

Introduction

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AIMS, CONTEXTS AND THEMES

The central theme of this edited collection is law's engagement with working families and its primary rationale is to bring together researchers from a variety of disciplines to explore this topical area, so as to encourage better connections between academic debate and policy proposals. There are two main aims. Firstly, to highlight some of the challenges – for parents, families as a whole, children, employers, policy-makers – that needs and desires for work–family reconciliation raise in contemporary societies, and secondly to (re)consider law's engagement with the difficulties and dilemmas that are posed by our ongoing endeavours to provide frameworks that relieve tensions between families, care-giving and paid work.

Families in market economies worldwide have long been confronted by the demands of participating in paid work *and* providing care for their 'dependent' members. The social, economic and political contexts within which families do so are, however, very different in the twenty-first century (see James 2009: 1–6). For example, we have seen an increase in the number of women who enter the public sphere of the labour market and remain post-childbirth; there has been a decline in manufacturing industries and an increase in jobs within the service sector; traditional models of industrial relations have been eroded and the demand for atypical workers and flexibility has increased; we have witnessed a growth in technical advances and globalisation of the economy has meant that countries are more interdependent and vulnerable to international catastrophes than ever before. The family has also undergone transformations in terms of its forms and how they function on a day-to-day basis: for example, families are more diverse, with a growth in the number of cohabiting couples, lone parents, non-resident parents and step-parents. Furthermore, it seems that Western cultures now demand more from families than ever before – parenting has, arguably, become more paranoid (Ferudi 2002) and intense (Hays 1996) with higher expectations placed upon parents to provide expert-driven childcare in an environment driven by competition. The pressures of

modern parenting can have a detrimental impact on parental abilities to avoid work–family conflicts, which can be especially difficult for some cohorts, such as those whose work is atypical and/or for lone mothers (see Clare Lyonette’s chapter in this collection). The demands of care-giving upon families have also been extended by the demographic fact of longer life expectancy, which can mean that individuals take greater responsibility caring for elderly relatives. Moreover, those who provide unpaid care do so in a world that increasingly encourages or even expects workers to relocate for employment purposes and can, therefore, be geographically distanced from family support networks.

The contexts within which families and labour markets operate may have changed considerably but neither ‘spaces’ are static: they ‘are in a state of flux, continually shaped by and impacting upon each other in ways that have consequences for all parties who operate and develop within them’ (James 2009: 1). Yet, there is, importantly, one feature that has remained relatively constant – the need to provide and receive care: whilst ‘families’ and ‘paid work’ have undergone considerable transformations which have altered the ways that they function, the basic need for someone to supply care has not changed. Care-giving/dependent relationships are, as Martha Fineman (2004) argues, a universally inevitable part of the human condition (for a discussion see Olivia Smith’s chapter in this collection). The notion of care is of course multifaceted and includes physical, emotional, economic and psychological care, and although this collection is primarily focused on the law’s (in)ability to enable those involved in care-giving – the physical work of providing care – to do so whilst participating in paid employment, the wider definition of care is significant as it usefully blurs the public–private divide. For example, a wider definition implicitly acknowledges that ‘good’ care involves providing economic security (generally through paid employment) as well as responsibility for physical and emotional well-being – this aspect of care is usually located in the ‘public’ sphere and yet care is often defined as a purely private concern. Moreover, whereas care-giving as a process requires physical presence with the recipient, under the wider definition of care, caring ‘about’ an individual or a cohort (e.g. children or the elderly) involves both recognizing a need for care and accepting some responsibility for meeting that need: this latter aspect of care is capable of including individual men and women, employers and governments, and communities as a whole (see Nicole Busby’s chapter in this collection).

Even if care is more widely defined so as to better promote broader responsibilities surrounding care, enabling families to fulfil their *care-giving* responsibilities, albeit within the family or through organizing and managing alternative outsourced care, is still essential. Indeed if families are better

able to fulfil their care-giving responsibilities this has far-reaching beneficial repercussions for all parties – employers, parents, children, the economy and society as a whole. Yet what seems like a relatively simple goal – to enable families to balance care-giving and paid employment – raises several difficulties and dilemmas for policy-makers. These difficulties and dilemmas are manifested in three interrelated themes that permeate the chapters in this book: the difficulties in effecting changes in family arrangements; the often wide divergence between policy ambition and practice; and the (indirect) introduction and perpetuation of gendered bias in new legal and policy frameworks. Each of these themes will be discussed briefly in order to provide some contextualization for, and linkages between, the various contributions to this collection.

Firstly, there are inherent difficulties in attempting to bring about social change, in terms of how families are able to manage their time, through employment laws. These difficulties arise because of two main issues. The first issue concerns the fact that decisions around care-giving and paid work are still viewed by many as a private responsibility to be negotiated between individual employers and workers so that any attempts to renegotiate the parameters of traditional employer–employee relationships have met with resistance. This has historically prevented legal ‘interventionism’ into the private sphere, and care-giving has traditionally been constructed as a private sphere issue (see, for example, Olivia Smith’s discussion of Ireland’s approach, Eugenia Caracciolo di Torella’s outline of early EU policy and Grace James and Thérèse Callus’s discussion of why children are still often ignored in work–family policy formation). As a result, it seems that, although governments are often keen to provide rhetoric that promotes an image of inspiring social change in relation to gendered divisions between paid work and care-giving or other activities, the relevant frameworks in fact provide little opportunity to challenge the status quo in any more than a superficial way (see Annick Masselot’s discussion of policy development in New Zealand and Suzi Macpherson’s consideration of the UK government’s rhetoric).

The second issue which makes it difficult to effect change in family arrangements results from the fact that, in many countries there is a strong traditional assumption, be it implicit or explicit, that women ought to and are innately better able to provide care for children and, by extension, other dependants. For example, as Sara Charlesworth explains, the normative ‘male breadwinner/female care-giver’ ideal is embedded in Australian culture to such an extent that the gender disparity in working time is polarized – with female part-time workers working very short weekly hours and male full-time workers working very long weekly hours. Smith’s description of Ireland’s approach to reconciling care-giving and paid work reveals how

the blatant assumption that care-giving is best attributed to women permeates the Irish Constitution and social arrangements so that the marriage bar, which prohibited female public sector workers from labour market participation upon marriage, was only challenged with Ireland's EU membership in 1973 (see also Roberta Guerrina's discussion of Italy's approach to work–family reconciliation). The corollary to such assumptions about mothers is the assumption that a father should demonstrate *his* worth to his family by providing financially which, as Weldon-Johns's assessment of Sweden suggests, can have an impact on take-up rates for leave opportunities in even the most progressive (in terms of work–family reconciliation policies) of countries. Where preferences for a laissez-faire approach are coupled with ingrained gendered assumptions it is bound to be difficult to bring about social change through work–family reconciliation laws. However, as Charlesworth notes (drawing on Smith 2006), law is able to challenge these assumptions, and the contributors in this collection all articulate the need for laws to do so, and to do so well, in order to promote social change.

Secondly, even once legislation has been enacted, there can be huge differences between policy ambitions and what actually occurs in practice. It may be the dominant, pervasive and gendered, cultures and norms which can hinder progress towards substantive changes in practice (as in Italy for example, as Guerrina's chapter shows) or the need for more specific legal measures to better accommodate care-giving within particular contexts – as Rachel Horton argues to be the case in the UK. This gap between ambition and practice can have its origins in the details of the particular legal provisions available: for example, leave (parental, paternity or maternity) if unpaid or poorly paid, limits the ability of families to utilize the 'right' (see, for example, Caracciolo di Torella's discussion of EU leave provisions). The right to leave itself and any linked provisions (see the right to share parental leave provisions in New Zealand, discussed by Masselot) could, if better paid, be hugely beneficial in terms of enabling families to provide care where needed. Laws which are limited only to certain categories of workers can also restrict their potential in practice: for example, as Masselot suggests, limiting parental leave provisions to those in full-time and permanent positions means that the laws fail to recognize the needs of some of the most vulnerable workers – those in atypical and precarious employments. As Weldon-Johns demonstrates, even in countries such as Sweden, which arguably offers the most choice and flexibility for working parents, the legal rights can in practice be difficult to take advantage of when optional and/or unpaid as they would inevitably trigger a substantial reduction in household earnings.

Finally, any legal framework that attempts to help families reconcile paid work and care-giving, risks introducing, or perpetuating, gendered bias through the relevant laws. Given the social construction of care-giving as a predominantly female concern, it is no surprise that the majority of chapters in this collection highlight and discuss the gender issues raised by work–family reconciliation laws. Indeed, as Masselot’s chapter demonstrates, even when the legal approach appears to be gender neutral and broader in nature, as in New Zealand where work–*life* as opposed to work–*family* balance policies are advocated for all workers, the laws still inevitably have gender implications in practice. Drafting and applying policies in gender-neutral terms avoids any meaningful discussion or acknowledgement of the realities of family life for many; that it is women who continue to do the bulk of unpaid domestic work and care-giving. Caracciolo di Torella’s discussion of EU reconciliation policies demonstrates how the Court of Justice in its interpretation of the relevant laws has often promoted a traditional view of how families (ought to) function and she considers whether the current shift towards recognizing reconciliation as a fundamental human right might ‘begin to address the boundaries that perpetuate the gap between reconciliation in theory and reconciliation in practice’.

The risk of perpetuating gendered bias is also evident when considering alternative means of accommodating the needs and desires of families through employment laws. James and Callus’s investigation of ways of better incorporating children’s well-being into reconciliation frameworks demonstrates that, whatever approach is preferred (rights-based or principle-conferring) the ‘acceptance of a gender-neutral and communal responsibility for providing that care’ is essential. Gender is clearly a core issue, at the heart of all challenges confronting those with an interest in alleviating work–family conflicts, and Busby, in her consideration of how to incorporate a broad definition of unpaid care-giving into the regulation of paid work, suggests an alternative approach that may help facilitate gender-free care-giving. Drawing upon Sen’s capabilities approach, Busby presents a ‘moral’ case and suggests that countries need, through law, to recognize ‘the social and economic benefits which accumulate from the contributions of those who do the unpaid work of caring whether for dependent children, disabled or infirm adults or elders’. Such recognition, she argues, enhances the status of care in society by promoting care-giving as a positive and rewarding experience.

STRUCTURE AND CONTRIBUTIONS

This collection of essays is divided into four complimentary sections which, during the process of writing and discussions with contributors, seemed to offer the most appropriate structure. The contributions are all primarily investigative in approach and articulate issues which are at the heart of employment law's engagement with working families. The chapters each highlight the gender implications of the relevant legislation and the need for sensitivity in this regard. Nonetheless, they each show how engaging with law, although often hindered by traditional *laissez-faire* notions and gendered ideologies, is still a useful means of promoting social change. The chapters also demonstrate how policy initiatives need to be formed and applied in a flexible way that promotes the potential for genuine change in terms of enabling a plurality of individual and societal care-giving and paid work commitments and desires to be met.

With this thematic overlap between chapters in mind, the three contributors in the first part – *work–family challenges* – explore particular challenges facing contemporary societies and legal systems. **Suzi Macpherson's** chapter, 'Reconciling employment and family care-giving: a gender analysis of current challenges and future directions for UK policy', highlights the UK's approach to reconciliation and considers its potential for achieving gender equality. The chapter illustrates how the gendered reality of women and men's labour market participation and involvement in caring for dependent children challenges policy formation and considers debates on preferences and choice in order to reflect on the drivers shaping women's and men's actions in relation to employment and family care-giving. At the heart of her chapter is what Macpherson calls 'the critical question', namely, 'what needs to change, and what policy measures would be required, to overcome the current limitations of policy so that we can work towards achieving greater gender equality through reconciliation policies'.

Clare Lyonette's chapter, 'Atypical working in Europe and the impact on work–family reconciliation', considers the particular challenges experienced by atypical workers, who are a unique and vulnerable cohort for whom work–family conflict can be especially pronounced. Highlighting the situation in Europe, and then focusing particularly on the UK, she demonstrates how the adequacy and effectiveness of working-time provisions can have a deep impact on family life and convincingly argues that they need to be re-appraised in order to alleviate some of the pressures experienced by working parents. Finally in this section, **Eugenia Caracciolo di Torella's** chapter, 'Is there a fundamental right to reconcile work and family life in the EU?', provides an account of the EU's engagement with reconciliation policies: she outlines the EU provisions in relation to leave, care and time –

and argues that these three dimensions of reconciliation need to 'be addressed and developed harmoniously'. The chapter demonstrates a shift in approach toward reconciliation at EU level – from perceiving it as a woman's issue to more recent suggestions that reconciliation might be a fundamental right – and Caracciolo di Torella considers whether this more recent approach is an improvement and how it could help improve gender equality in the EU.

Chapters in the second part – *national approaches and cross-national considerations* – explore aspects of work–family reconciliation challenges within the context of particular countries or legal systems. The chapters all reveal how the social and political contexts within which legal approaches to work–family reconciliation are developed can have an impact on the scope and nature of the policies, as well as on how they are interpreted by courts and tribunals and applied in practice. **Annick Masselot**, in 'The rights and realities of balancing work and family life in New Zealand', considers a country which 'prides itself on leading the world in gender equality'. Masselot shows that relevant policy in New Zealand is not motivated by a desire to eliminate gender discrimination or promote family well-being and how, in that context, it is used to underpin other priorities, such as migration and environmental protection. Masselot convincingly argues that the package of rights on offer does not provide adequate opportunities for parents to balance their work and family life, and serves to reinforce a gender imbalance that is based upon an assumption that mothers will provide the primary care of young children. **Sara Charlesworth**, in her chapter 'Law's response to the reconciliation of work and care: the Australian case', highlights Australia's approach, outlining relevant working time, labour and anti-discrimination laws. Charlesworth argues that women in particular pay a high price when attempting to combine paid work and care-giving – due to a dominant gender culture that exists and is perpetuated by the legal framework, especially by narrow tribunal and court interpretations of the provisions. Fortunately, as Charlesworth explains, some hope is offered by recent legislative initiatives, such as a national paid parental leave scheme and, for workers in the state of Victoria, an obligation on employers to reasonably accommodate employees with caring responsibilities, which although not devoid of flaws may better support gender equality in Australia.

The gender equality issues that permeate attempts to reconcile work and family life are again highlighted in **Roberta Guerrina's** chapter, 'Parental leave rights in Italy: reconciling gender ideologies with the demands of Europeanization'. A country with 'one of the worst track records when it comes to promoting equality of opportunities and women's access to employment' Guerrina illustrates how and why Italy has struggled to meet

the reconciliation demands of the EU. Her account not only provides an interesting critique of Italian reconciliation policies, but also demonstrates how societies with cultures that embrace a dominant ideology of motherhood struggle to engage with reconciliation policies (see also Olivia Smith's chapter). Whilst this section and the collection as a whole illustrate significant differences and similarities in terms of approaches to reconciliation, the importance of considering the typology that underpins national legislation when examining legal frameworks is underlined by **Michelle Weldon-Johns** in her chapter, 'Comparative lessons on work–family conflict – Swedish parental leave versus American parental leave'. Weldon-Johns focuses on work–family reconciliation legislation in Sweden and the USA and demonstrates how, using a particular classification model, the two countries display surprising similarities in terms of the rights they offer working families and how these rights operate in practice.

In the third part – *accommodating care* – two authors explore how legal regimes might be improved through an explicit duty to accommodate workers with care-giving responsibilities, drawing upon the right to reasonable accommodation under disability legislation in the UK. Both contributions whilst critical of the current individualistic and comparative nature of anti-discrimination law, recognize the potential that exists in utilizing such an approach as a means of providing substantive rights to carers that would offer employment protection, which could be both flexible and gender-free. **Rachel Horton's** chapter, 'Care-giving and reasonable adjustment in the UK', considers whether and how discrimination law could play a greater part in protecting and facilitating the participation of parents and carers in the workplace and analyses the case for care's classification as a ground worthy of specific employment protection. Focusing on the UK, Horton assesses the deficiencies in some of the existing legal provisions currently available to parents and carers, in particular the right to request flexible working and the existing anti-discrimination provisions. In particular, she argues that one significant form of anti-discrimination duty – the duty to provide reasonable adjustments – should be extended to those who care. **Olivia Smith's** chapter, 'Reconciling care-giving and paid work in Ireland: the contribution of protection against family status discrimination', focuses on the introduction of the 'family status' ground into Irish anti-discrimination law as a means of resolving tensions between paid work and care-giving. This provision, which prohibits direct and indirect discrimination against employees and job applicants with 'family status', is analysed and Smith suggests how, given the flaws in the relevant law, an express accommodation duty would provide a more direct means of supporting workers who need to reconcile care-giving and paid work.

Contributors in the fourth part – *changing focus* – propose and investigate broader reform of fundamental approaches to paid work–family reconciliation laws. Both contributions advocate approaches that require a shift in emphasis away from the market-based contributions of individuals towards broader, more holistic and community-focused notions of social responsibility. **Grace James and Thérèse Callus**’s chapter, ‘Child welfare and work–family reconciliation policies: lessons from family law’, focuses on the requirements (needs and desires) of families in their widest incarnation by placing children at the centre of legal intervention. Concerned with the way that children’s well-being is often absent from reconciliation frameworks and drawing on the ways in which children’s welfare has been incorporated into family law, they consider how this might be remedied in the employment law context. **Nicole Busby**’s chapter, ‘Unpaid care-giving and paid work within a rights framework: towards reconciliation?’, asserts that labour market intervention should result from the exercise of social choice regarding how individuals want to live and the type of society we want to live in which should be available to all citizens regardless of personal characteristics and status as ‘carer’ or ‘dependant’. Social and economic rights which result from the exercise of such choice are perfectly compatible with the operation of a market economy, in fact, liberalism’s key goals of autonomy, equality and freedom for all cannot be fully realized through the unfettered operation of the market *without* such intervention. Busby suggests the capabilities approach, which places individual need and desire at its centre, as an appropriate framework for evaluating resulting legal and policy instruments.

