict. The thrust of the argument was that the classification of the UK as displaying similarities to Sweden was inaccurate when gender was added to the analysis. This suggested, as before, a move away from a Swedish-style welfare state classification towards a more liberal US-style state. This is again inconsistent with the presumptions surrounding the present packages of Swedish and British work-family rights.[2] Nevertheless, this model also reinforced the difficulty of classifying the UK given the variety of divergent characteristics that it displayed.

The UK male breadwinner state

In contrast with the previous two models, Lewis' male breadwinner model classified the UK as a 'strong' male breadwinner state throughout the 20th century until the 1980s.[3] Consequently, this analysis identified that it continued to be underpinned by the male breadwinner ideology. This remained the case despite women's movement into the labour market, which was identified as having been on men's terms.[4] This classification of the UK

[1] Sainsbury, (1996), *op. cit.*, p.70
[2] See Table 1.1, p.14 for an overview of the packages of rights in these three states
[3] Lewis (1992), *op. cit.*, p.162-165
[4] As noted above at p.75

reflected the minimalist approach of the state at the time towards the work-family conflict, with very limited attempts being made by the state to enable working parents to balance their work and family commitments.[1]

This examination of Lewis' classification of the UK welfare state in many ways corresponded with Sainsbury's conclusions identifying similar work-family issues and a broadly similar classification of the UK. However, there was one notable difference between them. Whereas Sainsbury viewed the UK welfare state as only displaying some elements of the male breadwinner model,[2] Lewis classified it as a 'strong' male breadwinner state. While this does not necessarily mean that the state displayed no contradictory characteristics, it suggests that the male breadwinner model was the dominant ideology within the state. This conclusion, however, is consistent with the movement towards a liberal/male breadwinner-style classification of the UK within both Sainsbury's and Esping-Andersen's models.[3]

The 1960s-1980s UK Welfare State

The three classification models examined here displayed varying aims and classification criteria. Nevertheless, certain similarities can be identified and

[1] Lewis (1992), *op. cit.*, p.164; Fux, B., 'Which Models of the Family are Encouraged or Discouraged by Different Family Policies?', in F-X. Kaufmann, A. Kuijsten, H-J Schulze and K.P. Strohmeier, (Eds), *Family Life and Family Policies in Europe, Volume 2: Problems and Issues in Comparative Perspective*, (Oxford: Oxford University Press, 2002), pp.374-375 and 377-379

[2] See preceding section for details

[3] See above pp.81-90 for more details

an overall understanding of the UK welfare state during the 1960s-1980s can be drawn. One of the essential features of the UK at this time was that it was difficult to classify.[1] The UK welfare state displayed various, somewhat competing, characteristics. In some ways it was classified as a liberal or male breadwinner state, characterised by minimal state intervention, and limited supports or rights that facilitated or encouraged labour market exit in order to care. In other words, the UK was classified as the type of state that afforded few rights to working families to enable them to balance their work and family commitments. However, in other ways, it displayed similarities with the Swedish classifications with some evidence of state supports and some (albeit limited) work-family rights.

The competing regime classifications found within the various models also reflects the notion of welfare state regime development or mutation, which was also apparent within these various models. While the more recent changes in the package of work-family rights in the UK suggest a move towards the Swedish-style work-family model,[2] these classifications have suggested otherwise. They have instead shown that the UK welfare state has developed from one with similarities to the Swedish classification towards one closer to that of the USA.[1] While these examinations have focused on the classification of the welfare state and not the work-family conflict, they have nevertheless supported the contention that the UK welfare state was evolving. This in turn, could have implications for the ideology

[1] See Esping-Andersen and Sainsbury above, pp.81-90
[2] See Table 1.1, p.14 for an overview of the packages of rights in these three states

underpinning the legislation, including work-family legislation. The evolving nature of the UK welfare state was further reinforced in Lewis' classification,[2] which suggested that by the end of the 1980s the UK welfare state had lost any similarities it once shared with the Swedish model. This next section will begin where Lewis' analysis finished and examine those classification models that have focused specifically on the 1980s. It will consider, in particular, if the development of the UK welfare state is supported in these later models.

The UK welfare state in the 1980s: A liberal welfare state?

The conclusions of the previous section point towards an increasingly liberal classification of the UK, suggesting a closer correlation with the US welfare state model. This section examines the next chronological stage in the welfare state classification literature focusing solely on the 1980s. This section examines two alternative mainstream classification models. These are: Leibfried's social policy models and Castles and Mitchell's worlds of welfare model.[3]

[1] See sections on Esping-Andersen and Sainsbury above, pp.81-90
[2] See preceding section on Lewis' model
[3] Leibfried, (1992), *op. cit.*; Castles and Mitchell, (1993), *op. cit.*

Leibfried's social policy models

Leibfried's examination of welfare states was conducted with the aim of determining whether or not it was possible to identify a European welfare state.[1] In concluding that this was not possible, he identified four social policy regimes based on the relationship between poverty, poverty policies and social insurance that were present within Europe.[2] These indicators were different to those used in the models discussed earlier, and were focused on determining the position of the basic income debate within these regimes. This debate focused on the role of the state as a provider of minimal income support.[3] In this respect, the model was not directly concerned with issues central to the work-family conflict. Nevertheless, despite criticism surrounding the use of one particular welfare programme to distinguish between states,[4] the model displayed striking similarities, in terms of welfare state classifications, with the more robust classification models with two exceptions.[5]

Firstly, in addition to Esping-Andersen's three welfare state regimes, Leibfried added a fourth model which specifically represented the Southern European states, something which was arguably overlooked by Esping-Andersen.[6] Secondly, and most significantly, Leibfried presented a slightly

[1] Leibfried, (1992), *op. cit.*, p.246
[2] *ibid*, pp.251-254
[3] *ibid*, p.251
[4] Esping-Andersen, (1999), *op. cit.*, p.90
[5] As shown in Arts and Gelissen, (2002), *op. cit.*, Table 2, pp.149-150
[6] Arts and Gelissen, (2002), *op. cit.*, pp.142-146; Bonoli, (1997), *op. cit.*, pp.354-355. Although this was refuted by Esping-Andersen in his later work, (1999), *op. cit.*, pp.86-92

different classification of the UK. The models discussed in the previous time period classified the UK as displaying elements of liberal or male breadwinner states and elements of social democratic or individualistic states,[1] whereas Leibfried classified the UK as an Anglo-Saxon country only. This classification corresponds with Lewis's classification and suggests that the UK welfare state at this time had evolved further to correspond more closely with this liberal-style state and any social democratic-style elements that previously characterised the UK have been eroded. In spite of these differences, Leibfried's model also supports the practice of focusing on one aspect of a welfare state model which can produce valid and consistent classifications of welfare states in more general terms.[2]

The four social policy regimes that were identified were: the Scandinavian, the Bismarckian, the Anglo-Saxon and the Latin Rim countries.[3] As the names suggest, these regimes were largely regional and represented clusters of states from certain parts of Europe. The UK, as noted above, was classified as an Anglo-Saxon country.[4] This classification of the UK corresponded, to an extent, with those identified in the previous section, reinforcing the validity of a single-issue classification model. This model is broadly comparable to Esping-Andersen's liberal welfare state regime[1] and the male breadwinner model in the gendered literature. Anglo-Saxon countries, like the comparable regimes in previous models, were

[1] See preceding section on the period between the 1960s and 1980s
[2] As suggested above, pp.94-96
[3] See Leibfried, (1992), *op. cit.*, pp.251-254 for more details on each of these models
[4] *ibid*, pp.252-253

characterised by the minimalist role of the state and the aim of encouraging work in favour of welfare dependence.[2] The basic income debate was not central on the agenda of these states, with individuals being actively encouraged to participate in the paid labour market and not to opt out of paid employment.[3] While this model was not specifically concerned with the work-family conflict, the model underpinning this issue can equally be translated into this context. Since the state undertakes minimal support in this area, it suggests that support for work-family rights would also have been low, particularly if the state were to subsidise such rights through income replacements or other welfare supports. The UK, consequently, continues to be classified as a minimalist, laissez-faire type of welfare state.

Castles and Mitchell's worlds of welfare

A possible departure from the previous classifications of the UK welfare state was presented by Castles and Mitchell in their work which sought to re-examine the previous classifications of welfare states, particularly English-speaking welfare states.[4] This focus on English-speaking states reflected the divergent classifications of these states over time. One reason for this focus was that the Antipodean states and the UK had at times been classified as progressive welfare states, although they were at the time of the

[1] As shown in Arts and Gelissen, (2002), *op. cit.*, Tables 1 and 2, pp.143-144 and 149-150
[2] Leibfried, (1992), *op. cit.*, pp.252-253
[3] *ibid*, p.253
[4] Castles and Mitchell, (1993), *op. cit.*, pp.93-95

examination generally viewed as the opposite.[1] This premise is consistent with and reflects the development of the UK welfare state classification exposed by the previous welfare state regime models.[2]

Castles and Mitchell's analysis was a direct comparison with Esping-Andersen's model using data from the 1980s to re-classify the same states. In doing so, they identified four worlds of welfare: the liberal world, the conservative world, the non-right hegemony world and the radical world.[3] Each world represented a different distribution of welfare benefits and methods of welfare funding and spending.[4] Similarly to the previous welfare state models this analysis was not directly concerned with work-family issues.

The UK, along with the Antipodean states, was classified as a radical state.[5] In contrast with the previous models, this was not directly analogous to the broad understanding of the liberal model adopted here. Instead, the radical world was characterised by elements of liberal (Castles' and Mitchell's) and the non-right hegemony (social democratic in Esping-Andersen's terms) worlds.[6] The liberal elements were reflected in the low levels of welfare expenditure coupled with high levels of taxation.[7] These characteristics were also identified in previous classifications of the UK which emphasised the

[1] Castles and Mitchell, (1993), *op. cit.*, pp.93-94
[2] See above, pp.80-93
[3] Castles and Mitchell, (1993), *op. cit.*, pp.114-124
[4] *ibid*, pp.103-114
[5] *ibid*, pp.119-122
[6] Outlined at: Castles and Mitchell, (1993), *op. cit.*, pp.118-119 and 122 respectively
[7] *ibid*, pp.105 and 108

minimalist role of the state and the low levels of income replacement that it provided, coupled with means testing and stringent qualifying conditions which ensured that benefits were tailored to those most in need.[1] The non-right hegemony aspect focused on the issue of equality, with the state adopting a number of measures to promote equality, for instance through income redistribution.[2]

This classification distinguished the UK from both the US and Sweden, who were classified in similar terms as before: the US as a liberal state and Sweden as a non-right hegemony state.[3] The classification of the UK placed placed it somewhere between both of these models. However, in doing so, instead of presenting a wholly novel classification of the UK, it actually reinforced the findings of previous classification models.[4] By recognising the the liberal and social democratic elements inherent within it, it encompassed the various elements which caused classification problems within the earlier models. Where this model differed from the previous classifications was that it produced a distinct category encompassing those states with such characteristics. The relevance of this specific category of states was, however, later challenged by Esping-Andersen who argued that the states within this regime increasingly corresponded with the liberal model,[5] and consequently were not a distinct model.

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[1] See classifications above by Esping-Andersen, (1990), *op. cit.*, and Leibfried, (1992), *op. cit.*
[2] Castles and Mitchell, (1993), *op. cit.*, p.108
[3] *ibid*, pp.118-119, 122- 124
[4] See section above on Esping-Andersen and Sainsbury for more details, pp.81-90
[5] Esping-Andersen, (1999), *op. cit.*, p.90

The UK welfare state in the 1980s

The classifications of the UK in the 1980s in many ways reinforced the previous classifications. On the one hand, it supported the idea of the evolution of the welfare state classification by recognising the previous changes in the UK welfare state and the varying characteristics within the state.[1] On the other hand, it also suggested that the UK was becoming increasingly liberal.[2] From these classifications the development of the UK welfare state can be seen. The UK appears to have shared strong roots with the Scandinavian states, which it has gradually moved away from. In doing so, it moved closer towards the US and liberal welfare state models.

UK Welfare State – 1990-1997: Still liberal?

The period between 1990 and 1997 represents the final timeframe to be examined here. This period reflects the examinations in the literature and is useful because it presents the classifications of the UK up to the point before the most recent developments of work-family legislation were introduced. The implication of this is that the classification of the UK prior to the introduction of the legislation can be identified and compared against the classification based on the changes to the work-family legislation. Three classification models were presented using data from this time period by

[1] Castles and Mitchell, (1993), *op. cit.*
[2] Leibfried, (1992), *op. cit.*

Bonoli, Korpi and Palme and Esping-Andersen,[1] representing two broad classifications of the UK.

The liberal-style classification of the UK

The liberal-style classification of the UK was reinforced by Bonoli and Korpi and Palme. Nevertheless, these classification models were distinct. Bonoli's model examined how welfare was provided between states and how much support was given in the form of welfare expenditure,[2] while Korpi and Palme were concerned with examining social insurance models.[3] Nevertheless, both models presented similar classifications of the UK. Bonoli classified the UK as a British welfare state,[4] while Korpi and Palme categorised it as a basic security model.[5] Both of these models were similar to the liberal welfare state models identified above. They were characterised by basic state support, through low levels of welfare expenditure and benefits which were targeted to those most in need.[1] These classifications focused on liberal-style characteristics of the UK as a minimalist welfare state, which provided only a basic floor of rights. Like the majority of welfare state classification models, neither addressed the work-family conflict. Nevertheless, the modest approach of the state in the broader welfare

[1] Bonoli, (1997), *op. cit.*; Korpi and Palme, (1998), *op. cit.*; Esping-Andersen, (1999), *op. cit.*; Esping-Andersen, G., with Gallie, D., Hemerijck, A., and Myles, J., *Why We Need a New Welfare State*, (Oxford: Oxford University Press: 2002)
[2] Bonoli, (1997), *op. cit.*, pp.359-364
[3] Korpi and Palme, (1998), *op. cit.*, pp.665-669
[4] Label given by Arts and Gelissen, (2002), *op. cit.*, Table 2, p.150
[5] Korpi and Palme, (1998), *op. cit.*, pp.668-669 and 670

context suggests that the UK would have taken a similar approach here. These classifications reinforced the liberal-style classification of the UK and its clustering alongside the US.[2] In doing so, they also confirmed the move away from the Swedish-style classification.

Esping-Andersen

These liberal-style classifications of the UK can be contrasted with Esping-Andersen's re-examination of his welfare state regimes. This was a response to the criticisms of his original model, and focused particularly on the gendered strand of the critique, although other aspects were also considered.[3] In this re-examination of welfare state regimes, Esping-Andersen placed greater emphasis on the role of the family. In doing so he specifically examined the relationship between the state and the family focusing on the extent to which the family was responsible for the provision of welfare or support.[4] This analysis incorporated the family more explicitly into the analysis and the defining characteristics of his three original welfare state regimes.

Focusing on those regimes most commonly associated with the UK, both the liberal and social democratic regimes retained many of their defining

[1] Korpi and Palme, (1998), *op. cit.*, pp.668-669 and 670; Bonoli, (1997), *op. cit.*, pp.360-362
[2] *ibid*, p. 670
[3] Esping-Andersen, (1999), *op. cit.*, pp.88-94
[4] *ibid*, pp.45, 51 and 66

characteristics, with additional focus on the family. The liberal welfare state regime continued to be distinguished by the marginal role of the state, reflected in minimal and targeted means tested welfare assistance.[1] The family, like the state, adopts a marginal role in relation to care and welfare support within this regime.[2] The market and not the family was viewed as the main provider of such assistance. This has particular implications for the work-family conflict because such a regime assumes that working families do not need to balance work and family commitments because this is provided by someone else. The market also continued to adopt a central role within this regime, with the marginal role of the state encouraging reliance on private welfare.[3] This can be compared with the social democratic regime.

This welfare state regime also continued to be characterised by original characteristics such as the central role of the state, welfare assistance based on the principles of universalism and egalitarianism,[4] coupled with the marginal role of the market.[5] The state remained the primary provider of welfare assistance and this was reflected in the marginal role of the family as provider of assistance and support.[6] The strong role of the state within this regime also has implications for the work-family conflict. It may, as in the liberal model, reinforce a breadwinner model by adopting responsibility for care at the expense of personal care by working families. Alternatively, it

[1] Esping-Andersen, (1999), *op. cit.*, pp.75-76; Esping-Andersen, 'Towards the Good Society, Once Again?', in G. Esping-Andersen, et al. (Eds), (2002), *op. cit.*, p.15
[2] Esping-Andersen, (1999), *op. cit.*, pp.85-86
[3] *ibid*, pp.76; Esping-Andersen, (2002), *op. cit.*, p.15
[4] Esping-Andersen, (1999), *op. cit.*, p.78
[5] *ibid*, pp.78-79; Esping-Andersen, (2002), *op. cit.*, pp.13-14
[6] Esping-Andersen, (2002), *op. cit.*, pp.13 and 85-86

could mean that the state provides assistance to encourage working families to do this. It is this latter approach which tends to be the result in these states.

The clustering of states was similar under these re-examined welfare state regimes to those originally produced by Esping-Andersen. The US continued to be presented as an ideal example of the liberal regime, as did Sweden in relation to the social democratic regime.[1] The intermediate classifications of the UK would suggest a more robust clustering of the UK corresponding with that of the US, however, Esping-Andersen's new classification did not reflect this change. Esping-Andersen again identified the UK as displaying characteristics of different models. In some respects it continued to be similar to the US, with little labour market regulation, low levels of welfare state assistance and limited reliance on the family to provide care and support. On the other hand, it was also similar to Sweden in terms of the universal provision of certain welfare benefits and services. This classification reinforced earlier characterisations of the UK as an example of welfare state mutation.[2]

This understanding of the UK welfare state recognised that it had evolved from a welfare state which shared characteristics with the Scandinavian states in the post-war era to one which was becoming increasingly liberal.[1] This could be attributed to various factors, such as changes in political

[1] Esping-Andersen, (1999), *op. cit.*, p.77 and Table 5.4, p.85
[2] *ibid*, p.87

parties governing the UK, reflecting changing attitudes within the electorate. Nevertheless, this examination of welfare state regime classifications has identified that the change has been from the social democratic to the liberal regime. While the welfare state regimes are not directly related to the work-family conflict, a change in the overall classification of the state is likely to be reflected in a change in the work-family classification of the legislation. These conclusions support the central argument within this thesis, namely that the work-family model underpinning UK legislation can and has developed over time. The direction of this change, however, is inconsistent with the assumptions surrounding new work-family rights.[2] These interpretations of changing work-family policies instead point to a change in the opposite direction. The UK welfare state is conversely viewed as moving from the liberal towards the social democratic regime, following the work-family examples of Scandinavian welfare states. While both of these strands of argument support the notion of a developing ideology underpinning UK legislation, they identify this pull as being in two distinct directions. In examining the development of UK work-family legislation this analysis will also consider what direction the ideology underpinning UK legislation is moving in. In other words, is the UK moving towards the liberal US welfare state model, the Swedish welfare state model, or has the ideology remained consistent despite changes to the legislation?

[1] Esping-Andersen, (1999), *op. cit.*, p.87
[2] See pp.11-12 above

The UK welfare state pre-1997

In order to determine if the ideology underpinning UK work-family legislation has developed over time, it is necessary to identify a classification of the UK that can be used as a point of reference for assessing this potential development. This examination, as shown in Table 3.1, has identified various classifications of the UK.

Table 3.1: Classifications of the UK, USA and Sweden in Welfare State Regime Literature[1]

Countries/ Models	***UK***	***USA***	***Sweden***	***Comparative classification of the UK***
Esping-Andersen (1990) [1960s-1980s]	Liberal, with some Social-Democratic characteristics	Liberal	Social-Democratic	Elements of US and Swedish classifications
Sainsbury [1960s-1980s]	Male Breadwinner	Male Breadwinner	Individual Earner-Carer	Similar to the US
Lewis [1960s-1980s]	'Strong' Male Breadwinner	'Strong' Male Breadwinner	'Weak' Male Breadwinner	Distinct from Sweden – similar to the US
Leibfried [1980s]	Anglo-Saxon	Anglo-Saxon	Scandinavian	Similar to the US
Castles and Mitchell [1980s]	Radical	Liberal	Non-right Hegemony	Different from both – although with similarities to both
Bonoli [1990s]	British	N/A	Nordic	Distinct from Sweden
Korpi and Palme [1990s]	Basic Security Model	Basic Security Model	Encompassing Model	Similar to the US

This examination of the classifications of the UK welfare state over the period between 1960 and 1997 has shown that the UK has not been consistently clustered within the same regime model.[1] While it could be argued that the reason for this is that the political, social, economic and culture of a state changes over a period of time, other states like the US and Sweden have

[1] Esping-Andersen, (1990), *op. cit.*; Leibfried, (1992), *op. cit.*; Lewis, (1992), *op. cit.*; Castles and Mitchell, (1993), *op. cit.*; Sainsbury, (1994b), *op. cit.*; Sainsbury, (1996), *op. cit.*; Bonoli, (1997), *op. cit.*; Korpi and Palme, (1998), *op. cit.*; Sainsbury, (1999), *op. cit.*; Esping-Andersen, (1999), *op. cit.*

tended to be classified more uniformly.[2] This suggests that the position in the UK has been somewhat different, and instead reflects a genuine change in the regime type.[3] This poses a problem for identifying the base classification of the UK.

The classification of the UK as a liberal type of state has dominated thinking in this regard but, as this examination has shown, this clustering of the UK has only lately been universally accepted.[4] Alternative classifications recognise both the liberal and social democratic elements of the UK welfare state. In addition, the previous examinations have shown that the UK welfare state is often perceived as being similar to the US.[5] For instance, both have been classified as liberal and breadwinner states and have been characterised by unregulated labour markets.[6] This latter point is relevant from the perspective of the work-family conflict since it means that there are few, if any, work-family rights available to working parents to enable them to address this conflict. This is further reinforced, in the case of the UK, by the historic lack of state interference in the family.[1] Such an approach suggests that the UK has taken limited steps towards addressing the work-family conflict and to challenging the traditional family model. This can be contrasted with other states that adopt a more proactive role in the family, such as the Scandinavian states, which assume a greater responsibility for

[1] Table 3.1
[2] See Table 3.1 and Chapters Five and Six on the US and Swedish welfare states for more details
[3] As argued by Esping-Andersen, (1999), *op. cit.*, p.87
[4] Ellison, N., *The Transformation of Welfare States?*, (Oxon: Routledge, 2006), pp.13-14
[5] Crompton, (2006), *op. cit.*, p.92
[6] *ibid*, pp.104-105, and 128

the family exemplified in wide state provision of day care services and work-family rights.[2] However, it has been argued that these groupings are no longer valid and that the UK government is moving towards a Scandinavian, or Swedish, approach, particularly in the work-family context.[3]

The base classification of the UK that will be adopted here should reflect the dominant characteristics of the state. These correspond with the liberal and male breadwinner classifications. While this classification of the UK will be adopted here, the evolving nature of the welfare state will also be borne in mind in examining the development of the ideologies underpinning work-family legislation.

It has been argued that Scandinavian states enable working families to balance their work and family commitments through generous work-family rights and policies,[4] which were viewed as the most likely to support female labour market participation,[5] and the work-family conflict.[6] This reflected the expansive role of the state in Sweden and the generous rights and benefits they provided.[7] In the UK and the US, on the other hand, childcare has been viewed as a private issue, with the majority of childcare services being provided by the market.[1] Working families are instead assumed to undertake responsibility for care, with limited help from the state, which results

[1] Crompton, (2006), *op. cit.*, p.26
[2] *ibid*, p.27; see Chapter Six for an examination of the position in Sweden
[3] *ibid*, pp.214-215; See Hutton, W., *The world we're in*, (London: Little, Brown, 2002), p.257
[4] Repo, (2004), *op. cit.*, pp.624-625
[5] Hantrais, (2004), *op. cit.*, p.184
[6] den Dulk, et al., (1996), *op. cit.*, pp.31-34
[7] Hantrais, (2004), *op. cit.*, pp.200-201

predominately in mothers combing both roles.[2] This reflects the male breadwinner family model ideology, which it is argued underpinned this welfare state model.[3]

[1] Repo, (2004), *op. cit.*, pp.625-626
[2] Hantrais, (2004), *op. cit.*, pp.200 and 202-203
[3] Repo, (2004), *op. cit.*, p. 626

Chapter Four: The Work-family Conflict and the Work-family Classification Model

The preceding analyses of the family, the work-family conflict and welfare state regimes discussed in the previous two chapters have identified various indicators that can be used to critically analyse the development of work-family typologies. The specific analytical framework of the work-family classification model in particular is reflective of the welfare state regimes models,[1] focusing on certain indicators in order to distinguish between work-family typologies. Two of the indicators adopted here also have been identified as relevant following the welfare state regime analysis,[2] although one confirms the initial research on the family.[3] It will be argued here, and throughout, that this model is a valuable alternative to the ones adopted within the welfare state regime context. More specifically, it will be argued that these indicators offer a useful means of analysing factors that are specifically relevant to the work-family conflict, and that can be used to make significant distinctions between different work-family typologies.

Work-family indicators

The underpinning objective of the work-family classification model is to

[1] In terms of identifying various indicators that distinguish between pre-determined classification models, see Chapter Three for details
[2] Namely family care and the working family model, see pp.25-43 above
[3] The working family model, see pp.29-43 above

identify issues that can usefully critically analyse work-family legislation with a view to determining the way in which it engages with the work-family conflict. In order to fully meet this objective the indicators must identify who and what situations the legislation is directed towards, how it enables persons and families to address the conflict, and how it actually operates in practice. It is this specific focus which renders the welfare state regime models inappropriate in this context. While they provide valuable classifications of states in broader terms,[1] and in some specific contexts,[2] they fail to consistently and clearly address this issue. The work-family indicators that have been identified, drawing from the analyses within Chapters Two and Three, do just this. The three work-family indicators are: the family care model, the working family model, and gender roles.

Family care model

In Chapter Two the diverse understandings and composition of the family

[1] For example: Esping-Andersen, G., *The Three Worlds of Welfare Capitalism*, (Cambridge: Polity, 1990); Esping-Andersen, G., *Social Foundations of Postindustrial Economies*, (Oxford: Oxford University Press, 1999); Castles, F.G., and Mitchell, D., 'Worlds of Welfare and Families of Nations', in F.G. Castles (Ed) *Families of nations: patterns of public policy in Western democracies*, (Aldershot: Dartmouth Publishing Company, 1993); Bonoli, G., 'Classifying Welfare States: a Two-dimension Approach', 1997 Vol.26(3) *Journal of Social Policy* 351

[2] For example: Korpi, W., and Palme, J., 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries', 1998 Vol.63(Oct) *American Sociological Review* 661; Leibfried, S., 'Towards a European Welfare State? On Integrating Poverty Regimes into the European Community', in Z. Ferge and J.E. Kolberg (Eds), *Social Policy in a Changing Europe*, (Frankfurt am Main: Campus Verlag, 1992); Sainsbury, D., *Gendering Welfare States*, (London: Sage Publications Limited, 1994), (1994b); Sainsbury, D., *Gender, Equality and Welfare States*, (Cambridge: Cambridge University Press, 1996); Sainsbury, D., *Gender and Welfare State Regimes*, (Oxford: Oxford University Press, 1999); Lewis, J., 'Gender and the Development of Welfare Regimes', 1992

were identified.[1] Of particular relevance and importance were the family care situations that this produced. Within this analysis it was argued that the family should be viewed in caring terms, as opposed to compositional terms, and to this end the issue of family care became the focus.[2] This analysis of family care identified that there are a variety of caring responsibilities that working persons may experience throughout their lives. These may range from early childcare responsibilities to eldercare and encompass a variety of other caring situations in between.[3] The family care model must, consequently, appreciate this diversity of caring commitments.

While working persons may have a variety of caring responsibilities the question remains how can the family care model inherent within the legislation be identified and analysed? There are two indicators that can be used in this context to determine the family care model. These focus, respectively, on the caregiver and the person cared for, thus identifying who can care and for whom. The first indicator is concerned with identifying the rights holder. Focusing on to whom the rights are afforded is useful and relevant to the issue of family care, because it identifies who the legislation is targeted towards and the types of caregivers it encompasses. This may be a gendered right, available only to working mothers or fathers, or may be gender-neutral and available to both working parents and/or working carers more generally. This represents very different caring situations and a

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Vol.2(3) *Journal of European Social Policy* 159
[1] See pp.29-43 above
[2] See pp.25-29 above
[3] See *ibid*, in particular Fineman, M., *The Neutered Mother, the Sexual Family and Other*

spectrum of carers ranging from a gendered focus on childcare to a gender-neutral approach to care in more general terms. This reflects Fineman's broad, albeit gendered, understanding of caregivers,[1] and moves beyond the traditional focus on childcare.[2]

The second issue is related and focuses on the types of care situations that are covered by the legislation. This adopts a slightly different approach from the previous one and turns the attention to the person being cared for. Again, as seen in Chapter Two, this can range from very young children to older children and other persons in need of care.[3] This indicator is also useful because it identifies the variety of care situations that the legislation covers and together with the previous indicator provides a real overview of who can care and when/in what situations, indicating the types of family care the legislation encompasses. While there is a variety of different care situations that working persons may experience, three broad situations, reflective of the rights holders, can be identified. These are: early childcare, focusing on the pre- and post-childbirth periods; the care of young children; and the care of older children and other persons in need of care.

One main criticism could be advanced concerning the choice of these three types of divergent caring situations since they all encompass a form of childcare. It could be argued that they continue to focus on childcare

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Twentieth Century Tragedies, (New York: Routledge Press, 1995)
[1] *ibid*, pp.230-232 and 234-235
[2] As evidenced in the development and discussion of such rights
[3] See pp.25-29 above, in particular Fineman, (1995), *op. cit.*

responsibilities despite the adoption of the broader notion of the family in Chapter Two;[1] therefore the model does not reflect the development of caring responsibilities. The final category could instead focus solely on other carers and care situations, and the second category could encompass both the care of young and older children. While this may appear to be a useful approach, it does not entirely accurately reflect the different caring responsibilities at each period in time. The first of the family care situations identified here focuses specifically on the pre- and post-childbirth periods. This period is underpinned primarily by physical/medical care needs.[2] This can be contrasted with the second family care situation, which is instead focused primarily on social care for young children. In other words, it encompasses rights that are not biologically determined or necessary unlike maternity leave. The final family care situation is also primarily concerned with social care but focuses on those categories of persons traditionally excluded from legislative provision, namely older children and other dependant adults.[3] The distinction between caring situations adopted within this model reflects these different care models and carers.

This indicator, consequently, usefully identifies the family care model that the legislation apparently adopts with reference to the actual content of the legislation and its underpinning aims. However, this indicator cannot be used in isolation and must be analysed in terms of how the rights in question

[1] See pp.25-29 above
[2] As exemplified by the health and safety basis of the EEC Directive 92/85 on the Protection of Pregnant Women at Work, (PWD 1992), Art.1(1)
[3] As will be shown in the subsequent analyses of the legislation

interact and enable working families to address their work-family conflicts,[1] and how they actually operate in practice in terms of who utilises these rights and how.[2]

Working family model

The next work-family indicator is a development of the previous one and is concerned with the working family model. This indicator was initially identified with regards to the discussions of the family within the literature.[3] There it was argued that this approach to analysing the family was most appropriate because it necessarily reflected the relationship or conflict between work and family care responsibilities.[4] The significance of this indicator in classification models was also underscored by its inclusion within the welfare state regime models.[5]

The working family model of the work-family classification models, however, is slightly different from that adopted within the family and welfare state regime literature. Instead of being primarily concerned with the actual composition of working families, or the gendered division of labour that arguably underpins certain family models,[6] the working family model here is

[1] Examined under the next indicator – *Working family model*
[2] Examined under the final indicator – *Gender roles*
[3] See pp.29-43 above
[4] *ibid*
[5] Such as Sainsbury, (1994b), (1996) and (1999), *op. cit.*; Lewis, (1992), *op. cit.*; and Esping-Andersen, (1999), *op. cit.*
[6] See pp.18-25 above

concerned with the way in which the legislation enables working families to address their work-family conflicts. The question of the division of gender roles that the legislation reproduces will be dealt with separately.[1]

The working family model is, consequently, concerned with the way in which the work-family legislation as a whole enables working families to combine work and family commitments. The question that remains again is how does this indicator aim to determine this? This examination of the working family model will consider the location of the right(s) in question, and how they interact with the other, if any, work-family rights available to working persons and families at the point in time under examination. From this examination it will be possible to determine the extent to which the legislation enables working families to combine commitments, from not at all, to enabling one family member to undertake primary responsibility for care, to facilitating both. For instance, the rights may be short, limited in terms of the period during which they can be examined and may be the only rights available to working persons.[2] This package of rights suggests a markedly different organisation of work-family rights, and working family model, from one which offers long leave, which can be taken over an extended period of time and that can be used in combination with a variety of other rights to leave, to reduce hours etc…[3] In the first instance, there is an underlying presumption that care is undertaken outwith the labour market framework, while in the

[1] See subsequent section for details, pp.118-135
[2] For example the Family and Medical Leave Act of 1993, Public Law 103-3, discussed in Chapter Five: The US Welfare State and Work-family Rights
[3] For example the Parental Leave Act (SFS 1995:584), discussed in Chapter Six: The

latter there is a greater presumption that work and caring responsibilities can be combined.

In Chapter Two, three working family models were identified and generally similar models were found within the welfare state regimes.[1] These three models will be adopted here. As discussed in Chapter Two, these models represent three different work-family relationships – the separation of caring and earning commitments, which is reflected in the (male) breadwinner working family model; the combination of earning and caring roles, represented by the one and a half earner-carer working family model; and the equal sharing of earning and caring roles, adopted within the dual earner-carer working family model.[2]

Each of these models represent different ways of addressing the work-family conflict, with the (male) breadwinner working family model representing the least engagement between these two spheres. This model is exemplified by few work-family rights, which fail to enable working families to combine caring and earning commitments. To this end the rights that are available may be focused specifically on the physical/medical aspects of childbearing to the detriment of rights to care in more general terms.[3] The one and a half earner-carer working family model, in contrast, is encountered in legislation that recognises the caring commitments of working families to a greater

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[1] See pp.29-43 above
[2] *ibid*
[3] See pp.31-36 above

degree by providing them with specific rights enabling them to combine work and care commitments. This is limited though, by the focus on one parent, either directly or indirectly, as primary carer.[1] The dual earner-carer working family model, on the other hand, recognises the caring commitments of working persons to a much greater degree by recognising the dual responsibilities that working persons have.[2] While this appears to consider the gendered division of responsibilities of working families, it again focuses on the legal provisions and their theoretical, and not necessarily practical, implications for working families. Nevertheless, the final indicator underpinning the legislation, the division of gender roles, does address this issue.

Gender roles

Smart and Brophy, in their gendered analysis of law, focused on the effects of the legislation and not the legislation itself, because they argued that in contrast with the legislation, which may be stated in gender-neutral terms, *"the* effect *of law is never gender neutral."*[3] This is reinforced by examinations of equality legislation and the implications they have for working parents, which show that such legislation does not necessarily

[1] See pp.36-39 above
[2] See pp.39-42 above
[3] Smart, C., and Brophy, J., 'Locating law: a discussion of the place of law in feminist politics', in C. Smart and J. Brophy, (Eds), *Women in Law: Explorations in Law, Family and Sexuality*, (London: Routledge and Kegan Paul plc, 1985), p.17 – emphasis in original

achieve gender equality in practice.[1] This emphasises that just because legislation is set out in gender-neutral terms it does not necessarily mean that it will lead to gender equality.[2] There has to be a more fundamental change at a cultural and societal level in order for inequality to be challenged.[3] The same may be true for work-family legislation. This is why the gender roles indicator is so important in this context. While the previous two indicators have identified the content of the law, this indicator analyses the practical implications of the legislation in terms of the division of gender roles that it reinforces.

The examinations of the family and welfare state regimes in the previous chapters has shown that the division of responsibilities between men and women does underpin models of the family,[4] and is an important consideration in determining the impact and implementation of legislation and the classification of the state.[5] As an analytical tool it has been used as an indicator in welfare state regime analyses, particularly within the gendered literature where it has been afforded, either directly or indirectly, a more central role.[1] Within these models the examination of the division of gender roles has served to distinguish between seemingly similar models. This is

[1] Bridgeman, J., and Millns, S., *Feminist Perspectives on Law: Law's engagement with the female body*, (Sweet and Maxwell, 1998), pp.36-42; Bottomley, S., and Bronitt, S., *Law in Context*, (Annandale, N.S.W.: The Federation Press, 3rd Ed 2006), pp.264-268
[2] As noted by Hobson, B., 'The Individualised Worker, the Gender Participatory and the Gender Equity Models in Sweden', 2004 Vol.3(1) *Social Policy and Society* 75, p.76
[3] O'Donovan, K., *Sexual Divisions in Law*, (London: Weidenfeld and Nicolson, 1985), p.79
[4] For instance, the nuclear family model is often associated with a strict division of gender roles: Hantrais, L., and Letablier, M-T., *Families and Family Policies in Europe*, (London and New York: Longman, 1996), p.71
[5] See Chapter Three: Welfare State Regimes and the Work-family Conflict for the application of this indicator in welfare state regime models

particularly evident in Sainsbury's model,[2] which adopts a corresponding tripartite classification model from that being developed here. The inclusion of gender equality, as a separate indicator examining the actual gendered utilisation of rights, within the model facilitated a greater analysis of welfare states, as was the case there, by enabling claims of gender-neutrality to be challenged with reference to how the legislation and policies within the state operated in practice.[3]

The same principles can be applied in the present context, with a view to analysing the extent to which the legislation is gendered in practice. Consequently, while the previous two indicators have focused on the law's text and in theoretical terms, this final indicator challenges these examinations and questions the way the law operates in practice and how working families actually address their work-family conflicts.

In order to analyse the division of gender roles, the literature on these roles and the two different spheres of life that they represent, will be critically examined. This analysis, however, is based on the presumption that the law is gendered. If this is the case it has significant implications for working families and their utilisation of work-family rights. This examination, consequently, will begin firstly with a consideration of the gendered nature of law itself.

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[1] Sainsbury, (1994), (1996) and (1999), *op. cit.*; Lewis, (1992), *op. cit.*
[2] Sainsbury, (1999), *op. cit.*, Table 3.1, pp.77-80
[3] *ibid*, pp.89-95, especially pp.92-95 which considers caring rights

Law as gendered

The way in which law is presented and operates in practice is significant because it arguably directly impacts upon the way people organise their lives.[1] It has been argued that it not only reflects societal attitudes, but also encourages cultural change.[2] This is a significant and questionable feature of the role of law and this particular argument will be discussed further in Chapter Nine in the context of fathers' work-family rights.[3] The gendered nature of law is, consequently, an important consideration given the potential impact that it may have on the implications and utilisation of the legislation.

The argument that law is gendered is not a new proposition. Feminist literature strongly supports this contention, both in general terms[4] and in the specific labour law context.[5] The male norm is identified and upheld as underpinning the law and as the subject of it.[6] Bridgeman and Millns argue that this is an idealised model which represents a person who is independent

[1] Smart and Brophy, (1985), *op. cit.*, p.1
[2] McLean, S.A.M., 'The Legal Relevance of Gender: Some Aspects of Sex-Based Discrimination', in S.A.M. McLean and N. Burrows, (Eds), *The Legal Relevance of Gender: Some Aspects of Sex-Based Discrimination*, (Basingstoke: Macmillan Press, 1988), p.2
[3] With particular reference to Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)', 2001 *Journal of Law and Society* 520, p.534: See Chapter Nine: Fathers' Work-family Rights in the UK, pp.426-430 below
[4] See for instance: MacKinnon, K., *Toward a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989), p.124; Smart, C., *Feminism and the Power of Law*, (London and New York: Routledge, 1989); Naffine, N., *Law and the Sexes: Explorations in Feminist Jurisprudence*, (Sydney: Allen and Unwin, 1990), pp.100-101, and 103-122; Smart, C., 'The Woman of Legal Discourse', (1992) Vol.1(1) *Social and Legal Studies* 29, pp.30-34
For an overview see Scoular, J., 'Feminist Jurisprudence', in S. Jackson and J. Jones, (Eds), *Contemporary Feminist Theories*, (Edinburgh: Edinburgh University Press, 1998)
[5] Pateman, C., *The Sexual Contract*, (Cambridge: Polity Press, 1988), pp.131 and 135; Owens, R.J., 'Working in the sex market', in N. Naffine and R.J. Owens, (Eds), *Sexing the Subject of Law*, (Sydney: Sweet & Maxwell, 1997), pp.119, and 132-135
[6] Stang Dahl, T., *Women's Law: An Introduction to Feminist Jurisprudence*, (Oslo: Norwegian University Press, 1987), p.12; Naffine, (1990), *op. cit.*, pp.100-101, and 103-122

from others and the commitments of reality.[1] This is also reflected in Naffine's analysis of the man of law who is unencumbered from domestic and family care responsibilities by women in the home.[2] The male norm or model, consequently, is presented in opposition to domestic and family related commitments, and represents someone who is independent, autonomous, and has no-one or nothing else to think of but himself.

Similar classifications have been identified as underpinning labour law. Pateman, for instance, has argued that the worker in the labour law context was constructed around the male worker model, which reflects the division of gender roles in terms of the division of public and private spheres.[3] This separation of spheres is consistent with the more general classifications of the subject of law,[4] and will be examined in more depth in the following section.[5] The essence of Pateman's argument is that the structure of the labour market, and those participating within it, is necessarily dependent upon the assistance of a partner outwith the labour market providing support and family care. The spheres are, therefore, distinct but dependent on one another,[6] thus suggesting that there is an interrelationship between the two, and not solely a strict division between them. This position was later supported by Owens who also argued that the subject of labour law was male. A similar distinction was made between caring and earning capabilities

[1] Bridgeman and Millns, (1998), *op. cit.*, p.43
[2] Naffine, (1990), *op. cit.*, p.104
[3] Pateman, (1988), *op. cit.*, pp.131 and 135
[4] See pp.121-125 below
[5] See *Separate spheres ideology* section below pp.125-129
[6] Olsen, F.E., 'The Family and the Market: A Study of Ideology and Legal Reform', 1983 Vol.96(7) *Harvard Law Review* 1497, p.1524; McRae, S., *Flexible Working Time and Family*

with Owens arguing that women were primarily viewed in reproductive terms and men as productive workers,[1] as reflected in the equality legislation at that time.[2] This gendering of the worker was not only apparent from a legal perspective; it was also evident within the workplace itself, where workers were treated as having no or very few familial responsibilities.[3]

The thrust of this literature has been support for the male gendered classification of law. In spite of this analysis of law it has been argued that it does not necessarily actively further men's dominance nor does it aim to oppress women,[4] in spite of the implications it may have in practice. However, this view has been criticised by O'Donovan who argues that this neglects the power imbalances that exist between the spheres, particularly in relation to earnings.[5] Furthermore, O'Donovan argues that the law reinforces this division of spheres by locating the family in the private sphere, and thus outside the scope of regulation.[1]

In contrast with these arguments that the law is gendered and underpinned by a male model or norm, there has been increasing demands and support

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Life: A Review of Changes, (Policy Studies Institute, 1989), p.35
[1] Owens, (1997), *op. cit.*, p.119
[2] *ibid*, pp.132-135
[3] Dowd, N.E., 'Work and Family: The Gender Paradox and the Limits of Discrimination Analysis in Restructuring the Workplace', (1989) Vol.24 *Harvard Civil Rights Civil Liberties Review* 29 reproduced in D. K. Weisberg, (Ed), *Applications of Feminist Legal Theory to Women's Lives. Sex, Violence, Work, and Reproduction*, (Philadelphia: Temple University Press, 1996), p.550; Conaghan, J., 'The Invisibility of Women in Labour Law: Gender Neutrality in Model Building', 1986 Vol.14 *International Journal of Sociology of Law* 377, p.380; Pateman, (1988), *op. cit.*, p.131; Graycar, R., and Morgan, J., *The Hidden Gender of Law*, (Annadale, NSW: Federation Press, 2nd Ed 2002), pp.145-146
[4] Smart and Brophy, (1985), *op. cit.*, p.17; Stang Dahl, (1987), *op. cit.*, p.13; O'Donovan, (1985), *op. cit.*, pp.8-9
[5] O'Donovan, (1985), *op. cit.*, p.9

for equality for women and challenges to traditional gender roles.[2] Law has also, at times, recognised the specific female experience by 'maternalizing the female body' in law, focusing on their 'unique' childbearing responsibilities.[3] This is evident in the increasing availability of maternity and other childcare leaves.[4] In some instances, as will be further developed in Chapter Nine,[5] it has also been argued that law has become feminised.[6] The feminisation of law thesis is an important proposition because it suggests that the previous literature on the gendered nature of law is no longer applicable, at least in the context of work-family legislation. Alternative classifications of the gendered nature of, and subject of, certain areas of law are not novel having previously been anticipated by Naffine and Owens.[7] Nevertheless, they are at odds with the previous literature on the gendered nature of law. The evolution of the gendered nature and subject of law is, nevertheless, also consistent with the development of the work-family typology underpinning the legislation.

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[1] O'Donovan, (1985), *op. cit.*, pp.14-15
[2] Roach Anleu, S.L., *Law and Social Change*, (London: Sage Publications, 2000), p.171
[3] Frug, M.J., 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)', 1992 Vol.105(5) *Harvard Law Review* 1045, p.1050
[4] See Chapters Seven to Nine below
[5] See Chapter Nine: Fathers' Work-family Rights in the UK, pp.426-430 below
[6] Argument advanced by men's liberation groups as noted in Collier, *Masculinity, Law and the Family*, (London and New York: Routledge, 1995), p.27; Morris, A., and O'Donnell, T., 'Employment Law and Feminism', in A. Morris and T. O'Donnell (Eds), *Feminist Perspectives on Employment Law*, (Cavendish Publishing Limited, 1999), (1999b), p.1
[7] Naffine, (1990), *op. cit.*, p.102; Naffine, N., and Owens, R.J., 'Sexing Law', in N. Naffine and R.J. Owens, (Eds), *Sexing the Subject of Law*, (Sydney: Sweet & Maxwell, 1997), p.7

Separate spheres ideology[1]

The gendered nature of law was reflective of and reproduced the separation of the spheres of public and private life.[2] The literature on the division of public and private spheres has a long history,[3] and there is much debate within the literature as to what the spheres encompass.[4] Liberal theorists identify the division between the state and private life.[5] This interpretation is not particularly useful in this context and has been criticised on the basis that it is difficult to distinguish between the spheres since *"the meaning of state/civil society and public/private can be synonymous."*[6] In terms of this research, the particularly problematic feature of this distinction is the location of labour market work, which could be located within either sphere. A more suitable distinction has been identified by feminist scholars who have focused on the division between various aspects of public life including the state, market, employment and other areas of civil society, with the family being

[1] This classification of the division was adopted by: Classification of division given by: Hervey, T., and Shaw, J., 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', 1998 Vol.8(1) *Journal of European Social Policy* 43, p.50; McGlynn, C., 'Ideologies of Motherhood in European Community Sex Equality Law', 2000 Vol.6(1) *European Law Journal* 29, p.37

[2] As noted above: Bridgeman and Millns, (1998), *op. cit.*, p.43; Naffine, (1990), *op. cit.*, p.104; Pateman, (1988), *op. cit.*, pp.131 and 135

[3] It can be traced back to Aristotle: Barker, E., *The Politics of Aristotle*, (Oxford: Clarendon Press, 1946), pp.4-8, 32-38; Elshtain, J.B., 'Aristotle, the Public/Private Split and the Case of the Suffragists', in J.B. Elshtain, *The Family in Political Thought*, (Sussex: The Harvester Press Limited, 1982), pp.51-54; Freeman, M.D.A., 'Towards a Critical Theory of Family Law', 1985 Vol.38 *Current Legal Problems* 153, pp.166-167

[4] Olsen, (1983), *op. cit.*, pp.1501-1502; Pateman, C., 'Feminist Critiques of the Public/Private Dichotomy', in S.I. Benn and G.F. Gaus (Eds), *Public and Private in Social Life*, (London: St. Martin's Press, 1983), pp.291-292; Thornton, M., 'The Public/Private Dichotomy: Gendered and Discriminatory', 1991 Vol.18(4) *Journal of Law and Society* 448, p.448; Fredman, S., *Women and the Law*, (Oxford: Clarendon Press, 1997), pp.16-17

[5] Barker, (1946), *opt. cit.*, pp.4-8, 32-38**;** Elshtain, (1982), *op. cit.*, pp.51-54; O'Donovan, (1985), *op. cit.*, pp.8-9; Freeman, (1985), *op. cit.*, pp.166-168; Fredman, (1997), *ibid*, p.16;

[6] Thornton, (1991), *op. cit.*, p.448

located within the private sphere.[1] This distinction is more appropriate in this context because it mirrors the conflict between work and family life, presenting these competing spheres in opposition with one another.

The separate spheres ideology is based upon and reinforces traditional gender roles, with the family and the home being viewed as women's sphere and the market and the state being men's.[2] This is reflected in the distinction made between productive labour, undertaken in the paid labour market, and domestic labour, which is undertaken within the home.[3] O'Donovan further supports this interpretation by noting that this division is characterised by one person who works for wages and the other who works for love.[4] The productive public sphere of labour market work and those within it are viewed in masculine terms as: competitive, *"rational, calculating, economic individuals, whose actions are guided by self-interest"*.[5] These characteristics are consistent with and reflect the male model identified as underpinning the law,[6] and the unencumbered male worker.[7]

This can be compared with the private sphere and those within it are

[1] Thornton, (1991), *op. cit.*, p.449; Fredman, (1997), *op. cit.*, pp.16-17; Bridgeman and Millns, (1998), *op. cit.*, p.24
[2] Thornton, (1991), *op. cit.*, p.449; Reskin, B., and Padavic, I., *Women and Men at Work*, (London: Pine Forge Press, 1994), p.21; Bridgeman and Millns, (1998), *op. cit.*, p.24; Bottomley and Bronitt, (2006), *op. cit.*, p.253; Crompton, R., *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies*, (Cambridge: Cambridge University Press, 2006), pp.2 and 49
[3] Okin, S.M., *Women in Western Political Thought*, (London: Virago, 1980), pp.291-292; Olsen, (1983), *op. cit.*, p.1498; Whelehan, I., *Modern Feminist Thought: From the Second Wave to 'Post-Feminism'*, (Edinburgh: Edinburgh University Press, 1995), p.51
[4] O'Donovan, (1985), *op. cit.*, p.9
[5] *ibid*, pp.12 and 73; Whelehan, (1995), *op. cit.*, p.29
[6] See above pp.121-125
[7] James, G., *The Legal Regulation of Pregnancy and Parenting in the Labour Market*, (Oxon:

characterised by female traits such as: nurturing, care, emotion, reproduction.[1] This is consistent with family care responsibilities and women's position within these competing spheres is further reinforced as they continue to be identified as being *"the most appropriate carers for young children."*[2] This reinforces the stereotypical assumptions surrounding men and women's capabilities and roles, and contributes to the gendering of work and family care responsibilities.[3]

There are important implications of this separation of spheres in terms of the work-family conflict. One main one is the value afforded to each sphere. This can be reflected within the legislation in the extent to which working families; parents in particular, can arrange and combine these commitments. The public sphere of paid labour market work has been viewed as being superior to the private sphere of the home and the family, thus devaluing the importance of domestic labour and family care.[4] The inferiority of the private sphere is further reinforced by women being viewed as dependent on men, and the private sphere being perceived as inferior to the male dominated public sphere.[5] In doing so, the separation of these life spheres appears to overlook the relationship between work and family commitments.[6] This is reflected in the traditional way in which these two spheres have been divided

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Routledge-Cavendish, 2009), pp.17-18
[1] O'Donovan, (1985), *op. cit.*, pp.12 and 73; Whelehan, (1995), *op. cit.*, p.29
[2] Crompton, (2006), *op. cit.*, p.49
[3] Reskin and Padavic, (1994), *op. cit.*, p.21 and p.23
[4] Bridgeman and Millns, (1998), *op. cit.*, p.5; Fredman, (1997), *op. cit.*, p.17; Barker, (1946), *op. cit.*, pp.13, 32, 33, 36 and 374; Elshtain, (1982), *op. cit.*, pp.51 and 52; Olsen, (1983), *op. cit.*, pp.1499-1500
[5] Freeman, (1985), *op. cit.*, p.167
[6] Fredman, (1997), *op. cit.*, p.17

and understood.

Traditionally the separation of spheres has reflected the distinction between those areas in which the state is permitted, and does, intervene (public sphere of work, society etc…), and those in which it is, and does, not (private sphere of home, family, care etc…).[1] This understanding of the division, however, is not entirely accurate. It has been argued, for instance, that the state has always interfered in family life through its decisions on when, and in what circumstances, to intervene.[2] Developments in legislation have also blurred these boundaries, as is evident in the increasing development of work-family rights which arguably encouraged families, in certain ways, to provide care for their children. This distinction can, consequently, be criticised as more of an idealised division than an actual description of the separation of spheres, particularly since it overlooks certain interventions and can justify the state's lack of involvement in certain issues.[3]

Furthermore, it obscures the relationship between the family and other institutions within the public sphere since it assumes that it has no connection with it.[4] This is not the case. While the spheres may represent distinct

[1] O'Donovan, (1985), *op. cit.*, pp.8-9; Freeman, (1985), *op. cit.*, p.168; Lacey, N., 'Theory into Practice? Pornography and the Public/Private Domain in A. Bottomley and J. Conaghan, (Eds), *Feminist Theory and Legal Strategy*, 1993 Vol.20(1) *Journal of Law and Society* 1, Special Issue, p.94; Whelehan, (1995), *op. cit.*, p.29; Bridgeman and Millns, (1998), *op. cit.*, p.24
[2] Olsen, (1983), *op. cit.*, pp.1509-1513; O'Donovan, (1985), *op. cit.*, p.14
[3] Fletcher, R., 'Feminist Legal Theory', in R. Banakar and M. Travers (Eds), *An Introduction to Law and Social Theory*, (Oxford: Hart Publishing, 2002), p.145
[4] *ibid*, p.146

characteristics and areas of life, they are interrelated, as noted above.[1] It is the extent to which these two spheres, and the gender roles found within them, are separated or combined that underpins the work-family typologies and enables working families to address their work-family conflicts. The work-family conflict thus reflects the separate spheres ideology because it too is based on this relationship between work in the paid labour market and family responsibilities. While the separate spheres ideology is traditionally understood by this strict dichotomy the division of gender roles could equally represent other such arrangements.

The divisions of gender roles

The previous two sections have argued that there is a relationship between the separate spheres ideology and the work-family conflict. This analysis has suggested that these spheres are more closely connected and dependent upon one another than this conceptualisation would otherwise imply. Nevertheless, the separate spheres ideology and the gendered nature of law are based on a strict division of gender roles, which fails to fully appreciate the other divisions of roles that the legislation may produce. Within the gendered welfare state regime analyses other divisions of gender roles were also identified that may be usefully adopted here.[2] Similar approaches can

[1] Olsen, (1983), *op. cit.*, p.1524; McRae, (1989), *op. cit.*, p.35
[2] Sainsbury, (1994b), (1996), and (1999), *op. cit.*, Table 10.1 and pp.152-154, Table 2.1 and pp.41-43, and Table 10.1 and pp.77-80, respectively; Lewis, (1992), *op. cit.*; Hobson, (2004), op. cit., pp.76-77

also be identified in literature concerning gender roles.[1] From these analyses three specific divisions of gender roles, corresponding with the tripartite models within the other two indicators, can be identified: traditional division of gender roles, separate but equal gender roles, and shared gender roles.

Traditional division of gender roles

The first division of roles is along traditional stereotypical gendered lines. Care giving is firmly placed within the private (female) sphere, separating it entirely from the (male) public sphere of work. This corresponds with Chamberlayne's gender neutrality approach towards gender relations, which accords very little or no appreciation to women's particular caring responsibilities.[2] This approach is also consistent with the liberal notion of gender equality, which assumes that everyone can and should be treated in the same way.[3] The fundamental flaw in this approach is that it fails to appreciate, and so address, the specific issue of childcare and thus the work-family conflict. This approach may be reflected in equality or work-family legislation, which affords women the same rights as their male counterparts, or specific work-family rights in this instance, but is based on the unencumbered male model or norm and so fails to appreciate their specific

[1] Chamberlayne, P., 'Women and the State: Changes in Roles and Rights in France, West Germany, Italy and Britain, 1970-1990', in J. Lewis, (Ed), *Women and Social Policies in Europe. Work, Family and the State*, (Aldershot: Edward Elgar Publishing Limited, 1993), pp.172-174
[2] *ibid*, p.172; Similar to principle of non-intervention: Olsen, (1983), *op. cit.*, pp.1501
[3] Chamberlayne, (1993), *op. cit.*, p.172

position.[1] This approach upholds the traditional sexual division of labour because it does not recognise or challenge the gendered nature of child caring activities, by continuing to divorce employment and familial commitments by assuming that workers are not also carers.

Separate but equal gender roles

The second approach begins to recognise the caring responsibilities of working families but also upholds this traditional sexual division of labour. To this end, women's role as primary caregiver is again reinforced either directly or indirectly through work-family legislation. This model is reflective of the division of gender roles in Sainsbury's separate gender roles regime and of two separate approaches towards gender relations adopted by Chamberlayne.[2] In the first instance, it corresponds with the gender reinforcement approach, which supports the traditional division of gender roles, by reaffirming the value of unpaid domestic labour.[3] Chamberlayne notes that this could either be achieved by building society around female values, or by giving proper recognition and rewards for this type of work.[4] It is the second approach which is most clearly reflected in Sainsbury's model, in terms of the value given to personal care.[5] In terms of the work-family

[1] Smart, (1992), *op. cit.*, p.32
[2] Sainsbury, (1999), *op. cit.*, pp.78-79
[3] Chamberlayne, (1993), *op. cit.*, pp.172 and 174; A similar approach was also recognised by Lord Denning, *The Due Process of Law*, (London: Butterworths, 1980), pp.194-195 where he emphasised the importance of the roles that both undertook in their separate spheres
[4] Chamberlayne, (1993), *op. cit.*, p.174
[5] Sainsbury, (1999), *op. cit.*, pp.78-79

conflict this is evident in legislation which enables working families to care, but reinforces one parent, primarily the mother, as the sole or primary carer.[1] However, it is also evident in Chamberlayne's gender recognition approach.

Chamberlayne argues that this second approach reflects the social democratic approach by focusing on particular difficulties that inhibit equality, and trying to find solutions to them.[2] In other words, it attempts to address equality actively by aiming for equality of outcome.[3] This approach is evident within and underpins positive discrimination legislation such as quota systems and maternity leave,[4] both of which attempt to achieve equality through the provision of specific rights.[5] In doing so, they recognise and attempt to appreciate women's difference, but also emphasise their equality with men – in other words they are treated as separate but equal.[6] However, such an approach can serve to uphold the traditional sexual division of roles. If this is a one-sided exercise then the provision of specific rights for one gender group, for instance the right to maternity leave, may further entrench mothers' role as carer, while failing to challenge fathers' role within the family. While this is based on a different approach to the gender reinforcement model, it produces the same outcome. Working families and their caring responsibilities are recognised and valued, but who provides care remains

[1] See Chapter Eight: Parents' Work-family Rights for more discussion on these rights
[2] Chamberlayne, (1993), *op. cit.*, pp.172-173
[3] This is somewhat reflected in the discussion of Swedish legislation in Chapter Six: The Swedish Welfare State and the Work-family Conflict, which has been identified as a 'classic' social democratic state, as noted above in Table 3.1, p.106
[4] Chamberlayne, (1993), *op. cit.*, pp.172-173
[5] These objectives are seen to underpin such legislation, as discussed in the relevant chapters below
[6] Olsen, (1983), *op. cit.*, pp.1516; Freeman, (1985), *op. cit.*, p.167

highly gendered.

Shared gender roles

The third and final division of gender roles is shared gender roles.[1] In contrast with the other two, this division of roles reflects a move away from specifically gendered roles and towards a shared earner-carer identity for both working parents. Legislation underpinned by this division of roles not only encourages both partners to care in the form of specific or gender-neutral rights, but also facilitates their participation in both spheres. The facilitation of shared earning and caring roles is particularly significant because these roles will only be challenged if both parents have genuine access to these rights. If they are merely gender-neutral in theory, it may have the opposite effect.[2]

It is this division of gender roles which has been recognised as necessary for achieving equality between the sexes.[3] This division of roles is evident in Chamberlayne's gender reconstruction approach, which challenges gendered roles by encouraging male participation in the family and care giving, with the aim of achieving equally shared gender roles.[4] This

[1] Corresponds with Sainsbury's individual earner-carer model and Hobson's gender equity model: (1999), *op. cit.*, pp.78 and 79; and (2004), *op. cit.*, pp.76-77, respectively
[2] See discussion of parental rights in Chapter Eight: Parents' Work-family Rights
[3] Atkins, S., and Hoggett, B., *Women and the Law*, (Oxford: Basil Blackwell Ltd, 1984), pp.23-24
[4] Chamberlayne, (1993), *op. cit.*, pp.172 and 173-174

approach is distinct from the gender neutral approach discussed above, despite the possibility that such work-family legislation may be based on gender-neutral rights. The difference lies in the way in which the rights are presented and how they enable working families to balance their work and family commitments.

Gender roles

The three gender roles identified here are useful because work-family legislation may directly or indirectly reinforce divisions of gender roles in different ways, particularly from those anticipated, and this indirectly can facilitate their identification. This indicator is also significant because it enables the implications and practical utilisation of the legislation to be analysed.

These divisions represent a spectrum of the organisation of gender roles, which corresponds with the other indicators.[1] At one end the traditional sexual division of labour is upheld and at the other end the division of gender roles is challenged. This model is also useful because it facilitates greater scrutiny of legislation that appears to reproduce the same, or similar, division of gender roles. For instance, the traditional division of gender roles classification indirectly reproduces the sexual division of labour because it does not recognise the caring responsibilities of working families, and is thus

based on a male model of work. The same division is reproduced in the separate but equal division of gender roles classification, since it does not challenge the traditional sexual division of labour, although it does aim to address or recognise the value of these activities. While these models produce similar divisions of gender roles, they have different implications for working families. In the first instance, there is no support for caring activities whereas in the latter there is greater recognition of this role. What this spectrum also shows is that there is a certain degree of overlap between these different divisions, as was evidenced in gendered welfare state regimes models.[2]

Work-family typologies

These three work-family indicators have themselves identified three distinct classifications. These are similar to the classification frameworks developed within the welfare state regime literature because they also identify a minimalist model; a mid-point model, which displays elements of each extreme; and a comparatively progressive model.[3] Such an approach is useful because it serves to underscore the idealised, as opposed to practical, nature of these typologies. In other words, not unlike the models found within

[1] As above, each identifies three classifications
[2] For instance: Hobson, (2004), *op. cit.*, p.76; Sainsbury, (1999), *op. cit.*, Table 10.1 pp.77-80, which was necessary given the limitations of her previous dual classification model. Her analysis of states identified that it was difficult at times to classify them into one of these opposing models, Sainsbury, (1994), *op. cit.*, pp.166-169 and (1996), *op. cit.*, pp.70-72
[3] See discussions of welfare state regime models in Chapter Three: Welfare State Regimes and the Work-family Conflict, with an overview of classifications in Table 3.1 at p.106

the welfare state regime literature,[1] this model represents ideal and not necessarily the specific approach actively adopted by the state in question. In fact, it is not the position of this research that the classifications identified here coincide with any instrumental approach adopted by the states in question. The aim of this analysis instead is to determine whether the typology underpinning the legislation has actually changed and the implications that this has for working families.

Table 4.1 below presents the three work-family indicators and the three typologies that they produce. They identify distinct engagements with the work-family conflict and appear to represent a chronological development of typologies underpinning the legislation. While it may be the case that states develop through the different typologies in the development of work-family legislation, for instance it appears to be the case that most start with a gendered maternity leave focus,[2] this is not the argument advanced here.[3] This classification model instead reflects a range of approaches from weak to active engagement with the work-family conflict and support for working families.

[1] Esping-Andersen, (1990), *op. cit.*, p.28
[2] As seen in the discussions of work-family rights below
[3] This follows a similar approach adopted by Hobson, (2004), *op. cit.*, p.76 in her identification of gender regimes

Table 4.1: Work-family typologies [1]

Ideologies/ *Characteristics*	**Minimalist Typology**	**Mid-point Typology**	**Progressive Typology**
Family Care Model	Post-Natal Care – Mother and Child	Early Childcare	Family Care
Rights Holder	Working Mothers	Gender-Neutral Working Parents	Gender-Neutral Working Parents or Working Carers
Care Situations	Limited to Pre- and Post-Natal Period	Young Children	Older Children and/or Other Family Members
Working Family Model	(Male) Breadwinner	One and a Half Earner-Carer	Dual Earner-Carer
Gender Roles	Traditional:	Equal but different in practice:	Shared:
	Male Earners	Male Earners	Male Earner/Carer
	Female Carers	Female Carers	Female Earner/Carer

The minimalist typology

The minimalist work-family typology represents the most basic engagement with the work-family conflict. It is the first stage in the development of work-family rights, focusing on those rights which afford working families with the most rudimentary support in this context. To this end the family care model is focused on achieving equality by providing gendered medical-related rights. Work-family rights, consequently, focus solely on the period surrounding the child's entry into the family and maternal care. This focus reflects the (male) breadwinner working family model underpinning the

[1] Indicators and framework drawn from literature discussed above in Chapters Two and

ideology because it represents the male worker and model of law.[1] The combination of family care responsibilities and paid labour market participation are not facilitated within legislation underpinned by this typology. On the contrary it continues to endorse the male model of work, either by comparing women against a male standard, or by requiring them to enter the labour market on the same terms as the unencumbered male worker ideal.[2]

The most interesting aspect of this ideological model is the division of gender roles it upholds. This is because, in theory women are provided with equal opportunities to participate in the labour market, albeit on male terms, and their care giving role is not entrenched within the legislation.[3] However, the absence of an (extended) package of work-family rights reinforces the traditional separation of earning and caring responsibilities, and the consequent division of gender roles. What this typology, in actuality, represents is not the traditional male breadwinner working family with mothers as stay at home carers,[4] but it is nevertheless based on the same separation of spheres. The two competing spheres of work and life, while dependent upon one another,[5] are clearly set in opposition within this typology.

This minimalist typology is very much focused on maternal care and the

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pp.110-135
[1] As noted above at pp.121-125
[2] Morris and O'Donnell, (1999b), *op. cit.*, p.3
[3] *ibid*, p.3; Morris, A., 'Workers First, Women Second? Trade Unions and the Equality Agenda', in A. Morris and T. O'Donnell, (1999a), *op. cit.*, p.193
[4] As noted above in pp.31-36
[5] Olsen, (1983), *op. cit.*, p.1524; McRae, (1989), *op. cit.*, p.35

physical and medical aspects of such. It draws a clear line between this early care period and childcare in more general terms, thus, giving only a partial recognition to the caring role that working parents now have. Even where the rights do extend beyond the post-natal period, they remain exclusively for the benefit of working mothers. With this in mind, it is useful to classify this ideology as the *maternity to motherhood typology*. This reflects the gendered and temporal focus of these work-family rights.

The mid-point typology

The mid-point typology reflects elements of both the minimalist and the progressive typology. The progressive typology is reflected in the gender-neutral nature of the work-family rights which, in theory, provide both working parents with the opportunity to care. The family care model, thus, encompasses a wider range of caring responsibilities, although these remain limited to early childcare. In spite of these aims, legislation underpinned by this typology continues to reinforce traditional gender roles by facilitating the one and a half earner-carer working family model. This typology is, consequently, based on the notion that working parents fulfil two different, gendered, family roles. Fathers are again viewed as primary breadwinners with mothers remaining as primary caregivers. This typology is, consequently, in some respects similar to the maternity to motherhood typology. The main difference lies in the conceptualisation of the family care

model. In this instance, as noted above, the model is extended to include a wider understanding of childcare which goes beyond the post-natal period. In addition, this typology places more emphasis on enabling working families to balance their work and family commitments through the provision of specific work-family rights. However, the underpinning gendered model of care does not reflect this change. Mothers are still viewed as primary caregivers and so the concept of motherhood and maternal care is extended within this typology, thus the classification as the *extended motherhood typology*.

The progressive typology

Representing the opposite end of the work-family spectrum is the progressive typology.[1] This typology is underpinned by the objective of shared gender roles in work and family life, with both partners being encouraged and facilitated in entering the labour market and in child or family care. Again, it is the actual facilitation of work-family responsibilities that distinguishes this model from the extended motherhood typology since this challenges these inherently gendered roles. In this respect it endorses the dual earner-carer working family model with working carers being identified in terms of their competing roles.

This typology, endorses the notion of parenthood as opposed to motherhood,

which is inherent within the other typologies. Parenthood, as defined by Fredman, is the *"shared responsibility of mothers and fathers"*,[2] thus, recognising the role of both parents in caring for their children. However, the appropriate characterisation of this typology is not the parenthood typology, but the *family typology*. This reflects the wider understanding of family care which is adopted within this model. This is much wider than the previous two typologies, since it moves beyond early childcare to include various child and family care situations. In this context, the family care model predominately refers to the care of older children, but could also extend to the care of other family members.

Conclusion

The three typologies identified in Table 4.1 above can be re-classified as the maternity to motherhood typology (minimalist typology), the extended motherhood typology (mid-point typology), and the family typology (progressive typology).[3] While there is some overlap between these work-family typologies, it should be evident that they represent different ways of addressing and classifying the work-family conflict. The typology underpinning earlier UK work-family legislation, based on the welfare state classifications discussed in the previous chapter,[4] appears to correspond

[1] See Table 4.1 above
[2] Fredman, (1997), *op. cit.*, p.192
[3] See revised table, Table 4.2, in the appendix
[4] See pp.105-109 above

closely with the maternity to motherhood typology. One of the central arguments of this thesis is that the typology underpinning such legislation has developed over time. This thesis will test the application of this model and the strength of this argument by using it in the first instance to critically analyse the work-family legislation of the US and Sweden, as two 'ideal-type' examples of different welfare state regimes and countries which the UK has previously been classified alongside,[1] before examining the development of UK legislation in the remaining chapters.

[1] As noted in Chapter Three above; For an overview see Arts and Gelissen, (2002), *op. cit.*, and Table 3.1, p.106 above

Chapter Five – The US Welfare State and the Work-family Conflict

The classification of the US as a minimalist welfare state was alluded to in the earlier chapter on welfare state regimes.[1] This examination identified the US as a liberal type of welfare state regime within the mainstream literature.[2] This was reflected in the gendered literature, which identified the US as a male breadwinner state.[3] The various characteristics of these models were identified in Chapter Three,[4] but it is useful to reiterate the work-family related characteristics that can be drawn from these classifications. In the first instance, the preponderance of minimal and limited state supports characteristic of these classifications suggests that the US will only provide minimal support for working families and their caring responsibilities. This would correspond with few and/or limited work-family rights. This is further reinforced by the historical support for the male breadwinner family model in the US through tax and welfare benefits.[5] This also suggests that there

[1] See pp.80-109 above

[2] Esping-Andersen, G., *The Three Worlds of Welfare Capitalism*, Cambridge: Polity, 1990); Esping-Andersen, G., *Social Foundations of Postindustrial Economies*, (Oxford: Oxford University Press, 1999); Korpi, W., and Palme, J., 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries', 1998 Vol.63(Oct) *American Sociological Review* 661; Siaroff, A., 'Work, Welfare and Gender Equality: a New Typology', in D. Sainsbury, (Ed), *Gendering Welfare States*, (London: Sage, 1994) (Although this is from the gendered literature, the USA is classified as Protestant Liberal within this regime); Castles, F.G., and Mitchell, D., 'Worlds of Welfare and Families of Nations', in F.G. Castles (Ed) *Families of nations: patterns of public policy in Western democracies*, (Aldershot: Dartmouth Publishing Company, 1993); Leibfried, S., 'Towards a European Welfare State? On Integrating Poverty Regimes into the European Community', in Z. Ferge and J.E. Kolberg (Eds), *Social Policy in a Changing Europe*, (Frankfurt am Main: Campus Verlag, 1992)

[3] Sainsbury, D., *Gender, Equality and Welfare States*, (Cambridge: Cambridge University Press, 1996); Sainsbury, D., 'Women's and Men's Social Rights: Gendering Dimensions of Welfare States', in D. Sainsbury (Ed), *Gendering Welfare States*, (London: Sage Publications Limited, 1994) (1994b); Lewis, J., 'Gender and the Development of Welfare Regimes', 1992 Vol.2(3) *Journal of European Social Policy* 159

[4] See pp.59-80 above and Table 3.1, p.106 for more details

[5] Sainsbury, (1994b), *op. cit.*, pp.160-162; See Ginsburg, N., *Divisions of Welfare: A critical*

would be weak support for the dual earner-carer working family model and the work-family conflict within this state.[1]

This classification of the US welfare state located it alongside the UK in some instances, and in contrast with Sweden.[2] Such a distinction is also often found in the work-family context, with many writers contrasting US legislation with that in Sweden.[3] This contrast may suggest that the US and Sweden adopt diverse approaches towards working parents and the work-family conflict, with Sweden offering the most extensive package of work-family rights, and the US the least. This chapter will focus on the work-family typology underpinning US legislation, with that underpinning Swedish legislation being examined in the next chapter.

US work-family legislation pre-1993

The US as a federal state has legislation emanating at a federal level, which applies across all states, and legislation at a state level which applies within

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introduction to comparative social policy, (London: Sage Publications, 1992), pp.98-114, 117-120, 124-127, and 136-138 for an overview of the US welfare state at that time

[1] Crompton, R., *Employment and the Family. The Reconfiguration of Work and Family Life in Contemporary Societies*, (Cambridge: Cambridge University Press, 2006), p.130

[2] See Table 3.1, p.106 for an overview of the welfare state classifications and Chapter Six: The Swedish Welfare State and the Work-family Conflict for more details on Sweden

[3] Pelletier, A., 'The Family and Medical Leave Act of 1993 – Why Does Parental Leave in the United States Fall so far Behind Europe?', 2006-2007 Vol.42(3) *Gonzaga Law Review* 547, pp.568-571; Malin, M.H., 'Fathers and Parental Leave', [1994] Vol.72 *Texas Law Review* 1047; Kosich, J., 'Swedish Parental Leave Policy and its Lessons to the US', 1992-1993 Vol.11 *Dickson Journal of International Law* 163

each individual state.[1] With regards to work-family legislation there is both federal and state legislation.[2] Nevertheless, the federal Family and Medical Leave Act 1993 (FMLA 1993),[3] which is the central piece of work-family legislation in the US, will be the focus here. This approach has been adopted since state legislation is generally based on the rights contained within and the format of the FMLA 1993.[4] It is, consequently, necessary to understand the federal legislation. One example of state legislation will, however, be included within this analysis. This is the Californian legislation[5] since it offers the most extensive implementation of the rights to family and medical leave within the US.[6] This offers a comparison with the FMLA 1993 and the work-family typology underpinning it.

Background to work-family legislation pre FMLA 1993

Prior to the introduction of work-family rights in the US, a gendered approach to leave was supported, although not legislated for, reflecting the traditional practice of affording working mothers with the right to maternity leave.[7] The Women's Bureau of the US Department of Labor, for instance, in the 1940s

[1] For an overview of the US legal system see: Bureau of International Information Programs, *Outline of the U.S. Legal System*, (United States Department of State, 2004), pp.6-9 and 16-17
[2] See Appendix Tables 5.1 and 5.2 for an overview of state legislation
[3] The Family and Medical Leave Act of 1993, Public Law 103-3, Enacted February 5, 1993
[4] See Tables 5.1 and 5.2 in the appendix for an overview
[5] California Family Rights Act (aka Moore-Brown-Roberti Family Rights Act), Cal. Gov't Code § 12945.1 (West 2005) (CFRA)
[6] See Tables 5.1 and 5.2 in the Appendix for a comparison of state legislation
[7] The right to some form of maternity has had a long history of support with the ILO having implemented the C3 Maternity Protection Convention in 1919, [WWW Document] URL:

advocated mother's childcare rights and recommended introducing the right to six weeks pre-natal and eight weeks post-natal leave for pregnant women.[1] However, despite the support for gendered rights the US never explicitly adopted that approach towards this issue. In contrast, greater emphasis has been placed on equal treatment within the legislation.

Equal treatment: Civil Rights Act 1964 and the Equal Protection Clause

The work-family conflict in the US prior to 1993 was solely governed by anti-discrimination legislation, specifically Title VII of the Civil Rights Act 1964 (Title VII) and the Equal Protection Clause of the Fourteenth Amendment to the US constitution (Equal Protection Clause).[2] While these pieces of legislation did not explicitly address the work-family conflict, they were aimed at achieving equal treatment, which had certain implications for this conflict.

It has been argued that the notion of equal treatment in the US has been influenced by the liberal feminist movement, which was focused on achieving equal rights under the law. [3] This focused on the similarities between men and women, and was concerned with ensuring that women were treated in

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http://www.ilo.org/ilolex/cgi-lex/convde.pl?C003 (Last Updated: 2006), (Last Accessed: Sept 2009)

[1] Kamerman, S.B., and Gatenio, S., 'Mother's Day: More Than Candy And Flowers, Working Parents Need Paid Time-Off', Columbia University, *The Clearinghouse on International Developments In Child, Youth and Family Policies*, Issue Brief, Spring 2002, p.3

[2] The Civil Rights Act 1964, Pub. L. No. 88-352, Stat. 253 (now codified as amended at 42 U.S.C. § 2000e (2006)), (CRA 1964); U.S. Constitution: Fourteenth Amendment – Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

[3] Ginsburg, (1992), *op. cit.*, p.119; Pelletier, (2006-2007), *op. cit.*, pp.550 and 575

the same way as men.[1] This can be compared with the situation in Europe where, it has equally been argued, that the feminist movement was instead aimed at achieving special treatment for mothers in relation to pregnancy and maternity.[2] This approach in contrast, reinforced women's difference from men and was aimed at securing specific rights to accommodate these differences. An example of this at the European level was found in the Equal Treatment Directive.[3] While this did not afford working women with any definite work-family rights, it contained a specific exception to the equal treatment principle, namely the *"protection of women, particularly as regards pregnancy and maternity."*[4] This clearly adopted a special treatment approach towards achieving equality between men and women.[5]

Both Title VII and the Equal Protection Clause adopted the former equality approach by providing equal protection for both men and women against discrimination. In Title VII various *"unlawful employment practices"* were identified which prohibited employers from discriminating against persons because of their sex in relation to: recruitment, dismissal, terms and conditions, compensation, benefits, opportunities in employment and

[1] As this section will show, these aims underpinned the legislation in this context
[2] Pelletier, (2006-2007), *op. cit.*, pp.550 and 575
[3] Originally Council Directive 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 (76/207/EEC), (ETD 1976); as amended by Council Directive 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 (2002/73/EC), (ETD 2002); and consolidated in Council Directive 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) (2006/54/EC), (ETD 2006)
[4] ETD 1976, Art.2(3); ETD 2002, Art.2(7); ETD 2006, Art.28
[5] See discussion of this article and its interpretation by the ECJ in Chapter Seven: Mothers' Work-Family Rights in the UK, pp.286-321

training.[1] A similar approach was adopted in the Equal Protection Clause which required the State, in more general terms, not to *"deny any person within its jurisdiction the equal protection of the laws."*[2] Neither of these pieces of legislation explicitly encompassed work-family considerations. They referred, in more general terms and respectively, to the equal treatment of men and women in the employment context and under the law.

One possible interpretation of this underpinning legislation is that it would support and reinforce equal rights. Consequently, if any work-family rights were introduced at a national, state or employer level, these provisions require that they must be equally available to both male and female workers. This suggests that the legislation has the potential to recognise the work-family responsibilities of all working family members irrespective of sex. Nevertheless, under either or both of these rights gender specific work-family rights could, on the contrary, be challenged as incompatible with the legislation, with such rights being prohibited as contrary to the principle of equal treatment. Two cases, *Geduldig v Aiello* and *General Electric Company v Gilbert*,[3] which challenged the Equal Protection Clause and Title VII respectively, identified and underscored the equal treatment appraoch underpinning US equality legislation.

[1] CRA 1964 § 703(a) and (d) (§ 2000e-2(a) and (d))
[2] Fourteenth Amendment, s.1
[3] Geduldig v Aiello et al., 417 U.S. 484 (1973) and General Electric Company v Gilbert et al., 429 U.S. 125 (1978)

Equal treatment in the US courts: Geduldig v Aiello and General Electric Company v Gilbert

The scope of the equal treatment principle in the US arose in the context of these two significant cases, both of which related to work-family conflict issues. The first case, *Geduldig v Aiello*, was concerned with a Californian disability insurance programme which entitled qualifying temporarily disabled employees to compensation, but excluded pregnancy and illnesses relating to it from coverage.[1] The rationale behind this exclusion was that pregnancy and pregnancy related illnesses were gender-specific temporary disabilities. If the programme had permitted coverage in this instance it would have indirectly amounted to a maternity benefit for female employees, which was outwith the scope of the legislation.[2] Consequently, this would have been contrary to the Equal Protection Clause.

The appellees in this case were four women, who had suffered employment disability relating to pregnancy, but had received no compensation from the Unemployment Compensation Disability Fund.[3] Only one of the women experienced a normal pregnancy, with the remaining three encountering *"abnormal complications"*.[1] In the court of appeal a distinction was made between these normal and abnormal pregnancies, with the decision concentrating on the issue of whether the exclusion of normal pregnancy was

[1] California Unemployment Insurance Code, (CUIC), §§ 2601, 2626 and 2627
[2] As previously determined in Clark v California Employment Stabilization Commission, 166 Cal. App. 2d 326, p.332
[3] This was the fund who paid the compensation to temporary disabled employees

contrary to the Equal Protection Clause.[2] This focus was influenced by the decision in *Rentzer v Unemployment Insurance Appeals Board*.[3] In this case, also concerning the disability insurance programme, it was decided that employment disability arising from abnormal complications during pregnancy was covered by the legislation.[4] In doing so, a clear distinction was made between such circumstances where the abnormality resulted in it not being realistic to describe the situation as pregnancy,[5] and other pregnancy related illnesses or normal pregnancy. In other words, a distinction was made between exceptional medical circumstances and the everyday physical and social reality of pregnancy.

The district court upheld the argument that the exception against covering pregnancy was contrary to the Equal Protection Clause.[6] However, the Supreme Court reversed this decision and held that not insuring the risks of disability arising from normal pregnancy did not amount to sex discrimination.[7] In doing so the court adopted a very narrow understanding of equal protection, based solely upon equality of treatment in procedural terms and not upon the realities of the differing positions of men and women. This is evident in the judgment of Stewart J., giving the Opinion of the Court, who argued that *"[t]here is no risk from which men are protected and women*

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[1] Geduldig v Aiello, *op. cit.*, p.489
[2] The reason for this was that those women who had experienced abnormal pregnancies were subsequently compensated, *ibid*, pp.491-492
[3] Rentzer v Unemployment Insurance Appeals Board, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973) and Clark v California Employment Stabilization Commission, *op. cit.*
[4] Rentzer v Unemployment Insurance Appeals Board, *ibid*, pp.607-608
[5] *ibid*, p.608 – the case was concerned with an ectopic pregnancy
[6] Geduldig v Aiello, *op. cit.*, p.487
[7] *ibid*, p.497

are not. Likewise, there is no risk from which women are protected and men are not."[1]

The decision of the court can be understood as adopting a strictly equal treatment approach, such as Aristotle's approach toward equality: that likes should be treated alike and where they are different they should be treated differently.[2] Both male and female employees are entitled to the same rights and protections under the law. However, in adopting this interpretation of the equal treatment of men and women, the court failed to consider the specific circumstances and effects of pregnancy for working women.

The implication of this decision, later reiterated in *General Electric Company v Gilbert*, was that women were not entitled to specific benefits relating to the normal effects of pregnancy, only those which amounted to a disability. Even when amendments were made to the legislation to encompass certain pregnancy related disabilities,[3] a distinction was still drawn between the medical and the physical and social implications of pregnancy. By upholding this narrow interpretation of the equal treatment principle contained within the Equal Protection Clause, the court reinforced a particular notion of the person in law. Instead of offering a gender-neutral understanding of equal treatment, the court adopted a male gendered interpretation of the legal person by

[1] Geduldig v Aiello, *op. cit.*, pp.496-497
[2] Fredman, S., 'A Difference with a Distinction: Pregnancy and Parenthood Reassessed', 1994 Vol.110 *Law Quarterly Review* 106, pp.111-113
[3] This was later reflected in the addition of § 2626.2 which included abnormal complications arising during and as a consequence of pregnancy

ignoring the gender specific effects of childbearing.[1]

This approach was reinforced in the later decision of the Supreme Court in *General Electric Company v Gilbert*. This case was also concerned with a specific disability plan, this time provided by the employer, General Electric Company. The plan entitled employees to non-occupational sickness and accident benefits, but excluded disabilities arising from pregnancy.[2] This plan was challenged on the basis that it amounted to sex discrimination contrary to Title VII.[3] Again, this argument was initially upheld in the district court and by the appeal court which distinguished the decision in *Geduldig* since it was decided under the Equal Protection Clause.[4] However, on appeal this decision was overturned and it was accepted that *Geduldig* was relevant here. Although both cases dealt with different pieces of legislation, Rehnquist J., delivering the Opinion of the Court, reasoned that both were concerned with determining whether or not excluding pregnancy amounted to sex discrimination.[5] In accepting the relevance of *Geduldig*, the court followed that decision and held that this disability plan did not contravene Title VII because pregnancy discrimination was not sex discrimination per se.[6] In doing so, the court extended this narrow interpretation to Title VII,[1] with the effect that there were no alternative legislative means of challenging such programmes on the basis of sex discrimination. Pregnant employees

[1] Compare with discussion of *Law as gendered* at pp.121-125
[2] General Electric Company v Gilbert, *op. cit.*, p.127
[3] *ibid*, pp.127-128
[4] *ibid*, p.128, pp.132-133
[5] *ibid*, p.136
[6] *ibid*, p.136. This was further supported by the court concluding that the evidence did not show that this amounted to discrimination against women, pp.137-140

were, consequently, left without any specific protection under the legislation.

Despite the limiting judgments delivered in both of these cases, in each a dissenting opinion was delivered by Brennan J.,[2] which offered an alternative approach to the question of equal treatment.[3] While the majority judgments focused on the gender-specificity of pregnancy and related illnesses, Brennan J. identified that the purpose of the legislation, subject to challenge in *Geduldig*, was to compensate for wage losses when the employee was unable to work.[4] This, he argued, was not reflected in the exclusion of pregnancy from the list of covered temporary disabilities.[5] Pregnancy and related illnesses, he argued, presented an analogous scenario for the employees involved. Employees in this instance were similarly unable to work, equally suffered wage losses and medical expenses, and were consequently in a comparable situation to those entitled to compensation.[6] It was further reasoned that by excluding pregnancy from the scope of the insurance coverage it could only be concluded that it amounted to sex discrimination.[1] While there is merit in the approach adopted here, focusing on the comparable consequences for employees, it is based on a rather narrow view of the issues at hand. The focus remains on the equality of

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[1] Fredman, (1994), *op. cit.*, p.112
[2] Geduldig v Aiello, *op. cit.*, pp.497-505; General Electric Company v Gilbert, *op. cit.*, pp.146-160
[3] Fredman, (1994), *op. cit.*, pp.111 and 113
[4] CUIC § 2601: *"to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury."*
[5] Geduldig v Aiello, *op. cit.*, pp.500-501
[6] *ibid*, pp.500-501; Fredman, (1994), *op. cit.*, p.113; Similar analogies were mentioned in General Electric Company v Gilbert, *op. cit.*, p.151 regarding 'voluntary disabilities' and the distinction between 'disability' and 'disease', which Brennan J. argued did not necessarily preclude pregnancy from the scope of coverage

treatment, and not the unique position of pregnant employees.

Consideration was also given to the types of disabilities and risks that were included within the disability programmes. With regard to the General Electric Company's disability plan, Brennan J. argued that the exclusion of pregnancy was discriminatory because *"although all mutually contractible risks are covered irrespective of gender … the plan also insures risks … that are specific to the reproductive system of man and for which there exist no female counterparts covered by the plan. Again, pregnancy affords the only disability, sex-specific or otherwise, that is excluded from coverage."*[2] Consequently, while there was equal treatment with regards to gender-neutral risks, and protections for gender-specific risks, pregnancy remained the only provision that was afforded no protection.[3] Given this strict division, and the inability to clearly distinguish pregnancy and related illnesses from other forms of disability included within the plan, Brennan J. concluded that this exclusion amounted to sex discrimination.[4] The arguments adopted here are also similarly based on the equal treatment principle to the detriment of specific protections for pregnant workers.

While the equal treatment legislation challenged in these cases was aimed at achieving equality between the sexes, the judgments given here identified that they failed to address the sources of these inequalities by ignoring the

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[1] Geduldig v Aiello, *op. cit.*, p.501
[2] General Electric Company v Gilbert, *op. cit.*, p.152
[3] *ibid*, p.155
[4] *ibid*, pp.159-160

gendered nature of childbearing and the work-family responsibilities of working families. This was to an extent recognised in the dissenting judgments of Brennan J., which had a significant impact on the development of US legislation. Significantly, following these decisions amendments were made which began to recognise the comparable effects of pregnancy for working women.[1]

Gendered rights: The Pregnancy Discrimination Act 1978

The unsuccessful challenges to the equal treatment legislation exposed the gaps in US law in relation to pregnancy. Subsequently, a move from a focus on equality based rights to one encompassing gender-specific rights with the aim of equal treatment for pregnant employees was enacted.[2] This was achieved in the form of the Pregnancy Discrimination Act 1978 (PDA 1978).[3] The PDA 1978 amended Title VII to extend the prohibition of discrimination with regards to sex to include *"pregnancy, childbirth, or related medical conditions"*.[4] In doing so, this amendment overturned the decisions in

[1] For example, the Pregnancy Discrimination Act 1978, Pub. L. No.95-555, 92 Stat. 2076 (codified at 42 USC § 2000e(k)), discussed in the following section; Fredman, (1994), *op. cit.*, p.113

[2] United States Congress, House Committee on Education and Labor, *Prohibition of sex discrimination based on pregnancy: report together with dissenting views to accompany H.R. 6075*, H.R. Rep. No.95-948, (1978), p.2; Golden, N.G., 'Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies', 2006 Vol.8 *Journal of Law and Family Studies* 1, p.3; Kosich, (1992-1993), *op. cit.*, p.170

[3] See: Remmers, C.L., 'Pregnancy Discrimination and Parental Leave', 1989 Vol.11(3) *Industrial Relations Law Journal* 378 for an overview of the legislation

[4] CRA 1964, § 701(k) (§ 2000e(k) as codified) inserted by the PDA 1978, s.1

Geduldig and *Gilbert*,[1] making it illegal to exclude pregnancy, and pregnancy-related medical conditions, from temporary disability insurance programmes.[2] The PDA 1978, consequently, provided pregnant women with the same rights as other temporarily disabled workers. In addition, for the first time it rendered any dismissal or mandatory leave policies on the grounds of pregnancy illegal.[3] Pregnant workers were, consequently guaranteed the right to work until childbirth or until they were no longer able to do so for medical reasons.[4]

The introduction of the PDA 1978 appears, at first glance, to entitle pregnant employees to a positive right to leave with compensation relating to pregnancy or childbirth, in other words to some form of maternity leave. However, on closer examination of the PDA 1978, it is apparent that this is not the case, and that there are a number of flaws contained within it. In the first instance, as a piece of discrimination legislation the act does not entitle pregnant employees to any positive rights to leave with or without income replacement.[5] On the contrary, pregnant employees are only entitled to the same rights that are available to other temporarily disabled workers.[6] Consequently, the effect of the legislation was merely to extend the equal

[1] See above for a discussion of these cases, pp.149-155
[2] Pelletier, (2006-2007), *op. cit.*, p.551; Golden, (2006), *op. cit.*, p.9; Wisensale, S.K., 'Two Steps Forward, One Step Back: The Family and Medical Leave Act as Retrenchment Policy', 2003 Vol. 20(1) *Review of Policy Research* 135, p.137; Remmers, (1989), *op. cit.*, pp.380 and 384-389
[3] House of Representatives Report, *Family and Medical Leave Act of 1993*, (H.R. Rep. No. 103-8(II), 1993), p.10; Pelletier, (2006-2007), *op. cit.*, p.551; Golden, (2006), *op. cit.*, p.9
[4] H.R. Rep. No. 103-8(II), *ibid*, p.10; Pelletier, (2006-2007), *op. cit.*, p.551
[5] Kosich, (1992-1993), *op. cit.*, p.170
[6] Pelletier, (2006-2007), *op. cit.*, p.552; Golden, (2006), *op. cit.*, pp.3-4; Ginsburg, (1992), *op. cit.*, p.127; Remmers, (1989), *op. cit.*, pp.380-381

treatment provisions of Title VII to the gender-specific childbearing experience.

There are two main criticisms of this approach. This first is that adopting the disability framework in this context, treats pregnancy as if it were a form of disability.[1] This is problematic because it presents pregnancy and childrearing in a negative light, by treating them as if they are illnesses and undervaluing childbearing and rearing.[2] In doing so, the legislation adopts the reasoning and approach advocated by Brennan J. in *Geduldig*, which focused on the similar consequences and effects that pregnancy, and pregnancy related illnesses, has as compared with other temporary disabilities.[3] While this reasoning may have been justified with regards to the arguments advanced for not extending the right to pregnancy, the legislature could have taken this opportunity to introduce a specific parallel right encompassing pregnancy and childbirth as opposed to grafting it into the existing provisions. By adopting this approach, the legislation fails to appreciate the uniqueness of pregnancy and childbirth and the need to provide support for pregnant employees irrespective of the rights of other temporarily disabled workers.[1]

The second main criticism, alluded to above, is that the PDA 1978 only entitles pregnant workers to the same rights that are available to other

[1] Ashamalla, M., 'Swedish Lessons in Parental Leave', 1992 Vol. 10 *Boston University International Law Journal* 241, p.249
[2] *ibid*, p.249
[3] Geduldig v Aiello, *op. cit.*, pp.500-501

temporarily disabled workers.[2] This could be problematic, for instance, if temporarily disabled workers are only entitled to short periods of leave and insurance coverage, which fail to adequately cover the time period required to give birth and recover. More problematic, however, is the situation where the employer provides no rights for persons who are temporarily disabled.[3] In this situation, pregnant workers are not entitled to any leave or compensation.[4]

The implications of this legislation were clear from the numbers of pregnant workers who were covered by these rights. Following the introduction of the PDA 1978 only 36% of pregnant employees had, so called, maternity rights in 1988,[5] and only 60% with such rights had maternity insurance coverage.[6] In addition, by the end of the 1980s only 23 states had enacted either a specific right to unpaid maternity leave (12) or parental leave (11).[7] While these latter provisions were not specifically provided for within the PDA 1978, they provide an indication of how the circumstances and responsibilities of working mothers and fathers were recognised by state legislatures. As a whole, these figures show the limited impact that the legislation has

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[1] Golden, (2006), *op. cit.*, p.9
[2] Pelletier, (2006-2007), *op. cit.*, p.552; Golden, (2006), *op. cit.*, pp.3-4; Ginsburg, (1992), *op. cit.*, p.127; Remmers, (1989), *op. cit.*, pp.380-381
[3] Golden, (2006), *op. cit.*, pp.3-4; Kosich, (1992-1993), *op. cit.*, p.170
[4] The US Equal Employment Opportunity Compliance Commission, *Pregnancy Discrimination*, [Online] URL: http://www.eeoc.gov/types/pregnancy.html, (Last Updated: March 2009) (Last accessed: Sept 2009); Remmers, (1989), *op. cit.*, p.382
[5] Meisenheimer II, J.R., 'Employer provisions for parental leave', 1989 *Monthly Labor Review* 20, Table 1, p.22.; Ginsburg, (1992), *op. cit.*, p.127 – 40% in the mid-1980s
[6] Ginsburg, (1992), *op. cit.*, p.127
[7] Kosich, (1992-1993), *op. cit.*, pp.173-176; Kamerman, and Gatenio, (2002), *op. cit.*, p.3; See Tables 5.1 and 5.2 in the appendix for a more recent overview of state legislation

historically had on pregnant employees and work-family rights.[1] While some states and employers provided benefits or enacted specific rights to leave, some of which were extended to both working parents, the figures noted above show that coverage remained fairly low, with many pregnant employees not being entitled to leave with or without insurance. These conclusions question the effect that the PDA 1978 had with regards to pregnant employees. It could be argued that this issue was considered in the decision of the US Supreme Court in *California Savings and Loan Association v Guerra*.[2]

Judicial interpretation of the PDA 1978: California Savings and Loan Association v Guerra

The case of *California Savings and Loan Association v Guerra* was particularly significant since it presented the courts with the opportunity to revisit the decisions and reasoning accepted in *Geduldig* and *Gilbert*.[3] This case was concerned with the compatibility of a Californian statute, which provided pregnant employees with the right to unpaid disability leave with a qualified right to return to work, with Title VII.[4] The argument raised in this case was that the legislation was incompatible with Title VII on one of two

[1] Following the enactment of the FMLA 1993, discussed below, it is no longer possible to determine the impact that the PDA 1978 has on the expansion and availability of work-family rights
[2] California Savings and Loan Association v Guerra 479 U.S. 272 (1987)
[3] See discussions of these decisions above at pp.149-155
[4] California's Fair Employment and Housing Act, Cal. Gov't Code Ann. 12945(b)(2) (West 1980), (FEHA); California Savings and Loan Association v Guerra, *op. cit.*, pp.274-280

grounds: either it was impossible to comply with both pieces of legislation, or it prevented full achievement of the objectives of the Title VII.[1] In particular, it was argued that the amendment of Title VII by the PDA 1978 prohibited preferential treatment for pregnant employees, and did not require rights or benefits to be afforded to them that were not already available to other temporarily disabled workers.[2]

This case raised conflicting views, albeit with similar consequences, between those in favour of equal treatment and those advocating special treatment.[3] Those in favour of equal treatment argued that while the statute was not necessarily incompatible with Title VII, employers' actions could be if they did not extend the pregnancy benefits to all employees with disabilities.[4] The special treatment advocates,[5] on the other hand, argued that the statute should be upheld on the basis that it was compatible with the legislation. This was because it enabled women to balance work and childbearing, thus creating equality between men and women since, it was argued, only women would find themselves in this position.[6] In practical terms, there was very little difference between both of these approaches. Both supported the Californian statute as compatible with the Title VII, although for slightly different reasons, which have significant implications for the work-family conflict. For instance, the equal treatment approach suggests similarities

[1] California Savings and Loan Association v Guerra, *op. cit.*, pp.281-282
[2] *ibid*, pp.286-287; Also, see above discussion on the PDA 1978, pp.155-159
[3] Malin, (1994), *op. cit.*, pp.1059-1062
[4] *ibid*, pp.1059-1060
[5] *ibid*, p.1060
[6] *ibid*, p.1060

with the family typology since both appear to be underpinned by the principle of equal treatment in the workplace and with regards to the work-family conflict.[1] This can be contrasted with the special treatment approach, which may reinforce traditional gender roles, and thus female care giving, corresponding more closely with the maternity to motherhood typology.[2]

In spite of their differences, the decision of the court reflected elements of both these approaches.[3] The court held that the Californian legislation was compatible with Title VII as amended,[4] achieving the outcome sought by both camps. Particular emphasis was placed on the similar aims that both pieces of legislation sought to uphold, namely the promotion of equal opportunities within the workplace.[5] This reflected the line of reasoning advanced by the equal treatment advocates,[6] focusing on the equality aims of the legislation. The court further noted that even if Title VII, as amended by the PDA 1978, prohibited special treatment then employers could comply with both laws by extending these rights to all temporary disabilities.[7] However, in doing so the court left open the question of whether or not Title VII could force this extension,[1] thereby allowing for the possibility of gender-specific legislation, as supported by the special treatment advocates, to be adopted to achieve these equality objectives.

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[1] See Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.140-141 for an overview of this ideology
[2] See Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.137-139 for an overview of this model
[3] Malin, (1994), *op. cit.*, pp.1060-1061
[4] California Savings and Loan Association v Guerra, *op. cit.*, pp.287-292
[5] *ibid*, pp.288-290
[6] Malin, (1994), *op. cit.*, pp.1060-1061
[7] California Savings and Loan Association v Guerra, (1987), *op. cit.*, pp.291-292

The decision in *Guerra* can be interpreted as having reinforced the aims of the PDA 1978 in terms of overturning the decision in *Gilbert*,[2] and of ensuring that the implications of the legislation are not to weaken the protection afforded to pregnant employees. This latter point was explicitly reiterated by the Supreme Court upholding the Court of Appeals conclusion that the purpose of the PDA 1978 was *"to construct a floor beneath which pregnancy disability benefits may not drop--not a ceiling above which they may not rise."*[3] However, despite the potential positive implications, it could be argued that the decision in *Guerra* reinforced the previous approach towards pregnancy by interpreting it in equal treatment terms and continuing to associate it with disability.[4]

By not determining whether or not the legislation required the rights to be extended to both genders, the court also left open the possibility of the reinforcement of the gendered nature of childcare. This was particularly the case on the facts in *Guerra* where the disputed legislation did not require actual proof of the disability. This means that employers may have granted leave which was actually for the purposes of childcare as opposed to pregnancy or disability leave.[5] This is problematic because such a possibility reinforces the gendered nature of childcare since the act may not require the rights to be extended to fathers,[6] although they may be extended to male

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[1] Malin, (1994), *op. cit.*, p.1061
[2] California Savings and Loan Association v Guerra, (1987), *op. cit.*, pp.284-287
[3] California Savings and Loan Association v Guerra, 758 F.2d 390 (1985), p.396
[4] See section above on Equal treatment for details, pp.146-155; For instance, in this case the permitted leave was pregnancy disability leave: FEHA, § 12945(b)(2)
[5] Thornton, (1991), *op. cit.*, p.400
[6] *ibid*; Ashamalla, (1992), *op. cit.*, p.250

workers with temporary disabilities. On the other hand, it could be argued that it recognises the reality of the situation since women tend to be primary caregivers.[1] However, this is also problematic because it is based on the assumption that mothers are, and should be, primary caregivers. In addition, it has a circular effect with women merely being primary caregivers because they are the only ones afforded with the possibility to balance these competing commitments, as opposed to the decision being based on genuine choices.

Nevertheless, the decision in *Guerra* was significant. In the first instance, as noted above, it represented a break from the previous case law, as achieved by the implementation of the PDA 1978. In addition, it reinforced the equality aims underpinning US legislation at the time. Despite the possibility for special treatment with regard to pregnancy and childbearing rights, the legislation was still largely interpreted and understood in equal treatment terms. The main implication of this was that pregnant employees were protected on the basis of their status as being pregnant and temporarily disabled from working as a consequence. In doing so, this reflected a physical and medical approach towards this issue as opposed to a social understanding or recognition of the work-family conflict.

[1] Thornton, (1991), *op. cit.*, p.400

The work-family typology underpinning US legislation pre-1993

This examination of the legislation prior to the enactment of the FMLA 1993 has raised a number of questions about the work-family typology underpinning US legislation. However, before attempting to determine the typology underpinning this legislation, it must be borne in mind that the equality legislation is not technically work-family legislation but anti-discrimination legislation. There are a number of important distinctions between the two. In the first instance, anti-discrimination legislation does not afford working parents with any specific positive work-family rights. This makes the legislation difficult to classify in terms of the family care model, which is based specifically on who is entitled to the rights and the types of caring situations that they encompass.[1] There are similar implications for the working family model inherent within the legislation and the division of gender roles, which are also predicated on there being a specific right contained within the legislation. In spite of these difficulties, it is still possible to draw some conclusions regarding the work-family indicators.

In the first instance, with regard to the *family care model*, US legislation prior to 1993 has been based on the principle of equal treatment, and protection has been available to working persons in gender-neutral terms. This was evident from the interpretations of the equal treatment principles, which were

[1] See Chapter Four: The Work-family Conflict and the Work-family Classification Model, Table 4.1, p.137 for more details

strongly upheld in the case law, to the detriment of specific gendered rights.[1] However, this clear focus on equal treatment did not correspond with traditional notions of gender-neutral rights. While it did adhere to this principle, the effect was that the legislation adopted a male gendered notion of the ability to work, which failed to recognise the specific situation of pregnant employees.[2] The introduction of gendered protections as a means of addressing this gap, i.e. the PDA 1978, also followed this equality based approach.

While the provisions of the PDA 1978 attempted to address the situation of pregnant employees, the act continued to focus on equal treatment and failed to establish a positive right for pregnant employees, not to mention other employees with work-family commitments. The PDA 1978, consequently, reinforced the limited family care model which underpinned the anti-discrimination legislation.[3] This family care model corresponded most closely with that found in the maternity to motherhood typology since the legislation was restricted to equal treatment for pregnant and childbearing employees. By focusing on this group, the legislation concentrated on the medical and physical effects of pregnancy and childbirth, and mothers as caregivers.

Such an approach can be positively interpreted in this context because it concentrates on those childcare-related activities which are, by their nature,

[1] As seen in the decisions in Geduldig v Aiello, *op. cit.* and General Electric Company v Gilbert, *op. cit.*
[2] As also seen in *ibid*
[3] See pp.137-139 for more details

highly gendered, subjecting rights to care for children, in more general terms, to the equal treatment principle.[1] In doing so, the legislation has the potential to ensure that working parents are afforded the same rights, where available, to care for their children.[2] However, in the absence of such provision, it remains possible that the only protections that may be available are those falling within the scope of the pregnancy protection.[3] In addition, by focusing solely on the physical aspects of childbearing it reinforced the male model of work and failed to recognise the specific situation facing employees with child caring responsibilities.[4] This strengthens the correlation with the maternity to motherhood typology, in spite of the legislation's apparent gender-neutral aims.

The *working family model* indicator is more difficult to determine given the anti-discrimination nature of the legislation. The equality aims of the equal treatment legislation appeared to challenge the male breadwinner welfare state classifications of the US,[5] by entitling working parents to equal rights in all work-related respects. This welfare state classification displayed similarities with the (male) breadwinner working family model underpinning the maternity to motherhood typology, with the family being the primary site

[1] For a comparison see later discussions on the interpretation of Art.2(3) of the ETD 1974, (now Art 28, ETD 2006) in Chapter Seven: Mothers' Work-family Rights in the UK, pp.286-321
[2] If they were not provided with equal rights the provisions would be contrary to Title VII as amended by the PDA 1978
[3] As was generally the case in the US prior to the FMLA 1993, with very few states providing any work-family rights – see pp.158-159 above for more details
[4] Pelletier, (2006-2007), *op. cit.*, p.552; Kosich, (1992-1993), *op. cit.*, pp.173-176
[5] Sainsbury, (1996) *op. cit.*, pp.50, 58-63, 68-69, 89-90, 96-97, and 100-101 and Sainsbury, (1994b), *op. cit.*, pp.160-162, and 165-166

for the provision of care outside of the paid labour market.[1] However, in spite of the equality aims, the legislation appeared to continue to correspond with this classification. The equality legislation focused on ensuring that everyone was treated equally in the workplace and in terms of access to benefits, but it was based on a particular notion of equality. This touchstone of equality was the traditional male worker, i.e. a working person with no perceived caring commitments that compete with work in the paid labour market. In adopting this approach, the legislation failed to enable working families to address their work-family commitments. The only way in which it did impact on these was with regard to pregnant employees, thereby reinforcing the maternity to motherhood classification identified above.

The final work-family indicator is an examination of the *gender roles* that the legislation supports. The significant characteristic of US legislation at this time was that it was based on the aim of equal treatment. However, this aim was not achieved in practice because genuine equality between the sexes, and between those persons with and without caring responsibilities, was not supported within the legislation. With regards to equality between the sexes, the legislation did attempt to ensure equal treatment. However, as noted above, this was based on a male gendered understanding of equality. When the legislation was amended the only persons supported were pregnant employees, and only when they were temporarily disabled from working. With regards to the issue of equality between persons with and without caring

[1] See Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.137-139 for an overview of this typology

responsibilities, there was no support for working parents. The legislation did not encourage or address caring responsibilities in more general terms. This was also apparent from the above analysis of the first two indicators.

It is clear from this analysis that the work-family typology underpinning US legislation pre-1993 was the maternity to motherhood typology. This is consistent with the welfare state regime classifications,[1] and reinforces the minimalist approach adopted in the US at this time.

The Family and Medical Leave Act 1993

In 1993 the FMLA was finally introduced after a series of previous proposals and stiff opposition.[2] Such resistance continued to be expressed throughout the passage of the legislation, in particular one major concern was that it would pave the way for more extensive rights for working families, with the possibility of paid leave and it being extended to all employers in the future.[3] Nevertheless, the act was passed on the 5th February 1993 and its

[1] See Chapter Three: Welfare State Regimes and the Work-family Conflict, for more details, and Table 3.1, p.106 for an overview of classifications

[2] Previous proposed acts: Family Employment Security Act 1984; Parental and Disability Leave Act 1985; Family and Medical Leave Act 1986, H.R. 4300; Parental and Medical Leave Act 1987, S.249, (100th Congress, 1st Session, (1987); Family and Medical Leave Act 1987, H.R. 925, (100th Congress, 1st Session, (1987), (3 February 1987); Family and Medical Leave Act 1988, S.2488, (100th Congress, 2nd Session, (1988), (8 June 1988); Family and Medical Leave Act 1989, H.R. 770, (101st Congress, (1989), (2 February 1989); Family and Medical Leave Act 1990, S.345, (101st Congress, (1989); Family and Medical Leave Act 1991; and, Family and Medical Leave Act 1992. For an overview of some of the arguments surrounding the implementation of such legislation see: Pelletier, (2006-2007), *op. cit.*, p.553; Wisensale, (2003), *op. cit.*, pp.138-139; and, Remmers, (1989), *op. cit.*, pp.402-407; Ashamalla, (1992), *op. cit.*, pp.247-248; and Kosich, (1992-1993), *op. cit.*, pp.178-184

[3] Congressional Record – Extensions of Remarks, *Crusades for family leave have potential*

enactment introduced, for the first time, a gender-neutral right to leave for either family or medical purposes, which was aimed at addressing the gaps in the equal treatment legislation,[1] and the demographic changes occurring in the US at the time.[2] In doing so, it appears to have produced a change in the focus of work-family legislation. While the PDA 1978 resulted in a slight shift towards the gendered pregnant worker, the FMLA 1993 appears to have changed the focus back to gender-neutral rights, and the gender-neutral working carer. The extent to which this represents a departure from the previous anti-discrimination legislation will be determined by critically analysing the FMLA 1993 with reference to the work-family classification criteria noted in Chapter Four.[3] The previous section has indicated that US legislation prior to the introduction of the FMLA 1993 was underpinned by the maternity to motherhood typology, which corresponded with the liberal/male breadwinner welfare state classifications. However, the renewed focus on the gender-neutral working carer coupled with the enactment of specific work-family rights could indicate a shift in the typology underpinning the legislation. In order to determine which of the work-family typologies underpins the FMLA 1993, each of the work-family indicators will be used to critically analyse the rights to both family and medical leave starting with the family care model.

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for overkill, E198, (1993), (1993b), Mr D. Bereuter, E198

[1] Kosich, (1992-1993), *op. cit.*, p.176

[2] House of Representatives Report, *Family and Medical Leave Act of 1993*, (H.R. Rep. No. 103-8(I), 1993), pp.22-24

[3] See Table 4.1, p.137, Table 4.2, appendix, and pp.137-141 for further details

Family care model: Rights holder

Both of the rights to family and medical leave contained within the FMLA 1993 are gender-neutral and available to a variety of working carers.[1] They are primarily available to working parents of children under the age of one, but they also extend to the care of members of the employee's immediate family such as their spouse, child or parent if they have a serious health condition.[2] The wide category of rights holders contrasts with the previous maternity to motherhood classification of the concept underpinning US legislation. Such a classification would imply that the legislation would be restricted to working mothers and the care of young children, as was seen with regard to the PDA 1978. However, the inclusion of a wider group of working carers within the scope of the FMLA 1993 corresponds more closely with the family typology.

While the work-family classification model is principally based on childcare, the family typology also encompasses a wider interpretation of the family and their caring responsibilities, which can extend beyond childcare.[3] This typology embraces the diversity of the notion of the family and family care responsibilities,[1] and, thus, includes the gender-neutral working carer alongside the gender-neutral working parent.

[1] FMLA 1993, § 102(a)(1)
[2] *ibid*, §§ 102(a)(1) and (2)
[3] Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.140-141 on discussion of the family typology

While the rights to family and medical leave extend to a wide variety of working persons with caring responsibilities, the rights are only available to those employees who satisfy certain fairly restrictive conditions. In the first instance, the American employee must have 12 months continuous service with their current employer and have worked a minimum of 1250 hours in the previous 12 months period.[2] This requirement restricts the rights to US citizens, with an established labour market attachment and those who work full-time or long part-time working hours.[3] Such a requirement could exclude a number of employees, particularly those in atypical or part-time work. Based on research conducted by the Bureau of Labor statistics in 2007, this is most likely to negatively impact on female workers, since part-time workers continue to be predominately female.[4]

There are also specific exceptions to these provisions for certain Federal officers or employees, and employers engaging less than 50 employees at a particular worksite and within a 75 mile radius.[5] This exception effectively excludes 90% of employers within the US, and 40% of all employees.[6] The

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[1] See pp.18-25 for a discussion of the diversity of the family
[2] FMLA 1993, § 101(2)(A)
[3] On average at least 25 hours per week
[4] US Department of Labor, *American Time Use Survey – 2007 Results*, (Washington DC: Bureau of Labor Statistics, 2008), [WWW Document] URL: http://www.bls.gov/news.release/archives/atus_06252008.pdf (Last accessed: Sept 2009), Table 4, 65% of those working part-time were women as compared with 35% of men (22,288,000 women in part-time work as compared with 11,770,000 men). Broadly comparable figures were noted with regards to full-time work with only about 41% of those working full-time being women (50,201,000 women in full-time work as compared with 71,243,000 men).
[5] FMLA 1993, § 101(2)(B)
[6] Pelletier, 2006-2007, *op. cit.*, p.558; See also Department of Labor, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update*, (Department of Labor, 2002), [WWW Document] URL: http://www.dol.gov/asp/archive/reports/fmla/toc.htm (Last Accessed: Sept 2009), Table 3.1: 89.2% of establishments and 41.7% of employees

Act with its various qualifying conditions, consequently, evidences the liberal laissez-faire classification of the US welfare state. It only legislates for the right to leave in limited circumstances, encompassing only certain employers and making it difficult for working persons to qualify for the right. Most notably, it also reflects a balancing exercise between the concerns expressed by small businesses about the burdens that the legislation would place on them,[1] and the caring commitments facing working families, with arguably greater emphasis being given to the concerns of small businesses.

Nevertheless, the Act provides those working parents and families covered by the legislation with a gender-neutral right to leave in a number of family and medical care situations. In doing so, it reinforces equal treatment between the sexes, thus continuing the pre-1993 focus on equality. By adopting this approach the legislation aims at challenging gender roles and encouraging shared parenting.[2] This can be contrasted with the previous PDA 1978 focus on female caregivers. The broad potential scope of the legislation suggests that it is underpinned by the family typology. This reflects not only the gender-neutrality of the rights available to both men and women, but also the wider notion of family care it adopts, covering carers in addition to the more traditional focus on working parents,[3] thus suggesting the promotion of gender-neutral family care.

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not covered by FMLA 1993 in 2000

[1] See Working family model section below for more details pp.182-194

[2] Golden, (2006), *op. cit.*, p.14

[3] This parental and childcare focus is reiterated throughout the legislation available in both Sweden and the UK, with one exception, discussed in subsequent chapters

Family care model: Care situations

The rights to family and medical leave contained within the legislation encompass different circumstances in which leave can be taken. In spite of these differences, they are related in terms of the operation of the rights to leave. The legislation entitles employees to a total of 12 normal work weeks of unpaid leave, for either family or medical purposes, during any 12 month period.[1] This means that employees can either utilise 12 weeks of family leave or 12 weeks of medical leave, or combine the two. This provides working persons with the flexibility to utilise leave in the way that suits their particular circumstances, or which offers the most beneficial provisions. This may be the case where one of the forms of leave is paid, making it more attractive for working persons, that is where a choice between forms of leave is possible.[2]

Another degree of flexibility and choice inherent within the legislation is that leave may be taken by more than one carer, *"on an overlapping basis, or sequentially"*, the only condition being that they are both taking the leave for one of the covered reasons.[3] Working parents may, therefore, both use leave at the same time, either wholly or partially, in order to support one another and/or bond as a family, or they may use it at different times to extend the period during which the family is personally providing care.

[1] FMLA 1993, §§ 102(a)(1) and (c)
[2] This may be the case for medical leave used in relation to childbirth and family leave for the care of children, both of which are discussed below
[3] H.R. Rep. 103-8(1), (1993), *op. cit.*, pp.35-36

The rights to family and medical leave contained within the legislation entitle employees to two broad forms of leave, which can be taken in one of four main situations:

a) because of the birth of the employee's child and for the purposes of caring for that child;
b) because of the placement for adoption or foster care of a child with the employee;
c) for the purposes of caring for the employee's spouse, child or parent if they have a serious health condition;
d) and/or, because the employee is suffering a serious health condition that makes them unable to perform their job.[1]

There are three significant work-family rights contained within these provisions: two rights to family care and one right to medical leave. The family care situations encompass two distinct circumstances: the care of children on entering the family, and the care of family members who are ill. In addition, the right to medical leave could be used by a pregnant employee in relation to a pregnancy related illness or for the purposes of childbirth.[2] The FMLA 1993 thus covers a variety of family care situations, ranging from early childcare, to the care of certain groups of adults. Such a spectrum of caring situations is consistent with the family typology, reflecting the

[1] FMLA 1993, § 102(a)(1)
[2] 29 CFR 825, (Code of Federal Regulations, The Family and Medical Leave Act) (Last

classification identified above. However, a closer examination of the rights available to working persons raises questions about this classification, which will be considered in more detail below.[1]

Considering the package of rights as a whole, the rights to leave extend beyond childcare and enable employees to take leave to care for members of their immediate family when they are suffering from a serious health condition.[2] Working persons, consequently, are able to care for very young and seriously ill children, irrespective of their age, as well as other close family members, subject to the qualifying conditions of the legislation. The main condition here is that the family member is suffering from a serious health condition which is defined as: illnesses, injuries, impairments, or physical or mental conditions which involve inpatient care or continuing treatment by a health care provider.[3] Working parents and carers are, consequently, only afforded the right to leave in serious medical situations and are not entitled to provide care in more general terms.

This type of leave, insofar as it relates to children, is broadly similar to that found in most other countries. For instance, in later chapters comparable Swedish and UK rights to temporary emergency leave are identified and examined.[4] However, this right to leave in the US is 'family leave' in the

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revised: November 2008), § 825.120 Leave for pregnancy or birth (a)(4)

[1] See Working family model: Balancing work and family commitments section below, pp.184-187

[2] FMLA 1993, § 102(a)(1)(C)

[3] *ibid*, § 101(11)

[4] See Chapter Six: The Swedish Welfare State and the Work-family Conflict on temporary parental leave in Sweden and Chapter Eight: Parents' Work-family Rights in the UK on

broadest sense since it extends to other members of the employees' immediate family.[1] This aspect of the right goes beyond the equivalent legislation in other countries which tends to focus on childcare.[2]

In terms of the types of care situations included here, these rights to family leave contrast with the provisions on childcare leave. They instead appear to correspond with the notion of family care inherent within the family typology. This broad understanding of care reflects the wide and diverse notion of family care accepted within this ideology, and encompasses a number of caring situations that working families' experience. There is one limitation to this wide understanding of the family. This relates to the limited categories of family members covered by the legislation.

In addition to children, the right to family leave also covers spouses and parents.[3] While the House of Representatives report on the FMLA 1993 suggests otherwise,[4] the notion of family used in this context is primarily focused on the typical nuclear family unit of a married couple with children.[5] The legislation does not extend to other similar forms of family groups such

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dependant care leave in the UK

[1] While this is generally considered to be family leave, some classify it as medical leave, e.g. Craig, S., 'The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications', (1995) Vol.44(1) *Drake Law Review* 51, p.53

[2] Wisensale, S.K., 'California's Paid Leave Law: A Model for Other States?', in L. Haas and S.K. Wisensale (Eds), *Families and Social Policy. National and International Perspectives*, (London: The Haworth Press Inc., 2006), p.179

[3] FMLA 1993, § 102(a)(1)(C)

[4] H.R. Rep. 103-8(1), (1993), *op. cit.*, p.34

[5] Although not necessarily the biological nuclear family suggested in *ibid*, p.34; This reflects the narrow interpretation of family care noted by Dallos, R., and Sapsford, R., 'Patterns of Diversity and Lived Realities', in J. Muncie, M. Wetherell, M. Langan, R. Dallos and A. Cochrane (Eds), *Understanding the Family*, (London: Sage Publications, 1997), p.162 and

as unmarried cohabiting partners or same sex partnerships, adopting a narrow definition of spouse as *"a husband or wife"*.[1] In addition, the categories of family members do not include other members of the employee's family, such as siblings, aunts or uncles, grandparents or other persons who may reasonably rely on the employee for care and support. This can be contrasted with the rights to dependant care leave and to request flexible working in respect of dependant adults in the UK,[2] which both include much wider definitions of dependants, although they do not offer the same rights to leave as are contained within the FMLA 1993.[3]

From this perspective the Act, consequently, appears to adopt a narrow understanding of the family which does not reflect the diversity of family forms now prevalent within society.[1] However, the definitions of child and parental relationships do encompass a potentially wider group of persons.

In addition to the more traditional biological, adoptive and fostering relationships typically included within legislation of this kind, the legislation also includes persons who stood in loco parentis or a child of a person in such a position. It is this feature of the legislation, which the House of Representatives' report suggests extends the definition of the family beyond

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discussed above at pp.18-25

[1] FMLA 1993, § 101(13); Breidenbach, M., 'A Family Perspective on the Family and Medical Leave Act of 1993', *Wisconsin Family Impact Analysis Series*, (Madison, WI: University of Wisconsin Centre for Excellence in Family Studies, 2003), p.7; Wisensale, (2006), *op. cit.*, p.179

[2] Employment Rights Act 1996, c.18, (ERA 1996), s.57A (Dependants) and s.47E and Part VIIIA Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002/3236, as amended, (FWECRR 2002), Regs.3-3B (Flexible Working)

[3] See Chapter Eight: Parents' Work-family Rights in the UK for more details

the traditional nuclear family model.[2] Persons who are in loco parentis are defined within the FMLA Regulations as *"those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary."*[3] These definitions of included family members have the potential to encompass a number of other familial and similar relationships.

In order to satisfy this definition the employee must specifically show that s/he is responsible for day-to-day care and financial support of the child, or that the person in respect of whom the leave is to be taken had such a relationship with them. This issue was explored in the recent case *Martin v Brevard County Public Schools*.[4] In this case Martin had requested family leave for the purposes of caring for his granddaughter because his daughter, the child's mother, was imminently expecting to be deployed abroad with her army reserve unit.[5] The period during which family leave fell corresponded with a performance improvement period that Martin was required to complete. As a result of his family leave he was unable to complete this with the consequence that his employment contract was not renewed.[6] One of

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[1] See discussion of the family above at pp.18-25
[2] H.R. Rep. 103-8(1), (1993), *op. cit.*, p.34
[3] 29 CFR 825, § 825.122(c)(3)
[4] Martin v Brevard County Public Schools, No.07-11196, D.C. Docket No.05-00971 CV-ORL-22-KRS, (11th Circuit, 30 September 2008)
[5] *ibid*, pp.3-4
[6] *ibid*, pp.4-5

the main issues in this case was whether or not he was entitled to the leave in the first instance as a person in loco parentis with the child in question.[1]

The district court held in the negative on the basis that Martin was not entitled to family leave because *"no reasonable jury could find that [he] stood in loco parentis in this situation."*[2] This was reconsidered by the Court of Appeals with particular reference to generally accepted understandings of the concept in addition to the FMLA Regulation definition noted above. In doing so they concluded that *"[w]e cannot say as a matter of law that Martin stood in loco parentis … nor can we say that he did not. Martin has presented sufficient evidence to create a genuine issue of material fact, and the district court erred in concluding otherwise."*[3] The Court of Appeals, consequently, reversed the district court's interpretation but did not reach a positive decision either way as to whether or not this situation could amount to an in loco parentis relationship.

As opposed to providing answers, this case raised more questions about when a person may be considered to be in an in loco parentis relationship with a child. The decision appears to have recognised that there are situations where persons other than the biological or social parent of a child are responsible for their wellbeing and care. This could encompass grandparents or other persons who provide and care for the child, providing

[1] Martin v. Brevard County Public Schools, *op. cit.*, pp.4-6
[2] *ibid*, p.6 – Emphasis in original
[3] *ibid*, p.9 – Emphasis in original

they meet the requirements noted in the FMLA Regulations.[1] What the case does not clarify is whether or not such a person could be in loco parentis when the parent is also living with the child, or whether it is necessary for the person to be caring for the child independently of the parent.[2] Consequently, while the legislation and the open-ended decision in *Martin* has the potential to encompass the diversity of familial and caring relationships that may exist, it is unclear where the actual parameters of this definition lie.

Despite some of the limitations of this right to family leave, the right to a specific period of leave for the purposes of caring for family members in such circumstances is fairly novel. In introducing this right to family leave the US package of work-family rights addresses an area which has been largely overlooked in other states. The UK and Sweden, for instance, do not have directly comparable rights within their packages of work-family rights, although the rights to dependant care leave and to request flexible working in respect of dependant adults in the UK do offer some comparisons.[1]

Family care model

The typology underpinning the family care situations included within the

[1] In other words, they must care for the child on a day-to-day basis and financially support them. This was clear from the decision which placed particular emphasis on these criteria: Martin v. Brevard County Public Schools, *op. cit.*, p.9

[2] For a discussion of the decision see: Bosland, C.C., *In Loco Parentis Relationship May Entitle Grandparent to FMLA Leave*, [WWW Document] URL: http://federalfmla.typepad.com/fmla_blog/in_loco_parentis, (Last updated: October 2008) (Last accessed: Sept 2009)

FMLA 1993 is difficult to classify. On the one hand, the legislation covers a variety of working carers and care situations, which extend beyond the traditional focus on childcare responsibilities. In doing so it has been argued that the legislation addresses *"a diversity of special needs within a formally gender-neutral framework … assumes employees to be heterogeneous, embodied, encumbered, sometimes specially needy, but also equally entitled."*[2] These characteristics are consistent with the notion of family care inherent within the family typology. However, this typology envisages the care of older children, certainly children over the age of one, and possibly also the care of other family members. This legislation recognises this only to a limited degree, instead adopting a slightly narrow understanding of family care based on medical and physical needs and not social care. Nevertheless, the range of caring situations contained within the FMLA 1993 appears to reflect the family typology understanding of family care.

In order to assess more clearly the typology underpinning the legislation, it is necessary to critically analyse how the rights operate in practice and the way in which they enable working persons to balance their work and family commitments.

[1] See Chapter Eight: Parents' Work-family Rights in the UK for more details
[2] Vogel, L., 'Considering Difference: The Case of the U.S. Family and Medical Leave Act of 1993', 1995 Vol.2(1) *Social Politics* 111, p.116

Working family model

The family care model indicator identified that the FMLA 1993 offers rights to working parents and carers on a gender-neutral basis. This, underpinned by the earlier equality legislation, could suggests that the FMLA 1993 is based on the dual earner-carer working family model with both parents being entitled to equal and independent rights in relation to childcare and the care of seriously ill family members. This is also reflected in the equality aims of the legislation, which seek to promote equal opportunities by challenging stereotypical gender roles.[1] This working family model classification would indicate that the legislation not only enables both working parents to share caring responsibilities, but also that it would enable working families to combine their work and family commitments. Such aims were expressed throughout the process of the enactment of the legislation,[2] and in particular by the Labor and Human Resources Committee's Report to the Senate in the implementation of the Act: *"[t]he purposes of [the FMLA] are to balance the demands of the workplace and the needs of families; to entitle employees to take reasonable leave, for family or medical reasons; and to accommodate the legitimate interest of employers."*[3]

[1] FMLA 1993, s.2 Findings and Purposes; subsequently confirmed in Nevada Department of Human Resources v Hibbs 538 U.S. 721 (2003), p.737 per Rehnquist, C. J. delivering the Opinion of the Court; Suriyasak, T., and Kleiner, B.H., 'How to Prevent Discrimination Based on Taking Family and Medical Leave', (2003) Vol.22(3) *Equal Opportunities International* 49, pp.50-51; See Gender roles section below for further discussion of this point, pp.270-287

[2] Congressional Record – Senate, 5, *Family and Medical Leave Act of 1993*, S259, (21 January 1993), Mr Dodd, S259 and S260, and Mr Kennedy, S266; Craig, (1995), *op. cit.*, pp.63-64

[3] Senate Report No. 103-3, Family and Medical Leave Act 1993, (1993), p.43; Pelletier,

This statement of the aims of the legislation reflects two balancing exercises. The first is between work and caring responsibilities which is expressed in gender-neutral terms. The reference to the working family as opposed to working mothers and fathers also reflects the family focus of the legislation and treats the family and its caring responsibilities as one. This is significant because while it encompasses all family members and their caring commitments, at the same time it does not specifically recognise fathers' caring role. The invisibility of this role may have negative implications for fathers' utilisation of the right to leave.[1] The second balancing exercise that the statement of aims recognises is that between the interests of employees with caring responsibilities and those of businesses and employers. The importance of the needs and influence of these groups is clear within the qualifying conditions and the provisions of the legislation.[2]

The sentiments expressed by the Labor and Human Resources Committee were reflected in the aims of the legislation which, in particular, noted that balancing "*the demands of the workplace with the needs of families"* was one of the purposes of the FMLA 1993.[1] This examination of the working family model indicator will address these issues. This indicator is concerned primarily with the way in which the legislation enables working families to combine their work and family commitments, which is centrally related to the aims underpinning the legislation.

(2006-2007), *op. cit.*, p.553

[1] This will be explored in more detail in the Gender roles section below at pp.194-212

[2] The qualification conditions in particular reinforce this point, as noted above, with very few employers being covered by the legislation. See figures noted at p.171

Balancing work and care commitments

The first notable feature of the rights to family leave contained within the legislation is the extent to which they enable working families to balance their work and family commitments. This is particularly evident in the right to family leave for childcare purposes. This right, which must be utilised for the purposes of caring for a child, is coupled with the requirement that it must be taken because of childbirth or placement for adoption or fostering.[2] This condition suggests that the right to childcare leave is restricted to the early stages of the child's life, or entry into the family, and does not entitle an employee to leave to care for that child over an extended period of time. Even if this term could be open to a wider interpretation, it is subject to an additional restriction on the period during which the leave can be used, which further reinforces this reading.

The second condition is that it expires one year after the respective date of birth or placement.[1] Any parent wishing to utilise this right will consequently have to do so within this first year. This restriction is significant because, in the situation of childbirth, it confines the leave to the period surrounding childbirth and the early stages of the child's life. While this will enable working parents to care and bond with the new child, it does not appreciate the continuing childcare commitments that working families face. This is exacerbated by the relatively short period of family leave available in these

[1] FMLA 1993, s.2 Findings and Purposes, para.(b)(1)
[2] *ibid*, §§ 102(a)(1)(A) and (B)

circumstances, which, it has been argued, inadequately meets the needs of working families.[2]

Qualifying employees are only entitled to a maximum of 12 weeks leave per working parent, unless both parents work for the same employer in which case it can be limited to a maximum of 12 weeks leave per couple.[3] This poses problems of its own which will be returned to later.[4] Nevertheless, there are a number of more general criticisms of the legislation. In the first instance, the leave period may be too short to enable working parents to meet their new child caring responsibilities and to bond with the child.[5] The leave period may be particularly insufficient for working mothers who have experienced difficult pregnancies and/or births to enable them to recover and/or care for the newborn.[6] This is further reinforced by the way in which family and medical leave are tied together.[7] The specific consequences that this is likely to have in practice are that a pregnant employee who has used some or all of her entitlement to medical leave for a pregnancy related serious health condition prior to childbirth will be left with only a small amount of family leave, if any, to take following the birth.[8] This fails to appreciate the distinctions between the two forms of leave and the aims of enabling working parents to care for their children.[9] These features of the right to family leave

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[1] FMLA 1993, § 102(a)(2)
[2] Pelletier, (2006-2007), *op. cit.*, p.560
[3] FMLA 1993, § 102(f)
[4] See p.202 below for further discussion of this issue
[5] Pelletier, (2006-2007), *op. cit.*, p.560; Golden, (2006), *op. cit.*, p.13
[6] Golden, (2006), *op. cit.*, p.13
[7] FMLA 1993, § 102(a)(1)
[8] Craig, (1995), *op. cit.*, pp.56-57; also noted in Pelletier, (2006-2007), *op. cit.*, p.560
[9] *ibid*, p.57

for childcare purposes do not appear to fully address the work-family conflicts experienced by many working parents at this time, and throughout their working lives.

In addition, 12 weeks of continuous full-time unpaid leave does not compare favourably with the rights to leave offered in the other countries examined here.[1] Not only does the FMLA 1993 offer the shortest period of leave,[2] it also provides the least flexible form of leave. Even in the most generous circumstances working families will only be entitled to a maximum of 24 weeks combined leave for this purpose.

In spite of the restriction of this form of family leave to the early period of the child's life, working parents also have the right to use family leave to care for family members with a serious health condition. The availability of this right is not restricted to any particular time period,[3] subject to a maximum of 12 weeks leave per annum as before. This recognises and enables working persons with caring responsibilities to utilise the right to care for close family members throughout their working lives. This is a significant contrast to the right to family leave for childcare purposes because it offers a greater recognition of the caring commitments that working persons experience throughout their lives. In doing so, it reinforces that these are not limited to

[1] See subsequent chapters for discussions of Swedish and UK rights
[2] As compared with 480 days of paid parental leave and other options for unpaid leave in Sweden, and 12 months of maternity leave, 2 weeks of paternity leave and 13 weeks of parental leave available in the UK.
[3] Although in the case of children it is restricted to those under 18 unless they are suffering from a physical or mental disability, FMLA 1993, § 101(12)

working parents. However, the requirement of a serious illness within the legislation continues to address the issue of care from a medical and not a social perspective. Working persons, consequently, are not entitled to utilise the leave to provide care generally, for instance, for elderly parents or for children.

Nevertheless, in contrast with the previous right, the right to family leave to care for seriously ill family members does recognise some of the caring commitments that working persons experience throughout their lives. It makes some attempt to enable them to balance the work and family responsibilities that they may be faced with.

Flexibility

With regard to the issue of the lack of flexibility within the leave, there is one possible qualification to this. The rights to family and medical leave can in some instances be taken on an intermittent basis or on a reduced leave schedule.[1] This possibility would provide employees with more choice and flexibility in the arrangement of their leave. It would enable employees to spread their leave over a longer period of time, or alternatively to take smaller periods of leave at different times as opposed to one continuous block. The effect of leave being taken in this way would be for the overall maximum duration to remain 12 normal work weeks, while the period over which it

could be utilised would increase.[2] For instance, an employee could take 12 full-time workweeks leave or 24 half-time workweeks leave following the birth of their child. Alternatively, the employee could use 6 weeks leave at the time of the birth of their child and then use the remaining 6 weeks at a later date. The same is also true of family leave for the care of seriously ill family members. This would enable the employee to use the leave when it is of most benefit to them and their family.

The possibility for this flexibility in the utilisation of the right to leave could also make the right more accessible and useful for working families.[3] In addition, it may encourage more working families to utilise it. For instance, taking a continuous block of 12 weeks unpaid leave may not be financially viable for working families.[4] This has particular implications for single parents and low income families who cannot afford to take unpaid leave from work.[5] The right as it is currently formed is, therefore, based on a dual partnered with at least one breadwinner model of the family. Unlike single partner and earner families, this would enable one partner to utilise the unpaid leave without the family losing its entire source of income.[1] However, spreading the period of leave, and the costs of utilising it over an extended

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[1] FMLA 1993, § 102(b)(1)
[2] *ibid*, § 102(b)(1); H.R. Rep. 103-8(1), (1993), *op. cit.*, p.37
[3] Craig, (1995), *op. cit.*, p.70
[4] There is some indication of this in the discussion below, pp.208-211, on statistics from: Department of Labor, (2002), *op. cit*, Table 2.14, p.2-14 and Table 2.17, p.2-16; and, Commission on Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies*, (Women's Bureau (DOL), 1996), [WWW Document] URL: http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/84/c7.pdf (Last Accessed: Sept 2009), pp.84, and 99-100
[5] Pelletier, (2006-2007), *op. cit.*, pp.558-559; Wisensale, (2006), *op. cit.*, pp.178-179; Vogel, (1995), *op. cit.*, p.112

period of time, may be a more realistic option for working families.[2]

In addition, with regard to family leave for childcare purposes this may encourage more working fathers to use the right since they continue to earn more than working mothers and the loss of their income will have a significant impact on the family.[3] Combining the leave with periods of paid work could make it easier for such families to use the leave since earnings will only be reduced during this period and not suspended altogether. Such an approach would mirror more closely the types of flexibility found within the legislation in the UK,[4] and particularly in Sweden.[5]

However, the flexibility and choice that this appears to offer employees is limited. In relation to medical leave and family leave for the care of a seriously ill family member, such flexibility is only permitted when it is medically necessary, and in relation to birth or placement it is in fact not permitted unless agreed upon between the employer and employee.[1] In the first instances the legislation recognises that it may not always be appropriate for the leave to be taken as a continuous block, and that alternative arrangements would more fully meet the needs of the employee. In the latter instance, however, working families are not necessarily provided with choice and flexibility in the arrangement of the leave and their work-family

[1] Breidenbach, (2003), *op. cit.*, p.7
[2] Craig, (1995), *op. cit.*, p.70
[3] See Gender roles section below for further discussion of this issue, pp.194-212
[4] To an extent similar flexibility is found within the right to parental leave and the right to request flexible working
[5] For an overview and discussion of the package of work-family rights available in Sweden see Chapter Six: The Swedish Welfare State and the Work-family Conflict below

commitments and the options available to them may, in fact, be reduced.

The package of work-family rights

The length of family leave for childcare purposes, and the limited degree of flexibility contained within it, is not necessarily the most problematic feature of this right. If it is compared, for instance, with the UK gender-neutral right to 13 weeks unpaid parental leave there are a number of similarities between the two.[2] The main distinguishing feature between the two situations is that the FMLA 1993, and the rights contained within it, are the only work-family rights available to working parents across America. The most significant effect of this is that the right to family leave for childcare purposes is the only right to provide non-medically related care for children. It is this issue in particular that raises concerns about the legislation meeting its aim of addressing the needs of working families.

With regard to family leave for childcare purposes, the focus on the post-birth period and early childcare, coupled with the limited nature of the rights has certain implications for the working family model inherent within the legislation. These indicators suggest that the legislation is not based upon the dual earner-carer working family model. While both parents are entitled

[1] FMLA 1993, § 102(b)(1)
[2] Although, as will be discussed below in Chapter Eight: Parents' Work-Family Rights in the UK, this leave offers slightly more flexibility since it can be taken over a longer period of time and in weekly blocks.

to rights, the package of rights does not fully recognise the continuing caring responsibilities of working families. Instead it is based on the presumption that care will either be provided outside of the paid labour market by family members or by private providers. This suggests either the (male) breadwinner or the one and a half earner-carer working family model. However, the latter working family model can also be discounted because the legislation does not actually facilitate the balancing of work and family commitments beyond the first 12 month period, unless it relates to serious medical illness. This means that, in spite of the rights afforded by the FMLA 1993, US legislation continues to reinforce the (male) breadwinner working family model.

A comparison of the employment rates of working families in 2006 within the US supports this classification.[1] In that year, 38% of all married couples with children under 6 were male breadwinner families. In addition, 24% of all married couple family groups were comprised of a male breadwinner and a stay at home caregiver.[2] Furthermore, married mothers were more likely to work part-time than their unmarried, divorced, separated or widowed counterparts (27% as compared with 18%).[3] These figures correspond with the most traditional understanding of the male breadwinner working family

[1] Statistics from: U.S. Census Bureau, *Current Population Survey, 2006 Annual Social and Economic Supplement*, (27 March 2007) [WWW Document] URL: http://www.census.gov/population/socdemo/hh-fam/cps2007/tabFG8-all.xls (Last Accessed: Sept 2009); and U.S. Department of Labor, *Employment Characteristics of Families*, [WWW Document] URL: http://stats.bls.gov/news.release/famee.toc.htm (Last updated: May 2008) (Last accessed: Sept 2009)
[2] U.S. Census Bureau, (2007), *ibid*, Table FG8
[3] U.S. Department of Labor, (2008), *op. cit.*, Table 5. Employment status of the population by sex, marital status and presence and age of own children under 18, 2005-06 annual

model, and, to some extent, reflect the working family model classification identified in respect of this legislation.

However, 55.6% of married couples with children under 6 in 2006 and 2007 were dual-earner families.[1] While there are no statistics on the actual working arrangements between such families, in 2006 fathers of children under 6 years of age were more likely to be in employment and work full-time.[2] While this was also the case for working mothers,[3] a large number of them were outside the labour market.[4]

There are two ways in which these statistics can be interpreted. In the first instance, it could be suggested that the most common family form in the US is, in fact, the dual earner working family model, which is not reflected within the above analysis of this right to family leave. However, within the work-family classification model the dual earner is also the dual carer working family model. It is based upon this reciprocal sharing of commitments and not solely working practices.[5] Another way of interpreting these statistics is to consider that they in fact further reinforce the (male) breadwinner working family model. Such an interpretation is supported in the working patterns

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averages
[1] U.S. Department of Labor, (2008), op. cit., Table 4. Families with own children: Employment status of parents by age of youngest child and family type, 2005-06 annual averages
[2] 95.4% civilian labour force participation rate; 96% of employed fathers worked full-time: *ibid*, Table 5
[3] 72% of employed mothers worked full-time: *ibid*, Table 5
[4] 63.5% civilian labour force participation rate as compared with 95.4% for working fathers: *ibid*, Table 5. Employment status of the population by sex, marital status and presence and age of own children under 18, 2005-06 annual averages
[5] See pp.39-42 and 140-141 for an overview

displayed by both working mothers and fathers. Both tend to adopt the male model of work on entering the labour market by undertaking full-time employment. This is consistent with the (male) breadwinner working family model because it is based around the division of working and caring responsibilities. Those persons who are in the paid labour market are deemed to be free from such responsibilities,[1] which are undertaken by persons outwith it. This is supported by the working patterns of those family members in employment and by the legislation's narrow focus, which does not provide any general rights to leave for care purposes. This feature indicates that the legislation does not adequately enable working families to address their work-family conflicts over the course of their working lives.[2]

One of the reasons for this work-family classification may in fact be traced back to the equal treatment foundation of US work-family legislation. This has always focused on ensuring strictly equal treatment between men and women. However, because it has done so on the basis of a male gendered norm[3] it has failed to adequately address the more traditional feminised commitments such as childcare. This is reflected in the employment statistics, which at the same time support female caregivers outside of the labour market and female workers within it, but only on male terms. Since these aims also underpin the FMLA 1993, as will be discussed in more detail

[1] See pp.29-43 for a discussion of working family models and James, G., *The Legal Regulation of Pregnancy and Parenting in the Labour Market*, (Oxon: Routledge-Cavendish, 2009), pp.17-18 re unencumbered workers
[2] Craig, (1995), *op. cit.*, pp.60-61, and 63-66
[3] See discussion of equality legislation above pp.146-149 for more details

below,[1] it is unsurprising that they continue to influence the legislation.

Gender roles

The final work-family criterion is the division of gender roles inherent within the legislation. This characteristic critically analyses the actual or potential impact that the legislation has on the organisation and division of earning and caring responsibilities between men and women. In doing so, this classification may challenge the conclusions drawn in the previous examinations of the family care model and the working family model. These classifications have identified that the legislation is presented in gender-neutral terms and that the rights to family leave reinforce the (male) breadwinner working family model. This examination of gender roles will begin where the previous section concluded by considering the aims underpinning the legislation and the influence that these may have had regarding the division of these roles.

Gender-neutral aims

The rights to family leave in the US are gender-neutral and arguably encourage shared caring roles since parents or carers have an individual

[1] See *Gender roles* section below, pp.194-212

entitlement to leave.[1] The gender-neutral nature of the right to leave reflects the two central objectives of the legislation. The first aim, as discussed above, is focused on enabling working families to address their work-family conflicts.[2] The second main aim is to promote equal opportunities, challenge stereotypical gender roles and reduce discrimination against women by enacting gender-neutral rights to leave for family and medical purposes.[3] This aim was later confirmed in *Nevada Department of Human Resources v Hibbs* per Rehnquist, C. J. delivering the Opinion of the Court, who noted that:

> *"By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."*[1]

[1] FMLA 1993, § 102(a)(1), with the possible exception of those working for the same employer, § 102(f); Ashamalla, (1992), *op. cit.*, p.249
[2] *ibid*, s.2(b)(1) and (2)
[3] *ibid*, ss.2(b)(4) and (5); Suriyasak and Kleiner, (2003), *op. cit.*, pp.50-51

The interpretation of the scope of the FMLA 1993 adopted in this case reinforced these equality aims and the underpinning purpose of this legislation, which was equal treatment. These equality aims underpin many work-family rights, including Swedish and UK rights that will be discussed in later chapters.[2] In all of these states the provision of gender-neutral childcare rights is often perceived as one of the main ways of achieving the aims of gender equality and equal opportunities between men and women.[3] In fact, the FMLA 1993 has been compared with the development of Swedish parental leave and it has been argued that it follows a similar framework to Swedish legislation, albeit providing, for the main part, narrower and more limited rights.[4] These corresponding aims suggest that the typologies underpinning the work-family legislation within these very different countries could be more similar than their welfare state regime classifications suggest.[5]

Returning to the FMLA 1993, it has been argued that this underpinning equality aim is consistent with the history and development of work-family rights in the US.[6] These rights developed from: equal treatment rights, to the specific recognition of the situation of pregnant workers,[7] and finally to the introduction of individual rights to family leave, but all were underpinned by

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[1] Nevada Department of Human Resources v Hibbs 538 U.S. 721 (2003), p.737
[2] See Chapters 6 (Sweden), and 8 and 9 (Parents' and fathers' rights in the UK respectively)
[3] US: Wisensale, (2003), *op. cit.*, p.138; See relevant Chapters on Sweden (Six) and UK (Eight) for discussions of this
[4] Kosich, (1992-1993), *op. cit.*, p.176; See Chapter Six for more details on the Swedish package of work-family rights
[5] See Chapter Three for more details on these classifications, Table3.1, p.106, and Chapter Six for more specific discussions of the Swedish welfare state, pp.226-230
[6] Wisensale, (2003), *op. cit.*, p.138
[7] See above at pp.146-164 for discussions of the equal treatment legislation and the PDA 1978

the principle of equal treatment between the sexes. This interpretation of the aim underpinning the legislation appears to focus solely on its employment and equality outcomes as opposed to addressing the division of gendered earning and caring roles within the family. The next section will address the extent to which this is borne out in practice by examining the actual division of gender roles that the legislation produces.

Gendered division of earning and caring roles

Shared earning and caring gender roles are arguably supported by the gender-neutral aims of the legislation and the gender-neutral working carer inherent within it.[1] Such characteristics of the right to family leave, and the aims underpinning the legislation, arguably challenge the gendered views surrounding the caring role by aiming to encourage more fathers to participate in childcare and ensure equal treatment between the sexes.[2] In spite of these gender-neutral aims and classifications, certain aspects of the legislation suggest that these rights are more gendered in practice.

The restrictions surrounding the utilisation period and the lack of specific rights to maternity leave suggest that working mothers are likely to utilise the right to family leave around the time of childbirth and in the subsequent

[1] See above section on the *Family care model*, pp.170-182
[2] Kosich, (1992-1993), *op. cit.*, pp.168-169

weeks,[1] since this period of time coincides with that required in order to give birth and recover from it. This limitation on the right to leave, and the length of leave, suggests that it is primarily viewed in medical and/or physical terms, despite the fact that the provision states that leave can be taken *"because of the birth … and in order to care for"* the child.[2] The fact that the father can also take leave at this time and for these purposes, however, suggests that it does, to some extent, take into account the caring aspects of childbearing and rearing. Nevertheless, it does not adequately address the two.[3]

Another such issue relates to the rights to return to work on the expiry of the family leave period. Employees have the right to return to work in their previous or an equivalent position if they do so before or at the end of the maximum leave period.[4] While this provides working persons with job and career security and should encourage them to utilise the leave,[5] there is a specific exception to this right for those employees within the highest paid 10% of the company.[6] This exception applies when the return of such an employee would result in severe economic loss to the employer.[7] This particular provision highlights the influence that businesses and employers had in the drafting of the FMLA, and the balancing act between employer and employee needs which underpins the aims of the legislation.[1]

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[1] Malin, (1994), *op. cit.*, p.1061
[2] FMLA 1993, § 102(a)(1)(A)
[3] Craig, (1995), *op. cit.*, pp.56-57
[4] FMLA 1993, § 104(a)(1)
[5] Craig, (1995), *op. cit.*, pp.72-73
[6] FMLA 1993, § 104(b)(2)
[7] *ibid*, § 104(b)(1)

While the employee is generally guaranteed the right to return to work after having utilised the leave, the employer is protected from having to reinstate high earning employees. This exception could undermine the employee's choice as to whether or not to take leave in the first instance. This has particular implications for the aim of enabling working families to balance work and caring commitments. The less secure that working carers feel about utilising the rights to leave, the less likely they are to use them. In particular, this exception may discourage men from taking the leave since they tend to earn more than women, who in 2007 made on average 77.5% of male earnings, and are, consequently, more likely to be in this category of higher earners.[2]

This exception appears to sit uncomfortably with the aims underpinning the legislation, particularly those of challenging stereotypical gender roles. In contrast, it instead supports the traditional division of gender roles by making the leave less attractive to certain groups of employees, which are likely to be male dominated. This is also reflected in the way in which the legislation itself is viewed.

The FMLA 1993 is often considered to be of primary importance to women.[3] In fact, it has been argued that the *"ultimate purpose"*[4] of the FMLA 1993 is,

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[1] FMLA 1993, s.2, Purposes para.3
[2] Bishaw, A., and Semega, J., *Income, Earnings and Poverty Data From the 2007 American Community Survey*, American Community Survey Reports, ACS-09, (U.S. Department of Commerce, U.S. Census Board, 2008) [WWW Document] URL: http://www.census.gov/prod/2008pubs/acs-09.pdf (Last Accessed: Sept 2009), Table 6, p.13
[3] Vogel, (1995), *op. cit.*, p.115
[4] Pelletier, (2006-2007), *op. cit.*, p.555

as was stated in the testimony delivered concerning the need for family leave, that *"[a] woman should not have to choose between her job and becoming a mother and a couple should not be punished for becoming a family."*[1] The latter part of this statement is stated in gender-neutral terms, but the former focuses particularly on the situation of working mothers and the perceived benefits that the legislation may have for this group. While this statement was given by a woman who had suffered discrimination on this basis as testimony in favour of introducing this Act,[2] similar sentiments were noted within the legislation itself.

Within the findings section of the Act women's traditional role as primary caregiver was recognised, as was the possibility of discrimination on this basis if legislation was introduced on gendered terms.[3] The equality purposes of the legislation are aimed at addressing these issues. In doing so, they focus on the question of equality from a female perspective, starting with the working mother as the care giving norm. While support for this gendered role is not reflected specifically in the aims of the legislation,[4] it would have been more appropriate and effective to recognise the care giving responsibilities of both men and women here. Neither the findings nor the purposes of the legislation specifically address the question of men's caring role.[5] This can be contrasted with the legislation in Sweden and the UK in

[1] Personal testimony of Ms. Beverly Wilkinson, H.R. Rep. No. 103-8(I), (1993), *op. cit.*; p.24-25
[2] *ibid*, p.24
[3] FMLA 1993, Findings section, s.2(5) and (6)
[4] These refer to equal opportunities and discrimination on the grounds of sex, but do not specifically note that the purpose is to primarily address women's position in this regard.
[5] See FMLA 1993, s.2

which the child caring responsibilities and roles of both working parents are often restated,[1] with a view to making the leave more attractive to men and attempting to challenge the stigma surrounding their utilisation of such leaves.[2] The absence of such an approach in the US alongside references to working families' renders the male caregiver invisible and in doing so fails to challenge and renegotiate the traditional division of gender roles.

The gendered perception of the right is further evident from a survey conducted prior to the implementation of the Act. This research found that only 7% of male employees would utilise the unpaid leave as compared with 47% of their female counterparts.[3] These findings were subsequently supported in research reported by the Department of Labor in 2002 following the introduction of the FMLA 1993, which showed that 68.2% of mothers had taken leave under the Act for childcare (or related) purposes as compared with 34.1% of fathers.[4] While this shows a greater number of working parents utilising the leave than originally anticipated, it continues to reinforce the gendered nature of the rights, given the gendered perceptions surrounding the rights before they were implemented which were not challenged follow its enactment. These factors support the argument that the underpinning purpose of the Act is in fact gendered, since it is primarily viewed as enabling women to combine motherhood with employment.[5]

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[1] See Chapter Six on Sweden and later Chapters on the UK
[2] Breidenbach, (2003), *op. cit.*, p.7
[3] Malin, (1994), *op. cit.*, p.1050
[4] Department of Labor, (2002), *op. cit.*, Table A1-4.19, p.4-17: 32.4% of females used the leave as maternity leave and an additional 35.8% used it to care for a newborn or newly placed child amounting to 68.2% overall.
[5] Kosich, (1992-1993), *op. cit.*, p.168

Individual rights?

The gendered nature of the rights to family leave is also reflected in the exception to this individual entitlement to leave. Married couples who work for the same employer are only entitled to a maximum of 12 weeks leave for the family and not each.[1] It could be argued that this exception undermines the equal treatment aim of the legislation since it fails to provide working parents with an individual right to leave. This could also have implications for the division of responsibilities within the working family. This is because it is likely that the combination of leave periods will reduce the numbers of working fathers sharing the caring responsibilities with their wives, who are more likely to use the leave in order to give birth, recover from it and care for the child. It has already been established that working mothers use the right to family leave more frequently than working fathers,[2] and there is no reason to suggest that this pattern would not be replicated or exacerbated in these circumstances. The utilisation of family leave in this instance corresponds more closely with traditional understandings of the right to maternity leave. This type of care situation is consistent with the maternity to motherhood typology, which focuses on the physical aspects of childbearing and mother's rights. While the right to family leave is not restricted to working mothers, it could reinforce this division of caring responsibilities.

There is, however, one way in which both parents could still utilise their

[1] FMLA 1993, § 102(f)
[2] See statistics on utilisation rates mentioned above, p.201

entitlement to 12 weeks leave. This would occur where the wife has used the right to medical leave if she has suffered from a serious health condition relating to the pregnancy or childbirth. The father could then use family leave in connection with the birth of the child and in order to care for it. This arrangement could enable them to take a maximum of 24 weeks leave, 12 weeks each, since the restriction only applies to the sharing of family leave.[1] However, the mother would have to show that she was suffering from a serious health condition which includes illnesses and injuries which either require inpatient care or continuing treatment by a health care provider.[2]

This aspect of the right to family leave for childcare purposes assumes a traditional view of working families and the caring roles that each member adopts. It reinforces the notion of the female caregiver and male breadwinner and undermines the equal treatment aims of the legislation.

These arguments suggest that while the rights to family leave have been presented in gender-neutral terms, they are gendered in practice. This contrasts with the family typology classification noted above, which is based on shared earning and caring roles. On the contrary, this corresponds more closely with the extended motherhood typology. This typology is based on the traditional sexual division of gender roles, which also underpins the maternity to motherhood typology. The difference between these models lies

[1] FMLA 1993, § 102(f)
[2] *ibid*, § 101(11). A health care provider includes doctors or other persons whom the Secretary deems are capable of providing such services (*ibid*, § 101(6))

in the support given to working families to undertake these competing roles.[1] In the maternity to motherhood typology, there is limited support which focuses on the physical aspects of childbearing and assumes a division between workers and carers. In the extended motherhood typology there is more support for working carers, but this support is primarily aimed at working mothers. In the case of family leave, the legislation arguably does the latter. The rights are presented in gender-neutral terms but they fail to challenge the gendered nature of care. The main implication of this gendering of caring responsibilities is that employers will view the leave as a woman's right, and assume that they are more likely to use it in comparison with their male counterparts.[2]

These conclusions may appear surprising in this context given the long history of equality legislation in the US, which has similarly underpinned these rights. In addition, and in contrast with the UK and Sweden, work-family rights in the US have always been afforded on a gender-neutral basis. Consequently, work-family rights have never been gendered. Given these features of the legislation it may be surprising that it is surrounded by such gendered perceptions. One possible reason for this may be that because these rights are or have been traditionally gendered,[3] this stigma has attached to these gender-neutral rights. Another possible reason, advanced

[1] See Chapter Four: The Work-family Conflict and the Work-family Classification Model above pp.137-141 for more details on these typologies
[2] Malin, (1994), *op. cit.*, p.1062
[3] For instance, in both Sweden and the UK work-family rights started as being wholly gendered before becoming increasingly gender-neutral.

by some feminist scholars,[1] may be that the gender-neutrality of the rights fails to adequately address the work-family needs of working parents in particular.

Special treatment

In contrast with these gendered arguments concerning the right to family leave, some feminists have criticised the right on the grounds that it fails to recognise the gendered nature of pregnancy and motherhood.[2] One of the issues here is similar to that advanced in relation to the PDA 1978,[3] namely, that pregnancy is again treated as if it were an illness and not as a natural or normal event.[4] There is no specific right to maternity leave or leave for pregnancy-related illnesses contained within the FMLA 1993. There is solely the possibility of utilising the right to medical leave for this purpose.[5] The consequence of this is that working mothers will be forced to utilise the right to medical leave for physical and medical purposes relating to their own recovery from childbirth, to the detriment of family leave for the purposes of caring for the newborn.[6] The main thrust of this argument is that by not entitling pregnant employees to a gender-specific right to leave, the legislation does not appreciate the caring commitments that are connected

[1] Vogel, (1995), *op. cit.*, p.112
[2] *ibid*, p.112
[3] See section above, pp.155-164 for more detail on this
[4] Vogel, (1995), *op. cit.*, p.112
[5] See above discussion on this issue at p.174
[6] Craig, (1995), *op. cit.*, pp.56-57

with, and in addition to, the physical aspects of childbearing. As noted above,[1] working mothers may have little choice or legislative supports to enable them to take both pregnancy/childbearing related leave and leave for childcare purposes.

There are two ways in which this distinction between pregnancy/childbearing and childcare leave may be interpreted. In the first instance, such a division between these activities as advocated here can be construed as consistent with a gender-neutral shared earning and caring approach since the gendered aspects of pregnancy and maternity are distinguished from gender-neutral childcare responsibilities. In this framework of rights mothers would be entitled to special treatment in the form of specific gendered rights to maternity leave to encompass the physical aspects of childbearing, and both parents would be entitled to identical gender-neutral rights to care for the child.

The second way of interpreting this distinction, which appears to be the one adopted within the legislation, is that the invisibility of the gendered and gender-neutral activities obscures the various commitments that working families have. By creating one right to encompass these varying commitments only one approach towards the work-family conflict can be undertaken. Despite the arguments advanced by feminists, the previous examinations of US work-family rights indicate that the focus here is arguably pregnancy/maternity as opposed to childcare, thus, indirectly supporting

[1] At p.174

special treatment for working mothers.

A further feminist argument is that the legislation overlooks the fact that it is predominately women who rear and care for children and by adopting this gender-neutral approach it fails to take their specific role in this context into account.[1] The problem with this criticism in principle is that it does not recognise the benefit for working parents of both partners being able to care for and rear their children, thus attempting to challenge the gendered nature of this practice. In reality the fact that the leave period is so short and unpaid fails to appreciate the childcare responsibilities that working parents now have.[2] In this regard, it can be argued that it adopts a male model of work, equality and the work-family conflict.[3] It assumes that working parents will only require 12 weeks leave each in order to: in the case of working mothers, give birth and recover physically from doing so; and, for both, to provide care for a new born child who, the legislation assumes, will only require such care in its first year. In addition, it further assumes that working families will only subsequently require leave in times of serious illness and not for any alternative care purposes.

The limited nature of the right to provide personal care within the legislation assumes that someone other than the working parent will provide the majority, if not all, of the caring responsibilities for the child. It has been

[1] Vogel, (1995), *op. cit.*, p.112
[2] As noted above in the *Working family model: Balancing work and care commitments* section, pp.184-187
[3] Vogel, (1995), *op. cit.*, pp.113-114

argued that this approach reflects the traditional separation of childcare provision, eldercare provision may equally be included here, and family leave policies in the US. The consequence of this has been that pregnancy, childcare and family care have been viewed in the same terms as medical disabilities, as temporary events preventing the employee from working for a short period of time.[1] This fails to recognise the distinction between the different situations and the continuing responsibilities that working families' experience. In doing so, the legislation adopts a gendered approach towards the work-family conflict, endorsing the male model of work, the male breadwinner family model,[2] and the traditional division of gender roles. This is based on the notion of a strict division of earning and caring roles, with workers in the paid labour market not undertaking any, or if so only limited, caring responsibilities.

Unpaid Leave

Another factor which supports the limited and gendered nature of this right is the absence of a requirement for paid leave within the FMLA 1993. In the legislation itself this is stated in somewhat curious terms as the permission of unpaid leave.[3] This suggests some form of support for unpaid leave. This feature of the Act has been highly criticised as a consequence of the

[1] Craig, (1995), *op. cit.*, pp.61 and 62
[2] As noted in the Working family model section above, pp.182-194
[3] FMLA 1993, § 102(c)

disparate effects that it has on certain types of working families and persons.[1] Nevertheless, it is possible for an employer to provide paid leave or for an employee to decide, or an employer to require, that the leave be substituted with accrued leave which has a paid element.[2] However, it has often been referred to as a *"hollow right"*, because many workers will only be entitled to unpaid leave.[3] On average that amounted to around 50% of employees in 2002.[4] While this suggests that around 50% of employees did have a form of paid leave, there are wider implications of the unpaid nature of the right. For instance, there is evidence to suggest that this characteristic of the leave influences the number of working parents who will utilise it.

Research reported in 2002 showed that around 16.8% of persons surveyed took family or medical leave,[5] with around an additional 3% of persons needing to take leave but not doing so.[6] The main reason given for not utilising their right to leave was that they could not afford to do so.[7] While this is not necessarily a significant number of working persons this figure does not identify the numbers of persons who are not entitled to leave in the first instance and those who are entitled to some form of income

[1] Craig, (1995), *op. cit.*, pp.73-74
[2] FMLA 1993, §§ 102(d)(1) and (2)
[3] Pelletier, (2006-2007), *op. cit.*, p.558
[4] Department of Labor, (2002), *op. cit.*, Table A1-5.6, p.A-1-28 – unpaid in the following circumstances: 50.8% of all employees taking leave to care for a newborn; 56.9% of all employees taking leave in relation to adoption or foster placements; 42.7% of all employees taking leave for maternity-related reasons
[5] Commission on Leave, (1996), *op. cit.*, p.84
[6] 3.4% and 2.4% respectively: *ibid*, p.84; and Department of Labor, (2002), *op. cit.*, Table 2.14, p.2-14; Waldfogel, J., 'Family and medical leave: evidence from the 2000 surveys', 2001 *Monthly Labor Review* 17, pp.20
[7] 63.9% and 77.6% respectively: Commission on Leave, (1996), *op. cit.*, pp.99-100; Department of Labor, (2002), *op. cit.*, Table 2.17, p.2-16; Golden, (2006), *op. cit.*, p.11; Wisensale, (2003), *op. cit.*, p.140

replacement.

The most notable issue here is the gendered impact that this right has. It is more likely to effect the utilisation rates of working fathers since they tend to earn more money that working mothers,[1] and their role as a 'good father' is more often linked with their earning role.[2] The family will already be experiencing increased financial demands at this time and the loss of the main earners income for any period of time could be detrimental to them. This is supported by research reported in 1996 and 2002 which showed that the reasons that people required but did not use family leave almost never related to maternity leave, but about 9% of the situations did relate to parental leave.[3] Furthermore, 3.8% of fathers in the 2002 survey reported that they needed to take leave but did not do so compared with less than 10 un-weighted cases involving mothers.[4] This suggests that mothers are more frequently using the right to family leave following childbirth, while fathers are more likely to forego the leave as a result of financial concerns. This reflects the arguments advanced above concerning the gendered nature of the right. It suggests that the right to leave for childcare purposes has primarily been viewed as a mother's right and not, as the legislation purports, a gender-neutral right to leave.

[1] Women earned 77.5% of male earnings in 2007: Bishaw and Semega, (2008), *op. cit.*, Table 6, p.13
[2] Pelletier, (2006-2007), *op. cit.*, p.559; Malin, (1994), *op. cit.*, pp.1066-1067 and 1073
[3] 8.4% and 9.3% required parental leave respectively: Commission on Leave, (1996), *op. cit.*, pp.98-99; and Department of Labor, (2002), *op. cit.*, Table 2.16, p.2-15
[4] Department of Labor, (2002), *op. cit.*, Table A1-4.17, p.A-1-19

However, as noted above, the Act does provide for the possible substitution of paid leave. For instance, if the employer provides paid leave for less than 12 weeks, this can be used as leave under this Act, with the remaining weeks of leave being provided without pay.[1] In addition, an employee may chose to, or an employer may require that the employee, substitute any accrued paid leave, such as vacation, personal or family leave, for any periods of leave relating to birth or placement for adoption or foster care or the care of a child with a serious health condition.[2] While this appears to offer employees the possibility to take paid leave, it does reduce the other types of leave that are available to them. For instance, by forcing an employee to utilise their vacation leave in order to take paid family leave, it reduces the amount of vacation leave that they will be entitled to. In a sense this does not offer employees any additional rights since they would have to have used those forms of leave for these purposes before the legislation was introduced.

Division of gender roles

While the rights to family leave are based on gender-neutral aims and the gender-neutral working carer, this analysis of the rights has shown that they are underpinned by a gendered notion of care giving. The rights to family leave are generally perceived as women's rights and the legislation is primarily directed towards working mothers and female carers and in doing

[1] FMLA 1993, § 102(d)(1)
[2] *ibid*, § 102(d)(2)

so it fails to achieve its gender-neutral goals. This analysis has shown that the gendered nature of the right to family leave corresponds with the maternity to motherhood typology since it draws clear distinctions between workers and carers. The limited nature of the rights in terms of its length and the lack of wage compensation does not enable working parents to combine their caring and earning responsibilities. Instead they are based on the presumption of a division between earning and caring roles, as also shown in the analysis of the working family model, which is highly gendered.

The work-family typology underpinning US legislation

The enactment of the FMLA 1993 was supposed to represent a new approach towards addressing the work-family conflict in the US. This issue in particular formed one of the underpinning aims of the legislation. However, this analysis of the work-family typology underpinning US legislation has not produced a noticeable development from that underpinning the anti-discrimination legislation. In spite of the gender-neutral aims and nature of the rights to family leave, the legislation still reinforces and reproduces the traditional gendered division of caring responsibilities. For instance, the focus on equality of opportunity within the legislation fails to recognise the differences between men and women and between working carers and those without caring commitments. In addition, the focus of the legislation, as reflected within the literature, has been family leave for

childcare purposes.[1] This is also reflected in the proposals for amending the legislation,[2] and any improvements on the legislation enacted by individual states.[3] This reinforces the traditional childcare focus of work-family rights, and undermines and weakens the protection offered to other carers. In short, the legislation fails to address the work-family conflict in a meaningful way, thereby preventing working families from addressing their work-family conflicts.

All of these features are consistent with the maternity to motherhood typology, which was also identified as inherent within the anti-discrimination legislation. In spite of its gender-neutral and equality aims, the legislation fails to address the issue of balancing work and family commitments in a meaningful way. In failing to do so, the legislation reinforces a division between working and earning roles, with those in the workplace being unencumbered workers and those outside being unencumbered carers.[4] While the legislation and the practice of working families is not necessarily that working mothers are forced out of the labour market, the division of these roles is clearly drawn in gendered terms with the rights, either directly or indirectly, being of primary benefit to working women.

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[1] See for instance: Congressional Record – Extensions of Remarks, H.R. I. The Family and Medical Leave Act of 1993 E29, Mr W.D. Ford, (1993a), which identified this as *"the core principle of this legislation"*, at E30; Kamerman, S. B., 'Parental Leave Policies: An Essential Ingredient in Early Childhood Education and Care Policies', 2000 Vol.XIV(2) *Social Policy Report* 3; Craig, (1995), *op. cit.*, p.53; Kosich, (1992-1993), op. cit.; Ashamalla, (1992), op. cit.

[2] Wisensale, (2003), op. cit., pp.140-143 and 148

[3] See Tables 5.1 and 5.2 in Appendix for more details

[4] James, (2009), *op. cit.*, pp.17-18

The FMLA 1993, consequently, did not produce the distinctive change in the philosophy underpinning US legislation. It instead largely continued with the aims and objectives that had underpinned the earlier equality legislation. This may be compared with the equivalent rights to family and medical leave available to working persons in the state of California which, as the discussion of case law above has shown,[1] had a slightly different background with regards to the work-family conflict.

Family and medical leave in the state of California

The FMLA 1993 has been used as the framework for state legislation in this area, with many states enacting similar provisions.[2] California is the only state to provide the right to paid family leave,[3] which was introduced as a consequence of the problems exposed by the FMLA 1993 and the Californian version,[4] California Family Rights Act (CFRA).[5] From the utilisation of these rights and the gaps in coverage it was evident that families needed support to address all of their caring responsibilities,[6] hence the introduction of this right to leave with income replacement. This right was

[1] Geduldig v Aiello, *op. cit.*; General Electric Company v Gilbert, *op. cit.*; and, California Federal Savings and Loan Association v Guerra, *op. cit.* all emanated from California
[2] See appendix Tables 5.1 and 5.2 for more details
[3] SB 1661, Kuehl, (2002), which amended the Unemployment Insurance Code (UIC), which can be accessed on [WWW Document] URL: http://www.leginfo.ca.gov/.html/uic_table_of_contents.html (Last accessed: Sept 2009)
[4] This legislation enacts the rights to family and medical leave on the same basis as the FMLA 1993
[5] California Family Rights Act (aka Moore-Brown-Roberti Family Rights Act), Cal. Gov't Code, (West 2005), (CFRA), § 12945.2
[6] Senate Third Reading, SB 1661 (Kuehl), (23 August 2002), pp.9-10

aimed at *"compensat*[ing] *in part for the wage loss sustained by any individual [taking family or medical leave] … and to reduce to a minimum the suffering caused by unemployment resulting therefrom."*[1] This recognised that working families find it difficult to use leave if it is unpaid, and that including a paid element should have the effect of enabling more working families to utilise the leave.

In addition, within the legislation itself it was recognised that families could not afford to take unpaid leave;[2] and, that the government needed to address this since the private sector had been slow in dealing with this issue.[3] In spite of the support for the legislation, it was not without resistance. Such opposition focused on the grounds that: it would be too expensive; it would have a particularly negative impact on small businesses; and, it would increase unemployment.[4] Nevertheless, SB 1661, which amended the California Unemployment Insurance Code (CUIC), was subsequently enacted which introduced the right to paid family leave for all working families, with the aim of *"help*[ing] [working families] *reconcile the demands of work and family."*[5] This reflects the aims found within the FMLA 1993, but also adopts a slightly different focus since it is not also underpinned by equal treatment aims. SB 1661 is instead primarily concerned with enabling working families to address their work-family conflicts. This change in focus

[1] CUIC, § 2601
[2] *ibid*, § 3300(f)
[3] Congressional Record – Senate, (1993), *op. cit.*, Mr Metzenbaum, S266; Wisensale, (2006), *op. cit.*, p.185
[4] Wisensale, (2006), *op. cit.*, p.186
[5] CUIC, § 3300(g)

and underpinning aims may suggest an alternative work-family classification.

Californian work-family rights

In contrast with the federal legislation, Californians potentially have two separate rights available to them. In the first instance, they have the right to family leave, which corresponds with the rights available under the FMLA 1993. Secondly, they have a right to pregnancy leave which is distinct from this. In doing so, they appear to have addressed the feminist concerns, noted earlier,[1] regarding the dichotomy between special and equal treatment by affording specific protections relating to the gendered experience of pregnancy and the gender-neutral one of care. This analysis of these two rights will determine whether or not the approach adopted by the Californians is different and whether or not it has been underpinned by a different work-family typology.

Family leave

From the 1st of July 2004 the right to paid family leave has been available to working families. The right in many ways corresponds with the provisions contained within the FMLA 1993 and the CFRA, but is designed not only to

[1] See pp.146-147 above

enable those who could not afford to take unpaid leave to do so,[1] but also to enable those employees whose employers are not covered by these Acts to take leave. While the FMLA 1993 and CFRA only apply to those employees of employers who satisfy various conditions,[2] the UIC applies to all employers.[3] Consequently, all employees in California now have the right to take paid leave in certain circumstances.

The legislation entitles employees to 12 weeks leave for family and medical purposes,[4] thus, corresponding with the federal and state laws. The right to paid leave, however, is restricted to 6 of these weeks.[5] It is income related and entitles qualifying employees to 6 weeks paid leave at 55% of their wages subject to a maximum level.[6] There are no continuous service or hours requirements that must be satisfied in order to utilise the right to paid leave. The only qualifying conditions are that there is a one week waiting period during which the employee will not be paid,[7] and employers can require employees to use a maximum of two weeks vacation leave (with one week being included in the waiting period) before they will be entitled to paid leave.[8] The income related benefit is then paid by California's State Disability Insurance Programme,[9] which is funded entirely from employee

[1] CUIC, § 3300(f)
[2] The qualifying conditions for the FMLA 1993 equally apply to the CFRA
[3] CUIC, § 3303
[4] *ibid*, § 3300(d)
[5] *ibid*, § 3301(a)(1) and (d)
[6] *ibid*, § 2655 details the method for calculating the weekly benefit amount; Wisensale, (2006), *op. cit.*, p.183
[7] *ibid*, § 3303
[8] *ibid*, § 3303(g)
[9] *ibid*, § 3300(a)

contributions.[1]

The right to paid leave in connection with this legislation is available for the purposes of caring for a newborn or newly placed child for adoption or foster care, or a seriously ill family member.[2] The right to paid family leave is restricted in the case of caring for a child following childbirth or its placement for adoption or foster care to the first year following this event.[3] This reflects the provisions of the state and federal legislation, and again reinforces a limited notion of the caring responsibilities that working families with children face. The definition of family members, however, represents a wider category than that contained within the FMLA. Family members include parents, children, spouses and domestic partners.[4] The inclusion of domestic partners extends this right to same-sex partnerships,[5] and in doing so encompasses a wider notion of family care. However, this notion of family care continues to focus on the nuclear family model, albeit with a broader understanding of the relationships contained within this model. In doing so it excludes other categories of extended family members,[1] who may reasonably rely on the employee for care and/or support.

A major criticism of the legislation is that there is no right to job security

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[1] CUIC, § 3300(f)
[2] *ibid*, § 3301(a)(1) and (d) – Length; § 3302(e) – Purposes; and SB 1661, s.7 – Commencement
[3] *ibid*, § 3302(e)(1)
[4] SB 1661, Section 6, adding Chapter 7 to Part 2 of Division 1 of the UIC, § 3302(e)
[5] California Codes, Family Code, § 297, details the process by which same-sex couples enter into domestic partnerships. The Family Code can be accessed on [WWW Document] URL: http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=fam&codebody=&hits=20 (Last Accessed: Sept 2009)

contained within it, although employees could be covered by other employment statutes, such as the FMLA 1993 and the CFRA. Problems arise, however, when the employee is not entitled to leave under either of these pieces of legislation.[2] In these circumstances employees will have no job protection rights, meaning that their employer is not obliged to enable them to return to work, or a particular post, at the end of their leave. This is a particularly problematic feature of the right to paid leave in California. It compromises the employee's ability to utilise the rights by offering them no protection when they do so. This may have the effect of the legislation only strengthening the rights of those already entitled to leave, and not meeting the additional aim of extending it to employees not covered by existing legislation.

Pregnancy leave

In addition to the right to family leave, Californian employees are also entitled to a form of pregnancy leave.[3] Employers must allow working women who are disabled from work by pregnancy, childbirth or a related medical condition to be absent from work for this reason for a reasonable period of time up to 4 months, unless it is based on a *"bona fide occupational*

[1] Golden, (2006), *op. cit.*, p.31
[2] *ibid*, p.29
[3] This was the piece of legislation challenged but ultimately upheld in California Federal Savings and Loan Association v Guerra, *op. cit.*

qualification".[1] This provision covers all women working for employers employing five or more persons.[2]

Women are deemed to be disabled by pregnancy, childbirth or a related medical condition if they cannot: work at all; perform one or more of the essential duties of their job; and work without posing harm to themselves, their baby or others, in the opinion of their health care provider.[3] Consequently, the legislation does not entitle pregnant employees to four months leave as such. It only enables them to be on leave for a maximum of four months while they are suffering from pregnancy disability.[4] If they are able to return to work within that time period they must do so.[5] During the leave, pregnant employees can receive some form of income replacement through State Disability Insurance,[6] thus providing employees with a form of wage replacement at this time. Following the leave period, employees are entitled to return to the same or similar job, on the same or similar terms.[7]

While this legislation enables pregnant employees to take four months leave while they are suffering from a pregnancy disability, this cannot be used in addition to the right to leave under the FMLA 1993. Instead, these rights run

[1] Fair Employment and Housing Act, California Codes, Government Code, § 12945(a) (West 2005), (FEHA), can be accessed at [WWW Document] URL: http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=gov&codebody=&hits=20 (Last Accessed: Sept 2009)
[2] *ibid*, § 12926
[3] California Administrative Code Regulations, Title 2: Administration, (2 CCR§ 7291.2), § 7291.2(g) (2005) definition of pregnancy disability; and California Codes, Government Code, § 12926(f) definition of essential functions
[4] FEHA, § 12945(a)
[5] *ibid*, § 12945(a); Golden, (2006), *op. cit.*, p.17
[6] CUIC, §§ 2625 and 2626(a) and (b)(1)
[7] FEHA, § 12945(a); Cal. Code Regs. Tit. 2, §§ 7291.2(j) and 7291.9(a) (2005)

concurrently, unless the reason for the leave relates to *"disability on account of pregnancy, childbirth, or related medical conditions"*.[1] However, an employee who wishes to use maternity leave following the birth of her child may do so under the CFRA which does not run concurrently with pregnancy leave.[2] Consequently, this form of leave can be used in addition to the right to family leave for childcare purposes following the birth of their child.

Work-family classification

The aims of the Californian legislation, not unlike the federal provisions, are set out in gender-neutral terms. They are primarily to enable working families to balance their work and family commitments,[3] which is apparent in the separation of pregnancy-related and childcare leave. The rights to family leave themselves reflect this, also being gender-neutral rights to paid leave. In parallel with the federal legislation, this reflects the family typology family care model. This is particularly the case with the extended notion of close family members contained within the legislation.[4]

With regards to the working family model inherent within the legislation, the two rights to leave appear to recognise more explicitly the work-family commitments that working persons experience at this time. While this is

[1] FEHA, § 12945.2(s)
[2] CFRA, § 12945.2(o)
[3] CUIC, § 3300(g)
[4] See pp.173-180 above

limited to instances involving childbirth and the period surrounding it, these are still significant developments. They provide recognition of the unique experience of pregnant employees and that working mothers also need time to bond with and care for the child independently of their own physical and medical needs at this time. Nevertheless, the limited length of the paid leave period and the continuing focus on early childhood continue to reinforce the (male) breadwinner working family model, and the maternity to motherhood typology.

While the legislation continues to draw distinctions between work and family responsibilities, it does offer working carers with increased support. The provision of paid leave for caring purposes reflects greater recognition of the value of caring. However, in spite of the gender-neutral aims, and the focus on the work-family conflict, the utilisation of the rights to family leave more closely reflect the work-family classification of US legislation as a whole. In the years following the introduction of the right, the vast majority of claims for paid family leave were for the purposes of bonding with the child.[1] In addition, the overwhelming majority of these claims were made by women.[2] This suggests that while the legislation attempted to redress the work-family conflicts that working persons face, it still did not adequately challenge the traditional division of gender roles.

[1] 88.4% of claims for this leave in 2004/2005 and 88.5% of claims in 2005/2006 were for this purpose: Employment Development Department, *Paid Family Leave Utilization Rates*, [WWW Document] URL: http://www.paidfamilyleave.org/press/edd_statistics.pdf (Last Accessed: September 2009); Golden, (2006), *op. cit.*, p.31

[2] 83% of claims for childcare purposes in 2004/2005 and 81.4% in 2005/2006 were made by women: Employment Development Department, *op. cit.*; Golden, (2006), *op. cit.*, pp.31-32

While the legislation reinforced this division of gender roles, it reflected more closely the extended motherhood typology as opposed to the maternity to motherhood typology. This is evident in the greater value accorded to care through the provision of paid leave, which provides working families with a more genuine choice and right to family leave. This is indicative of the extended motherhood typology because it supports working persons in their choice as carers, although it does so along gendered lines and does not fully enable them to be both earners and carers.

Despite the longer history of work-family rights and the greater coverage and compensation offered to working persons with caring commitments, California does not appear to be underpinned by a radically different work-family typology. There is a greater appreciation of these competing activities, but this does not translate into rights which actually enable working persons to address their work-family conflicts on a continuing basis.

The most appropriate work-family classification of the Californian legislation is that it is moving towards the extended motherhood typology. This classification reflects the limited nature of the rights which primarily focus on childcare, and are predominately used by working women. While this was also true of the federal rights, and the maternity to motherhood typology, they are not as restricted. They recognise, to a limited extent, the value of care and the need for working persons to provide personal care at different times, which can be difficult, if not impossible when it is unpaid. This is more

reflective of the extended motherhood typology.

Conclusion

This analysis of the work-family typology underpinning US legislation has identified a number of important issues. In the first instance, it has shown that there is some connection between the welfare state regime classifications and the work-family typologies underpinning the legislation. This is certainly reflected in the instance of the US, which displays similarities between the two. The minimalist classification of the US welfare state is mirrored in the modest work-family rights that are afforded to working persons. With this in mind, it could be suggested that the following chapter will display much more extensive work-family rights given the contrasting welfare state regime classification of Sweden.[1]

This analysis has also identified that the US work-family legislation is based upon a particular approach towards the work-family conflict. This legislation is inherently intertwined with equality legislation and the aims of equal treatment, which is explicitly reflected within the work-family rights themselves. However, this focus on equal treatment has been to the detriment of specific, gendered, rights for working persons, which has arguably resulted in these rights being viewed in gendered terms. The

[1] See Table 3.1, p.106 above for Swedish classification and Chapter Six: The Swedish Welfare State and the Work-family Conflict below for further details

gendered nature of these rights in practice, along with their limited ability to adequately address the work-family conflict has reflected the maternity to motherhood typology underpinning the legislation.

Chapter Six – The Swedish Welfare State and the Work-family Conflict

Within the welfare state regime literature Sweden is viewed in contrasting terms to the US.[1] The previous examination of the mainstream literature revealed that Sweden has generally been classified as a social-democratic type of welfare state,[2] while the gendered literature identified that it has moved furthest from the male breadwinner model.[3] While there has been some debate regarding the validity of these models, and the states clustered within them,[4] Sweden has continued to typify this model.[5] Indeed, it has been argued that it is the closest to the 'ideal' model of the welfare state.[6]

The general characteristics associated with Sweden's welfare state regime classifications were identified in Chapter Three.[1] It is typified by the active and generous role of the state, which adopts the primary supportive role for

[1] See Chapter Three: Welfare State Regime and the Work-family Conflict and Table 3.1 p.106 for more details on this

[2] See *ibid* for an overview of the classifications and for an overview of selected literature see Arts, W., and Gelissen, J., 'Three Worlds of Welfare Capitalism or More? A state-of-the-art-report', 2002 Vol.12(2) *Journal of European Social Policy* 137, Tables 2 and 3, and pp.149-150 and 152

[3] Lewis, J., 'Gender and the Development of Welfare Regimes', 1992 Vol.2(3) *Journal of European Social Policy* 159; Hantrais, L., *Family Policy Matters: Responding to Family Change in Europe*, (Bristol: Policy, 2004), p.117; Sainsbury, D., 'Women's and Men's Social Rights: Gendering Dimensions of Welfare States', in D. Sainsbury (Ed), *Gendering Welfare States*, (London: Sage Publications Limited, 1994), (1994b); Sainsbury, Diane, *Gender, Equality and Welfare States*, (Cambridge: Cambridge University Press, 1996); Sainsbury, D., 'Gender and Social-Democratic Welfare States', in D. Sainsbury (Ed), *Gender and Welfare Regimes*, (Oxford: Oxford University Press, 1999)

[4] See for instance: Gupta, N.D., Smith, N., and Verner, M., *Child Care and Parental Leave in the Nordic Countries: A Model to Aspire to?*, IZA Discussion Paper No.2014, (Germany: IZA, March 2006); Ginsburg, N., 'Sweden: The Social-Democratic Case', in Cochrane, A., and Clarke, J., and Gewirtz, S., (Eds), *Comparing Welfare States: Britain in International Context*, (London: Sage Publications, 2001); Sainsbury, (1999), *ibid*; Leira, A., 'Mothers, Markets and the State: A Scandinavian 'Model'?', 1993 Vol. 22(3) *Journal of Social Policy* 329, pp.342-346

[5] Sainsbury, (1999), *op. cit.*, pp.87-95

[6] Ginsburg, N., *Divisions of Welfare: A critical introduction to comparative social policy*,

working families.[2] This can be contrasted with the position in the US, where it has been identified that the state adopts a minimalist role in the provision of welfare and work-family support.[3] Drawing from these previous models, but focusing specifically on the work-family conflict some additional characteristics may be added here, these include: universal and comprehensive provision of work-family rights and benefits based on residence and/or citizenship; high levels of state involvement in the provision of welfare benefits and/or services; and rights aimed at achieving gender equality.[4]

These characteristics, in particular the aim of combating gender inequality, suggest that the legislation is underpinned by the family typology, as the most progressive work-family classification,[5] and the one most likely to correspond with Sweden's welfare state regime classification.[6] This can be contrasted with the US classification which was identified as being underpinned by the maternity to motherhood typology in the previous chapter,[7] thus reinforcing their distinct welfare state regime categorizations.[1]

(London: Sage Publications, 1992), p.30; Ginsburg, (2001), *op. cit.*, p.196

[1] See Table 3.1, p.106 above for an overview

[2] See the following for characteristics attributed to this state: Björnberg, U., and Latta, M., 'The Roles of the Family and the Welfare State: The Relationship between Public and Private Financial Support in Sweden', 2007 Vol. 55(3) *Current Sociology* 415, p.442; Hantrais, (2004), *op. cit.*, pp.200-201; Rostgaard, T., and Lehto, J., 'Health and social care systems: How different is the Nordic model?', in M. Kautto, J. Fritzell, B. Hvinden, J. Kvist and H. Uusitalo, (Eds), *Nordic Welfare States in the European Context*, (London: Routledge, 2001), p.137; Gynnerstedt, K., 'Social policy in Sweden: current crises and future perspectives', in M. Mullard and S. Lee, (Eds), *The Politics of Social Policy in Europe*, (Cheltenham: Edward Elgar Publishing Limited, 1997), pp.196-197

[3] See Table 3.1, p.106 above for an overview

[4] Rostgaard and Lehto, (2001), *op. cit.*, p.137; Gynnerstedt, (1997), *op. cit.*, pp.196-197

[5] See Table 4.1 above p.137

[6] See Table 3.1, p.106 above for an overview

[7] See pp.212-214 above

While this more supportive classification may hold true in the general welfare state regime context,[2] the question remains whether it is also appropriate in the work-family context. A cursory glance at the literature would tend to suggest that this is the case.

Sweden is often viewed as the frontrunner of work-family policies,[3] with some justification since they were the first state to introduce the right to gender-neutral parental leave in 1974.[4] It has also been argued that it is the state which has taken the greatest steps towards encouraging women to enter and remain in the labour market.[5] This has potential relevance for the work-family conflict, particularly the way in which female employment is facilitated with regards to care.[6] Furthermore, it has also been argued that it has gone furthest to enable working families to address their work-family conflicts.[7]

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[1] See Table 3.1, p.106 above for an overview of the welfare state regime classifications

[2] Which would appear to be the case given the consistent classifications of Sweden within this literature: See *ibid* for a discussion of welfare state regimes; for an overview of the classifications and for an overview of selected literature see Arts and Gelissen, (2002), *op. cit.*, Tables 2 and 3, and pp.149-150 and 152

[3] Leira, (1993), *op. cit.*, pp.333-334; Malin, Martin H., 'Fathers and Parental Leave', 1994 Vol.72 *Texas Law Review* 1047, p.1057; Craig, S., 'The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications', 1995 Vol. 44 *Drake Law Review* 51, p.77; Nyberg, A., 'Economic crisis and the sustainability of the dual earner, dual career model', Presented to ESRC seminar, University of Manchester, 31 October 2003, [WWW Document] URL: http://www.lse.ac.uk/collections/worklife/Nybergpaper.pdf (Last Accessed: Sept 2009), pp.1 and 26; Hantrais, (2004), *op. cit.*, p.184; Caracciolo di Torella, E., 'A critical assessment of the EC legislation aimed at reconciling work and family life: Lessons from the Scandinavian model?', H. Collins, P. Davies and R. Rideout (Eds), *Legal Regulation of the Employment Relation*, (London: Kluwer Law International, 2000), p.453

[4] Hobson, B., Johansson, S., Olah, L., and Sutton, C., 'Gender and the Swedish Welfare State', in E. Brunsdon and M. May (Eds), *Swedish Welfare: Policy and Provision*, (London: Social Policy Association, 1995), p.14; Bruning, G., and Plantenga, J., 'Parental Leave and Equal Opportunities: Experiences in Eight European Countries', 1999 Vol.9(3) *Journal of European Social Policy* 195, p.202

[5] Nyberg, (2003), *op. cit.*, pp.1 and 26; Hantrais, (2004), *op. cit.*, p.184

[6] For instance, are both roles combined or is one person identified as the primary caregiver? This will be discussed further below under *Working family model*, pp.263-270

[7] van der Lippe, T., Jager, A., and Kops, Y., 'Combination Pressure. The Paid Work-Family Balance of Men and Women in European Countries', 2006 Vol.49(3) *Acta Sociologica* 303,

The Swedish experience has also been drawn upon in the development of similar rights at state and European level.[1] These classifications of Sweden suggest that the work-family legislation is more advanced and supportive of working families than that available in the US,[2] further reinforcing their divergent welfare state regime classifications.[3]

Such a comparison between these states supports their distinctive welfare state classifications and their selection for analysis here. However, the Swedish experience is not without its critics,[4] nor does it necessarily adhere to these idealised standards.[5] In particular, there are those who have argued that the Swedish package and experience of work-family rights does not fully address the work-family conflict, but only makes it easier for working mothers to combine some labour market activity with childcare.[6] This is somewhat at odds with the general gender-neutral and equality based image of the

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pp.306-307; Morgan, P., *Family Policy, Family Changes: Sweden, Italy and Britain Compared*, (London: St Edmundsbury Press, 2006), pp.18-19; Ginsburg, (1992), *op. cit.*, p.54

[1] Influence in the US: Craig, (1995), *op. cit.*; Malin, (1994), *op. cit.*; Kosich, J., 'Swedish Parental Leave Policy and its Lessons to the US', 1992-1993 Vol.11 *Dickson Journal of International Law* 163; Ashamalla, M., 'Swedish Lessons in Parental Leave', 1992 Vol.10(24) *Boston University International Law Journal* 241.
Influence at the European level, (Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, O.J. 1996, L145/4, (PLD 1996)): Bruning and Plantenga, (1999), *op. cit.*, pp.195-196 and 205; Hardy, S., and Adnett, N., 'The Parental Leave Directive: Towards a 'Family-Friendly' Social Europe?', 2002 Vol.8(2) *European Journal of Industrial Relations* 157, p.166

[2] This view was supported in a prima facie comparison of available rights: Craig, (1995), *op. cit.*, p.77

[3] See Table 3.1, p.106 for a comparison of classifications

[4] Hobson, et al., (1995), *op. cit.*, p.1

[5] For instance, while Lewis, (1992), *op. cit.*, pp.168-170 classifies it as a weak male breadwinner state, it still does not fully depart from the male breadwinner model. The same is true of Sainsbury's classification which identifies Sweden as moving furthest away from the male breadwinner but not fully gender-neutral, (Sainsbury, (1994b), *op. cit.*, p.167; Sainsbury, (1996), op. cit., pp.70-72). Similar observations were also made by Hobson, (2004), *op. cit.*, pp.79-80

[6] Morgan, (2006), *op. cit.*, p.122

Swedish model, as presented above,[1] and suggests that the typology underpinning Swedish work-family legislation may not be as progressive as first assumed. Nor may it be as distinct from that underpinning US legislation, particularly given the focus on working mothers noted above. The following analysis of Swedish work-family rights examines the similarities between these states, particularly with regards to gender equality, which underpins both states' work-family policies.[2] The potential parallels between these states also raise the question of the relationship between the welfare state regime classifications, the work-family typologies and the work-family conflict, which will be explored in the detailed examination of Swedish work-family legislation.

The emergence and development of the right to parental leave in Sweden

In comparison with the US right to family leave, Swedish parental leave developed from a system of maternity rights. This section will provide a critical overview of the emergence and development of these rights,[3] before

[1] See Table 3.1, p.106 above for an overview
[2] See Chapter Five: The US Welfare State and the Work-family Conflict and pp.242-243 below for more details
[3] For an overview of this development see: Ohlander, A-S., 'The Invisible Child? The struggle for Social Democratic family policy in Sweden, 1900-1960s', in G. Bock and P. Thane (Eds), *Maternity and Gender Policies: women and the rise of the European Welfare States, 1880s-1950s*, (London: Routledge, 1991), pp.60-92; Kosich, (1992-1993), *op. cit.*, pp.165-167; Malin, (1994), *op. cit.*, p.1057; Hobson, et al., (1995), *op. cit.*, pp.14-18; Leira, (1993), *op. cit.*; Hirdman, Y., 'State Policy and Gender Contracts: The Swedish Experience', in E. Drew, R. Emerek, E. Mahon, (Eds), *Women, Work and the Family in Europe*, (London: Routledge, 1998); Ginsburg, (2001), *op. cit.*, pp.213-218; Gupta, et al., *op. cit.*, p.6

focusing on the package of work-family rights currently available to working families.[1]

From maternal rights to gender-neutral leave

Sweden was not only a frontrunner in the development of gender-neutral rights,[2] but it also introduced a form of maternity leave at a very early stage. Unpaid maternity leave was initially introduced in 1901 as a health and safety measure, preventing mothers from returning to work within the four week period following childbirth.[3] This mandatory right was very much focused on medical concerns such as the mother's recovery and the child's health.[4] It was clearly distinct from any form of childcare leave being restricted to the post-birth period with no appreciation of continuing caring commitments. Maternity benefits were subsequently introduced in 1931 and by 1955 working mothers were entitled to 3 months paid maternity leave,[5] while being protected against dismissal on that ground.[6] The right later developed into a

[1] As correct in September 2009
[2] Leira, (1993), *op. cit.*, pp.333-334; Malin, (1994), *op. cit.*, p.1057; Craig, (1995), *op. cit.*, p.77; Nyberg, (2003), *op. cit.*, pp.1 and 26; Hantrais, (2004), *op. cit.*, p.184; Caracciolo di Torella, (2000), *op. cit.*, p.453
[3] Statistics Sweden, *Women and Men in Sweden, Facts and Figures 2008*, (Stockholm: Statistics Sweden, 2008), [WWW Document] URL: http://www.scb.se/statistik/_publikationer/LE0202_2008A01_BR_X10BR0801ENG.pdf (Last Accessed: Sept 2009), p.8; Gupta et al., (2006), *op. cit.*, p.6; Ohlander, (1991), *op. cit.*, pp.60-61
[4] Ohlander, (1991), *op. cit.*, pp.60-61
[5] Statistics Sweden, (2008), *op. cit.*, pp.8-9
[6] Gupta et al., (2006), *op. cit.*, p.6; Myrdal, A., *Nation and Family. The Swedish Experiment in Democratic Family and Population Policy*, (Cambridge, Massachusetts: The M.I.T. Press, 1968), p.416

period of 6 months leave, 3 of which were paid,[1] and was akin to the modern parental leave system before a change of policy direction resulted in its effective abolition. The focus of the maternity leave system had arguably changed by this time. Instead of being primarily concerned with the health and safety of mothers and children, it was focused on the working mother, enabling her to take leave to care for her child and compensating her for loss of earnings.[2]

The benefits of more equal sharing of childcare responsibilities between men and women were recognised and supported much earlier than the legislative attempts to revise work-family rights.[3] Nevertheless, the change in family policy was directly influenced by the Recommendations of the Family Policy Commission,[4] which were translated into Proposition 1973:47.[5] This Proposition recommended changes to insurance provisions, most notably the replacement of the maternity leave and benefit provisions with gender-neutral parental rights.[6] In addition, the right to 'daddy's days'[7] or paternity leave was proposed which would enable working parents to take up to ten days together in the period following childbirth.[8]

[1] Hobson, et al., (1995), *op. cit.*, p.14
[2] *ibid*, p.14
[3] Myrdal, (1968), *op. cit.*, p.122
[4] Familjepolitiska kommitténi, *Familjestöd*, (SOU 1972: 34)
[5] Proposition 1973:47 Kungl. Maj:ts proposition angående förbättrade familjeförmån inom den allmänna försäkringen, m.m., [WWW Document] URL: http://www.riksdagen.se/webbnav/index.aspx?nid=37&dok_id=FW0347, (Last Accessed: Sept 2009), as translated by http://www1.worldlingo.com/mywl/
[6] *ibid*, pp.19-20 and 38; Hobson, et al., (1995), *op. cit.*, p.15
[7] As they are often referred to within the literature
[8] Proposition 1973:47, *op. cit.*, pp.21 and 42

The recommendations of the Commission and the Proposition were significant because they outlined the aims underpinning the introduction of the right to parental leave in Sweden. It was apparent that the government's true objective was gender equality in the workplace, and the introduction of parental leave was the first step towards achieving this aim.[1] The government assumed that the replacement of maternity leave with the gender-neutral right to parental leave would enable both parents to undertake and share childcare,[2] thus resulting in a renegotiation of their caring and earning roles.[3] In spite of these aims, however, there was an underpinning assumption, reflected within the discussions, that mothers would remain primary caregivers.[4] Other aims of the reform were: to increase awareness of fathers' care giving role, and to achieve equality in the family through shared responsibility for childcare.[5] Introducing these rights and facilitating fathers' utilisation was key to challenging the male breadwinner-female caregiver model,[6] and moving towards shared and more equal gender roles.

These aims underlined the true objectives of the Swedish government in enacting this legislation, namely to influence the way in which families organised their lives and care.[7] The government, consequently, were not

[1] Proposition 1973:47, *op. cit.*, pp.35 and 42; Kosich, (1992-1993), *op. cit.*, pp.165 and 168-169
[2] Wilson, D., *The Welfare State in Sweden*, (London: Heinemann, 1979), p.14
[3] Proposition 1973:47, *op. cit.*, p.42
[4] Hobson, et al., (1995), *op. cit.*, p.15
[5] Proposition 1973:47, *op. cit.*, p.42; Hantrais, (2004), *op. cit.*, p.103; Björnberg, U., 'Working and Caring for Children: family, policies and balancing work and family in Sweden', in Carling, Duncan and Edwards, (Eds), *Analysing Families: Morality and rationality in policy and practice*, (London: Routledge, 2002), (2002b), p.95; Malin, (1994), *op. cit.*, p.1075
[6] Hantrais, (2004), *op. cit.*, p.103
[7] Agell, A., 'Should and Can Family Law Influence Social Behaviour?', in J. Eekelaar and T.

acting in response to growing demands by working fathers for equal rights, but rather on the basis that such legislation would address the gender inequalities between the sexes, which they perceived were rooted in the sexual division of childcare responsibilities. While it was identified in Chapter Four that this is one of the possible effects of law,[1] this has also been challenged, particularly in the context of developing rights for working fathers.[2] The desire of fathers to get involved and their support for work-family rights is crucial to their success, particularly in the context of shared rights and gender equality.

While these recommendations sought to achieve social and cultural change, they also reflected the changing composition of the Swedish working family. From the 1960s it has been argued that the Swedish working family was moving towards the dual earner working family model, with increasing numbers of both men and women in the labour market and attitudes supporting this family model.[3] All of these changes led to a shift in the 1970s family policy, from a focus on working mothers to gender-neutral working

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Nhlapo (Eds), *The Changing Family: Family Forms and Family Law*, (Oxford: Hart Publishing, 1998), p.125

[1] See pp.121-125 above and McLean, S.A.M., 'The Legal Relevance of Gender: Some Aspects of Sex-Based Discrimination', in S.A.M. McLean and N. Burrows, (Eds), *The Legal Relevance of Gender: Some Aspects of Sex-Based Discrimination*, (Basingstoke: Macmillan Press, 1988), p.2

[2] See Chapter Nine: Fathers' Work-family Rights in the UK, pp.426-430 below; Collier, R., 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)', 2001 Vol.28(4) *Journal of Law and Society* 520, pp.527-528 and 537-538

[3] Hogerud, A-L., *Är lagstiftning ett bra verktyg för att uppnå ett mer jämställt uttag av föräldraledighet?*, (Juridiska Fakulteten, vid Lunds universitet, 2005), [WWW Document] URL: http://web2.jur.lu.se/internet/biblioteket/examensarbeten.nsf/0/0A663ED9CCCFBF19C125701A006FD748/$File/exam.pdf?OpenElement, (Last Accessed: Sept 2009), as translated by http://www1.worldlingo.com/mywl/, p.42

parents.[1] The most significant effect of this change was the implementation of the recommendations with the re-conceptualisation of maternity leave as parental leave.[2] The rights to maternity leave were entirely replaced with those of parental leave, ensuring that both working parents had the same rights of access to the leave that had previously been reserved for working mothers. This change in focus reflected a very different approach towards the issue of childcare which was distinct from that adopted in many other countries, particularly at that time.[3] The policy appeared to support the dual earner-carer working family model by giving working parents equal opportunities and access to childcare rights.[4]

Despite the gender-neutral aims of parental leave, the right to leave was still viewed in gendered terms. It was assumed that the mother would utilise the majority of the leave and that the father would use any remaining leave after the mother had finished breastfeeding.[1] This was evident in the way in which the right to parental leave was initially implemented. At the time of its introduction it was merely a replacement for the previous system of maternity leave. There were no specific rights for working mothers or fathers, with the subsequent exception of the right to 10 'daddy's days' or paternity leave. In light of these comparatively minor changes in terms of the framework of work-family rights it is unsurprising that it continued to be viewed in gendered

[1] Hobson, et al., (1995), *op. cit.*, p.15
[2] Ohlander, (1991), *op. cit.*, pp.70-71
[3] Hobson, et al., (1995), *op. cit.*, p.15
[4] Peer Review, *Parental Insurance and Childcare: Executive Summary*, (2004), [WWW Document] URL: http://pdf.mutual-learning-employment.net/pdf/sweden04/execsumSWE04.pdf, (Last Accessed: Sept 2009), p.4; Nyberg, (2004), *op. cit.*, p.1

terms.

This was further reinforced with the aforementioned implementation of the right to 'daddy's days' or paternity leave, which the father could utilise while the mother was exercising the right to parental leave. The introduction of this right to leave was significant because it was the only gender-specific right that accompanied this reform of childcare leave. By including a right that would enable working fathers to take supplementary leave to that taken by mothers, it is arguable that it further entrenched the traditional division of gender roles.[2] In a sense, the right to parental leave effectively retained the status quo with the assumption that working mothers would remain the main users of parental leave. This was reflected in the utilisation rates of working families in the early years following its enactment. The percentage of days of parental benefit drawn by working fathers in 1974 was 0% rising to 6% in the 11 years following the enactment of the legislation.[3] This can be compared with the percentage of insured persons using temporary parental benefit, where fathers' utilisation rates were much higher representing 40% of days in 1985.[4] Their utilisation of this form of leave reflects their use of 'daddy's days'/paternity leave, since this is classified as a form of temporary parental

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[1] Hobson, et al., (1995), *op. cit.*, p.15
[2] An argument used in the UK context by James, G., 'All that Glitters is Not Gold: Labour's Latest Family-Friendly Offerings', [2003] 3 *Web Journal of Current Legal Issues*, http://webjcli.ncl.ac.uk/2003/issue3/james3.html (Last Accessed: May 2009), part 4; James, G., 'The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?', 2006 *Industrial Law Journal* 272, p.278; James, G., *The Legal Regulation of Pregnancy and Parenting in the Labour Market*, (Oxon: Routledge-Cavendish, 2009), p.44
[3] Statistics Sweden, (2008), *op. cit.*, p.44; More recent statistics will be discussed below under *Gender roles*, pp.281-287
[4] *ibid*, p.44; More recent statistics will be discussed below under *Gender roles*, pp.281-287

leave with benefit,[1] and reinforces the traditional division of gender roles the legislation was supposed to challenge.

While the aims of the legislation correspond with the family typology, the way in which the right to parental leave was enacted and utilised suggests that it did not have the intended effect. On the contrary, the gender-neutral rights which facilitated childcare in the child's first six months reinforced the previous focus on maternal care. The typology underpinning the legislation was, consequently, closer to the extended motherhood typology.[2] While it had progressive elements in terms of the novel extension of this right to working fathers, it failed to actively challenge traditional gender roles. In spite of the differences in implementation, particularly with regards to the development of these rights, the right to parental leave, as originally introduced, in Sweden displayed many similarities with the right to family leave in the US. Both rights were effectively gender-neutral rights to childcare leave, entitling working families to a total of 6 months leave in order to care for their child.[3] The rights in both states were based on equality aims,[4] but neither effectively challenged these, instead reinforcing maternal care.[5] However, subsequent changes in 1995 were introduced that were

[1] The Parental Leave Act (SFS 1995:584), Passed on 24 May 1995. Amendments up to SFS 2006:442. [WWW Document] URL: http://www.sweden.gov.se/content/1/c6/10/49/85/f16b785a.pdf (Last Accessed: Sept 2009) (PLA 1995), 8 §; National Insurance Act 1962:381, as amended up to and including SFS 2008:480, [WWW Document] URL: http://www.riksdagen.se/webbnav/index.aspx?nid=3911&bet=1962:381 (Last Accessed: Sept 2009), as translated by http://www1.worldlingo.com/mywl/, Chapter 4, (NIA 1962), 10 §
[2] See Table 4.1 p.137 above
[3] 6 months shared parental leave in Sweden and 12 weeks leave per parent in the US
[4] See above pp.182-183 and 232-233 for US and Swedish aims respectively
[5] As noted above pp.212-214 and 235-237 for US and Swedish legislation respectively

aimed at increasing fathers' utilisation rates and making the rights more flexible.[1] These amendments with their apparently increased focus on paternal care could represent a distinct change in the typology underpinning Swedish work-family legislation.

The work-family typology underpinning Swedish work-family rights

While the substantive rights to childcare leave are contained within the Parental Leave Act 1995 (PLA 1995) as amended, the corresponding rights to parental benefit are contained within the National Insurance Act 1962 (NIA 1962).[2] There is also a limited right to leave available to carers of persons who are seriously ill contained within the Care Leave Act 1988 (CLA 1988).[3] Similarly the corresponding right to benefit is contained within the NIA 1962.[1] This package of rights will be analysed as a whole throughout providing a comprehensive classification of the work-family typology underpinning Swedish legislation.

Before analysing the rights it is useful to outline some of the features that are applicable to the whole package. In doing so, a distinct is made between the rights to childcare leave which are subject to the same qualifying conditions

[1] Hobson, et al., (1995), *op. cit.*, p.15
[2] The Parental Leave Act (SFS 1995:584), Passed on 24 May 1995. Amendments up to SFS 2006:442, (PLA 1995); National Insurance Act 1962:381, as amended up to and including SFS 2008:480, (NIA 1962)
[3] Care Leave Act 1988:1465, [WWW Document] URL: http://www.notisum.se/rnp/sls/lag/19881465.HTM (Last Accessed: Sept 2009), as translated by http://www1.worldlingo.com/mywl/

and the rights to carer leave which is legislated for separately and is discussed where appropriate throughout. When the childcare legislation was originally enacted it contained a qualification requiring six months continuity or a minimum of 12 months in the previous 2 years with the current employer at the date of the commencement of leave.[2] This condition has now been removed.[3] The effect of this amendment has been to extend the rights to leave to all working parents irrespective of their employment history. This amendment, therefore, covers a greater number of working parents including those who were not entitled to these rights previously.

The five rights to leave contained within the PLA 1995 are: maternity leave, full parental leave with or without parental benefit, partial parental leave with parental benefit, partial parental leave without parental benefit, and temporary parental leave.[4] These rights, with the exception of temporary parental leave, are coupled with the right to 480 days parental benefit at 80% of the employees' income for the first 390 days, subject to a minimum of 180 Swedish Krona (SEK) (approx £15.60)[5] per day, with the remaining 90 days being paid at this minimum rate.[1] The rights to leave and parental benefit can be combined in a variety of ways, providing working families, in principle, with a degree of choice and flexibility in order to address their work-family conflicts. They provide working families with different options relating to the

[1] NIA 1962, Ch.3
[2] PLA 1995, 9 §
[3] In the SFS 2006:442 amendments
[4] PLA 1995, 3-8 §§
[5] Based on an exchange rate of 1 SEK to 0.08661 pounds sterling: http://uk.moneycentral.msn.com/investor/market/crncconverter.asp?iCurIdFrom=39&iCurIdTo=3&dAmt=1.00, (Correct as of 15 Sept 2009)

care of children up to the age of 8,[2] while the rights to temporary parental leave entitle working families to leave in emergency medical-related situations.[3] The various options available to working families are discussed below in the work-family classification of these rights.[4]

The coverage of the right to parental benefit is distinct from that of the rights to leave, since it only extends to insured working parents, meaning that while all working parents will be entitled to leave, they may not be entitled to income replacement. The right to parental benefit is regulated by Swedish social insurance legislation, which is aimed at providing *"financial security at various stages of a person's life"*.[5] This is reflected in the virtual universality of entitlement achieved by two methods of qualifying for parental benefit. In the first instance, there is a residence-based entitlement which grants qualifying employees the right to minimum and basic parental benefit. In order to qualify working parents must either be actual residents of Sweden or have lived or are likely to live there for at least one year, and have children.[6] If they satisfy this requirement they will be entitled to the basic level of parental benefit, i.e. 180SEK per day. The second form of parental benefit is

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[1] NIA 1962, Ch.4, 3 and 6 §§
[2] PLA, 1995, 3-7 §§
[3] *ibid*, 8 §
[4] See pp.242-287 below for further details
[5] Swedish Government, *Twentieth report on the implementation of the European Social Charter submitted by the Government of Sweden*, (2000), [WWW Document] URL: http://www.humanrights.coe.int/cseweb/FR/PDF/Sweden.pdf (Last Accessed: Sept 2009), p.10
[6] Socialförsäkringslag, 'Social Insurance Act', (1999:799), (hereinafter SIA 1999) [WWW Document] URL: http://62.95.69.15/cgi-bin/thw?%24%7BHTML%7D=sfst_lst&%24%7BOOHTML%7D=sfst_dok&%24%7BSNHTML%7D=sfst_err&%24%7BBASE%7D=SFST&%24%7BTRIPSHOW%7D=format%3DTHW&BET=1999%3A799%24, (Last Accessed: Sept 2009), as translated by http://www1.worldlingo.com/mywl/, Ch.1, 1 §, Ch.2, 1 § and Ch.3, 1 §

earnings related, and in order to be entitled to it, and temporary parental benefit, working parents must work in Sweden and have children.[1] Consequently, in order to qualify for parental benefit, parents in Sweden will either have to have lived there for at least one year (or be likely to do so) or work there, have a child, and leave paid employment temporarily in order to care for that child.[2] The majority of parents in Sweden should, therefore, be entitled to some forms of income replacement during parental leave, albeit that this may represent a nominal amount. This represents a distinct change in emphasis for work-family rights than was initially evident when maternity leave was first introduced. As noted above,[3] the focus at this time was on mothers as workers, attempting to compensate them from having been absent from work.[4] The focus now appears to have changed and be instead primarily concerned with the provision of care, and combining this with work commitments.

The job security of employees utilising any of these rights is also protected by the right to return to work *"to the same extent as prior to the leave period."* [1] It is not clear from the terms of the Act what exactly the right to return means, for instance, is it a right to return to the same job that the employee held prior to exercising the right, or is it merely the right to return to work on the same or similar terms as before including the same working hours? Only the latter

[1] SIA 1999, Ch.1, 1 §, Ch.2, 7-10 §§ and Ch.3, 4 §
[2] Försäkringskassan, *For families with children*, (Stockholm: Försäkringskassan, August 2007); Ministry for Health and Social Affairs, *Social Insurance in Sweden*, Factsheet No.20, (October 2005), [WWW Document] URL: http://famratt.com/pdf/eng_socialinsurance.pdf (Last Accessed: Sept 2009)
[3] At pp.231-238 above
[4] Hobson, et al., (1995), *op. cit.*, p.14

interpretation appears clear from the terms of the legislation. While the former interpretation would provide working parents with greater protection and job security, the legislation does ensure that working parents can re-enter the labour market without detriment irrespective of the extent of their leave.

Aims underpinning work-family rights

In spite of the gendered assumptions that surrounded the initial enactment of the right to parental leave, the aims underpinning this package of work-family rights have not changed since their initial introduction. The various aims frequently attributed to this package of work-family rights are: to enable and encourage mothers to remain in the workplace,[2] to enable and encourage parents to share the responsibility for childcare,[3] to act in the best interests of children,[4] to facilitate women's economic independence,[5] to make men's caring role more visible,[6] and primarily to achieve gender equality in the workplace and the family.[7]

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[1] PLA 1995, 15 §
[2] Berg, A., 'Commission proposes controversial parental leave changes', (eironline, 2 November 2005), [WWW Document] URL: http://www.eurofound.europa.eu/eiro/2005/10/feature/se0510103f.html, (Last Accessed: Sept 2009)
[3] *ibid*; Björnberg, U., 'Ideology and choice between work and care: Swedish family policy for working parents', 2002 Vol. 22(1) *Critical Social Policy* 33, (2002a) p.35
[4] Drew, E., *Parental Leave in Council of Europe Member States*, CDEG (2004) 14 Final, (Strasbourg: Council of Europe, 2005), p.20
[5] *ibid*, pp.20-21
[6] Björnberg, (2002a), *op. cit.*, p.35
[7] *ibid*, p.35; Hantrais, L., and Letablier, M-T., *Families and Family Policies in Europe*, (London and New York: Longman, 1996), p.40; Drew, (2005), *op. cit.*, pp.20-21; van der Lippe, et al., (2006), *op. cit.*, p.307; Malin, (1994), *op. cit.*, pp.1075-1076

The aims that initially underpinned the right to parental leave, therefore, continue to underpin current work-family rights. The question that remains is whether they have been more successful in achieving these objectives. This will be assessed by critically analysing the package of work-family rights in terms of the work-family classification model, comparing and contrasting, where relevant, the welfare state regime classifications, the pre-1995 position and comparable rights in the US and the UK.

Family care model: Rights holder

Within the current package of work-family rights there are three different categories and four different potential rights holders. The three main categories are: gendered rights, gender-neutral rights for working parents, and gender-neutral rights for working carers.

Gendered rights

This package of work-family rights contains two specifically gendered rights to leave. These are reflective of a number of packages of rights, the US being a particular exception to this, and are the rights to 'daddy's days' or paternity and maternity leave.[1]

The right to 'daddy's days' or paternity leave is not specifically labelled in this way in the PLA 1995 or the NIA 1962, coming instead under the ambit of temporary parental leave and benefit.[2] This form of leave is at times referred to as 'daddy's days' in the Swedish literature,[3] but the paternity leave classification is preferable here to refer to the right to leave with temporary parental benefit which is analogous to the UK right to paternity leave.[4] This will enable a distinction to be drawn between the different situations in which temporary parental benefit in more general terms can be drawn, and will allow easier comparisons to be made between the rights available in the different countries examined here.

The right to paternity leave was initially proposed alongside the re-conceptualisation of maternity leave,[5] and was enacted in 1980.[6] It entitles working fathers to 10 days leave with temporary parental benefit which can be used on the birth of their child.[7] While the right is generally reserved for working fathers, it can also be used by other carers in certain situations,[1] and in a gender-neutral way. In particular and in contrast with the right to maternity leave, the right to paternity leave is also available to adoptive parents. The right is gender-neutral in this instance, with adoptive parents

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[1] PLA 1995, 3-4 and 8 §§; NIA 1962, Ch.4, 10 §
[2] PLA 1995, 8 §; NIA 1962, Ch.4, 10 and 12 §§
[3] The Ministry of Health and Social Affairs, *Swedish family policy*, Fact Sheet No.14, (September 2008), [WWW Document] URL: http://www.iesf.es/fot/Family-policy-S-2003.pdf (Last Accessed: Sept 2009)
[4] Contained within: Employment Rights Act 1996, c.18, ss.80A-80E, (ERA 1996); Paternity and Adoption Leave Regulations 2002, SI No.2002/2788, Part 2, (PALR 2002); and discussed below in Chapter Nine: Fathers' Work-family Rights in the UK
[5] Proposition 1973:47, *op. cit.*, pp.21 38, and 42
[6] Gupta et al., (2006), *op. cit.*, p.6
[7] PLA 1995, 8 §; NIA 1962, Ch.4, 10 and 12 §§

being entitled to 5 days each unless they make alternative arrangements.[2] This is a rather significant distinction that is drawn between natural and adoptive parents. In the context of paternity leave it provides adoptive parents with equal rights in comparison with working fathers, recognising the care giving value of the right to leave at this time, irrespective of the gender of the caregiver. However, this is distinct from the right to maternity leave which remains gendered throughout.[3] The Swedish legislation, consequently, distinguishes between leave which is related to the physical experience of childbearing and that which is concerned with childcare. In this respect, it is similar to the FMLA 1993 which entitles a pregnant worker to medical leave for a medical reason relating to their pregnancy and both parents to family leave for the purposes of childcare.[4]

While the right to parental leave initially effectively abolished the gender-specific right to maternity leave,[5] this has been re-introduced and working mothers have effectively regained a specifically gendered right to leave.[6] This re-enactment of the right to a specific period of maternity leave was necessary to fulfil the minimum requirements of the Pregnant Workers Directive 1992 (PWD 1992).[7] In spite of the availability of parental leave for working mothers, which in theory entitled them to longer leave entitlements, because of the gender-neutral nature of the legislation it failed to comply with

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[1] See below under *Gender-neutral: working carer*, pp.249-253
[2] PLA 1995, 8 §; NIA 1962, Ch.4, 12 §
[3] See following section for more on this right
[4] FMLA 1993, § 102(a)(1)
[5] As discussed above at pp.231-238
[6] PLA 1995, 4 §
[7] EEC Directive 92/85 on the Protection of Pregnant Women at Work (PWD 1992), Art.8

the Directives requirements. Consequently, these objectives were achieved by entitling pregnant employees to a minimum of 14 paid weeks leave.[1] This right is, therefore, principally focused on the physical and medical aspects of childbearing and the unique role and experience of pregnant employees in this context. This is further reinforced by the right being reserved only to pregnant employees.

This is a distinctive feature of the Swedish right to maternity leave. The right is, therefore, not available to working fathers or adoptive parents as it is in some countries, for example the UK.[2] This is significant because it reinforces the gender-neutral nature of childcare by distinguishing the right to maternity leave, which can be viewed more as a health and safety measure than a right to childcare leave. This corresponds with the PWD 1992 which it implements and which was introduced under the ambit of health and safety.[3] This can be compared with the reasoning and decision in *Commission v Italy*,[4] discussed below in Chapter Seven.[5] In that case the ECJ upheld a distinction that had been drawn between adoptive mothers being entitled to the same rights to maternity leave as natural mothers, while fathers were not entitled to such leave in lieu of the working mother.[6] The justification in the case was based on stereotypical assumptions concerning parents' caring roles with maternal

[1] PWD 1992, Art.8
[2] UK has similar rights for adoptive parents which can be used by either, but not shared between, adoptive parents: ERA 1996, ss.75A-B; PALR 2002, Part 3
[3] Art.118 Treaty of Rome
[4] Commission v Italy [1984] 3 CMLR 169
[5] See pp.295-300 below for more details
[6] Commission v Italy, *op. cit.*, pp.184-185

care being favoured and supported by the legislation.[1] By limiting the period of maternity leave to the physical aspects of childbearing, this supports the idea that either working parent can care for their child, and challenges the notion that childcare is gender-specific.

The right to maternity leave is coupled with the possibility of wage replacement. Female employees utilising the right to maternity leave may claim parental benefit while on leave from 60 days prior to the expected date of childbirth,[2] but it is not necessary for them to do so.[3] This provides working mothers with the option of simultaneously utilising their rights to leave and parental benefit, or extending the overall length of parental leave by forgoing their rights to parental benefit at this time. In the context of the right to parental leave and benefit, the right to maternity leave with parental benefit can represent the mother's entitlement to 60 days non-transferable parental benefit.[4]

[1] See: McGlynn, C., 'Ideologies of Motherhood in European Community Sex Equality Law', 2000 Vol.6(1) *European Law Journal* 29, p.36pp.36 and 38-39; Caracciolo di Torella, E., and Masselot, A., 'Pregnancy, maternity and the organisation of family life: an attempt to classify the case law of the Court of Justice', 2001 Vol.26(3) *European Law Review* 239, p.244; and discussion of decisions in Chapter Seven: Mothers' Work-family Rights in the UK, pp.295-300
[2] NIA 1962, Ch.4, 4 §
[3] PLA 1995, 4 §; NIA 1962, Ch.4, 4 §
[4] PLA 1995, 4 §; NIA 1962, Ch.4, 4 §

Gender-neutral: working parent

The second category of rights holders contained within the legislation is the gender-neutral working parent. This rights holder has been the primary focus of the right to parental leave and is contained within the various rights to parental leave.

The four rights to parental leave (full with parental benefit, partial with parental benefit, full without parental benefit, and partial without parental benefit) are available to all working parents, including adoptive parents, enabling either or both to personally care for their child.[1] The former two rights to leave can be accompanied with parental benefit days which are, in theory, shared equally between the parents, although one parent can elect to transfer all of their entitlement to leave to the other partner with the exception of 60 days non-transferable leave which is reserved exclusively to each.[2] The rights to parental leave, consequently, contain gendered elements. However, the objective here is that they will further encourage the sharing of gender roles[3] and not undermine it, which is reflected in their equal extension to both working parents.

The right to temporary parental benefit is also available to either working parent.[4] The gender-neutrality of the rights holder is reinforced within the

[1] PLA 1995, 5-7 §§
[2] NIA 1962, Ch.4, 3 §
[3] See pp.242-243 above for the aims underpinning the legislation
[4] PLA 1995, 8 §, NIA 1962, Ch.4, 10 §

legislation, which entitles a working parent to the full amount of parental leave and benefit if they are either a single parent or the other parent is not entitled to the right to parental benefit.[1] This means that either parent could utilise the right to leave irrespective of the labour market attachment of the other parent. Working fathers, for instance, could, theoretically, utilise the entire leave period if their wife was not entitled to these rights. This appears to be distinct from the right to parental leave more generally which Björnberg argues can only be utilised by a working father if his wife was also in employment.[2] However, entitlement to parental benefit is individualised being based on each parents' own earnings.[3]

Gender-neutral: working carer

The final category of rights holder is the gender-neutral working carer. In the childcare context this is the unspecified alternative worker, who can utilise certain rights to temporary parental leave in lieu of the gender-neutral working parent or father.[4] There are a few circumstances in which this is possible. In the first instance, the right to paternity leave can be exercised by another person if the father is not entitled to parental benefit, has relinquished his right, the mother has died or the father is not allowed to

[1] NIA 1962, Ch.4, 3 §
[2] Björnberg, (2002b), *op. cit.*, p.94
[3] NIA 1962, Ch.4, 6 § – entitlement to parental benefit is based on the parents' earnings
[4] PLA 1995, 1 §; NIA 1962, Ch.4, 2 §

utilise the right.[1] In order to utilise this right, the alternative person must be covered by the insurance provisions, and be absent from work in order to support the mother and child following their return to the family home or to care for older children at this time.[2] Such a person is entitled to the same rights as a working father would have been in the circumstances.

Temporary parental leave and benefit can also be used by another person in certain circumstances. These circumstances relate to the two emergency childcare situations included within the legislation.[3] Similarly to the paternity leave situation, the alternative person must be covered by the relevant insurance provisions and be absent from work for one of these purposes instead of the child's parent. This means that other family members, such as the child's employed grandparents are able to utilise the right to leave in respect of their grandchildren if this is preferred.[4] This contrasts with the US position where it was more difficult to extend such rights to other caregivers, in spite of the realities of the caring arrangements.[5] This provides working families with greater choice and flexibility in relation to their care commitments.

The package of work-family rights in Sweden entitles working families, but predominately working parents, to various rights to leave that should enable

[1] NIA 1962, Ch.4, 10 §
[2] PLA 1995, 8 §; NIA 1962, Ch.4, 10 §
[3] NIA 1962, Ch.4, 11a §
[4] Kamerman, Sheila B., 'Parental Leave Policies: An Essential Ingredient in Early Childhood Education and Care Policies', 2000 Vol.XIV(2) *Social Policy Report* 3, p.11
[5] As discussed above, pp.173-182

them to address their competing work and care commitments. These centre on the care of children under 8 years of age, but also encompass older children up to 16, or 21 if disabled.[1] In addition, it reflects the changing nature of familial relationships and enables a broader range of persons with equivalent caring responsibilities to care.[2] This is particularly evident in the right to care leave.

The right to care leave in Sweden corresponds with the US rights to family leave,[3] and provides other working carers with the right to leave. Not unlike the US right to leave which is limited to persons who are seriously ill, the right to leave in Sweden is restricted to insured persons who are caring for another insured person who is terminally ill.[4] However, in contrast with the US right it is not restricted to persons within the nuclear family model. The category of persons included here extends beyond familial relationships and also encompasses close friends and neighbours.[5] This is significant because it reflects a wide understanding of the caring relationships that exist and persons that are relied upon for care.

The expansion of these rights to include a variety of care givers reflects the

[1] PLA 1995, 8 §; NIA 1962, Ch.4, 10, 10a, 10b, and 11 §§
[2] European Commission: Employment and Social Affairs, *Family Benefits and Family Policies in Europe*, (European Commission, 2002), p.81
[3] See Chapter Five for more details on the situations covered by the FMLA 1993, pp.173-182
[4] CLA 1988, 3 and 4 §§; For an overview of rights see also: Försäkringskassan, (Swedish Social Insurance Agency), *Närståendepenning*, [WWW Document] URL: http://www.fk.se/irj/go/km/docs/fk_publishing/Dokument/Publikationer/Faktablad/Närståendepenning.pdf, (Last Updated: Oct 2008), (Last Accessed: Sept 2009) as translated by http://www1.worldlingo.com/mywl/
[5] Försäkringskassan, (2008), *ibid*

reality of the growing diversity of working families.[1] In doing so, it adopts a wide interpretation of the family care commitments that working families face, which are not limited to the traditional nuclear family model but can also include their extended families. In addition, this expansion of the rights to alternative family members recognises the extent of the caring responsibilities that face working families with childcare commitments. The extension in the context of the right to paternity leave is a prime example of this. In this instance, enabling alternative family members to utilise the right to paternity leave recognises that the caring responsibilities facing working mothers at this time remain, and that the support that would have been provided by the absent father is still necessary. The legislation, consequently, attempts to create the same supportive and caring situation for mothers and newborns in these circumstances that would have existed if the father was utilising the leave.

Rights holder

Taken as a whole, the package of work-family rights is based on the gender-neutral working parent or carer. Even the gender-specific rights to maternity and paternity leave appear to reinforce the gender-neutral nature of childcare leave, with maternity leave in particular being reserved to the biological aspects of childbearing. This emphasis suggests that the focus within the

[1] See discussion of the diversity of the family in Chapter Two: The Work-family Conflict, pp.18-25

legislation has now changed from a focus on motherhood to parenthood.[1] The gender-neutrality of these rights corresponds with the family typology classification, which is based on a gender-neutral rights holder. In doing so, it reinforces the welfare state regime classifications of Sweden.[2]

Family care model: Care situations

While the first indicator has focused on the categories of working persons entitled to utilise the leave this second aspect of the family care model will examine the types of family care situations that are included within the legislation. Three distinct family care situations can be identified within the Swedish package of work-family rights, corresponding with the three classifications of care within the family care model indicator.[1] This reflects the diversity of rights and caring situations encompassed within the legislation and suggests that the previous indications of a family typology classification of Sweden work-family rights are appropriate.

Pre- and post-natal care

As noted previously, the rights to maternity and paternity leave are limited to the periods prior to and following childbirth, with a focus on childbirth and the

[1] Leira, (1993), *op. cit.*, p.333
[2] See Table 3.1, p.106 for an overview

entry of the child into the family. This is particularly reflected in the reservation of maternity leave, as noted above, to pregnant employees.[2] The right to maternity leave entitles pregnant employees to a minimum of 7 weeks full leave prior to the expected week of childbirth and 7 weeks after, with the two weeks following childbirth being compulsory.[3] The way in which this right has been enacted, in the context of the rights to parental leave, draws a clear distinction between leave which is to enable mothers to recover physically from childbirth, to breastfeed and care for the newborn, and that which is solely for the purposes of providing care for the child.

The right to paternity leave is also restricted to the post-birth period, but it is not specifically tied to the date of childbirth. Paternity leave and temporary parental benefit instead must be taken within 60 days of the child leaving the hospital.[4] This means that a father's right to paternity leave would not expire if the child was, for instance, ill and unable to leave the hospital for the first 3 months of its' life. This reflects the aims underpinning the system of parental leave, which include encouraging fathers to participate more fully in the care of young children.[5] By restricting the use of paternity leave to the period following the child's arrival in the family home, fathers are encouraged to participate in childcare. Once the child has left hospital the father can use the right in order to either care for the mother and the child, or to care for

[1] As displayed in Table 4.1, p.137
[2] At pp.243-248
[3] PLA 1995, 4 §
[4] NIA 1962, Ch.4, 12 §
[5] Proposition 1973:47, *op. cit.*, p.42

older children in the family.[1] These conditions are reflected in the UK right to paternity leave, and reinforce the purpose of the leave as supportive and not primary care.[1]

The right to paternity leave does not adopt a notably wider notion of family care than that underpinning the right to maternity leave. Both rights are restricted to a limited period of time when children are still very young. In doing so, the rights are related to the physical aspects of childbearing and the immediate effects that this has for working families. Neither right adequately addresses the issue of childcare more generally, nor do they enable working families to renegotiate their work and family lives following the birth of a new child. However, both of these rights should be viewed in the wider context of the package of work-family rights, which offers working families greater rights to care.

Care of young children

The various rights to parental leave complement the gendered pre- and post-birth rights, facilitating parental care over an extended period of time. The combinations of these rights to parental leave provide working families with a number of options regarding their work-family conflicts, potentially corresponding closer to the family focused notion of care. In the first

[1] Nyberg, (2003), *op. cit.*, p.17; International Social Security Association, *Social Security in Sweden*, (National Organising Committee for the 27th General Assembly, 2001), p.15

instance, working families are entitled to full-time parental leave with parental benefit until the child is 18 months old,[2] which can be utilised with or without parental benefit.[3] Instead of taking full-time parental leave, working parents are also entitled to take leave on a more flexible basis. The remaining two forms of leave cover such situations. The first entitles working parents to reduce their working hours while they are receiving a corresponding amount of parental benefit.[4] The second form of partial parental leave affords working parents with the right to reduce their working hours by a maximum of one quarter of their normal hours in order to care for their child until they reach the age of eight, or complete their first year of school.[5]

The gender-neutrality of the right to parental leave, and consequently the right to care for your child, is also reinforced by the reinstatement of the right to maternity leave alongside the right to paternity leave, since it entrenches the distinction between leave for childbearing purposes and childcare leave.

Family care

The final family care situation evident within the childcare legislation reflects a wider notion of care similar to that found within the FMLA 1993.[6] It is

[1] The implications of this will be discussed further under *Gender roles*, pp.270-286
[2] PLA 1995, 5 §
[3] *ibid*, 5 §
[4] *ibid*, 6 §; NIA 1962, Ch.4, 3 and 7 §§
[5] PLA 1995, 7 §
[6] As discussed above at pp.173-182

limited in much the same way as that legislation to illness and there are two distinct rights in this context. In the first instance, there is the right to temporary parental leave and benefit to be used in emergency situations where the employee has to personally care for a child. Three such situations are specifically envisaged within the legislation.[1] The first is to enable the employee to accompany their child to medical appointments.[2] A similar right also applies to parents of disabled children up to the age of 12.[3] The second situation is where the employee's child, under the age of 12, is ill. This right can also be used by parents of children between 12 and 16 if the child is ill and in need of special care and supervision, which should be supported by medical evidence, and to parents of children between 16 and 21 (23 if they attend school) who are disabled.[4] This enables working parents to personally care for older children, and reflects the continuing nature of childcare obligations.

The final situation is where the child's ordinary caregiver is ill or contagious, even if the employee would not normally qualify for temporary parental benefit because their child is less than 240 days old.[1] The reason why the age of the child is a specific condition here is that parents of children who are less than 240 days old are able to take full-time parental leave during this period, meaning that they should not normally need to utilise temporary parental benefit. The exception in the case of the illness of the caregiver,

[1] PLA 1995, 8 §; NIA 1962, Ch.4, 10 §
[2] International Social Security Association, (2001), *op. cit.*, p.15
[3] NIA 1962, Ch.4, 10a §
[4] *ibid*, Ch.4, 10b and 11 §§

however, covers the situation where the parent who is on parental leave with parental benefit is ill and the other parent is required to care for the child.

The right to temporary parental benefit is subject to a maximum of 120 cash benefit days available per year at 80% of qualifying income.[2] This is divided into a maximum of 60 days in the first instance, with it being possible to use an additional 60 days, but these extra days can only be used for the child's illness.[3] The leave can also be taken on a flexible basis, similarly to the right to parental leave. The amount of temporary parental benefit paid reflects the proportion of leave actually used by the employee.[4] This means that employees do not have to forgo an entire day's leave and benefit if they only need to use a proportion of it.

Leira notes that the inclusion of the right to leave to care for sick children, alongside the rights to parental leave, represents a renegotiation of the relationships between the family, the state and the market.[1] This certainly appears to be the case, which is further reinforced with the inclusion of older children within the legislation. These features of the package of work-family rights also reflects the family typology classification of care by recognising that caring responsibilities extend beyond the early stages of a child's life, and that there will be situations in which teenagers, for instance, will also require care and support. In this sense, the Swedish package of work-family

[1] NIA 1962, Ch.4, 10 §; PLA 1995, 8 §
[2] *ibid*, Ch.4, 12 §
[3] *ibid*
[4] *ibid*, Ch.4, 14 §

rights corresponds with the family typology and the previous assumptions concerning the Swedish welfare state.

In addition to these childcare rights there is the analogous right to leave with benefit for carers of persons who are ill,[2] which corresponds with the US rights to family leave for seriously ill persons.[3] The scope of the right to leave in these circumstances mirrors the right to temporary parental leave and benefit by enabling working carers to take leave for up to 60 days in relation to the person being cared for, 240 if the person has HIV,[4] while receiving a care benefit of 80% of their earnings.[5] However, not unlike the US right to leave which is limited to persons who are seriously ill, the right to leave in Sweden is restricted to insured persons who are caring for another insured person who is seriously ill.[6] This condition has the effect of limiting the leave available and does not appreciate the more general caring responsibilities that working persons may have for other dependents such as elderly parents. However, in contrast with the US right, and as noted above, it is not restricted to persons within the nuclear family model.[1]

The availability of this right for working carers is significant because it enables them to leave work for a period in order to provide non-child-related

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[1] Leira, (1993), *op. cit.*, p.335
[2] Contained within the CLA 1988
[3] See Chapter Five for more details on the situations covered by the FMLA 1993, pp.173-182
[4] CLA 1988, 4 §
[5] *ibid*, 5 and 8 §§; NIA 1962, Ch.3, 10a §; Johansson, L., *Services for Supporting Family Carers of Elderly People in Europe: Characteristics, Coverage and Usage: National Background Report for Sweden*, (Stockholm: Socialstyrelsen (The National Board of Health and Welfare, September 2004), p.35
[6] CLA 1988, 4 §; Försäkringskassan, (2008), *op. cit.*

care. However, there is very little commentary, or awareness of this right in the English speaking literature,[2] and the focus remains very much on working parents and childcare rights. Nevertheless, the, albeit limited, recognition that this provides working carers, alongside the various childcare rights, reflects a wide variety of caring responsibilities that working families experience. This further reinforces the family typology work-family classification suggested above.

Family care model: Swedish work-family rights

This analysis of the family care model indicator supports the conclusions drawn in the welfare state regime literature concerning the classification of the Swedish welfare state.[3] The rights provide comprehensive coverage to virtually all parents, and selected other carers, living and working in Sweden. They are afforded on a gender-neutral basis and also enable other family members to provide childcare.

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[1] Försäkringskassan, (2008), *op. cit.*

[2] The only pieces referring to the right are: Fujisawa, R., and Colombo, F., *The Long-term Care Workforce: Overview and Strategies to Adapt Supply to a Growing Demand*, OECD Health Working Papers No.44, (Paris: Organisation for Economic Co-operation and Development (OECD), March 2009), pp.42 and 44; Lysne, L., *Creating Strategies to Support Canada's Family Caregivers 2007 and Beyond: A Discussion Paper*, (Ottawa, Ontario: The J.W. McConnell Family Foundation, July 2007), p.11; Keefe, J.M., Fancey, P., and White, S., *Consultation on financial compensation initiatives for family caregivers of dependent adults*, Final Report March 2005, (Maritime Data Centre for Aging Research and Policy Analysis, Department of Family Studies and Gerontology, Mount Saint Vincent University, 2005), p.8; Keefe, J.M., *A project of the "Hidden Costs/Invisible Contributions: The Marginalization of 'Dependent' Adults" research program*, (October 2004), [WWW Document] URL: http://www.msvu.ca/Mdcaging/PDFs/Profile_Sweden_final.pdf, (Last Accessed: Sept 2009), pp.1 and 3; Johansson, (2004), *op. cit.*, pp.19, 34 and 35

[3] See Chapter Three: Welfare State Regimes and the Work-family Conflict generally and Table 3.1 at p.106 for an overview

While Sweden, like the US, adopts a primary childcare focus, it also attempts to reflect some of the other caring commitments that working families' experience. This is evident in the various rights to care which reflect the changing caring responsibilities of working families. From the intensive caring commitments that follow a child's entry into the family,[1] to the on-going caring commitments that working families have for young children,[2] to the emergency care situations that working families may experience throughout the course of their working lives,[3] this package of work-family rights in principle attempts to support working families at each stage. This is indicative of the family typology work-family classification since the legislation offers an integrated package of rights, available to a variety of carers, covering a range of caring situations.[4]

While it is apparent that these rights are focused predominately on families with children, the legislation is underpinned by a second equality objective. This is equality between those families with and without caring responsibilities.[1] By providing them with the ability to care, and supporting them financially while doing so, the legislation recognises the value of care giving and the need to support working families and their caring commitments.

Initial observations can be made regarding these characteristics of the

[1] Maternity and paternity leave
[2] The rights to parental leave
[3] Temporary parental leave and care leave
[4] Table 4.1, p.137

Swedish work-family rights. In the first instance, they suggest that there is a close relationship between the welfare state classifications of Sweden and the work-family typologies underpinning the legislation. Secondly, it could be assumed that the legislation does enable working parents to address their work-family conflicts, by offering an extensive package of work-family rights. Finally, it could be suggested that the gender-neutrality of the legislation facilitates a renegotiation of gender roles. The accuracy of these initial observations will be challenged in the subsequent sections analysing the working family model and the division of gender roles.

These conclusions are to an extent supported by comparative research, which examined the right to parental leave in Sweden and Finland in terms of Esping-Andersen's welfare state analysis model.[2] The report concluded that Swedish parental leave legislation protects women against the social risk of childbearing, by enabling them to combine childbearing with labour market employment, and also that it reduces the burdens facing working parents by enabling them to focus on their family responsibilities while utilising parental leave.[3] This suggests that the legislation does address its equal treatment objectives by facilitating female employment, and equality between those families with and without caring commitments. However, this is questionable given that the working mother continues to be identified as the person combining work and caring commitments, suggesting a continuation of

[1] Peer Review, (2004), *op. cit.*, p.1
[2] Schleutker, E., *Is it commodification, de-commodification, familialism or de-familialization? Parental leave in Sweden and Finland*, (WiP Working Paper Nr.31-2006, 2006), pp.7-15
[3] Schleutker, (2006), *op. cit.*, pp.28-31

traditional gendered roles. The subsequent analyses of the working family model and the division of gender roles will examine this issue further.

Working family model

The previous indicator suggests that the package of Swedish work-family rights is based on the family typology understanding of family care. The emphasis on equality and gender-neutral rights to leave, in particular, suggest a similar classification of the working family model underpinning the legislation. Such a classification would suggest that the legislation supports the dual earner-carer working family model.

Such a categorization of the working family in Sweden is consistent with the welfare state regime literature.[1] In addition, the presence and support for the dual earner-carer working family has been taken for granted within this state, with it being assumed that both partners take an active role in family care.[2] This is further supported by Björnberg who argues that this family model was supported within the legislation which had *"a direct influence on individual choice concerning employment and family."*[3] There is, consequently, a presumption that there is support for the dual-earner working family within Swedish work-family legislation.[4]

[1] See Table 3.1, p.106 above
[2] Hantrais, (2004), *op. cit.*, p.184
[3] Björnberg, (2002b), *op. cit.*, p.94
[4] Drew, E., 'Changing Family Forms and the Allocation of Caring', in E. Drew, R. Emerek, E.

This classification is further supported in the objectives that have been advanced as underpinning Swedish work-family legislation.[1] One in particular is that it is to enable working parents to leave the labour market in order to provide personal care for their child.[2] León's interpretation of social democratic states is also consistent with this. She argues that addressing the work-family conflict is a social and political issue within such states, thus reinforcing the central role of the state and the greater levels of support that appear to be found within these states.[3]

All of these classifications and interpretations appear to endorse the presence and support for the dual earner-carer working family model underpinning work-family rights. The key question here is the extent to which the legislation enables working families to balance their work and family commitments, and central to that question are the issues of choice and flexibility.

Choice and flexibility for working families

One of the identifying characteristics of the Swedish welfare state has been

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Mahon, (Eds), *Women, Work and the Family in Europe*. London: Routledge, 1998), (1998b), p.28

[1] See pp.242-243 above

[2] European Commission, (2002), *op. cit.*, pp.6 and 82

[3] León, M., 'Welfare State regimes and the social organization of labour: Childcare arrangements and the work/family balance', 2005 Vol.53(2) *Sociological Review* 204, pp.210-211

"to maximise personal choice and flexibility."[1] This appears to be reflected in the framework of the parental work-family rights, which are underpinned by the aim of shared responsibility for care.[2] In the first instance, working families are entitled to full-time parental leave with parental benefit until the child is 18 months old.[3] This right is not dependant upon the parent receiving parental benefit at the time,[4] which means that a working parent can utilise full-time parental leave even if they are not entitled to parental benefit or wish to save their entitlement and draw it in relation to another form of leave.[5] Working parents are, consequently, given a wide degree of control over their rights and the arrangement of leave and pay. While a working parent can be on full-time parental leave and not use parental benefit, the reverse is not true. If a working parent is receiving full parental benefit then they are entitled to full parental leave, which they must take.[6] This reflects the compensatory nature of parental benefit in terms of wages lost and distinguishes it from a childcare/childbirth bonus.

Instead of, or in addition to, taking full-time parental leave, working parents are also entitled to take leave on a more flexible basis. The remaining two forms of leave cover such situations. The first entitles working parents to reduce their working hours by three quarters, a half, one quarter or one eighth while they are receiving a corresponding amount of parental benefit.[7]

[1] Hantrais, (2004), *op. cit.*, p.201
[2] Björnberg, (2002a), *op. cit.*, p.46
[3] PLA 1995, 5 §
[4] *ibid*
[5] Such as partial leave with parental benefit, *ibid*, 6 §
[6] NIA 1962, Ch.4, 5 and 7 §§
[7] PLA 1995, 6 §; NIA 1962, Ch.4, 3 and 7 §§

This means that working parents can extend the length of their parental leave period to suit their own preferences and/or responsibilities. In addition, this also enables both parents to care for their child at the same time in the child's life, which would not otherwise have been possible since only one working parent is entitled to claim parental benefit at a time.[1] However, if both parents use parental leave and benefit in this flexible way, both can care for their child at different times of the day or week,[2] enabling them to share the responsibility of childcare.

The right to care leave and benefit can also be utilised on a similarly flexible basis. Carers can either receive benefit on a full-time, half-time or quarter-time basis.[3] This also enables working carers to combine working and caring responsibilities, and ensures that they do not lose any of their entitlement to leave and benefit because they are caring for someone on a more flexible basis.

The second form of partial parental leave affords working parents with the right to reduce their working hours by a maximum of one quarter of their normal hours in order to care for their child until they reach the age of eight, or complete their first year of school.[4] This again enables working parents to have more choice and control over their work and family responsibilities, although the right in this instance is unpaid. The effect of this legislation is

[1] NIA 1962, Ch.4, 16 §
[2] Björnberg, (2002b), *op. cit.*, p.94
[3] CLA 1988, 7 §
[4] PLA 1995, 7 §

that working families are not restricted to a prescribed childcare leave formula and can change the arrangements of their parental leave at different times to suit their different childcare responsibilities.

These rights to parental leave, prima facie, present working parents with a number of options, and a great deal of choice and flexibility regarding their work-family conflicts. For instance, working parents could utilise the right to full-time parental leave with each drawing 240 days parental benefit. Alternatively, one parent could use full-time parental leave for 240 days while the other uses their 240 days on a part-time basis. Another possibility could be for parents to combine periods of full-time leave with periods of partial leave with and without parental benefit. The only limitation on the flexibility of parental leave utilisation is that it is subject to a maximum of three different blocks of leave within a calendar year, with reference to the year in which the leave began.[1] In addition, the length of the period during which leave can be utilised enables working families to use some form of leave until the child is settled in primary school, and various rights to temporary parental leave enable working families to also care for older children in emergency care situations.[2]

On the face of it, the rights to parental leave appear to offer working parents a notable amount of choice and flexibility, which have been key themes of

[1] PLA 1995, 7 §
[2] See details above, pp.255-260

this legislation.[1] However, the question that remains is whether or not this choice and flexibility extends to both working parents, or whether it presumes that one parent will adopt primary responsibility for care. In the first instance, it should be borne in mind that there are only 120 days of non-transferable parental benefit days, 60 for each parent,[2] with the remaining 360 being divisible between the parents in accordance with their own needs and desires. Working families may, consequently, only divide the non-transferable days equally and continue to adopt the traditional primary/secondary caregiver division of responsibilities with regards to the non-transferable period.[3] The payment of benefit during leave tends to reinforce this arrangement.[4]

The price of increased choice and flexibility that this package of rights offers is the reduction in household earnings. During the first 390 days parental benefit is paid at the most generous rate of 80% of the employees' income.[5] While working families will experience a drop in their income at this time, the compensation level remains relatively high and should not discourage utilisation.[6] The remaining 90 days, however, are paid at the minimum rate of 180SEK per day,[7] which may have a more negative impact on utilisation rates. However, it is not the compensation levels, as such, that are a problematic feature of this package of work-family rights in terms of genuine

[1] Proposition 1973:47, *op. cit.*, pp.20 and 38
[2] NIA 1962, Ch.4, 3 §
[3] Björnberg, (2002a), *op. cit.*, pp.35-36 and 47
[4] See *Utilisation rates* section below, pp.281-285 for details
[5] NIA 1962, Ch.4, 6 §
[6] Actual utilisation rates will be discussed below in the *Utilisation rates* section, pp.281-285
[7] NIA 1962, Ch.4, 3 and 6 §§

choice and flexibility, but the effect of their extension over the range of rights on offer.

This is particularly the case given the optional nature of the use of parental benefit during the various forms of leave.[1] While this provides working parents with more choice in how they utilise the leave and the length of the period over which they do so, it necessarily results in a reduction in household earnings. If working parents decide to use the more flexible forms of leave, combining it with paid employment, then they may only be entitled to a proportion of parental benefit if they receive any at all. This may make it more difficult for both working parents to combine flexible working and periods of parental leave.[2] The legislation, consequently, assumes that working parents have a sufficient or another source of income which they can rely upon to support their utilisation of such leave, such as a full-time partner's wage. This suggests that the legislation assumes that the employee utilising the more flexible leave provisions has a partner and one who can/will support them finically while they are on leave.

In contrast with the assumptions regarding the working family model underpinning the legislation, this analysis suggests that the package of rights presumes that one partner will adopt the primary care giving role, while the other will provide supportive care. While this appears similar to the US

[1] PLA 1995, 5 and 7 §§
[2] Similar arguments were made regarding the right to unpaid parental leave in the UK: McColgan, A., 'Family Friendly Frolics? The Maternity and Parental Leave etc. Regulations 1999', 2000 Vol.29(2) *Industrial Law Journal* 125, pp.139-142; see Chapter Eight: Parents'

legislation,[1] the Swedish package of rights contrasts with the FMLA 1993, in this context. The Swedish rights are more specifically aimed at enabling working families to address the conflicts between work and family commitments, whereas the US legislation is primarily concerned with equality.[2] In addition, the Swedish legislation presents a framework of rights that enables both parents and other carers, in principle, to earn and care, although in practice it presumes one will undertake primary responsibility for combining care with work. The most appropriate classification of the working family model underpinning the legislation is, consequently, the one and a half earner-carer working family model, which is characteristic of the extended motherhood typology.

Gender roles

The stated aims of Swedish rights to parental leave include the objective of achieving gender equality between the sexes within the home and, in particular, in the workplace, through the sharing of childcare responsibilities.[3] This is supported by the preceding examination of the family care model underpinning Swedish legislation, which classified the package of work-family

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Work-family Rights in the UK for further discussion of this

[1] See pp.182-194 above for the Working family model classification of US legislation

[2] This reflects the different strands of feminist support for rights in both Sweden and the US. Specific rights were supported in Sweden, while equal rights were pursued in the US: Ginsburg, N., 'Sweden: The Social-Democratic Case', in A. Cochrane and J. Clarke, (Eds), *Comparing Welfare States: Britain in International Context*, (London: Sage Publications, 1993), pp.196-197

[3] See section above on *The emergence and development of the right to parental leave in Sweden*, pp.230-238; Hantrais and Letablier, (1996), *op. cit.*, p.40; Björnberg, (2002b), *op.*

rights as gender-neutral. Such a classification suggests that working parents will share the leave equally thus challenging traditional gender roles. However, the working family model analysis indicates that the arrangement of the package of rights does not facilitate shared earning and caring. Instead, while the legislation does provide working families with the framework to enable them to combine work and family commitments, it assumes that only one parent will primarily combine these roles. This section will critically analyse whether or not this package involves a renegotiation of gender roles, the gendered nature of the rights in practice, and the utilisation rates of working mothers and fathers.

Renegotiation of gender roles

The division of gender roles, and the separate spheres ideology,[1] is based on the distinction between labour market and family care activities. The stated goals of Swedish parental leave legislation are to challenge these divisions and renegotiate these traditional gender roles.[2] Some of the gendered welfare state regime literature supports such within the Sweden welfare state. The main thrust of this literature is that the Swedish welfare state is moving towards the dual earner-carer model,[3] and the division of gender

cit., p.95
[1] See Chapter Four: The Work-family Conflict and the Work-family Classification Model, pp.125-129
[2] As noted above pp.125-129
[3] Sainsbury, (1994b), *op. cit.*, p.167; Sainsbury, (1996), *op. cit.*, pp.70-72; Sainsbury, (1999), *op. cit.*, pp.86-87, 89-94 and 104; Hobson, (2004), *op. cit.*, p.75

roles that this implies.

There is consensus that the model of the worker inherent within Swedish legislation is being re-negotiated. Instead of the traditional unencumbered male worker model underpinning the legislation,[1] this model is expanding to represent a more realistic view of working persons. To this end there is an individualisation of rights and benefits,[2] and workers are increasingly being viewed as persons with earning and caring commitments.[3] Even the more generally termed *adult worker model* advanced by Lewis encompasses these competing commitments in the Swedish context.[4]

These classifications support the more common perceptions of the Swedish welfare state, as the progressive leader in the work-family context.[5] In this instance they reflect a distinct change from an approach which reinforced traditional gender roles, to one which attempts to challenge them. If this supposed change reflects a genuine shift in the identity and understanding of the worker underpinning Swedish legislation, then it could also suggest a genuine challenge to the division of gender roles.

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[1] James, G., *The Legal Regulation of Pregnancy and Parenting in the Labour Market*, (Oxon: Routledge-Cavendish, 2009), pp.17-18
[2] Sainsbury, (1994b), *op. cit.*, pp.162-164; Sainsbury, (1996), *op. cit.*, pp.63-67; Sainsbury, (1999), *op. cit.*, pp.86-87, 103 and 104; Drew, (1998b), *op. cit.*, p.28; Hobson, (2004), *op. cit.*, pp.75, and 77-78
[3] Leira, (1993), *op. cit.*, pp.332-333
[4] Lewis, J., 'The Decline of the Male Breadwinner Model: Implications for Work and Care', 2001 Vol.8(2) *Social Politics* 152, pp.163-164
[5] As noted above pp.230-238

Gendered nature of the rights

The support for the renegotiation of gender roles in Swedish legislation advanced above can be questioned upon closer examination of the work-family rights, which continue to be viewed in gendered terms. While the aims underpinning the package of work-family rights continue to be related to gender equality,[1] certain implications can be drawn from the way in which they are articulated. Kosich, for instance, noted the objectives underpinning parental leave legislation in the following terms:

> *"The purpose behind this legislation was to make it easier for women to combine the dual roles of wage-earner and mother. These rights were also given to men in the name of equality and in recognition of the need to increase their role in the family and in the rearing of the children."*[2]

While he goes on to argue that anyone can undertake childcare, mothers' rights are clearly identified as primary. Enabling them to combine these two life commitments is considered to be the primary objective of the legislation. However, extending these rights to fathers was only necessary in the interests of equality,[3] as was the case in the US.[1] Consequently, equal

[1] Original aims: Proposition 1973:47, *op. cit.*, pp.35 and 42; Current aims: see pp.242-243 above
[2] Kosich, (1992-1993), *op. cit.*, p.168
[3] *ibid*, pp.168-169

treatment objectives appear to be more important than challenging gender roles.

A similar interpretation was offered more recently by Berg who argued that that the right to parental leave was in fact aimed at helping *"women with small children to keep their connection with working life and give both parents the possibility of sharing responsibility for the care of their children."*[2] While the second aim is again consistent with the notion of gender-neutral parenting, the first aim is not. It presumes that mothers remain primary care givers, and that enabling them to address their work-family conflicts is the central goal of the legislation.

These interpretations of the aims underpinning the legislation are also reinforced in other gendered analyses of Sweden, which argue that traditional roles are instead reinforced, with the state and legislation focusing on working mothers. This was evident in the gendered classification of Sweden as a 'woman friendly' welfare state, reflecting that *"[m]others' dual role as child carers and workers* [was] *recognised by the state and withdrawal from the labour market to have children* [was] *common."*[3] This classification presented a particular approach towards gender equality. It argued that the approach adopted by Sweden was gendered, focusing on working mothers and their work-family commitments.

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[1] See Chapter Five: The US Welfare State and the Work-family Conflict, pp.182-183
[2] Berg, (2005), *op. cit.*, paragraph 2
[3] Windebank, J., *'To What Extent Can Social Policy Challenge the Dominant Ideology of Mothering? A Cross-National Comparison of Sweden, France and Britain*', 1996 Vol.6(2)

This is also reflected in Hobson's analysis of the Swedish welfare state.[1] This analysis of Swedish social policy in the period up to the 1990s identified it as falling within the gender participatory model.[2] This model is characterised by affording working parents childcare rights to enable working mothers to participate in the labour market.[3] Working mothers are thus able to combine work with caring commitments. The focus is, consequently, on support for, but divided gender roles, which is indicative of the extended motherhood work-family typology.[4] This classification reflected the attempts made by the state to achieve gender equality, but also recognised the limited impact that this had on working mothers, with working women continuing to undertake caring work while working fathers remained primary breadwinners.[5] Consequently, despite assumptions that these rights would result in gender equality in the labour market and the family, the gender equity model was not achieved in Sweden.[6]

Such an approach reflects the differences between men and women and attempts to achieve gender equality by providing working women, and mothers more specifically, with rights that value their difference. This approach is distinct from that usually associated with Sweden, where it is assumed that working parents share earning and caring roles. Such an approach instead reinforces the traditional gendered division of roles.

Journal of European Social Policy 147, pp.151 and 152
[1] Hobson, (2004), *op. cit.*
[2] *ibid*, pp.79-80
[3] *ibid*, pp.76 and 78
[4] See Table 4.1 above p.137
[5] Hobson, (2004), *op. cit.*, pp.79-80
[6] *ibid*, pp.81-82

Viewing these rights in gendered terms has two main implications for the package of work-family rights. By reinforcing working mothers as working carers it indicates to employers that mothers will be the primary recipients of parental rights. It has been argued that these assumptions have led to notable discrimination against women and sex segregation within the Swedish labour market.[1] The second main implication for working families is that it has the potential to undermine paternal care. Notably, both of these possible implications are objectives that the legislation was aiming to address.

However, while both of the aims noted above have previously been attributed to the right to parental leave;[2] more recently, it has been argued that the first is no longer one of the government's policy goals.[1] This would leave the second aim of facilitating shared parenting as the remaining objective of the parental leave legislation. The issue of whether or not the aim of facilitating mother's labour market participation continues to underpin the legislation is important because it is quite different from that of encouraging shared parenting and achieving gender equality between the sexes. It may encompass these other aims, but not necessarily. Instead it is primarily concerned with enabling mothers to combine both their work and family commitments in order to remain in the labour market. In order to determine which of these aims, if any, underpins the legislation in practice it is useful to consider certain characteristics of the package of rights such as financial

[1] Malin, (1994), *op. cit.*, pp.1063-1064
[2] See reference to aims of the legislation above, pp.242-243

compensation, and fathers' supportive role.

Financial compensation

Financial considerations, such as income replacement, are often advanced as a central factor influencing fathers' use of parental leave,[2] often in conflicting ways.[3] The current right to earnings related parental benefit, and care allowance, is capped at 80% of the parent's earnings, subject to a maximum income ceiling.[4] The maximum compensation level applicable in this instance is often lower than most parents' wages, particularly those of working fathers,[5] and may, therefore, encourage more mothers than fathers to utilise the right and/or the majority of the days,[6] particularly the minimum payment days which are set at a lower rate again,[7] and which represent the period most likely to be used by working fathers. This is particularly the case because working mothers are more likely to use leave corresponding with the period during which they are breastfeeding, leaving the latter part of the parental leave period for working fathers. However, since these days are paid at the minimum rate they are less attractive to working fathers.

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[1] Schleutker, (2006), *op. cit.*, p.19
[2] Bruning and Plantenga, (1999), *op. cit.*, p.205 and Caracciolo di Torella, (2000), *op. cit.*, p.458
[3] Björnberg, (2002a), *op. cit.*, p.41; The Equal Opportunities Ombudsman, *Parenthood and Parental Insurance, The Current Situation in Sweden*, (Stockholm: The Equal Opportunities Ombudsman, 2006), pp.7 and 18-19
[4] NIA 1962, Ch.4, 3 and 6 §§
[5] In 2006 women's wages were 92% (weighted value – 84% unweighted) of men's: Statistic Sweden, (2008), *op. cit.*, p.80
[6] Nyberg, (2003), *op. cit.*, p.19
[7] 180SEK: NIA 1962, Ch.4, 3 and 6 §§

In addition, because gainful employment continues to represent a very important aspect of the male identity and status, and correspondingly motherhood remains an integral part of the female identity,[1] working fathers' are generally more reluctant to undertake a more central caring role.[2] The insurance provisions relating to the payment of parental benefit, consequently, appear to reinforce the traditional division of gender roles.

These conclusions appear at odds with other research on working fathers and their role identity. Research undertaken by Björnberg published in 1998 showed that Swedish fathers were more likely to define themselves in terms of their caring as opposed to their earning roles, although it also conceded that their actual engagement was much lower than that of working mothers.[3]

Fathers' supportive role

One of the key elements of the package of work-family rights is the way in which mothers' caring commitments are *"non-negotiable"*, whereas fathers have greater choice regarding whether and how much (or little) leave they take.[4] Of course, there is the inherent question of whether or not fathers have any genuine choice regarding this decision, or whether this is wholly

[1] Björnberg, (2002a), *op. cit.*, pp.41-42; See Chapter Nine: Fathers' Work-family rights in the UK for more on this, pp.423-430
[2] Bruning and Plantenga, (1999), *op. cit.*, p.205
[3] Björnberg, U., 'Family Orientation Among Men: A Process of Change in Sweden', in E. Drew, R. Emerek, E. Mahon, (Eds), *Women, Work and the Family in Europe*, (London: Routledge, 1998), p.201
[4] The Equal Opportunities Ombudsman, (2006), *op. cit.*, p.6

dependant on mothers' choices. Nevertheless, this further reinforces the division of roles between working mothers and fathers, and the secondary role of the father in this context. This is particularly the case with regards to the right to paternity leave.

While the right to paternity leave enables both parents to be involved and to be on leave together at the very early stages of the child's life, enabling the family to bond together and both partners to be involved in care, it arguably undermines fathers' caring role at this time. This is to an extent reflected in the actual terms of the legislation which outline the purpose of the leave as being to assist the mother and the newborn, or to look after older children at this time.[1]

The emphasis on the supportive role of the father in the context of the UK right to paternity leave, which is expressed in analogous terms, has been criticised by James since it arguably presents the fathers' role as secondary in this context, thereby reinforcing the idea that the mother is the primary caregiver.[2] However, this interpretation of paternity leave often reflects the reality of the situation facing working families following the birth of a new child. The real issue here is the location of the right to paternity leave in the context of the package of work-family rights available to both working parents. Where this is the sole right to paid leave that working fathers are

[1] PLA 1995, 8 §; NIA 1962 Ch.4, 10 §
[2] James, (2003), *op. cit.*, part 4; James, (2006), *op. cit.*, p.278; James, (2009), *op. cit.*, p.44

entitled to, as was the case in the UK to which James was referring,[1] the argument is justified because there is no recognition of the value of the father's caring role. Where this is part of a larger package of rights, which entitle working fathers to additional rights to leave, this argument loses some of its weight.

The right to paternity leave in Sweden corresponds with the second example mentioned here since working fathers have equal rights to parental leave. However, this is potentially limited to the 60 non-transferable days of leave reserved for each working parent. This interpretation is further reinforced by fathers' rights being referred to in terms of their non-transferable leave days and not in terms of the equal division of parental leave days more generally.[2] Further support may also be found in the way in which these rights are used by working families.

Utilisation rates

The previous sections have presented conflicting views and interpretations of the gendered nature of these work-family rights to leave. The utilisation of the rights offers the clearest indication of the actual division of gender roles upheld by the legislation. This indicator shows how the rights have actually been utilised in practice, and the way in which working families have

[1] ERA 1996, ss.80A-80E; PALR 2002, Part 2
[2] This was the case, for instance, in Hobson, et al., (1995), *op. cit.*, pp.16-17, which

addressed their work-family conflicts.

When the right to parental leave was first introduced in 1974, working mothers used all of the parental leave benefit days and continued to draw about 95% of the days throughout the 1980s.[1] This division of leave between the parents was perhaps not entirely surprising since the leave period was previously solely available to working mothers and was relatively short. In 1974 the right to parental leave entitled working parents to 6 months of shared leave.[2] This was the same as the previous right to maternity leave. The length of the leave would have made it difficult for working parents to share, particularly if the mother was breastfeeding or was still recovering from the effects of childbirth.[3] The gendered division of parental leave utilisation indicates that these initial attempts of the government to facilitate the renegotiation of childcare responsibilities and reduce the inequalities between the sexes failed to do so. It could be argued that it gave working parents too much choice with regards to the division of parental leave, combined with few incentives to share the leave, for example there were no penalties for not sharing leave. The rights to non-transferrable, 'use it or lose it', periods of leave were not introduced until 1995.[1]

The legislation at this time, while claiming to address the issues of gender

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discussed fathers' rights in this way

[1] 95% in 1980 and 94% in 1985, Statistics Sweden, *Women and Men in Sweden, Facts and Figures 2006*, (Stockholm: Statistics Sweden, 2006) [WWW Document] URL: http://www.scb.se/statistik/_publikationer/LE0202_2006A01_BR_X10ST0602.pdf (Last Accessed: Sept 2009), p.45

[2] As discussed above at pp.231-238

[3] Caracciolo di Torella, (2002), *op. cit.*, p.458

equality,[2] in fact reinforced the traditional division of gender roles that was inherent within the previous maternity rights. In doing so, it reflected the extended motherhood typology, as opposed to the maternity to motherhood typology, by reinforcing these traditional roles. This classification is more appropriate here despite both models being underpinned by a similar sexual division of labour. The distinguishing characteristic of the extended motherhood typology is that work-family rights are strengthened, albeit through the reinforcement of traditional gender roles.[3] This is the case here because the re-conceptualisation of the right as a gender-neutral right to leave reinforced the idea that childcare was not necessarily a gendered activity, and that childcare was not incompatible with labour market participation. Nevertheless, the way in which it was implemented in practice did not challenge this gendered perception.

More recent evidence of fathers' utilisation rates shows an increase in the numbers of days and percentage of fathers drawing parental leave benefit. In 2007, of the 633,000 persons in receipt of parental cash benefit 44% were men.[4] This shows working fathers are increasingly utilising their rights to leave. One reason that has been advanced to explain this is the introduction of the non-transferable periods of leave. Studies on fathers' utilisation rates both before and after the introduction and extension of the right to a non-

[1] PLA 1995, 5 §; NIA 1962, Ch.4, 3 §
[2] As discussed above at pp.231-238
[3] See Table 4.1 above, p.137
[4] Försäkringskassan (Swedish Social Insurance Agency), *Social Insurance in Figures 2008*, (Stockholm: Försäkringskassan, 2008), p.8; This is the same division of days as was found in 2005: Försäkringskassan (Swedish Social Insurance Agency), *Social Insurance in Sweden 2006: Transit to Adulthood*, (Stockholm: Försäkringskassan, 2006), p.151

transferable period of leave support this view.[1] These studies showed that fathers' utilisation rates increased following these changes, but that this was predominately limited to the length of the non-transferable leave period.[2] This further suggests that fathers' rights are viewed in terms of these non-transferable periods of leave and not in equal terms with those of working mothers. This offers little support for shared gender roles and the family typology classification identified above in the context of the family care model indicator.

Fathers' increased utilisation should also be viewed in the context of the actual number of days leave used by working mothers and the number of working fathers using leave. In 2007 41.6% of working fathers used parental leave benefit days.[3] While a substantial number of fathers used this right, the majority continued not to exercise their rights. Even those who did use the right continued to use a small proportion of the days that the family were entitled to. In 2007 this figure was 21% of the total number of days drawn.[4] Despite the number of days drawn by working fathers increasing steadily since the introduction of the leave, it still falls far short of an equal division of childcare responsibilities and fails to meet the objectives of gender equality and shared responsibility for childcare.[5] One of the reasons for this may be

[1] Ekberg, J., Eriksson, R., and Friebel, G., *Parental Leave – A Policy Evaluation of the Swedish "Daddy-Month" Reform*, (Germany: IZA Discussion Paper No.1617, 2005); Eriksson, R., *Parental Leave in Sweden: The Effects of the Second Daddy Month*, Working Paper 9/2005, (Stockholm University: Swedish Institute for Social Research (SOFI), 2005)
[2] Ekberg, Eriksson, and Friebel, (2005), *ibid*, pp.11-12 and 16-18; Eriksson, (2005), *ibid*, pp.10-15
[3] Försäkringskassan, (2008), *op. cit.*, p.8
[4] *ibid*, p.8
[5] Noted above at pp.242-243

that fathers always have, and continue to, compete with mothers to use the leave that is transferable.[1] Support for this argument may be found in the way that working parents utilise the non-transferable right to temporary parental leave and benefit. In contrast with the right to parental benefit, utilisation of this right has consistently been more equally divided between the parents with 36% of the days being used by fathers 2007.[2] The research indicates that working fathers are more likely to utilise leave on a temporary basis in instances where they are not competing with working mothers for access to the right. These utilisation rates of working parents reinforce the suggestion that the extended motherhood typology underpins Swedish work-family rights.

This research on fathers' utilisation rates raises the question of why they continue to utilise their work-family rights in such small numbers. Workplace attitudes are often advanced as a main contributing factor to fathers' low utilisation rates.[3] As a consequence of outdated and traditional views on men and women's gender roles, fathers may feel unable to request such leave. Evidence shows that this is particularly the case for fathers who work in male dominated workplaces and who feel that such a request would be considered unacceptable or difficult if not impossible because of the nature of the job.[4] Such attitudes further indicate that the legislation has not achieved

[1] Malin, (1994), *op. cit.*, p.1058
[2] Statistics Sweden, (2008), *op. cit.*, p.44 – While this figure has dropped from 40% in 1974 it has remained consistently around 35%
[3] Björnberg, (2002a), *op. cit.*, pp.42-43; Bruning and Plantenga, (1999), *op. cit.*, p.205 and Caracciolo di Torella, (2000), *op. cit.*, p.458; Malin, (1994), *op. cit.*, pp.1078-1079
[4] Björnberg, (2002a), *op. cit.*, pp.42-43

the cultural change objectives originally underpinning it.

Division of gender roles

The division of gender roles underpinning Swedish work-family legislation again contrasts with the family typology classification of the family care model indicator. This indicator instead corresponds with the working family model classification. While the legislation affords working families a package of rights to address their work-family conflicts, they reinforce traditional gender roles. This was evident in the perceptions of the rights as primarily for the benefit of working mothers,[1] and fathers' low utilisation rates.[2]

While this classification of the division of gender roles is different from that underpinning the US package of rights,[3] similarities are again evidenced within their work-family classifications. The US package of rights is based on a similar division of gender roles, albeit one which offers limited support for working carers.[4] This is somewhat surprising given their distinct welfare state classifications,[5] and the distinct package of rights found within these states.[6] However, this was recognised to an extent by Lewis who identified that the US, Sweden and the UK were all based upon the adult worker

[1] See above pp.273-281
[2] As shown in the preceding section
[3] Which was classified as the maternity to motherhood typology, see pp.212-214 above
[4] See Chapter Five: The US Welfare State and the Work-family Conflict for more details
[5] See Table 3.1 for an overview of these, p.106
[6] *ibid*

model.[1] This model reflects the equality objectives underpinning the legislation within these states by treating working persons equally.[2] The difference between the approaches in the US and Sweden is that there is greater support and recognition for caring responsibilities in the latter system,[3] reflecting the extended motherhood typology classification here.

This classification is characterised by recognising working persons in terms of their relationship to paid work. It supports gender equality particularly in the context of female employment, which is explicitly recognised within this model. However, it also reflects the different emphasis placed on care with the Swedish package of rights recognising working persons as workers and carers – or in more realistic terms primarily as working mothers. This classification is significant because it not only reinforces the competing influences of Sweden and the US on the UK package of work-family rights, but also underscores the importance of equality within the legislation, a goal which the legislation has arguably failed to achieve.[4]

The work-family typology classification of Swedish work-family rights

The overall work-family typology classification of Swedish legislation is the extended motherhood typology, with elements of the family typology in

[1] Lewis, (2001), *op. cit.*, pp.163-164
[2] *ibid*
[3] *ibid*
[4] Björnberg, (2002), *op. cit.*, p.48

relation to family care. While the family care model analysis uncovered the potentially wide-ranging application of the rights and the various care situations which they encompassed, this was not reflected by the way in which the rights operated in practice. The limitations of the rights which inhibited genuine choice and flexibility across the package and reinforced a primary caregiver role were supported by the gendered nature and utilisation of the rights in practice. The working family model and gender roles indicators, consequently, identified the extended motherhood typology underpinning the legislation.

The work-family typology underpinning Swedish work-family legislation is, consequently, not the classification that might have been expected in light of the welfare state regime literature on Sweden.[1] Instead of representing the paradigm example of the family typology, the package of work-family rights instead continues to reinforce and reproduce a female model of care giving. To this end, while the legislation represents a notably different package of rights for working families from that available in the US,[2] the typology underpinning it is not markedly different. In addition, while working fathers have explicitly been a feature of work-family rights for over 30 years, they are still not achieving gender equality in family care. This suggests that it is more than simply a change in legislation and policy that is necessary to achieve shared parenting and challenge traditional gender roles.

[1] See Table 3.1 for an overview of these, p.106
[2] As seen in Table 1.1 above, p.14

Chapter Seven – Mothers' Work-family Rights in the UK

The previous chapters have identified that there are greater similarities between Sweden and the US than the welfare state regime analysis,[1] or a brief comparison of their rights,[2] would suggest. In addition, it is apparent that equality goals and a widening understanding of the family have underpinned the development of legislation within these states.[3] These work-family classifications have particular implications for the UK because of the historical similarities it has displayed at times with both states.[1]

In order to locate the UK work-family classification within the context of these two states the package of work-family rights in the UK will be divided into three chapters. These chapters broadly reflect the chronological development of the introduction of these work-family rights into UK legislation. This chapter focuses on mothers' rights, Chapter Eight examines parents' rights, and Chapter Nine analyses fathers' rights. By dividing the chapters in this way it should be possible to identify and analyse the development of the work-family classification of UK legislation.

The development of work-family rights in the UK has in many ways been tied with its obligations under European law. The influence of Europe is particularly apparent with regards to the development of mothers' and

[1] See Chapter Three: Welfare State Regimes and the Work-family Conflict, for an overview see Table 3.1, p.106
[2] See Table 1.1, p.14
[3] See underpinning aims noted above, US, pp.182-183 and Sweden, pp.242-243

parents' rights.[2] Given this influence it is at times appropriate and necessary to adopt a European focus when analysing the development of these rights. Such an approach is adopted in the examination of mothers' rights in this chapter, and parents' rights in the subsequent chapter.

The development of mothers' rights

The previous chapters identified the different ways in which work-family rights developed in the US and Sweden, although they were both aimed at achieving equality between men and women. In the US the formal equal treatment approach underpinned the legislation,[3] while in Sweden equality was pursued through specific rights.[1] The development of rights for working mothers in the UK, and the European, context can also be divided in these two ways. This chapter, consequently, reflects this division and analyses these two different contexts in which mothers' rights have developed and the work-family implications of each. These will be compared and contrasted with the welfare state classifications of the UK, and subsequently the typology underpinning the current rights available to working mothers. In this

[1] See Table 3.1, p.106 for an overview
[2] Council Directive 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, 76/207/EEC, (original version), (ETD 1976), 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), O.J. L204/23, (26/07/2006), (ETD 2006); EEC Directive 92/85 on the Protection of Pregnant Women at Work (PWD 1992); Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, O.J. 1996, L145/4, (PLD 1996)
[3] As identified in Chapter Five: The US Welfare State and the Work-family Conflict

respect a distinction will also be drawn between those rights introduced prior to and post 1997, reflecting the data used within the welfare state regime literature and the change in governmental regime in the UK.[2] This again presents an opportunity to challenge the relationship and relevance of the welfare state regime classification models in the work-family context.

Equal treatment in the context of mothers' work-family rights

Equality legislation relating to mothers' work-family rights was first introduced in the UK in 1975 with the Sex Discrimination Act 1975 (SDA 1975),[3] shortly before they were introduced at the European level in the Equal Treatment Directive 1976 (ETD 1976).[4] Under the SDA 1975 and ETD 1976 both men and women are subject to the equal treatment principle, offering them equal treatment and protection under the law.[5] There is one notable exception to this which is relevant in the work-family context, namely specific protection is given to women in relation to pregnancy.[1] Despite the chronology, the SDA 1975 gives effect to the ETD 1976 in UK law, and the interpretation and development of both are relevant to the identification and understanding of the work-family typology underpinning mothers' rights in the UK. The focus of development, however, has been at the European level where a number of

[1] As identified in Chapter Six: The Swedish Welfare State and the Work-family Conflict
[2] See Chapter Three: Welfare State Regimes and the Work-family Conflict, pp.80-109
[3] Sex Discrimination Act 1975, c.65 (hereinafter SDA 1975), prior to the introduction of the SDA 1975 was the Equal Pay Act 1970, c.41 (hereinafter EPA 1970), but it is not relevant to the current analysis
[4] ETD 1976, now ETD 2006
[5] SDA 1975, s.2(1); ETD 1976, Art.2(1), now ETD 2006, Art.1

cases, some of which have originated from the UK,[2] have been decided outlining the scope of the equal treatment principle.

The application of the work-family typology classification model is slightly more difficult in this context because there are no specific work-family rights, and the legislation does not extend rights but offers protection against unequal treatment.[3] Nevertheless, these provisions, and their interpretations, enable certain conclusions to be drawn regarding the work-family classification.

Family care model: Rights holder

The equality legislation was presented in gender-neutral terms and is consequently applicable to both men and women.[4] As noted above, both the SDA 1975 and the ETD 1976 established the equal treatment principle prohibiting all forms of sex-based discrimination.[5] However, there are two exceptions to this. Firstly, there is the positive discrimination exception contained within the ETD 1976, which allows discrimination in so far as it aims to remove *"existing inequalities which affect women's opportunities."*[6] The second exception is found within both pieces of legislation and is the

[1] SDA 1975, s.2(2); ETD 1976, Art.2(3), now ETD 2006, Art.28(1)
[2] Such as: Case C-32/93 Webb v EMO Air Cargo (UK) Limited [1994] 2 CMLR 729; Case C-394/96 Brown v Rentokil [1998] 2 CMLR 1049
[3] As reinforced in Case 184/83 Hofmann v Barmer Ersatzkasse [1985] ICR 731, p.737
[4] SDA 1975, s.2(1); ETD 1976, Art.2(1), now ETD 2006, Art.1
[5] ETD 1976, Art.2(1), now ETD 2006, Art.1; SDA 1975, s.1
[6] ETD 1976, Art.2(4), comparable provision now contained in ETD 2006, Art.3

most significant in this context. In terms of the ETD 1976 it allows Member States to adopt measures to protect women, *"particularly as regards pregnancy and maternity."*[1] The exception contained in the SDA 1975 is similar, but is stated in different terms as pregnancy and childbirth.[2] This raises the question of whether the legislation differs in terms of the scope of protection for working mothers. In the context of the SDA 1975 the specific reference to childbirth limits the exception to natural births and the periods directly prior to and following the birth itself. In this respect it is very much based on the physical, and so gendered, aspects of childbearing and not care giving in a broader sense. This is further reinforced in the annotated notes to section 2 where Marshall emphasizes the gendered nature of childbearing and men's inability to become pregnant as the justification for this exception.[3]

Guidance may also be drawn from the Irish case *Telecom Eireann v O'Grady*.[4] This case involved a similar analysis of the Irish Employment Equality Act 1977 which gave effect to the ETD 1976. The Act, like the SDA 1975, adopted the 'pregnancy and childbirth' terminology as opposed to the wider 'pregnancy and maternity' exception.[5] The point at issue here was whether or not the exception encompassed adoption, which would have been included under the ETD 1976.[6] The court here adopted a very narrow

[1] ETD 1976, Art.2(3), now ETD 2006, Art.28(1)
[2] SDA 1975, s.2(2)
[3] *ibid*, General Note to s.2, annotated by P.D. Marshall
[4] Telecom Eireann v O'Grady [1997] 1 CMLR 322
[5] Employment Equality Act 1977, s.16; ETD 1976, Art.2(3)
[6] As will be seen below pp.296-300 in the decision of Commission v Italy [1984] 3 CMLR 169, which was distinguished in this case, para.14

interpretation of the provision limiting childbirth to the actual birth of a child, thus, subjecting the right to adoption leave to the equal treatment principle.[1] While this was a decision of the Irish courts, it may offer some guidance on how the UK equivalent provisions may be interpreted.[2] This decision reinforces that such an interpretation would be quite narrowly focused.

The exception relating to pregnancy and maternity (or childbirth) does not guarantee women with any rights to maternity leave or such protections, but it enables states to grant these rights only to women without contravening the equal treatment principle. This contrasts notably with the US approach towards equality, which was very strictly based on equal treatment in all instances.[3] This type of provision or legislation would have been, in contrast, prohibited in the US as was seen in *Gilbert* and *Geduldig*.[4] While the effects of these decisions were overturned by the introduction of the PDA 1978, even this legislation would not have endorsed the equality approach of the European and UK legislation. The PDA 1978 only has the effect of equalising treatment for pregnant workers in comparison with temporarily disabled workers.[5] It solely prohibits discrimination against them.[6] While the SDA 1975 and the ETD 1976 are also only pieces of anti-discrimination

[1] Telecom Eireann, *op. cit.*, paras.15-16
[2] Such an interpretation appears to be borne out in practice given the way in which adoption leave has been introduced in the UK. See pp.338-340 below for further details on this right
[3] See discussion of equality legislation in the US and the FMLA 1993 in Chapter Five, The US Welfare State and the Work-family Conflict, pp.144-214
[4] Geduldig v Aiello et al., 417 U.S. 484 (1973); General Electric Company v Gilbert et al., 429 U.S. 125 (1978); See pp.149-155 above
[5] Civil Rights Act 1964, § 701(k) (§ 2000e(k) as codified) inserted by the Pregnancy Discrimination Act 1978, Pub. L. No.95-555, 92 Stat. 2076 (codified at 42 USC § 2000e(k)), s.1; See pp.155-164 above
[6] See pp.155-164 above

legislation, the focus is different. These pieces of legislation instead legitimate and uphold specific rights for working mothers irrespective of whether or not they are extended to working fathers or other working carers. This underscores the difference in equality approaches inherent within the different legal systems as influenced by the different feminist movements in each.[1]

While the legislation in these different legal systems is underpinned by similar equality goals, the main distinction is the way in which they have been interpreted and implemented in practice. In the European context, if legislation is deemed contrary to the equal treatment principle, it is the responsibility of Member States to equalise the treatment. This could result in the right being extended to those not receiving the treatment or it could result in the right being removed altogether to achieve equality. It is only necessary for the treatment to be equal; it does not guarantee the right to equally receive the particular treatment or right.[2]

In spite of the gender-neutrality of the equality legislation, and the goals of achieving equal treatment for both men and women, it appears to be focused particularly on women's experience. Certainly from the work-family perspective it is working women who are entitled to special rights relating to pregnancy and maternity (childbirth), which need not be extended to working

[1] See above at pp.146-147
[2] As reinforced in Hofmann, *op. cit.*, pp.737, although this was questioned to an extent in the opinion of Advocate General Slynn in Commission v France [1989] 1 CMLR 408, where he suggested that it was about extending rights to men and not removing them from women,

fathers. The legislation thus recognises women's specific and unique role at this time. The corollary of this is that legislation which encompasses rights beyond this period is subject, in theory, to the equal treatment principle. In many ways this is much closer to the US equality approach which would similarly require equalisation of treatment in this instance.[1]

The focus on working mothers and their care giving role, however, reinforces a single earner-carer within the working family model. This focus could undermine the principle of equality and choice in family care by reinforcing women as primary caregivers.[2]

Family care model: Care situations

The decisions of the ECJ interpreting Art.2(3) are concerned with the scope of the exception relating to pregnancy and maternity. This is relevant to the analysis of the care situations underpinning the legislation because they outline the scope of rights relating to pregnancy and maternity and, therefore, those outside the protection of equal treatment. Given the stated limitation of the protection, it could be assumed that the decisions should reinforce a narrow interpretation of these concepts relating to childbearing and the

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pp.412 and 414-415

[1] See discussion of US equality legislation above, pp.146-164

[2] Economic and Social Committee, *Opinion on the communication of the Commission to the Council concerning equality of treatment of men and women as regards access to employment, vocational training, promotion and working conditions*, (15.12.75), O.J. No C286/8, para.2; Economic and Social Committee, *Opinion on the economic and social*

mothers' physical recovery.[1] It could be assumed that any other questions of childcare related leave would mirror the equality approach underpinning US legislation.[2] The decisions of the ECJ, however, adopt rather different interpretations of the scope of this exception. Two such interpretations can be identified here – one focusing on maternity and maternal care situations, and the other on maternity and motherhood.

Maternity and maternal care

The first line of cases interpreting the Art.2(3) exception reinforced the importance of maternal care in the period following the child's entry into the family, irrespective of the circumstances. The authoritative decision in this regard was delivered in *Commission v Italy*.[3] In this case, the European Commission argued that section 6 of Italian Act 903,[4] entitling only mothers to the equivalent of maternity leave on the adoption of a child, was contrary to the ETD 1976.[1] The argument was based on the wording of the exception in Art.2(3), which referred specifically and exclusively to pregnancy and maternity. The thrust of this argument was that a strict interpretation of these terms would exclude adoption and other conditions relating to childcare more generally from the exception to the equal treatment principle. It was argued

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situation of the woman in the European Community, (12.06.76), O.J. No C131/34, paras.9-10

[1] As would appear to be the case in the SDA 1975

[2] In other words, be equal between men and women

[3] Commission v Italy, *op. cit.*

[4] Italian Act 903 of 9 December 1977 on equal treatment between men and women as regards employment, G.U.R.I. 17 December 1977, p.9041

that the right, therefore, should have been available to either parent.[2] Such an argument would have been accepted in the US under the equality legislation,[3] and is now the case under the FMLA 1993.[4] The Italian government, on the other hand, argued that this right should be assimilated with the right to maternity leave, which was included within the exception. The argument followed that since fathers were not entitled to the right to maternity leave, which was uncontested, and that this was merely an extension of that right, it was also included within the exception.[5]

Advocate General Rozès rejected the Italian government's argument, and instead considered the rights to be different in nature. The right to leave in relation to adoption was distinct from maternity leave since it was principally concerned with the child's interests, and was not for the purposes of protecting women who have recently given birth. This reasoning led the Advocate General to conclude that the right should have been available to both parents, and failing to grant it to fathers was contrary to the equal treatment principle.[6] This interpretation of the exception in Art.2(3) draws a clear distinction between maternity, which refers to care and protection in the post-birth period, and parenthood or childcare, which recognises the roles of both parents in providing care for their child. In doing so, this interpretation adopts the family typology notion of family care which is underpinned by a

[1] Commission v Italy, *op. cit.*, pp.171-173
[2] *ibid*, p.180
[3] See pp.146-164 above
[4] FMLA 1993, § 102(a)(1)
[5] Commission v Italy, *op. cit.*, p.180
[6] *ibid*, pp.180-181

gender-neutral rights holder and a wide range of caring situations, recognising the roles of both parents in this context. This interpretation is also consistent with the early goals of the proposed Directive, namely to enable working parents to balance their work and family commitments.[1] Irrespective of the right in question, this interpretation of the scope of the exception limits it to those periods which are biologically specific to working mothers and recognises that care giving is gender-neutral. This distinction between gender specific rights and childcare more generally is evident within the current package of rights in Sweden, where maternity leave, in principle, is limited to the period surrounding childbirth and the remaining gender-neutral parental leave covers the childcare period.[2] However, in spite of the logical analysis and apparently literal translation of the Directive offered by the Advocate General the ECJ adopted a different approach.

The ECJ, in contrast, accepted the Italian government's submissions and held that the legislation was not contrary to the ETD 1976 since its purpose was *"to assimilate as far as possible the conditions of entry of the child into the adopting family to those of the arrival of a newborn child in the family during the very delicate initial period."*[1] This interpretation contrasts starkly with the narrow interpretation adopted by Advocate General Rozès, and

[1] Proposal for a Council Directive on the implementation of the principle of equality of treatment of men and women as regards access to employment, vocational training, promotion and working conditions, OJ No.C124/2, (04/06/75), proposals make reference to 'family status' and contain no exceptions to the equal treatment principle; Economic and Social Committee, (1975), *op. cit.*, General comments: para.1; More, G., 'Equal Treatment in European Community Law: The Limits of Market Equality', in A. Bottomley (Ed), *Feminist Perspectives on the Foundational Subjects of Law*, (London: Cavendish Publishing Limited, 1996), p.268

[2] Parental Leave Act 1995, (SFS 1995:584), (PLA 1995), 4 and 5 §§

treats adoption as analogous to pregnancy and maternity.[2] There are two ways of viewing this interpretation. In the first instance, it can be understood as equitable since it offers adoptive parents the same rights as are afforded to natural parents. However, it can also be viewed as a missed opportunity to challenge traditional gender roles, instead reinforcing a particular notion of family care and gender roles.[3] Such an interpretation reinforced the perceived importance of the mother-child bonding relationship, devaluing the role of working fathers without justifying this distinction.[4]

This interpretation of the legislation exposes the use of the language used within the legislation. The inclusion of maternity as opposed to childbirth has enabled the exception to take on this wider meaning. Instead of focusing on the period unique to pregnant workers, this interpretation of the legislation has extended the notion of maternity. Some have argued that this has gone too far as to encompass motherhood more generally.[5] Such an extension is certainly clearer in subsequent decisions of the ECJ. While this understanding of the exception could appear equitable since it corresponds with the rights given to natural parents; it reinforces a particular notion of family care and gender roles, the latter issue will be discussed in more depth

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[1] Commission v Italy, *op. cit.*, pp.184-185, para.16
[2] McGlynn, C., 'Ideologies of Motherhood in European Community Sex Equality Law', 2000 Vol.6(1) *European Law Journal* 29, p.36
[3] *ibid*, pp.36 and 38-39; Caracciolo di Torella, E., and Masselot, A., 'Pregnancy, maternity and the organisation of family life: an attempt to classify the case law of the Court of Justice', 2001 Vol.26(3) *European Law Review* 239, p.244
[4] McGlynn, (2000), *ibid*, p.36, pp.38-39; Caracciolo di Torella and Masselot, (2001), *ibid*, p.244
[5] McGlynn, (2000), *op. cit.*, p.36

in the gender roles section below.[1]

Maternity and motherhood

The preceding analysis of the exception suggests that while the legislation offered specific protection for working mothers where the rights relate to pregnancy and maternity, where they address wider childcare concerns this would be subject to the principle of equal treatment. The case of *Hofmann v Barmer Ersatzkasse* was concerned with this very issue.[2]

This case challenged the German Law for the Protection of Working Mothers which entitled working mothers to two consecutive periods of leave following childbirth.[3] The first block of leave was an eight week compulsory maternity leave period directly following childbirth.[4] The second block was an additional period of maternity leave available from the end of the first leave period until the child was six months old.[5] This second period of leave was optional, unlike the first, and if the mother intended to utilise the leave she had to inform her employer four weeks before the end of her compulsory maternity leave period of her intention to do so. For the duration of the additional maternity leave period the mother was entitled to receive a daily

[1] At pp.318-323
[2] Hofmann, *op. cit.*
[3] Mutterschutzgesetz
[4] Schutzfrist – paragraph 6(1) of *ibid*
[5] Mutterschaftsurlaub – paragraph 8(a) of *ibid*, as amended by a Law of 25 June 1979

allowance from the state.[1]

In this case the parents agreed that the father would utilise the second period of leave, while the mother would return to work.[2] The arrangement itself was relatively unproblematic, with both parents and Hofmann's employer all in agreement. The problem arose when Hofmann attempted to claim the daily allowance from the relevant sickness fund, Barmer Ersatzkasse, and this request was refused on the basis that the right was only available to the child's mother.[3] Hofmann subsequently raised an action challenging this legislation and the case was eventually referred to the ECJ for a determination on two questions regarding the compatibility of the German law with the ETD 1976. The main question sought to determine if a period of additional maternity leave solely for mothers contravened the equal treatment principle.[4]

The main arguments in this case centred on the purpose of the leave, and so the types of care situations it envisaged. The Commission and Hofmann both argued that the leave was for the purposes of caring for the child and not to protect the mother. Consequently, placing it outwith the exception in Art.2(3) and subject to the equal treatment principle. In support of their argument they submitted that: the leave was optional; certain qualifying conditions had to be met; it ended if the child died; and it was not for the

[1] Mutterschaftsgeld – paragraphs 13(1) and (3) of *ibid*
[2] Hofmann, *op. cit.*, p.733
[3] *ibid*
[4] *ibid*, Advocate General Darmon: point 3, pp.733-734

purposes of protecting the mother on biological grounds, but was instead to reduce the burdens she faced combining work and care, which could easily be met by fathers undertaking the child caring role.[1] These factors, they argued, supported the notion that the leave was for caring for the child and not the mother's physical recovery. This being the case, they submitted that the legislation was contrary to the equal treatment principle since it did not afford working fathers the same rights.[2] Again this kind of argument and equality approach would have found favour in the US context, and now does in terms of the FMLA 1993.[3]

The German government on the other hand, argued that it was for the protection of working mothers in the post-natal period. They relied on expert evidence that showed that they needed this time to recover, and that only women suffered from the additional burdens of care and work which could only be relieved by affording them this right.[1]

The case, therefore, presented the ECJ with another opportunity to examine and interpret the issues of gender-neutral and shared parenting leave within the scope of the ETD 1976. The potential was there for the ECJ to consider and recognise a distinction between maternity and childcare leave and the importance of the role of the father in care giving and childrearing by affording both parents the right to equal treatment in relation to childcare-

[1] Hofmann, *op. cit.*, pp.745-746 and 762-763
[2] *ibid*, pp.734-735
[3] See discussion of legislation above in Chapter Five: The US Welfare State and the Work-family Conflict

related leave. The Advocate General and the ECJ, however, did not utilise this opportunity. In contrast, they both accepted the German government's arguments and decided that the leave fell within the exception in Art.2(3).[2]

In determining the scope of the exception they adopted a maternal approach to family care. In the first instance, they noted that this type of leave fell within the exception in Art.2(3) because: *"it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physical and mental functions have returned to normal after childbirth ..."*[3] This justification is entirely consistent with the exception within Art.2(3) since it focuses on those characteristics that are specific to pregnant and working mothers who have recently given birth. This interpretation does not appear to extend the notion of family care beyond the concepts contained within the exception, although the optional and conditional features of the right may. This reason must, however, be considered within the context of the judgment as a whole. In their judgment the ECJ also stated that this kind of leave would, in principle, fall within the exception in Art.2(3) so far as it attempted *"to protect a woman in connection with the effects of pregnancy and motherhood"*.[4] In contrast with the previous justification, this understanding of the exception is wider than the concepts of pregnancy and maternity expressed in the ETD 1976 and much

[1] Hofmann, *op. cit.*, pp.749-754 and 763
[2] *ibid*, pp.739-741 and 760-765
[3] *ibid*, ECJ: point 25, p.764
[4] *ibid***,** ECJ judgment: point 26, p.765; Advocate General Darmon: point 11, p.739

wider than the reference to childbirth in the SDA 1975.[1] The decision of the ECJ here again extends the exception further to include, this time explicitly, the wider concept of motherhood.

The implications of this interpretation were important, particularly in terms of the family care situations that they envisaged. Of particular significance were the implications for the development of the jurisprudence of the ECJ. Ellis, for instance, noted that:

> *"[t]he Court is apparently saying that different provision is permissible in connection with 'motherhood', which in ordinary language, is a state of very much longer duration than 'maternity'. The unfortunate innuendo here, of course, is that Article 2(3) may be going to be interpreted in future by the ECJ to legitimize other forms of preferential treatment for mothers which are based on outdated notions of parental role-playing within families."*[2]

The decision here, thus, has further entrenched the maternal care giving role in the period following childbirth. It is no longer limited to the physical aspects of childbearing but also includes early childcare. This is a rather interesting and significant suggestion, particularly in light of the current rights to maternity leave in the UK which entitle working mothers (or adopters) to 52

[1] SDA 1975, Art.2(2)
[2] Ellis, E., *European Community Sex Equality Law*, (Oxford: Oxford University Press, 1991),

weeks of maternity (adoption) leave, 39 of which are paid.[1] These rights have not been challenged and currently, and for the foreseeable future, they remain solely for working mothers, with the exception of adoption leave which could be used by either, but cannot be shared between adopters.[2] The question, and the danger,[3] that remained was the extent to which maternal care was going to be upheld in subsequent decisions of the ECJ.

This wide notion of maternal care is problematic for a number of reasons. In the first instance, entitling only mothers to a lengthy period of childcare leave could have a negative impact on their labour market participation or opportunities.[4] Secondly, it could make it difficult, if not impossible, for fathers who want to care for their children, or families who want to share these responsibilities.[5] However, the period of leave being challenged in *Hofmann* was relatively short, being restricted to the first 6 months of the child's life.[6] This leave was similar to the maximum period of leave found in the UK at that time.[7] Both of these leave periods could be argued to fall within the parameters of maternity, particularly if the mother was still

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p.170

[1] Maternity leave: Statutory Maternity Pay (General) Regulations 1986, S.I. 1986/1960, (SMP(G)R 1986), Reg.2 as amended by Statutory Maternity Pay, Social Security (Maternity Allowance), and Social Security (Overlapping Benefits) (Amendment) Regulations 2006, S.I. 2006/2379, (SMPSS(MA)SS(OB)(A)R 2006), Reg.3(2), and Reg.11(3A); Adoption leave: Paternity and Adoption Leave Regulations 2002, SI 2002/2788, (PALR 2002), Regs.18 and 20

[2] PALR 2002, Reg.15(2)

[3] As suggested by Ellis, (1991), *op. cit.*, p.170

[4] Kilpatrick, C., 'How Long is a Piece of String? European Regulation of the Post-Birth Period', in T.K. Hervey and D. O'Keeffe (Eds), *Sex Equality Law in the European Union*, (Chichester: John Wiley, 1996), p.93

[5] Kilpatrick, (1996), *op. cit.*, p.93

[6] Hofmann, *op. cit.*, p.732, 733 and 743

[7] Employment Protection Act 1975, c.71, (EPA 1975), ss.36(1) and 48(1)

breastfeeding.[1] However, this loses some of its weight when contrasted with the right to parental leave in Sweden which initially enabled working parents to share 6 months leave, although utilisation by fathers was relatively low,[2] this has been extended since its introduction.[3]

The importance of the length of the leave in question was further supported by Ellis who argued that had the leave period been longer, for instance a year or more, then such an approach might not have been adopted by the ECJ since such a long period of leave could not be considered as relating solely to maternity.[4] Nevertheless, subsequent decisions of the ECJ would appear to lend some support to her perspective. For instance, in the later decision in *Commission v France*,[5] Art.2(3) was interpreted more strictly.[6]

In that case, the European Commission argued that section 19 of the French Act 83-635 was contrary to the ETD 1976.[7] This section enabled existing agreements which provided specific rights to women to remain in force after the incorporation of the ETD 1976 into French law, but it also noted that they should subsequently be amended to comply with the ETD 1976. These agreements included rights such as: additional maternity leave, reduced

[1] Caracciolo di Torella, E., 'A critical assessment of the EC legislation aimed at reconciling work and family life: Lessons from the Scandinavian model?', H. Collins, P. Davies and R. Rideout (Eds), *Legal Regulation of the Employment Relation*, (London: Kluwer Law International, 2000), p.458
[2] See information on utilisation rates on pp.281-285
[3] Now 480 days leave with parental benefit: PLA 1995, 3-8 §§, National Insurance Act 1962:381, as amended up to and including SFS 2008:480, 3 §
[4] Ellis, (1991), *op. cit.*, p.170
[5] Commission v France, *op. cit.*
[6] Kilpatrick, (1996), *op. cit.*, p.90
[7] Commission v France, *op. cit.*, p.416-417

working hours for women over 59, early retirement, leave to care for sick children, extra annual leave corresponding with the number of children, extra days off on their child's first day of school and mothers' day, daily breaks in certain occupations, bonuses relating to second children for pension calculations and allowances towards to the cost of childcare.[1] The French government argued that the rights were compatible with the ETD 1976 because certain rights fell within the Art.2(3) exception, and the others were permitted by the positive discrimination exception in Art.2(4).[2]

In determining whether the rights fell within the exception in Art.2(3), Advocate General Slynn referred to the interpretation of the article in *Hofmann*.[3] In doing so, he reasoned that provisions relating to pregnancy or maternity could be retained, including the right to extra maternity leave *"since it seeks to protect a woman in connection with the effects of pregnancy and motherhood ..."*[4] Advocate General Slynn thus, adopted the reasoning and the wide interpretation of Art.2(3) advanced in *Hofmann*. However, he went on to argue that the exception must be interpreted strictly,[5] with the exception in Art.2(3) being restricted solely to situations which aim to protect women who have given birth and the relationship between them and their children. This interpretation even appears to be at odds with that in *Commission v Italy*, which extended these same exceptions to adoptive mothers.[6]

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[1] Commission v France, *op. cit.*, p.409
[2] *ibid*, p.411
[3] *ibid*, Advocate General Slynn: p.412; ECJ judgment: p.418, para.13
[4] *ibid*, Advocate General Slynn: p.412
[5] *ibid*
[6] As noted above at pp.296-300

While Advocate General Slynn reiterated the broader understanding of the exception in *Hofmann*, his application of the exception was much narrower. This was further reinforced by his interpretation of the *'special relationship between a woman and her child'* mentioned in the *Hofmann* judgment.[1] He argued that this refers solely to the period *"which follows pregnancy and childbirth, and not any later period."*[2] In doing so, he outlined the scope of the exception in more restrictive terms and ensured that it did not cover all forms of so-called maternity leave, or other rights afforded solely to mothers.[3] Where fathers could equally fulfil the same status as women, for example as parents or workers, then the equal treatment principle should be applied.[4] Advocate General Slynn consequently appeared to draw a distinction between specifically gendered rights and those which could be used by either parent.

The decision, thus, to an extent limited the potential scope of the interpretation of Art.2(3) in *Hofmann*.[5] However, this was not fully achieved because the case still permitted periods of additional maternity leave within the scope of the exception,[1] although it did suggest that there was a point at which this exception would no longer apply, and thereafter the equal treatment principle would dictate that there should be equal treatment in

[1] Hofmann, *op. cit.*, p.764
[2] Commission v France, *op. cit.*, Advocate General Slynn: p.412
[3] Examples are noted in Commission v France, *op. cit.*, Advocate General Slynn: pp.413-414; ECJ judgment: p.418, para.14
[4] Commission v France, *op. cit.*, p.413
[5] As adopted in these later cases; Case C-345/89 The Republic (France) v Stoeckel [1993] 3 CMLR 673, Advocate General Tesauro: pp.680-681, para.6; Case C-366/99 Griesmar v Ministre de L'Economie, Des Finances et de L'Industrie and Another [2003] 3 CMLR 5, p.127, para.44

relation to childcare as between women and men. Consequently, it remains the case that the decision in *Hofmann* still leaves open the question of when maternity does evolve into parenthood and therefore into a period when the leave can rightly be referred to as childcare leave and outside the exception contained in Art.2(3).[2]

Family care model

While the limitations of using the work-family typology classification model to analyse anti-discrimination legislation were noted above, certain conclusions can be drawn regarding the family care model in light of the scope of the legislation. In the first instance the identification of the rights holder has pointed towards the gendered working mother. While the legislation has been presented in gender-neutral terms, and the principle of equal treatment equally applies to working fathers, the scope of the exception in Art.2(3) has effectively rendered the principle redundant in the work-family context. This reinforces the very distinct approach adopted at the European level towards the objective of equality as compared with that inherent in the US legislation. Whereas the US legislation is based on the principle of formal equality,[3] the European approach has been substantive equality,[4] pursued through specific

[1] Commission v France, *op. cit.*, pp.413-414
[2] Ellis, (1991), *op. cit.*, p.172; Hervey, T., and Shaw, J., 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law', 1998 Vol.8(1) *Journal of European Social Policy* 43, p.51
[3] See pp.146-147 above for details
[4] Webb, *op. cit.*, Advocate General Tesauro, p.735; Case C-284/02 Land Brandenburg v Sass [2004] ECR I-11143, para.34; Case C-342/01 Merino Gomez v Continental Industrias

rights for working mothers. While the legislation had the potential to redress the gendered focus on childcare, it failed to do so. The maternal focus was also evident in the care situations encompassed within the exception.

The ECJ interpretation of Art.2(3) has resulted in a widening of the notion of maternal care, particularly that which is biologically and specifically related to mothers. This interpretation of maternity and motherhood has been extended beyond the post-childbirth period and has arguably encompassed general childcare periods.[1] However, underlying this is the assumption that at one point maternity leave does end and childcare leave begins. Because of this, albeit restricted assumption, the most appropriate family care model classification is the maternity to motherhood typology. This reflects the extended boundaries of the concepts of maternity and motherhood, but also recognises these are principally related to the post-childbirth period.

Working Family Model

The working family model indicator is more difficult to analyse in the context of anti-discrimination legislation. Since neither the legislation,[2] nor the decisions of ECJ introduced any work-family rights, certain inferences have to be drawn by comparing and contrasting the aims underpinning the

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Del Caucho SA [2004] ECR I-2605, para.37; Case C-136/95 Caisse Nationale d'Assurance des Travailleurs Salaries (CNAVTS) v Thibault [1998] 2 CMLR 516, p.528 and 534

[1] Particularly in the Hofmann case

[2] ETD 1976; SDA 1975

legislation with regard to the working family model that the interpretations of Art.2(3) have been based upon.

Work-family aims

While the ETD 1976 itself is primarily aimed at achieving equal treatment between the sexes,[1] prior to its adoption additional goals underpinned the proposed legislation. These goals were related to the working family model inherent within the legislation because they expressly related to the work-family conflict. In a memorandum concerning the legislation, the Commission noted that an additional objective was to enable working families to balance their work and family commitments.[2] This goal was reiterated in the Economic and Social Committee's Opinion on the proposed the legislation.[3] By including this goal within the legislation the Economic and Social Committee argued that it would recognise the importance of addressing both the inequalities that women may face within the workplace and their position within the family, which may affect this.[4] The inclusion of such an objective is notable and has wider implications than the gendered Economic and Social

[1] ETD 1976, Recital 7 and Article 1(1); Economic and Social Committee, *Opinion on the communication of the Commission to the Council concerning equality of treatment of men and women as regards access to employment, vocational training, promotion and working conditions*, O.J. No C286/8, 15.12.75, recital 9, General comments: para.1
[2] Proposal for ETD, (1975), *op. cit.*
[3] Economic and Social Committee, (1975), *op. cit.*, General comments: para.1; More, G., 'Equal Treatment in European Community Law: The Limits of Market Equality', in A. Bottomley (Ed), *Feminist Perspectives on the Foundational Subjects of Law*, (London: Cavendish Publishing Limited, 1996), p.268
[4] Economic and Social Committee, (1975), *op. cit.*, General comments: para.10; Specific comments: Chapter I, point 3

Committee's Opinion would suggest. Not only would the legislation be aimed at establishing equality in general terms, but also in the specific family context. This contrasts with the objectives underpinning the SDA 1975, which explicitly excluded such scope, focusing instead on equality in the public sphere.[1] Instead, it reflects the dual earner-carer working family model inherent within the family typology because it aims to achieve equality including within the work-family context.

The gender-neutral and shared parenting objectives were further reinforced by the views of the Economic and Social Committee concerning men's and women's roles within the family. The Committee noted that the ways in which society understands these roles are changing,[2] and that this will have an impact on family policy.[3] In addition, "*parenthood is a 'social function'*"; consequently, society should bear the burden of enabling working parents to meet their family commitments.[4] They consequently submitted that the division of roles within the labour market and the family were identified as concerns that had to be addressed within equality legislation, suggesting a potential renegotiation of traditional gender roles.[5]

Despite these initial and potentially far-reaching objectives, the ETD 1976 was adopted with much narrower stated goals, which focused solely on

[1] SDA 1975, General Note, annotated by P.D. Marshall
[2] Economic and Social Committee, *Opinion on the economic and social situation of the woman in the European Community*, O.J. No C131/34, 12.06.76, General comments: para.2.1.1
[3] *ibid*, Specific comments: Chapter I, point 9
[4] *ibid*, Specific comments: Chapter I, point 13(b)
[5] See following section for further discussion of *Gender roles*, pp.317-321

achieving equality between the sexes.[1] The only provision which touched upon the work-family conflict was the exception in Art.2(3), suggesting that all rights falling outside the scope of this exception are subject to the equal treatment principle. The cases interpreting this article provide some indication of the extent to which the previous work-family goals are inherent within the legislation.

Work-family application

If there remained any doubt about the work-family goals being removed from the legislation, they were quickly dispelled in the case law which adopted a clear consensus regarding the scope of the Directive. The issue of shared parenting roles was first advanced in *Hofmann*.[2] The submissions regarding this issue were roundly rejected by the Advocate General and the ECJ. In outlining the scope of the Directive they noted that:

> *"… a period of leave which is available to either of the two parents does not fall within the ambit of Council Directive (76/207/EEC). Offering a choice designed to promote a better distribution of responsibilities between the partners is, for the time being, a matter for member states alone …"*[3]

[1] ETD 1976, Recital 7, Article 1(1); More, (1996), *op. cit.*, p.268
[2] Hofmann, *op. cit.*
[3] *ibid*, Advocate General Darmon: para.8, p.736; ECJ: para.24, p.764

This interpretation of the scope of the Directive confirms the departure from the original work-family goals. It makes it clear that the Directive is aimed at achieving equality in the public sphere, with issues regarding the family or the work-family conflict being outside its scope and concern.[1] This was later confirmed in a number of cases following the decision in *Hofmann*.[2] Similar arguments were advanced by Naffine regarding the equal treatment legislation. She argued that women must show that they are the same as men in order to achieve equality in the public sphere.[3] Similar observations were made concerning the SDA 1975, where it was clearly stated by Marshall in the annotated notes to the legislation that it was *"not concerned with private relationships"*.[4] This reinforces the male breadwinner worker model underpinning the legislation, and the (male) breadwinner working family model that this implies. Such distinctions reinforced the separate spheres ideology and made it clear that the legislation was not for the purposes of addressing inequalities within the family nor was it for the purposes of addressing the work-family conflict.[5]

Similar views were presented by Hantrais and Letablier who argued that the public sphere focus of equality legislation failed to provide women with rights on the basis of their unpaid domestic work.[6] While this is certainly the case

[1] More, (1996), *op. cit.*, p.272
[2] Commission v France, *op. cit.*, ECJ para.11; Stoeckel, *op. cit.*, ECJ para.17; Fredman, S., *Women and the Law*, (Oxford: Oxford University Press, 1997), p.195; McGlynn, (2000), *op. cit.*, p.37
[3] Naffine, N., *Law and the Sexes: Explorations in Feminist Jurisprudence*, (Sydney: Allen and Unwin, 1990), p.137
[4] SDA 1975, General Note to the Act, annotations by P. D. Marshall
[5] See pp.125-129 for a discussion of separate spheres ideology
[6] Hantrais, L., and Letablier, M-T., *Families and Family Policies in Europe*, (London and New

since the rights are focused on the public sphere, it fails to recognise the weight given to mothers' domestic role within the legislation and subsequent interpretations of it.

This can be contrasted with the Swedish notion of equality which sought to address equal treatment through a renegotiation of work-family responsibilities.[1] In this instance, working persons were, to an extent, recognised as earners and carers, although this package also reinforced a single primary caregiver working family model.[2] It is notable that within both of these legal systems, and also in the US, the focus has been on achieving the objective of equality between men and women and not necessarily addressing the work-family conflict. While these aims may have been found together in certain instances,[1] that of addressing the work-family conflict has not been a primary or sole objective. Given that the legislation in question here is equal treatment legislation this is unsurprising, but it could have implications for the effect of the legislation in terms of the objectives, perceived or actual, that it attempts to achieve.

This has a number of implications regarding the working family model underpinning the legislation. Had the previous goals of addressing inequalities in the work-family conflict been enshrined within the legislation it would have suggested that it was based on a dual earner-carer working

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York: Longman, 1996), p.122

[1] See Chapter Six: The Swedish Welfare State and the Work-family Conflict for a discussion of these rights

[2] See classification above at pp.263-270

family model. However, by explicitly distinguishing these issues these interpretations ensure that the ETD 1976 cannot address these issues, and therefore, that they cannot determine whether or not they are underpinned by the equal treatment principle. In locating such leave within the exception to the equal treatment principle, the court reinforces the separation of accommodating caring responsibilities and achieving equality within the workplace.[2]

This narrow interpretation has been criticised in particular since it is perceived as offering *"the archetypal statement of the perpetuation of 'separate spheres' ideology in EC law"*.[3] Thus, in determining that these issues fall within the private sphere and consequently outwith the competence of the ECJ, they have been criticised for upholding the status quo, and reproducing and reinforcing the stereotypical divisions of traditional gender roles by legitimating the current sexual division of responsibility between the parents.[4] This supports the notion that the exception within the legislation is underpinned by the maternity to motherhood typology.

Within the case law there is also a reinforcement of the maternal care role. While this will be discussed further in the gender roles section below,[1] it is important to note that it presumes a single caregiver working family model. Furthermore, the equality legislation is based on a male model of work and

[1] See for instance, the aims underpinning Swedish legislation pp.242-243
[2] More, (1996), *op. cit.*, p.272
[3] Hervey and Shaw, (1998), *op. cit.*, p.50; McGlynn, (2000), *op. cit.*, p.37
[4] McGlynn, (2000), *op. cit.*, p.37; Caracciolo di Torella and Masselot, (2001), *op. cit.*, p.245

care commitments. The focus on equality in the public sphere and limited, gendered, intervention in the family and family care is indicative of this.[2]

These goals can be compared with the way in which the exception has been interpreted by the ECJ. In the first instance, all of the decisions reinforced the notion of maternal care, while refusing to address and/or support the sharing of earning and caring roles.[3] This is inconsistent with the dual earner-carer working family model inherent within the family typology, which is based on the principle that both working parents are able to earn and care. In contrast, the 'dominant ideology of motherhood' endorses a particular working family model.[4] This working family model is based upon the male model of work, with limited concessions being made to enable only working mothers to combine work with their family commitments.[1]

Gender Roles

The previous two sections have identified that the application of the equality legislation has been underpinned by the maternity to motherhood typology. Throughout this analysis the division of gender roles has arisen a number of times, questioning the extent to which the objectives of gender equality have been achieved. In particular, there is a strong argument that the case law

[1] At pp.318-321
[2] McGlynn, (2000), *op. cit.*, p.41
[3] Fredman, (1997), *op. cit.*, p.195
[4] See p.318-321 below for further discussion of this

reinforces the 'dominant ideology of motherhood' in European law.[2]

'Dominant ideology of motherhood'[3]

The 'dominant ideology of motherhood' is best expressed by Oakely as the ideology that: *"all women need to be mothers, that all mothers need their children and that all children need their mothers."*[4] This statement identifies three aspects to this ideology. The first is that the appropriate and archetypal role of a woman is as a mother.[5] Such a notion of the female ideology was identified in the research on Sweden and why mothers continue to take more parental leave than working fathers.[6] The second aspect identifies mothers' primary responsibility as caring for their child when they are young.[7] This is again is consistent with the understanding of the female typology noted in Chapter Six.[8] The third aspect upholds the relationship between a mother and her child as being essential for the child's well-being,[9] particularly the provision of personal care by the mother.[10] These three elements are found

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[1] McGlynn, (2000), *op. cit.*, p.41
[2] *ibid*, p.29
[3] Terminology developed by: Oakely, A., *Women's Work: The Housewife, Past and Present*, (1974) (Pantheon Books); and endorsed by McGlynn, (2000), *op. cit.*
[4] *ibid*, p.186
[5] Brannen, J., and Moss, P., *Managing Mothers: Dual Earner Households After Maternity Leave*, (London: Unwin Hyman, 1991), p.93; Fredman, S., 'European Community Discrimination Law: A Critique', 1992 Vol.21(2) *Industrial Law Journal* 119, p.127; Fredman, (1997), *op. cit.*, p.195
[6] See utilisation rates of working parents in Sweden, pp.280-287
[7] Windebank, J., 'To What Extent Can Social Policy Challenge the Dominant Ideology of Mothering? A Cross-National Comparison of Sweden, France and Britain', 1996 Vol.6(2) *Journal of European Social Policy* 147, p.148; McGlynn, (2000), *op. cit.*, p.31
[8] See p.287 above for the Swedish work-family classification
[9] McGlynn, (2000), *op. cit.*, p.31
[10] Windebank, (1996), *op. cit.*, p.148

within the Art.2(3) jurisprudence of the ECJ. The cases of *Commission v Italy* and *Hofmann* in particular have laid the foundations for the development and entrenchment of this theory at the European level.[1] The interpretations of the scope of the ETD 1976 adopted within these cases have been confirmed in subsequent decisions of the ECJ,[2] underscoring the significance of these interpretations and the extent to which they have become entrenched into European law.

The second element of this ideology is reflected in the *Commission v Italy* decision, where the courts assimilation of adoption with pregnancy and maternity has been argued to reinforce the perceived importance of the mother-child bonding relationship.[3] The decision in *Hofmann* also reinforces both the second and third elements of this ideology in the interpretation of Art.2(3) adopted by the ECJ.[4] The ECJ justified the application of the exception in this case on the basis that it was:

> *"legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of*

[1] McGlynn, (2000), *op. cit.*, p.29
[2] Brown, *op. cit.*, Advocate General Colomer, pp.1081-1082, para.75; Case C-421/92 Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband N db./O pf. eV [1994] 2 CMLR 681, p.694, para.21; Webb, *op. cit.*, p.742, para.20; Thibault, *op. cit.*, Advocate General Colomer p.524, para.21; ECJ judgment: p.534, para.25; Case C-32/01 Busch v Klinikum Neustadt GmbH & Co Betriebs-Kg [2003] 2 CMLR 15, ECJ: pp.503-504, para.42; Land Brandenburg, *op. cit.*, paras.32-34
[3] McGlynn, (2000), *op. cit.*, p.36
[4] *ibid*, p.38

employment."[1]

Inherent within this interpretation and this ideology is the sexual division of labour between men and women, with women's natural role being constructed as the primary caregiver and men's as the principal earner.[2] This corresponds with other criticisms regarding the way in which the legislation has been interpreted. Kilpatrick argues that *"there is a clear distinction to be drawn between perpetuating women's disadvantage by refusing to recognise their difference and perpetuating ideologies of the 'natural' role of women as the primary childcarer and homemaker."*[1] This interpretation of the scope of the Art.2(3) can be considered to have done the latter. By excluding additional leave reserved solely for mothers from the scope of the right to equal treatment, it thereby reinforced traditional family models and gender roles and ignored the value of gender-neutral parental leave in challenging these assumptions. These interpretations of the exception underscore and reinforce specific gender roles. While the goals of the legislation are stated in more general terms, it is apparent that the application of the exception has upheld the traditional division of gender roles. This is again consistent with the maternity to motherhood typology and reflects the equality focus of the legislation, which fails to address inequality in the work-family conflict.

[1] Hofmann, *op. cit.*, ECJ: point 25, p.764
[2] Smart, C., *The Ties that Bind – Law, Marriage and the Reproduction of Patriarchal Relations*, (London: Routledge Kegan Paul, 1984), p.xii; Windebank, (1996), *op. cit.*, p.149; McGlynn, (2000), *op. cit.*, pp.31 and 34

Work-family typology

In spite of the equality goals and the potential for equal treatment in childcare, along US lines, the work-family classification of this equality legislation has been identified as the maternity to motherhood typology. This analysis of the application of the legislation has identified the centrality of mothers' role and maternal care within the jurisprudence of the ECJ. This is particularly significant because it was the opportunity for working persons to be recognised equally in terms of their earning and caring roles, and to limit the legislation that was truly aimed at protecting women's biological condition prior to and following childbirth. What is also significant is that the more recent restatement of the ETD in 2006 reinstates this exception in the same terms,[2] continuing to legitimate the broad scope of the exception and the jurisprudence of the ECJ.

Specific rights for working mothers – pre-1997

Work-family rights in the UK, and subsequently in Europe, developed against and alongside this equality background. Again the UK took the lead,[3] with European rights not being introduced until the PWD 1992 was eventually enacted. While the UK introduced the right to pregnancy and maternal

[1] Kilpatrick, (1996), *op. cit.*, p.90
[2] ETD 2006, Art.28(1)
[3] Employment Protection Act 1975, c.71 (EPA 1975), s.34; Employment Protection (Consolidation) Act 1978, c.44 (EP(C)A 1978), s.60, later replaced by s.24 Trade Union

protection prior to such provisions being required by European law, it was still somewhat behind most other European states.[1] This fact has been described as *"a striking gap in the labour laws of the UK"*.[2] This 'gap' was filled by the Employment Protection Act 1975 (EPA 1975). The EPA 1975 was first piece of work-family legislation enacted in the UK, which introduced specific rights for working mothers. This Act introduced the right not to be dismissed for a reason relating to pregnancy,[3] and the rights to maternity leave and pay.[4] The Act entitled working mothers with two years continuous service to 6 weeks paid maternity leave,[5] paid at 90% of earnings,[6] with the right to return to work up to the 29th week following the date of childbirth.[7] The right to leave for antenatal appointments was also subsequently introduced in 1980.[8]

The introduction of the EPA 1975 was identified as a significant change to labour law within the UK, representing the *"Labour government's conception of the future (socialist) labour law."*[1] This suggests that the legislation was viewed as representing a major change to the landscape of individual employment rights, viewing working parents in terms not only of their labour market status but also their family commitments. In addition, it indicates a move towards the Swedish welfare state model, with their classification as an

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Reform and Employment Rights Act 1993, c.19, (TURERA 1993)
[1] Sweden, for instance, enacted such a right in 1901
[2] EPA 1975, General Note to sections 34-52, annotated by B. Bercusson
[3] *ibid*, s.34; EP(C)A 1978, s.60, later replaced by s.24 TURERA 1993
[4] *ibid*, s.35-38, 48-50 and Sch.3
[5] *ibid*, s.35(2), and ss.36(1) and (2)
[6] *ibid*, s.37(1)
[7] *ibid*, s.48(1)
[8] EP(C)A 1978 s.31A, as inserted by s.13 Employment Act 1980, c.41 (EA 1980)

ideal social democratic state.[2] In welfare state terms the corollary of this would be a move from limited state intervention in work and family life,[3] towards a greater emphasis and recognition of the work-family conflict.[4] The following work-family classification of mothers' rights pre-1997 examines the extent to which this perceived change was borne out in practice.

Family care model: Rights holder

The analysis of this first work-family indicator seems somewhat obvious given the gendered nature of the rights to maternity leave. Such rights are specifically limited to working mothers. However, the issue of the rights holder can be analysed in much broader terms in order to determine if the rights to maternity leave are restricted to natural mothers, or if they include either alternative caregivers or adoptive parents, as they do in both Sweden and the US.[5]

Within the legislation itself specific reference is made to leave as a consequence of pregnancy and confinement.[6] Maternity protections and leave were, consequently, tied very closely with the physical and biological

[1] EPA 1975, General Note, annotated by B. Bercusson – bracket in original
[2] See Table 3.1, p.106 for an overview
[3] den Dulk, L., van Doorne-Huiskes, A., and Schippers, J., 'Work-family arrangements and gender inequality in Europe, 1996 Vol.11(5) *Women in Management* 25, pp.30-31
[4] León, M., 'Welfare State regimes and the social organization of labour: Childcare arrangements and the work/family balance', 2005 Vol.53(2) *Sociological Review* 204, p.211
[5] FMLA 1993, § 102; PLA 1995, 5-8 §§. Although in Sweden this is limited to the rights to parental leave and not the specific maternity rights as noted above at pp.243-247
[6] EPA 1975, s.35(1); EP(C)A 1978, s.33(1); TURERA 1993, s.34; ERA 1996, s.72

aspects of childbearing, distinguishing it from a general period of childcare leave. In this respect, the legislation adopts a very narrow understanding of maternity, distinct from that found within the subsequent jurisprudence of the ECJ,[1] and in keeping with the SDA 1975 exception regarding pregnancy and childbirth.[2] While this is reflective of the maternity to motherhood typology classification of family care, it draws a clear distinction between leave that is for biological purposes and that which is for general care purposes.

Family care model: Care situations

While the work-family rights during the period prior to 1997 were specifically addressed to working mothers, three distinct care situations can be identified within the legislation. These are: rights during pregnancy, during the pre- and post-childbirth periods, and rights to childcare leave.

Pregnancy

The rights against unfair dismissal and to attend ante-natal appointments were specifically related to the pregnancy period.[3] The rights against unfair dismissal, however, were later extended to also include reasons relating to

[1] As noted above, pp.296-311
[2] SDA 1975, s.2(2)
[3] Unfair dismissal: EPA 1975, s.34; EP(C)A 1978, s.60, later replaced by s.24 TURERA 1993. Ante-natal appointments: EP(C)A 1978, s.31A(1) and (4) as added by the EA 1980,

maternity leave,[1] thus affording protection to all of the rights available to women at this time. These rights reinforced the health and safety focus of the rights holder by affording protection to women during this unique period.

More significant is the right to paid time off work in order to attend antenatal appointments. This right is also necessarily focused on pregnancy and the physical aspects of childbearing. While it is referred to as the right to time off work for ante-natal care, it only entitled pregnant employees to the right not to be unreasonably refused time off work in order to attend antenatal appointments.[2] The employer, after the first appointment,[3] was entitled to refuse such absence if the employee failed to produce documentation regarding her pregnancy and appointments.[4] What amounts to reasonable refusal was not outlined within the legislation itself, but the General Note to the section suggests that it might be reasonable to refuse if the appointment could be held outside of normal working hours.[5] This may, in particular, make it more difficult for part-time workers to exercise the right. The right was subsequently amended and the right as contained within s.55 of the ERA 1996 removes the references to 'unreasonable refusal' and instead 'permits' an employee to such time off.[6] The other conditions and rights to pay remain the same.[7] This is significant because it changes the right to a

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s.13
[1] EPA 1975, s.34; EP(C)A 1978, s.60, later replaced by s.24 TURERA 1993
[2] EP(C)A 1978, s.31A(1) and (4) as added by the Employment Act 1980, c.42, s.13
[3] *ibid*, s.31(A)(3)
[4] *ibid*, s.31(A)(2)
[5] EA 1980, General Note, annotated by C.D. Drake; Such an approach was adopted obiter in Gregory v Tudsbury Ltd [1982] IRLR 267, paras.8-9
[6] ERA 1996, s.55(1)
[7] ERA 1996, ss.55(2)-(3) and 56

positive right to take leave, reinforcing the importance of such appointments and care for pregnant employees.

The right is gender specific and does not entitle expectant fathers to attend along with their partners, although such a right has been advocated and is discussed below.[1] This could possibly have been justified by the difficulties in establishing whether or not male workers had pregnant partners and the existence of antenatal appointments,[2] but already it establishes a distinction between the role of mothers and fathers in relation to childbearing. The right focuses solely on the physical aspects of childbearing and, thus, the implications for working mothers, as opposed to the social aspects of having children and thus fathers' rights. In doing so, it indicates that fathers do not have a role in the pre-birth, pregnancy period, which lays the foundations for later distinctions between the caring roles of both parents.

Pre- and post-childbirth

The right to paid maternity leave was introduced, as noted above, as a means of protecting pregnant employees and those who had recently given birth.[3] When the right was first introduced it entitled working mothers with two years continuous service at the beginning of the 11th week before the

[1] See Chapter Nine: Fathers' Work-family Right in the UK, pp.436-439
[2] *ibid*
[3] McRae, S., *Maternity Rights in Britain: The PSI Report on the Experience of Women and Employers*, (London: Policy Studies Institute, 1991), p.1

expected week of confinement to 6 weeks paid leave.[1] The level of wage compensation was 90% of normal earnings,[2] and the leave could be taken from any point from the 11th week before the expected week of confinement.[3] The right was, consequently, very much concentrated on the immediate pre- and post-birth period encompassing those periods and situations which were specific to working mothers. The protection of pregnant employees was generally accepted as the purpose of the right to maternity leave.[4] Given the limited duration and timing of paid maternity leave, this was an appropriate and accurate understanding of its purpose at this time.

However, the effects of the right were far from universal. Those working mothers who could not comply with the continuity requirements of the legislation had no rights to maternity leave, and would have to leave their job in order to have and care for their child. This was reflected in McRae's study on maternity rights.[5] The right to paid maternity leave was later strengthened as a consequence of the UK government's obligations under the PWD 1992.

The PWD 1992 initially aimed to introduce the right to a minimum of 18 weeks paid leave at 80% of earnings for all pregnant employees.[6] This would have provided many working women with the right to maternity leave who previously did not qualify for it. The universality of the proposed right

[1] EPA 1975, s.35(2), ss.36(1) and (2); EP(C)A 1978, s.33(3), ss.34(1) and (2)
[2] EPA 1975, s.37(1); EP(C)A 1978, s.35(1)
[3] EPA 1975, s.36(2); EP(C)A 1978, s.34(2)
[4] McRae, (1991), *op. cit.*, p.1
[5] *ibid*, pp.65-66
[6] TURERA 1993, General Note, annotated by G. Thomas, 19-57

was more consistent with the health and safety protections that it sought to address. In addition, it would have provided them with a genuine right to leave following the birth of their child as compared with 6 weeks paid leave, available in the UK, all of which could have been used prior to the birth. However, the UK government opposed this version[1] and it was eventually watered down to a minimum of 14 weeks,[2] which still enabled pregnant employees to a greater period of leave, although did not go as far as some thought necessary.[3] Two weeks of the leave were compulsory and had to be used in the period following and/or before childbirth.[4] The leave was to be compensated at the same amount as state sickness benefit,[5] and leave could now be taken from the 6th week before the expected week of confinement.[6]

The minimalist classification of the UK was further reinforced by the UK's implementation of the PWD 1992. While the PWD 1992 provided for minimum benefits, thus, providing the UK with the opportunity to re-examine maternity leave provisions and enhance them in line with the most generous rights in Europe, the UK did not take this opportunity.[7] The right to 18 weeks leave was again supported in parliament but not accepted.[1] The UK

[1] House of Commons Hansard, *Trade Union Reform and Employment Rights Bill*, Col.156, (16 February 1993), (1993a), Ms. Eagle at Col.232
[2] EP(C)A 1978, s.35 as substituted by TURERA 1993, s.23
[3] House of Commons Hansard, (1993a), *op. cit.*, Ms. Quin, Col.226
[4] Dir 92/85/EEC Article 8(2); Maternity (Compulsory) Leave Regulations 1994, SI 1994/2479, Reg.2
[5] TURERA 1993, General Note, annotated by G. Thomas, 19-57; Dir 92/85/EEC Arts.8(1) and 11(4)
[6] EP(C)A 1978, s.34(1) as substituted by TURERA 1993, s.23
[7] House of Commons Hansard, *Second Reading of the Trade Union Relations and Employment Rights Bill*, Vol.214, (17 Nov. 1992), Col.168, Mr Frank Dobson at Col.186
[1] House of Commons Hansard, (1993a), *op. cit.*, Ms. Quin at Col.225-229 and 238-242

government instead adopted a minimalist transposition,[1] only increasing the period of paid maternity leave to the minimum required by the PWD 1992,[2] and creating a two-tier payment structure with the right to 90% income replacement being limited to the first 6 weeks and thereafter being paid at the same rate as statutory sick pay.[3] Nevertheless, these amendments extended the right to paid maternity leave to 14 weeks, reinforcing the health and safety objectives of the legislation.

Childcare

While the right to paid maternity leave reflected those health and safety aims, this was coupled with the right to unpaid leave which began to recognise a wider notion of mothers' caring responsibilities. The right to paid maternity leave in the UK was limited, however, qualifying working mothers were entitled to a potential maximum of 40 weeks leave,[4] which could begin from the 11th week before the expected week of childbirth[5] and which must end by the 29th week following childbirth.[6] Working mothers in the UK, thus, could potentially utilise a longer period of leave, covering a wider notion of family care and possibly including periods of childcare leave as well as strictly

[1] House of Commons Hansard, *Lords amendments to the Trade Union Relations and Employment Rights Bill*, (13 Jun. 1993), (1993b), Col.870, Ms Quin at Col.870
[2] TURERA 1993, s.35(1)
[3] EP(C)A 1978, s.35
[4] In order to qualify working mothers must have 2 years continuous service on the 11th week before the expected week of confinement: *ibid*, s.33(3)
[5] Later reduced to the 6th week: *ibid*, s.34(1)(b) as amended by TURERA 1993, s.23
[6] Right to return to work: Originally enacted in EPA 1975, s.48(1) and later restated in ERA 1996, s.79(1)

maternity leave periods. This can be compared with the Swedish system where both parents were entitled to share 6 months leave in the first instance.[1] The distinction between these two periods is an important one and refers to the difference between periods of leave in which either parent could care for the child, and those periods in which the mother is breastfeeding and/or requires in order to recover from the physical effects of childbearing.

The extension of the leave here reflects the wider understanding of maternal care adopted within the decisions of the ECJ,[2] which have been reiterated in relation to maternity leave under the PWD 1992.[3] This extension of the exception in Art.2(3) ETD 1976 to maternity leave in general terms is significant because it could subsequently justify the inclusion of long periods of maternity leave under this exception, which are actually periods of childcare leave. In doing so, not only does it reinforce mothers' stereotypical gender role, but it also undermines the principle of equality that the legislation was supposed to uphold.[4] It goes beyond the 'biological conditions' of the pregnancy and also recognises *'the special relationship between a woman and her child'*[1] by limiting this extended, optional and unpaid, period of leave to working mothers. The same arguments and criticisms advanced in *Hofmann* can be levelled against the three-tiered system of maternity leave in

[1] See above pp.231-238
[2] Noted above at pp.296-311
[3] C-411/96 Boyle and others v EOC [1998] 3 CMLR 1133, para.41; C-324/01 Merino Gomez *op. cit.*, para.32; C-116/06 Kiiski v Kamperee Kaupunki, 20 Sept 2007, ECJ, para.46; Commission v Luxembourg, [2005] 3 CMLR 1, para.32
[4] Caracciolo di Torella, E., 'Recent Developments in Pregnancy and Maternity Rights', 1999 Vol.28(3) *Industrial Law Journal* 276, p.281

the UK, and in fact were considered.[2] What is apparent here is a move away, limited as it was particularly since it was unpaid, from the health and safety protections to maternal care.

Family care model

Mothers' rights pre-1997 can, consequently, be classified in two ways. There were those rights which were available to all pregnant employees and related to their health and well-being both during pregnancy and after childbirth.[3] These rights corresponded closely with the types of care situations envisaged within the maternity to motherhood typology. The second set of rights was those which facilitated maternal care in the period following the childbirth period. While this form of leave extended beyond the post-birth period and could encompass care that may equally be undertaken by working fathers, it did not necessarily encompass the care of young children, although it does indicate a widening of the maternal care role. Given the limited access to the right in terms of the qualifying conditions and unpaid nature of the leave, in addition to the limited support afforded to working families on the mothers' return to work,[1] it can more appropriately be classified as falling within the maternity to motherhood typology also. It reflected this typology in the potentially broadening of the concept of

[1] Hofmann, *op. cit.*, p.764
[2] *ibid*, p.756
[3] Rights to leave for ante-natal appointments and to paid maternity leave
[1] EP(C)A 1978, General Note to s.45, annotated by B. Bercusson

maternal care beyond maternity to encompass other care situations.

Working family model

At the time when the legislation was enacted it was noted that working women adopted the same working patterns as working men.[1] While the legislation was based on the assumption and goals of equality, the focus again was equality within the workplace and not equality within family life. This has particular implications for the working family model underpinning the legislation suggesting that it was based on a dual earner working family model with both partners adopting similar roles. The right to paid maternity leave, consequently, reflected the equality context in which the legislation was introduced. It enabled working mothers to exit the labour market in order to care for children, thus recognising their unique position as pregnant employees and providing them with equal opportunities as compared with working fathers. This suggests that the underpinning goal of the right to maternity leave, and other mothers' work-family rights, was to enable women to participate in the labour market on equal terms with men. In this context, this was achieved by recognising the unique experience of working mothers and by attempting to redress the inequalities they faced by enabling them to have children without that conflicting with their labour market participation.[1] The same goals, notably, underpinned the US legislation which instead

[1] Employment Protection (Consolidation) Act 1978, c.44 (EP(C)A 1978), General Note annotated by B. Bercusson

adopted the wholly gender-neutral approach towards work-family rights.[2]

This presumption of dual-earning and equality would appear to correspond with the dual earner-carer working family model, since this is underpinned by shared earning and caring roles.[3] However, while working women may adopt similar working patterns to working men, this was not mirrored in shared caring rights. The only perceived parallels between the working parents' roles were, therefore, within the labour market. This reinforces the gendered model of the working person underpinning the legislation.[4] It views working persons in terms of their earning roles, with caring responsibilities only being recognised in terms of how they compromise the working persons' ability to work. The legislation, consequently, is underpinned by the (male) breadwinner working family model, which is inherent within the maternity to motherhood typology. It is underpinned by the presumption that workers enter the labour market unencumbered by caring responsibilities. Aside from aiming to complement equality between men and women,[5] through the specific protection for pregnant employees, the legislation fails to recognise the caring commitments that they had.[6] In doing so, the legislation reinforces the (male) breadwinner working family model, and the maternity to motherhood typology classification.

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[1] Fredman, (1997), *ibid*, p.205
[2] FMLA 1993, § 102
[3] See Table 4.2, appendix and pp.140-141
[4] See pp.121-125 above for more on the gendered nature of law
[5] PWD 1992, Recital 10
[6] Morris, A., and O'Donnell, T., 'Employment Law and Feminism', in A. Morris and T. O'Donnell (Eds), *Feminist Perspectives on Employment Law*, (Cavendish Publishing Limited, 1999), p.3; Morris, A., 'Workers First, Women Second? Trade Unions and the Equality Agenda', in Morris and O'Donnell, (1999), *ibid*, p.193

Gender roles

The provision of gender specific rights offering protection to working mothers was aimed at achieving equality between the sexes by providing women with the same access to opportunities as men, by enabling them to have children and return to work.[1] These equality based goals are somewhat inconsistent with the classifications of the previous two indicators. Both of these indicators pointed towards the maternity to motherhood typology classification of mothers' rights pre-1997. This is also reflected in the division of gender roles that the legislation reinforced. The (male) breadwinner working family model classification is indicative of the division of gender roles inherent within the legislation. This division represents the state's lack of engagement in the family as exemplified by the welfare state regime classifications of the UK.[2] This essentially leaves the question of the gendered division of labour to working families.[3] However, the lack of support for childcare in the legislation and by the state reinforced maternal care and the traditional division of gender roles. The legislation reinforced these gendered roles by failing to challenge the gendered division of labour within the family. It did so by only affording women the right to (paid) leave to care for their children in the early period of their lives.[1] In doing so, the legislation made it financially impossible for men to take leave instead, thus

[1] McRae, (1991), *op. cit.*, p.1
[2] As noted above in Chapter Three, pp.80-109; See also León, (2005), *op. cit.*, p.211; den Dulk et al., (1996), *op. cit.*, pp.30-31
[3] Lewis, J., 'Introduction: Women, Work, Family and Social Policies in Europe', in J. Lewis (Ed), *Women and Social Policies in Europe. Work, Family and the State*, (Aldershot: Edward Elgar Publishing Limited, 1993), p.4
[1] Fredman, (1997), *op. cit.*, p.194

also perpetuating the traditional division of gender roles.[1]

This model, as identified by Owens,[2] treats working persons as if they were male workers with no caring responsibilities. Such an approach is evident in equality legislation,[3] which seeks to equalise treatment without addressing the reasons for the difference in the first place. The caring commitments of working families are restricted to the physical aspects of childbearing. This was further supported by the exception to the principle of equal treatment in the SDA 1975, which excludes equal treatment with men in relation to pregnancy and childbirth.[4] This was limited, however, to equality within the workplace, as was noted earlier in the division of public and private relationships underpinning the legislation.[5] Within the legislation, this was reflected in the limited rights to leave, particularly paid leave, available to working mothers, which placed them in the same position as male workers, adopting a male model of work-family commitments. Such a model was outlined by Fredman as she argued that the right was underpinned by the male norm since it focused on the pre- and post-natal periods and did not recognise the caring responsibilities that working families would now face.[1] In this regard, it has been argued that the government has no role in facilitating or supporting working parents and their childcare commitments.[1] However, in doing so, the legislation reinforced the male norm and the

[1] Fredman, (1997), *op. cit.*, pp.194-195
[2] Owens, R.J., 'Working in the sex market', in N. Naffine and R.J. Owens, (Eds), *Sexing the Subject of Law*, (Sydney: Sweet & Maxwell, 1997), pp.119-120 and 130-135
[3] Morris and O'Donnell, (1999), *op. cit.*, p.3
[4] SDA 1975, s.2(2)
[5] See discussion on equality legislation in previous sub-section
[1] Fredman, (1997), *op. cit.*, p.197

traditional sexual division of roles.

This is further reinforced by the increased support and strengthening of the right to maternity leave,[2] which continues to be restricted to working mothers. The continued support and legitimacy given to the right to maternity leave further reinforces and entrenches maternal care in the child's early life. However, this legislation also contains inherent weaknesses regarding its availability to working mothers.[3] Nevertheless, maternal care was still reinforced, as exemplified by the number of women who left the labour market following childbirth or who moved to part-time work.[1] All of these indicators point towards the traditional division of gender roles inherent within the maternity to motherhood typology.

Work-family typology

This analysis of specific rights for working mothers in the period prior to 1997 reinforces the work-family classification of the equality legislation. In spite of the distinct approach that specific rights offers, the relationship with the equal treatment legislation reinforces the primacy given to mothers' caring role. The rights to maternity leave were underpinned by similar equal treatment objectives. Consequently, increased strength and legitimacy were afforded

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[1] Brannen and Moss, (1991), *op. cit.*, p.30
[2] Discussed further below at pp.337-351
[3] With reference to the qualifying conditions: EP(C)A 1978, s.33(3)
[1] McRae, (1991), *op. cit.*, pp.65-66

to mothers' rights, principally on biological and health and safety grounds, but increasingly on much wider terms.[1]

This maternity to motherhood typology classification corresponds, in large part, with the classifications of the UK in the welfare state regime literature.[2] This is reflected in the limited rights available to working families, which are afforded on the most minimalist terms,[1] which leave the real questions of the work-family conflict for families to address themselves. This indicates that the UK, in this context at least, mirrored the more liberal welfare state regime classification models with their minimalist characterisations.

Mothers' work-family rights post-1997

While the typology underpinning mothers' work-family rights has merely appeared to broaden the scope of maternal care in the preceding analysis, it could be argued that the typology underpinning mothers' work-family rights in the UK has changed post-1997. The language surrounding work-family rights, including the right to maternity leave has changed from a focus on equality and equal treatment to being centred on work-life balance. This language is evident in government documents such as the *Fairness at Work*

[1] This continues to be the case for current rights to maternity leave, as will be shown below at pp.340-344
[2] See pp.80-109 above for details
[1] EPA 1975, General Note to s.34, annotated by B. Bercusson

White Paper,[1] and this was reiterated by the then Minister for Women and Equality, Patricia Hewitt, who noted that maternity leave and pay was *"part of our new measures to help parents balance work and family life."*[2] These goals correspond with the early goals of the draft ETD,[3] and place families and their work-family commitments at the centre of the development of rights. In addition, the right to maternity leave has extended to enable all pregnant women to 52 weeks leave,[4] 39 of which are paid,[5] subject to qualifying conditions.[6] This examination will determine the extent to which the current legislation represents a development in the underpinning work-family typology.

Family care model: Rights holder

The rights to maternity leave pre-1997 were restricted solely to working mothers, adopting a biological and physical analysis of the purpose of leave. Since the 6th of April 2003 this aspect of the right has now developed to recognise the comparative roles and situations of adoptive parents. This right to adoption leave is broadly similar to that of maternity leave entitling an adoptive parent to take leave on the placement of a child for adoption.[1] This

[1] *Fairness at Work*, White Paper, (1998), Cm 3968, pp.54-55; Anderman, S.D., *Labour Law: Management Decisions and Workers' Rights*, (Butterworths, 2000, 4th Ed), p.143
[2] House of Commons Hansard, 18 September 2003, *Maternity Provision*, Col.1067
[3] See above at pp.300 and 313
[4] ERA 1996, ss.71 and 73; Maternity and Parental Leave etc. Regulations 1999, S.I. 1999/3312, (MPLR 1999), Reg.7
[5] SMP(G)R 1986 Reg.2 as amended by SMPSS(MA)SS(OB)(A)R 2006, Reg.3(2)
[6] Relating to length of service: SMP(G)R 1986, Reg.11(3)
[1] PALR 2002, Reg.16(1)

right has been enacted on a gender-neutral basis and entitles either partner, in an adopting couple, subject to qualifying conditions,[1] to utilise the right to adoptive leave.[2] There are, however, some notable distinctions between maternity and adoption leave. One such distinction relates to the rights holder.

The gender-neutrality of the right to adoption leave reflects the family typology notion of care. It enables either parent to care for their child during the first year of placement, recognising the gender-neutrality of care giving in more general terms and moving away from the gendered approach adopted by the ECJ in *Commission v Italy*.[3] The legislation will later enable them to share the leave through the extension of the right to additional paternity leave.[4] While the legislation still concentrates on early childcare, there is increased recognition of the caring responsibilities of working persons, and not solely working mothers.

[1] PALR 2002, Reg.15(2)
[2] *ibid*
[3] As discussed above at pp.296-300
[4] ERA 1996, s.80BB, inserted by WFA 2006, s.4

Family care model: Care situations

While the categories of rights holders included within the legislation has developed, the types of family care situations have also been extended. Three distinct categories of caring situations can again be identified. The first, relating to the pregnancy period corresponds with that identified previously.[1] Pregnant employees continue to be afforded protection against discrimination during maternity leave,[2] and they retain the right to time off in order to attend ante-natal appointments.[3] The second category is also similar to that found in the previous legislation, relating to the pre- and post-childbirth periods. The final category is quite distinct, however, and relates to the proposals regarding the current maternity leave system.[4] This is classified as parental care. The latter two categories will be the focus of analysis here.

Pre- and post-childbirth

This family care situation is similar to that contained within the pre-1997 legislation. The right to maternity leave remains broadly similar throughout the development of the right, enabling working mothers to leave in the pre- and post-natal periods. The right to paid maternity leave has increased a

[1] See pp.326-328 above for details
[2] ERA 1996, s.99
[3] *ibid*, ss.55-57
[4] As contained within the Work and Families Act 2006, c.18

number of times during this period from 14 weeks prior to 1997 to 18, 26,[1] and now 39 weeks,[2] with the intention to increase this again to 52 weeks by the end of the current parliament.[3] Rights for adoptive parents have similarly developed, and they are also entitled to a maximum of 52 weeks leave,[4] 39 of which are paid at a fixed statutory level.[5] This is distinct from the right to maternity leave which is earnings related in the first instance before dropping to the statutory level.[6] All working mothers are now entitled to maternity leave during this period, although they may not all be entitled to maternity pay.[7]

The maternity leave period extends much further than the original focus on the protection of pregnant employees. The extension of the right to paid and unpaid maternity leave, particularly paid leave, facilitates early childcare. In doing so it represents a greater recognition of the family care responsibilities of working families which extend beyond the post-natal period and continue during the early stage of the child's life and beyond. This is reflective of the

[1] Leave: MPLR 1999, Reg.7, later amended by the Maternity and Parental Leave (Amendment) Regulations 2002, S.I. 2002/2789, (MPL(A)R 2002), Reg.8. Pay: SMP(G)R 1986 as amended by the Social Security Maternity Benefit and Statutory Sick Pay (Amendment) Regulations 1994/1367
[2] SMP(G)R 1986 Reg.2 as amended by SMPSS(MA)SS(OB)(A)R 2006, Reg.3(2)
[3] DTI, *Additional Paternity Leave and Pay Administration Consultation*, (London: DTI, May 2007), pp.4-5 and 31, although this has currently been postponed: House of Commons, *Maternity pay and leave*, [WWW Document] URL: http://www.parliament.uk/commons/lib/research/briefings/snbt-01429.pdf, (Last Updated: 15 September 2009), (Last Accessed: Sept 2009) (2009a)
[4] Social Security Contributions and Benefits Act 1992, c.4, (SSCBA 1992), s171ZN(2), as amended by WFA 2006, s.2
[5] Statutory Paternity Pay and Adoption Pay (General) Regulations 2002, S.I. 2002/2822, (SPPAP(G)R 2002), Reg.21(5), as amended by the Statutory Paternity Pay and Adoption Pay (General) and the Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) (Amendment) Regulations 2006, S.I. 2006/2236, (SPPAP(G)SPPSAP(WR)(A)R 2006), Reg.4; SSCBA 1992, s171ZN(2)
[6] SSCBA 1992, ss.166(1) and (2)
[7] SMP(G)R 1986 Reg.11(3A)

extended motherhood classification of family care. In 1992 Ellis suggested that leave for such a period may be considered to be contrary to the equal treatment principle.[1] However, no such challenges have, as yet been taken against the legislation. Instead, the interpretation of the exception and its acceptance with regards to the PWD 1992 appears to have legitimated and strengthened the inviolability of the right to maternity leave as a bastion of mothers' rights, which cannot be challenged. However, the most recent extensions to the right to maternity leave encompassing all pregnant employees irrespective of length of service,[2] and extending the length of leave to 39 weeks, is coupled with the proposed rights to additional paternity leave and pay, which could instead represent a move towards a parental care model.

Parental care

In recent years the right to additional paternity leave has been advanced and the framework for the introduction of this right has been enacted.[3] The Work and Families Act 2006 (WFA 2006) has the power to establish the right to gender-neutral childcare leave, available to either parent, including adoptive parents, to look after their child following childbirth and the reserved

[1] Ellis, (1992), *op. cit.*, p.170
[2] Although length of service is relevant in relation to qualifying for maternity pay: SMP(G)R 1986 Reg.11(3A)
[3] Work and Families Act 2006, c.18, (WFA 2006)

maternity leave period up until the child's first birthday.[1] The Act in the first instance increased the length of the maternity pay period to 39 weeks for children due or born on or after the 1st of April 2007 with a view to further increasing the period to 52 weeks,[2] although this appears to have been omitted in more recent proposals.[3] This will increase the maternity pay period to correspond with the entire length of the leave period currently available to working mothers, subject to certain qualification conditions.[4] Alongside this expansion will be the introduction of the new right to additional paternity leave for fathers/partners. This will entitle them to a maximum of 26 weeks additional paternity leave which they can utilise to care for the child if the mother returns to work at some point between the 26th week following childbirth and ending on the child's first birthday.[5]

The aim of this right is to enable working fathers to share the period of leave between 6 months to one year with the mother.[6] This right will be discussed in Chapter Nine in more detail,[1] but this brief overview of the right and how it interrelates with the right to maternity leave highlights the potential change in underpinning typology. The main implication for the work-family classification of mothers' rights is that it could represent a departure from the maternity to

[1] WFA 2006, ss.3 and 4
[2] *ibid*, ss.1 and 2
[3] Reference to being extended: *ibid*, Explanatory Notes, p.3; *ibid*, s.1; SMPSS(MA)SS(OB)(A)R 2006, Reg.3, amending SMP(G)R 1986, Reg.2(2); No reference to corresponding increase in pay period: House of Commons, (2009b), *Paternity pay and leave*, [WWW Document] URL: http://www.parliament.uk/commons/lib/research/briefings/snbt-00952.pdf, (Last Updated: 15 September 2009), (Last Accessed: Sept 2009), pp.9-11
[4] Qualifying conditions will continue to apply with regards to pay
[5] ERA 1996, ss.80AA(4) and (5), inserted by s.3 WFA 2006
[6] DTI, *Work and Families: Choice and Flexibility, Draft Regulations on Maternity and Adoption Leave and Flexible Working*, (London: DTI, January 2006), (2006a), p.33

motherhood typology. While the right to maternity leave itself would still share similarities with the maternity to motherhood typology, the package of rights that it would be a part of would represent a potentially different understanding of family care. Such a classification of family care would appear to correspond most closely with the family typology.

Working family model

The current right to maternity leave is different from that previously afforded to working mothers. Whereas the previous rights focused solely on the physical and biological aspects of childbearing,[2] the current right to maternity leave extends beyond that initial period to also encompass childcare. If the proposals for additional paternity leave are enacted this may recognise the caring responsibilities of both working parents, and so acknowledge them both as earners and carers,[1] thus reflecting the dual earner-carer working family model inherent within the family typology. Nevertheless, at the moment the rights to maternity and adoption leave continue to facilitate one parent in the primary care giving role.

In doing so, it reflects the one and a half earner-carer working family model. This reflects the greater recognition of the work-family responsibilities of working families which extend beyond the post-natal period and continue

[1] Chapter Nine: Fathers' Work-family Rights in the UK for further details
[2] See pp.326-329 for further discussion of these rights

during the early stages of the child's life and beyond. However, there are two distinct implications of the way in which the legislation does this. In the first instance, it appreciates the caring commitments that working families have, as opposed to treating working families in a similar way to the US FMLA 1993, as having a temporary commitment that requires them to leave the labour market and return on the same terms as before within a relatively short period of time.[2] On the other hand, the legislation continues to treat childcare as a maternal care issue.

This is further supported by the extension of maternity leave entitling all pregnant employees, irrespective of length of service, to one year of maternity leave.[3] The provisions relating to the payment of maternity leave also reflect this. As noted above, working mothers and adopters are entitled to 39 weeks paid leave,[4] but there are different levels of pay for each. Statutory maternity pay maintains the three-tiered payment structure contained within the pre-1997 legislation.[5] The first 6 weeks are earnings-related at 90% of earnings,[6] with the remaining 33 weeks being paid at the statutory rate,[7] and the final 13 week being unpaid. This contrasts with the

[1] This will discussed further in Chapter Nine: Fathers' Work-family rights in the UK below
[2] FMLA, § 102
[3] Adoptive parents must satisfy continuity requirements of 26 weeks continuous employment prior to the week of notification of match with the child for adoptive purposes: Social Security Contribution and Benefits Act 1992, c.4, (SSCBA 1992) s.171ZL(1) and (3)
[4] Statutory Maternity Pay (General) Regulations 1986, SI 1986/1960, (SMP(G)R 1986), Reg.2(2); Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002, SI 2002/2822, (SPP&SAP(G)R 2002), Reg.21(5)
[5] As noted above at pp.328-331
[6] SSCBA 1992, ss.166(1) and (2)
[7] *ibid*

right to statutory adoption pay, which is always paid at the statutory level.[1] Working mothers must have been employed for a minimum of 26 weeks on the 14th week before the expected week of confinement, and in the 8 weeks prior to the 14th week before the expected week of confinement earn over the lower earnings limit, to be entitled to statutory maternity pay.[2] The only qualifying conditions applicable to working mothers relate to their entitlements to statutory maternity pay, for those not entitled to statutory maternity pay there is maternity allowance.[3] Working mothers are, consequently, fairly well supported and facilitated in order to take leave. However, this is achieved by broadening the concept of maternal care.

The concepts of maternity and motherhood are extended further under this legislation to include periods of leave which could be taken by either parent, as demonstrated in the proposals for parents to share this leave.[4] While this can be viewed as part of the strategy for extending the right to gender-neutral leave, it remains the case that it strengthens mothers' work-family rights, and their caring role.[5] In addition, the introduction of the right to additional paternity leave may not necessarily result in women being entitled to less leave. As will be seen in the later examination of the proposed right, the current proposals do not change women's entitlements to, or the length of, maternity leave.[6] The right will instead provide working parents with the

[1] SSCBA 1992, s.171ZN(1)
[2] *ibid*, s.164
[3] SSCBA 1992, s.35
[4] See Chapter Nine: Fathers' Work-family Rights in the UK
[5] But has as yet to have any impact on working fathers. With the postponement of the introduction of the right, the mothers' role is further reinforced.
[6] See DTI, *Work and Families: Choice and Flexibility, Additional Paternity Leave and Pay*,

choice to decide how to arrange their work-family commitments. While there are currently other work-family rights available to working families, as will be discussed in the following chapters, the strength and dominance of the right to maternity leave continues to play a major role in this package of rights.

Gender roles

In contrast with the pre-1997 rights,[1] the current maternity provisions reinforce maternal care by recognising the caring commitments of working mothers and working families and providing specific rights to enable them to address their work-family conflicts. In this instance there is not the same division between familial responsibilities and work commitments as previously underpinned the legislation. Working mothers are, in contrast, entrenched as earner-carers. While the legislation upholds the traditional division of gender roles, it reflects the division underpinning the extended motherhood typology because mothers are supported as caregivers by facilitating them in their abilities to combine work with caring commitments. This is reflected in particular in the length of leave, particularly paid leave, which enables working mothers' to take maternity leave for up to one year.

This is also reflected in the introduction of the right to adoption leave, which

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(London: DTI, March 2006), (2006b); and Chapter Nine: Fathers' Work-family Rights in the UK for more details on the proposed structure of this right

challenges the traditional gender roles surrounding parenting, by enabling any working adoptive parent to utilise the leave to care for a newly adopted child.[2] While the UK government implemented a similar framework for adoption leave as they had for maternity leave, they did not accept the reasoning of the ECJ in *Commission v Italy*, and treat adoption as analogous to maternity,[3] thus, restricting the leave to working mothers. On the other hand, the right to adoption leave is gender-neutral, recognising the diversity of families adopting children, such as same-sex relationships, or single adopters.[4] Nevertheless, in doing so it also challenges the traditional division of gender roles and recognises the value of either parents' caring role. This appears to correspond with the division of gender roles inherent within the family typology, which is based on an equal recognition and division of earning and caring responsibilities.[5] Whether the right acknowledges these outcomes is more difficult to determine since there are no statistics currently available which provide details of how this right has been utilised by adoptive parents. Nevertheless, it challenges, in principle, the gendering of the right and of childcare. In contrast, the current right to maternity leave appears to reinforce the traditional division of gender roles, since working mothers continue to have sole access to paid childcare leave.[6] Nevertheless, the proposals for introducing the right to additional paternity leave suggest a

[1] Discussed above at pp.321-337
[2] PALR 2002, Part 3
[3] See pp.296-300 above for the discussion of this case
[4] PALR 2002, Reg.15
[5] Table 4.2, appendix and pp.140-141
[6] The subsequent work-family rights that will be discussed in Chapter Seven are unpaid and the right to parental leave arguably cannot be classified as a right to childcare leave

more equal division of gender roles.[1]

The work-family classification of mothers' rights post-1997

The typology underpinning mothers' work-family rights post-1997 represents a development in the work-family classification of mothers' rights. While the legislation remains highly gendered, it reflects a widening notion of family care by extending such rights to adoptive parents, and to a wider range of caring situations. The context in which these rights have been enacted and strengthened raises questions about the work-family typology underpinning not only these rights, but the package of work-family rights as a whole. A more restrictive maternity leave period reflecting the physical and biological aspects of pregnancy and childbirth, as contained in the Swedish maternity leave package,[2] indicates greater recognition of the earning and caring roles of both working parents within the wider package of rights. Such an approach was advanced by Kilpatrick who suggested that maternity leave should be limited to the physical aspects of childbearing, and leave thereafter should be available to both working parents.[3] While this was not fully achieved in Sweden, the gendered history and underpinnings of the parental leave package were influential here.[1] The concern in the UK context is that a similar gendering of the package of work-family rights flows from the primacy

[1] See Chapter Nine: Fathers' Work-family Rights in the UK, in particular pp.473-479 for further discussion of this
[2] PLA 1995, 4 §
[3] Kilpatrick, (1996), *op. cit.*, p.93

given to mothers' work-family rights.

Conclusion

This examination of mothers' work-family rights has emphasised that the main developments have centred on the notion of family care and the care situations encompassed within the legislation. This has extended from the European interpretations of the terms of 'pregnancy and maternity' in Art.2(3) ETD 1976 to maternity to motherhood which has in turn been endorsed in the UK legislation,[2] and subsequently extending to motherhood itself. This development is significant because in spite of the gender-neutral aims of the legislation, the gendered nature of care has not been challenged. Instead the legislation further reinforces and entrenches maternal care. This was shown to be the case in both Sweden, which adopted a similar specific rights approach to addressing the issue of gender-neutrality and equal opportunities,[3] and in the US, which adopted a distinct equal treatment approach.[4] This raises the question of which approach, if any, is more appropriate in the context of achieving equality in the work-family context. It perhaps also suggests some tentative conclusions, namely that a continuing focus on equality and equal treatment will never fully address or achieve the objectives of gender-neutral shared parenting because they are, in fact, quite

[1] See pp.230-238 above for background to the introduction of parental rights in Sweden
[2] See pp.340-344 above for details
[3] As shown in Chapter Six: The Swedish Welfare State and the Work-family Conflict
[4] As shown in Chapter Five: The US Welfare State and the Work-family Conflict

distinct objectives.[1] Instead a primary, if not sole, focus on work-family objectives is required.

[1] Similar conclusions were noted by Sohrab, J.A., 'Avoiding the 'Exquisite Trap': A Critical Look at the Equal Treatment/Special Treatment Debate in Law', [1993] Vol.1(2) *Feminist Legal Studies* 141 in her comparison of equal treatment and special treatment more generally

Chapter Eight – Parents' Work-family Rights in the UK

In the Swedish context the first main development in work-family rights was the move from mothers' rights to parents' rights.[1] A similar development was evident in the context of the development of European,[2] and subsequently, UK,[3] work-family rights. Analyses of the gendered nature of work-family discourse have also noted a comparable trend moving away from equality towards choice and flexibility. The effect of this trend is to move away from the comparison with the male model of work towards one which in principle recognises the diverse and changing realities of working families.[4] Two strands of parental rights can be identified in the UK: those implementing European obligations, and those developed at national level. The rights to parental and dependant care leave fulfil the UK's European commitments, while the rights to request flexible working emanated in the UK.[5] The move towards parental work-family rights reflects this approach.

The main distinction between these rights and those discussed in the

[1] With the substitution of maternity leave with parental leave in 1974
[2] Council Directive No.96/34 on the framework agreement on parental leave, O.J. 1996, L145/4, (Hereinafter PLD 1996), following on from the EEC Directive 92/85 on the Protection of Pregnant Women at Work (PWD 1992)
[3] In some instance, as required to transpose these European obligations into national law
[4] Smithson, J., and Stokoe, E.H., 'Discourses of Work-life Balance: Negotiating 'Genderblind' Terms in Organisations', 2005 Vol.12(2) *Gender, Work and Organisation* 147, pp.147-152 – provides an overview of these approaches and criticisms of them
[5] These rights have now gained support at the European level in recent proposals amending the Pregnant Workers Directive and Parental Leave: Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, {SEC(2008) 2526} {SEC(2008) 2527}, COM(2008) 600/4, (Revised Proposal PWD), Art.11(5); Proposal for a Council Directive implementing the revised framework agreement on parental leave BUSINESSEUROPE, UEAPME, CEEP, ETUC and repealing Directive

previous chapter is that they are in principle gender-neutral rights to care, similar to the US rights to family and medical leave,[1] for the benefit of both working parents. This can be contrasted with the focus of maternity leave which was primarily the needs of women and not those of children.[2] This was evidenced in the discussion of these rights in the previous chapter which emphasised their initial focus on the physical aspects of childbearing and not childcare more generally,[3] although more recent developments have moved in this direction.[4] Parental rights, on the other hand, are perceived as representing a shift towards a focus on the interests of children and achieving gender equality between mothers and fathers.[5] In this regard, they are based on aims that are consistent with the family typology, such as gender-neutrality and shared parenting.[6] Also notable regarding parental rights is the continuing focus on equality between men and women which remains an underpinning aim of the legislation.[7]

Not only does the change of rights holder represent a development from those rights discussed in the previous chapter, but it also suggests a corresponding change in the ideology underpinning the legislation. This

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96/34/EC, COM(2009) 410 final, (30 July 2009), (Revised Framework Agreement), Clause 6

[1] FMLA 1993, § 102(a)

[2] Kamerman, S.B., 'Parental Leave Policies: An Essential Ingredient in Early Childhood Education and Care Policies', 2000 Vol.XIV(2) *Social Policy Report* 3, p.13; Moss, P., and Deven, F., 'Leave Policies and Research: A Cross-Nation Overview', in L. Haas and S.K. Wisensale (Eds), *Families and Social Policy. National and International Perspectives*, (London, New York: Haworth Press Inc., 2006), p.256

[3] See pp.321-337 above for a discussion of pre-1997 rights to maternity leave

[4] See pp.337-350 above for a discussion of post-1997 rights to maternity leave

[5] Moss and Deven, (2006), *op. cit.*, p.256 re children; Drew, E., *Parental Leave in Council of Europe Member States*, CDEG (2004) 14 Final, (Strasbourg: Council of Europe, 2005), p.10; Kamerman, (2000), *op. cit.*, p.13

[6] Chapter Four, Table 4.1 pp.137 and 140-141 for overview of this ideology

[7] PLD 1996, Preamble to the Framework Agreement

would represent a further development of the philosophy underpinning work-family legislation in the UK. This chapter, therefore, examines the emergence and development of parental work-family rights and question the extent to which they mark a change in the work-family classification of UK legislation. The chapter first critically examines the rights introduced to satisfy European obligations before analysing the UK rights to request flexible working.

Parental rights: European obligations

The rights to parental leave and dependant care leave in the UK were enacted in order to comply with the requirements of the PLD 1996.[1] The rights in the UK have largely been tied to the European legislation,[2] unlike other Member States which have adopted much more developed rights.[3] As a consequence of the close relationship between European legislation and rights in the UK, it is useful to analyse the emergence and development of these parental rights in European law.

[1] PLD 1996, Framework Agreement, Clauses 2 and 3
[2] Moss and Deven, (2006), *op. cit.*, p.267; Also apparent in the subsequent analysis of the legislation
[3] Sweden, in the context of the current analysis, is a classic example of this, although it also has a longer history of such rights. See Drew, (2004), *op. cit.*, Table 2, pp.22-23 for an overview of rights in Europe

The development of parental and family leave in Europe

The rights to parental and family leave[1] in Europe were initially proposed in 1983 and underwent a process of transformation before finally being enacted in 1996.[2] In spite of the development of these rights, two main aims underpinning the legislation can be identified, which remained consistent throughout the development of this legislation and continue to underpin it. These are: the promotion and harmonisation of parental leave and leave for family reasons, thus enabling working parents to balance their work and family commitments; and, the promotion of the principle of equal treatment and opportunities between men and women.[3]

Enabling working parents to balance work and family commitments

Prior to the introduction of the PLD 1996, there was no legislative basis for enabling working families to address their work-family conflicts. In particular, there were no means by which such rights could be extended to working fathers. The gaps in European law in this context were exposed by the

[1] Dependant care leave in the UK

[2] Council Directive on parental leave and leave for family reasons as amended by the European Parliament, OJ No. C117, 30 April 1984, p.174; Amended proposal for a Council Directive on parental leave and leave for family reasons, COM (84) 631 *final*, OJ No. C316, 27 November 1984, p.7, (Amended Directive 1984); PLD 1996

[3] Commission Proposal for a Council Directive on parental leave and leave for family reasons, COM (83) 686 *final*, O.J. No. C333, 9 December 1983, p.6, (Draft Directive 1983), Recitals, 5, 7 and 8; PLD 1996, Preamble to the Framework Agreement; European Commission Network on Childcare and Other Measures to Reconcile Work and Family Responsibilities, *Leave arrangements for workers with children: a review of leave arrangements in the member states of the European Union and Austria, Finland, Norway*

Hofmann v Barmer Ersatzkasse case,[1] which also identified the need for changes to the law in order to address the issue of shared responsibility for childcare. As discussed previously, this case was primarily concerned with gender-neutral and shared childcare responsibilities, and whether they should be subject to the equal treatment principle.[2] In particular, the arguments in *Hofmann* were based on the principle of equal treatment enshrined within the legislation, particularly as regards the ability of both and/or either parent to provide care.[3] Had these arguments been accepted they would have enabled working families to renegotiate their caring commitments with, for instance, working fathers being able to undertake childcare instead of mothers who would then be free to return to the labour market.[4] The arguments raised in this case adopted the notion of shared parenting and dual gender roles inherent within the family typology model. Consequently, this case had the potential to challenge the stereotypical views surrounding childcare and extend the right to equal treatment to childcare leave.[5] However, as discussed previously, the ECJ decided that this fell within the exception in Art.2(3) thus reinforcing a stereotypical notion of mothers' caring responsibilities which was identified as being consistent

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and Sweden, (European Commission Network on Childcare and Other Measures to Reconcile Work and Family Responsibilities, 1994), p.7

[1] Case 184/83 Hofmann v Barmer Ersatzkasse [1985] ICR 731, Advocate General Darmon's Opinion point 8, p.736. The implications of this decision, in this context, were also noted in the European Parliament with various questions being asked concerning the introduction and support for specific legislation on parental leave: Debates of the European Parliament, *Report of Proceedings from 9 to 11 October 1984*, (1984-1985 Session), (Europe House: Strasbourg), Annex OJ, No.2-317, Questions No.79 and 80 by Mrs Wieczorek-Zeul (H-235/84) and Mrs Cinciari Rodano (H-236/84) respectively.

[2] See Chapter Seven for a discussion of this case in the context of mothers' work-family rights, pp.300-309

[3] Hofmann, *op. cit.*, Advocate General Darmon's Opinion point 5, p.735

[4] As were the particular circumstances of this case

[5] Pannick, D., *Sex Discrimination Law*, (Oxford: Clarendon Press, 1985), p.322 fn 54

with the maternity to motherhood typology.[1]

In determining the purpose and scope of the ETD 1976 both the Advocate General and the ECJ determined that gender-neutral childcare leave was outwith the scope of the directive, and that enabling working families to address their work-family conflicts was a national concern.[2] Even if they had accepted that such legislation was subject to the equal treatment principle, they appeared reluctant to support gender-neutral parenting. Within the judgment they both identified the purpose of the ETD 1976 in narrow terms as being limited to enabling members of one sex to receive the same treatment as members of the opposite sex in the area of employment rights.[3] Accordingly, they determined that the legislation did not entitle working parents to enhanced rights, with the consequence that it would be equally valid to remove the right from those benefiting as it would be to extend it to those not receiving it.

This was a significant interpretation of the scope of the legislation, and one that appears to have subsequently been questioned in *Commission v France*, which suggested that the opposite is in fact the case.[4] Nevertheless, it underscores the reluctance of the ECJ to extend rights to working fathers in this way, alongside the preservation of the stereotypical maternal care role.[5]

[1] Hofmann, *op. cit.*, ECJ Decision, point 26, p.764; See Chapter Seven for more details on the work-family classification,pp.290-321
[2] Hofmann, *op. cit.*, Advocate General Darmon's Opinion point 8, p.736
[3] *ibid*; reiterated in the ECJ decision points 23-24, p.764
[4] Advocate General Slynn in Commission v France [1989] 1 CMLR 408, pp.412 and 414-415
[5] See pp.290-321 for an analysis of the jurisprudence of the ECJ in this context

In response to this the European Commission decided that it was necessary to address the issue of parental leave independently, and proposed a directive to this effect.[1] Drawing from international experience[2] a draft directive on parental and family leave was subsequently presented by the European Commission in 1983,[3] which attempted to address the specific issue of gender-neutral family care. Thus, the proposals attempted to provide working families with the framework enabling them to balance their work and family commitments. Certain aspects of the draft directives reflected this objective.

In the first instance, the various versions of the draft directives presented the rights to parental and family leave. While the rights were modified throughout this period, some consistent characteristics can be identified. All of the versions introduced the right to a minimum of three months non-transferable parental leave, which was afforded to working parents in order to care for their child.[4] This provided working families with the ability to utilise a block of

[1] Hofmann, *op. cit.*, Advocate General Darmon's Opinion point 8, p.736
[2] International experience: Economic and Social Committee, *Opinion on the proposal for a Council Directive on parental leave and leave for family reasons*, (84/C206/15), (6 August 1984), O.J. Vol.27 No.C206/47, para.1.1; ILO R165 Workers with Family Responsibilities Recommendation 1981, [WWW Document] URL: http://www.ilo.org/ilolex/english/recdisp1.htm (Last Accessed: Sept 2009); and, ILO C156 Workers with Family Responsibilities Convention, 1981, [WWW Document] URL: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C156 (Last Accessed: Sept 2009). Swedish experience: PLA 1995; Hardy, S., and Adnett, N., 'The Parental Leave Directive: Towards a 'Family-Friendly' Social Europe?', 2002 Vol.8(2) *European Journal of Industrial Relations* 157, p.166; Ellis, E., 'Note on the Draft Directive on Parental Leave and Leave for Family Reasons', (1985) Vol.10 *Holdsworth Law Review* 58, p.58
[3] Draft Directive 1983; subsequently amended twice: Draft Directive 1984; and Amended proposal for a Council Directive on parental leave and leave for family reasons, COM (84) 631 *final*, OJ No. C316, 27 November 1984, p.7, (Amended Draft Directive 1984)(collectively hereinafter Draft Directives) before being shelved until it was later enacted in 1996, (PLD 1996)
[4] Articles 1, 4(1), (3) and (6) of the: Draft Directive, 1983, *op. cit.*; Draft Directive, 1984, *op. cit.*; and, the Amended Draft Directive, 1984, *op. cit.*, Article 4(7) instead of Article 4(6); and

leave either on a full-time or part-time basis, with the employer's consent,[1] at any time until the child's second birthday.[2] The leave was consequently, fairly similar to the subsequent framework of the FMLA 1993 in the US, with fairly rigid rights to be used in the period closely following childbirth.[3] Both pieces of legislation left the question of flexibility to be determined between employers and employees,[4] reflecting the balance to be achieved between the interests of businesses and those of working families.[5]

Greater flexibility was proposed in subsequent drafts of the directive enabling working parents to take the leave on an intermittent basis.[6] While the proposals for parental leave were restricted to a relatively short period of time, they afforded working families with access to leave during a period when they were experiencing increased caring demands. This was further entrenched within the legislation by restricting it to the person actually in charge of the child and taking responsibility for its care. This was made particularly explicit in later drafts.[1] While the main implication of this is that working families cannot take leave together as a family, it does ensure that the period over which leave can be utilised is maximised.

The proposed legislation further supported families in addressing their work-family conflicts by proposing that leave should be accompanied with some

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PLD 96/34/EC, *op. cit.*, Framework Agreement, Clauses 2(1) and (2)
[1] Draft Directives , *op. cit.*, Art.5(1)
[2] *ibid*, Art.4(5)
[3] Although this was much more restricted in the US to the first year, FMLA 1993, § 102(a)
[4] In Europe: Draft Directives, *op. cit.*, Art.5(1). In the US: FMLA 1993, § 102(b)
[5] See pp.182-183 and 198-199 above
[6] Draft Directive 1984, *op. cit.*, Art.5(1)

form of wage replacement.[2] This was removed as a positive suggestion with discretion being given to the Member States as to whether or not to provide a form of income replacement,[3] but was later reinstated.[4] The inclusion of some element of remuneration alongside the right to parental leave was significant because research indicates that it provides working families with greater access to such rights.[5]

In addition, each version included the right to a form of temporary family leave in order to deal with family issues.[6] The situations amounting to *"pressing (or important)[7] family reasons"*,[8] were not exhaustively defined in the legislation. They encompassed medical emergencies and related reasons, but also extended to social reasons such as attending a child's wedding.[9] They also extended to dependants other than the worker's children.[1] The rights were further latterly extended to include other carers where the natural or legal parent was ill or dead.[2] This recognised that other categories of persons may in actuality care for children and affords them the same access rights, but only in these limited circumstances.

The aims of enabling working families to balance their work and family

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[1] Draft Directives, *op. cit.*, Art.4(1)
[2] Draft Directive 1983, *op. cit.*, Art.6
[3] Draft Directive 1984, *op. cit.*, Art.6
[4] Amended Draft Directive 1984, *op. cit.*, Art.6
[5] As will be discussed further below, pp.390-397
[6] Articles 1, and 8 of the: Draft Directive, 1983, *op. cit.*; Draft Directive, 1984, *op. cit.*; and, the Amended Draft Directive, 1984, *op. cit.*; and PLD 96/34/EC, *op. cit.*, Framework Agreement, Clause 3
[7] As added in Draft Directive 1984, *op. cit.*
[8] Draft Directives, *op. cit.*, Arts.1 and 8
[9] *ibid*, Art.8(2)

commitments appear to have been addressed to some degree within the proposed directives. There are a couple of notable exceptions to this, namely the relatively short duration of the parental leave utilisation period, which does not facilitate parental care beyond this early stage of the child's life.[3] This does not enable working families to address all of the work-family conflicts that they may experience throughout their working lives. The absence of positive rights to any form of pay during the leave also potentially undermines this goal.[4]

Equal treatment and opportunities between men and women

The second underpinning aim of the parental leave legislation reflects the equality focus of the previous European work-family legislation.[5] Not only was the parental leave legislation introduced against this equality background, but it was also underpinned by equality aims.[6] This was further reflective of the legislative frameworks that were drawn from in the drafting process. The primary materials drawn from here were the Swedish parental leave experience,[7] and the ILO Recommendations and Conventions on workers with family responsibilities,[8] which were in turn influenced by the UN

[1] Draft Directives, *op. cit.*, Art.8(2)
[2] Draft Directive 1984, *op. cit.*, Art.1; Amended Directive 1984, *op. cit.*, Art.1
[3] The length of parental leave will be discussed further below at pp.377-379
[4] The payment of parental leave will be discussed further below at pp.390-397
[5] ETD 1976 as discussed in the previous chapter, pp.290-321
[6] Draft Directive 1983, *op. cit.*, Recitals, 5, 7 and 8; PLD 1996, Preamble to the Framework Agreement
[7] Hardy and Adnett, (2002), *op. cit.*, p.166; Ellis, (1985), *op. cit.*, p.58
[8] Economic and Social Committee, (1984), *op. cit.*, para.1.1; ILO R165, *op. cit.*; and, ILO

Convention on the Elimination of All forms of Discrimination against Women.[1]

Within the international documents the aims of achieving equality between the sexes was of central importance.[2] They were primarily concerned with the issue of challenging gender roles and achieving equal treatment and opportunities between the sexes, as opposed to introducing specific work-family rights. Addressing the conflict between work and family responsibilities, particularly from a gender-neutral perspective, was central to achieving this aim.[3] This approach assumes that by providing working parents with equal opportunities in relation to family care that this will result in equal treatment in the workplace.

In this respect, they appear to be underpinned by aims consistent with the family typology. However, there is an inherent danger with this equality-based approach,[4] namely that it is concerned primarily with achieving equality as opposed to addressing the work-family conflict.[5] The extent to which such proposals would achieve the equality objectives is also questionable given the limited guidance concerning rights that may challenge inequalities. The ILO Recommendation merely encourages Members to

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C156, *op. cit.*

[1] ILO R165, *op. cit.*, Recital 7; and, ILO C156, *op. cit.*, Recital 7; UN Convention on the Elimination of All forms of Discrimination against Women 1979, (CEDAW 1979), [WWW Document] URL: http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (Last Accessed: Sept 2009)

[2] CEDAW 1979, preamble paras.13 and 14; ILO R165, *op. cit.*, Recital 7; and, ILO C156, *op. cit.*, Recital 7

[3] CEDAW 1979, *op. cit.*, preamble para.14; ILO R165, *op. cit.*, Recitals 8-11; and, ILO C156, *op. cit.*, Recitals 8-11

[4] As seen with regards to maternity rights in Chapter Seven

[5] As seen in Chapter Five and in Chapter Seven, particularly as regards the equality

enact parental and family leaves, but the details of these rights are left to Members to determine.[1] The only conditions that are noted are that parental leave should be taken in a *"period immediately following"* the maternity leave period,[2] and that family leave should be taken to temporarily care for an ill dependant.[3] This can be contrasted with Swedish legislation at the time which provided a more structured framework of rights for working families.[4] The right to parental leave in Sweden, however, also adopted a similar maternal approach with parental leave replacing the previous maternity leave system while not entitling working parents to individual rights to leave.[5] Despite their differences both of these instruments raise the question of the purpose of the leave. For instance, if parental leave is associated with maternity leave it may make it more attractive to working mothers who would use it following their maternity leave period.[6] Such a consequence would undermine the purpose of the leave and the equality objectives of the Recommendation.

The objective of achieving equality between the sexes was reflected in the Draft Directives which afforded working parents the right to non-transferable parental leave. While similar in terms of the length of childcare leave available to working families, this was distinct from the right to parental leave

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legislation, pp.290-321
[1] ILO R165, *op. cit.*, Arts.22(2) and 23(3)
[2] *ibid*, Art.22(1)
[3] *ibid*, Art.23(1) and (2)
[4] PLA 1995, 3-8 §§
[5] Although both parents have 60 non-transferable days leave each
[6] Parental leave as a mothers' right will be discussed further below at pp.392-394

in Sweden at the time, which was wholly transferable.[1] The draft directives instead entrenched the notion of gender-neutral and shared parenting within the legislation by ensuring that working parents were each entitled to leave, and that if one parent failed to utilise the leave the family would lose it. The individual rights approach to work-family rights has been supported for these reasons.[2] While it reduces the choice and flexibility afforded to working families, it ensures that each parent is recognised in their role as both earner and carer.

While the Draft Directives subsequently left the question of payment with Member States, they set out a more structured framework for implementing the rights, although discretion was still given to Member States. Despite aiming to promote equal treatment and opportunities, the Draft Directives also restricted the length of the right to parental leave to a relatively short timeframe in the period generally following maternity leave. In addition, the general position that leave would be taken as a block, although later amendments would have permitted intermittent leave,[3] could reinforce mothers' utilisation of leave following maternity leave.[4]

[1] As discussed above at pp.230-238
[2] Bruning, G., and Plantenga, J., 'Parental Leave and Equal Opportunities: Experiences in Eight European Countries', (1999) Vol.9(3) *Journal of European Social Policy* 195, pp.196 and 207
[3] Draft Directives, *op. cit.*, Art.5(1)
[4] Parental leave as a mothers' right will be discussed further below at pp.392-394

Summary

The right to parental leave in Europe was, consequently, first introduced against a highly gendered and equality based backdrop with regards the work-family conflict. Those documents and experiences that were drawn from appear to offer gender-neutral statements about the work-family conflict and appear to be based on gender-neutral aims. In practice, however, they also had the potential to reinforce the traditional division of gender roles which was upheld in *Hofmann* and restated in subsequent decisions of the ECJ.[1] The European Commission was in the position whereby it could continue to reinforce these stereotypical roles or could enact legislation that would genuinely seek to challenge them.

Opposition to the draft parental leave directives

The draft directives were unsuccessful largely because the UK was strongly opposed to the introduction of such legislation and continually blocked its approval,[2] which at that time required unanimous support.[1] The UK opposition to the Directives was based, for the main part, on the costs and

[1] See Chapter Seven for a more detailed discussion of these decisions pp.295-310
[2] House of Commons Hansard, *Parental and Family Leave*, (26 November 1985) (1985c), Vol.87, Col.829, Cols.852-854; House of Commons Hansard, Parliamentary Debates, Written Answers, *Parental Leave*, Vol.53, (30 January 1984), Col.27, Mr Gummer at Col.27; reiterated in House of Commons Hansard, Parliamentary Debates, Written Answers, *Parental Leave*, Vol.72, (5 February 1985), (1985a), Col.479, Mr Bottomley at Col.479; and House of Commons Hansard, Parliamentary Debates, Written Answers, *Parental Leave*, Vol.80, (10 June 1985), (1985b), Col.352, Mr Bottomley at Col.352; Ellis, E., 'Parents and Employment: An Opportunity for Progress', 1986 Vol.15(1) *Industrial Law Journal* 97, p.108

burdens to business that the then Conservative UK government feared parental leave would produce. In the first instance, the UK government maintained that parental leave was bad for small businesses,[2] despite the House of Lords Select Committee suggesting that small businesses with less than 20 employees should be exempt from the right to parental leave.[3] While this amendment would have enabled some working parents to benefit from the Directive, the concern with this proposal was that many working parents might in fact be employed in these types of business, meaning that many would not have been entitled to the right. A second related concern was that parental leave would increase the burdens on employers, thus reducing competition, which was one of the government's key policy aims.[4] The government were consequently particularly concerned about balancing the interests of business against those of working families, which was also apparent in the US work-family experience.[5]

Another reservation that the UK government had about the legislation was that they believed that it would make women less attractive to businesses since they would be more likely to utilise the leave.[6] This concern was particularly significant because it assumed that the work-family conflict was a female issue, and that the right to parental leave would reinforce this division

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[1] This was because it was being introduced under Art.100 of the E.E.C. Treaty
[2] House of Commons Hansard, (1985c), *op. cit.*, Mr. Charles Wardle (Bexhill and Battle), Col.842
[3] Ellis, (1986), *op. cit.*, p.106
[4] House of Commons Hansard, (1985c), *op. cit.*, The Parliamentary Under-Secretary of State for Employment (Mr. Peter Bottomley), Col.830, and Wardle, Col.843
[5] See pp.182-182 and 198-199 above
[6] House of Commons Hansard, (1985c), *op. cit.*, Mr. Tony Marlow (Northampton, North), Col.843

of care. While it could be argued that this was merely a realistic and pragmatic view of the likely utilisation of parental leave, particularly in light of the Swedish experience at that time,[1] the UK government made no attempt to recognise the potential that the legislation had to challenge these gender roles. For instance, this type of argument neglected the various counter arguments supporting the legislation and its equal treatment and opportunities benefits.[2] Such arguments recognised the potential complementary benefits to men and women, such as: enabling more women to balance their work-family conflicts and thus undertake paid employment;[3] and, encouraging and supporting fathers becoming involved in childcare.[4] Although it is notable that these aims reflect two different consequences for men and women, which continue to assume that women undertake primary responsibility for childcare.

In spite of the strong opposition to parental leave in the UK the Parental Leave Bill was introduced as a private members' bill in 1987.[5] The Bill was presented in broadly similar terms to the original Draft Directives, entitling working parents to 13 weeks paid leave, to be used with respect to children under the age of two.[6] The Bill was read a second time,[1] but was never

[1] See discussion of mothers' and fathers' utilisation rates in Chapter Six pp.281-285. Mothers used around 95% in 1980 and 94% in 1985, Statistics Sweden, *Women and Men in Sweden, Facts and Figures 2006*, (Stockholm: Statistics Sweden, 2006) [WWW Document] URL: http://www.scb.se/statistik/_publikationer/LE0202_2006A01_BR_X10ST0602.pdf (Last Accessed: Sept 2009), p.45
[2] House of Commons Hansard, (1985c), *op. cit.*, Ms. Jo Richardson (Barking), Col.835
[3] *ibid*, Mr. John Golding (Newcastle-under-Lyme), Col.850
[4] *ibid*, Richardson, Col.835; Ellis, (1986), *op. cit.*, p.107
[5] By Harry Cohen, House of Commons Hansard, *Parental Leave*, (11 February 1987), (1987a), Vol.110, Col.317, Cols.317-319
[6] *ibid*, Col.317

subsequently debated. The Parental Leave Bill was again introduced in 1988,[2] but with no greater success. The Bill, not unlike the Draft Directives, was in the meantime abandoned.

The Parental Leave Directive 1996

The right to parental leave was finally enacted, at the European level, in 1996 alongside the right to family leave.[3] The current rights to parental leave and family leave contained within the PLD 1996 reiterate and endorse the work-family and equality aims of the previous documents.[4] The aim of encouraging shared parenting was more pronounced in the PLD 1996, which explicitly referred to this in the General Considerations of the framework agreement on parental leave.[5] However, the rights are presented as minimum standards with much of the detail of the rights being left to Member States to determine.[6] This returns to the sort of approach adopted in the ILO Recommendation. In addition, it questions the ability of the legislation to harmonise parental rights across Member States.[7]

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[1] House of Commons Hansard, *Parental Leave Bill*, (27 March 1987), (1987b), Vol.113, Col.730, Cols.730-735
[2] House of Commons Hansard, *Parental Leave*, (9 November 1988), Vol.113, Col.333, Cols.333-335
[3] PLD 1996, Framework Agreement, Clauses 2 and 3
[4] *ibid*, Preamble to the Framework Agreement
[5] *ibid*, General Considerations 7 and 8
[6] *ibid*, Clauses 2 and 3
[7] Hardy and Adnett, (2002), *op. cit.*, pp.169-170; Busby, N., 'Division of labour: maternity protection in Europe', 2000 Vol.22(3) *Journal of Social Welfare and Family Law* 277, pp.277-278, 280-282 and 291-292 makes similar observations regarding the PWD 1992

The PLD 1996 is, consequently, a much watered-down version of the original Draft Directives. The PLD 1996 contains the same right to three months parental leave, which is in principle non-transferable,[1] but extends the utilisation period until the child's eighth birthday, although the Member State may set an earlier age if they wish.[2] This extended period of time reflects the longer utilisation period found in Sweden.[3] However, this could be applied much more narrowly with Member States implementing the right to be used during a very short period of time. This could be set as low, for instance, as one year like the US right to family leave following birth or adoption.[4] This possibility, alongside the potential for the leave to be transferable, reinforces maternal care, particularly if the mother is breastfeeding.[5]

The main changes relate to the payment of leave. The references to some form of income replacement in the original Draft Directives[6] are no longer contained within the PLD 1996. This is a significant change because it means that Member States are under no obligation to combine parental leave with the right to income replacement. This, as will be shown in the examination of UK parental leave, can have an impact on those utilising the leave.[7] For some, this feature of the legislation reinforces mothers' primary

[1] PLD 1996, Framework Agreement, Clause 2(2)
[2] *ibid*, Framework Agreement, Clause 2(1)
[3] PLA 1995, 5 and 7 §§
[4] FMLA 1993, § 102(a)(1)(A) and (B) and (a)(2)
[5] Caracciolo di Torella, E., 'A critical assessment of the EC legislation aimed at reconciling work and family life: Lessons from the Scandinavian model?', in H. Collins, P. Davies and R. Rideout, (Eds), *Legal Regulation of the Employment Relation*, (London: Kluwer Law International, 2000), p.447
[6] Draft Directives, *op. cit.*, Art.6
[7] See pp.390-397 below

responsibility for care since they often earn less than their male partners.[1]

The right to family leave has also undergone various changes since it was originally introduced. The right still entitles working persons to leave in emergency situations involving illness or injury, but it is now limited to these types of medical situations.[2] This contrasts with the broader situations contained within the original Draft Directive,[3] but is comparable with the approach adopted within the FMLA 1993 and the Swedish PLA 1995,[4] reinforcing the emergency and temporary nature of this right. The Draft Directives also contained the right to receive income replacement during the leave.[5] This provision, not unlike that relating to parental leave, is also notably missing from the PLD 1996.

More recently there have been proposals to amend the PLD 1996.[6] Within the General Considerations to the new framework agreement, there is a continuing focus on the need to achieve equality between men and women with regards to shared childcare responsibilities.[7] The main changes proposed to the framework agreement are to increase the period of parental leave to 4 months, which should be non-transferable, however all but one month may be transferred.[8] In addition, the new framework agreement

[1] Caracciolo di Torella, E., (2000), *op. cit.*, p.447; Hardy and Adnett, (2002), *op. cit.*, p.165
[2] PLD 1996, Framework Agreement, Clause 3
[3] Draft Directives, *op. cit.*, Art.8(2)
[4] FMLA 1993, §§ 102(a)(1)(C) and 101(11); PLA 1995, 8 §
[5] Draft Directives, *op. cit.*, Art.8(4)
[6] Revised Framework Agreement, (2009), *op. cit.*
[7] *ibid*, General Considerations 8 and12
[8] *ibid*, Clause 2

proposes the right to request flexible working on return from parental leave.[1] This right is currently available in the UK and is independent from any other work-family rights.[2] One final notable inclusion is the greater emphasis and encouragement of some form of income replacement during leave. While the matter was still left to Member States to determine,[3] the importance of income replacement during leave was reiterated within the General Considerations to the framework agreement.[4] The proposals present a strengthening of the minimal standards in light of the weakness in national implementation,[5] suggesting that current national transposition is unsatisfactory.

The work-family classification of parental rights in the UK

The rights contained within the PLD 1996 lay the foundations to encourage Member States to enact rights that correspond with the family typology, since it is underpinned by gender-neutral and shared parenting aims.[6] However, the minimalist approach contained within the PLD 1996 lends itself to individual interpretation and application by the Member States. Not unlike the PWD 1992,[1] this raises the question of the ability of the legislation to achieve harmonisation in this area, particularly when the legislation across

[1] Revised Framework Agreement, (2009), *op. cit.*, Clause 6(1)
[2] See below pp.403-419 for a discussion of this right
[3] Revised Framework Agreement, (2009), *op. cit.*, Clause 5(5)
[4] *ibid*, General Considerations 18-20
[5] *ibid*, General Considerations 16 and 20
[6] PLD 1996, recital 3, Framework Agreement preamble, General Considerations 4, 5 and 8, and Clauses 1 and 2(2)

Member States is diverse.[2] Even within the context of the current research the implementation in Sweden is notably different from that in the UK.

The Swedish parental leave experience, although influencing and not necessarily implementing European parental leave,[3] represents an extensive application of the rights to parental and family leave.[4] While the content of these rights may vary between Member States, the way in which the right to parental leave is enacted may also differ. For instance, in Sweden this right is in the first instance linked with childbirth and extends the traditional right to maternity leave, and the maternity leave period, to both working parents.[5] Internationally the US has adopted a similar approach with a short period of family leave for this purpose being available to all qualifying working parents.[6] Both of these rights are, consequently, underpinned by maternal work-family typologies.[7]

The UK opted-in to the PLD 1996 in 1997 and eventually incorporated it into

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[1] Busby, (2000), *op. cit.*, pp.277-278, 280-282 and 291-292
[2] For details see: Moss, P., and Korintus, M., (Eds), *International Review of Leave Policies and Related Research 2008*, Employment Relations Research Series No.100, (London: BERR, July 2008); Eironline, *Family-related leave and industrial relations*, (European Foundation for the Improvement of Living and Working Conditions, 2004), [WWW Document] URL: http://www.eurofound.europa.eu/eiro/2004/03/study/TN0403101S.htm (Last updated: 16 Sept 2004), (Last Accessed: Sept 2009), Table 4 – comparison of parental leave across Europe in 2003; Commission of the European Communities, *Report from the Commission on the implementation of Council Directive 96/34/EC of 3rd June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC,* (19/06/2003), COM(2003) 358 Final – presents detail and comparison of legislation implementing the PLD 1996 across Europe
[3] Hardy and Adnett, (2002), *op. cit.*, p.166; Ellis, (1985), *op. cit.*, p.58
[4] Although this is not necessarily reflected in practice. See Chapter Six above, pp.238-287 for a discussion of the work-family typology underpinning Swedish work-family legislation
[5] PLA 1995, 5-7 §
[6] FMLA 1993, § 102
[7] See classifications above at pp.212-214 and 287

UK law in 1999.[1] Working persons are now entitled to temporary leave to deal with emergency care situations,[2] and to time off work to care for young children.[3] The parental leave legislation initially only covered those children born on or after the 15th of December 1999.[4] However, this qualification was subject to a successful challenge by the TUC and the provision was extended to include those children who were born before the 15th of December 1999 whose fifth birthday was after that date.[5] Despite the minimalist nature of the PLD 1996, the UK adopted a light-touch approach to implementing it with individual workplace agreements being encouraged.[6] In keeping with this minimalist approach, the details of the right to parental leave were implemented in the UK as a minimal fall-back position for those workplaces without individual arrangements for such leave.[7] These provisions entitle working parents with one year's continuous service,[8] to 13 weeks unpaid parental leave, which can be used until the child is 5 years old.[9] The leave cannot be taken in a continuous block, unlike the Swedish and US equivalents,[10] being subject instead to a maximum of 4 weeks per

[1] Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, O.J. 1997, L10/24; Employment Rights Act 1996, c.18, (ERA 1996), ss.57A-57B and 76-80, as amended by the Employment Relations Act 1999, c.26, ss.7 and 8 and Sch.4 parts I and II; Maternity and Parental Leave etc Regulations 1999, (MPLR 1999), SI 1999/3312, Regs.13-16 and Sch.2
[2] ERA 1996, s.57A
[3] *ibid*, Part VIII, Chapter II; MPLR 1999, Part III and Schedule 2
[4] MPLR 1999, Reg.13(3)
[5] R. v Secretary of State for Trade and Industry Ex p. Trades Union Congress [2001] 1 CMLR 5; MPLR 1999, Reg.15(2), Reg.13(3) was revoked by the Maternity and Parental Leave etc. (Amendment) Regulations 2001, SI 2001/4010, Reg.3(c)
[6] House of Lords Hansard, *Maternity and Parental Leave etc. Regulations 1999*, (9 December 1999), (1999b), Col.1447, Lord Sainsbury of Turville at Cols.1448 and 1449; Hardy and Adnett, (2002), *op. cit.*, p.167
[7] MPLR 1999, Reg.16 and Sch.2
[8] *ibid*, Reg.13(1)(a)
[9] *ibid*, Regs.14(1) and 15
[10] FMLA 1993, § 102(b); PLA 1995, 10 §

year.[1] Further detail and analysis of these rights is discussed in the work-family classification analysis below.[2]

Family care model: Rights holder

Both the rights to parental leave and dependant care leave are presented in gender-neutral terms and provide working parents and, in some instances, carers with individualised non-transferable entitlements to leave.[3] The individualised right to leave is significant because it reinforces the gender-neutrality of leave by ensuring that both sexes have equal access to these rights. This is consistent with the family typology classification of family care since rights are presented on a gender-neutral basis.[4] The rights to parental leave and dependant care leave are not restricted to natural parents and may also extend to other carers. In the case of parental leave the employee wishing to utilise the leave must have responsibility for the child in question.[5] The issue of whether or not they have responsibility for the child for the purposes of this Act is a legal question and is determined by examining whether or not they have parental responsibility, or responsibilities,[6] for the child; or alternatively, if they are registered as the child's father.[7] The right is consequently restricted to those persons with legal caring obligations.

[1] MPLR 1999, Reg.16 and Sch.2 para.8
[2] Particularly within the *Family care model sections*, pp.377-383
[3] Parental leave: MPLR 1999, Reg.13(1); Dependant care leave: ERA 1996, s.57A(1)
[4] See Table 4.2 below, in appendix
[5] MPLR 1999, Reg.13(1)(b)
[6] In Scotland
[7] MPLR 1999, Reg.13(2)

The legislation does not contain the flexibility inherent within the Swedish legislation which enables other carers to utilise the leave in certain instances,[1] and instead adopts a more realistic approach towards the question of responsibility for care. The more restrictive approach is also evident in the US, as exemplified by the *Martin* case discussed previously.[2] While recognising the caring responsibilities of both working parents, the legislation does not fully appreciate the variety of carers with childcare responsibilities. A more expansive approach, however, is adopted in the right to dependant care leave.

This right covers a wide variety of dependants. In addition to children it includes spouses, parents and persons living with and in the family.[3] This broadly reflects the traditional nuclear family model inherent within other analyses of similar rights such as the right to leave in the US, although that is slightly more restricted.[4] In the case of persons who are ill, injured or have been assaulted the categories of dependants also includes persons who reasonably rely upon the employee for assistance or to make arrangements for their care in such circumstances.[5] This corresponds with the wider category of dependants found within the Swedish legislation, although in that instance limited to persons who are terminally ill.[6]

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[1] Such as when the father is unable or not entitled to take such leave: PLA 1995, 8 § and NIA 1962, 2, 10 and 11a §§

[2] Martin v Brevard County Public Schools, No.07-11196, D.C. Docket No.05-00971 CV-ORL-22-KRS, (11th Circuit, 30 September 2008); See pp.178-180 above for a discussion of this case

[3] ERA 1996, s57A(3)

[4] FMLA 1993, § 102(a)(1)(C)

[5] ERA 1996, s57A(4)

[6] CLA 1988, 4 §

In addition, the dependant to which the leave relates must be one from the defined list contained within the legislation, which includes: spouses, children, parents, someone who reasonably relies upon the employee and someone who lives in the same house but is not an employee, tenant, lodger or boarder.[1] The categories of dependants are much wider than those originally contained within the Draft Directive, which focuses on the caring responsibilities within the nuclear family model,[2] i.e. between spouses and for children.[3]

The rights holders entitled to dependant care leave reflects the various caring responsibilities that working persons may experience throughout their lives. In doing so, it encompasses a wide notion of family care, corresponding with that found in the family typology. Not only does it extend beyond early childcare, with no age limits being set in this regard, but it also includes non-nuclear family model relationships and persons who are not technically family members, such as neighbours or friends. In this regard, it could be said to focus on the presence of a caring and dependant relationship as opposed to the actual familial relationship between the persons. Such an approach is reminiscent of Fineman's analysis of care and the family,[4] and is useful because it reflects realistic commitments and not assumptions relating to pre-determined roles.

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[1] ERA 1996, ss.57A(3)-(5).
[2] See above pp.18-29 for more on this family model and familial caring responsibilities
[3] Draft Directive 1983, *op. cit.*, Art.8(2). This is similar to the caring responsibilities encompassed within US and Swedish legislation: see pp.170-173 and 242-252 for rights holder classifications of both
[4] Fineman, M., *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies*, (New York: Routledge Press, 1995), pp.230-232, discussed above at pp.27-29

Family care model: Care situations

The rights to parental leave and dependant care leave offer two distinct rights covering different care situations. In the first instance, parental leave encompasses a specific right to childcare leave, while the right to dependant care leave is only for emergency situations, consequently, both will be examine separately below.

Childcare

The right to parental leave provides employees with the right to a total of thirteen weeks unpaid leave per child until the child's fifth birthday,[1] or eighteen weeks leave until the child is eighteen, but only if that child is disabled.[2] A maximum of four weeks leave is permitted per year,[3] which must be taken in week long blocks, unless the leave relates to the care of a disabled child, in which case shorter periods can be used.[4]

The right to parental leave in the UK is, consequently, distinct from the equivalent rights in Sweden and the US perhaps suggesting a divergent work-family classification. It is a separate entitlement to childcare leave which can be used during the first 5 years of the child's life as opposed to

[1] MPLR 1999, Reg.14(1) and 15(1)
[2] *ibid*, Reg.14(1A) and 15(3)
[3] *ibid*, Reg.16, Sch.2, para.8
[4] *ibid*, Reg.16, Sch.2, para.7; As confirmed in Rodway v New Southern Railway Ltd

one which is interlinked or a substitute for maternity leave.[1] The previous chapters have shown that these equivalent rights in Sweden and the US are not underpinned by the family typology, despite the many similarities that they contain. On the other hand, both are underpinned by the maternal work-family typologies since while they are aimed at the gender-neutral working parent; they are in fact gendered in practice.[2] This can be compared with the UK implementation of parental leave. In the UK parental leave is not an alternative or an attempt to redesign maternity leave, but an additional right to leave, which can be used over an extended period of time. These distinguishing features of the right to parental leave in the UK could suggest that it does in fact correspond with the family typology.

The right to parental leave is generally available until the child's 5th birthday;[3] consequently, it is available beyond the immediate post-natal period and entitles working parents to care for children until around the time when they would normally start primary school. This is comparable with the right to parental leave in Sweden which is available until the child reaches the age of 8 or finishes their first school year,[4] reflecting the later school attendance age in that country. While the legislation in the UK adopts an earlier cut-off point than Sweden, and that is possible under the PLD 1996,[5] this should be considered in the context of the period when childcare is a particular concern

(Formerly South Central Trains Ltd) [2005] ICR 1162; EAT decision [2005] ICR 75
[1] As is the case in both Sweden and the US
[2] See pp.168-214 and 238-287 for US and Swedish work-family classifications
[3] MPLR 1999, Reg.15(1); It is extended to 18 if the child is disabled, Reg.14(1A)
[4] PLA 1995, 5-7 §§
[5] PLD 1996, Framework Agreement, Clause 2(1)

for working parents. Adopting a cut-off period which extends beyond normal school attendance age reflects this to an extent and should not be overly criticised with respect to the longer period in Sweden since they both aim to achieve the same goals.

While it is not available for the care of older children, the right to parental leave does appreciate some of the caring responsibilities of working parents. It recognises that these continue beyond the period surrounding and immediately following childbirth, although taken alone it fails to also appreciate that these can continue throughout the child's life. This right could be understood as being underpinned by the family typology. It enables working parents to care for their child over an extended period of time, when their childcare responsibilities are likely to be most demanding. In addition, because the purpose of the leave is to care for the child it can encompass a variety of caring situations enabling the working parent to take leave in non-emergency or medical related situations unlike the right to dependant care leave.

Emergency care

The minimalist implementation of the right to parental leave is not reflected to the same extent in the implementation of the right to family leave, or dependant care leave, in the UK. The right is contained in the ERA 1996 as

amended and enables employees to *"take a reasonable amount of time off"* work: in order to provide personal care when a dependant is ill, gives birth or is injured or when their usual care arrangements are disrupted; in order to arrange care for an injured or ill dependant; when a dependant dies; or, in order to attend a child's school in order to deal with an incident.[1] These categories reflect the medical focus of family leave in the PLD 1996, and the legislation in the US and Sweden,[2] but it also encompasses other emergency care situations. This is more consistent with the approach of earlier drafts of the directive and again represents a distinction from the Swedish and US legislation. However, a similar yet broader category of situations was also proposed in the US by President Clinton which would have enabled working parents to take time off work in order to attend events or meetings at a child's school.[3] While this was not translated into federal legislation many states have adopted analogous rights.[4]

In order to qualify for this right the employee must inform their employer of the reason for their absence as soon as reasonably practicable and, if possible, the length of time they expect to be absent for.[5] However, there is

[1] ERA 1996, s.57A(1)
[2] FMLA 1993, § 102(a) and PLA 1995, 8 §
[3] H.R.234, Family and Medical Leave Enhancement Act, (105th Congress, 1st Session), (1997-1998), [WWW Document] URL: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h234ih.txt.pdf (Last Accessed: Sept 2009), supported by Clinton but never enacted. A similar bill has been proposed more recently: H.R.824, Family and Medical Leave Enhancement Act, (111th Congress, 1st Session), (2009), [WWW Document] URL: http://maloney.house.gov/documents/olddocs/family/020105FMLEnhancementAct.pdf (Last Accessed: Sept 2009)
[4] See Table 5.2 in the appendix for details
[5] ERA 1996, s57A (2)

no cap on the maximum number of days that an employee can take,[1] subject to the *caveat* that it is reasonable to enable the employee to take necessary action.[2] This is again wider than that originally contained within the Draft Directive, which provided that Member States could impose such limits.[3] It is also wider than the rights in both Sweden and the US which are limited to 120 days maximum in Sweden,[4] and 12 weeks per year in the US.[5]

In spite of the flexibility that this appears to provide, it is clear that the legislation refers specifically to emergency situations. This was reinforced in *Qua v John Ford Morrison*,[6] which considered the concepts of 'reasonable' and 'necessary'. In doing so the EAT reinforced that they had to be determined with reference to the particular circumstances in question.[7] Following the terms of Lord Sainsbury's analysis of the right during its' passage through the House of Lords,[8] the EAT reiterated that the legislation is restricted to emergency situations and does not permit employees to provide personal care on a continuing basis.[9] In doing so they drew attention to the foreseeability of absence, with the legislation being limited to those instances where such leave was unexpected.[1] This reasoning reinforces that what is reasonable will be limited to a few days. This is reflected in the

[1] Which was a possibility under PLD 1996, Framework Agreement, Clause 3(2)
[2] ERA 1996, s57A(1)
[3] Draft Directive 1983, *op. cit.*, Art.8(1)
[4] PLA 1995, 8 § and NIA 1962, 12 § – normally 60 days but can be increased to 120 in exceptional circumstances
[5] FMLA 1993, § 102(a)(1)(C)
[6] Qua v John Ford Morrison [2003] ICR 482
[7] *ibid*, p.490
[8] House of Lords Hansard, *Employment Relations Bill*, (8 July 1999), Col.1037, Lord Sainsbury of Turville, Cols.1084-1085
[9] Qua, *op. cit.*, pp.490-491

average number of days taken for this purpose in 2006, which was 5.07 days, with the median being 2.13 days.

While the right to dependant care leave is restricted to these medical and emergency situations, it covers a wide variety of dependants.[2] This encompasses a wide notion of family care, corresponding with that found in the family typology. Not only does it extend beyond early childcare, with no age limits being set in this regard, but it also includes non-nuclear family model relationships and persons who are not technically family members, such as neighbours or friends.[1] In addition, the right to dependant care leave can be used at any time when one of these types of situation arises. It is not limited by reference to the age of the dependant, nor is it limited to a certain number of days per year, or situation. All of these characteristics suggest that the right to dependant care leave is underpinned by the family typology notion of family care.

The family care model

The family care model underpinning these parental rights is consistent with the family typology. In comparison with mothers' rights the legislation recognises the caring responsibilities of both working parents and also other carers. It is the first attempt to move the work-family focus from a solely

[1] Qua, *op. cit.*, p.491; Rodway, (EAT), *op. cit.*, p.80
[2] ERA 1996, s57A(4)

childcare perspective to a more inclusive understanding of care. While this is much more limited than the rights available to working carers in the US, and while childcare remains the primary focus, there is nevertheless greater recognition of family care.

Working family model

The right to parental leave in the UK has been described as *"establish[ing] the foundation for a workplace culture which recognises the importance of balancing work and family responsibilities."*[2] This understanding of the purpose and implications of the right to parental leave is consistent with the aims of the PLD 1996.[3] This suggests a significant re-negotiation of the caring and earning responsibilities of working families, enabling them to address their work-family conflicts, which is a key consideration in determining the working family model inherent within the legislation. A prima facie examination of the legislation tends to support this view.

Both of the rights are available to both working parents, and in some instances working carers, so they should in principle support dual earner-carer working family models. One particular feature of the rights that

[1] ERA 1996, s.57A(3) and (4)
[2] European Commission: Employment and Social Affairs, *Family Benefits and Family Policies in Europe*, (European Commission, 2002), p.87
[3] Bruning and Plantenga, (1999), *op. cit.*, p.205

supports this is their individualised nature.[1] While the PLD 1996 encourages the non-transferability of parental rights, it does not prohibit it.[2] Even the revised framework agreement only requires that one of the months leave be non-transferable.[3] This is a significant feature of the right to parental leave because the Swedish experience in particular indicates the poor sharing of such rights which are transferable.[4] The implications of this are also noted in the General Considerations of the revised framework agreement,[5] which raises the question of why they have not included these proposals within the agreement itself.

Finch argues that non-transferable leave is one of the ways in which equality between working parents in terms of their utilisation of rights can be achieved.[6] By adopting leave on this basis, the UK appears to be strengthening their support for dual earner-carers. However, there are other characteristics of the legislation that suggest that it is instead based on a single earner-carer working family model. One such characteristic is the unpaid nature of the leave.

The absence of income replacement accompanying the right to childcare leave makes it more difficult for working families to utilise the leave. In the

[1] MPLR 1999, Reg.13(1)
[2] PLD 1996, Framework Agreement, Clause 2(2)
[3] Revised Framework Agreement, (2009), *op. cit.*, Clause 2(2)
[4] As discussed in above, pp.281-285; Finch, N., 'Childcare and Parental Leave', in J. Bradshaw and A. Hatland (Eds), *Social Policy, Employment and Family Change in Comparative Perspective*, (Northampton: Edward Elgar Publishing, 2006), (2006a), pp.127-130 and 132
[5] Revised Framework Agreement, (2009), *op. cit.*, General Considerations, para.16
[6] Finch, (2006a), *op. cit.*, p.132

first instance, it has particular concerns for different family groups. Arguments advanced in the Social Security Select Committee identified concerns that if the leave was unpaid that it could prevent poorer families from utilising it.[1] In particular, the NSPCC argued that *"the government's current plans will discriminate against the poor. They will only allow the well-off to take advantage of unpaid parental leave."*[2] In the parliamentary debates regarding the right to parental leave it was also argued that utilisation would be low because of the unpaid nature of the right.[3] This appears to have been borne out in practice. In the first instance, *The Second Work-Life Balance Study: Results from the Employees' Survey*, conducted in 2004, identified that 4% of all of the working parents studied utilised the right to parental leave.[4] The small numbers of working parents using the right was reiterated in research conducted in 2006 which identified that 1% of the total number of employees studied, or 6% of working parents with dependant children studied, used the right to parental leave.[5] This indicates that this right has not frequently been used in the UK. This reinforces comments made by the EOC in relation to the Green Paper *Work and Parents: Competitiveness and Choice* in 2001. With regard to the right to parental leave, and in particular the issue of parental leave pay, the EOC stated that:

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[1] Social Security Select Committee (SSSC), *Social Security Implications of Parental Leave*. HC 543 (ISBN 0 10 556431 1), (London: The Stationery Office, 1998/9), paras.11-13
[2] NSPCC, cited in *ibid*, para.12
[3] House of Commons Hansard, *European Standing Committee B*, *Employment Law*, (3 December 1997), Mr Rammel
[4] Stevens, J., Brown, J., and Lee, C., *The Second Work-Life Balance Study: Results from the Employees' Survey*, (London: DTI, Employment Relations Research Series No.27, 2004), p.88
[5] Hooker, H., Neathey, F., Casebourne, J., Munro, M., (Institute for Employment Studies), *The Third Work-Life Balance Employee Survey: Main findings*, (London: DTI, Employment Relations Research Series No. 58, March 2007), p.122

"[t]he restrictive way in which parental leave has been introduced in Britain means that it lacks a clear purpose and role."[1] Despite these comments being made a number of years ago, they remain relevant to the current right to parental leave.

The unpaid nature of the right could have particular implications for certain types of working families such as single parent families or low income families who may not be able to afford to take advantage of the rights to unpaid leave. It also has particular implications for both parents' utilisation of the leave. Not only does it fail to fully support working parents in their roles as both earners and carers by failing to value care, it also undermines dual earning and caring by making it cost-prohibitive for both working parents to use it.

Flexibility

The legislation also limits the ability of working families to address their work-family conflicts by restricting the right to parental leave in terms of when and how it can be utilised. While it is more flexible than the US right to parental leave which must, generally, be taken in one continuous block,[2] the leave must be taken in one-week blocks, unless the child is disabled in which case

[1] EOC, *EOC Response To DTI Green Paper Work and Parents: Competitiveness and Choice - March 2001, Executive Summary*, p.14
[2] FMLA 1993, § 102(b)

shorter periods are permitted.[1] This is notably different from the right to parental leave in Sweden which incorporates a greater degree of flexibility and choice into the parental leave package enabling working families to care over an extended period of time,[2] enabling working families to absorb the costs of any periods of unpaid leave.

There are a number of problems relating to the inflexibility of the leave. In the first instance, it may require working parents to utilise more leave than they need in the circumstances. This leads to further complications since the purpose of the leave must be to care for the child.[3] The rigidity of the legislation was particularly evident in the *Rodway v New Southern Railway Ltd* case.[4]

In *Rodway* the employee wanted to utilise parental leave for one day in order to care for his son.[5] Although his request was denied, he failed to attend work and was subsequently disciplined. The issue that arose in this case was whether he was entitled to parental leave and so whether he had been subjected to a detriment for a reason relating to it.[6] The ET originally upheld his complaint adopting a purposive interpretation of the PLD 1996.[7] This approach was roundly rejected by both the EAT and the Court of Appeal.[1] The EAT held that the regulations clearly stipulated, in cases where the

[1] MPLR 1999, Reg.16, Sch.2, para.7
[2] PLA 1995, 3-8 §§, as discussed above in pp.253-260
[3] MPLR 1999, Reg.13(1)
[4] Rodway, (EAT), *op. cit.*; Rodway, *op. cit.*
[5] *ibid*, pp.76-77; and *ibid*, p.1164
[6] *ibid*, pp.79-81 and 83; and *ibid*, pp.1163, and 1164
[7] *ibid*, p.80, citing paras.29-31 of the ET judgment

default provisions apply, that parental leave should be taken for a minimum of one week.[2] They also held that the provisions contained within Reg.14(4), which relate to the aggregation of leave were an employee takes less than one week's leave in terms of Regs.14(2) or (3), only apply to leave in respect of a disabled child.[3] While the Court of Appeal largely upheld this decision,[4] they agreed with the appellant that Reg.14(4) should not be restricted solely to the care of a disabled child. Instead they reasoned that it would also apply in situations where the default regulations did not apply.[5] The effect of the decision in *Rodway*, consequently, is to underscore that the default provisions can only be used in one week blocks. However, individual workplace or collective agreements may provide for greater flexibility enabling employees to extend their leave period over a longer period of time. If such flexibility is not available working parents will have to establish that they require parental leave for the full week in order to care for the child. If they are unable to do so, for instance, because they only require one or two days leave, they will not be entitled to any leave. As the ET suggested, this consequence appears to undermine the purpose of the legislation.[6]

The effect of the default provisions is to make it more difficult for working families to address their work-family conflicts in certain instances. The position that Mr Rodway found himself in meant that he was not entitled to

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[1] Rodway, (EAT), *op. cit.*, pp.82-83; and Rodway, *op. cit.*, p.1168
[2] *ibid*, p.82
[3] *ibid*
[4] Rodway, *op. cit.*, p.1168-1169
[5] *ibid*, p.1167
[6] Rodway, (EAT), *op. cit.*, p.80, citing para.30 of the ET decision

parental leave because the care period was too short, nor was he entitled to dependant care leave because it was not an emergency care situation.[1] This feature of the right to parental leave, alongside the employers' ability to postpone the utilisation of leave,[2] makes it difficult for working families, particularly those without a support network outside of the labour market, to address all of their family care responsibilities. This decision has, consequently, reinforced the inflexibility of parental leave in the UK. This can be compared with the entirely flexible Swedish parental leave system, which enables working parents to use parental leave in a variety of ways.[3]

Working family model

The working family model underpinning these parental rights reflects the one and a half earner-carer working family model. In spite of the legislation being extended to both working parents, the unpaid and inflexible aspects of the leave suggest that it would be difficult for both working parents to assume family care responsibilities. Instead it suggests that one family member is presumed to undertake primary responsibility for unpaid care while the other supports the family financially. This is consistent with Bruning and Plantenga's analysis of parental leave in 8 European countries. They also identify that the implications and experience of parental leave within different

[1] Rodway, (EAT), *op. cit.*, p.80, citing para.32 of the ET decision
[2] MPLR 1999, Sch.2, para.6
[3] PLA 1995, 3-8 §§; See pp.253-260 above for more discussion of the care situations included within the legislation

states did not necessarily facilitate equal opportunities or challenge traditional gender roles.[1] While their analysis did not extend to the UK, the same conclusions can be drawn regarding this right to parental leave. The question that this poses is why has parental leave been so ineffective? The answer quite plainly appears to be that it continues to be based on a maternal model of care.[2] Whether or not this upholds traditional gender roles will be examined in the following section.

Gender Roles

While the family care model section identified that these are gender-neutral work-family rights, the working family model classification questions this by identifying that the working family model inherent within the legislation is the one and a half earner-carer working family model. The question that remains is the division of gender roles that the legislation upholds. There is evidence to suggest that the legislation is gendered in practice. This could be explained in terms of the historical and conceptual roots that the right to parental leave often has with female labour market participation and the right to maternity leave.[3] In the previous examinations of Swedish and US work-family rights the specific relationship between these rights and the gendered

[1] Bruning and Plantenga, (1999), *op. cit.*, pp.205-207, which confirms research presented in 1995 by Organisation for Economic Co-operation and Development, (OECD), *Employment Outlook*, (OECD, July 1995), pp.195-196, which made similar observations concerning the right to parental leave
[2] Bruning and Plantenga, (1999), *op. cit.*, p.208
[3] Drew, (2004), *op. cit.*, p.41; OECD, (1995), *op. cit.*, p.180

implications of such were clearly evident.[1] In Sweden, as noted previously, the right to parental leave was a re-conceptualisation of the right to maternity leave. Working parents were given equal access to this previously gendered right, with no additional or alternative rights to maternity leave originally being preserved.[2] A similar position was adopted in the US, although with no previous maternity leave history. Rights were enacted to enable both parents to care for their child, with no specific rights to maternity leave.[3] This approach towards these work-family rights and the work-family conflict was problematic because although gender-neutral these rights were directly associated with mothers' rights to leave following childbirth. The result of this was that the rights were presumed to be mothers' rights and not parents' rights, making them less attractive to working fathers and reinforcing (either directly or indirectly) the traditional division of gender roles.[4] While, as noted above, the right to parental leave has been adopted on an individualised basis, distinct from the right to maternity leave, it appears to be the case that the right to parental leave in the UK has also been treated as a mothers' right.

[1] See Chapters Five, pp.194-212 and Six, pp.270-287 above for more details on the gendered nature of these rights in these countries
[2] See Chapter Six, pp.231-238 for a discussion of the development of Swedish work-family rights – now there are specific rights to maternity leave in order to comply with the PWD 1992 as previously discussed at pp.243-247
[3] See Chapter Five, pp.168-214 for a discussion of US work-family rights
[4] See Chapters Five, pp.194-212 and Six, pp.270-287 above

Mothers' rights

There are various aspects of the rights which reinforce the traditional sexual division of labour. One such feature is that the legislation entitles working parents to a period of unpaid leave.[1] The implications of this form of leave on the ability of both working parents to utilise the leave was discussed in the previous section, but it also has a significant impact on assumptions regarding the gendering of the leave.

In the context of the gendered utilisation of parental leave, evidence also suggests that the payment of leave is clearly linked with male utilisation rates.[2] The experience in both Sweden and the US confirms this trend.[3] Concerns have also been raised in the UK context.[4] In the UK, the issue was much debated in the Social Security Select Committee,[5] in particular, they considered the possible implications of parental leave and concluded that it was evident to them *"that if parental leave [was] unpaid take-up among fathers [would] be particularly low"*.[6] This conclusion reflects the disparate earning levels of men and women, with women continuing to earning a

[1] There is no provision within the legislation for the payment of leave, with the implication that leave is unpaid
[2] Finch, (2006a), *op. cit.*, p.133
[3] Sweden: Bruning and Plantenga, (1999), *op. cit.*, pp.200 and 204-205. Sweden and the US: OECD, (1995), *op. cit.*, pp.173, 186-189, Table 5.4, in the US 0% of men in January 1994 took family leave for the purposes of paternity leave, although it should be borne in mind that this was very shortly after the legislation had been enacted.
[4] For an overview of criticisms see McColgan, A., 'Family Friendly Frolics? The Maternity and Parental Leave etc. Regulations 1999', 2000 Vol.29(2) *Industrial Law Journal* 125, p.139
[5] SSSC, (1998/9), *op. cit.*, paras.7-38
[6] *ibid*, para.14

percentage of men's earnings.[1] The differing utilisation rates between men and women were also anticipated during the debates on the leave,[2] and in government projections. Within the original regulatory impact assessment it was projected that only 1000 persons would utilise the leave per year,[3] and that only 10% of fathers and 50% of mothers would use the leave.[4] In implementing the right to parental leave on an unpaid basis the UK government appear to have ignored the implications for working fathers and introduced a right that they anticipated would be of primary importance and benefit to working mothers.

The relationship between the payment of leave and fathers' utilisation rates was further reinforced by the findings of the 2004 Eurobarometer survey of men throughout Europe.[5] The results from this study indicated that the payment of leave was a major issue in determining whether or not fathers would utilise it. The study identified that the main factor discouraging men from taking parental leave was the lack or inadequate provision of income replacement.[6] In comparison, the main factor that would encourage greater paternal utilisation was to increase the financial compensation available

[1] Men continue to earn on average 12.8 (median) or 17.1 (mean) more than women: Office for National Statistics, *2008 Annual Survey of Hours and Earnings*, (14 November 2008), p.6, [WWW Document] URL: http://www.statistics.gov.uk/pdfdir/ashe1108.pdf (Last Accessed: Sept 2009)
[2] House of Lords Hansard, *Work and the Family*, (13 October 1998), Col.884, per Baroness Blatch at Cols.905-906
[3] SSSC, (1998/9), *op. cit.*, para.10
[4] DTI, *Parental Leave Consultation*, (London: DTI, May 2001), (2001b), p.8
[5] Eurobarometer, *Europeans' Attitudes to Parental Leave*, European Commission, Special Eurobarometer 189/Wave 59.1, (European Opinion Research Group EEIG, 2004)
[6] 42%, *ibid*, p.20

during the leave.[1] The responses of fathers from different European countries supported these answers with men in Sweden, being more likely to indicate that they have or would use it, compared with British men who were considerably less likely to do so. Only 33% of Swedish men said that they either had not or would not take leave, compared with 84% of British men.[2]

Utilisation rates

Very little research has been conducted concerning the actual utilisation rates of these rights by working families. However, the evidence that is available indicates more equitable sharing of parental rights than the foregoing has suggested. Research regarding the right to dependant care leave suggests comparable rates between men and women, with working mothers using marginally more leave overall than working fathers. *The Third Work-Life Balance Employee Survey* published by the DTI[3] showed that in 2006 92% of men who had experienced an emergency had taken time off to deal with it compared to 89% of women.[4] However, women took slightly longer periods of leave in these circumstances, taking on average 5.57 days leave compared with men who took 4.62 days, with the medians being 2.23 and 2.04 days respectively.[5] Overall, there is very little difference in the use

[1] 38%, Eurobarometer, (2004), *op. cit.*, p.18
[2] *ibid*, p.10
[3] Hooker, et al., (2007), *op. cit.* – this research was based on 2081 telephone interviews conducted in February and March 2006, p.8
[4] *ibid*, Table A5.29, p.213 – figures based on 799 responses
[5] *ibid*, Table A5.30, p.214

of dependant care leave between working parents suggesting that it is not necessarily gendered in practice. This can be compared with the Swedish experience, where working parents are entitled to temporary leave with temporary parental benefit for a maximum of 120 days per year in similar circumstances.[1] Swedish working fathers tend to use this right in comparable numbers with the right to parental leave and benefit,[2] 36% of the temporary parental benefit days drawn in 2007 were taken by fathers.[3] While Swedish mothers continue to take primary responsibility for care, this research shows that in both countries both working parents are taking responsibility for their children, and other dependants, when they are ill.

Attitudes towards the gendered division of caring responsibilities were also evident within the 2004 Eurobarometer study. Swedish men were most supportive of shared parenting, with 12% stating that they either had or would take parental leave because both parents should share the responsibilities equally.[4] While this appears to be a small proportion of responses, the numbers of men giving this response was four times greater than the equivalent British results, and were three times the EU average.[5] These gendered attitudes towards care and shared parenting further suggest that the legislation is underpinned by the traditional division of gender roles.

[1] PLA 1995, 8 §; See Chapter Six, pp.256-260 above for more on this right
[2] 42% of persons claiming temporary parental benefit are men compared with 44% of those using parental benefit: Statistics Sweden, (2008), *Women and Men in Sweden, Facts and Figures 2008*, (Statistics Sweden), [WWW Document] URL: http://www.scb.se/statistik/_publikationer/LE0202_2008A01_BR_X10BR0801ENG.pdf (Last Accessed: Sept 2009), p.44
[3] *ibid*
[4] Eurobarometer, 2004, *op. cit.*, p.14
[5] 3% and 4% respectively, *ibid*

However, the utilisation rates of working parents present rather surprising results.

Similar utilisation rates for men and women in relation to parental leave were also identified.[1] *The Third Work-Life Balance Employee Survey* identified that only 31 of the 2081 employees involved in the study,[2] 19 of which were mothers and 12 fathers, utilised the right to parental leave.[3] Given the relatively small scale of this study these findings again do not enable strong conclusions to be drawn about the utilisation of parental leave, particularly with regard to the division of mothers and fathers using the right. Nevertheless, they do suggest that working parents are generally using the right equally, although mothers' perhaps marginally more frequently. What these figures indicate most significantly is that the right to parental leave has been largely unsuccessful in enabling working families to address their work-family conflicts. The corollary of this is that it fails to challenge the gendered nature of care by facilitating and encouraging the sharing of earning and caring responsibilities.

Finch argues that the division of gender roles has equally not been challenged by the Nordic countries, including Sweden.[4] This contrasts

[1] Stevens, et al., (2004), *op. cit.*
[2] This amounted to 1% of total employees studied and 6% of those with dependant children: Hooker et al., (2007), *op. cit.*, p.122
[3] *ibid*
[4] Finch, (2006a), *op. cit.*, p.138; This supports earlier research by Larsen, T.P., Taylor-Gooby, P., and Kananen, J., *The Myth of a Dual-earner Society – New Policy Discourses in European Welfare State*s, (2004), University of Kent, [WWW Document] URL: http://www.kent.ac.uk/wramsoc/conferencesandworkshops/conferenceinformation/berlinconference/themythofadualearnersociety.pdf (Last Accessed, Sept 2009), which argued that

somewhat with the welfare state regimes classifications of both Sweden and the UK which would indicate a greater challenging of these roles in Sweden. However, the way in which these roles have been reinforced does reflect the slightly different approach towards the work-family conflict within these states. In Sweden, this reinforcement of gender roles has been achieved by strengthening the value of care,[1] which has been viewed and used in gendered terms. In the UK this has been through limited and minimal engagement with caring responsibilities, again reinforcing the liberal welfare state regime classification.[2] These different approaches, nevertheless, reflect similar work-family classifications. Both reinforce the traditional division of gender roles, and are underpinned by the extended motherhood typology.

Conclusions regarding European parental rights

The harmonisation and equality objectives of the PLD 1996 appear to be a long way from the reality of parental leave in the UK. Instead of challenging the maternity to motherhood typology underpinning mothers' work-family rights, these parental rights reinforce maternal care. While the right to parental leave has been introduced on gender-neutral terms and has, in practice, generally been used equally poorly by both working parents, the

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legislation in both Sweden and the US was still underpinned by the male breadwinner ideology in spite of efforts made to move towards the dual-earner model

[1] See Chapter Six pp.270-286 for more details on discussion of gender roles in Sweden; León, M., 'Welfare State regimes and the social organization of labour: Childcare arrangements and the work/family balance', 2005 Vol.53(2) *Sociological Review* 204, p.211

[2] *ibid*; Hantrais, L., *Family Policy Matters: Responding to Family Change in Europe*, (Bristol: Policy, 2004), pp.202-203

gendered nature of childcare remains intact. One possible reason for this is that very few people use the right to parental leave. Alternatively, and not necessarily unrelated, is the fact that maternity leave remains the most dominant and developed work-family right in the UK.[1] Consequently, as the package of work-family rights develops in the UK it appears to be centred upon and around the mother as primary caregiver in the first instance, with parents' rights being added as peripheral additional rights solely in order to comply with European obligations.

UK parental rights

The foregoing discussion has focused on those parental rights that have been imposed upon the UK as a consequence of European obligations. The rights to request flexible working have, in contrast, developed at the UK level. Similarly to the other work-family rights, however, the roots of these rights can be traced to equality legislation.[1]

Flexible working and sex discrimination

Prior to the introduction of the right to request flexible working, some employers did grant working parents' requests to change their hours of work.

[1] Moss and Deven, (2006), *op. cit.*, p.268; Compare with discussion of mothers' rights in Chapter Seven

However, in practice this right was often treated as a woman's issue.[2] This reflects the dominance of female utilisation of flexible working arrangements.[3] Mothers made greater use of flexible working arrangements, particularly part-time working, than fathers with the exceptions of working from home and shift work which fathers did more often.[4] Although while these forms of flexible working are 'flexible', they are not necessarily 'family-friendly', whereas those arrangements adopted by working mothers are more concerned with combining work and family commitments, further entrenching the gendered perception of such activities. In addition, fathers were far less likely to request changes to spend more time with their family or to meet their family commitments.[5] One of the reasons given by fathers for not requesting part-time work was that it would adversely affect their career prospects.[6] Perhaps one of the main reasons why this was the case was because the legislation used by working parents to support access to such rights was sex discrimination legislation.[7] However, this has also been used by working fathers to achieve comparable rights, although on a much smaller scale.[8]

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[1] In particular the SDA 1975

[2] Cully, M., O'Reilly, A., Millward, N., Forth, J., Woodland, S., Dix, G., and Bryson, A., *The 1998 Workplace Employee Relations Survey, First Findings*, (London: DTI, 1998), p.20

[3] *ibid*, Table 9, p.20. Ten and 13 percent of male workers in the private and public sector respectively had access to working from home, compared to 6% and 9% of female workers in the private and public sectors respectively.

[4] *ibid*, Table 9, p.20; O'Brien, M., and Shemilt, I., *Working fathers: earning and caring*, (Manchester: EOC, 2003), Figure 4.7 pp.54-55

[5] O'Brien and Shemilt, (2003), *ibid*, p.54 and Table A2.2 p.69 (27.7% and 20.9% of fathers gave this response as a reason for working part-time as compared with 56.3% and 39.9% of working mothers)

[6] *ibid*, p.54 and Table A2.5 p.70 (65.7% of fathers compared with 45.3% of mothers thought that this would be the case)

[7] SDA 1975; See Fraser, M., 'New rights for old. Flex-working and sex discrimination', 2004 Vol.26(2) *Employee Relations* 167 for an overview

[8] Robert Jones v Gan Insurance (2000) settled out of court; Walkingshaw v The John Martin Group, Case No: S/401126/00 Held in Edinburgh Employment Tribunal on 25 and 26 January and 22 February 2001

One such case which exposed the gendered nature of this practice is the unreported case *Walkingshaw v The John Martin Group*.[1]

This case involved a father who requested a change in his working hours in order to care for his child.[2] His request was refused on the basis that it would be *"too complicated"*, as was his subsequent suggestion of job sharing.[3] He consequently resigned and later raised this sex discrimination case against his employer. The argument raised in this case was that the refusal of his request to change his working hours amounted to direct sex discrimination since female employees' requests had previously been considered and granted by the employer.[4]

The Employment Tribunal subsequently held that Walkingshaw had been directly discriminated against on the grounds of his sex;[5] further noting that they had *"no doubt"* that a female request would have been considered in more depth and is likely that such a request would have been granted.[6] The particular importance and value of this case is that it underscores the attitude that certain employers had regarding these rights as predominantly for the benefit of working mothers and not working parents more generally. This was also evident in this case where it was suggested that the issue and concern of sex discrimination was a consideration in granting female

[1] Walkingshaw, (2001), *ibid*
[2] *ibid*, p.4
[3] *ibid*, p.4
[4] *ibid*, p.6
[5] *ibid*, pp.12-13
[6] *ibid*, p.13

requests,[1] but was not similarly considered in Walkingshaw's case.

The right to request flexible working

The right to request flexible working has primarily been concerned with enabling working parents with children under 6, 18 if disabled, to request a change to their hours, times or place of work for the purposes of caring for that child.[2] The right has recently been extended to include carers of dependant adults,[3] and to carers of children under 17 years of age.[4]

The right to request flexible working was initially introduced against a clearly gendered approach towards working parents and the work-family conflict. The legislation was introduced as an attempt to change society's views and approach towards this issue.[5] This was evident in the Government's equality based aim of encouraging fathers' participation in the family while at the

[1] Walkingshaw, (2001), *op. cit.*, p.6
[2] ERA 1996, s.80F(1)
[3] Work and Families Act 2006, c.18, (WFA 2006), and The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006, SI 2006/3314, (FW(ECR)(A)R 2006), Reg.5 amending The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, S.I. 2002/3236 (FW(ECR)R 2002),by inserting Reg.3B
[4] As recommended by: Walsh, I., *Right to Request Flexible Working: A review of how to extend the right to request flexible working to parents of older children*, (London: BERR, May 2008), p.19; and BERR, *Consulting on Implementing the Recommendations of Imelda Walsh's Independent Review: Amending and Extending the Right to Request Flexible Working to Parents of Older Children*, (London: BERR, August 2008), pp.8-9; FW(ECR)R 2002, Reg.3A as amended by Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009, S.I. 2009/595, (FW(ECR)(A)R 2009), Reg.2(2)
[5] Anderson, L., 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working 'Rights' for Parents', 2003 Vol.32(1) *Industrial Law Journal* 37, p.41; Reflected to an extent by Ms Hewitt's comments regarding the Walkingshaw case in House of Commons Hansard, *Employment Bill*, (27 November 2001), Col.664, Col.868

same time increasing mothers' participation in the labour market.[1] The gender-neutrality of the right was further supported by comments made by the Government and supporters of the right during its passage through parliament. For instance, the Equal Opportunities Commission praised the introduction of the right since, *"for the first time employers will have an explicit duty to properly consider fathers as well as mothers' requests to work part time."*[2] This was also reiterated by the then Minister for Employment and the Regions, Alan Johnston, who argued that evidence from Labour Force Surveys suggested that both parents would use the right.[3]

The background surrounding the introduction of the right to request flexible working is in stark contrast to that surrounding the introduction of parental leave, which was viewed in much more gendered terms.[1] Thus, suggesting a move towards the family typology underpinning the legislation reflecting these gender-neutral and shared parenting objectives.

This underpinning aim of the legislation appears, at first glance, to correspond with the family typology since it is based on gender-neutrality and shared earning and caring roles. However, the gender-neutrality of the right was subjected to challenge during the House of Commons and Standing

[1] HM Treasury and DTI, *Balancing work and family life: enhancing choice and support for parents*, (London: Stationery Office, 2003), p.14. This point was also made in subsequent research by Smeaton, D., and Marsh, A. (Policy Studies Institute), *Maternity and Paternity Rights and Benefits: Survey of Parents 2005*, Employment Relations Research Series No.50, (London: DTI, March 2006), Table 10.1, p.93

[2] House of Commons Hansard, (2001), *op. cit.*, Col.868

[3] House of Commons Hansard, *Standing Committee F, Employment Bill*, 16th Sitting, (22 January 2002), Col.577, Alan Johnston (The Minister for Employment and the Regions), Col.622

Committee debates,[2] and can also be questioned by examining the right in more detail.

The work-family classification of the rights to request flexible working

The rights to request flexible working have developed in three stages extending the right to three different groups of caregivers and persons requiring care. The framework of the rights is identical in all three situations so the rights will be discussed together below to avoid unnecessary repetition. The main differences between the rights can be found in the examination of the family care model underpinning the legislation. In contrast with previous analyses of this indicator, this examination will begin by considering the care situations encompassed within the legislation. This will identify the development of the right and the extension of those persons requiring care covered by the legislation.

Family care model: Care situations

When the right to request flexible working was first enacted it was restricted primarily to the care of young children, reflecting the childcare focus of the

[1] As noted above pp.354-371
[2] House of Commons Hansard, (2001), *op. cit.*, Angela Watkinson (Upminster), Col.914 and House of Commons Hansard, (2002), *op. cit.*, Mr Philip Hammond (Runnymed and Weybridge), Col.605

package of work-family rights in the UK at this time.[1] The right could only be exercised by parents, and other carers in limited circumstances,[2] of children until their 6th birthday, or 18 if the child is disabled.[3] The legislation thus recognised that the childcare responsibilities of working parents extend beyond the post-natal period and can be continuing, and are most demanding at this time.[4] In this respect it reflects the approach adopted in Sweden and focuses on period following childbirth and ending when the child starts primary school.[5]

This aspect of the right has been criticised on the basis that working families require more flexibility when their children are at school and as they get older.[6] Consequently, the right to request flexible working was limited because it did not appreciate the caring responsibilities that all working persons with childcare responsibilities could have. Furthermore, it was limited to employees with children failing to recognise the diverse caring commitments working persons may experience throughout their lives. The limitations of the scope of this right have been recognised by those who would have preferred to see the legislation extend to other employees with caring responsibilities, such as for elderly parents, or to all employees.[7] In

[1] As reflected in the package of rights for working mothers and parents discussed thus far; Also noted by James, G., *The Legal Regulation of Pregnancy and Parenting in the Labour Market*, (Oxon: Routledge-Cavendish, 2009), p.49
[2] See the following section for details, pp.407-409
[3] FW(ECR)R 2002, Reg.3A as inserted by FW(ECR)(A)R 2006, Reg.5
[4] House of Commons Hansard, (2002), *op. cit.*, Alan Johnson at Col.589
[5] Explanatory Notes to Employment Act 2002, c.22, (EA 2002), para.124
[6] Camp, C., *Right to Request Flexible Working: Review of impact in first year of legislation*. (Working Families, 2004), p.13; James, (2009), *op. cit.*, p.49
[7] House of Commons Hansard, (2001), *op. cit.*, Mr Wittngdale, Col.877 and Mr Hammond, Col.897; House of Commons Hansard, (2002), *op. cit.*, Mr Hammond, Cols.603-604 and Mr

response to such demands the right to request flexible working was subsequently extended to working persons with other caring commitments.

Regulations were adopted following the implementation of the WFA 2006, introducing the right to request flexible working for carers of adults.[1] Consequently, a person who cares for someone over 18 who is either: their partner, including married and civil partners, and those living together as though they were in such a relationship;[2] their relative; or someone who lives at the same address as them, will also be entitled to request a change in their working arrangements. The right has, consequently, been extended to encompass the various care giving responsibilities that working families' experience. In doing so, it extends the notion of family care beyond the traditional focus on children and childcare responsibilities. This understanding of family care corresponds more closely with that adopted in the family typology. However, there were still some caring situations which fell outside the scope of the legislation. For instance, this amendment extends the right to those adults over 18 who were in need of care. The types of care situations covered here are not defined in the legislation. This, consequently, has the potential to cover a wide range of circumstances. However, it may also pose problems for employees and employers who are unsure of the types of situations envisaged here. In addition, parents of children, who are not disabled, between 6 and 18 were excluded, despite the

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Lamb, Cols.616 and 618

[1] FW(ECR)R 2002, Reg.3B as inserted by FW(ECR)(A)R 2006, Reg.5

[2] *ibid*, Reg.2(1) as inserted by FW(ECR)(A)R 2006, Reg.3

Government consulting on this issue at the same time. [1] This was another area where there was support for extending the right.[2] This could result in situations where carers of children between the ages of 6 and 18, who are not disabled in terms of the Act, are not afforded the right to request flexible working although their child is in need of care as may be determined by the legislation. The response to this has been a further stage of reforms extending the right to request flexible working to parents of children under 17.[3]

The right to request flexible working as it currently stands appears to address some of the concerns and criticisms originally surrounding its early childcare focus.[4] Instead it is much more reflective of the family typology classification of family care. This is evident not only in the extensive coverage for those with childcare responsibilities, but also for those with other caring commitments, for instance, care of elderly parents. This is the first work-family right enabling such carers to address their work-family conflicts and in doing so is notably different from the comparable rights in Sweden and the US.

Focusing on the types of caring situations encompassed within the three

[1] DTI, *Work and Families: Choice and Flexibility, A Consultation Document*, (DTI: London, February 2005), (2005a), pp.58-59 and DTI, *Work and Families: Choice and Flexibility, Government Response to Public Consultation*, (DTI: London, October 2005), (2005b), pp.42-43

[2] TUC, *Changing Times: Flexibility and Flexible Working in the UK, TUC assessment of flexible working in the UK*, (TUC, 2005), pp.4-5

[3] FW(ECR)R 2002, Reg.3A, extends the right to children up until their 17th birthday as amended by FW(ECR)(A)R 2009, Reg.2(2)

[4] For instance as identified by James, (2009), *op. cit.*, p.49

packages of rights, the US and Sweden both adopt a distinct medical focus within these rights to care.[1] This contrasts with the UK legislation which enables working persons to request flexible working in respect of an adult who is need of care.[2] This can cover a variety of circumstances and is not necessarily limited to illness, unlike the rights for this category of persons in the US and Sweden.[3] By adopting this wider notion of family care, the legislation encompasses a broader understanding of the family and is underpinned by the family work-family typology.

Family care model: Rights holder

The rights to request flexible working with regards to childcare purposes are available to those employees who satisfy a particular type of relationship with the child. These relationships focus on parents or parental figures that have the responsibility for the child's upbringing.[4] On the one hand, the legislation recognises that a child may be cared for by someone other than their natural parents, and covers same-sex relationships. However, on the other hand, a closer inspection of the legislation shows that it is restricted to the traditional model of the family, with a focus on parental rights and the exclusion of certain groups of relatives.[5] Consequently, other family members who may

[1] FMLA 1993, § 102(a)(1)(C); PLA 1995, 8 §
[2] FW(ECR)R 2002, Reg.3B
[3] FMLA 1993, § 102(a)(1)(C); PLA 1995, 8 §
[4] FW(ECR)R 2002, Reg.3(1)(b) and (c) as amended by The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) (No. 2) Regulations 2007, S.I. 2007/2286, (FW(ECR)(A)(No.2)R 2007), Reg.4
[5] *ibid*, Regs.2(2) and (3)

live with the child and their parent(s) and who may care for them are not entitled to request flexible working unless they have parental responsibility.[1]

This can be compared with the availability of work-family rights in both the US and Sweden. While there is not a comparable right to request flexible working in the US, there are some similar restrictions on those persons who have access to work-family rights. The *Martin* case, discussed above,[2] underscored the strict criterion that has to be met in order to be eligible under the FMLA 1993, in spite of the realities of the care giving arrangements in practice.[3] While these are not as stringent as the UK requirement for the carer to have legal responsibilities for the child, they still limit those entitled to utilise the leave. The Swedish rights adopt a more realistic approach towards who cares for children and access to childcare rights, enabling other carers to utilise them in certain circumstances.[4]

With regards to carers of adults a wider range of rights holders is adopted within the legislation. This includes the partner of the person being cared for, including married and civil partners, and those living together as though they were in such a relationship;[5] their relative; or someone who lives at the same address as them.[1] The definition of relative used here is equally broad and includes parents, siblings, grandparents, aunts and uncles and also

[1] Explanatory Notes to the Employment Act 2002, c.22, para.122. [WWW Document] URL: http://www.opsi.gov.uk/Acts/acts2002/en/02en22-b.htm, (Last Accessed: Sept 2009)
[2] Martin, *op. cit.*; See Chapter Five pp.178-180 above for details
[3] *ibid*
[4] PLA 1995, 8 §; NIA 1962, 2, 10 and 11a § – Although this is restricted to temporary parental leave
[5] FW(ECR)R 2002, Reg.2(1) as inserted by FW(ECR)(A)R 2006, Reg.3

encompasses the same wide range of full- and half-blood, adopted, step, in-law and guardian relationships.[2] The right to request flexible working has, consequently, developed from a focus on gender-neutral working parents caring for young children, to the gender-neutral working carer caring for children and adults in need of care. In doing so, it too reflects the notion of family care inherent within the family typology classification.

Working family model

The working family model underpinning the rights to request flexible working have changed significantly with the recent reforms to the legislation.[3] These have increasingly recognised the caring commitments of not only the majority of working parents, but also of working families more generally.[4] This has extended beyond the initial focus on young children to include the parents of older children and persons with other caring responsibilities.[5] There are two main characteristics of these rights to request flexible working that impact upon the ability of working families to address their work-family conflicts. The first is the impact of the request on the family income, and the second is the nature of the right itself.

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[1] FW(ECR)R 2002, Reg.3B
[2] *ibid*, Reg.2(1) as inserted by FW(ECR)(A)R 2006, Reg.3 and amended by The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2007, S.I. 2007/1184, (FW(ECR)(A)R 2007), Reg.2
[3] As amended by FW(ECR)(A)R 2006
[4] As identified in the family care model situations above, pp.403-407
[5] FW(ECR)R 2002, Reg.3B as inserted by FW(ECR)(A)R 2006, Reg.3

Flexible working and family income

The right to request flexible working encompasses a range of changes to working arrangements. This could entail a change in the times or places of work while maintaining the same level of labour market attachment. Alternatively, this could involve reductions in hours or work and, consequently, earnings. Working families may choose to re-negotiate their working hours in order to address their work-family conflicts without reducing their labour market attachment, thereby enabling both to undertake dual earning and caring roles. However, if working parents wish to reduce their labour market attachment, thus reducing their earnings it may be more difficult for both to combine earning and caring roles.

While the arguments advanced here may appear to be self-evident, they can be compared with the rights in Sweden where working families, initially at least, can combine working and caring responsibilities without a complete loss of income relating to the time spent caring. This can be achieved by utilising the right to parental leave and benefit on a temporary basis.[1] This may make the transit from full-pay to reduced earnings easier for working families who can subsequently reduce hours following the exhaustion of parental leave with benefit.[2] In addition, it could make it easier for both parents to work flexibility while maintaining a supportive level of income.

[1] PLA 1995, 6-7 §§
[2] *ibid*, 7 §

Another significant feature of the right which may further undermine the dual earner-carer model here is the permanent nature of the request.[1] Once an employee has a request accepted there is no automatic opportunity to return to their original working arrangements. Again this can be contrasted with the Swedish experience which restricts the rights to the period prior to the child entering primary school.[2] Once they have completed this first year or reached the age of 8 the working parent will no longer be entitled to the leave and will revert to their previous working hours.[3] In some ways this is a more useful system than the one currently in place in the UK because it enables working parents to revert to their previous position without having to make additional requests and ensures that any changes to their working arrangements can be modified or adapted to their changing needs.

However, unlike the current right in the UK, the Swedish rights continue to distinguish between care for pre-schoolers and older children, with support being restricted to the former.[4] Consequently, working families in Sweden are not entitled to reduce their hours or remain working on the reduced hour schedule after this time whereas in the UK it is now possible for parents of older children to make such requests for changes.[5]

This feature coupled with the possibility of reducing the family income

[1] ERA 1996, s.80F – right is to a variation in terms and conditions
[2] PLA 1995, 5-7 §§
[3] *ibid*
[4] In other words, flexible working under the legislation is limited to parents of children under 8
[5] FW(ECR)R 2002, Reg.3A, extends the right to children up until their 17th birthday as amended by FW(ECR)(A)R 2009, Reg.2(2)

(potentially permanently) raises questions about the ability of the legislation to enable working families to fully address their work-family conflicts throughout their working lives, although this is perhaps negated to an extent by the extension of the right to parents of older children.

Right to request

One distinctive feature of the right to flexible working is that it is solely a right to request flexible working and not an automatic right for working parents or carers to change the way in which they work. This contrasts notably with the comparable Swedish right to partial parental leave. As discussed previously, in Sweden working parents have the right to reduce their working hours by ¾, ½, ¼ or 1/8 of their normal hours until the child reaches the age of 8, or the end of their first year at school, while receiving parental benefit at an equivalent reduced level.[1] Thus, working parents are not only afforded greater rights to change their working arrangements, but they are also provided with additional support in order to care for their children. Alternatively, working parents can reduce their working hours by up to ¼ until the child is 8, or the end of their first year at school, without receiving parental benefit.[2] These rights provide working parents with the opportunity to remain in employment while also addressing their childcare commitments. In comparison with the UK rights, these are rights to change working hours and

[1] PLA 1995, 6 §; See Chapter Six, pp.253-260 for more details
[2] *ibid*, 7 §

not solely the right to make such a request. Working parents also have the right to change the form of parental leave they are utilising up to three times per calendar year.[1] This provides them with even greater flexibility with regards to utilising their rights, thus, enabling working families to address their work-family conflicts.

In drafting the right in the UK, the right to request was justified as being a balance between the interests of working parents and employers,[2] and is aimed at encouraging dialogue between the two about flexible working.[3] Properly understood, it is a right to request on the part of the employee and a duty to consider that request seriously on the part of the employer.[4] However, this aspect of the right has been criticised as being *"meaningless"* since it does not provide working persons with any specific rights to change their working arrangements.[5] This has led to the right being referred to as *"sound bite"* legislation.[6] In this respect, it is argued that while the legislation raises the issue of flexible working and the problems facing working parents, it does not actually afford them any genuine rights to enable them to meet their caring responsibilities.

This aspect of the right is key to understanding how it was implemented and how it operates in practice. In particular, this is reflected in the construction

[1] PLA 1995, 10 §
[2] House of Commons Hansard, (2002), *op. cit.*, Johnson, Col.586
[3] *ibid*, Johnson**,** Cols.583 and 586
[4] *ibid*, Johnson, Col.586
[5] *ibid*, Hammond, Cols.584-585
[6] Anderson, (2003), *op. cit.*, pp.41-42

of the right as a right to request flexible working.

Gender roles

The right to request flexible working as originally introduced was to achieve a *"cultural change"* in the work-family context.[1] However, during the implementation of the right there was a sustained belief that the legislation and flexible working for childcare purposes would remain gendered.[2] Part of the reason given to support this argument was the relationship with sex discrimination legislation,[3] which appears to have been justified given the continued preference for protection under the SDA 1975 as opposed to the flexible working legislation.

Flexible working and sex discrimination continued

Following the enactment of the right to request flexible working there has been only one reported case under the legislation.[4] In contrast, the majority of cases concerning refusals for flexible working have continued to utilise the sex discrimination framework.[5] There are certainly benefits to doing so,[1] not

[1] Anderson, (2003), *op. cit.*, p.41
[2] House of Commons Hansard, (2002), *op. cit.*, Mr Hammond, Col.605
[3] *ibid*
[4] Commotion v Rutty [2006] ICR 290
[5] See for instance: MacMillan v Ministry of Defence (2003), ET 11/11/2003; Hardys, Hansons Plc v Lax [2005] EWCA Civ 846; British Airways Plc v Starmer [2005] IRLR 863; Aviance UK Ltd v Garcia-Bello 2007 WL 4735493

least of all the greater application of the SDA 1975 to include all workers and not only employees with 26 weeks continuous service.[2] The rights can also be used even if the employee has only applied for the job under the SDA 1975.[3] The remedies are also much greater under the SDA 1975 than the flexible working provisions, which are uncapped in the first instance and limited in the second to 8 weeks pay subject to a maximum weekly rate.[4]

The continuing preference for the sex discrimination procedure not only signifies that the flexible working legislation is inadequate, it also reinforces the gendered nature of care by regarding refusal of such requests as indirect sex discrimination. In doing so there is an acceptance, as there was in *London Underground v Edwards*,[5] that women are primary caregivers. There is a danger that this will have a negative impact on fathers' utilisation of the right. While they have also used sex discrimination legislation in the past,[6] this has been far less frequent than working mothers. This feature of the application of the legislation and the restriction of the right to being a request raises questions about its ability to achieve a cultural change and thus achieve equality between the sexes in relation to care. Indeed, the continuing gendered nature of the right is also evident in research conducted following its implementation.

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[1] See Fraser, (2004), *op. cit.*, for an overview especially pp.179-180
[2] SDA 1975, ss.1 and 6; FW(ECR)R 2002, Regs.3(1)(a) and 3B(1)(a)
[3] SDA 1975, s.6
[4] *ibid*, s.65; ERA 1996, s.80I, and FW(ECR)R 2002, Reg.7
[5] London Underground v Edwards 1999 IRLR 494, at pp.505-507
[6] As discussed previously, pp.398-403

The utilisation of flexible working

Research undertaken by Working Families in 2004 showed that the majority of respondents considered the right to be a *"mother's right"*.[1] This reflected fathers' and mothers' expectations regarding the availability and access to work-family rights.[2] This was reflected in subsequent research undertaken for the DTI in 2005 which showed that mothers' employers' provided more flexible working opportunities than fathers'.[3] It was recognised in this research, however, that this may simply be a result of fathers' lack of awareness of the provisions.[4] Nevertheless, this further reinforces the idea that mothers are perceived and are treated as primary caregivers and that this is considered to be primarily their concern.

This division of gender roles was also supported by continuing lower utilisation rates by working fathers.[5] In another report by Grainger and Holt published in 2005 it was noted that only about 12% of men with children under 6, as compared to approximately 36% of similarly situated women, requested flexible working.[6] In addition to the smaller numbers requesting flexible working, fathers' requests were accepted slightly less frequently than mothers'. The results of the *First Flexible Working Survey* using data from

[1] Camp, (2004), *op. cit.*, p.9; Dex, S., *Families and work in the twenty-first century*, (York: Joseph Rowntree Foundation, 2003), pp.46-47
[2] O'Brien and Shemilt, (2003), *op. cit.*, pp.47-51
[3] Smeaton, and Marsh, (2006), *opt. cit*, Table 10.1, p.93
[4] *Ibid*, p.93
[5] As identified above, O'Brien and Shemilt, (2003), *op. cit.*, Figure 4.7 pp.54-55; Cully, et. al, (1998), *op. cit.*, Table 9, p.20; TUC, (2005), *op. cit.*, p.8
[6] Grainger, H., and Holt, H., *Results of the second flexible working employee survey*, Employment Relations Research Series No. 39, (London: DTI, April 2005), p.2 and Table

2003-2004 showed very little variation between the acceptance rates with 78% of female flexible working requests being fully accepted, 9% being partially accepted and 10% refused as compared to 75% of male requests which were fully accepted.[1] However, the difference between the numbers of male and female requests that were accepted had risen in 2005, as shown in the findings of the *Second Flexible Working Survey*. In this second report 72% of female requests were fully accepted, 13% were partially accepted and 10% were refused compared with 62% of male requests being fully accepted and 14% being refused.[2] The results of both of these surveys showed that mothers' requests have been accommodated to a greater extent. Not only were mothers' requests more likely to be fully accepted, they were also more likely to be partially accepted. This could suggest that employers are more willing to accommodate working mothers and find other suitable alternatives for them than they are for working fathers, further reinforcing the traditional division of gender roles.

Flexible working legislation appears to continue to support the traditional division of gender roles. Working mothers continue to be viewed as primary caregivers which impacts on the ability of both working parents to change their working arrangements to accommodate care giving commitments. Until the legislation either genuinely enables working carers to address their work-family conflicts, or provides employment tribunals with the opportunity to

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A3a p.29

[1] Palmer, T., *Results of the first flexible working employee survey*, Employment Relations Occasional Papers, (London: DTI, April 2004), p.10

[2] Grainger and Holt, 2005, *op. cit.*, p.18 and Table A6, p.35

question employers' decisions it will not challenge the gendered nature of care that underpins this package of work-family rights.

Work-family classification of UK parental work-family rights

Parental rights in the UK in some ways reinforce the previous maternal classifications of work-family rights, but in other ways they present a novel development of work-family rights, in the UK context at least. In the first instance, the background against which these rights developed was again rooted in equality legislation, which continues to be closely associated with the practice of flexible working. This reinforces gendered stereotypes about appropriate roles and underscores the traditional sexual division of labour inherent within the legislation. These characteristics of the right reinforce the extended motherhood typology underpinning the legislation.

However, there are also elements of the family typology classification inherent within the legislation. The rights to request flexible working also recognise a much broader notion of family care than was previously evident within the legislation. It encompasses a move from childcare towards other caring responsibilities. This is a significant development because it represents a notably different approach towards care. While this is a novel development in the UK context, it is also evident in both the US and

Sweden,[1] reflecting a broader move towards family care within all three states.

Parental work-family rights in the UK and work-family typologies

Bruning and Plantenga, having examined parental leave provision in eight European countries, concluded in 1999 that: *"In spite of all the differences and in spite of all the dynamics, there remains one constant element: parental leave refers primarily to leave taken by mothers; the role of fathers is disappointing."*[2] While this interpretation has greater resonance where parental leave is an alternative to maternity leave, as in Sweden and the US,[3] this understanding remains accurate in the specific UK context and is not limited to parental leave itself. Parental rights in the UK fail to challenge the dominance of maternal care.[4] The main reason for this remains that mothers' rights in the UK dominate the package of work-family rights. The right to maternity leave is still the central right to care leave, with these parental rights offering no more than nominal rights to working parents.

There is support for the development of parental rights as an alternative to the strong maternity leave provision in the UK, and as a means of

[1] As noted at pp.173-180 and pp.253-260, respectively above
[2] Bruning and Plantenga, (1999), *op. cit.*, p.208
[3] PLA 1995, 5 §; FMLA 1993, § 102(a)(1)(A) and (B)
[4] As identified in Chapter Seven

challenging traditional gender roles.[1] This analysis of parental rights in the UK, alongside comparisons with the US and Sweden, questions the likely success of such an approach. The key is in how such rights are framed and how the wider package of rights interacts with one another. Certain central characteristics can be identified that would be necessary to challenge the gendered nature of such rights. In the first instance, the leave period must be long enough to facilitate dual caring.[2] Secondly, it must be accompanied by some form of income replacement to enable working families to utilise the leave.[3] Thirdly, and most significantly, it must encompass non-transferable individual rights to leave to enable both working parents to access leave.[4] This final characteristic reflects the final stage in the development of work-family rights – specific rights for working fathers, which will be examined in the following chapter.

[1] Caracciolo di Torella, E., 'New Labour, New Dads – The Impact of Family Friendly Legislation on Fathers', 2007 Vol.36(3) *Industrial Law Journal* 318, p.328; Equality and Human Rights Commission, *Working Better: Meeting the changing needs of families, workers and employers in the 21st century*, (Equality and Human Rights Commission, March 2009), Chapter 2 and 3

[2] Caracciolo di Torella, (2000), *op. cit.*, p.458; Length of leave discussed above at pp.377-379

[3] As noted above at pp.390-397

[4] Importance of individual rights noted above by Bruning and Plantenga, (1999), *op. cit.*, pp.196 and 207

Chapter Nine – Fathers' Work-family Rights in the UK

"Public debate has long been focused on 'working mothers', especially so-called 'Yummy Mummies', and the challenges they face. The needs of 'working fathers' are often neglected. There is little discussion of the constraints facing them, or of the economic penalty for being active fathers. Yet fathers' involvement in bringing up children is important. There should be an opportunity for everyone to create the right balance between life and work, with all the economic and social advantages that this can bring."[1]

This statement from the EHRC in 2009 expresses the findings of the experience and implementation of work-family rights examined in the previous chapters. This analysis has indicated that working mothers are still viewed as primary caregivers, and that the package of work-family rights, discussed thus far, is centred upon a working mother. However, more recently there has been a more concerted effort to address fathers' work-family rights and their caring responsibilities. This chapter reflects this shift in the means of addressing the work-family conflict by focusing on those rights that are specifically for working fathers. In doing so, it also considers proposed rights, which may also be classified as parental rights but because they include elements of specifically gendered rights they will be discussed

[1] Equality and Human Rights Commission, (EHRC), *Working Better: Meeting the changing needs of families, workers and employers in the 21st century*, (Equality and Human Rights

here.

There is continuing support for the proposition that until fathers become more equally and visibly involved in care, genuine equality between the sexes will not be achieved.[1] However, such an assumption has been questioned in light of the various debates surrounding fathers and fatherhood.[2] One may also question whether or not this is necessarily the case given the experiences in the US and Sweden, examined above, which failed to display a genuine renegotiation of these roles.

Such participation must be more than nominal rights which are extended to working fathers, as shown by the experience in the US, and Sweden to a lesser degree.[3] They must provide fathers with the ability to balance their work and family commitments, coupled with the willingness of men to share these responsibilities.[4] This chapter focuses on this issue with a view to critically analysing whether or not this is the case. The previous chapters have traced the development of work-family rights in the UK from a focus on working mothers to encompassing both working parents. The final stage in the current development of work-family rights has been the extension of

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Commission, March 2009), p.14

[1] This was identified as early as 1989 and continues to remain an issue in 2009: Ve, H., 'The Male Gender Role and Responsibility for Childcare', in K. Boh, M. Bak, C. Clason, M. Pankratova, J. Qvortrup, G.B. Sgritta, K. Waerness (Eds), *Changing Patterns of European Family Life. A Comparative Analysis of 14 European Countries*, (London: Routledge, 1989), p.251; EHRC, (March 2009), *op. cit.*, p.23

[2] Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)', 2001 Vol.28(4) *Journal of Law and Society* 520, p.534

[3] See Chapters Five and Six for more details, particularly pp.194-214 and pp.270-287 for discussion of division of gender roles

[4] Boh et al., (1989), *op. cit.*, p.257

rights to working fathers. This is distinct from the previous attempts to extend rights to working parents since they are specifically aimed at working fathers and their caring commitments as opposed to both working parents. The enactment of specific work-family rights for working fathers can arguably change the scope of the package of work-family rights. The previous package of rights in the UK provided general rights for both working parents and specific rights only for mothers which, as the previous chapters have shown,[1] reinforced the gendered nature of caring responsibilities. By extending specific rights to working fathers the package of rights recognises their caring responsibilities, and suggests that the work-family classification of UK legislation has moved away from the typologies concerning motherhood towards the family typology.

The working man as the working father

Traditionally men who are fathers have been viewed in economic terms. In the employment rights context they have been largely indistinguishable from other working men. This has tied in with the perception of working fathers as economic providers with no recognition of their care giving role.[2] This was reflected in research conducted in 1989 based on national reports from 14 European countries which showed that fathers continued to be defined in these traditional terms, with minimal consequences for their labour market

[1] See in particular Chapters Seven: Mothers' work-family rights and Chapter Eight: Parents' work-family rights
[2] Ve, (1989), *op. cit.*, p.251

participation.[1] This can be compared with figures reported in 1999 which also showed that their economic role remained an important aspect of their identity.[2] This was particularly so for fathers, who continued to identify this characteristic as the thing that people most expected from them.[3] This contrasted to an extent with mothers' views of fathers which focused more on their involvement within the family than their providing role.[4] However, more interesting within this research was the numbers of fathers and mothers who expected fathers to be both providers and involved within the family. Only around 14% of both fathers and mothers responded in this way.[5] This suggests that fathers were still viewed as either workers or fathers and not as working fathers with competing commitments, even by mothers who expected more from them in terms of familial involvement.

Despite the increasing focus on working fathers and their caring responsibilities, their earning and supportive role in the family remains an integral aspect of their identity. However, many of these studies were conducted prior to the introduction of the rights to paternity leave, and despite the emphasis on their earning role, 61% of working fathers utilised the option of paternity leave in 2000 before the right to paternity leave was introduced in the UK.[6] The implementation of specific work-family rights for working

[1] Ve, (1989), *op. cit.*, p.251
[2] Warin, J., Solomon, Y., Lewis, C., and Langford, W., *Fathers, work and family life*, (London: Family Policy Centre for the Joseph Rowntree Foundation, June 1999)
[3] *ibid*, figure 1.1, p.11 – around 43% of fathers gave this response
[4] *ibid*, figure 1.2, p.11 – around 70% of mothers gave this response in contrast with 30% who expected fathers to be providers.
[5] *ibid*, figures 1.1 and 1.2, p.11
[6] O'Brien, M., and Shemilt, I., *Working fathers: earning and caring*, (Manchester: EOC, 2003), p.x and Table 4.8 p.56

fathers, consequently, may reflect a change in this approach and a renegotiation of fathers' work-family responsibilities.

Twenty years on from the initial research, however, the fathers' role as the economic provider for the family remains relatively unchallenged. Research conducted between late 2008 and early 2009 revealed that 38% of parents still agree that this is the fathers' responsibility.[1] While 27% disagreed and 35% were neutral, the majority response was still reflective of these traditional identities.[2] While the numbers of persons supporting this notion of fatherhood are reducing, this research nevertheless suggests that very little has happened in the meantime to challenge these perceptions and renegotiate fathers' identities and roles.

This traditional role should be viewed in the context of more modern perspectives on the working father. Such perspectives could be attributed to assumptions concerning their role following women's, and consequently mothers', entry into the paid labour market. As women have increasingly entered employment, the presumption has been that fathers must be undertaking a greater role in domestic life.[3] In previous years, this has been coupled with limited attempts to incorporate working fathers into the work-family debate, arguably without any clear guidelines or role in the work-family

[1] Ellison, G., Barker, A., Kulasuriya, T., and YouGov, *Work and care: A study of modern parents*, (Manchester: EHRC Research Report Series, Research Report: 15, 2009), Figure 1: Values and attitudes towards work and childcare, p.23
[2] *ibid*, Figure 1: Values and attitudes towards work and childcare, p.23
[3] Warin, et al., (1999), *op. cit.*, p.8; Young, M., and Willmott, P., *The Symmetrical Family*, (London: Routledge, 1973), p.x

package of rights.[1]

Such assumptions correspond with the conceptualisations of the working father as the so-called 'new father', which places greater emphasis on their caring role. In doing so, they are presented as representing a break from the previous conceptualisation of fathers and fathering, with greater focus on shared responsibilities.[2] However, this has posed many challenges for working fathers who are now struggling to define their identity.[3] This is particularly the case because, as noted above, they continue to be defined with reference to their earning role,[4] which contrasts with, and creates tension with, the presumption that their work-family responsibilities have changed.[5]

Gendered equality?

Working fathers, consequently, currently face a crisis of identity, which is

[1] Kilkey, M., 'New Labour and Reconciling Work and Family Life: Making It Fathers' Business?', 2006 Vol.5(2) *Social Policy and Society* 167, pp.168-171

[2] Lupton, D., and Barclay, L., *Constructing Fatherhood: discourses and experiences*, (London: Sage Publications, 1997), pp.1 and 14, with reference to Pleck, J., 'American fathering in historical perspective', in M. Kimmel (Ed), *Changing Men: New Directions in Research on Men and Masculinity*, (Beverly Hills, CA: Sage, 1987). Although it has been argued that these references to the 'new father' are not novel, and that such concerns surrounding fathers roles have been raised in the 19th century among middle class fathers: Lupton and Barclay, (1997), *op. cit.*, p.41

[3] Collier, R., *Masculinity, Law and the Family*, (London; New York: Routledge, 1995), p.177, refers to this in the context of change and 'crisis'; Lewis, C., *A man's place in the home: Fathers and families in the UK*, (Foundations: Joseph Rowntree Foundation, April 2000), pp.2 and 3

[4] Collier, (1995), *ibid*, pp.193 and 259-260; Lupton and Barclay, (1997), *op. cit.*, pp.1-2; Warin, et al., (1999), *op. cit.*, pp.9, 11, 14-17, 42 and 43

[5] Collier, (1995), *op. cit.*, p.195; Lupton and Barclay, (1997), *op. cit.*, p.146; Warin, et al.,

exacerbated by the way in which work-family legislation has been introduced in the UK. From a legal perspective, it has been argued that legislation which has sought to address equality issues has *"swung too far in favour of women."*[1] This feminisation of the workplace,[2] as supported by the analyses of work-family rights in previous chapters,[3] is arguably one of the major barriers facing working fathers who wish to combine work and caring responsibilities. Psychological research into fatherhood has also posed the question *"why can't a man be more like a woman?"*[4] This appears to be the same question that is being asked in the context of work-family rights.

There has also been a increased interest in working fathers' caring role, as noted by Collier in 2001:

> *"what has become a recurring theme within more recent academic research on contemporary fathering and fatherhood is the belief that the promotion and encouragement of 'active parenting' on the part of men is something which is, or should be, a desirable objective on the part of liberal democratic governments. That is, it should be part of the role of*

(1999), *op. cit.*, pp.11 and 41-42; Lewis, (2000), *op. cit.*, p.6; Collier, (2001), *op. cit.*, p.531

[1] Views of men's liberationist groups as noted in Collier, (1995), *op. cit.*, p.27

[2] For an overview see: Collier, R., ''Feminising' the Workplace? Law, the 'Good Parent' and the 'Problem of Men'', in A. Morris and T. O'Donnell (Eds), *Feminist Perspectives on Employment Law*, Cavendish Publishing Limited, 1999)

[3] See in particular Chapters Seven: Mothers' Work-family Rights in the UK and Chapter Eight: Parents' Work-family Rights in the UK

[4] Garbarino, J., 'Reinventing fatherhood', 1993 Vol.74(1) *Families in Society* 51, p.53; Collier, R., 'Feminist Legal Studies and the Subjects of Men: Questions of Text, Terrain and Context in the Politics of Family Law and Gender', in A. Diduck and K. O'Donovan (Eds), *Feminist Perspectives on Family Law*, (New York: Routledge-Cavendish, 2006), p.242

> *government, and an objective to be legitimately achieved by legal means, to 'make the father figure' by promoting good, effective and socially positive fathering."*[1]

Collier identifies that the issue of shared parenting, and fathers' role within that context, is increasingly featuring on the governmental agenda, making it more visible and raising questions about the father and fatherhood.[2] This is clear in the work-family context with increasing numbers of consultations and proposals advocating greater choice and sharing of caring commitments. However, Collier is also critical of the role that the government should play in this context.[3] The important point to determine here is whether or not the government is trying to effect social change, or reflect it. Comments made by the then Prime Minister Tony Blair in the foreword to *Fairness at Work* in 1998 suggested that it was the latter.[4] He stated that:

> *"It is often said that a change of culture cannot be brought about by a social change in the framework of the law. But a change in law can reflect a new culture, can enhance its understanding and support its development."*[5]

[1] Collier, (2001), *op. cit.*, p.527
[2] *ibid*, pp.527-528
[3] Particularly the approach taken to change men's behaviour as opposed to reflecting their calls for change: Collier, (1999), *op. cit.*, pp.167-181, especially pp.177-178
[4] *Fairness at Work*, (1998), *op. cit.*
[5] *ibid*, Foreword

This statement appears to support the notion that the roles and responsibilities of working parents and families were changing and that the legislative framework had to recognise and reflect that change by providing them with support and protection. However, this interpretation was not endorsed by Collier, who appears to be suggesting that the former, in fact, is the case.[1]

This interpretation of Collier's position is further supported later in his work where he notes that there is resistance to such change.[2] This has certain implications for the implementation and utilisation of work-family rights. For instance, if fathers campaigned for such rights there would be a strong presumption that they would utilise them. On the contrary, if they are forced upon working families, there may be more resistance to social change and weaker support for the rights.

One of the important things to bear in mind is that it is not just about reconfiguring work-family rights to enable both working parents to balance these commitments, but it is also necessary for both parents to accept these changing roles.[3] According to research reported in 1999 the latter issue has been constrained by mothers' role as *"gatekeepers"* to childcare.[4] This underscores the importance of individualised independent rights for both working parents, which recognises both of their specific circumstances and

[1] Collier, (1999), *op. cit.*, pp.167-181, especially pp.177-178
[2] Collier, (2001), *op. cit.*, pp.537-538
[3] Cohen, D., *Being a Man*, (London: Routledge, 1990), p.189
[4] Warin, et al., (1999), *op. cit.*, pp.38-39 and 42; Lewis, (2000), *op. cit.*, p.6

roles as opposed to a model centred on the experience of the working mother.

These perceptions and concerns surrounding the identities of working fathers suggest that their work-family experience is not altogether distinct from the evidence of the previous chapters. This following section, in critically analysing the work-family typology underpinning fathers' rights, will assess the extent to which these perceptions continue to underpin, and/or undermine, fathers' work-family rights.

Fathers' work-family rights in the UK

Prior to the expansion of work-family rights in the UK, suggestions were advanced that the experience from the Scandinavian countries be drawn on. This was suggested in general terms by those persons examining the role and place of the father in the childcare context,[1] and in more specific terms by policymakers.[2] The following sections will critically analyse current and proposed fathers' rights in the UK with comparison to the Swedish, and the US, models. In doing so it will determine whether or not the legislation actually did and does adopt the family approach and the extent to which this represents a departure from the previous focus on maternal care.

[1] Warin, et al., (1999), *op. cit.*, p.44
[2] O'Brien and Shemilt, (2003), *op. cit.*, p.xi

Fathers' in the UK currently have the right to paternity leave, which entitles them to two weeks leave to be taken during the 56 days following childbirth.[1] There are also proposals to introduce the right to additional paternity leave by April 2011.[2] This right was briefly discussed in Chapter Seven, and it is proposed will enable working fathers to utilise up to 26 weeks leave following the mothers' return to work.[3] More recently alternative proposals have been advanced by the Equality and Human Rights Commission (EHRC),[4] which advance a re-visioning of the right to parental leave comparable with the package of rights in Sweden.[5] This chapter will discuss the extent to which fathers' current work-family rights represent a development of the ideology underpinning the legislation, and the potential implications of the proposed rights to additional paternity leave, and the reconfigurations of childcare leave advanced by the EHRC. In order to do so the examination of the rights will be divided into three stages: rights during pregnancy, the post-childbirth period and for childcare purposes.

[1] Employment Rights Act 1996, c.18, (ERA 1996), ss.80A and 80B; Paternity and Adoption Leave Regs 2002, SI 2002/2788, (PALR 2002), Reg.5
[2] Work and Families Act 2006, c.18, ss.3-10; DTI, *Work and Families: Choice and Flexibility, A Consultation Document*, (London: DTI, February 2005), (2005a); DTI, *Work and Families: Choice and Flexibility, Government Response to Public Consultation*, (London: DTI, October 2005), (2005b); DTI, *Work and Families: Choice and Flexibility, Additional Paternity Leave and Pay*, (London: DTI, March 2006), (2006b); House of Commons, *Paternity pay and leave*, [WWW Document] URL: http://www.parliament.uk/commons/lib/research/briefings/snbt-00952.pdf, (Last Updated: 15 Sept 2009), (Last Accessed: Sept 2009) (2009b), pp.9-11
[3] DTI, (2005a), *ibid*, Ch.4; DTI, (2005b), *ibid*, pp.25-35; DTI, (2006), *ibid*, pp.9-13; House of Commons, (2009b), *ibid*, p.9-11
[4] EHRC, (2009), *op. cit.*
[5] *ibid*, pp.Table 1, pp.39-40

The work-family classification of fathers' rights in the UK

Introducing fathers' rights to the current package of work-family rights has arguably moved away from the previous focus on mothers' rights and the motherhood typologies towards the family typology. Indeed, if the work-family classifications were to be viewed as chronological stages this would be the corresponding conceptualisation for this development of work-family rights. Granting fathers specific rights to leave, in principle, displays similarities with this work-family typology since it recognises the caring responsibilities of both working parents. This section will explore the extent to which this is reflected in the work-family classification and will compare and contrast the current and proposed rights for working fathers.

Family care model: Rights holder

While the right to paternity leave is principally aimed at working fathers, it is in fact not limited to them. The right can be utilised by working fathers, the mother's partner or spouse, or the child's adopter, or the partner or spouse of the adopter.[1] The legislation also applies to same sex couples, recognising to some extent the changing diversity of family forms.[2] However, unlike the comparable Swedish right to paternity leave, which enables another family member to take leave at this time where the father is either not entitled to the

[1] ERA 1996, ss.80A-80B as supplemented by PALR 2002, Regs.4(2)(b) and 8(2)(b)
[2] See pp.18-25 above

rights or is no longer present,[1] this right is restricted solely to those persons in the position of the working father. Since this is the case, the holder of this right will be referred to as the working father throughout this discussion. The concept of the working father in this context, consequently, will be deemed to represent this wider category of persons.

There are also other conditions that must be satisfied in order for working fathers to utilise the right to paternity leave. In the first instance, they must have been employed with their current employer for at least 26 weeks by the end of the 15th week before the expected date of childbirth or on the date of notice of the placement for adoption.[2] This contrasts with the mother's right to maternity leave, which no longer includes a continuity requirement for leave.[3] Working fathers, consequently, have to show a greater labour market attachment than working mothers in order to utilise their rights. The EHRC have proposed removing this inconsistency in the first of three staged reforms to the current package of work-family rights.[4] This would enable all working parents to access work-family rights, recognising the importance of both of their caring responsibilities. The final condition is that the working father has, or expects to have, full responsibility for raising the child,[5] and

[1] Parental Leave Act (SFS 1995:584), (PLA 1995), 8 §, National Insurance Act 1962:381, (NIA 1962), 2, 10 and 11a §§ as discussed above at pp.249-252
[2] PALR 2002, Regs.4(2)(a) and 8(2)(a)
[3] Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006/2014, (MPLPAL(A)R 2006), Reg.6 which revoked Reg.5 of the Maternity and Parental Leave etc Regulations 1999/3312, (MPLR 1999), which had placed a length of service requirement on working mothers in order to be entitled to additional maternity leave.
[4] EHRC, (2009), *op. cit.*, Table 1: Stages in the parental leave policy recommendations, pp.39-40
[5] PALR 2002, Regs.4 (2)(c) and 8(2)(c)

that he is taking the time off to support the mother or care for the new child.[1]

A similar approach has been adopted, thus far, in relation to the proposed right to additional paternity leave. It is proposed that the eventual regulations will include requirements for working fathers to also satisfy criteria relating to their relationship with the mother of the child and the child itself.[2] While the rights to maternity and paternity leave are distinct, it is envisaged that the right to additional paternity leave will be linked with the right to maternity leave. In order for working fathers to qualify for the right, the mother must have been entitled to leave and have returned to work with some of her entitlement remaining before the child's first birthday.[3] In addition, they will have to satisfy conditions relating to their relationship with the mother of the child and the child itself, as well as a continuity of employment requirement. It is likely that this will require working fathers to have qualified for (ordinary) paternity leave before they will be entitled to additional paternity leave.[4] While this will make it easier for employers to administer,[5] it would also impose additional service burdens on working fathers in comparison to those required for maternity leave. Working fathers would be required to have a minimum of 60 weeks continuity in order to qualify for additional paternity leave, while mothers again would have to satisfy no such conditions.

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[1] ERA 1996, ss.80A(1) and 80B(1)
[2] WFA 2006, ss.3 and 4, which will insert new ss.80AA and 80BB into the ERA 1996, ss.80AA(1)-(2) and ss.80BB(1)(2) are of particular relevance here
[3] WFA 2006, ss.3 and 4, which will insert new ss.80AA and 80BB into the ERA 1996, ss.80AA(2)-(5) and ss.80BB(2)-(5)
[4] In other words paternity leave as currently exists: DTI, (2006b), *op. cit.*, pp.4-5; DTI, *Partial Regulatory Impact Assessment, Additional Paternity Leave and Pay – Administration of Additional Statutory Paternity Pay (ASPP)*, (London: DTI, May 2007), p.5
[5] DTI, *Work and Families: Choice and Flexibility, Additional Paternity Leave and Pay,*

The EHRC proposals also distinguish between specific rights for mothers and fathers, with proposals to increasingly enhance the rights of working fathers over a projected 10 year period.[1] While this reformed package of rights will include gender specific rights for working mothers and fathers and gender-neutral rights to be shared between them, it reinforces the position adopted within the aforementioned fathers' rights. It envisages specific rights for working fathers which are aimed at increasing their utilisation and access to work-family rights.

Not unlike mothers' work-family rights, the current and proposed rights holders here are working fathers, or those in their position. This is not surprising; however, what is of particular interest in this context is whether or not the legislation genuinely reflects the working father as the rights holder. In other words, is the rights holder actually a working father with caring responsibilities that have to be met outside of the paid labour market? Are their caring commitments adequately addressed and are they actually viewed in terms of their caring role? Or is the working father of the legislation such in name alone? This important issue will underpin the subsequent discussions of fathers' work-family rights.

Summary of Responses to Consultation, (London: DTI, August 2006), (2006c), pp.4-5

[1] See EHRC, (2009), *op. cit.*, Table 1: Stages in the parental leave policy recommendations, pp.39-40 for an overview of the proposals

Family care model: Care situations

The caring situations encompassed by work-family rights with regards to children can usefully be considered in terms of three distinct time periods: the period during pregnancy, the period following the birth of the child, and childcare more generally. Working mothers have rights during all three of these stages, principally because they are pregnant and require rights and protections during that unique experience, and subsequently because they bear children and require recovery time following childbirth. Because of the unique nature of pregnancy and childbearing, the experience of the working father at this time is often neglected. The focus is instead on their role with regards to childcare more generally. However, they also play an important role at this time and their rights at these stages are worthy of consideration. This examination of the care situations included within the legislation will critically analyse the extent to which they have been recognised.

During pregnancy

Working fathers currently do not have any specific rights to time off work to attend antenatal appointments with the mother of the child.[1] This means that unless employers are willing to grant working fathers' leave, they will either have to take annual leave in order to attend such appointments or forego attending them altogether. Research reported in 2006 appears to suggest

that it is the latter that most working fathers are doing in practice. This research uncovered that only 44% of employed fathers and 50% of self-employed fathers took any time off work during their partners' pregnancy.[2] The primary reason given for taking time off work was to attend antenatal appointments.[3]

In spite of the absence of such a right, it has not been wholly neglected by lawmakers. There has been some non-governmental support for extending the right to attend ante-natal appointments already afforded to working mothers,[4] to working fathers.[5] In 2004, for instance, the DTI recommended that working fathers be entitled to the right to attend antenatal appointments with the mother of the child.[6] While pregnant employees have the right to attend antenatal appointments, working fathers do not have the right to accompany them. In light of this the DTI recommended that working fathers should be given the opportunity to do so. They anticipated that many benefits would flow from the introduction of such a right. In the first instance, they recognised the desire of fathers to be more involved in decisions regarding the pregnancy and birth.[1] In addition, they argued that involving fathers at this early stage would result in them being more actively involved in

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[1] ERA 1996, ss.55-57
[2] Smeaton, D., and Marsh, A. (Policy Studies Institute), *Maternity and Paternity Rights and Benefits: Survey of Parents 2005*, Employment Relations Research Series No.50, (London: DTI, March 2006), p.79
[3] Around 78% gave attending an ultrasound as a reason and 62% gave the reason of attending other hospital appointments: *ibid*, Chart 9.1, p.79
[4] ERA 1996, ss.55-57
[5] House of Lords (HoL) Hansard Debates, Grand Committee, *Work and Families Bill*, (9 March 2006), Col.325, amended proposed by the Liberal Democrats
[6] DTI, *Fathers to be and Antenatal Appointments: A Good Practice Guide*, (DTI: London, November 2004)

childcare once the baby arrives.[2] To this end, they set out good practice guidelines to encourage and guide employers in extending the right to attend antenatal appointments to working fathers.[3]

While these recommendations were only produced as a good practice guide for employers, extending the right to working fathers would send the message that childbearing and rearing is not a wholly gendered activity. It could even begin to challenge the idea that pregnancy is solely a female issue, by recognising the role of fathers and their family responsibilities.[4] Support for such a right was also echoed in 2005 by Working Families in response to the DTI's *Work and Families: Choice and Flexibility* consultation.[5] Most significantly, there was some support for this right in the House of Lords when it was tabled as an amendment to the Work and Families Bill during its passage through the House.[6]

The tabled amendment to the Work and Families Bill was the first time that a right to antenatal appointments had been presented for working fathers. It was framed in the same way as the other rights for working fathers mentioned previously, meaning that it would have equally applied to other

[1] DTI, (2004), *op. cit.*, p.2; Also reiterated in the HoL Hansard, (2009), *op. cit.*, at Col.GC387
[2] *ibid*, p.2; Also reiterated in HoL Hansard, (2006), *op. cit.*, Col.GC387
[3] DTI, (2004), *op. cit.*, pp.4-14
[4] Similar sentiments were expressed in HoL Hansard, (2006), *op. cit.*, Col.GC387 per Baroness Walmsley
[5] Working Families, *Work and Families – Choice and Flexibility*, (London: Working Families, May 2005), p.10
[6] HoL Hansard, (2006), *op. cit.*, Col.GC387, amendment 23, presented by Baroness Walmsley

persons in a similar position, including same-sex partners.[1] Consequently, it would have fitted neatly into the current, and proposed, package of rights available to working families.

While there was some support for the proposed amendment,[2] it was suggested that this was a matter best left to be negotiated between employers and their employees.[3] In particular, a distinction was drawn between the health and safety objectives underpinning the right for pregnant workers, which do not apply to working fathers.[4] While this may be a valid point and the justification for introducing such a right for pregnant workers,[5] extending the right or one similar, to working fathers may be beneficial to the family in the longer term for the reasons previously expressed by the DTI. Nevertheless, the situation remains that working fathers have no positive right to time off to attend such appointments. A gendered distinction consequently remains between the roles and responsibilities of working parents at this time.

Post-childbirth

Currently, the only work-family right available exclusively to working fathers is

[1] HoL Hansard, (2006), *op. cit.*,
[2] *ibid*, Col.GC387-GC388
[3] *ibid*, Col.GC389 per Lord McKenzie of Luton
[4] *ibid*
[5] As well as satisfying their obligations under the EEC Directive 92/85 on the Protection of Pregnant Women at Work (PWD 1992)

the right to paternity leave. This right was introduced on the 6 April 2003 and for the first time afforded working fathers with their own specific entitlement to leave. Provided the working father meets the criteria noted above,[1] he will be entitled to either one or two consecutive weeks leave to be taken at any point in the 56 days following the birth of the child,[2] which may be accompanied with the right to paternity pay.[3] Paternity pay is available to those working fathers who earn more than the lower earnings limit;[4] those who earn less than this will be entitled to income support during paternity leave instead.[5] The right to paternity pay corresponds with the lower levels of maternity pay and are currently set at a maximum of 90% of average weekly earnings or £123.06 per week,[6] whichever is lesser amount.[7]

This right enables working fathers to be present with the family in the period following the birth of their child. This provides the family with the opportunity to bond and start to adjust to their new circumstances. However, working fathers are only entitled to a relatively limited amount of time off work following the birth of their child. In addition, it must be taken within the first 8 weeks of the child's life. These two main characteristics of the right again reinforce the maternity to motherhood focus on the medical and physical aspects of childbearing. This is further reinforced by the singular nature of

[1] In the *Family care model: Rights holder section*, pp.432-436
[2] ERA 1996, ss.80A(4) and 80B(4); PALR 2002, Regs.5(1)-(2) and 9(1)-(2)
[3] Social Security Contributions and Benefits Act 1992, c.4, (SSCBA 1992), s.171ZA – same provisions as apply to paternity leave
[4] *ibid*, s.171ZA(2)(c)
[5] *ibid*, s.124
[6] Correct as of 5 April 2009
[7] Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002, SI 2002/2818, (SPPSAP(WR)R 2002), Regs.2 and 3, birth and adoption respectively

their work-family rights, which means that they are only able to provide care, with the mother present, during the very early stages of the child's life. With this in mind, it is difficult to argue that the right to paternity leave as it currently stands offers working fathers a right to leave which enables them to address their work-family conflicts and provide care for their child.

In spite of these criticisms of the right to paternity leave, there are some merits to this right. As noted above, it enables the family to bond at a time when they are experiencing significant changes. Having the right to such leave is consequently important for both working fathers and the family as a whole. The importance of this right is reflected in both of the potential proposals to extend fathers' work-family rights, which both retain the right to paternity leave as it currently stands.[1] The main difference is the composition and the location of the right within the overall package of work-family rights. Whereas within these proposals it is coupled with more extensive specific rights to childcare leave,[2] within the current package it is the only right that working fathers are entitled to. In the current context it is this feature of the package of work-family rights that undermines fathers' caring role.

[1] DTI, (2006b), *op. cit.*, p.15; EHRC, (2009), *op. cit.*, Table 1: Stages in the parental leave policy recommendation, pp.39-40
[2] As detailed in the following subsection

Childcare: Additional paternity leave

The right to a form of leave similar to the proposed right to additional paternity leave has been advanced on a number of occasions. O'Brien and Shemilt, for instance, drawing from the Scandinavian experience suggested such a change in 2003.[1] In addition, the focus of the government has increasingly been on giving working parents greater choices with regard to their work and family responsibilities.[2] With this in mind, the DTI consultation exercise beginning with *Work and Families: Choice and Flexibility* in 2005, started the ball rolling towards the right to additional paternity leave.[3]

The right to additional paternity leave was initially introduced as the right to transferable maternity leave and pay.[4] This meant that the right was envisaged as a form of flexibility within the maternity leave provisions. The consultation canvassed opinions as to the desirability of this scheme, the options as to how it would operate in practice, the amount of leave which could be transferred, and at what point in time this could be transferred.[5] While there was general support for fathers to become more involved in childcare, the responses to the proposed right to transferable maternity leave here were mixed.[6] This reflected the desire of many respondents for

[1] O'Brien and Shemilt, (2003), *op. cit.*, p.xi
[2] DTI, *Work and Families: Choice and Flexibility, Government Response to Public Consultation*, (DTI: London, October 2005), (2005b), p.6;
[3] DTI, *Work and Families: Choice and Flexibility, A Consultation Document*, (DTI: London, February 2005), (2005a), pp.38-51
[4] DTI, (2005a), *op. cit.*, Ch.4
[5] *ibid*
[6] DTI, (2005b), *op. cit.*, p.25

individual rights for working fathers.[1] As a consequence, various alternatives were advanced in order to achieve the same objectives such as the extension of paternity leave and the payment of parental leave.[2] In spite of these alternatives, the government persisted with some form of transferable maternity leave, which would enable fathers to share leave after the first six months following the child's birth.[3] The framework for this right has now been enacted in the WFA 2006.[4]

The right to additional paternity leave has been proposed alongside the extension of the right to maternity leave.[5] The extension of the maternity leave and pay period provides the framework for this right. Together the amendments and introduction of these rights is intended to provide working parents with the structure, freedom and choice to share early childcare responsibilities.[6] In this respect, it displays some similarities with the Swedish parental leave model,[7] which also provides working families with a framework for sharing work-family rights and responsibilities.

There have been a number of consultations on the right to additional paternity leave and pay following the enactment of the WFA 2006,[8] but the

[1] DTI, (2005b), *op. cit.*, pp.25-26 and 49-50
[2] *ibid*, pp.26 and 50
[3] *ibid*, pp.27-28
[4] WFA 2006, ss.3 and 4
[5] *ibid*, ss.1-4
[6] The rhetoric of choice permeates throughout all of the Work and Families documentation: DTI, (2005b), pp.2, 3-4, 6, and 25-27; DTI, (2006b), *op. cit.*, pp.7 and 8; DTI, (2006c), *op. cit.*, p.3
[7] See Table 1.1, p.14 for an overview of the package of rights, and pp.253-260 above
[8] See in particular: DTI, *op. cit.*, (March 2006); DTI, *op. cit.*, (November 2006)

draft regulations have still to be produced.[1] This means that the actual content of the right to additional paternity leave and how it will be administered can only be inferred from these previous consultations and the implementing framework of the Act. Nevertheless, from these a number of potential characteristics of the right can be identified.

In the first instance, it would appear to be the case that the right to additional paternity leave and pay will only be available to working fathers if the mother was also entitled to maternity leave and pay and has some of her entitlements remaining on her return to work. This is clear from the WFA 2006 which provides that the regulations may contain such conditions,[2] and the recommendations from the consultations themselves which have adopted this framework.[3] Such an approach has been typical of the rights to such forms of leave, with both Norway and Sweden initially adopting similar approaches.[4]

When parental leave was first introduced in Sweden the entitlement to parental allowance was dependant on the mother's entitlement and income level.[5] This meant that if the mother was not insured above the guaranteed

[1] See BERR, *Additional Paternity Leave and Pay*, [WWW Document] URL: http://www.berr.gov.uk/whatwedo/employment/workandfamilies/add-paternity-leave/index.html (Last accessed, May 2009) for up-to-date information regarding the progress of the implementation of this right; House of Commons, (2009b), *op. cit.*, pp.9-11 indicates that the right will be implemented by April 2011
[2] ERA 1996, proposed ss.80AA(2) and 80BB(2) to be inserted by WFA 2006, ss.3 and 4
[3] DTI, *op. cit.*, (March 2006), pp.22-28; DTI, *op. cit.*, (November 2006), pp.8-11
[4] Sainsbury, D., 'Gender and Social-Democratic Welfare States', in D. Sainsbury (Ed), *Gender and Welfare State Regimes*, (Oxford: Oxford University Press, 1999), pp.92-94
[5] Nyberg, A., 'Economic crisis and the sustainability of the dual earner, dual career model', Presented to ESRC seminar, University of Manchester, (31 October 2003), [WWW

level, then the father could not receive compensation above that amount.[1] This was removed in 1986 and father's parental allowance is now based on their own income.[2] In Norway, the comparable right to leave was imposed onto the maternity leave framework, as in Sweden and as proposed here, and working parents were entitled to share what continued to be referred to as maternity leave.[3] The gendered connotations surrounding the right to leave in Norway had a considerable negative impact on working fathers' utilisation of the right.[4] This experience reinforces the dangers of presenting the right as a mothers' right which can be shared with fathers in contrast with a right that can be used by both parents to care for their child. It is arguably the former that is being proposed in the UK. What is more questionable is the emphasis that is placed on mothers' choice within the proposed framework, as opposed to individual rights to leave. This will be returned to below.[5]

The second notable feature of this right is the intention of the government to enable working fathers to take up to 26 weeks leave some of which will be paid if the mother had any outstanding entitlements on her return to work.[6] While the initial proposals were to extend maternity pay to 52 weeks, meaning that working fathers would be entitled to pay during leave, more

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Document] URL: http://www.lse.ac.uk/collections/worklife/Nybergpaper.pdf (Last Accessed: 2008 April, 14), p.18

[1] Nyberg, (2003), *op. cit.*, p.18

[2] *ibid*, p.18

[3] Sainsbury, (1999), *op. cit.*, p.92

[4] *ibid*, pp.92-94

[5] *Working family model*, pp.451-473

[6] DTI, (2006b), *op. cit.*, pp.6-7

recent proposals indicate that it will not be extended beyond 39 weeks.[1] The main implication of this is that working fathers would be entitled to up to 13 weeks paid leave with the remaining 13 weeks unpaid.[2] It is probable that the requirement that the mother return to work will not be restricted to her actual physical return to the workplace and will include situations where she is no longer on maternity leave, although she has taken a different form of leave such as annual leave.[3] The leave is likely to be available after the 20th week following childbirth,[4] thus enabling the mother to utilise around the first six months of leave.

This right would, consequently, provide working fathers with the possibility of taking up to 6 months leave in order to care for their child during the first year of the child's life. This compares notably with their current right to paternity leave and provides greater recognition of their caring responsibilities for young children. In doing so, it appears to mark a departure from the maternity to motherhood typology and extend towards the family typology classification of family care. While the focus remains on the care of young children, the framework for care is more akin to the gender-neutral and shared parenting aims inherent within the family typology.

[1] House of Commons, *Maternity pay and leave*, [WWW Document] URL: http://www.parliament.uk/commons/lib/research/briefings/snbt-01429.pdf, (Last Updated: 15 September 2009), (Last Accessed: Sept 2009) (2009a), pp.7-10; House of Commons, (2009b), *op. cit.*, pp.9-11
[2] House of Commons, (2009a), *ibid*, pp.7-10; House of Commons, (2009b), *op. cit.*, pp.9-11
[3] DTI, (2006c), *op. cit.*, pp.6-7
[4] *ibid*, p.7

Childcare: EHRC proposals

While the proposed right to additional paternity leave would appear to extend the scope of the package of work-family rights beyond the current maternal focus, the EHRC proposals are even more far-reaching. The EHRC recognises that there are three main elements to the package of work-family rights: rights for working mothers, working parents and working fathers.[1] This reflects the division of chapters adopted within this research, and the physical and social aspects of parenting. The rights to maternity leave, as discussed above,[2] should focus on the physical and medical aspects of childbearing and recovery, while parental and paternity leave should be concerned with care giving in more general terms.

The proposals advanced by the EHRC incorporate these three distinct types of rights and thus go beyond the proposed right to additional paternity leave and pay. The proposals identify three stages in which work-family rights may be developed, which progressively move away from the current package of rights towards a shared parenting model of rights.[3] While the focus, currently, remains childcare it can be contrasted with the additional paternity leave focus on the child's first year. Instead, the EHRC proposals would eventually result in a wholly redesigned package of rights for parents of children under the age of 5.

[1] EHRC, (2009), *op. cit.*, p.32
[2] Chapter Seven: Mothers' Work-family Rights in the UK
[3] EHRC, (2009), *op. cit.*, Table 1: Stages in the parental leave policy recommendations, pp.39-40

The three stages of development have distinct aims or focuses, which seek to address certain shortcomings of the current package of work-family rights. The first stage is aimed at making work-family rights more accessible and affordable to working families. At this stage there is no change to the rights actually available to working families, they are solely strengthened.[1] The second stage sees a more radical change to the rights available to working families. This would involve a reduction in the number of weeks of maternity leave that working mothers are entitled to, reducing from 52 to 26. This would be changed alongside an increase in parental leave from the individual entitlement to 13 weeks leave to 52 weeks of family leave which would be divided into four distinct blocks, three of which would be paid. The three paid blocks would be divided into three eight week periods divided into four weeks at 90% of earnings and four at the statutory level for each working mother, working father, and one final period of family leave which can be used by either parent. The remaining 28 weeks leave would be unpaid.[2] The final stage of the development of the rights to leave would strengthen this division with four months paid leave each for working mothers, fathers and another four month period that could be used by either. This would either be paid at 50% of wages for the whole 52 week period or 26 weeks at 90% with the remaining unpaid.[1]

This proposed package of work-family rights would also retain the right to maternity leave as distinct from these rights to parental leave, and the right to

[1] EHRC, (2009), *op. cit.*, Table 1: Stages in the parental leave policy recommendations, p.39
[2] *ibid*, Table 1: Stages in the parental leave policy recommendations, p.40

paternity leave in the current form. It therefore, reinforces the distinction between necessary gendered rights to leave, and between supportive rights and actual rights to childcare leave. In this respect, the EHRC proposals appear to be underpinned by the family typology approach towards the work-family conflict. These proposals encompass various caring situations for the care of young children under the age of 5. In addition, it recognises specific gendered rights to care which again reinforce gender-neutral shared parenting which is inherent within this ideology.

In some ways the direction of the EHRC research and recommendations reflects the US approach towards the work-family conflict. While the implementation of rights in the US has been identified as having been underpinned by the maternity to motherhood typology,[2] they have adopted a distinct – family typology – approach towards equality. This inclusive approach seeks to achieve equality between men and women with regards to access to rights, and *all* families with and without caring responsibilities.[3] This is reflected in the overall package of proposals advanced by the EHRC.

In the foreword to the *Working Better* document Nicola Brewer, Chief Executive of the Commission, notes that this is only the first step in the proposals for reform.[4] A second document, expected later in 2009,[1] will focus on disabled workers, older workers and others with caring

[1] EHRC, (2009), *op. cit.*, Table 1: Stages in the parental leave policy recommendations, p.40
[2] See Chapter Five: The US Welfare State and the Work-family Conflict above, pp.168-214
[3] As exemplified in FMLA 1993, § 102(a)
[4] EHRC, (2009), *op. cit.*, pp.6 and 12

responsibilities,[2] thus reflecting the previous extensions to the rights to request flexible working. This proposed expansion of the coverage of work-family rights would represent a distinct change in the package of rights available to working families in the UK. It would move the debate away from childcare and instead focus on family care, thus fully reflecting the family typology notion of care.

Family care model

This examination of the family care model underpinning fathers' rights in the UK has identified that there are two distinct understandings of care underpinning current and proposed rights. With regards to the current right to paternity leave it is apparent that it is underpinned by the maternity to motherhood typology of family care. It is restricted to a short period of leave to be used in the period immediately following the birth. While there may be clear justifications for implementing this right in this way, as it currently stands this tends to undermine working fathers' caring role.

This can be contrasted with the proposals to provide working fathers with additional rights to leave. These proposals recognise more explicitly the work-family responsibilities and conflicts that working fathers face and provide alternative frameworks which enable them to do so. In this respect

[1] EHRC, (2009), *op. cit.*, p.12
[2] *ibid*, pp.6 and 12

both of the alternative proposals advanced by the government and the EHRC are reflective of the family typology notion of family care.

Working family model

In 2001 working fathers continued to work the longest hours in Europe,[1] and much longer hours than working mothers (46.1 hours as compared with 27.8).[2] Fathers were also much more likely to be in full-time employment than men who were not fathers, thus supporting the continuing significance of their breadwinning role.[3] The importance of breadwinning to fathers was also reflected in various studies, as discussed above.[4] Consequently, prior to the introduction of the right to paternity leave, working fathers remained defined by their earning role and there was little appreciation of their work-family commitments. This in turn appears to be supportive of the (male) breadwinner or the one and a half earner-carer working family model, which are inherent within the motherhood typologies. The previous examinations of work-family rights in the UK also reinforced this interpretation of fathers' role.

However, the composition of the working family did not entirely reflect this. Research reported in 2003 showed that the working family model in the UK had changed from one reflecting the male breadwinner model, to a form of

[1] O'Brien and Shemilt, *op. cit.*, p.vii and Table 2.14 p.15
[2] *ibid*, p.vii and Table 2.11 pp.13-14
[3] *ibid*, p.vii and Table 2.1 p.8 (86% worked full-time as compared with 71% of non-fathers)
[4] *ibid*, p.19; Warin et al, (1999) *op. cit.*, pp.11 and 14-17; See also pp.423-430 above

dual-earner working family.[1] This research reflected the pattern of working and labour market commitments that working families adopted and not necessarily their arrangement of work-family responsibilities. Nevertheless, it raises the question of whether or not the working family model underpinning the legislation challenged these stereotypical roles by enabling working fathers to also address their work-family conflicts in a meaningful way. In other words, has the working family inherent within the legislation changed to encompass the dual earner-carer working family? According to governmental documentation, this is exactly what they aimed to do. In 2003 the DTI and HM Treasury produced *Balancing work and family life: enhancing choice and support for parents*.[2] In the introduction to this report it was noted that the working family has changed and is moving towards a dual earner model, which must be reflected in the legislation addressing the work-family conflict.[3]

This analysis of the working family model indicator will consider the extent to which fathers' rights enable working families, and in particular working fathers, to balance their work and family commitments. In doing so, it will reflect upon these rights in the context of the package of work-family rights as a whole. Again for the sake of clarity, the current rights which focus on the post-childbirth period will be contrasted with the proposed rights which are concerned with childcare more generally.

[1] HM Treasury and DTI, *Balancing work and family life: enhancing choice and support for parents*, (London: Stationery Office, 2003), Chart 2.1 p.6
[2] HM Treasury and DTI, (2003), *op. cit.*
[3] *ibid*, pp.5-6

Post-childbirth

The introduction of specific rights for working fathers was aimed in particular at addressing the issue of their participation in the work-family conflict and at enabling them to spend time with their family following the birth of their child.[1] The right to paternity leave appears to provide some recognition of the working father's child caring role and challenge the perception that childcare policies and childcare more generally is a female issue.[2] However, as noted above, this is only achieved to a limited extent with the short and inflexible period of paternity leave available during a restricted period of time.

The inflexibility of the leave is evident in its restriction to one or two consecutive weeks leave.[3] Working fathers therefore have to decide in the first instance whether or not they want to utilise the right to leave, and then whether or not they wish to exhaust their maximum entitlement. Even if they do decide to utilise their full entitlement to paternity leave, it is still only two weeks. This is arguably not a sufficiently long enough period of time for the father to care for the child and/or adjust to the changing circumstances of family life. Nor does it provide adequate support for the working mother, which is an explicit aim of the right,[4] to do the same.[5]

[1] HM Treasury and DTI, (2003), *op. cit.*, p.25
[2] DTI, *Framework Document on Paternity Leave and Pay*, (London: DTI, 8 May 2001), (2001a), p.5
[3] PALR 2002, Regs.5(1) and 9(1)
[4] ERA 1996, ss.80A(1) and 80B(1) and PALR 2002, Regs.(5)(1) and 8(1)
[5] James, G., 'All that Glitters is Not Gold: Labour's Latest Family-Friendly Offerings', [2003] 3 *Web Journal of Current Legal Issues*, part 4, [WWW Document] URL:

The inadequacy of the current length of paternity leave is also evident in research reported in 2006, which showed that while most fathers utilise between 6-10 days leave,[1] about 20% took between 1-15 days leave and 13% took over 16 days.[2] In addition, 20% of those fathers taking leave at this time did not use their right to paternity leave at all, while 30% used paternity leave along with their other rights to leave such as annual leave.[3] This suggests that working fathers require and want to take more leave at this time, and underscores the shortcomings of the current right to leave.

In addition, there is no flexibility for fathers to utilise this right over a period of time or on an intermittent basis, even within the current eight week period. This results in the family having very little time to spend together caring for and adjusting to the arrival of the new child in the family. In addition, it may adversely affect the ability of certain families to utilise the right to leave. As noted previously, the right to paternity pay is not income related, unlike the rights to maternity pay. The implications of this are that working fathers are only ever entitled to the minimum statutory payment. This could have a detrimental effect on utilisation rates. This was reflected to an extent in research published in 2006, which showed that of those working fathers not utilising the right to paternity leave, 13% cited that they could not afford to do so as the primary reason.[4] This presents similar concerns to that

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http://webjcli.ncl.ac.uk/2003/issue3/james3.html (Last Accessed: May 2009)

[1] Around 43%: Smeaton and Marsh, (2006), *op. cit.*, Chart 9.3, p.80

[2] *ibid*, Chart 9.3, pp.80-81

[3] *ibid*, p.82

[4] *ibid*, p.82, see also Table 9.1: Number of days' paternity leave taken by fathers, p.126 for a more detailed look at the composition of those utilising the right

experienced within the US package of rights, underscoring the importance of a paid element to the leave. Given these financial constraints on certain groups of working families, and the increased costs that a new family member entails, the inflexibility of the right to paternity leave renders it inaccessible to all working families. A greater degree of flexibility, either with respect to utilising the leave in non-consecutive weeks or on an intermittent basis, may address this to a certain extent by enabling families to spread and absorb the reduction in wages.

In addition, unlike the Swedish right to paternity leave, it does not necessarily reflect the realities of the situation. In Sweden the legislation enables working fathers to utilise their right on the child entering the family upon leaving the hospital.[1] The right to paternity leave is thus postponed until the child actually enters the family and the father is able to use it for the stated purposes, i.e. bonding with the child and supporting the mother. In the UK the right is very much tied to the date of birth, or at least the expected date of birth.[1] While the effect of this provision is to extend the period during which paternity leave can be used in cases where the child is born prematurely to the date on which the child was originally expected, it does not have the same degree of flexibility as the Swedish right. If, for instance, the child was ill and was in hospital for the initial period following their birth the father may be unable to take the leave for the specified purpose, whereas in Sweden this would still be possible.

[1] See PLA 1995, 8 §, and NIA 1962, 12 § discussed above in Chapter Six: The Swedish Welfare State and the Work-family Conflict, pp.253-255

These features of the right in particular make it impossible for working fathers to address their work-family conflicts beyond the first two months of the child entering the family. To this end James questions whether or not it meets the governments' objectives of enabling both parents to address their work-family conflicts.[2] These are valid criticisms because the right does not address working fathers' work-family conflicts in the same way or to the same extent as it does working mothers'.[3] Whereas working mothers had, at that stage, a right to 6 months paid and 6 months unpaid maternity leave,[4] working fathers were only afforded two weeks leave to be taken during the mothers' leave period. This has currently been exacerbated by the increase of the maternity leave pay period to 39 weeks, while fathers' rights remain rooted at two weeks although there are some indications that this will change by April 2011 with the implementation of the additional paternity leave proposals.[5] In this respect, it is similar to the maternity to motherhood notion of care situations. It is limited to and linked with the arrival of the child into the family. In addition, it presupposes that the mother is and will remain primary caregiver, thus reflecting the (male) breadwinner working family model.

[1] PALR 2002, Reg.5(2)(b) and 9(2)(b)
[2] James, (2003), *op. cit.*, part 4
[3] *ibid*; See also the discussion of mothers' rights in Chapter Seven: Mothers' Work-family Rights in the UK
[4] See Chapter Seven: Mothers' Work-family Rights in the UK for more details, pp.321-337
[5] House of Commons, (2009b), *op. cit.*, pp.9-11

Childcare: Additional paternity leave

The proposed right to additional paternity leave can, in many ways, be viewed as a response to the inadequacies of the current right to paternity leave. Whereas the right to paternity leave was the sole right specifically addressed to working fathers, the right to additional paternity leave would be implemented in addition to this, thus increasing the rights available to working fathers and extending them beyond the post-birth period. It could be assumed that the implementation of such a right would correspondingly increase the ability of working fathers to participate in family care and address their work-family conflicts. These kinds of objectives are characteristic of the dual earner-carer working family model. By addressing the caring role of working fathers the legislation encompasses the shared parenting aims of the family typology.

A number of characteristics of effective implementation of such rights can be identified, drawing from experience elsewhere, particularly Sweden.[1] These include: independent rights; individualised non-transferable rights, with use it or lose it incentives; (earnings related) paid leave; and flexibility in terms of utilisation.[1] As will become apparent from the following discussion of the right, in spite of the fact that the right has yet to be implemented, it has already been heavily criticised for failing to adequately address these

[1] Caracciolo di Torella, E., 'A critical assessment of the EC legislation aimed at reconciling work and family life: Lessons from the Scandinavian model?', in H. Collins, P. Davies and R. Rideout (Eds), *Legal Regulation of the Employment Relation*, (London: Kluwer Law International, 2000), pp.457-458

characteristics.[2] These relate directly to the way in which it has been proposed the rights will be implemented.

Mothers' as gatekeepers to care

At the beginning of the chapter it was suggested that mothers are often viewed as gatekeepers to fathers' participation in care.[3] The proposed right to additional paternity leave appears to set this on a statutory footing. In the previous section on the framework of the right to additional paternity leave it was suggested that the precise details of the right to leave have not been finalised and it is only possible to conjecture how the right will actually be framed if it is eventually implemented.[4] What does appear clear from the WFA 2006 and the consultations is that it will be linked with the mother's rights to maternity leave and pay.[5] In the responses to previous government consultations the inter-relationship with the right to maternity leave was the subject of some concern.[6] This was primarily related to the impact that it would have on the father's eligibility for the right.[7] There are a number of

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[1] As noted above at p.420
[2] Kilkey, (2006), *op. cit.*, pp.172-173: Caracciolo di Torella, E., 'New Labour, New Dads – The Impact of Family Friendly Legislation on Fathers', 2007 Vol.36(3) *Industrial Law Journal* 318, pp.323-324
[3] Warin, et al., (1999), *op. cit.*, pp.38-39 and 42; Lewis, (2000), *op. cit.*, p.6
[4] See *Family care model: Care situations, Childcare: Additional paternity leave* above, pp.442-447 for more details
[5] ERA 1996, proposed ss.80AA(2) and 80BB(2) to be inserted by WFA 2006, ss.3 and 4; DTI, *op. cit.*, (2006b), pp.22-28; DTI, *Work and Families: Choice and Flexibility, Additional Paternity Leave and Pay, Government Response to Consultation*, (London: DTI, November 2006), (2006d), pp.8-11
[6] DTI, (2005b), *op. cit.*, pp.25-27 and 49-50
[7] *ibid*, p.50; EOC, *Response to the Department of Trade and Industry, Work and Families: Choice and Flexibility*, (May 2005), p.6; Working Families, *Work and Families – Choice and*

related aspects to this.

In the first instance, there is the condition for the mother to have actually been entitled to the right to leave and pay in order for fathers to be equally entitled to utilise the leave. This strikes at one of the fundamental characteristics of effective leave, namely that it should be available as an independent non-transferable right to leave. According to research undertaken in 2000 42% of women were not in employment prior to giving birth.[1] Under the proposed provisions, the fathers of the children born to these mothers would not be entitled to any leave. This remains the case irrespective of whether the mother subsequently wishes to or actually does join the labour market.[2] One of the justifications for this is likely to be that the purpose of the leave is to provide care for the child. Where the mother is not participating in the paid labour market, there is no need for the working father to also take time away from work in order to provide care. However, the same considerations are not applied with respect to working mothers and their right to leave. Their right to maternity leave is viewed completely independently from the father's labour market situation, in spite of the broadly similar effect on the family, with the obvious exception of the specifically gendered recovery and breastfeeding periods. This is also at odds with the comparable Swedish and US legislation, which recognises the rights to leave and the caring responsibilities of both parents irrespective of the labour

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Flexibility, (London: Working Families, May 2005), pp.1 and 9
[1] EOC, (2005), *op. cit.*, p.6
[2] *ibid*

market position of the other partner.[1]

The second main concern follows on from this. It relates to the situation where working mothers are entitled to leave. In this instance, working fathers will be entitled to leave, provided they satisfy the qualifying conditions. However, they are still not afforded an independent right to childcare leave under the proposals as they currently stand. Instead they are merely presented with the opportunity to have a right to leave, subject to the mother of the child forgoing a portion of their leave entitlement.[2] The proposed right is therefore somewhat distinct from the rights currently available in Sweden and the US, which equally afford individual non-transferable rights to both working parents.[1]

The effect of this framework is that working fathers will have no, or extremely limited, choice regarding their utilisation of this right. For instance, if working mothers decide to use their full entitlement to leave, working fathers will have no rights whatsoever. The only real choice is given to working mothers, which undermines the choice and flexibility and dual earner-carer and shared parenting objectives of the legislation.

These features of the right wholly undermine its presentation as a specific right to leave for working fathers. In this regard, the right is even more of a token right than the right to request flexible working, discussed in the

[1] PLA 1995, 5 §; FMLA 1993, § 102(a)(1)
[2] WFA 2006, ss.3 and 4

previous chapter.[2] While that right also fails to provide working parents with an independent right to change their working practices, it at least gives employees the right to request and the employer an obligation to seriously consider the right.[3] This proposed right to additional paternity leave provides working fathers with neither an independent right to leave nor a right to have their desire to take leave considered seriously. Even when working fathers have the opportunity to utilise the right, the legislation does not necessarily facilitate shared parenting.

Costs and flexibility

The main hurdles facing working families who are given the opportunity to take leave are the levels of wage replacement available to them, and the inflexibility of the right to leave. Taking the wage replacement issue first, it is proposed that working fathers would be entitled to the minimum statutory paternity pay level when utilising their right to leave during the first 13 week period and unpaid leave for leave during the final 13 weeks.[4] The justification advanced here is that if the working mother was continuing to exercise her right this is the level of wage replacement she would be entitled to.[1] While these justifications may appear to make economic sense, they further fail to recognise the father's right as independent from that of the

[1] PLA 1995, 5-7 §§ and the FMLA 1993, §§ 102(a)(1)(A) or (B) respectively
[2] See pp.403-418 above for details
[3] ERA 1996, s.80G
[4] House of Commons, (2009b), *op. cit.*, pp.9-11

working mother. In addition, given the relatively small numbers of fathers projected to use this right,[2] there appears to be very little genuine justification for this approach. This is also reflected in the Working Families response to the government consultation on work-family rights, in which they argued that the proposed rights to additional paternity leave would have a limited impact on working fathers, particularly because it does not entitle working fathers to an individual right to leave at this time.[3]

The flexibility issue is closely related to the question of pay. Given the limitations on the payment of leave greater flexibility in terms of utilisation of the leave may have been a way to counterbalance the detrimental effects of a reduction in income. However, the legislation affords very little flexibility for working families.[1] Once the mother returns to work and the father utilises the right to additional paternity leave, the mother cannot subsequently take another period of maternity leave. Consequently, the legislation provides for one choice and change in caregiver. The implication of this is that once working families have decided to change caring responsibilities, they cannot revisit that decision. If they subsequently decide that it is inappropriate or that it is not working, they will effectively have to forgo any remaining entitlement to leave. This provides working families with very little choice and flexibility regarding their work-family responsibilities. This is further reinforced by considering the comparable framework in Sweden, which

[1] DTI, (2006d), *op. cit.*, pp.6-7
[2] House of Commons Research Paper 05/82, *The Work and Families Bill*, (November 2005), p.34
[3] Working Families, (2005), *op. cit.*, p.1

allows for three different forms of parental leave within any calendar year,[2] thereby enabling working families to tailor their entitlements to suit their circumstances. The lack of choice and flexibility is also underscored by the inflexibility of the leave itself.

The leave cannot be taken on an intermittent or part-time basis. This is similar to the US right to family leave, although it is possible for such arrangements to be made,[3] but compares markedly with the Swedish right. The flexibility afforded to Swedish working parents enables families to combine low and/or unpaid leave with paid work.[4] This makes the leave more affordable for working families and enables them to redress their work-family conflicts in an unique and personal way, which in reality is exactly what the work-family conflict is.

The way in which the right to leave is currently framed, consequently, fails to adequately and realistically address the work-family conflict from the perspective of working fathers. To this end it clearly fails to facilitate shared parenting. Instead, it appears to further reinforce the current package of rights and their focus on maternal care. With this in mind, the most appropriate classification of the working family model underpinning this proposed legislation continues to be the one and a half earner-carer working family model.

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[1] Kilkey, (2006), *op. cit.*, p.173
[2] PLA 1995, 10 §
[3] FMLA 1993, § 102(a)(1) and (b)
[4] PLA 1995, 6-7 §§

Childcare: EHRC proposals

Within the critique of the proposed right to additional paternity leave there was support for a redressing of the right to parental leave.[1] The EHRC recommendations appear to adopt this framework within their proposals for change. There is a lot of debate surrounding the work-family conflict and the role of the government through the introduction of work-family rights.[2] The EHRC have recently declared in their quite radical proposals for changes to the current package of work-family rights: *"[o]ur objective is not to dictate what parents and families do, but to remove the barriers to genuine choice."*[3] The focus on choice has underpinned all of the previous governmental consultations and proposals for change, but its continued inclusion here suggests that the promised choice and flexibility,[4] has not been achieved. This is further supported by research undertaken at the request of the EHRC, which showed that only 31% of working parents agreed that they had a choice regarding spending time with their children or at work, as compared with 48% who disagreed.[1]

If the current right to paternity leave is focused upon here, as noted above, this would appear to be a true reflection of the way in which fathers' rights interact with the package of rights as a whole. Even the additional paternity leave proposals fail to challenge these conclusions. The question that

[1] Caracciolo di Torella, (2007), *op. cit.*, pp.324-325 and 328
[2] As discussed previously at pp.426-430
[3] EHRC, (2009), *op. cit.*, p.14
[4] Also included within the documentation

remains is whether or not these proposals, which follow the preferred parental leave approach, challenge this and actually represent greater and more genuine choice for working families.

Each of the EHRC's proposals represents a new change for working families that is aimed at making these rights more accessible to them. The first stage is focused on low paid or single parent working families who find it difficult to utilise their rights because they cannot afford the reduction or loss of income.[2] To that end the focus is on increasing the levels of statutory maternity and paternity pay, extending the right to maternity allowance to working fathers – paternity allowance, and removing the continuity requirements for entitlement to statutory pay.[1] Under these proposals, working mothers would continue to be entitled to 39 weeks paid leave, but 18 weeks would be paid at 90% of earnings with 21 at the flat rate. Fathers would also be entitled to earnings related paternity pay, also at 90% for both weeks.

While at this stage there is very little change to work-family rights, there is greater recognition of the caring role of both working parents. From the perspective of working fathers their right to paternity leave and pay would finally correspond with mothers' rights to maternity leave. While still very limited, this is likely to be a significant change for working fathers, particularly in light of the research noted above which indicated that affordability of leave

[1] Ellison, et al., (2009), *op. cit.*, Figure 17: Parental attitudes on choice, p.56
[2] EHRC, (2009), *op. cit.*, pp.9 and 25

was one of the main reasons why fathers did not utilise their rights.[2] While this may encourage greater paternal participation in the post-birth stage, these changes will have no impact on the arrangement of work and family responsibilities between working parents. The second and third stages in the proposed development of rights, however, offer more radical changes to the current package of work-family rights and fathers' entitlements to leave.

These next stages in the development see two quite fundamental changes to the current package of work-family rights.[3] The first change is the reduction in the maternity leave period to 26 weeks. This would be allied with a reconfiguration of the right to parental leave, which would be increased to 52 weeks leave with each parent initially receiving a dedicated period of 8 weeks paid leave, which would be increased to 4 months by the end of stage three.[4]

On the face of it, these changes offer greater opportunities for working families to balance their work-family commitments. It appears to address some of the criticisms of the right to additional paternity leave. It provides working fathers with a specific, non-transferable right to leave in order to care for their children beyond the early stages of their lives. This contrasts with the right to additional paternity leave, which is dependent, in essence transferable and does not entitle working fathers to any genuine rights to

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[1] *ibid*, Table 1: Stages in the parental leave policy recommendations, p.39
[2] Compare with discussion of fathers' use of parental leave, pp.390-397
[3] As discussed above, *Family care model: Care situations, Childcare: EHRC proposals*, pp.447-450
[4] *ibid*; EHRC, (2009), *op. cit.*, Table 1: Stages in the parental leave policy recommendations, p.40

care. In addition, it is limited to the first year of the child's life, thus, it fails to take account of their continuing familial responsibilities.

Furthermore, and most notably, the proposed rights draw distinctions between pregnancy and maternity, which are rightly highly gendered activities and childcare, which is not. By limiting maternity leave to 26 weeks it underscores that anyone should be able and entitled to care for the child after this period. This appears to mark a clear break from the focus on maternal care and the motherhood classifications and instead reflect and support both working parents as earners and carers.

However, what is slightly concerning about the EHRC's proposals is that they contain no details regarding the administration of these rights. While the rights to shared parental leave are certainly commendable and perhaps preferable to the currently proposed rights to additional paternity leave, there are certain aspects of the rights which are potentially problematic.

The administration of the EHRC's proposals

In the first instance, the direct impact on the maternity leave period is somewhat problematic. Prior to the introduction of these proposed rights working mothers will have been entitled to 52 weeks leave, 39 of which will

have been paid.[1] Directly following the introduction of these rights, this will be immediately reduced to 26 weeks. While working mothers and families may presumably be able to use parental leave after this period of maternity leave, the question that remains is what consequences will there be for utilising the rights in this way? In particular, will the rights to return and terms and conditions during leave be comparable to the current situation, will working parents continue to have to satisfy the same qualifying conditions in order to be entitled to parental leave, and how much flexibility will the rights contain?

In the first instance, the issue of rights to return and terms and conditions during leave should at a minimum be the equivalent of the current provisions.[2] However, while this may operate on a comparable basis with regards to maternity leave, the problem arises with respect to parental leave. While the current provisions draw distinctions between leave periods of less and more than 4 weeks,[3] the proposed rights envisage a longer period of leave, with the right to utilise more than the current maximum of 4 weeks per year. This should be reflected in the rights to return in order to support and protect working parents who wish to utilise their rights. If it is not, then it may indirectly impact on working fathers who, as noted in the research discussed above,[4] have a greater labour market attachment than working mothers and who may be more concerned about maintaining their specific post.

[1] WFA 2006, ss.1 and 2
[2] MPLR 1999, Regs.9 and 17-18A
[3] *ibid*, Reg.18
[4] At pp.423-430

The second issue that remains unaddressed is that of qualifying conditions. The recommendations for change propose no changes to the qualifying conditions for parental leave, which would mean that working parents would have to have been continuously employed by their current employer for one year prior to being able to utilise the right.[1] If this condition is retained then it will, in the first instance, have particular implications for working mothers who would have previously been automatically entitled to 52 weeks maternity leave, irrespective of length of service.[2] The main implication of that would be that they may be forced to return to work at the end of the 26 week maternity leave period without any further rights to leave until they satisfy those qualifying conditions. Working fathers may also find this condition difficult to satisfy, meaning that the working family may be faced with very few options or choices regarding childcare. The reconfigured right to parental leave must, consequently, set realistic and realisable qualifying conditions to enable working families to access and utilise these rights to leave.

The final main issue of concern that these proposals produce is that regarding the flexibility of the right to parental leave. The question remains, will it be presented in a similarly flexible and individualistic way to the rights to parental leave in Sweden, which affords working families with a great degree of choice regarding how the leave is organised as between the parents and

[1] MPLR 1999, Reg.13(1); ERA 1996, s.76
[2] ERA 1996, ss.71 and 73; MPLR 1999, Regs.4 and 7

with regards to their work-family conflicts?[1] Or will it maintain the arguably rigid and relatively inflexible current model of parental leave in the UK?[1] In order for the proposals to achieve their goals of increasing choice and flexibility for working families it is arguably the former approach that must be adopted.

At this stage in the recommendation process it is not possible to draw firm conclusions regarding the likely impact that they will have on the ability of working families to address their work-family conflicts. On first reading the rights appear to offer that possibility. They seem to provide individualised, independent, non-transferable rights to leave to both working parents, thus strengthening and integrating the father's childcare role within the package of rights. They draw a clear distinction between maternity leave that is genuinely dedicated towards the physical and medical aspects of childbearing, and childcare leave which is a gender-neutral social right. Nevertheless, the pivotal element of this package of rights is how they are implemented and how they correspond with one another. The administration of this and its implications are potentially fundamental to the success of these rights. If this is achieved it is possible that this re-envisioning of work-family rights in the UK will successfully challenge the focus on maternal care evident in the examinations of previous chapters. Instead it will shift towards parental care, with both working parents being given the opportunity to combine their work and family responsibilities. To this end, it would support

[1] See Chapter Six: The Swedish Welfare State and Work-family Rights, pp.253-260 for further details

the dual earner-carer working family model inherent within the family typology.

Working family model

The working family model underpinning work-family rights in the UK has been considered in the context of current and proposed rights. The current rights to paternity leave offer working fathers with limited ability to participate in family care. They fail to provide working fathers with a genuine caring role,[2] which is reinforced by its close connection with mothers' rights to leave and the post-birth period. Consequently, it reinforces the maternal focus on childcare and the motherhood classifications. The working family model inherent within fathers' work-family rights is consequently the one and a half earner-carer working family model. This reflects the focus on one parent as primary caregiver inherent within the current package of rights, with the other providing a more secondary role.[3]

This does not represent any development in UK work-family rights, and the proposed right to additional paternity leave, as currently framed, is unlikely to achieve this. The framework of this right and the inherent dependence on

[1] See Chapter Eight: Parents' Work-family Rights in the UK, pp.386-389 for further details
[2] Caracciolo di Torella, (2007), *op. cit.*, p.323. This will be discussed in more detail in the following section
[3] *ibid*, pp.322-324; James, G., 'The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?', 2006 Vol.35(3) *Industrial Law Journal* 272, p.275. This will be developed further in the following section

mothers as gatekeepers of childcare further entrenches their primary role in this context.[1] In addition, it does not actually provide working families with any additional rights to leave. They remain focused on the post-birth/early childcare period and do not address the continuing work-family commitments that working families face. This again reinforces the motherhood typology classifications of the current package of work-family rights.

The EHRC's recommendations are the only proposals which have the potential to represent a change in the working family model underpinning the legislation. These recommendations, to some extent, appear to use the additional paternity leave proposals as a springboard for their package of work-family rights. However, in doing so the proposals attempt to specifically address the work-family conflicts of both working mothers and fathers by providing them (in theory) with symmetrical childcare rights.[2]

Working families, consequently, are presented with a package of rights that should support and encourage gender-neutral shared parenting. To this end, it is arguable that they would reflect a shift towards the dual earner-carer working family model, but the actual framework and operation of the rights is currently so unclear that it is not possible to draw determinative conclusions at this stage.

[1] Again developed further in the following section
[2] With the notable exclusion of the rights to maternity and paternity leave

Gender roles

The previous analyses of current and proposed fathers' work-family rights has identified that while they aim to provide rights which enable both parents to share child caring responsibilities, they currently fall far short of it. The current rights instead focus on enabling the family to care together, while the proposed rights do not necessarily address the continuing work-family commitments that working families face. To this end it has been suggested that the rights do not facilitate or support dual earning and caring working families. At the beginning of this work-family analysis the question was posed as to whether or not the legislation genuinely recognises men as working fathers.[1] This analysis of the final work-family indicator will to an extent focus on this issue.

The working father – earner and carer?

There are varying views on the role of working fathers and the extent to which their role is recognised within work-family legislation. Even the governmental stance on the issue is in fact conflicting. In 2005 the focus on working fathers and their childcare commitments was reinforced by Jacqui Smith, as Deputy Minister for Women and Equality. With regard to the right to paternity leave she noted that the government *"understand the important*

[1] In *Family care model: Rights holder*, pp.432-436

role that [fathers] ... play in the raising of their children."[1] It would appear from this comment that the government adopted a supportive and visible stance towards working fathers and their childcare commitments. However, this can be compared with the aims that originally underpinned the legislation.

Gender equality

The introduction of specific rights for working fathers, not unlike mothers' rights, was underpinned by the objectives of gender equality. This was particularly evident in the 2003 DTI publication, *Balancing Work and Family Life: Enhancing Choice and Support for Parents'*, which reinforced this commitment by noting that:

> *"[s]upporting greater participation of men in family responsibilities is important to the objective of gender equality, and as important as increasing women's ability to participate in the labour market."*[1]

This suggests that the overall objective of the government was to achieve equal treatment as between men and women and not necessarily equality for

[1] Hansard House of Commons Westminster Hall Debate, *Working, Caring and Life Balance*, (10 March 2005), Col. 519WH, Jacqui Smith at col. 520WH

working fathers. While this focus on fathers' rights began to, at least in theory, challenge the gendered nature of childbearing and caring,[2] it does not appear to have been specifically aimed at the work-family experience of working fathers. This is reflective of the comments made by Collier regarding the role of the government in pursuing and promoting rights for working fathers.[3] As Collier suggests, this is more indicative of the government pulling working fathers into care to achieve its aims of gender equality, than of working fathers pushing for work-family rights.[4]

This is further reinforced in the EHRC's proposals. These are also concerned with achieving equal treatment between men and women and, in forthcoming proposals, between working families with and without caring responsibilities.[5] This reflects the family typology aims of US family and medical leave, and the equal treatment principles which underpin it. Experience from the US has shown, however, that adopting this equality based approach does not necessarily facilitate equal access to and utilisation of work-family rights.[6] The EHRC's proposals, however, appear to represent a hybrid of the US and the Swedish models. The family focus of the proposals is coupled with individual gendered rights for working parents, which attempts to achieve equality through specific rights. Experience has again shown the limitations of this approach.[7] Perhaps the main issue here

[1] HM Treasury and DTI, (2003), *op. cit.*, p.14
[2] James, (2003), *op. cit.*, part 2
[3] Discussed above at pp.426-430
[4] *ibid*
[5] EHRC, (2009), *op. cit.*, p.12
[6] See the work-family classification of work-family rights in the US above at pp.168-214
[7] See the work-family classification of work-family rights in Sweden above at pp.238-287

has been that the underpinning objective has been gender equality and not the re-negotiation of the work-family conflict.

Secondary rights

The questionable focus of fathers' work-family rights has been further undermined by the way in which the rights themselves have been implemented. Focusing on the current right to paternity leave, and equally evident in the proposals for additional paternity leave, it is apparent that the rights are not specifically focused on working fathers or their rights to care. The right to paternity leave in the UK has instead always been associated with supporting the working mother around the time of childbirth. This was reflected as early in the development of the right in the responses to the introduction of such in the 2001 *Work and Parents: Competitiveness and Choice, A Green Paper*.[1] To this end, the right was underpinned by the supportive aims of utilising the leave *"for the purpose of caring for the child or supporting the mother"*, which were expressly included within the text of the legislation.[2]

While the justification of both parents being absent at this time is reflective of the aims of enabling the family to bond and to a degree the realities of the situation, it could be argued that this focus on the fathers' supportive role

[1] DTI, (2001a), *op. cit.*, pp.1 and 4
[2] ERA 1996, ss.80A(1) and 80B(1)

undermines their caring role.[1] It has been persuasively argued that the right to paternity leave reinforces fathers' limited role in this context by providing them solely with a *"'secondary' right"* to leave.[2] Their role is not independent of the mothers' right whichever way it is viewed. As discussed above,[3] the right to additional paternity leave is very much subject to the mothers' rights and choices. The same is equally true of the current right to paternity leave. It has to be used during the mothers' maternity leave period, and so under the watchful eye and presence of the new mother. It is consequently not a time for working fathers to care for and bond with their new child on their own.

Another notable aspect of the proposed right is the question of the terms and conditions and rights to return that the father will be entitled to having utilised the leave. A bare majority of respondents to the government consultation were in favour of equivalent rights to ordinary maternity leave.[4] This would entitle a working father to return to the same job on the same conditions as he had before he utilised the leave. Another option was to entitle working fathers to the same rights that a mother would have had on her return during this later period. This was also widely supported in the consultation responses, because it would provide equivalent rights irrespective of who was utilising the leave.[1] However, there are a number of justifications for preferring the former approach, namely: that it should mirror mothers' rights

[1] James, (2003), *op. cit.*, part 4; and James, (2006), *op. cit.*, p.278
[2] Caracciolo di Torella, (2007), *op. cit.*, p.323
[3] DTI, (2006d), *op. cit.*, pp.6-7
[4] 50% of respondents chose this option: DTI, (2006c), *op. cit.*, pp.10-11

on their first period of extended leave, since this is equally the fathers' first period of leave; that this would increase utilisation of the leave by fathers in particular because it would ensure job security for working fathers, and it would amount to less favourable treatment if there were different rules; furthermore, it should be no more onerous than mothers utilising the ordinary maternity leave period.[2]

The working fathers' role is further undermined by not providing them with an automatic right to care for their child.[3] While this has been discussed above in relation to the proposed right to additional paternity leave,[4] the same is equally true of the current right to paternity leave. With regards to the proposed right, the gendered nature of both roles is further reinforced in responses to these proposals. For instance, the EOC identified that the implementation of the proposed right in this way could lead to the reinforcement of traditional gender roles.[1] These are certainly not challenged by providing working mothers with the sole discretion to allow working fathers access to these rights.

With regards to current rights, working fathers must satisfy qualifying conditions in order to be entitled to utilise this right. This further suggests that the working fathers' role is secondary to that of the working mother, whose rights are automatic. It is almost as though working fathers'

[1] 43% of respondents chose this option: DTI, (August 2006), *op. cit.*, p.10
[2] *ibid*, pp.10 and 11
[3] James, (2006), op. cit., p.275; Caracciolo di Torella, (2007), *op. cit.*, p.322
[4] At pp.458-461 above

participation at this time is viewed as a 'bonus' and not as necessary as that of working mothers. These features of the rights to additional and ordinary[2] paternity leave reinforce the gendered nature of the package of work-family rights in the UK,[1] with working fathers clearly being viewed as workers and only working mothers being recognised as both earners and carers. This confirms the one and a half earner-carer extended motherhood typology classification of these rights identified in the previous section. While both parents are given the opportunities to care for their children, this remains divided along gendered lines with working mothers being designed and supported as primary earner-carers and working fathers secondary carers at best.

The work-family classification of fathers' work-family rights in the UK: Conclusions

This analysis of the work-family typology underpinning current and proposed rights for working fathers' in the UK has identified a number of important key points. In the first instance, it has indicated that the current package of rights for working fathers has failed to renegotiate their work-family role. Instead it has further entrenched the division between working mothers and fathers as earners and carers, with working fathers being firmly assessed in terms of their earning role. With this in mind, and the concerns regarding the actual

[1] EOC, (2005), *op. cit.*, p.6
[2] As it would be called following the introduction of additional paternity leave

administration of the proposals, it is difficult to see how the recommended changes to fathers' rights will challenge these preconceptions. Indeed the proposed additional paternity leave scheme only strengthens this position.

What is also clear from this analysis is that independent, individualised and non-transferable rights for working fathers are necessary to begin to challenge the currently gendered model of care underpinning the legislation. A renegotiation of the parental leave system is likely to have the biggest and most effective impact on the rights of working fathers; however, this must be administered in such a way that it actually achieves these aims. While guidance can be drawn from the Swedish (and US) experience, lessons must also be learned. One of the main ones to bear in mind is that the transformation from maternity leave to parental leave, and the consequent participation by working fathers, was not immediately and overwhelmingly felt.[2] It is a progressive change that must be both desired by and have engagement from working fathers in order to succeed. The main concern regarding the EHRC's recommendations for change is that it is as yet unclear whether or not such proposals have the support of working families and in particular working fathers.

This analysis has indicated that the work-family typology underpinning fathers' current work-family rights is the maternity to motherhood typology. Even the proposed changes to fathers' rights have made little impact on this

[1] Caracciolo di Torella, (2007), *op. cit.*, p.328
[2] See discussion of participation rates of working fathers in Chapter Six: The Swedish

classification, identifying an extended motherhood typology classification of these rights. This suggests that the work-family typology underpinning legislation in the UK has not developed to the same extent as the changes (actual and proposed) to the package of work-family rights. Instead they have continued to reinforce traditional gender roles, albeit while recognising to a greater extent the work-family responsibilities of working families. The EHRC's proposals offer at least one possibility for a genuine break in this trend, not only with regards to working fathers but also to working persons with a variety of caring responsibilities. However, this is very much dependent on whether or not the government adopt their proposals in the first instance, and how they would be administered in the second. At present the legislation continues to be centred on the gendered working mother and her work-family conflicts.[1]

Welfare State and the Work-family Conflict, pp.281-285

[1] Weldon, M., 'The Parental Body in Law: An Examination of How the Working Parent is Conceptualized in UK Labour Law', *eSharp Journal*, Issue 8 Un/Worldly Bodies, [WWW Document] URL: http://www.gla.ac.uk/media/media_41210_en.pdf (Last accessed: May 2009)

Chapter Ten – The Development of Work-family Rights in the UK: Some Conclusions

This research project has attempted to identify and understand the development of the work-family classification of legislation in the UK, with reference to the experiences of both the US and Sweden. In doing so, it has sought to challenge the way in which the packages of work-family rights of these states are viewed, seeking to identify commonalities and divergences between them and learn lessons from their implementation of rights. The starting point for this analysis has been the presumption that UK legislation has developed markedly in recent years, suggesting a radical change in the typology underpinning it. This was transported into this tri-state analysis by the historical connections that the UK has had with both the US and Sweden, and the perceived similarities that it continues to have with them.[1] A related aim, consequently, has been to locate its possible development in the context of these two idealised and apparently distinct states.[2]

From this analysis various conclusions can be drawn. These relate not only to the overarching aims of the project noted above, but also the underlying objectives which enable these wider conclusions to be drawn. These objectives relate to the broad issue of the relationship between the welfare state regime classifications and the work-family conflict, and the development of a classification model that enables the work-family typologies to be

[1] See Table 3.1, p.106 for an overview of the welfare state regime classifications
[2] Idealised classification given by Esping-Andersen, *Social Foundations of Postindustrial*

critically analysed. This concluding chapter will begin by considering these issues.

The relationship between welfare state regime classifications and the work-family conflict

The initial analysis of the welfare state regime literature suggested that there may be similarities between the classifications presented in this context and the packages of work-family rights found within the states examined.[1] A comparison between these welfare state classifications as presented in Table 3.1, and the subsequent analyses of the rights within these states, and the overview of work-family rights within these states in Table 1.1 suggest, prima facie, a degree of convergence.[2] In Table 3.1 and Chapters Three and Five more generally, the US was identified as a minimalist state, with very limited action being taken by the state to address individuals' and families' welfare needs.[3] These were largely left for the market and the family to organise.[4] This model and classification of the US welfare state suggested that it would offer limited rights and supports for working families with respect to the work-family conflict.[5] This was, to an extent, displayed within the work-family analysis of the rights to family and medical leave, which provided working

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Economies, (Oxford: Oxford University Press, 1999), pp.27, 87, and 143
[1] As noted above at pp.77-80
[2] See Table 1.1, p.14 and Table 3.1, p.106
[3] See Table 3.1, p.106 for an overview
[4] See relevant welfare state classifications in pp.59-80 above
[5] Crompton, R., *Employment and the Family. The Reconfiguration of Work and Family Life in Contemporary Societies*, (Cambridge: Cambridge University Press, 2006), p.130

families with fairly short, very specific and arguably inadequate rights to leave.[1] The US package of work-family rights, thus, appeared to be consistent with its welfare state classification.

Similar conclusions can be drawn by examining the welfare state regime classification of Sweden. Table 3.1 and Chapters Three and Six more generally identified Sweden as a more extensive provider of welfare support.[2] It was characterised by universal and relatively generous welfare coverage, which attempted to meet the needs of a variety of groups not solely those most in need.[3] Again, this was somewhat reflected in their package of work-family rights outlined in Table 1.1 and discussed in Chapter Six, which encompassed a variety of caring situations and included support through the payment of most forms of leave, coupled with the flexibility inherent within these rights.[4]

The same was also true with the more problematic and interesting position of the UK in this context. Within Table 3.1 the UK classification and its location with regards to the US and Sweden was identified. This showed the continuing liberalisation of the UK welfare state, and its subsequent similarities with the US model, but also its connection with the Swedish-style welfare state. While the classification of the UK in Chapter Three more

[1] As discussed in pp.168-214 above
[2] See discussion of welfare states in pp.59-80, 106 and 226-230
[3] As reflected in Esping-Andersen's classification: *The Three Worlds of Welfare Capitalism*, (Cambridge: Polity, 1990), p.28
[4] As discussed at pp.238-287 above

generally suggested a liberal-type classification,[1] this appears to contrast with the package of rights outlined in Table 1.1 which displayed greater similarities with the Swedish package of rights.[2] The principal explanation for this is that the legislation outlined in Table 1.1 was introduced at a later date than the welfare state analysis presented in Table 3.1. Nevertheless, subsequent analyses of the work-family classification of UK legislation have suggested a connection with the welfare state regimes classification as evidenced in Table 3.1.

This classification is best expressed within this literature in the form of Esping-Andersen's argument that the UK was an example of a *'mixed case'*.[1] It is this categorisation that the work-family classifications of the UK appear to support. In subsequent sections the work-family classification, and its development, will be discussed in more depth, but for present purposes it is sufficient to note that the UK continues to display characteristics of both the Swedish and the US models and packages of rights, thereby continuing to be a 'mixed case'.

All of the states examined here, consequently, appear to display close relationships between their welfare state regime classifications and the packages of work-family rights available within each state. There are possible justifications for this, in particular because they are necessarily related to the role of the state and how active it is in supporting individuals,

[1] See pp.93-109 above
[2] Presented on p.14

groups and families more generally.[2] This was more explicit in certain welfare state regime models, such as that advanced by Esping-Andersen, which very clearly discussed the relationship between the state, the market and the family in the provision of welfare.[3] The welfare state regime classification framework, consequently, has provided a useful foundation for analysing the work-family conflict because they are both concerned, at their roots, with very similar relationships. However, it is apparent from the work-family analysis that these classifications, particularly of the US and Sweden where they are more determinate, do not fully explain or understand the work-family typology underpinning these states. These more general classification models cannot expect to identify the particular nuances and ways in which the legislation addresses this conflict without focusing on work-family indicators, as has become apparent in the work-family classification throughout.

The work-family classification model

The similarities that have been identified between the welfare state regime models and the work-family rights available within these states may raise the question of the need for the specific work-family model. The main justification that has been advanced is that it enables a more focused

[1] As discussed above at pp.82-86
[2] See Chapter Three generally for discussion of the different approaches adopted within the classification literature
[3] Esping-Andersen, (1990), *op. cit.*; Esping-Andersen, (1999), *op. cit.*, pp.74-86

analysis to be undertaken than was possible under the broader welfare state regime models. This work-family classification model, for the first time, envisaged an analytical model that would focus exclusively on the work-family conflict. In doing so, it concentrated on those issues, identified from the welfare state regime models and family literature,[1] which were most significant to analysing the conflict. These were identified as the types of family care included within the legislation, the working family model that the legislation supports and the division of gender roles that this reinforces.[2] These three indicators underpin the three work-family typologies,[3] establishing and delineating the distinctions between them. While these aims may be worthy, they can effectively be undermined if the model affords no additionality to the current classification frameworks. The usefulness of the tripartite analytical model that this produced and the weaknesses of the welfare state regime classifications in this context were apparent on closer analysis of the rights.[4] Further supporting the value of this model within the work-family and classificatory context.

The limitations on the welfare state regime models were apparent in the closer analysis of the package of work-family rights in the US. While the US legislation does offer limited support for working families with regards to their work-family conflicts, it adopts a rather wide notion of family care beyond the

[1] See Chapter Four: The Work-family Conflict and Work-family Classification Model for more details
[2] See Chapter Four, in particular pp.110-135 for more details
[3] The Maternity to motherhood typology, the Extended motherhood typology, and the Family typology, outlined in Table 4.2, appendix
[4] As undertaken in Chapters Five to Nine

traditional focus on childcare responsibilities.[1] This appreciation of the additional caring responsibilities included within the legislation was not recognised within the welfare state regime analysis, but was apparent in the analysis of the caring situations encompassed within it. This has significant implications for the work-family conflict, because it indicates a broader recognition of the family care situations included within the legislation, which affords various different family groups with opportunities to address their work-family conflicts. This aspect of US legislation is inconsistent with the classification produced by the welfare state regime models, although the limited nature of the rights in more general terms reinforces the minimalist approach of the US. Nevertheless, this analysis identifies the work-family significance of more closely scrutinising these rights using a more tailored classification model.

Similar conclusions can also be drawn regarding the analysis of the Swedish package of rights. While the legislation in principle corresponds with the welfare state regime classification providing working parents with a number of rights, which have a significant degree of flexibility, they continue to reinforce traditional gender roles.[2] While some of the gendered welfare state regime models include the division of gender roles within their analysis,[3] they

[1] Discussed above at pp.270-286
[2] Discussed above at p.67-77
[3] Sainsbury, D., 'Women's and Men's Social Rights: Gendering Dimensions of Welfare States', in D. Sainsbury (Ed), *Gendering Welfare States*, (London: Sage Publications Limited, 1994), (1994b); Sainsbury, D., *Gender, Equality and Welfare States*, (Cambridge: Cambridge University Press, 1996); Sainsbury, D., 'Gender and Social-Democratic Welfare States', in D. Sainsbury (Ed), *Gender and Welfare State Regimes*, (Oxford: Oxford University Press, 1999); Lewis, J., 'Gender and the Development of Welfare Regimes', 1992 Vol.2(3) *Journal of European Social Policy* 159

tend to suggest that Sweden has moved furthest from this model and closest towards shared gender roles.[1] The combination of the gender roles indicator with the working family model enables a more focused work-family analysis to be undertaken, which challenges these presumptions. The working family model's focus on the way in which the legislation enables working families to address their work-family conflicts identifies and seeks to challenge the family model inherent within the legislation. The gender roles analysis draws from this and questions the gendered arrangement of caring responsibilities within the family. This can be contrasted with the primary focus on the division of roles within the welfare state regime analyses, which only enables presumptions to be drawn concerning the work-family conflict, whereas the work-family typology indicators facilitate a deeper analysis of the rights.

Both of these peculiarities of these packages of work-family rights were evident from the work-family classifications, but were not apparent from the welfare state regime classifications, which adopt much broader brush analyses of the states and which fail to specifically address the work-family conflict. The work-family typology model is, consequently, useful because it enables this type of distinction to be made between somewhat similar rights based on small, but significant, distinctions. This is also particularly relevant from this analysis of the work-family rights within all three of these states, which were often underpinned by the same objectives, presented in gender-neutral terms and offered broadly similar rights to leave, although they were

[1] Sainsbury, (1994b), *op. cit.*, p.167; (1996), *op. cit.*, pp.70-72; Lewis, (1992), *op. cit.*, pp.168-170; Hobson, B., 'The Individualised Worker, the Gender Participatory and the

underpinned by distinct work-family typologies.

In spite of the limitations of the welfare state regime classification literature, it was nevertheless useful because it provided the framework for developing the work-family typology model, identifying indicators that could usefully analyse the development of these rights.

The development of the work-family classification of UK legislation

The principal aim of this research has been to address the question of the extent to which the work-family typology underpinning UK legislation has developed over the period examined. This has focused on the period prior to 1997 as the marker period and the development of work-family rights in the UK between then and Sept 2009 as the comparator periods. The legislation in the UK has changed over this period of time, the questions for analysis that remain are: in what ways have the rights developed, and has this resulted in a change in the typology underpinning them?

The development of work-family rights

At the beginning of Chapter One it was suggested that there has to be a re-focusing of work-family rights. That the traditional focus on working mothers

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Gender Equity Models in Sweden', 2004 Vol.3(1) *Social Policy and Society* 75, pp.79-80

must be replaced with recognition of the caring responsibilities of both working parents in order to enable working families to address their work-family conflicts.[1] This analysis of the development of the work-family typology underpinning UK legislation has traced the expansion of work-family rights in the UK over the last 12 years. This examination has identified that there has been two broad changes in the law that have mirrored, to an extent, these suggestions.

In the first instance, they have, in principle, evolved in the way suggested from a specifically female gendered focus on maternity rights,[2] to the recognition of parents' and fathers' rights through gender-neutral and specific rights to leave.[3] This parental focus is likely to continue to dominate the development of these rights with recommendations for change adopting a similar model.[4] This evolution of work-family rights has been shown to be fairly typical of the development of rights, as shown by the Swedish experience, which also adopted this same evolutionary path.[5] The second main change is a further development from the first and represents a move from the sole focus on parental or childcare rights. Instead, increasing emphasis is being placed on the caring responsibilities of other working persons,[6] which reflects the US equality based family care approach. This

[1] Equality and Human Rights Commission, (EHRC), *Working Better: Meeting the changing needs of families, workers and employers in the 21st century*, (Equality and Human Rights Commission, March 2009), p.22
[2] See Chapter Seven: Mothers' Work-family Rights in the UK for more details
[3] See Chapter Eight: Parents' Work-family Rights in the UK, and See Chapter Nine: Fathers' Work-family rights in the UK for more details
[4] As discussed above at pp.442-450
[5] See Chapter Six, pp.230-238 for more details
[6] As shown above by the right to dependant care leave and the development of the rights to

suggests that the legislation has developed in two very significant ways. In the first instance, it suggests a renegotiation of childcare rights and recognition of the gender-neutrality of caring responsibilities. In the second instance, it suggests a further renegotiation of caring rights, recognising the diversity of caring responsibilities that working families experience and the changing landscape of care, particularly in light of the ageing population in the UK.[1]

A cursory glance at the current package of rights in the UK would suggest that it appears to have developed in such a way as to enable working parents (and families) to address their work-family conflicts. The assumption would, consequently, be that this would be reflected in the development of work-family typologies, and in doing so would represent a move towards the family typology.

The development of underpinning typologies

The question of the development of the philosophies underpinning work-family legislation has, in the first instance, two strands to it: has the typology developed, and if so in which way? In order to be able to answer these questions it must be possible to identify the typology initially underpinning the legislation, and compare it against the analysis of the development of rights.

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request flexible working

[1] National Statistics, *Population Estimates*, (Published: August 2008), [WWW Document]

The classification of UK legislation in the pre-1997 period was identified as the maternity to motherhood typology.[1] This was consistent with conclusions drawn from the welfare state regimes analysis, and reflected the wholly maternal focus of the legislation.[2] This was further underpinned by the equality aims of the legislation,[3] which was not actively engaged with addressing the work-family conflict. The development of work-family legislation in the UK post-1997, as noted above,[4] represented fairly radical changes to this pre-1997 package. However, as the analysis of the right in Chapters Seven to Nine has shown, the work-family classification did not reflect these changes.

URL: http://www.statistics.gov.uk/cci/nugget.asp?ID=6 (Last Accessed: Sept 2009).
[1] As discussed in pp.321-337 above
[2] *ibid*, and pp.80-109
[3] Discussed in Chapters Seven to Nine
[4] See preceding section, The development of work-family rights, for more details

Table 10.1: The Development of the Work-family Typology Underpinning UK Legislation[1]

	Package of Work-family Rights pre-1997	***Mothers' Rights***	***Parents' Rights***	***Fathers' Rights***	***Package of Work-family Rights 2009***
Work-family classification	***Maternity to motherhood typology***	Maternity to motherhood typology	Extended motherhood typology	Maternity to motherhood typology	
Aggregate classification		Maternity to motherhood typology	Extended motherhood typology	Extended motherhood typology	***Extended motherhood typology (with some family typology elements)***
US classification					***Maternity to motherhood typology (with some family typology elements)***
Swedish classification					***Extended motherhood typology (with some family typology elements)***

The development of the typology underpinning work-family legislation discussed within Chapters Seven to Nine is usefully presented in Table 10.1 above. This table depicts the development of rights and shows that the thinking underpinning the legislation has changed over the course of the period examined. However, the table also clearly identifies that the changes to the law have not resulted in a radically alternative philosophical underpinning to the legislation. Instead, this analysis has reinforced and

[1] UK: Chapters Seven to Nine; US: Chapter Five; and Sweden: Chapter Six

reproduced the initial maternal focus within the legislation, which continues to dominate the package of rights in the UK.

The right to maternity leave has shown itself to be the central distinguishing feature of the package of work-family rights in the UK. Its long history has rendered it the most developed work-family right and the central focus of the work-family package. While this has positive implications for pregnant workers, irrespective of their labour market attachments,[1] this has come at the price of comparative rights for working fathers. This is clearly evident in the comparison of rights for working fathers, who currently have a mere fraction of the entitlements of working mothers.[2] In addition, the dominance of motherhood and mothers' rights remains relatively unchallenged in the additional paternity leave recommendations, which further entrench this maternal care model.[3]

The UK in the context of Swedish and US work-family classifications

Table 10.1 above also presents the comparative classifications of the US and Sweden. The work-family typologies underpinning the US legislation was identified as the maternity to motherhood typology.[4] This was reflective of

[1] Following the changes to entitlement to maternity leave: Social Security Contributions and Benefits Act 1992, c.4, (SSCBA 1992), s171ZN(2), as amended by WFA 2006, s.2; Employment Rights Act 1996, c.18, (ERA 1996), ss.71 and 73; Maternity and Parental Leave etc. Regulations 1999, S.I. 1999/3312, (MPLR 1999), Reg.7
[2] See Chapter Nine: Fathers' Work-family Rights in the UK for more details
[3] See discussions above at pp.457-464 and 473-479
[4] See pp.168-214 above

the equality based focus and development of such rights in the US.[1] They endorsed a clearly equal treatment approach in terms of entitlements to the legislation, which would arguably appear to have been consistent with the family typology. However, the strict division between work and family responsibilities that the legislation reinforced in the longer term supported the maternity to motherhood typology.[2] The family typology, as noted above, was, however, evident to an extent in the scope of family care.[3] This classification of the US is somewhat in accordance with the expectations of the state's approach towards the work-family conflict suggested by the welfare state regime classifications. To that end, the US represents one end of the work-family typology spectrum.

Sweden, however, does not represent the opposite end of the spectrum. Instead the classification of the Swedish legislation is the extended motherhood typology. This reflects the way in which the parental leave system continues to primarily encourage maternal care.[4] While it is the case that working fathers' have more actively participated in care in Sweden,[5] it still fails to fully challenge traditional gender roles. Consequently, while the package of rights in Sweden is quite distinct from that in the US,[6] the typology underpinning it is not. This classification of Sweden, as noted above, is at odds with its welfare state regime classification and

[1] See pp.144-168 above
[2] See pp.168-214 above
[3] See pp.173-182 above
[4] See pp.238-287 above
[5] See discussion of utilisation rates above at pp.280-285
[6] See Table 1.1, p.14 for an overview of the packages

presumptions surrounding its approach towards the work-family conflict. This classification also suggests that there are greater similarities between these two states and their work-family rights than is generally perceived to be the case.[1]

The work-family classification of the UK continues to display similarities with both of these states. In the first instance, the overall classification is consistent with the Swedish one. Both are underpinned by the extended motherhood typology.[2] This is somewhat consistent with the expectations that the changing package of rights would produce,[3] although both fail to achieve the objectives of gender-neutral shared parenting.[4] However, the classification of the UK is not as clear-cut as this, and it also displays elements of the family typology classification in terms of the development of care situations. This classification is slightly more surprising than the correlation with the Swedish model. While the UK has traditionally shared similarities with the US and was previously determined to be a liberal-style welfare state regime,[5] there has been no continuing connection or consideration of the US work-family model in the development of work-family rights. This is not the case for the Swedish model, which has often been held out as an exemplar model in this context.[6]

[1] See later section, *Equality rights or work-family rights*, for more on this
[2] See Table 10.1 above for an overview
[3] Particularly with reference to the comparison of rights in Table 1.1, p.14
[4] As shown in the work-family classification of Swedish rights in pp.238-287, and in the UK in Chapters Seven to Nine
[5] As outlined in Chapter Three, pp.80-109
[6] As noted at p.228 above

The UK model is consequently, not unlike its general welfare state regime classifications, still in a state of flux.[1] It displays similarities with both the US and Swedish classifications and underscores the greater degree of convergence between these states than has been previously apparent. While each state has adopted fairly different ways of addressing the work-family conflict, each has been underpinned by similar aims. These have principally been to encourage equality between the sexes and different types of working families.

Lessons to be learned? The future development of work-family rights

This analysis of the work-family classifications of the legislation within these three states has identified a number of lessons that may be learned regarding the future development of work-family rights. These can be considered under the following two heads: lessons regarding the aims underpinning the rights; and those regarding the concepts inherent within them.

Equality rights or work-family rights?

At the end of the previous section it was suggested that the work-family rights of all three states have been underpinned by the aim of equal treatment.

[1] As discussed in pp.82-86 above

This was also evident throughout the analyses of these work-family rights.[1] It was identified that each of these packages developed from equal treatment legislation and was initially aimed at achieving equality for women by providing them with the ability to bear children without losing their labour market position.[2] This saw the introduction of specific rights to maternity leave,[3] with the exception of the US which fairly radically presented gender-neutral family leave, albeit on the same principles.[4] While the gender equality focus was undoubtedly justified at the time when working mothers had no rights or protections, is the focus on equal treatment still justified today?

As the analysis of work-family rights has shown, the work-family legislation continues to be based on equal treatment or related aims. It is often stated that the rights should enable mothers to work and fathers to care.[5] The aims are, therefore, to achieve equality in those spheres where the opposite sex has hitherto been dominant. While these aims may be valid and necessary elements of breaking down the barriers to shared parenting, they are not necessarily the same as the aims of addressing the work-family conflict. Indeed these two goals may not facilitate the same outcomes. In order to consider the differences, it is useful to determine the scope of both of these aims.

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[1] As noted above at pp.144-168, 230-238 and 289-321
[2] *ibid*
[3] As discussed above, in the UK context, at pp.321-337
[4] The Family and Medical Leave Act of 1993, Public Law 103-3; As discussed at pp.168-214 above
[5] As noted for instance in: HM Treasury and DTI, *Balancing work and family life: enhancing choice and support for parents*, (London: Stationery Office, 2003), p.14

The aim of facilitating working families to achieve a balance between their commitments and address their work-family conflicts is necessarily concerned with the structure and implementation of the rights. It is about, as the government publicity suggests,[1] providing working families with genuine choice and flexibility regarding their utilisation of the rights. It is about placing the decisions in the hands of working families and allowing them to negotiate their own formula for addressing their work-family conflicts. The aim of achieving equality between men and women, in contrast, is concerned with ensuring that both have equal entitlements and genuinely equal access to the rights, which means that both are, in theory, able to participate in care. Taken to its logical conclusion, achieving this aim would require the legislation to ensure that both parents can realistically use the rights. Given fathers' historical absence and/or reluctance to participate in care,[2] facilitating equality would require ensuring that fathers can and will utilise the rights.

There is an inherent danger within each of these aims. Within the work-family aim, it is providing a package of rights which reinforces traditional gender roles.[3] For the equality aim, it is focus on achieving equal treatment to the neglect of the ongoing work-family conflict.[1] Consequently, it is apparent that both aims are important and necessary for the development and success of work-family rights, the question that remains is: were they both evident in these packages of rights?

[1] As evidenced within all of the 'Work and Families: Choice and Flexibility' consultation documents
[2] See pp.423-430 for a discussion of fathers' role in this context
[3] As evidenced to an extent in the Swedish and UK packages of rights

From the above analysis it appears to be the case that the equality aims have taken precedence.[2] While, as discussed previously, these were central aims when the rights first emerged, it is the case that this has continued with the development of the rights. In the US this is very much the case given the lack of development of such rights, which were heavily influenced by the principle of equal treatment.[3] However, the same is true of Swedish rights which have continued to strengthen the rights of working fathers in order to encourage greater equality in the sharing of caring responsibilities.[4] A similar approach is being adopted within the UK in their proposals for additional paternity leave and particularly so in those advanced by the EHRC.[5]

While there are certain justifications for introducing specific rights for working mothers and fathers, not least of all to encourage (or effectively force) utilisation, it may in fact be at odds with the work-family aims. By forcing working families to utilise rights in a particular way, it removes a degree of choice and flexibility from them. In doing so, it reinforces the point made by Collier, and noted above,[6] concerning the role of the government in this context. Instead of reflecting a cultural change as suggested by Tony Blair,[7] it forces such changes upon working families. While this may be welcome to

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[1] As evidenced from the US, and to an extent the Swedish, packages of rights
[2] See in particular the gender roles analyses within the work-family classifications discussed above
[3] See work-family classification of the US above at pp.168-214
[4] See in particular pp.260-287 above
[5] As discussed above at pp.442-450 and 473-479
[6] Collier, R., ''Feminising' the Workplace? Law, the 'Good Parent' and the 'Problem of Men'', in A. Morris and T. O'Donnell (Eds), *Feminist Perspectives on Employment Law*, (Cavendish Publishing Limited, 1999), pp.167-181, especially pp.177-178; discussed at pp.427-430 above
[7] DTI, *Fairness at Work*, White Paper, Cm 3968, (London: The Stationery Office, 1998),

many working families, and encourage and enable working fathers to utilise the leave, it is arguable that the main concern and objective is gender equality and not addressing the work-family conflict. The distinctions between these two objectives and the implications in practice are clearly apparent in the US experience.

The right to family leave is inherently based on equality aims – equality between men and women, and equality between families with and without caring responsibilities. [1] In practice, however, the limitations are clear. In spite of these aims it was shown that the rights were principally used by working mothers and it failed to address the work-family conflict because the equal treatment principle was based on the male model of work and not the female model of care.[1]

One of the central failures of these three packages of rights has been their continued focus on equality between the sexes to the detriment of addressing the work-family conflict. Future developments of work-family legislation must address this issue by achieving a balance between these aims. The EHRC's proposals have the potential to do this. At the moment they appear to reinforce equality aims by focusing on specific rights for each working parent, but also the element of choice by providing a family right to leave available to either parent. The enactment of these proposals would be somewhat novel in the UK given their history of individual entitlements to leave, and poor

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Foreword; discussed at pp.427-430 above
[1] As discussed above at pp.168-214

rights for working fathers.[2] However, the US experience has shown that providing gender-neutral rights in the absence of gender-specific entitlements to leave does not necessarily encourage shared parenting.[3] The experience in Sweden, and elsewhere,[4] has also suggested that individual rights as opposed to family rights are more likely to encourage shared parenting. A better approach may be to divide the leave equally between the partners, thus achieving equality aims, while incorporating the flexibility within how it can be utilised, thus affording working families with greater choice. While this is still the government attempting to effect a culture change, it reinforces both parents as equal earner-carers.

The future of work-family rights

This research has shown that in order for work-family rights to move beyond the maternal plateau that appears to have been reached within the states examined, there has to be a renegotiation of the aims underpinning the legislation. The focus must move away from the principally equality based aims and focus more directly on facilitating work-family balance. In order to do so there are three concepts inherent within the legislation that must also be addressed, namely maternity, family care, and fatherhood.

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[1] See in particular pp.194-212
[2] See discussions of parental leave in Chapter Eight and fathers' rights more generally in Chapter Nine
[3] As noted above at pp.194-212
[4] Bruning, G., and Plantenga, J., 'Parental Leave and Equal Opportunities: Experiences in Eight European Countries', 1999 Vol.9(3) *Journal of European Social Polic*y 195, pp.196 and 207

Maternity

The concept of maternity has been central within this research. It has been an inherent defining concept within the work-family typologies model, and a stalwart feature, whether expressed or otherwise, of these packages of work-family rights. Given the fundamental importance of the right to maternity leave in this context, and mothers' connected role, the concept of maternity will continue to play a fundamental role in the development of work-family rights. The concept of maternity must, consequently, be definitively classified.

Throughout this research it has become apparent that the concept of maternity has been renegotiated. When it was first introduced it was narrowly defined and legislated for on health and safety and equality terms.[1] Maternity was, consequently, genuinely concerned with the medical and physical effects of childbearing. However, the European interpretation of this concept marked the beginning of a widening of the maternity period.[2] These interpretations amounted to an increasing social care understanding of maternity that witnessed the expansion of this concept at the expense of parenthood and fatherhood. Such an approach is still evident today in the UK with the right to maternity leave providing mothers with a monopoly over early childcare,[3] which further encourages this division at later stages of the

[1] As discussed at pp.290-321 above
[2] Case 184/83 Hofmann v Barmer Ersatzkasse [1985] ICR 731and subsequent decisions. See pp.290-231 above for more details
[3] Even with the possible introduction of additional paternity leave – see pp.457-464 above for

child's life.[1]

The narrow conceptualisation of maternity has, consequently, largely disappeared, but it must be rediscovered in order to break away from the maternal focus inherent within each of these packages of rights. The Swedish model has arguably attempted to regain this understanding of maternity by providing a relatively shorter period of maternity leave separate from the rights to parental leave.[2] The purposes of this were to reinforce health and safety objectives to comply with the PWD 1992, and to distinguish between maternity and gender-neutral social care.[3] The EHRC's proposals in the UK are of the same ilk and are also aimed at achieving this distinction by retrenching mothers' maternity rights.[1] There is, however, a danger in doing this without providing working mothers, and families more generally, with continuing support and protection following the maternity leave period. If the EHRC's proposals are adopted there has to be access and genuine rights to gender-neutral childcare leave that continue to enable personal care during the child's first year, but on a gender-neutral basis.

This expansion of the concept of maternity to encompass motherhood more generally has been one of the key influencers of the development of work-family rights. A restatement of the original physical and medical objectives of the concept, allied with a greater recognition of parenthood should begin to

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discussion of this
[1] As was evident from the utilisation rates of parental rights in Chapter Eight, pp.394-397
[2] See discussion on Swedish maternity leave above at pp.243-247 and 253-255
[3] *ibid*

challenge the gendered nature of work-family rights and family care more generally.

Family care

The second concept that has to be renegotiated is that of family care. There has to be a growing acceptance of the caring responsibilities that working families experience throughout their lives – be they for growing children or other persons who rely on the family's or worker's care. Such an approach has begun to be recognised within the US and Swedish legislation and more frequently that of the UK.[2] While in the UK context this has yet to result in any positive rights to leave for working carers, excepting dependant care leave, there are proposals anticipated from the EHRC that will do so,[3] thus potentially strengthening the rights to working carers currently available under the right to request flexible working legislation.[4] In any case, this appears to be the next site for the development of work-family rights.

Such a re-visioning of family care should recognise the diversity of working families that are now emerging.[5] To this end, it is not just about extending rights to eldercare situations, it may also include affording rights to

[1] EHRC, (2009), *op. cit.*, Table 1, pp.39-40
[2] FMLA 1993, § 102(a)(1)(C); Care Leave Act 1988:1465, 3 and 4 §§; ERA 1996, s.80F, and Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, S.I. 2002/3236, (FE(ECR)R 2002), Regs.3 and 3A
[3] EHRC, (2009), *op. cit.*, p.12
[4] FE(ECR)R 2002, Regs.3 and 3A
[5] As identified in Chapter Two, pp.18-25

grandparents or other relationships were care is provided, either alongside or in the absence of working parents.[1] Any revisions to, or new, work-family rights should consider more fully the question of who cares, and who requires support in the form of work-family rights.

Fatherhood

The final concept that must be addressed is fatherhood. As suggested in Chapter Nine, there continues to be debate surrounding fathers' roles and their identities in this context.[2] The concept of fatherhood is very much in a state of flux. This is particularly so in the UK work-family context, where their role is further undermined by the lack of specific rights and consequent undefined role.[3] In order to redress this issue, the concept of fatherhood and their childcare role must be more clearly established.

The absence of such a defined role may be the result of the way in which fathers' rights have developed in this context. As has been suggested, their rights have not been the result of overwhelming demands by working fathers to obtain rights. Instead they have been the product of demands for equality and equal treatment in childcare rights.[4] This makes sense in terms of the

[1] As was argued in Martin v Brevard County Public Schools, No.07-11196, D.C. Docket No.05-00971 CV-ORL-22-KRS, (11th Circuit, 30 September 2008), in the US, and is already evident in Swedish temporary parental leave. See pp.178-180 and pp.253-260 respectively
[2] At pp.423-430
[3] As discussed above at pp.451-479
[4] As shown in Chapter Nine

identity problems that modern fathers experience, since they are struggling to fit into the identities that are being advanced for them, and not ones that they themselves have defined. Until this is accepted, and/or changes, their rights will always appear to under-achieve their aims.

Fatherhood can be recognised in the work-family context by affording working fathers with greater and stronger rights to care. There has to be an equivalent recognition or acceptance of fathers' role as compared with that of working mothers. Only once this is achieved will the maternal dominance underpinning the legislation be challenged.

Future of the research and proposals for future research

It has been the intention of this research to identify the ways in which work-family rights, and the typologies underpinning them, have evolved over time, and how they may continue to develop in the future. It has shown that these rights have indeed developed, as have the underpinning philosophies, although not necessarily to the same extent. From these conclusions it has been possible to identify lessons that can be learned about the development of work-family rights, lessons which could be transposed into future changes to the law. This research may, consequently, be useful to policymakers who may wish to consider the experience of other broadly similarly situated states and the ways in which such legislation has effected or otherwise addressed

the work-family conflict. This research could be used to reflect on the way in which the rights have developed and the suggestions for future development and points of consideration could be taken into account in this context.

This research also leaves the path open for future research on the continuing development of work-family rights, and in particular research could be undertaken to re-configure the package of work-family rights available to working families within the UK.[1]

[1] Word Count: 98,148, excluding contents, appendix and bibliography

Appendix – Tables

Table 4.2: Work-family Typologies (revised)

Table 5.1: US State Legislation: Family and Medical Leave

Table 5.2: US State Legislation: Temporary Leave

Table 4.2: Work-family Typologies (Revised)

Ideologies/ *Characteristics*	**Maternity to Motherhood Typology**	**Extended Motherhood Typology**	**Family Typology**
Family Care Model	Post-Natal Care – Mother and Child	Early Childcare	Family Care
Rights Holder	Working Mothers	Gender-Neutral Working Parents	Gender-Neutral Working Parents or Working Carers
Care Situations	Limited to Pre- and Post-Natal Period	Young Children	Older Children and/or Other Family Members
Working Family Model	(Male) Breadwinner	One and a Half Earner-Carer	Dual Earner-Carer
Gender Roles	Traditional:	Equal but different in practice:	Shared:
	Male Earners	Male Earners	Male Earner/Carer
	Female Carers	Female Carers	Female Earner/Carer

Table 5.1: US State Legislation: Family and Medical Leave

State	Type of Leave	Conditions	Period of Leave	Paid
Alaska *AS 39.20* *(Alaska Statutes Title 39 Public Officers and Employees, Chapter 20 Compensation, Allowances, and Leave)*	**Personal Leave** Leave for any reason when business permits Medical reasons at any time including: medical disability of child pregnancy and childbirth or placement for adoption **Family and Health Leave** Pregnancy and childbirth Placement for adoption Care for child who has a serious health condition	State employees and officers only 30 days continuity required to be entitled to personal leave 6 months continuity working at least 35 hours per week or 17 ½ hours per week for at least 12 months Employer must employ at least 21 employees within a 50 mile radius	Accrues: 2 days/month 2years< service 2 ¼ days/month 2-5 years service 2 ½ days/month 5-10 years service 3 days/month 10+ years service Must take a min of 5 days personal leave per 12 months 18 workweeks during any 24 month period Expires one year after birth/placement Employer may require leave for birth/placement to be taken as a single block	Yes Must use accrued paid leave until only have 5 days of paid leave left, then un/paid
California *Senate Bill 1661, Section 6 (2002)*	**Paid Family Care Leave** Childbirth Placement for adoption or fostering Care for family member who is seriously ill	Must wait 7 consecutive days before temporary disability benefit is paid Employer may require that other paid leave be used first	6 weeks paid leave	6 weeks of wage replacement benefits max within any 12 month period
California Family Rights Act (CFRA)	**Family and Medical Leave** Childbirth Placement for adoption or fostering Care for a child (including an independent adult child), spouse, grandparent, sibling or domestic partner suffering a serious health	Employers with 50+ employees The State and any political of civil subdivision	12 workweeks within a 12 month period Can be taken in one or more periods – total length will not exceed 12 weeks/year	No – but can substitute paid leave (may be required by the employer)

	condition		Leave may run concurrently with FML, but can be taken in addition since the mother can use Pregnancy Disability Leave to recover from pregnancy and childbirth, which runs concurrently with FMLA. If she has some remaining FMLA at the end of this period, it will run concurrently with CFRA, thereafter the employee will be able to use CFRA.	
Connecticut *Connecticut General Assembly Statues, Chapter 557 Employment Regulation, Sec. 31-51KK+*	**Family and Medical Leave** Childbirth Placement for adoption or fostering Care for child with serious health condition	12 months continuity and 1000 hours of service within that period Number of employees the employer should employ to qualify is determined annually on Oct first	16 workweeks max within a 24 month period Can't be taken intermittently or on reduced leave schedule unless employer agrees	No – but can substitute paid leave (may be required by the employer)
District of Columbia *DC ST § 32-501, formerly DC ST 1981 § 36-1301* *(District of Columbia Official Code, Title 32. Labor, Chapter 5. Family and Medical Leave)*	**Family Leave** Childbirth Placement for adoption or fostering Care of child with serious health condition	One years continuous service with at least 1000 hours service in the previous 12 month period	16 workweeks of leave during any 24 month period Leave for birth/placement expires 12 months after birth/placement Can be taken on a reduced leave schedule with employer agreement over a max of 24 continuous weeks If both parents are employed by the same employer the total max length of leave may be limited to 16 workweeks within a 24 month period and a max of 4 weeks simultaneous leave	No – but can substitute paid leave

Hawaii *Hawaii Family Leave Law, Chapter 398, Hawaii Revised Statutes*	**Maternity Disability Laws** **Family Medical Leave** Childbirth Placement for adoption Care for child, spouse, parent or grandparent (including in-laws) with a serious health condition	All working women Fathers and Adoptive parents not covered by FMLA or MDL Work in the private sector for a company employing more than 100 employees during each of 20+ workweeks in a calendar year 6 months continuity	Period during which you are medically disabled as a result of pregnancy and childbirth (usually 6-8 weeks) 4 weeks leave per calendar year Intermittent leave permitted for birth, adoption placement, and serious health condition of family member	No – but can substitute paid leave
Maine *Maine Revised Statutes, Title 26: Labor and Industry, Chapter: 7 Employment Practices, Subchapter: 6-A Family and Medical Leave Requirements (PL 1987, c.661(new))*	**Family Medical Leave** Childbirth Placement for adoption Serious health condition of child	Must have 12 months continuous service Employer: • 15+ employees • State • City, town or municipal agency with 25+ employees • Agent of the state	10 consecutive weeks in any 2 year period	No
Massachusetts *The General Laws of Massachusetts, Part I., Title XXI, Chapter 149.*	**Maternity Leave** Childbirth Adoption placement	'eligible employee' - same as FMLA Female employees who have completed their probationary period	Max 8 weeks	No

Section 105D.				
Minnesota *Minnesota Statutes 2007, Chapter 181 Employment*	**Parenting Leave** Childbirth or adoption Must begin no later than 6 weeks after birth or after leaving the hospital	Must have 12 months continuous service and work at least ½ of the no of hours a full-timer does in the same job classification Employer = 21+ employees on at least one site	6 weeks leave - could be increased with employer's agreement	No
Montana *Montana Code, Title 2: Government Structure and Administration , Chapter 18: State Employee Classification, Compensation, and Benefits, Part 6: Leave Time* *2-18-606*	**Parental Leave** (not definite laws, suggests for legislation) If employee is adopting If employee is birth father	State employees	Reasonable period of absence Should permit employees to use sick leave following childbirth or placement for adoption for a max of 15 days	

New Jersey *New Jersey Permanent Statutes, Title 34 Labor and Workmen's Compensation* *34:11B Family Leave Act*	**Family Leave** Childbirth or adoption Serious health condition of the child	12 months continuous service with a minimum of 1000 hours worked in that period Employers must employ: • From date of act until 365 after = 100+ employees • From 366-1095 day following intro = 75+ employees • From 1095+ days since its intro = 50+ employees During each of the 20 or more calendar workweeks in the current/previous calendar year	12 weeks within a 24 months period Can be taken intermittently if agreed Can be taken on a reduced time schedule not exceeding 24 consecutive weeks	May be either paid or unpaid – no provision for payment
Title 43 Pensions and Retirement and Unemployment Compensation *43:21-25-43:21-65*	**Temporary Disability Benefits** Employees who are temporarily disabled for medical reasons, including pregnancy and childbirth	Employer must be a covered employer under the Temporary Disability Benefits Law Employee must be a covered individual, which means they must be in paid employment or out of such employment for less than 2 weeks	Will be payable after from the 8th day of the disability and payable during the period of disability, although if it continues for over 3 consecutive weeks the 1st week will also be paid Subject to a max of 26 weeks in respect of one period of disability	Partial Wage Replacement
Oregon *Oregon Revised Statutes, 2007 Edition, Volume 14, Chapter 659A, Family Leave*	**Family Leave** Care for child that has just been born or adopted (under 18) Care for sick or injured child who requires home care Care for a family member with a serious health condition For own serious health condition	180 days continuity working at least 25 hours per week Employers who employ at least 25 employees each work day for at least 20 workweeks in the year leave is to be taken	12 weeks per year + 12 weeks per year for female employees who have suffered from illness or injury relating to childbirth that disables her from performing any job offered by her employer +12 weeks per year to care for a sick child in the home	No – but can substitute paid leave

Rhode Island *The State of Rhode Island General Laws, Title 28-48 Rhode Island Parental and Family Medical Leave Act*	**Family Leave** Serious illness of a family member **Parental Leave** Childbirth Placement for adoption	Must have 12 months continuity and be in full-time employment of an average of 30 hours per week Private business 50+ employees City, town, municipal agency 30+ employees	13 consecutive workweeks parental or family leave in any two calendar years	No
Tennessee *Tennessee Code 4-21-408 & 8-50-806* *(Title-Chapter-Part/Section)*	**Leave for adoption, pregnancy, childbirth and nursing an infant**	12 month continuity as full-time employee Employer must employ 100+ employees	4 months leave max	No
Vermont *Vermont Statutes, Title 21 Labor, Chapter 5 Employment Practices, Sub-Chapter 4A Parental and Family Leave*	**Parental Leave** During pregnancy Following childbirth Within a year of adoption placement of under 16s **Family Leave** Serious illness of the employee's child	One year continuous service at an average of 30 hours per week Employer must employ 10+ employees for an average of 30 per week during the previous year Employer must employ 15+ employees for an average of 30 per week during the previous year	12 weeks max within a 12 months period	No – but can substitute paid leave

Washington *Title 49 of the Revised Code of Washington (RCW) Labor Regulations, Chapter 49.78 RCW Family Leave*	**Leave** Childbirth and to care for the child Placement for adoption or fostering Care for child with serious health condition	12 months continuity and 1250 hours service in that period	12 workweeks within a 12 months period Can be taken intermittently or on reduced leave schedule - only until 12 months from birth or placement Can be limited to a max of 12 weeks in total if both parents work for the same employer	No
Wisconsin *Updated 2005-06 Wis. Stats. Chapter 103 Employment Rights, 103.10*	**Family Leave** Childbirth Placement for adoption Care for child with a serious health condition	Only those employees working for employers of 50+ people	6 weeks leave max within a 12 month period for childbirth or placement 2 weeks leave max within a 12 month period for serious health condition 8 weeks max in total within a 12 month period Can be taken as partial absence from employment	No – but can substitute paid leave

Table 5.2: US State Legislation: Temporary Leave

State	Type of Leave	Conditions	Period of Leave	Paid
Maine *Maine Revised Statutes, Title 26: Labor and Industry, Chapter: 7 Employment Practices, Subchapter: 2 Wages and Medium of Payment*	**Family Sick Leave** Leave to care for a child who is ill	Must have 12 months continuous service Employer: • 15+ employees • State • City, town or municipal agency with 25+ employees • Agent of the state	40 hours minimum per 12 months	Yes
Massachusetts *The General Laws of Massachusetts, Part I., Title XXI, Chapter 149. Section 52D.*	**Leave** Participate in school activities Take child to routine medical/dental appointments	'eligible employee' - same as FMLA	24 hours of leave within any 12 month period Leave can be taken intermittently or on a reduce leave schedule	No – but can substitute paid leave (May be required by employer)
Minnesota *Minnesota Statutes 2007, Chapter 181 Employment*	**School Conference and Activity Leave** **Sick or injured child care leave**	Must have 12 months continuous service and work at least ½ of the no of hours a full-timer does in the same job classification Employer = 21+ employees on at least one site	16 hours per 12 months Reasonable periods	No, but can substitute paid leave
Rhode Island *The State of Rhode Island General Laws, Title 28-48 Rhode Island Parental and Family Medical Leave Act*	**School Involvement Leave** Attend school conferences or activities for their child	Must have 12 months continuity and be in full-time employment of an average of 30 hours per week Private business 50+ employees City, town, municipal agency 30+ employees	10 hours of leave within any 12 month period	No – but can substitute paid leave

Vermont *Vermont Statutes, Title 21 Labor, Chapter 5 Employment Practices, Sub-Chapter 4A Parental and Family Leave*	**Short-term Family Leave** School activities and conferences - must relate to educational advancement Take child to routine medical/dental appointments Respond to a medical emergency involving their child	One year continuous service at an average of 30 hours per week Employer must employ 10+ employees for an average of 30 per week during the previous year Employer must employ 15+ employees for an average of 30 per week during the previous year	4 hours max within a 30 day period and max of 24 hours within a 12 month period Employer can require that it be taken in a min of 2 hour segments	Can use paid leave at employer's discretion

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