

**PARENTAL LEAVE IN SOUTH AFRICA: BRIDGING THE GAP BETWEEN
GENDER ROLES AND THE RIGHT TO EQUALITY**

by

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Declaration of originality

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Annexure G

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Danielle Visser

Summary

Equality. A concept at the heart of many a discussion in South Africa yet a concept far from being truly realised. The research paper titled, 'Parental Leave in South Africa: Bridging the gap between gender roles and the Right to Equality' examines the concept of parental leave and how the implementation of a parental leave policy can assist in achieving equality. The researcher will show that there is a direct link between the implementation of a parental leave policy and higher female workforce participation, a decrease in discrimination based on gender in the workplace, a more balanced share of childcare responsibilities between parents, a better environment for the child in question and most importantly a decrease in sex-role gender stereotypes. In order to facilitate such a discussion, the current leave policy and proposed Labour Laws Amendments Act in South Africa as well as the International position on parental leave policies is discussed in Chapter one. The sex-role stereotype of men as breadwinners and women as primary care-givers is discussed in Chapter two. Chapter three delves into the concept of a shared leave policy, currently adopted by Sweden as an ideal solution. Chapter three also sets out the researchers proposed parental leave model adapted to suite the South African climate. Chapter four elaborates on the benefits such a shared-parental leave policy would have on the child with the principle of the best interest of the child forming the basis of the discussion. The final Chapter will serve as a conclusionary chapter summarising the researcher's position.

1. Chapter one

1.1. Introduction

The democratisation of South Africa in 1994 placed a spotlight on the principle of equality.¹ The heightened awareness was in reaction to the disparities of equality experienced in the Apartheid era. Legislative provisions were consequently adopted to eradicate all forms of discrimination including those that specifically related to gender. In an effort to further protect and promote the principle of gender equality, multiple institutions were established with the primary mandate of protecting such rights.² Although these milestones have ensured noticeable changes regarding the status of women, progress has been slow in expunging discriminatory practices, harmful social norms and persistent stereotypes. Inequitable access to resources, opportunities and power due to gender inequality persists.³

1.2. Research problem

A fundamental aspect of gender equality is equal opportunity to achieve and enforce one's human rights, ultimately benefiting from social, political, cultural and economic development.⁴ The latter can only be achieved through fair access to economic participation.⁵ South Africa currently has more unemployed women than men and there is a visible gender pay gap.⁶ These practical results prove that more needs to be done to afford women an equal opportunity to participate in economic activities. Such efforts should begin with the revision and amendment of relevant legislation and policy. Female economic development should be encouraged. Labour law and policy govern many of the aspects relevant to achieving such development and needs to be urgently revised and possibly amended.

¹ RS Masango & N Mfene 'Milestones for gender equality in South Africa: 1994-2014' (2015) 50 *Journal of Public Administration* 623.

² Examples of such institutions include the Commission for Gender Equality, the Equality Courts of South Africa and the Ministry of Women, Children and People Living with Disabilities.

³ http://southafrica.unfpa.org/en/topics/gender-equality-3_ (accessed 25 May 2017).

⁴ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women 'Written Submission on Paternity Leave-Labour Laws Amendments Bill' (2016) 3.

⁵ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women (n 4 above) 5.

⁶ D Budlender *et al* 'A Survey of Time Use: How South African women and men spend their time' (2001) *Statistics South Africa* figure 1 36.

Currently, South Africa's labour law provides for a maternity leave provision which allows the mothers of new-born babies to take four months maternity leave.⁷ Conversely, fathers are permitted to take a mere three days leave following the birth of their child.⁸ This clear disparity contributes to discrimination and inequality in a number of ways, but most notably in its perpetuation of the male breadwinner, female caregiver sex-role stereotype.⁹ This stereotype has been proven to curb female economic participation.¹⁰ South Africa's current maternity and paternity leave policy thus needs to be addressed.

A gender-neutral parental leave policy can have a powerful positive impact on female economic participation.¹¹ Such policy can result in practical benefits for both parents within the workplace and the home environment.¹² Parental leave policies can have gender transformative effects encouraging more equally shared parenting responsibilities. Such policies can narrow the gender pay gap across South Africa and the world.¹³ Such changes can have a positive psychological impact on the new-born child and promote the best interests of the child.¹⁴ Sweden has proven that the structuring of family policy to provide for shared gender-neutral parental leave can result in positive practical outcomes, including the promotion of the best interests of the child.¹⁵ Parental leave policies can be an effective tool in achieving greater female economic participation, a more balanced distribution of unpaid childcare, an environment better suited for child development and ultimately improved gender equality outcomes.¹⁶ Not adopting a tool such as this will have far-reaching consequences for South Africa.

⁷ The Basic Conditions of Employment Act, Act 75 of 1997 Chapter 3(25)(3).

⁸ The Basic Conditions of Employment Act, Act 75 of 1997 Chapter 3(27)(2)(a).

⁹ B Heilman *et al* 'State of the World's Fathers: Time for Action' (2017) *Promundo, Sonke Gender Justice, Save the Children and MenEngage Alliance* 52.

¹⁰ Baine and Company 'Gender (dis)parity in South Africa: Addressing the heart of the matter' (2017) 1.

¹¹ A Bosch (eds) 'Womens Report 2015: Equal Pay for Equal Value' (2015) *South African Board for People Practices* 4.

¹² Bosch (n 11 above) 4.

¹³ Bosch (n 11 above) 4.

¹⁴ ME Lamb 'Parenting and child development in non-traditional families' (1998) 6.

¹⁵ K Earles 'Swedish family policy-continuity and change in the Nordic welfare state model' (2011) 45 *Social Policy and Administration Journal* 180.

¹⁶ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women (n 4 above) 5.

1.3. Research question

- i. Whether South Africa's employment law should be amended to include a shared gender-neutral parental leave legislative provision to ensure compliance with the Constitutional requirement of equality?

1.4. Sub-questions

- i. What is the link between achieving gender equality and amending family policy?
- ii. Whether the current legislative provision regarding maternity leave creates harmful prescriptive sex-role stereotypes ultimately discriminating against mothers, fathers, adoptive parents and other non-traditional primary caregivers?
- iii. Does South Africa's current position on parental leave comply with the country's international obligations to eliminate gender stereotypes?
- iv. How can the establishment of a 'shared-parental leave' legislative provision promote the best interests of a child as envisaged under both international and national child law?
- v. Which parental leave model would result in the fulfilment of South Africa's international and national law obligations, ultimately promoting equality, non-discrimination, the best interests of the child and the elimination of gender stereotypes?

1.5. Methodology

The research on the proposed questions follows a desktop-based methodology with a text-based analysis. Numerous primary sources in the form of scholarly research articles and books have been consulted. Secondary sources are also consulted in the form of definitions and the explanations of principles relevant to the research. Core definitional elements providing for an understanding on maternity, paternity and parental leave are utilised. Further secondary sources are used to provide a foundational understanding of principles such as the concept of the best interests of the child and gender stereotypes. Comparative research is conducted in chapter four, by comparing Sweden's current parental leave model with South Africa's position. Sweden's model is used as a foundational model because of the practical results achieved in the areas of equality and non-discrimination through the introduction of its

parental leave policy. Lastly, international and domestic laws are applied to the relevant arguments to highlight obligations and corresponding compliance.

1.6. Grasping 'gender stereotypes'

The United Nations defines the principle of gender stereotypes as follows:¹⁷

The practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men.

These 'assumptions' often result in negative effects, such as prejudicial treatment and discrimination. Negative gender stereotypes present an obstacle to true equality.¹⁸ Such negative practice is embedded within social and cultural norms and is therefore difficult to truly dismantle. Gender stereotypes are further perpetuated through the application of many legislative provisions: such stereotypes are present both directly and indirectly within family, health and employment law.¹⁹

Gender stereotypes include various sub categories.²⁰ 'Sex stereotypes' ascribe discriminatory assumptions to the physical, intellectual and cognitive capacity of either men or women. An example of such an assumption would be that women are physically weak. The second sub-category refers to 'sexual stereotypes'. These assumptions are based on the sexual attributes of men and women. One example of a sexual stereotype would be the assumption that men are sexually aggressive. The third category is labelled as 'sex-role stereotypes' which assume that certain genders have specific societal roles. The idea that men are the breadwinners and women are the caregivers within a family is an example of such a stereotype. Lastly these stereotypes can be compounded through the interrelation of gender stereotypes with additional attribute specific stereotypes. This would manifest itself in stereotypes based on a combination of sex and race or age or class etc.

¹⁷ <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx> (accessed 26 May 2017).

¹⁸ Professor Rebecca Cook 'Gender Stereotyping' (lecture), University of Pretoria, Pretoria, 28 March 2017.

¹⁹ Professor Rebecca Cook 'Gender Stereotyping' (lecture), University of Pretoria, Pretoria, 28 March 2017.

²⁰ RJ Cook 'Naming gender stereotypes' in RJ Cook & S Cusack *Gender stereotyping transnational legal perspectives* (2010) 45.

Here the researcher focuses on the idea of sex-role stereotypes within the family unit and how the current employment legislation of South Africa is perpetuating such sex-role stereotypes, ultimately promoting inequality. Much discrimination is based on the view of South African women as caregivers and not breadwinners as a foundational stereotype.

1.7. Gender stereotypes in South Africa: Women are caregivers and not breadwinners

The 2018 quarterly labour force report from Statistics South Africa indicates that 28.8% of South African women are unemployed compared to 26.7% of men.²¹ This data indicates a disparity in female economic participation. Data has also shown that in 2013, only 46% of South African women with minor children in their homes participated in the country's labour force.²² Childcare is therefore a deterring factor for female workforce participation in South Africa. The question that arises is why childcare is deterring female participation only and not affecting male economic participation? The gender stereotype, specifically the sex-role stereotype, assumes that women are caregivers and not breadwinners. The notion that women are considered primarily responsible for the nurturing of their children is an ancient yet globally accepted idea.

South African women are however particularly vulnerable to this expectation. Customary law provides for patriarchal domination.²³ Today, the expectation that women be caregivers has many negative effects on the progression of women in society. The progression of female employment is particularly affected. In addition to the lack of female economic participation currently experienced in South Africa, studies have further shown that women who are in fact participating in the labour force experience secondary gender discrimination.²⁴ South Africa has more female than male graduates, yet only 10% of the CEOs in South Africa are female.²⁵ The latter is below the global average of 12%. Societal ideals and gender stereotypes of women in the South African workplace have been cited as 'actively discouraging women who

²¹ Statistics South Africa *Quarterly Labour Force Survey 1st Quarter* (2018) 10.

²² Statistics South Africa *Economic Empowerment Report, 2001–2014* (2014) 42.

²³ C Albertyn 'The stubborn persistence of patriarchy? Gender equality and cultural diversity in South Africa' (2009) *Constitutional Court Review* 2 166.

²⁴ ME Heilman 'Description and prescription: How gender stereotypes prevent women's ascent up the organizational ladder' (2001) 57 *Journal of Social Science* 658.

²⁵ Baine and Company (n 10 above) 1.

aspire to ascend to senior management positions'.²⁶ Gender stereotypes must be addressed to ensure that South African women can fully participate in the economy. The current parental leave structure in South Africa cripples female development both in terms of hindering access to the workforce as well as perpetuating sex-role stereotypes that hamper progress in the workplace. A parental leave policy can be an effective tool in combating such crimping sex-role stereotypes and inequality.²⁷

1.8. Maternity, paternity and parental leave policies

The United Nations and many of its specialised agencies have adopted the concept of equality of opportunity for both men and women.²⁸ The International Labour Organization (ILO) has however adopted specific Conventions and Recommendations on maternity, paternity and parental leave. The ILO is a United Nations agency mandated to develop labour policies and standards that promote appropriate working conditions.²⁹ The ILO formulates the definition of maternity leave as an employment-protecting tool, ensuring mothers are able to give birth to their children and return to work without prejudice.³⁰ ILO Convention No. 183³¹ and Recommendation No. 191³² prescribes at least 18 weeks of maternity leave, with employees being paid their full previous salary. Salaries are to be financed by social insurance or public funds. Section 10(3) and 10(4) of Recommendation No. 191 provides for parental leave specifically.³³

The employed mother or the employed father of the child should be entitled to parental leave during a period following the expiry of maternity leave.

The period during which parental leave might be granted, the length of the leave and other modalities, including the payment of parental benefits and the use and distribution of parental leave between the employed parents, should be determined by national laws or regulations or in any manner consistent with national practice.

²⁶ Baine and Company (n 10 above) 7.

²⁷ Heilman *et al* (n 9 above) 52.

²⁸ Examples include: the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the United Nations Population Fund (UNFPA), the United Nations Development Programme (UNDP) and the Organization of Economic Cooperation and Development (OECD).

²⁹ <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (accessed 12 June 2018).

³⁰ Organisation for Economic Co-Operation and Development Report 'Doing Better for Families' (2011) 133.

³¹ International Labour Organization Maternity Protection Convention No. 183 (2000).

³² International Labour Organization Maternity Protection Recommendation No. 191 (2000).

³³ International Labour Organization Maternity Protection Recommendation No. 191 (2000) Section 10(3) and 10(4).

ILO Convention No. 156³⁴ and Recommendation No. 165³⁵ provide for broader protection of parents. It provides for the protection of workers' family responsibilities and recommends that policies be developed to ensure that both men and women with family responsibilities are not discriminated against. It further recommends that such responsibilities not hinder the worker from advancing their economic position.

The ILO defines paternity leave as 'a short period of leave for the father immediately after childbirth in order to take care of the infant and assist the mother'.³⁶ The 2009 International Labour Conference centralised the issue of gender equality and work-family balance, encouraging governments to develop paternity and parental leave policies.³⁷ Paternity leave policies have now been adopted by many countries across the world.³⁸

The Oxford English Dictionary defines parental leave as:³⁹

A period of absence from work, paid or unpaid and usually as required by law, granted by an employer to an employee who is the parent of a baby or young child.

The term is inclusive of maternity leave, paternity leave and leave provided to adoptive parents. Such leave is often referred to as 'home care leave'.⁴⁰ Parental leave is therefore gender-neutral and based on the inclusive term 'parent' as opposed to 'mother' or 'father'. The definition itself illustrates all the variables applicable to the concept of parental leave. Each country is to determine for itself variables such as payment, span, practical application, the age limit of the children in question and

³⁴ International Labour Organization Workers with Family Responsibilities Convention No. 156 (1981).

³⁵ International Labour Organization Workers with Family Responsibilities Recommendation No. 165 (1981).

³⁶ Organisation for Economic Co-Operation and Development Report (n 30 above) 130.

³⁷ International Labour Conference 'Gender equality at the heart of decent work' 98th Session (2009) 50.

³⁸ In 2005, 37 of the 187 International Labour Organisation member states provided leave specifically to fathers of new born children including 12 member states from Africa. These figures did not include Countries that have made provision for parental leave policies. C. Hein 'Reconciling work and family responsibilities: Practical ideas from global experience' (2005) *International Labour Organisation report* 120–121.

³⁹ Oxford English Dictionary https://en.oxforddictionaries.com/definition/parental_leave (accessed 18 June 2018).

⁴⁰ TM Phillpot 'Parental leave for fathers in South Africa' unpublished Masters Dissertation, University of Johannesburg, 2014 8.

whether such leave would be individual, transferable or shared between the respective parents.⁴¹

Many countries have moved towards the progressive, general parental leave model. The specifications of this model are however subject to the relevant country's needs and resources. Some have applied a shared-parental leave structure, where both parents may utilise the offered leave and the respective parents decide upon the length.⁴² This then allows the alternate parent to utilise the remaining leave. Other countries have an individual parental leave model which is non-transferable and requires either parent to make use of the available leave.⁴³ Lastly, some countries have opted for a hybrid model that includes elements of individual as well as shared-parental leave structures.⁴⁴

One of the fundamental reasons why the international community is moving towards more balanced work-family policies is to reduce inequality.⁴⁵ This concept has not gone without criticism. Critics are inquiring about the practical connection between parental leave and the reduction of inequality. The answer seems to lie in the collective benefit of many factors. The first connecting factor is simple: encouraging the sharing of parental duties will level the field of expected parental responsibility. This will in turn increase the economic participation of female employees, ultimately ensuring the equal access to economic opportunities. Studies have shown that female employment is 6.8% higher in countries that have implemented mandatory paternity leave policies compared to countries that have not.⁴⁶ The second factor is closely related to the former. Gender discrimination in the workplace is rife. It has been shown that men are more likely to be hired.⁴⁷ They are perceived to have fewer family responsibilities

⁴¹ Hein (n 38 above) 122.

⁴² Examples of Countries with shared-parental leave policies include Cuba, Estonia, Hungary and Vietnam. International Labour Organisation Director General Report 'Equality at work: Tackling the challenges' (2007) *International Labour Conference 96th Session* 80–81.

⁴³ Examples of Countries with individual non-transferable parental leave policies include Belgium, Iceland and Ireland. International Labour Organisation Director General Report (n 42 above) 80–81.

⁴⁴ Examples of Countries with hybrid model parental leave policies include Norway and Sweden. International Labour Organisation Director General Report (n 42 above) 80–81.

⁴⁵ Organisation for Economic Co-Operation and Development Report 'Babies and Bosses: Reconciling work and family life' (2007) 3.

⁴⁶ Heilman *et al* (n 9 above) 52.

⁴⁷ Slater and Gordon Survey on Maternity discrimination: 40% of 500 managers interviewed stated that they would not hire a woman of child bearing age out of fear of maternity leave. Although this survey was conducted in the United Kingdom, this attitude should be seen as a global trend.

which, in the eyes of the employer, may affect productivity. As mentioned, levelling the field of expected parental responsibility by implementing a shared-parental leave policy will ensure that female employees' family responsibility cannot be differentiated from those of their male counterparts. The third factor relates to the current unequal contribution to unpaid childcare work when it comes to males versus females. This in itself is a form of inequality.

A parental leave policy encourages an increase in the father's contribution to unpaid care work resulting in a reduction of inequality.⁴⁸ Redistribution of unpaid childcare has been shown to transform deep-seated gender stereotypes.⁴⁹ Further, data has shown that the implementation of parental leave policies results in a more balanced distribution of unpaid childcare between males and females.⁵⁰ In the United Kingdom, studies have found that fathers who took paternity leave following the birth of their child were much more likely to participate in childcare responsibilities. Such fathers were 19% more likely to assist with tasks such as feeding of the new-born child or to wake up in the evenings to tend to the new-born child, compared to fathers who did not take paternity leave following the birth of their child.⁵¹ Clearly parental leave policies can transform practical behaviour and deeply rooted ideas of childcare responsibility roles.⁵² Ultimately such policies can reduce gender inequality as a whole.

The concept of equality of opportunity for both men and women, as envisaged by numerous international agencies, is supported by a gender-neutral parental leave model. There are distinct links between parental leave policies and the achievement of equality outcomes. The sharing of parental responsibilities decreases the unequal distribution of unpaid childcare and the discrimination towards women within the workplace. It further increases female economic participation and erodes longstanding sex-role stereotypes. South Africa can benefit from all these practical outcomes and should therefore adopt a gender-neutral, inclusive parental leave policy.

⁴⁸ Heilman *et al* (n 9 above) 52.

⁴⁹ Heilman *et al* (n 9 above) 52.

⁵⁰ Heilman *et al* (n 9 above) 52.

⁵¹ Heilman *et al* (n 9 above) 60.

⁵² Heilman *et al* (n 9 above) 52.

1.9. Limitations of this research

Although the research has adequately answered the research questions, there are some unavoidable limitations to this research. Firstly, South Africa's current unemployment rate for women is 29.5%.⁵³ Therefore 29.5% of South African women are currently not enjoying the formal protection provided for by the country's labour law provisions.⁵⁴ Consequently, almost a third of South African women remain unaffected by the legislative amendments proposed in this research. Secondly, the research is limited in that no developing nation has to date implemented a parental leave policy modelled on the proposed structure. Research was therefore conducted on similar models from developed nations. Lastly, the research is limited to a brief discussion on the financial implications that the proposed parental leave policy would have on the South African economy. This limits the comprehensiveness of the discussion surrounding the implementation of the proposed parental leave policy.

1.10. Structure

In order to provide valuable context, Chapter one provides a broad discussion on the principles and definitions of gender stereotypes as well as maternity, paternity and parental leave policies. This chapter provides the foundation for the researcher's submissions. Chapter one further provides for the clear connection between achieving equality and the implementation of a parental leave model.

Chapter two discusses South Africa's current laws in respect of family policy and examines whether such laws and policy comply with South Africa's international obligation to eliminate gender stereotypes. A discussion on gender stereotyping as a human rights violation then notes the relevant international instruments expressly providing for state obligations to address gender stereotyping. Once the obligations have been highlighted, South Africa's current position is analysed to determine if such obligations are being met. This research discusses how the current South African employment legislation providing for maternity leave creates a prescriptive sex-role stereotype and ultimately discriminates against both the mother and father of a newborn child. The Labour Law Amendments Bill (LLA Bill) is critically examined as a

⁵³ Statistics South Africa *Quarterly labour survey Q2 2018* <http://www.statssa.gov.za/?p=11375> (accessed 2 August 2018).

⁵⁴ The Basic Conditions of Employment Act, Act 75 of 1997.

possible solution. The National Assembly passed the LLA Bill in November 2017. It still requires the National Council of Provinces and the President's approval but it is considered to be a breakthrough in law reform efforts.⁵⁵ The researcher argues that the LLA Bill, although a step in the right direction, is not an adequate solution to the current discriminatory policy. The researcher argues that there is a need for further legal reform to assist in the removal of gender stereotypes embedded in current legislation. Such change has been shown to enhance the principle of gender equality both on paper and in practice.⁵⁶ This discussion includes an exploration of the current pre-conceived ideas relating to gender roles in parenting and the hetero-normative family structure ideal focusing on the socially accepted notion of the woman as the primary caregiver. Gender roles within non-traditional family structures are also discussed in this chapter, as are the implications of both the *Hugo*⁵⁷ and the *Mia* case⁵⁸. The latter provides valuable insight on the subject matter of surrogate parents and non-traditional family units.

Chapter three examines the best interests of the child principle as both a national and international doctrine. It is then applied to both the current parental leave position in South Africa and the proposed shared-parental leave model. This discussion will determine which family policy model is in the best interests of the new-born child's psychological development. The researcher argues that current maternity policy in South Africa does not provide for the best interests of the child in all circumstances. This chapter provides for a multidisciplinary approach to the principle of the best interests of the child as numerous psychological findings are discussed.

Chapter four examines the possible solutions to the harmful sex-role stereotypes perpetuated in South African employment law and the need for compliance with international and national law. Various family policy models are reviewed and the Swedish parental leave model is discussed as an ideal foundational model to be built upon to achieve a realistic solution for the diverse society of South Africa. The

⁵⁵ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women 'Written Submission on Paternity Leave- Labour Laws Amendments Bill' (2016) 3 & LIPCO Portfolio Committee on Labour 'Written Submission: Paternity Leave - Labour Laws Amendment Bill' (2016) 4.

⁵⁶ Earles (n 15 above) 181.

⁵⁷ *President of the Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 (CC).

⁵⁸ *M I A v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC).

researcher then debates the numerous variables relevant to the fashioning of a parental leave model and proposes a gender-neutral shared-parental leave model. Factors such as the duration, earning related benefits, practical safeguards and non-traditional family units are discussed. The researcher argues that amendments to South African employment legislation to provide for a shared-parental leave policy will assist in dismantling gender stereotypes within the context of employment and care-giving capabilities. Finally Chapter Five concludes the discussion, summarising the researcher's arguments.

2. Is South Africa's current employment legislation compliant with the country's international obligations?

Gender stereotypes hamper the achievement of equal economic opportunity and contribute to the preservation of discrimination.⁵⁹ These harmful stereotypes are considered to be *contra bonos mores*.⁶⁰ The obligation to address such stereotypes is however founded on more than just moral expectation. Addressing gender stereotypes is prescribed by international law. This chapter is structured around the concept of the state's obligation to address gender stereotypes and South Africa's failure to do so.

2.1. Gender stereotypes as an international human rights violation

Many states are unaware that their failure to address gender stereotypes is in contravention of numerous international treaties. There is a lack of awareness surrounding human rights obligations associated with the transformation of gender stereotypes.⁶¹ The point of departure when discussing these obligations is to determine the type of gender stereotypes that form the subject of concern for international instruments.

The simple answer is that international instruments are concerned with gender stereotypes that affect the fulfilment of the human rights they protect. The Office of the United Nations High Commissioner for Human Rights (OHCHR) attempts to provide guidance in its report on gender stereotyping as a human rights violation.⁶² The OHCHR provides for an explanation which surrounds the distinction made between 'harmful gender stereotypes' and 'wrongful gender stereotyping'. The latter is concerned with how ascribing specific attributes to either a man or woman can result in the hindering of the fulfilment of that individual's rights. An example of a 'wrongful stereotype' would be when a country includes gender stereotypes in its legislative provisions.⁶³ A 'harmful stereotype' is one that is negative and harmless but ultimately may limit the capabilities of the individual who forms part of the generalised group.⁶⁴

⁵⁹ See paragraph 1.8 above.

⁶⁰ L Blum 'Stereotypes and Stereotyping: A moral analysis' (2004) 33 (3) *Philosophical Papers* 251.

⁶¹ Office of the United Nations High Commissioner for Human Rights 'Gender Stereotyping as a Human Rights Violation' (2013) *Commissioned Report* ii.

⁶² Office of the United Nations High Commissioner for Human Rights (n 61 above) ii.

⁶³ Office of the United Nations High Commissioner for Human Rights (n 61 above) 21.

⁶⁴ Office of the United Nations High Commissioner for Human Rights (n 61 above) 20.

This explanation provides that not all gender stereotypes are of concern to the various international human rights instruments but instead only gender stereotypes that are harmful and wrongful need to be addressed by these instruments.⁶⁵

Various international treaties refer either directly or indirectly to obligations in relation to gender stereotyping obligations. Some contain express gender stereotyping obligations while in others the obligations are implied.⁶⁶ The latter is often connoted through the obligations relating to non-discrimination and equality.⁶⁷ Express obligations in relation to gender stereotyping are currently exclusively found in the Convention on the Elimination of All Forms of Discrimination against Women⁶⁸ (CEDAW), the Convention of the Rights of Persons with Disabilities⁶⁹ (CRPD) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa⁷⁰ (Maputo Protocol). For the purposes of this study, focus will be laid on only the treaties with express reference to obligations to address gender stereotypes.

2.1.1. CEDAW

CEDAW makes explicit reference to state obligations regarding gender stereotypes and it is the first international treaty to do so. These duties are characterised as both positive and negative, and refer to both harmful and wrongful gender stereotypes.⁷¹ Article 5 provides for express obligations in reference to gender stereotypes. Article 5 in CEDAW states:

State Parties shall take all appropriate measures:

⁶⁵ Office of the United Nations High Commissioner for Human Rights (n 61 above) 19.

⁶⁶ Office of the United Nations High Commissioner for Human Rights (n 61 above) 44.

⁶⁷ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the African Charter on Democracy, Elections and Governance (ACDEG), the African Charter on the Rights and Welfare of the Child (ACRWC) and the African Charter on Human and Peoples' Rights (ACHPR) all provide for implied obligations requiring member states to address gender stereotypes.

⁶⁸ UN General Assembly Convention on the Elimination of All Forms of Discrimination against Women 1979.

⁶⁹ UN General Assembly Convention on the Rights of Persons with Disabilities: resolution adopted by the General Assembly 2007.

⁷⁰ African Union Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2003.

⁷¹ Office of the United Nations High Commissioner for Human Rights (n 61 above) 23.

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interests of the children is the primordial consideration in all cases.

These provisions obligate states to modify their behaviour. Such behaviour would assume that women are less important than men. Sex-role stereotypes that place men as the head of the household and women as the homemakers and ideals surrounding childcare responsibilities are also included. Article 5 clearly promotes equality through a state's obligation to address gender stereotypes.

Article 2(f) supports the obligations set out in article 5. Article 2(f) provides as follows:

State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

The state is therefore duty-bound to take 'appropriate measures' which would include amending certain laws. Women are not to be discriminated against on any basis, including the basis of gender ideals and stereotypes.⁷² CEDAW makes further implied reference to state obligations to address gender stereotypes in its preamble. The CEDAW preamble recognises the need to change 'the traditional role of men as well as the role of women in society and in the family in order to achieve true equality'.⁷³ It is worth noting that it refers to the roles of men as well as women. This is significant as it has been found that corresponding male stereotype needs to be addressed to affect change in harmful female stereotypes. As an example, when it comes to the sex-role stereotype of women as homemakers and men as breadwinners, the female stereotype can only be addressed if the male stereotype is also addressed.⁷⁴

⁷² Office of the United Nations High Commissioner for Human Rights (n 61 above) 24.

⁷³ Convention on the Elimination of All Forms of Discrimination Against Women preamble para 14.

⁷⁴ Office of the United Nations High Commissioner for Human Rights (n 61 above) 25.

Practically this would mean encouraging the idea that men are also nurturing and that child care responsibilities should be shared equally.

Numerous human rights mechanisms have also contributed to the awareness of gender stereotyping as an international human rights violation. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has been recognised as being instrumental in achieving progress in this effort.⁷⁵ The CEDAW Committee has been successful in exposing the harm caused by gender stereotypes and the perpetuation of the same by states.⁷⁶ The CEDAW Committee recognises that gender stereotypes violate the human rights of women.⁷⁷ The CEDAW Committee has further provided numerous recommendations, valuable explanations and interpretations of CEDAW. Its interpretation of articles 5 and 2(f) of CEDAW provide for state obligations to 'modify and transform harmful gender stereotypes and eliminate wrongful gender stereotyping'.⁷⁸ The distinction accommodates the right to freedom of expression which would be encroached upon if states were obligated to 'eliminate' beliefs, albeit stereotypical.⁷⁹ The CEDAW Committee therefore requires states to try and 'transform' such harmful beliefs. States are however obligated to expunge all wrongful stereotypes that encroach on the human rights of individuals.⁸⁰

2.1.2. CRPD

The CRPD is the second international treaty which expressly provides for state obligations to address gender stereotypes. This treaty's core objective is to protect the rights of people with disabilities and refers to compound stereotyping which consists of stereotyping on the basis of disability and other factors, including sex. Article 8(1)(b) states:

1. States Parties undertake to adopt immediate, effective and appropriate measures:
(b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

⁷⁵ Office of the United Nations High Commissioner for Human Rights (n 61 above) ii.

⁷⁶ Office of the United Nations High Commissioner for Human Rights (n 61 above) ii.

⁷⁷ Office of the United Nations High Commissioner for Human Rights (n 61 above) ii.

⁷⁸ Committee on the Elimination of All Forms of Discrimination Against Women 'R.K.B. v. Turkey' Communication No. 28/2010 para 8.8.

⁷⁹ Office of the United Nations High Commissioner for Human Rights (n 61 above) 25.

⁸⁰ Office of the United Nations High Commissioner for Human Rights (n 61 above) 25.

This provision differs from the CEDAW provisions as it provides for the 'combating' of all stereotypes. Although no formal definition has been provided for, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has used the terms 'combat' and 'eliminate' interchangeably. The CRPD Committee therefore endorses the combatting/eliminating of both harmful and wrongful stereotypes without distinction.⁸¹ Article 8(2) sets out the nature of what the CPRD considers to be 'appropriate measures'. The general theme is awareness raising and training.

2.1.3. Maputo Protocol

The Maputo Protocol is the only African human rights instrument which expressly references the elimination and modification of stereotypes as a member state obligation. The Maputo Protocol's primary objective is the protection and promotion of women's rights and therefore makes both implied and express statements with regarding the elimination of gender stereotypes.

The promotion of the principle of equality is a golden thread throughout the instrument. The Maputo Protocol's non-discrimination provisions have further implications regarding the elimination of gender stereotypes. The principles of equality and non-discrimination provide for member state obligations to address gender stereotypes. These obligations further support the express provisions found in articles 2, 4 and 12.

Article 2, which provides for the elimination of discrimination against women, expressly states in sub article (2) that:

States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

The obligations set out in this article are similar to those in article 5 of CEDAW, as mentioned above. It requires states to modify patterns, practices and ideas of sex-role stereotypes. Article 2(2) further provides a list of strategies to adopt to ensure that gender stereotypes are eliminated. This list provides for 'public education, information,

⁸¹ Office of the United Nations High Commissioner for Human Rights (n 61 above) 33.

education and communication strategies'. Education is noted as the main tool to use in the elimination of gender stereotypes. The success of this tool however remains difficult to measure.⁸²

Article 4 of the Maputo Protocol provides for the Rights to Life, Integrity and Security of the Person and article 4(2)(d) states that:

States Parties shall take appropriate and effective measures to:

- d) actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women;

Article 4 requires states to 'take appropriate and effective measures' without explicitly specifying what constitutes an effective or appropriate measure.⁸³ Article 4(2)(d) does however require member states to address gender stereotypes.

Lastly, article 12 obligates states to promote and protect the right to education:⁸⁴

States Parties shall take all appropriate measures to:

eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination;

This progressive provision requires states to take 'all appropriate measures' to eliminate stereotypes within the educational and media spheres. This article acknowledges the harm that can be caused by education and the media. .

In addition to the obligations set out in the Maputo Protocol, the African Union has expressly addressed gender stereotypes in its 2009 Gender Policy.⁸⁵ The African Union Gender Policy acknowledges that stereotypes need to be eradicated to ensure development and equality.⁸⁶ It further states that the 'elimination of gender

⁸² J Bishop 'Gender-based Violence and Gender Stereotyping in International Law' unpublished LLM Dissertation, University of Cape Town, 2012, 26.

⁸³ Bishop (n 82 above) 26.

⁸⁴ Article 12(1)(b) of the Maputo Protocol.

⁸⁵ African Union 2009 Gender Policy 12

http://www.un.org/en/africa/osaa/pdf/au/gender_policy_2009.pdf (accessed 2 August 2018).

⁸⁶ African Union 2009 Gender Policy (n 85 above) 12.

stereotypes, sexism and all forms of discrimination' needs to be prioritised by member states at 'programming and policy level'.⁸⁷ The policy proposes that states encourage their respective media to '[b]e partners to eliminate sexist languages and stereotypical representation of women'.⁸⁸

South Africa is a member state to the CEDAW, the CRPD and the Maputo Protocol which all provide for express state obligations to address gender stereotypes in all forms.⁸⁹ South Africa is bound by these obligations and the country's family policy and legislation should reflect that. Gender-neutral parental leave policies have been shown to have a positive impact on the dismantling of gender-stereotypes and should therefore be considered as an effective tool for addressing such gender stereotypes.⁹⁰ An inclusive parental leave policy would be an 'appropriate measure' in addressing gender stereotypes, ultimately assisting in ensuring compliance with South Africa's international obligations. In order to ascertain whether South Africa is complying with such obligations, one must first identify the gender stereotypes in South Africa's family policy and legislation.

2.2. Current parental leave position in South Africa

Parental leave in South Africa is currently regulated by the Basic Conditions of Employment Act, Act 75 of 1997 (the BCEA). An employer must give expectant mothers four months' unpaid maternity leave.⁹¹ The BCEA does not currently expressly provide for paternal leave. The Act refers to paternal leave in a sub-leave category under the 'family responsibility' leave provision. This provision allows for a three-day leave period.⁹² Companies may, at their own discretion, provide for additions to these basic standards. This is however the exception and not the norm. These leave provisions related to the distribution of parental leave therefore provide for a pro-mother leave system.

⁸⁷ African Union 2009 Gender Policy (n 85 above) 11.

⁸⁸ African Union 2009 Gender Policy (n 85 above) 25.

⁸⁹ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed 11 July 2018) and <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 2 August 2018).

⁹⁰ Heilman *et al* (n 9 above) 52.

⁹¹ The Basic Conditions of Employment Act, Act 75 of 1997 Chapter 3(25)(3).

⁹² The Basic Conditions of Employment Act, Act 75 of 1997 Chapter 3(27)(2)(a).

Pro-mother leave provision systems are contributing to the already unequal role of parents.⁹³ This pro-mother system reinforces the role of the mother as the primary caregiver of a child, prejudicing the father's role and relieving the latter of certain responsibilities related to childcare.⁹⁴ It perpetuates the social and cultural ideals of gender roles.⁹⁵ This system minimises the role of fathers within parental structures and ultimately violates the rights of fathers, parents in same-sex relationships, and adoptive parents. The system furthermore prevents women's access to full economic participation and affects their reproductive choices.⁹⁶ This pro-mother system hinders the career aspirations of women as it has been shown that employers are more likely to hire men than women.⁹⁷ This biased hiring attitude reflects employer concerns about maternity leave and other time-consuming parental responsibilities.⁹⁸

Evidently, South Africa's current family policy does not prioritise the elimination of stereotypes or discrimination. In an attempt to rectify this discriminatory legislation a draft Labour Laws Amendment Bill has been proposed.

2.3. Labour Laws Amendments Bill

The African Christian Democratic Party (the ACDP) proposed a draft Labour Laws Amendments Bill which was published on 25 November 2015 and has since been passed by Parliament. The bill now requires the final stamp of approval from the National Council of Provinces and the President to take effect.⁹⁹ The November 2017 passing of the LLA Bill has been hailed as historic in many respects. Firstly, this is the first time a private member's bill has been passed in parliament.¹⁰⁰ Secondly, it is considered a breakthrough in the furthering of gender equality, as it offers fathers ten days of paternity leave.¹⁰¹ Lastly, the LLA Bill provides same-sex couples, adoptive

⁹³ Earles (n 15 above) 181.

⁹⁴ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women (n 4 above) 5.

⁹⁵ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women (n 4 above) 5.

⁹⁶ South African Law Reform Commission 'Research proposal paper: Maternity and paternity benefits for self-employed workers' (2017) v.

⁹⁷ Slater and Gordon Survey on Maternity discrimination <http://www.slatergordon.co.uk/media-centre/news/2014/08/slater-gordon-highlights-maternity-discrimination/> (accessed on 20/03/2017).

⁹⁸ A Bosch (eds) 'Womens Report 2016: Pregnancy in the workplace' (2016) *South African Board for People Practices* 5.

⁹⁹ <http://www.sabinetlaw.co.za/labour/legislation/labour-laws-amendment-2017> (accessed 01 February 2018).

¹⁰⁰ <https://www.timeslive.co.za/news/south-africa/2017-11-30-parental-leave-breakthrough-national-assembly-passes-bill/> (accessed 07 February 2018).

¹⁰¹ Labour Laws Amendment Bill [PMB5-2015] Section 25A(1).

parents and surrogate parents access to parental leave.¹⁰² Most would therefore agree that the LLA Bill is a positive step towards reinforcing gender equality and supporting non-traditional family roles.¹⁰³ Notwithstanding the above benefits of social change, the LLA Bill is structured in a manner which provides solutions to the practical concerns of parental leave. It has provided practical safeguards against abuse or dishonest leave claims. Section 26 requires the parental leave applicant to be named on the child's birth certificate.¹⁰⁴ Section 25 further requires the leave application to be made in writing and that such an application be made at least one month prior to the relevant birth or adoption.¹⁰⁵ To minimise the impact that an extended leave provision would have on South Africa's economy, the LLA Bill would replace the current family responsibility leave provision in the BCEA.¹⁰⁶ A parent would therefore not be able to claim both three days family responsibility leave (as it stands currently) and the additional ten days provided for in the LLA Bill. The LLA Bill has also addressed the practical concern around unpaid leave and the inevitable increased financial strain of having an additional dependent. Sections 26A and 29A require the Unemployment Insurance Fund (UIF) to provide parents on leave with parental benefits.¹⁰⁷

However, the LLA Bill has not gone without criticism. Many have criticised the bill as being conservative and inadequate in its approach.¹⁰⁸ The main concern surrounding the LLA Bill relates to the ten-day period offered to the fathers of new-borns.¹⁰⁹ Numerous submissions to the Portfolio Committee of Labour regarding the LLA Bill have argued for a lengthening of that period.¹¹⁰

The LLA Bill attempts to rectify the wrongs of the current maternity leave provisions in South Africa. The bill specifically seeks to expand the qualifying criteria to achieve a 'more inclusive' parental leave policy. Unfortunately the improvement of a 'more

¹⁰² Labour Laws Amendment Bill [PMB5-2015] Section 25B(1)(a) & Section 25C(1)(a).

¹⁰³ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women (n 4 above) 4.

¹⁰⁴ Labour Laws Amendment Bill [PMB5-2015] Section 26A(1)(a).

¹⁰⁵ Labour Laws Amendment Bill [PMB5-2015] Section 25A(3) & Section 25A(4)(a).

¹⁰⁶ Labour Laws Amendment Bill [PMB5-2015] Section 26A & Section 29A.

¹⁰⁷ Labour Laws Amendment Bill [PMB5-2015] Section 26A.

¹⁰⁸ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women & LIPCO Portfolio Committee on Labour (n 55 above) 5.

¹⁰⁹ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women & LIPCO Portfolio Committee on Labour (n 55 above) 5.

¹¹⁰ Sonke Gender Justice & Mosaic Training, Service & Healing Centre for Women & LIPCO Portfolio Committee (n 55 above) 5.

inclusive' parental leave policy is not an adequate standard in the pursuit of eliminating gender stereotypes and furthering equality. Affording 'different' parents, different periods of leave will continue to perpetuate gender stereotypes within the workplace and within society as a whole. This ultimately limits a woman's access to productive employment. Productive employment is essential to facilitate access to resources, which are essential for the fulfilment of many other needs required for true human dignity. The impact of gender stereotypes therefore has far reaching consequences for women. Countries should take steps to create an environment for all its citizens to reach their full potential.¹¹¹ Leave policies that promote negative sex-role stereotypes do not create an environment that allows women to thrive in the workplace nor does it promote an environment for men to thrive as fathers in the home.

The current maternity leave provisions within South Africa are clearly not ideal. The LLA Bill's attempt to address the shortcomings has been ineffective. The current parental leave legislative position within South Africa is weak in its efforts to address gender stereotypes and inequality. The South African judiciary has however made headway in challenging sex-role stereotypes through its interpretations of such legislation.

2.3.1. Challenging sex-role stereotypes in South Africa

*President of the Republic of South Africa and Another v Hugo*¹¹² ('the Hugo case') challenged the sex-role idea of women as primary caregivers within a family unit.¹¹³ The case was instituted in the Constitutional Court of South Africa by Mr. John Hugo against President Nelson Mandela. This was in response to President Nelson Mandela's decision to remit the sentences of certain categories of prisoners. The remission of sentences was reserved for mothers convicted of nonviolent offences who had children younger than twelve years of age. Mr Hugo challenged the constitutionality of these pardons. He argued that the pardon was discriminatory on the grounds of sex as he was not afforded the same opportunity even though he was the sole caregiver to his son. He further sought an order requiring the pardon to apply equally to fathers. President Nelson Mandela's response was that the foundation of

¹¹¹ United Nations Declaration on the Right to Development (1986) Article 1.

¹¹² *President of the Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 (CC).

¹¹³ Cook (n 20 above) 45.

his decision rested on the principle of the best interests of the child. In the consideration of this principle, expert testimony was provided on the idea that women play a 'special role' in the rearing of young children. He ultimately relied on the sex-role stereotype that women are the primary caregivers to children. In the majority decision, Justice Goldstone held that although the presidential pardons conformed to sex-role stereotypes and ultimately resulted in mothers and fathers being treated differently, the decision did not amount to unfair discrimination as envisioned in the interim Constitution of South Africa. Justice Kriegler, in a minority judgement, held however that the presidential pardons did violate the South African interim Constitution on the grounds of gender discrimination.¹¹⁴ The *Hugo* case is a clear example of the law perpetuating prescriptive sex-roles stereotypes within the family unit. All but one judge failed to identify this harmful re-enforcement of a social norm. The idea that a mother is the exclusive primary caregiver to a child is a generalisation and re-emphasises the societal notion of a women being a homemaker and not a breadwinner.¹¹⁵

18 years after the *Hugo* case judgment was made, *M I A v State Information Technology Agency (Pty) Ltd*¹¹⁶ (*the MIA case*) again challenged the sex-role stereotype of women as primary caregivers within a family unit. Only this time the Court held a more progressive view. The case was heard in the Labour Court and was instituted by a biological male who was denied maternity leave by the respondent. The respondent in the matter was the employer of the applicant. The respondent formally provided for four months paid maternity leave in its leave policy. The applicant and his civil union spouse acted as the commissioning parents in a legally recognised surrogate-motherhood agreement.¹¹⁷ They had decided that the applicant would adopt the role of primary caregiver.¹¹⁸ The applicant then formally applied for maternity leave from the respondent. The respondent however argued that the applicant did not comply with the definition of a 'mother' and consequently only granted him two months paid adoption leave with a further two months unpaid adoption leave.¹¹⁹ In an attempt

¹¹⁴ *President of the Republic of South Africa and Another v Hugo* 1997 6 BCLR 708 (CC) 64.

¹¹⁵ Cook (n 20 above) 50.

¹¹⁶ *M I A v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC).

¹¹⁷ *M I A v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC) para 5.

¹¹⁸ *M I A v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC) para 26.

¹¹⁹ *M I A v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC) para 2.

to resolve the dispute, the applicant instituted a claim with the Commission of Conciliation, Mediation and Arbitration (CCMA). This claim was however denied leading the applicant to approach the Labour Court. The foundation of the applicant's claim rested on an assertion that the failure to provide him with maternity leave is discriminatory on the basis of gender, sex, sexual orientation as well as family responsibility. The respondent's argument was based on the strict application of the wording of the BCEA, which neither provides for surrogate mothers nor commissioning parents.¹²⁰ The Court ultimately rejected this argument and disapproved of the respondent's oversimplified interpretation of the BCEA's provisions. The Court held that the best interests of the child is a constitutionally required consideration in all matters which affect a child and should therefore have been considered in this matter.¹²¹ The Court stated that it must consider the spirit of the law and not merely the letter of the law and that 'any policies adopted by an employer should recognise or be interpreted or amended to adequately protect the rights that flow from the Civil Unions Act and the Children's Act'.¹²² Ultimately the Court held that the respondent's rejection of the applicant's application for maternity leave constituted unfair discrimination and ordered the respondent to reimburse the applicant for the two months unpaid leave, which he consequently had to accept.

The decision in the *MIA* case is praiseworthy. It indicates an expansion of thought surrounding family models. The judgment recognises the progression of society and supports non-traditional family structures. The *MIA* case shows there is hope for the dismantlement of sex-role stereotypes in South Africa. The researcher argues that the implementation of a shared-parental leave policy would further assist in dismantling such harmful stereotypes.

Both the minority judgment in the *Hugo* case and the judgment in the *MIA* case have helped challenge sex-role stereotypes. Despite our judiciary's contribution in these cases, such judgments are no substitute for the state's international law responsibilities. These progressive judgments do not meet South Africa's express obligations as provided for in the CEDAW, the CRPD and the Maputo Protocol. Nor

¹²⁰ *MIA v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC) para 10.

¹²¹ *MIA v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC) para 13.

¹²² *MIA v State Information Technology Agency (Pty) Ltd* 2015 36 ILJ 1905 (LC) para 18.

does it relieve South Africa from its duties in terms of the numerous additional international treaties requiring states to promote and protect equality and non-discrimination.

2.4. Complying with international obligations

The representation of women as homemakers and child carers is a harmful sex-role stereotype. Parenting leave made exclusively available to mothers perpetuates such sex-role stereotypes. By not implementing a gender-neutral shared-parental leave policy, South Africa is therefore in direct contravention of the aforementioned provisions and in indirect contravention of the implied provisions of gender equality and non-discrimination. Gender stereotypes harm both men and women in every aspect of their lives.¹²³ The harm that it can cause is therefore considerable. Gender stereotypes can encroach on all human rights.¹²⁴ The OHCHR report makes mention of just seven of the areas that are affected by gender stereotypes. The list includes the harm caused by an increase in discrimination, gender-based violence, adequate standard of living, access to health and education, family life and marriage and public life, with specific reference to employment.¹²⁵ In all these areas, the stereotype that women are inferior and men are superior has violated women's right to equality. The last two areas, that is family life, marriage and public life with specific reference to employment are the two areas that are most affected by the current maternity leave policy in South Africa. A shared-parental leave policy will prevent the reinforcement of the sex-role stereotype of women as caregivers and men as breadwinners. A parental leave policy would be an 'adequate measure' as provided for in the international treaties South Africa is party to, in meeting the prescribed obligations of addressing gender stereotypes, with the ultimate goal of achieving substantive equality.

A gender-neutral shared-leave policy would not only ensure South Africa's compliance with international law. Such policy change would also be in fulfilment of national law. The Constitution requires the promotion and protection of equality and non-discrimination. The adoption of a shared-parental leave policy would be a measure towards fulfilling such prescribed obligations. The Constitution further requires that the

¹²³ Office of the United Nations High Commissioner for Human Rights (n 61 above) 62.

¹²⁴ Office of the United Nations High Commissioner for Human Rights (n 61 above) 62.

¹²⁵ Office of the United Nations High Commissioner for Human Rights (n 61 above) Chapter 4.

best interests of the child principle needs to be applied to all matters relevant to the child in question. Family policy therefore needs to be reviewed to ensure its compliance with the constitutionally prescribed best interest of the child principle.

3. A parental leave policy and the best interests of the child

Each member of a family is affected by the structure of family policy and their interests therefore need to be considered when formulating such policy. Both national and international law however explicitly protect the interests of children, considered as a vulnerable group within the family unit. The best interests of the child should therefore be one of the primary considerations in the formulation of family policy and specifically parental leave models. Important practical consequences of family policy, which impact the interests of the child, need to be examined. Such consequences include the developmental outcomes of a new-born who has had the opportunity to emotionally bond with both parents; the impact that the current maternity leave position, which makes provision for only the mother (who may in some circumstance be the breadwinner) to take four months unpaid leave, has on the child's family unit economically; and the social consequences of perpetuating sex-role stereotypes in the parenting unit of a child. The researcher argues that the practical implications of the current maternity leave policy are not in the best interests of the child. They also prevent South Africa from meeting its national and international obligations.

3.1. Best interests of the child principle: An international perspective

The best interests of the child principle is a principle which stands at the core of most state obligations set out in the various international instruments which protect children's rights. South Africa's ratification of the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) requires the country to meet such obligations.

3.1.1. The UNCRC and the ACRWC

The UNCRC refers to the best interests of the child as a principle concern in all matters related to the child.¹²⁶ The best interests of the child principle is held with such regard that it constitutes one of four pillars of the UNCRC. The best interests of the child principle is held at a higher standard in the ACRWC compared to the UNCRC.¹²⁷ The principle is referred to not only as a primary consideration, as stated in the UNCRC. Article 4 refers to the best interests of the child as *the* primary consideration in all

¹²⁶ The United Nations Convention on the Rights of the Child article 3.

¹²⁷ Bergmans 'The best interest of the child' <https://www.bregmans.co.za/the-best-interest-of-the-child/> (accessed 28 July 2018).

matters related to the child. The word 'the' has been interpreted to elevate the best interests of the child principle to the highest consideration in matters relating to the child.¹²⁸

The obligations provided for by the UNCRC are, for the most part, similar to those provided for by the ACRWC. The promotion of the child's development is a common thread shared between the UNCRC and the ACRWC. The preamble of both the UNCRC and the ACRWC refers to the 'harmonious development of a child and how such development can only occur by grow[ing] up in a family environment, in an atmosphere of happiness, love and understanding'. Such an environment can be created when a state provides for policy that promotes child development. A gender-neutral parental leave policy is one example of a factor that would promote such an environment.

Article 6(2) of the UNCRC and article 5 of the ACRWC require the state to prioritise child development through all accessible means, including policy improvement. Numerous additional articles refer to the principle of the best interests of the child and to the general promotion of the child's development in all spheres of their life.

The distribution of parental rights and responsibilities between both parents is an obligation provided by both the UNCRC and the ACRWC. Article 18 of the UNCRC specifically provides for the obligation by states to recognise that parenting responsibilities are the responsibility of both parents. Article 18(2) of the ACRWC requires member states to 'ensure equality of rights and responsibilities of spouses with regard to children'. South Africa, as a member state to both instruments therefore has an international obligation to promote the recognition of shared-parental responsibilities.

The ACRWC is unique in its use of the expanded term 'parents or other persons responsible for the child.' Article 20 of the ACRWC provides for this term and reflects the African cultural view on traditional family structures as expanded to include extended family. These family models are not necessarily structured in a manner

¹²⁸ Bergmans (n 127 above).

considered to be traditional by Western society.¹²⁹ The value that African culture places on family is again illustrated by the unique provision in article 18 of the ACRWC, which explicitly provides for the protection of the family unit. Although importance is placed on the value of family in the preamble of the UNCRC, it does not provide for an explicit provision as found in the ACRWC. The researcher believes that article 19 of the ACRWC which states that 'every child shall be entitled to the enjoyment of parental care...' is in support of the state obligation to ensure that children have access to care from a parent/parents. The article is however gender-neutral in its specification allowing for the interpretation that the state is obligated to promote parental care from either a mother/father/both parents or any other person/persons who provide parental care. Further as is shown below, the first months of a child's life forms the foundation of many developmental elements which influence adulthood and can therefore be characterised as one of the periods that require attentive parental care.¹³⁰ A parental leave policy would allow for both parents to provide the required parental care set out in article 19 of the ACRWC, during one of the most vital developmental phases of the child's life.

There is therefore a clear obligation in both the ACRWC and the UNCRC, which South Africa is party to, to ensure that the best interests of the child is considered in all matters relating to that child. International obligations aside, South Africa is further obligated by its national legislation to consider the best interests of the child.

3.2. The best interests of the child principle in South Africa

The Constitution of South Africa¹³¹ (Constitution) provides for the protection of the 'best interests of the child'. Article 28(2) states that 'a child's best interests are of paramount importance in every matter concerning the child'. The child's interests are further protected by the Children's Act¹³², which provides that the protection of a child's interests shall be prioritised when deciding on any matter related to a child. The Children's Act further provides 14 factors to be considered when applying the best interests of the child principle. Although all such factors would need to be considered

¹²⁹ BD Memzur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *South African Public Law* 25.

¹³⁰ D Louw & A Louw *Child and adolescent development* (2014) 132.

¹³¹ The Constitution of the Republic of South Africa 1996.

¹³² The Children's Act 35 of 2005.

when determining the best interests of a child, Section 7(1)(h) provides specifically for the consideration of 'the child's physical and emotional security and his or her intellectual, emotional, social and cultural development'.

This factor is relevant to the researcher's argument as the current maternity leave policy does not provide for this consideration. Research has shown that child development is promoted through the access to both parents within the child's formative months.¹³³

The Constitution and the Children's Act have been supported by the judiciary through the numerous cases which provide guidelines on and promote the best interests of the child principle. *McCall v McCall*¹³⁴ (*McCall* case) is one such authoritative case, whereby the judiciary has provided guidelines on the best interests of the child principle. In the *McCall* case, an extensive list of criteria was provided to assist in determining what the best interests of the child in question are. This list is considered to be valuable in determining the best avenue to take when deciding on the wellbeing of a child and should be considered in its entirety. It is worth noting that the factors provided for in the *McCall* case are for the most part similar to the list provided by the Children's Act.¹³⁵ One difference lies in the expanded application which is provided for in the Children's Act. The application of the factors provided for in the Children's Act is not restricted to parents, but instead includes caregivers and any other person who provides care to the child.¹³⁶ The factor which considers 'the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development' is relevant to this discussion. Again, the best interests of the child is considered in the light of positive child development. Such development is hindered when a child does not have access to both parents during his/her period of attachment.¹³⁷

¹³³ R Feldman 'Parent–infant synchrony: a biobehavioral model of mutual influences in the formation of affiliative bonds' (2012) *Monographs of the society for research in child development Journal* 42.

¹³⁴ *McCall v McCall* 1994 3 SA 201 (c) 204J-205G

¹³⁵ The list of factors provided for in the *McCall* case was provided prior to the enactment of the Children's Act, and therefore precede the list provided for in the Children's Act.

¹³⁶ Bergmans (n 127 above).

¹³⁷ Feldman (n 133 above) 42.

In *P v P*¹³⁸ (*P* case), the court re-emphasised the 'gender-neutral function' of parenting and challenged the societal ideals behind the maternal preference principle which was previously applied in custody cases. Instead JA Van Heerden held that mothers are not always better child carers than fathers. The best interests of the child principle is therefore applied through the consideration of the relevant facts of the case in question and through the application of the factors laid down in the Children's Act and the *McCall* case. There is no blanket approach in determining the best interests of the child and each case needs to be considered individually. A parental leave policy which provides for the choice of which parent, if not both, will provide care to the new-born child would therefore allow for the required parental discretion. Such discretion ensures that the best interests of the specific child, within its specific circumstances, are considered. In the case where both parents choose to provide care simultaneously, the child's best interests will be served, specifically in terms of the child's psychological development.

The best interests of the child principle is again highlighted in the White Paper on families.¹³⁹ The family unit is considered a pillar of the South African value system.¹⁴⁰ The structure of the South African family unit is however constantly evolving and such evolution should be considered when drafting family policy.¹⁴¹ As discussed above, the latter needs to occur with the best interests of the child in mind. The White Paper on Families underpins the value of family within society and advocates for the reform of policy to meet the needs of the 'different types of families in South Africa'.¹⁴² The White paper on families acknowledges that the term family is so expansive that it would be difficult to provide a definition which encompasses all possible variants of the family unit.¹⁴³ Noting this disclaimer, the White Paper on Families defines family as:

A societal group that is related by blood (kinship), adoption, foster care or the tie of marriage (civil, customary or religious), civil union or cohabitation, and go beyond a particular physical residence.¹⁴⁴

¹³⁸ *P v P* 2007 5 SA 94 (SCA).

¹³⁹ The Department of Social Development of the Republic of South Africa *White Paper on Families in South Africa* 2013.

¹⁴⁰ A Bauling 'Maternity, Paternity and Parental Leave and the Best Interests of the Child' (2016) *Obiter* 163.

¹⁴¹ The Department of Social Development of the Republic of South Africa (n 139 above) 16.

¹⁴² The Department of Social Development of the Republic of South Africa (n 139 above) 16.

¹⁴³ The Department of Social Development of the Republic of South Africa (n 139 above) 11.

¹⁴⁴ The Department of Social Development of the Republic of South Africa (n 139 above) 11.

This expansive definition pays homage to the diversity of South African families and the researcher argues that leave policies which affect the family unit should be structured in a manner which meets the needs of all variants of family structures. The researcher argues that this can only be achieved through expanding the definition of the term 'parent' and by providing a choice to those who fall within the definition of who would provide care. The White paper on Families has strategic goals such as achieving gender equality, eliminating discrimination and encouraging co-parenting with the best interests of the child in the forefront of its proposals.¹⁴⁵ The White paper on families further suggests that the implementation of a comprehensive parental leave policy is one method that could be utilised to achieve such goals.¹⁴⁶

South Africa has underlined the importance of the best interests of the child principle in numerous instruments. The White paper on families, case law, the Children's Act and the highest law of the land, the Constitution, all affirm the weight of this principle. Some have even argued that the principle has been elevated to status of a right.¹⁴⁷ As parental leave policy is a matter relating to the care of a new-born child, the best interests of that child must be considered when formulating the relevant policy. The impact on the child's physical, intellectual, spiritual, cultural, social and psychological wellbeing must be considered. The best interests of the child in reference to the psychological development of the child will however form the focus of this chapter.

3.3. Psychological impact of parental leave policy on a new-born child: A multidisciplinary approach

Physical, motor, personality, emotional and social development occur from birth. The level of stimuli the baby receives affects all the aforementioned areas of development. Under stimulation can have detrimental developmental outcomes for the child.¹⁴⁸ It is therefore vital that the child is provided with the opportunity to be stimulated by both parents from birth. The first months of a child's life is characterised by important phases of attachment. Psychologists refer to the latter as the 'emotional bonding that

¹⁴⁵ The Department of Social Development of the Republic of South Africa (n 139 above) 39-40.

¹⁴⁶ The Department of Social Development of the Republic of South Africa (n 139 above) 41.

¹⁴⁷ I Currie & J De Waal *The Bill of Rights Handbook* (2005) 619.

¹⁴⁸ Dr C Power 'Babies who lack love and stimulation at risk of poor brain development' *The Telegraph* (2009) <https://www.telegraph.co.uk/news/health/news/5454066/Babies-who-lack-love-and-stimulation-at-risk-of-poor-brain-development.html> (accessed 2 September 2018).

takes place between individuals' and has important developmental consequences.¹⁴⁹ The attachment phase influences the personality foundation of the child as well as physical, emotional and social development. Positive attachment ensures that the infant feels secure. This security enables the infant to experiment and explore uncharted territory without fear.¹⁵⁰ Infants who securely attach to their parents are more likely to have an expanded vocabulary and better intimacy skills in their later years.¹⁵¹ When a poor-quality bond is established between an infant and his/her parents, he/she is more likely to have trouble with interpersonal relationships as an adult.¹⁵² Insecure attachment has also been shown to result in a higher chance of suffering from anxiety disorders as an adult.¹⁵³ It is therefore crucial that the first social relationship the infant experiences with his/her parents is positive. Psychological data has shown that paternal-infant bonding is held to be as important as maternal-infant bonding.¹⁵⁴ Positive and meaningful attachment with both parents provides the child with added security and benefits development which can impact adulthood.

It has further been shown that the child's capability to provide optimal parenting to the next generation is already formed during its first months of life.¹⁵⁵ Paternal participation in childrearing has also been shown to benefit a child's intellectual and social development. Increased involvement by fathers has shown to 'positively relate to children's social maturity, IQ and achievement'.¹⁵⁶ There is no empirical support for the notion that women are biologically superior for childrearing or that men are incapable of providing nurturing parental behaviour to their children.¹⁵⁷ This psychological approach to the importance of the first months of life emphasises the need for both parents to effectively bond with their infant to ensure optimal development. Scientific work has shown that, when compared to non-traditional family models, traditional family units with the mother as the primary caregiver does not

¹⁴⁹ Louw & Louw (n 130 above) 132.

¹⁵⁰ Louw & Louw (n 130 above) 137.

¹⁵¹ D Benoit 'Infant-parent attachment: Definition, types, antecedents, measurement and outcome' (2004) 9(8) *Paediatrics & Child Health* 541.

¹⁵² Benoit (n 151 above) 541.

¹⁵³ Louw & Louw (n 130 above) 133.

¹⁵⁴ Feldman (n 133 above) 42.

¹⁵⁵ Feldman (n 133 above) 42.

¹⁵⁶ Lamb (n 14 above) 25.

¹⁵⁷ Lamb (n 14 above) 6.

provide for a preferential developmental environment.¹⁵⁸ Some research even suggests that more flexible sex-roles amongst parents provide developmental advantages. One such advantage relates to preparation of a child for a more egalitarian focused, future society, and providing them with the skills to adapt to evolving sex-roles.¹⁵⁹ Another psychological advantage of encouraging non-traditional family unit through the amendment of parental leave legislation is that it provides the child with a more balanced presentation of mothers and fathers, leading to improved social development.¹⁶⁰

The above psychological evidence has proven that access to both parents from birth has positive developmental effects on a new-born child. Such positive effects are in the best interests of the child. The best interests of the child is a principle which is a prescribed consideration with reference to all matters which concern a child. This requirement is set out by national and international law. South Africa is therefore obligated to consider this principle in all matters relating to a child. Family policy, and specifically parental leave legislation, regulating the access to care that a child is entitled to, would need to pass the best interests of the child 'test'. Such legislation would need to be in line with practices that result in positive child development. Legislative provisions regulating parental leave consequently needs to provide the new-born child with access to both parents. A maternity leave policy or a parental leave policy with inadequate leave provisions is detrimental to South Africa's ability to meet national as well as international obligations to consider the best interests of the child. South Africa's family policy therefore needs to reflect the application of the best interests of the child principle whilst still taking cognisance of the country's diverse society and unique needs. A unique solution needs to be found which encompasses the variables relevant to the South African cultural, economic, social and legal position.

¹⁵⁸ Lamb (n 14 above) 8.

¹⁵⁹ Lamb (n 14 above) 6.

¹⁶⁰ Lamb (n 14 above) 25.

4. What is the solution?

Addressing gender stereotypes is not merely an elective. South Africa is bound expressly and implicitly by international and national law to do so.¹⁶¹ The sex-role stereotypes which are reiterated in South Africa's current maternity leave policy have to be eliminated. South Africa needs to adopt a policy which ensures compliance with both national and international law. The researcher proposes the amendment of the current BCEA to replace the gender specific maternity leave policy with a shared-parental leave model unique to South Africa. Such amendment would address the international and national obligations previously mentioned. The proposed 'solution' is founded on the Swedish shared-parental leave model but has been adjusted to account for the needs of the South African people and economy. The Swedish shared-parental leave policy is the first policy of its kind and has achieved distinct social progress in furthering equality outcomes. South Africa has committed itself to achieve such outcomes.

4.1. The Swedish parental leave model

Sweden is respected as the ideal model of a social democratic welfare state.¹⁶² The Swedish state has successfully promoted economic and gender equality through its family policy which focuses on female labour force participation and the male's role in childrearing.¹⁶³ The reasons for Sweden's adoption of a shared-parental leave policy are twofold. Firstly the adoption came in response to the increase of women within the workplace in an attempt to encourage such continued participation. Secondly, Sweden introduced the shared-parental leave policy to ensure that child-caring responsibilities were more equally distributed amongst parents regardless of sex.¹⁶⁴ Sweden's motivation behind the implementation of a shared-parental leave policy was to aid the progression of the dual-earner family model.¹⁶⁵ The shared-parental leave policy was adopted in 1974 making Sweden the first country to include fathers in their parental leave model.¹⁶⁶ This date is also significant as it highlights the extensive period

¹⁶¹ See para 2.1 above.

¹⁶² Earles (n 15 above) 180.

¹⁶³ Earles (n 15 above) 181.

¹⁶⁴ Earles (n 15 above) 181.

¹⁶⁵ AZ Duvander *et al* 'Swedish parental leave and gender equality achievements and reform challenges in a European perspective' (2005) *Institute for Future Studies* 3.

¹⁶⁶ Duvander *et al* (n 165 above) 3.

Sweden has had to 'fine-tune' the model and ultimately ensure its effectiveness. The lengthy period of existence also allows Sweden's parental leave policy to act as an ideal experiment providing crucial information on the advantages and disadvantages, as well as practical implementation and consequences.

In the 1970's, married women and women with young children accounted for below 50% of the Swedish female labour force. Following the introduction of the above equality-focused family policy, in the 1980's married women and women with young children rose to represent more than 85% of the female labour force.¹⁶⁷ The family policy ultimately contributed to women constituting 48% of the total Swedish workforce in the 1990's.¹⁶⁸ The policy was positively endorsed and was a clear sign of the intention in Sweden to 'move from a male breadwinner to a dual-earner and ultimately an earner-carer society'.¹⁶⁹ The policy draws attention to the importance of fathers in a family and is focused on ensuring the economic independence of women as well as the best interests of the child.¹⁷⁰

The current parental leave policy in Sweden provides parents with 13 months of leave per child. During this period the parents enjoy a prescribed 80% income replacement rate. Three additional months are offered at a flat rate. This policy sets out a system of 12 months of shared-parental leave with 2 months being reserved for each parent respectively. The 12 months are flexible and may be shared in whichever proportion the parents see fit.¹⁷¹ The Swedish parental leave policy allows parents to utilise this leave until their child is eight years old.¹⁷² This system allows parents the choice in deciding who will remain with the child for the majority of the allowed period. The needs of the child are thus considered and the opportunity to choose promotes the right to choice, encouraging gender fairness. The Swedish family model evidently has many characteristics which have contributed to positive practical outcomes. South Africa would however not benefit from merely duplicating this model. Countries have varying

¹⁶⁷ S Gustafsson & R Jacobsson 'Trends in female labour force participation in Sweden' (1985) 3 *Journal of Labour Economics* 256.

¹⁶⁸ Earles (n 15 above) 182.

¹⁶⁹ Earles (n 15 above) 184.

¹⁷⁰ Duvander *et al* (n 165 above) 19.

¹⁷¹ Swedish Parental leave policy fact sheet <https://sweden.se/quickfact/parental-leave/> (accessed on 16/03/2017).

¹⁷² Swedish Parental leave policy fact sheet <https://sweden.se/quickfact/parental-leave/> (accessed on 16/03/2017).

needs and resources and these variables need to be considered. It is therefore important to have a comprehensive understanding of family models in determining which model would be most suitable for South Africa.

4.2. Family policy models

Ferrarini has identified three broad structures of family policy models.¹⁷³ The first refers to the general-family policy model, also known as the male breadwinner model, identified by a gender divided structure which lacks earnings-related benefits offered to fathers.¹⁷⁴ South Africa currently has a male breadwinner model. The second model is a market-orientated model, which provides for formal paternity leave allowances yet does not support such leave with the appropriate benefits as it ordinarily provides for flat rate benefits.¹⁷⁵ This ultimately discourages fathers from utilising the formal allowances. The final model is referred to as the dual-earner model which provides for earnings-related benefits as well as formal gender-neutral leave allowances. The dual-earner model is structured to achieve equality.¹⁷⁶

Sweden's family policy is hailed for achieving a relatively effortless shift from a traditional, gendered divided family structured model to the gender neutral, dual-earner model.¹⁷⁷ The latter model is structured to encourage both parents' economic and childcare participation.¹⁷⁸ It has been shown that a country's family policy model affects the views adopted by its people. Therefore a traditional, gender divided family policy will produce citizens with traditional, gender divided beliefs and perceptions.¹⁷⁹ The progressive dual-earner model thus promotes ideas of gender equality and an egalitarian society. Female workforce participation has also been shown to be higher in countries that have adopted dual-earner family leave models than in countries with a traditional-family leave model.¹⁸⁰

¹⁷³ T Ferrarini 'Family policy and cross-national patterns of poverty' in O Kangas & J Palme (eds) *Social policy and economic development in the Nordic countries*. (2005) 120.

¹⁷⁴ Ferrarini 'Family policy and cross-national patterns of poverty' in O Kangas & J Palme (eds) (n 173 above) 120.

¹⁷⁵ Ferrarini 'Family policy and cross-national patterns of poverty' in O Kangas & J Palme (eds) (n 173 above) 120.

¹⁷⁶ Duvander *et al* (n 165 above) 6.

¹⁷⁷ Duvander *et al* (n 165 above) 4.

¹⁷⁸ Duvander *et al* (n 165 above) 4.

¹⁷⁹ Duvander *et al* (n 165 above) 5.

¹⁸⁰ W Korpi 'Faces of inequality: Gender, class and patterns of inequalities in different types of welfare States' (2000) *Social Politics* 148.

4.3. Learning from experience

The major advantage to analysing Sweden's family policy lies in the understanding of both the successes and failures of the implementation of such a policy. The policy has been in existence for 44-years and provides valuable insights on the implementation, reception and outcomes of such a policy.

The Swedish family model is not above reproach and has experienced a number of policy dilemmas.¹⁸¹ One such dilemma has resulted from the transferable nature of the parental leave allowance. The transferability of the available leave has had the practical consequence of women utilising the greater portion of the leave allowance on offer.¹⁸² From a comparative perspective, however, Swedish fathers utilise some of the highest percentages of leave days compared to fathers from other countries.¹⁸³ The debate surrounding the transferability of the parental leave has however led to some important conclusions. It has been shown that parental leave structured to ensure a portion of the leave is non-transferable is more likely to be used by fathers.¹⁸⁴ One alternative suggestion has been to employ a 'one-third' structure.¹⁸⁵ Such a structure would allocate one third of the parental leave to mothers and one third to fathers. The parents are then to divide the final third voluntarily amongst themselves.¹⁸⁶ The debate surrounding gendered leave allocation highlights the conflicting outcomes of freedom of choice, offered by the shared-parental leave model, and gender equality, which is more efficiently achieved by providing prescribed allocations.¹⁸⁷

Another debate surrounding the structure of the Swedish shared-parental leave model relates to the earnings-related benefits offered. On the one hand, an earnings-related benefit provision has shown to result in higher female workforce participation in

¹⁸¹ Duvander *et al* (n 165 above) 4.

¹⁸² Duvander *et al* (n 165 above) 12.

¹⁸³ <https://www.thelocal.se/20171110/dads-in-sweden-are-taking-more-parental-leave-than-ever> (accessed 13 July 2018).

¹⁸⁴ Organisation for Economic Co-Operation and Development Report (n 45 above) 22.

¹⁸⁵ Duvander *et al* (n 165 above) 19.

¹⁸⁶ Iceland has successfully employed the 'one-third' parental leave structure.

¹⁸⁷ Duvander *et al* (n 165 above) 19.

comparison to the alternative flat rate benefits provided by other countries.¹⁸⁸ On the other hand however, parents with lower levels of connection to the workforce¹⁸⁹ may not qualify for such benefits resulting in the delay of childbearing.¹⁹⁰ An earnings-related benefit structure has also been found to be financially prejudicial for parents who form part of the lower connection to the workforce group. Having children without a strong earning foundation will result in not qualifying for such benefits and ultimately not receiving needed financial support.¹⁹¹ Again a contrast of ideals between higher female workforce participation on the one hand, and a delay in childbearing on the other.

These two policy dilemmas provide for variables that can be chosen to align with the relevant country's policy goals. The researcher believes that, given South Africa's history and new constitutional dispensation emphasising equality, the country's family policy should contain the variables that produce a policy in which equality forms the foundation of all its provisions. South Africa's current parental leave position does not promote these positive policy goals. Instead it encourages inequality, emphasises sex-role stereotypes and discriminates against mothers, fathers and non-traditional primary caregivers.

4.4. Proposed parental leave policy for South Africa

South Africa is a unique country and therefore the researcher is in no way suggesting that Sweden's parental leave model would be an ideal solution for South African families. The researcher does however argue that the current policy is far from ideal and that Sweden's parental leave policy 'ticks most of the boxes'. The Swedish family policy outcomes of gender equality, a higher female workforce participation rate, an increase in paternal participation in the home, achieving a dual-earner family model and ensuring the child's best interests are kept at heart, all align with South Africa's desired family policy outcomes.

¹⁸⁸ Ferrarini 'Family policy and cross-national patterns of poverty' in O Kangas & J Palme (eds) (n 173 above) 125.

¹⁸⁹ For example: students, casual and part-time workers.

¹⁹⁰ Duvander *et al* (n 165 above) 4.

¹⁹¹ Duvander *et al* (n 165 above) 4.

4.4.1. Proposed structure: Duration

The researcher argues that in addition to the proposed lengthening of the period, the leave should be structured to accommodate a 'shared-leave' approach. The latter structure would be a forward-thinking work-family policy and would assist in addressing the discrimination seen in the current gender pay gap. Such a change in law would result in employers no longer being able to prejudice female employees. It would provide family structures with the fair choice of which parent (if not both) will provide primary care to the new-born child. A parental leave model would help dismantle deep-seated harmful gender stereotypes. The latter is a major contributing factor to inequality in South Africa and needs to be addressed, starting with the gender stereotypes perpetuated in our maternity leave legislation.

The researcher submits that South Africa would benefit from a conservative version of the Swedish parental leave policy. The South African economy is in a developing phase and can practically not provide the resources required to perfectly replicate the Swedish model. The better solution for South African would entail a more conservative period of parental leave. Research has shown that in considering the numerous factors associated with parental leave, a minimum of six months parental leave should be provided to the parents of new-borns.¹⁹² The considerations that have influenced the research around determining the optimal length of parental leave include the long-term economic effects of utilising parental leave, the health of the mother and child, the parental bonding period, the practicalities of breastfeeding and political, cultural and social ideals surrounding family policy.¹⁹³ A minimum period of six months, specifically 180 days, of shared-parental leave should therefore be provided for in the Employment Act. This would extend the current maternity leave position by only two months, making it economically viable, whilst still addressing the current inequitable male breadwinner model. The actual number of months provided for in the parental leave policy is of little consequence in achieving the desired change in sex-role stereotypes. The critical factor is allowing both parents access to such leave.

¹⁹² J Galtry & P Callister 'Assessing the Optimal Length of Parental Leave for Child and Parental Well-Being How Can Research Inform Policy?' (2005) 26 *Journal of Family Issues* 237-239.

¹⁹³ Galtry & Callister (n 192 above) 237-239.

To learn from the dilemmas experienced in the Swedish model, South Africa should earmark portions of the shared-parental leave policy as per the 'one-third' model. A period of 60 days (two months) should be reserved for the mother's physiological postpartum recovery. The six weeks following the delivery of a child is referred to as puerperium. Puerperium is defined as 'the time from the delivery of the placenta through the first few weeks after the delivery'.¹⁹⁴ Following the puerperium, the body is considered to have returned to a non-pregnant state with many of the physical changes associated with pregnancy and childbirth having subsided.¹⁹⁵ Structuring the shared-parental leave policy to include a mandatory period of eight weeks for mothers who have given birth, will ensure that mothers recover physiological from childbirth and pregnancy. It will further prohibit mothers from making the unhealthy decision to return to work without having fully recovered from childbirth.

The second one-third should be reserved for the father of the new-born child. Studies have shown that the allocation of non-transferable paternal leave, which expires if not utilised, results in a higher percentage of fathers making use of the allocated leave.¹⁹⁶ South Africa would therefore have a higher chance of achieving true equality if one-third of the leave, in this case 60 days, is earmarked specifically for fathers.

The final one-third should then be unreserved, allowing the parents to freely choose to distribute the leave days in keeping with their personal needs and preferences. A provision which allows for the voluntary distribution of the remaining leave emphasises the right of choice. Parents will ultimately have the choice of whether to return to work or provide childcare to their new-born.

The first and second-thirds allocated to mothers and fathers respectively could, at the parent's discretion, run concurrently, allowing for both parents to utilise the leave simultaneously. This would be advantageous as it allows for the father to assist the mother during the vulnerable puerperium and it would further allow for both parents to

¹⁹⁴ Zhongshan Medical University Hospital Chung Shan Medical University <http://www.csh.org.tw/dr.tcj/educartion/f/web/Puerperium/index.htm> (accessed 4 July 2018).

¹⁹⁵ Zhongshan Medical University Hospital Chung Shan Medical University <http://www.csh.org.tw/dr.tcj/educartion/f/web/Puerperium/index.htm> (accessed 4 July 2018).

¹⁹⁶ Organisation for Economic Co-Operation and Development Report (n 45 above) 22.

bond with their child in the formative months.¹⁹⁷ Alternatively the two-thirds could be utilised consecutively, maximising the duration of childcare from the parents. One of the fundamental objectives the proposed structure is therefore to provide the freedom to choose the arrangement which best suits the parent's circumstances and priorities.

4.4.2. Proposed structure: Earning related benefits

The inclusion of an earnings-related benefits provision in a country's family policy has been shown to be beneficial in achieving positive female workforce participation goals.¹⁹⁸ Countries that provide for flat rate benefits have had lower success in achieving such outcomes.¹⁹⁹ The Swedish debate surrounding the allocation of earnings-related benefits has shown that benefits structured around earnings do however cause mothers of childbearing age to delay childbearing.²⁰⁰ The researcher argues that the former outcome is more suited to the South African position and that an earnings-related benefit structure should be included in the proposed parental leave model. The choice to delay first time motherhood has been shown to have positive economic consequences.²⁰¹ The average age of first-time mothers in South Africa is 22.5 years, whereas in Sweden the average age of first-time mothers is 28.9 years.²⁰² The allocation of earnings-related benefits for parental leave would be a positive policy provision resulting in both higher economic growth for women as well as higher levels of economic participation.

South Africa's current legislative position on parental leave provides for fathers having access to three days family responsibility leave, which is fully paid. Mothers have access to four months of unpaid maternity leave which can be subsidised by social benefits, specifically provided for in the Unemployment Insurance Fund Act (hereinafter "the UIF").²⁰³ Part D of the UIF currently provides mothers on maternity

¹⁹⁷ Feldman (n 133 above) 42.

¹⁹⁸ Ferrarini 'Family policy and cross-national patterns of poverty' in O Kangas & J Palme (eds) (n 173 above) 125.

¹⁹⁹ Ferrarini 'Family policy and cross-national patterns of poverty' in O Kangas & J Palme (eds) (n 173 above) 125.

²⁰⁰ Duvander *et al* (n 165 above) 4.

²⁰¹ MYM Leung *et al* 'The Relationship between Age at First Birth and Mother's Lifetime Earnings: Evidence from Danish Data' (2016) 11(1)e0146989 *PLoS ONE* <https://doi.org/10.1371/journal.pone.0146989> (accessed on 13 July 2018).

²⁰² Mothers' age at first birth <http://chartmix.co/view/MYB7ywk#embed> (accessed 2 July 2018).

²⁰³ Unemployment Insurance Act 63 of 2001.

leave with the opportunity to claim benefits if certain requirements are met.²⁰⁴ Once the application for maternity benefits has been accepted, mothers are entitled to benefits which are structured in accordance with both earnings-related benefits and flat rate benefits. If a mother is earning less than the prescribed benefit transition income level²⁰⁵ she is entitled to a percentage of her earnings, scaled to provide mothers with a lower monthly income with a higher percentage, capped at a maximum of 58%. As at 1 April 2017, the transition income level was R17 712.00 per month.²⁰⁶ Mothers who earn higher than the prescribed transition income level are provided with a flat rate benefit of 38% of the transition income level, R583.86 per day as at 1 April 2017.²⁰⁷ In determining the benefits to be paid to mothers, the UIF considers the applicant's average salary over the previous six-month period. The applicant is required to have contributed to the unemployment fund in the previous six months to qualify for maternity benefits. The applicant is entitled to one month of maternity benefits for every six months of contributions to the fund.²⁰⁸

The amendments proposed by the LLA Bill do not seek to increase the above percentages or income levels and instead endeavour to expand the list of maternity leave beneficiaries to include fathers, adoptive parents and commissioning parents.²⁰⁹ The LLA Bill does state that the funding of the proposed parental benefits is to be the responsibility of the UIF. The LLA Bill still allows for such benefit scale decisions to be made by the Minister subject to the UIF Act.²¹⁰

In order to maximise the effect of amending the current position on parental leave in South Africa, it is imperative that adequate benefits are provided to parents who utilise such leave. Formally providing for parental leave is of little consequence if provision is not made to subsidise the lost income associated with such leave. The researcher is therefore of the opinion that legislative amendments need to include prescribed

²⁰⁴ Unemployment Insurance Act 63 of 2001 Part D.

²⁰⁵ The benefit transition income level is linked to the 1953 International Labour Organisation Convention (Convention No. 102) which states 'that the wage of a skilled manual worker should determine the appropriate income level at which to set a ceiling for membership of a social insurance scheme'.

²⁰⁶ Government Gazette No. 40691 Notice 231 (17 March 2017) 97.

²⁰⁷ Government Gazette No. 40691 Notice 231 (17 March 2017) 97.

²⁰⁸ Unemployment Insurance Act 63 of 2001 sec 13.

²⁰⁹ Unemployment Insurance Act 63 of 2001 sec 58(12)(c).

²¹⁰ Labour Laws Amendment Bill [PMB5-2015] Section 25A(5).

benefits financed both by employers as well as social benefits. Employers should be compelled to provide parents who utilise parental leave with financial compensation. The shortfall can then be subsidised by the state. The researcher further proposes that such provisions should be earnings-based. By 2017, the percentage of international organisations that provided for paid maternity leave had doubled from three years prior.²¹¹ This drastic change over a short period shows an international trend in prioritising family. South Africa should follow suit.

4.4.3. Proposed structure: Safeguarding provisions

Family policy and leave provisions are often exploited and a shared-parental leave policy is especially vulnerable to abuse. The gender neutral and inclusive nature of the proposed definition of 'parent', although seen as progressive and adventitious, can be misused. It is therefore critical to ensure that practical safeguards are in place whilst still guaranteeing that genuine claims are not restricted.

The LLA Bill proposes many forward-thinking safeguards to limit abuse of the proposed leave. One such precaution is the requirement that the parent be either noted as the father on the child's birth certificate, is noted as a parent on an adoption order or has been noted as a parent on a motherhood agreement.²¹² This should deter parents who are not inclined to take formal responsibility for the child in question from attempting to benefit from the child's birth. Further the LLA Bill requires a formal application for the utilisation of the parental benefits.²¹³ The application must be submitted to an employment office and is subject to investigation. The latter safeguards against abuse and allows for the parental benefits application to be declined if the formal requirements are not met. Section 25A of the LLA Bill requires that the applicant notify his/her employer in writing of their intention to take leave. Such notification must occur at least one month prior to the commencement of the intended leave period. In addition to the aforementioned safeguards, Sweden's provision allowing single parents who have sole-guardianship, to utilise the entire proposed period, should also be adopted.²¹⁴

²¹¹ Society for Human Resource Management '2017 Employee Benefits: Remaining Competitive in a Challenging Talent Marketplace' (2017) 23.

²¹² Labour Laws Amendment Bill [PMB5-2015] Section 26(A)(1).

²¹³ Labour Laws Amendment Bill [PMB5-2015] Section 26(B).

²¹⁴ Duvander *et al* (n 165 above) 10.

4.4.4. Proposed structure: Non-traditional family structures

There has been an increase in non-traditional methods of childbearing which allow same-sex partners, couples with fertility challenges and individuals who choose to be single parents the opportunity to become parents. There are many such non-traditional methods, but for the purposes of this research paper, surrogacy and adoption will be discussed.

A surrogacy agreement is a progressive approach to childbearing, whereby a woman carries a child on behalf of (a) commissioning parent/parents. Once the child has been born the commissioning parent/parents will be considered its legal guardian/guardians.²¹⁵ The BCEA does not explicitly provide for leave for commissioning parents. The LLA Bill includes commissioning parents in its proposed parental leave policy. These parents would however be limited to ten weeks of leave.²¹⁶ Although the inclusion of commissioning parents is considered progressive, the researcher believes that such parents should have access to a much greater period of parental leave. The researcher therefore proposes that the gender-neutral definition of 'parent' would encompass commissioning parents, allowing them access to the entire proposed period of five months.

The second non-traditional childbearing method which is relevant to this research paper is adoption. Although the concept of legally making another person's child your own is not considered non-traditional, the inclusion of such parents within family leave policy is. The BCEA currently provides adoptive parents with the same period of leave as fathers, which is three days of family responsibility leave.²¹⁷ The LLA Bill proposes to extend this period considerably to a period of ten weeks, but again the researcher argues that this period is inadequate and discriminatory. The researcher's proposed parental leave policy includes adoptive parents within the definition of 'parent', thereby allowing them access to the entire, proposed five-month period of parental leave.

²¹⁵ Collins English Dictionary <https://www.collinsdictionary.com/dictionary/english/surrogacy> (accessed 10 July 2018).

²¹⁶ Labour Laws Amendment Bill [PMB5-2015] Section 25(c)(1)(a).

²¹⁷ The Basic Conditions of Employment Act, Act 75 of 1997 Sec 27(2)(a).

This proposed solution therefore incorporates numerous elements that have been thoughtfully adjusted to ensure suitability for South Africa. The proposed family policy can be summarised as a gender-neutral, inclusive, share-parental leave policy, proposed to be six months in duration. The six month period would be funded both through social insurance (the UIF) and the relevant employer. The period would further be distributed in accordance with the 'one-third' principle. Lastly numerous safeguards have been proposed to ensure minimal abuse of the proposed policy. Such a policy would assist South Africa in complying with its international and national legal obligations, centralise the best interests of the child principle and assist in the dismantling of gender stereotypes. Ultimately encouraging equality within the work and home environments.

5. Conclusion

The gender milestones achieved by South Africa has assisted in creating a more equitable nation. This process has however stagnated and more needs to be done. The gender stereotypes that have been perpetuated within some of South Africa's legislative provisions need to be dismantled. The current maternity leave is one such legislative provision that needs to be addressed to assist in achieving equality. Although South Africa's current unemployment rate means that 29.5% of South African women will remain unaffected by such legislative amendments, the remaining 70.5% of women who are employed will enjoy the positive consequences of such legislative changes.²¹⁸ Such amendments will have a positive effect on the elimination of harmful stereotypes that affect all South African women regardless of their employment status.

The proposed amendments to the current maternity leave policy would encourage a more equitable society based on gender fairness. It would further assist in dismantling existing sex-role stereotypes. These sex-role stereotypes are harmful and violate numerous national and international human rights. Graeme Russell argues that:

Male sex-roles need to change if women are to achieve equal opportunities in the educational, occupational, and social spheres because male and female sex-roles are defined in relation to one another.²¹⁹

This proposed transformation can only occur if a father is considered to have equal parenting responsibilities to those of a mother.

Family policy has been utilised by Sweden as an opportunity to change the hearts and minds of its people. The implementation of a shared-parental leave policy has resulted in numerous positive outcomes including a higher female workforce participation, greater involvement by fathers in child care, a remarkable impact on the dismantling of sex-role stereotypes within society and ultimately the promotion of equality across the country.²²⁰ The researcher proposes that a similar parental policy be implemented in South Africa in order to achieve comparable outcomes.

²¹⁸ Statistics South Africa quarterly labour survey Q2 2018 <http://www.statssa.gov.za/?p=11375> (accessed 2 August 2018).

²¹⁹ Lamb (n 14 above) 9.

²²⁰ See para 4.1 above.

The proposed parental leave model would have positive developmental consequences for the children of the parents utilising such leave, ultimately adhering to the constitutionally required best interests of the child principle.²²¹ The inclusion of adoptive and commissioning parents and fathers in the distribution of parental leave would result in a more egalitarian society with flexible gender roles. It would provide a remedy to the current discriminatory policy which excludes adoptive and commissioning parents and men from an important part of family life because of unrealistic traditional family models. The proposed model would assist South Africa in complying with its national and international obligations of promoting the eradication of gender stereotypes, protecting the family unit and the best interests of the child, and promoting non-discrimination and equality. A gender-neutral, inclusive, shared-parental leave policy would ultimately bridge the gap between gender roles and the right to equality.

²²¹ See para 3.2 above.

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