Brexit and the work family conflict – a Scottish perspective

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Brexit and the Work-family Conflict – a Scottish Perspective

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The Scottish Government's desire to maintain the EU employment and equality law framework and further strengthen employment rights underpins its recently renewed commitment to seek devolution in these areas as a result of Brexit. This reflects wider concerns about the potential impact of Brexit on employment and equality law, which are equally mirrored in the work-family context.[1] Given the Scottish Government's position, this paper will critically examine whether there is, or could be, a distinctly Scottish perspective in the context of work-family rights post-Brexit. In order to do so, the paper will begin by framing the analysis by critically considering gender and work-family conflict. In doing so, it will acknowledge that this concerns gender equality for both men and women as workers and carers. It will then note the potentially gendered implications of Brexit for work-family conflict for both working parents. The paper will then turn to critically examining the Scottish Governments' position on EU employment and equality law in the post-Brexit context. In doing so it will consider in particular: whether Scotland has, in principle, a potentially distinct approach towards employment and equality law; whether there is anything within the current legal framework that would enable Scotland to retain any degree of continuity with EU law; and if Scotland were to gain powers over employment and equality law, is there the potential for a distinctly Scottish approach towards work-family conflict post-Brexit.

The paper will examine the potentially gendered implications of Brexit from the perspective of traditional dual-partnered heterosexual working parents given the challenges within the current package of rights for working fathers, and the difficulties in challenging entrenched gender roles. While the experiences of alternative family models are equally deserving of further consideration (Weldon-Johns, 2016), the UK has at times extended rights for atypical family models beyond those guaranteed at an EU level. For instance, the UK has gone further than the Court of Justice of the EU (CJEU) in recognising the rights of intended parents in surrogacy (Judgment of 18 March 2014, *CD v ST*, C-167/12, EU:C:2014:169 and

[1] The term work-family draws from Fineman's (1995) understanding of family care and is used to denote the tension between paid work and family care responsibilities, which can extend beyond the mother-child relationship to encompass other relationships of care (Weldon-Johns, 2011). Despite its broader application in general, this paper focuses on traditional parent-child relationships.

Judgment of 18 March 2014, *Z v A Government Department*, C-363/12, EU:C:2014:159; Children and Families Act 2014 c.6 (CFA 2014). In contrast, while the CJEU has begun to recognise the role of the working father, and thus gender-neutral parenting (Judgment of 30 September 2010, *Roca Alvarez v Sesa Start Espana ETT SA*, C-104/09, EU:C:2010:561 and Judgment of 16 July 2015, *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, C-222/14, EU:C:2015:473), this compares notably with the highly gendered package of rights in the UK. In addition, Article 7 of the Charter of Fundamental Rights of the EU (2012/C 326/02) (CFR) replicates Article 8 ECHR, which has also been used successfully by fathers seeking access to parental leave, again promoting gender-neutral parenting (*Markin v Russia* (2013) 56 EHRR 8). The loss of the CFR and its future development in this area will also have potentially greater implications for working fathers. Consequently, the position of working fathers is arguably the most vulnerable post-Brexit. This has implications not only for working fathers, but also working mothers and possibly alternative family models reflecting the traditional dual-partnered working family model.

Gender and the work-family conflict

The reconciliation of work and family life is often primarily viewed through the lens of enabling women to enter into, or remain within, the paid labour market. Recognising the role of, and facilitating gender equality for, working fathers is not often explicitly addressed. This was evident when the reconciliation of work and family life was first addressed, both within the UK and the EU. At this time the underpinning legal framework for work-family rights was primarily maternal in focus, and reinforced stereotypical views of the division between work and private life. This was particularly evident in the jurisprudence of the CJEU in Judgment of 26 October 1983, *Commission v Italy*, Case 163/82, EU:C:1983:295 and Judgment of 12 July 1984, *Hofmann v Barmer Ersatzkasse*, Case 184/83, EU:C:1984:273. In these cases, the rights of working fathers were afforded a secondary status to those of working mothers. The primacy of the mother-child relationship was afforded a special status in both cases, even though there was no biological imperative to do so since the requested leave was only for childcare. The subsequent jurisprudence of the CJEU reinforced the 'special relationship between a woman and her child' (first noted in *Hofmann*, par. 25) and conflated the concepts of maternity and motherhood (McGlynn, 2000, p.36; Ellis, 1991, p.170). In doing so, it entrenched the notion of the 'dominant ideology of motherhood' (McGlynn, 2000, p.41).

While the focus on pregnancy and maternity arguably offered some protection for pregnant workers and working mothers, its reach to motherhood undermined the position of working fathers and presupposed that women were primary caregivers (McGlynn, 2000; More, 1996; Caracciolo di Torella and Masselot, 2001; Fredman, 2014). This led to a significantly gendered approach towards addressing work-family conflict, which arguably undermined rather than supported the position of working mothers.

Despite this, over the years there has been a growing discussion around the concept of 'new fatherhood' (Lupton and Barclay, 1997; Warin et al., 1999). This has, in part, attempted to redefine what it means to be a father, in particular redefining the boundaries of fatherhood identity. In doing so, it has tried to challenge the perception of working fathers solely as primary breadwinners and instead recognise and value their caring role (Lupton and Barclay, 1997). One of the key considerations here has been the erosion of the male breadwinner working family model that has positioned fathers as breadwinners and limited their identity as 'worker-carers' (Lewis, 2001). There has been academic support for the recognition of all working parents (and carers) as workers and carers (Crompton, 1999; Gornick and Meyers, 2003; James, 2009), and there is merit, particularly from a gender equality perspective, in recognising that both parents do, and should, have equal responsibility for the care of their children.

However, debates around 'new fatherhood' have at times 'problematised fatherhood' (Collier, 1999, 2001, 2008; Collier and Sheldon, 2008). Thus, instead of creating a positive fatherhood identity, they have largely focused on identifying men's behaviour as 'problematic' and in need of change. This has related to what are identified as negative behaviours more generally (Lewis, 2000), and in relation to childcare (Collier, 1999). Even notions of 'good fatherhood' are potentially problematic because not only can they create expectations of what it means to be a 'good' and 'involved' father, which may be in contrast with their lived experiences, they have also, at times, continued to recognise fathers' breadwinning role as a key aspect of that identity (Collier, 2010, p.148). Consequently, fathers have found it difficult to relate to the different identities of fatherhood presented to them, which have often remained in contrast with their lived experiences of working and family life (Collier, 2001 and 2010; Collier and Sheldon, 2008). In addition, both Collier (1999) and Miller (2011a and 2011b) have argued that it is problematic to assume that fathers actually want to challenge traditional roles and undertake greater responsibility for childcare. While this may

be the case, a key consideration when trying to recognise fathers' caring role should not be to try to force social change on all working fathers, but to facilitate those who want to undertake a more equal role in childcare to do so, thus, recognising the diversity and fluidity of the fatherhood identity (Dermott, 2001, 2005; Collier and Sheldon, 2008). There are also wider underpinning justifications for engaging fathers in childcare including: recognising the interests of the child and the benefits of developing relationships with both parents (James, 2012 and Foubert, 2017); increasing female participation in the workplace; and challenging gender inequality that can result from women's entrenched role as primary caregiver (Caracciolo Di Torella, 2015). The main problem that has endured in this context thus far has been the disconnect between the 'new fatherhood' rhetoric and the reality that working fathers have not undertaken a significantly greater role in childcare, which is in part reinforced by the underpinning work-family legislation.

This has been reflected in the rhetoric of successive Westminster Governments about recognising the role of working fathers (Department of Trade and Industry, 2003, 2005; HM Government, 2011). However, little more than lip-service has been paid to this in practice (for an overview of some critiques of former and current rights see: McColgan, 2000; James, 2006; Caracciolo Di Torella, 2007; Weldon-Johns, 2011; Mitchell, 2015). This is particularly evident in the introduction of UK work-family rights, where there has been no direct EU influence. These have either been gender-specific rights for working fathers, such as the right to paternity leave (Paternity and Adoption Leave Regulations 2002/2788 (PALR 2000)), or gender-neutral rights, such as shared parental leave (Shared Parental Leave Regulations 2014/3050 (SPLR 2014)). Despite being presented as rights enabling both parents to be involved in childcare, the way that they operate in practice reinforces traditional gender roles. For example, the right to paternity leave is short, it is not earnings-related, and it requires fathers to have established continuity of employment with the employer before being able to access it (James, 2006; Caracciolo Di Torella, 2007; Weldon-Johns, 2011). The right to shared parental leave is similarly problematic because it does not confer individual rights on working fathers, it is also not earnings-related, and it requires both parents to have established continuity of employment with their employers (Mitchell, 2015; Aitkenson, 2017). Alongside extensive maternity rights (Employment Rights Act 1996 c.18 (ERA 1996); Maternity and Parental Leave etc Regulations 1999/3312 (MPLR 1999)), both rights reinforce the role of

mothers as primary caregivers, with fathers relegated to a secondary role (James, 2006; Caracciolo Di Torella, 2007; Weldon-Johns, 2011).

Despite the rhetoric of 'new fatherhood', fathers remain relegated to this secondary role. This reinforces the challenges they face when trying to reconcile their identities as fathers with the reality of working life and opportunities to engage in care. Furthermore, within the debates on fatherhood, Collier has previously been critical of the efforts of former governments which, he argued, have tried to effect, as opposed to reflect, societal change (1999; 2001). This may also explain why there has not been the radical change to parenting roles and the division of work and care that the discourse on 'new' and 'engaged' fatherhood might suggest because fathers are struggling to fit into the identities that are being given to them, not ones that they themselves have necessarily sought or defined (Collier, 1999, p.178 and 2001, pp.537-9 and 542-3). This was particularly evident in the Westminster Government's Impact Assessment on Flexible Parental Leave, enacted as Shared Parental Leave, which estimated that only between 2-8% of fathers would use the right in practice (HM Government, 2012, pp.5 and 25-7), despite the right being aimed at encouraging shared parenting (HM Government, 2011, pp.5-7).

Despite various efforts to redefine the worker-carer model to recognise and encompass working fathers (Crompton, 1999; Lewis, 2001; Gornick and Meyers, 2003), the current UK package of work-family rights continues to reinforce traditional gender roles. This remains the case despite greater recognition of the role of working fathers at an EU level. In particular, the CJEU has begun to recognise the role of the working father, and thus gender-neutral parenting (Caracciolo di Torella, 2014), resulting in a move towards the 'levelling up' of substantive equality in this context (Fredman, 2014). As Fredman argues, '[s]ubstantive equality … can only be genuinely furthered if pregnancy and parenthood are appropriately distinguished' (2014, p.442). This was a significant issue in the earlier jurisprudence involving working fathers which conflated the two. Fredman argues that, in this context, equality should have a substantive value and that should be the social value of parenting. Such an approach would move the debate from the original focus on sameness or difference, wherein likes are treated alike and those who are not alike may be justifiably treated differently. In this context, equality as 'sameness' has been problematic because it produces inappropriate comparisons, as seen in previous discussions on ill man comparators in pregnancy discrimination (Fredman, 2014, pp.445-6 and Wintemute, 1998). However, the equality as

'difference' approach has also been problematic because it reinforces traditional gender roles (Fredman, 2014, pp.446-50). Thus, Fredman (2014) argues that each approach in practice has continued to undermine genuine gender equality. Instead, she argues, guaranteeing fathers equal access to, and incentives to engage with, work-family rights have the potential to facilitate a move towards substantive equality in the future. In both *Roca Alvarez* and *Maistrellis* there was a change in the reasoning of the CJEU, which appeared to adopt this approach. In both cases, working fathers claimed access to gender-neutral childcare-related rights. However, in both instances this was refused on the basis of their partners' employment status. Notably in both cases, had the mother been trying to access the same rights she would have been able to do so irrespective of the employment status of her partner. The CJEU ultimately recognised that working fathers were entitled to equal treatment in relation to access to work-family rights. In *Roca Alvarez* the CJEU acknowledged that '[t]he positions of a male and a female worker, father and mother of a young child, were comparable with regard to their possible need to reduce their daily working time in order to look after their child' (par.24). Thus, drawing a clear distinction between pregnancy and maternity related leave, and leave for the purpose of childcare. The CJEU further noted that,

> 'to refuse entitlement to the leave at issue in the main proceedings to fathers whose status is that of an employed person, on the sole ground that the child's mother does not have that status, could have as its effect that a woman … would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden.' (par.37).

This approach was further endorsed by the CJEU in *Maistrellis*:

> 'a provision such as the one at issue in the main proceedings, far from ensuring full equality in practice between men and women in working life, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties' (par.50).

In both instances, the CJEU was mindful of both the potential role of working fathers in relation to childcare and the implications for the mother who would otherwise bear the sole burden of childcare responsibility. Despite this, the UK right to Shared Parental Leave, discussed below, retains similar employment status qualifications for both parents.

In the work-family context there remains a tension between recognising and protecting the rights of both working parents as worker-carers, and the underpinning identities of motherhood and fatherhood (James, 2009). Failing to acknowledge the implications for working fathers, as has arguably been the case in the UK context, not only continues to exclude them from this discourse, but also further undermines the position of working mothers. Consequently, the future of work-family rights, whatever the relationship with the EU, must be to continue to recognise and support the role of the working father. However, this is one of the key areas of vulnerability post-Brexit in the work-family context.

Brexit – gendered implications for work-family rights

There has been an emerging discussion of the gendered implications of Brexit, particularly for women, and notably in the employment and equality context (Guerrina and Masselot, 2018; Fawcett Society, 2018; Millns, 2016; McColgan, 2016). The work-family context has been specifically identified as one where the UK could potentially lose out on EU developments post-Brexit (McColgan, 2016; Ford, 2016). While this is likely to have disproportionate consequences for women who are largely still primary caregivers (ONS, 2016, Figure 2), there are also significant implications for working fathers. As noted above, despite discussions around the emergence of 'new fatherhood', and the greater acknowledgement of fathers' rights by the CJEU, the UK package of work-family rights continues to reinforce traditional gender roles. It will be important to ensure that their work-family rights are also developed and protected post-Brexit.

There are a number of potential areas of vulnerability in the context of the work-family conflict post-Brexit, and each of them has potentially gendered implications. In particular, while it has been argued that the UK has at times been a leader in relation to equality legislation (HC Women and Equalities Committee, 2017, p.4), this is not equally true in the context of work-family conflict. For instance, it was EU law that guaranteed protections for pregnant workers by recognising that pregnancy discrimination is inherently sex discrimination (Judgment of 8 November 1990, *Dekker v Stichting Vormingscentrum voor Jong*

Volwassenen (VJV-Centrum) Plus, C-177/88, EU:C:1990:383), ultimately forcing UK courts to revisit their approach in this context (e.g. in Judgment of 14 July 1994, *Webb v EMO Cargo Ltd*, C-32/93, EU:C:1994:300; [1996] 2 CMLR 990 (HL)). Nevertheless, the position of working mothers and pregnant workers under the current legislative regime, underpinned by EU law, has still not provided women with sufficient safeguards against discriminatory and/or detrimental treatment (Fawcett Society, 2018, pp.37-40; Taylor, 2017, pp.96-97). Consequently, the position of working mothers and pregnant workers is arguably even more vulnerable post-Brexit without the guaranteed floor of EU rights. This may particularly be the case for protections which impose significant burdens on business (like the situation in *Webb*). It is in this context that the particular gendered implications of Brexit are going to be felt most keenly, with consequences particularly for working mothers.

The wider UK package of work-family rights can be divided into: those that directly derive from EU legislation, namely unpaid parental leave (Parental Leave Directive 2010/18/EU (PLD 2010); MPLR 1999); those which were in place prior to similar EU legislation, such as maternity leave (ERA 1996; MPLR 1999), dependent care leave (ERA 1996), and the right to request flexible working (ERA 1996; Flexible Working Regulations 2014/1398); and rights which have been introduced and developed solely at a UK level, such as shared parental leave (SPLR 2014), and paternity leave (PALR 2000). In addition to specific work-family rights, working parents are also protected by employment equality law (Equality Act 2010 c.15 (EA 2010)), largely under the protected characteristic of sex, but also pregnancy and maternity, and in some cases disability (Judgment of 17 July 2008, *Coleman v Attridge Law*, C-303/06, EU:C:2008:415). Of these rights, EU-derived work-family rights are most likely to be vulnerable to repeal post-Brexit. However, UK-derived work-family rights, which are largely gender specific rights for working fathers, are also likely to be vulnerable to stagnation and deterioration post-Brexit.

The right to unpaid parental leave is the only solely EU-derived work-family right within the UK package of rights. This entitles working parents with one years' continuous employment to a total of 18 weeks unpaid leave per child, which can be used until the child's 18th birthday. The vulnerability of this right is particularly likely given the limited uptake of the right in practice (Tipping et al., 2012), which may make it easier to withdraw from the statute books. While it is not the most extensive work-family right and has been criticised for reinforcing gender roles (McColgan, 2010; Weldon-Johns, 2013; Caracciolo di Torella,

2014), it is the only one which provides both parents with an individual, non-transferable right to care for their child. In addition, it necessarily focuses on childcare rights since it extends far beyond the post-birth period. Removal of this right would signify a step back in relation to gender equality and the work-family conflict, particularly while the EU is taking significant steps forward in this area.

Arguably the greatest consequence of Brexit is the potential loss of development of domestic law in line with that at a European level (Barnard, 2016; McColgan, 2016). The recent jurisprudence of the CJEU is one example of this. Another is the European Parliament and Council proposal for a new directive to replace the current PLD 2010. The new directive has the dual aims of addressing women's underrepresentation at work and encouraging better sharing of childcare responsibilities between men and women (Proposal for a Directive by the European Parliament and of the Council on Work-life Balance for Parents and Carers and repealing Council Directive 2010/18/EU COM/2017/0253 final). While the proposals are not introducing any significant rights not currently within the UK package of work-family rights, it is the potential for further development in this field that is lost. In particular, it is the change in attitude towards the work-family conflict and gender equality that the proposals embody that could mark a notable step-change between the UK and the EU post-Brexit (see Caracciolo di Torella, 2017 for a discussion of the proposals).

There is also the potential future development and impact of the CFR in the interpretation of work-family rights. The Westminster Government have already stated their intention to withdraw from the CFR following Brexit (EU (Withdrawal) Bill (HL Bill 79 (EU(W)B)), s.5(4)), with much criticism (McCorkindale, 2018; Busby, 2017; Lock, 2017; Yong, 2017). While the CFR can only be used to interpret EU law and does not provide free-standing rights, its interpretative potential remains to be seen. In the work-family context Article 7 of the CFR mirrors Article 8 ECHR. Article 8 was relied upon by a father in *Markin v Russia* (2013) 56 EHRR 8 to successfully secure equal access to parental leave, acknowledging that 'insofar as parental leave and parental leave allowances are concerned, men are in an analogous situation to women' (par.132). The ECtHR upheld the serviceman's complaint that the Russian government had breached his Article 8 right by not affording him access to parental leave on the same terms as servicewomen. In doing so, the ECtHR noted that

> '[i]t is true that art.8 does not include a right to parental leave or impose any positive obligation on states to provide parental leave allowances. At the same time, by enabling one of the parents to stay at home to look after the children, parental leave and related allowances promote family life and necessarily affect the way in which it is organised. Parental leave and parental allowances therefore come within the scope of art.8 of the Convention' (par.130).

In Article 53(3) of the CFR it notes that the scope of the rights that correspond with those in the ECHR should be the same. Consequently, a similar interpretation of the scope of Article 7 is likely to be adopted here. This could have significant future implications for the interpretation and development of work-family rights, particularly as the approach of both the CJEU and the ECtHR endorses a more gender-neutral approach to childcare responsibilities.

Furthermore, Article 33 of the CFR refers to 'Family and professional life' and Article 33(1) states that 'The family shall enjoy legal, economic and social protection'. This could be open to a potentially wide interpretation in the work-family context. For instance, it could pave the way for increases in the protections available to working parents, and enhancement of economic rights to paid/earnings-related leave. This would arguably provide families with economic protection when exercising work-family rights. Article 33(2) goes on to state that in order '[t]o reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.' While the protections for pregnancy and maternity are greater, the inclusion of an individual right to parental leave is notable here, in particular, given the more recent jurisprudence of the CJEU in this context reinforce fathers' rights.

Within the work-family context there is an underlying tension between reinforcing traditional gender roles and providing opportunities to enhance gender equality. Often initiatives to redress the balance have focused solely on one gender. Brexit has the potential to further entrench traditional gender roles and push fathers even further to the side-lines. This paper will now turn to consider whether there is a potentially differentiated response to this in Scotland.

Employment and equality law: the Scottish Government's perspective

Employment and equality law (with limited exceptions) are currently reserved matters under the Scotland Act 1998 c.46 (SA 1998), schedule 5. However, since the results of the Scottish independence referendum, the Scottish Government has unsuccessfully sought devolution of employment and equality law (Scottish Government, 2014b, 31-32; Smith Commission, 2014). In the period between the referenda the main justification advanced for devolution of employment and equality law was to enable the Scottish Government to achieve 'full fiscal autonomy' (Scottish Government, 2015, para.6, 22-30 and 53-57). The focus and reasoning at that time was to have control over 'key economic levers' to enable the Scottish Government to 'create jobs', 'tackle inequality' (The Scottish Government, 2014b, iii), and 'boost competitiveness' (Scottish Government, 2015, par.5, see also para.21-30). It was also argued that the devolution of equality law would help overcome the '[b]arriers which prevent women from getting into work, participating in society and from earning the same as men…' and '[p]rotection against discrimination could be strengthened' (Scottish Government, 2015, par.54). While the focus was on economic considerations, gender equality was also a key underpinning justification for devolution of these powers. In the period following the referendum on EU membership the narrative has changed slightly to focus more fully on ensuring social justice and the protection of employment and equality rights post-Brexit (Scottish Government, 2016a).

Despite the original focus on economic considerations, particularly in the context of employment policy, it was nevertheless clear that the Scottish Government preferred a social partnership model (Scottish Government, 2014a, par.5.25), akin to that at a European level. This indicated a commitment to the European approach towards employment relations (Murphie and Weldon-Johns, 2016), which continues to endure following the results of the UK referendum on EU membership. This was further strengthened by Scots clearly voting to remain within the EU as compared with the vote in other parts of the UK (62% voted remain in Scotland as compared with only 46.6% in England (Electoral Commission, 2016). Politically this has provided the Scottish Government with some leverage to argue in favour of a differentiated outcome for Scotland (Sturgeon 2016; Scottish Government, 2016a and 2018), or alternatively devolution of key areas to enable Scotland to maintain the legal position post-Brexit (Scottish Government, 2016b, ch.4). However, the reality, thus far, has been that this has had little impact on intra-UK Brexit negotiations (May 2016). Despite this, the Scottish

Government has set out its own proposals regarding its potential future relationship with the EU (Scottish Government, 2016b and 2018).

The Scottish Government's desire to maintain a relationship with the EU, and particularly to guarantee employment and equality rights, is somewhat in contrast to the position of the Westminster Government. The desired future relationship between the UK and the EU still remains unclear and the commitment to maintaining and developing employment and equality rights is less robust. The Westminster Government have stated that employment rights will be maintained in the period post-Brexit (HM Government, 2017, pp.31-33), leading some to argue that employment and equality laws will not change significantly in the immediate post-Brexit period (Ford, 2016; Russell and MacLean, 2016). The Westminster Government have also appeared to acknowledge the recommendations of the House of Commons Women and Equalities Committee (2017) and have noted their commitment 'to ensure the continued protection of people's rights not to be discriminated against, harassed or victimised in the provision of goods, services and public functions, housing, transport and education' (HM Government, 2017b p.1). However, despite having the opportunity to do so, the Westminster Government has not taken any positive steps to ensure this, for instance by including a constitutional guarantee of equality as proposed by the House of Commons Women and Equalities Committee (2017, p.26). The current version of the EU(W)B does note that 'due regard' must be had to the EA 2010 when enacting statutory instruments relating to withdrawal (Schedule 7, para.22), however this is far short of the kind of guarantee proposed here, which would have been more comparable with that in the Human Rights Act 1998 c.42 (HRA 1998). Notably there is also no reference to the employment context here in the commitment to preventing discrimination.

The more pressing concern is the loss of the floor of rights and the future development of these areas of law which are vulnerable to stagnation or deterioration (Barnard, 2016; McColgan, 2016; Ford, 2016; Busby, 2017), and not enhancement as the government claims (HM Government, 2017a, p.31). This is of particular concern given the deregulatory approach that has been adopted in recent years to UK employment rights (Hepple 2013; Ford, 2016). Indeed, as Dickens has noted: '[w]orker protection as the objective of labour legislation, addressing the imbalance of power inherent in the employment relationship, has been displaced by regulation in the interest of a free market economy …' (2014, 238). There are some instances of 'gold plating' of EU employment law rights (Russell and Maclean, 2016;

Beecroft, 2011), including some work-family rights, particularly the right to maternity leave, which is likely to be retained post-Brexit. There have also been instances where there has been further extension of rights to atypical family models, particularly in the context of extending maternity leave to intended parents in surrogacy. While the CJEU was unable to extend equivalent maternity rights to intended parents under the Pregnant Workers Directive 92/85/EEC, the UK CFA 2014 redefined adoption leave to include parents in this situation (EEC Directive 92/85 on the Protection of Pregnant Women at Work (PWD 1992)), (*CD v ST* and *Z v A Government Department*; For a discussion of these cases see Caracciolo di Torella and Foubert, 2015). This is one area where the UK has the potential to develop the law further than that at an EU level post-Brexit due to the difficulties in achieving consensus, particularly around controversial topics such as alternative reproduction and family care.

Where there has been this enhancement at a UK level, it has often been around maternal rights and/or operates in such a way as to reinforce gender roles rather than challenge them. The desire to maintain and further develop these standards will also undoubtedly wane over time. Such an approach was evident in the recommendations of the previous Beecroft Report on Employment Law (2011), which would appear to strengthen this concern. Some of the key recommendations related, directly or indirectly, to work-family rights and could come to fruition post-Brexit. These include: exempting small businesses from the rights to request flexible working and shared parental leave; removing third party harassment provisions from the EA 2010; and introducing a financial cap for discrimination claims (Beecroft Report, 2011, pp.5-6 and 8). It is at this point that employment and equality law become vulnerable, especially to 'the interests of the free market economy', as noted above. It is unsurprising that the Scottish Government, along with many others (Guerrina and Masselot, 2018; Fawcett Society, 2018; Busby, 2017; Barnard, 2016; Millns, 2016; McColgan, 2016; Ford, 2016), perceive Brexit as a genuine threat to employment and equality rights.

Could Scotland retain EU employment and equality law post-Brexit?

The Scottish Government is committed to attempting to either remaining within the EU or maintaining some kind of relationship that will enable the continuation of EU law post-Brexit. It is beyond the scope of this paper to discuss in detail the constitutional implications and likelihood of success of the Scottish Government proposals, but broadly speaking in 2016 these were: independence; to remain within the EEA, either alongside the UK or on their own;

or, further devolution of repatriated powers from the EU, such as employment law (Scottish Government, 2016). The commitment to the devolution of employment was reiterated in the Scottish Government's programme for government in 2017-18 (Scottish Government, 2017a, p.27). In January 2018 the Scottish Government (2018a) presented updated proposals, which focused on Scotland remaining within the Single Market. In the context of work-family conflict the key feature of each of these proposals is that the Scottish Government would have the ability to maintain and follow the development of employment and equality law in line with changes at a European level. However, without remaining within the EU they would lose their ability to shape the future development of such legislation at the EU level.

As noted above, employment and equality law are outwith the current devolved competencies of the Scottish Parliament and without some kind of new constitutional arrangement, Scotland will be unable to automatically assume power of these areas post-Brexit (Zahn, 2018). One way in which EU employment and equality law could remain applicable in Scotland could be under s.29 of the SA 1998. Under ss.29(1) and (2)(d) acts of the Scottish Parliament are not considered to have the force of law if, among other things, they are 'incompatible with any of the Convention rights or with EU law'. The current version of the EU(W)B intends to insert clauses maintaining this position for retained EU law (s.11). This would ensure that retained EU law is protected post-Brexit, and insofar as this relates to EU employment and equality law this will ensure some continuation of that in the immediate period following Brexit. There are a number of caveats to this. Firstly, s.29 only applies to acts of the Scottish Parliament and not acts of the Westminster Parliament. Since all work-family rights are created by either acts or statutory instruments of the Westminster Parliament, this does not guarantee that they will remain in force post-Brexit. Secondly, since it only applies to legislation it has no impact on the continuing application or interpretation of EU law by the Scottish courts. Thirdly, as it refers to retained EU, it is subject to revision by the Westminster Parliament. While it requires the Scottish Parliament to act compatibly with retained EU law, it will not confer any additional guarantees about the implementation or retention of any areas of EU law post-Brexit.

In an attempt to retain control over those areas of EU law that will be repatriated post-Brexit and that are already devolved to the Scottish Parliament, the Scottish Government passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (UKEU(LC)(S)B) on the 22 March 2018. The UKEU(LC)(S)B contains various provisions which

either retain or incorporate EU law into Scots law post-Brexit. This includes: retaining devolved EU-derived domestic legislation (s.2); incorporating devolved direct EU legislation into Scots law (s.3); retaining the application of s.2(1) of the European Communities Act 1972 c.68 for devolved competencies (s.4); retaining the general principles of EU law and the CFR, including their application by courts and tribunals, in so far as they relate to devolved competencies (s.5); retaining the supremacy of EU law with respect to those laws applying on and after exit day (s.6); allowing the courts and tribunals, where it is considered relevant, to have regard to the principles or judgments of the CJEU when interpreting retained devolved laws (s.10); and enabling Scottish Minister to make provisions corresponding to EU law post-Brexit (s.13), although this explicitly excludes the EA 2010 (s.13(5)(h)). The UKEU(LC)(S)B also makes provision enabling departure from EU law in devolved areas in order to address deficiencies arising from EU withdrawal (s.11).

While the UKEU(LC)(S)B would ensure that there is continuity for those areas already specifically devolved to the Scottish Parliament, it does not go as far as fully embedding EU law beyond the current effects of s.29 of the SA 1998. In order for the UKEU(LC)(S)B to have been effective in this context, the Scottish Parliament would have had to consider the possibility of adopting a similar provision to that in s.3 of the HRA 1998, which would require the Scottish courts to continue to interpret legislation, and common law principles, consistently with relevant principles of EU law. One possible way of achieving this would have been to attempt to retain the CFR more generally, rather than just in relation to devolved areas. This is necessary to ensure that the key principles of EU law continued to permeate all aspects of the application and interpretation of the relevant law in the Scottish context.

However, the UKEU(LC)(S)B has still to receive Royal Assent (SA 1998, s.32) as it is currently subject to legal challenge on the basis that it is outwith the legislative competence of the Scottish Parliament. The case will be heard by the Supreme Court on 24-25 July 2018. Despite this, leading Scottish experts believe that the UKEU(LC)(S)B is within the Parliament's legislative competence. It focuses on devolved competencies (s.1(4)(a)), and provisions aimed at responding to the status of EU law in this context following Brexit should similarly be within the Parliament's legislative competence (McCorkindale and McHarg, 2018). In addition, since the legislation will not come into effect until after EU withdrawal (s.1(3)), the argument that provisions enabling departure from EU law are incompatible with s.29(2)(d) SA 1998 is also considered to be invalid (McCorkindale and McHarg, 2018).

Given the current challenges facing the UKEU(LC)(S)B had the Scottish Parliament adopted a broader approach which attempted to retain EU law more fully this would certainly have been subject to a similar challenge. Consequently, while the UKEU(LC)(S)B underscores the clear commitment of the Scottish Government to preserve EU law in a meaningful way post-Brexit, it may be unable to deliver it in practice, and certainly not in its entirety.

Current, and potential, legal frameworks appear unable to accommodate the Scottish Government's ambitions to retain and/or acquire powers over employment and equality law. However, there may be alternative legal frameworks which could enable work-family rights to be protected and developed post-Brexit. Two possibilities are to consider the work-family conflict through the lens of current human rights obligations, or through commitments to international obligations.

Human Rights and work-family conflict

Human rights are currently within the devolved competency of the Scottish Parliament. In addition, s.29(1) and (2)(d) of the SA 1998 requires the Scottish Parliament to act compatibly with Convention rights in addition to their EU obligations. The ECHR was adopted by the Council of Europe and is not part of EU law, thus it will not be directly affected by Brexit. As noted previously, the ECtHR has previously held that Article 8 ECHR can be engaged when seeking equal access to the right to parental leave (*Markin*). This offers the potential, for working fathers in particular, to argue that Article 8 rights have been breached if the state does not afford working parents equal access to work-family rights. This could ensure that the gender-neutral approach towards working parents and care that is emerging at an EU level would not be entirely lost. However, it is important to remember that ECHR places obligations on the state and does not apply as between individuals. Nevertheless, the interpretative obligations under s.3 HRA 1998 do ensure that legislation must be interpreted consistently and so could be used in the application of such legislation as between private individuals (as noted in *X v Y (Employment: Sex Offender) aka X v Y (Unfair Dismissal)* [2004] ICR 1634, par.57).

While the application of human rights post-Brexit extends across the UK, the SA 1998 contains those additional obligations in s.29 to act consistently with Convention rights. This could be notable because if Scotland were to gain powers over employment and equality law then they would also be required to ensure that they were compatible with Convention rights,

including Article 8 and its interpretation in *Markin*. Should the Scottish Parliament subsequently wish to enact work-family legislation then it would arguably be required to ensure that it enacts such rights on a gender-neutral basis, recognising the right to care of both working parents. This could ensure greater recognition of fathers' rights in the future.

International obligations and the work-family conflict

In 2013 the Scottish Human Rights Commission and the Scottish Government launched Scotland's National Action Plan for Human Rights (SNAP) (Scottish Human Rights Commission, 2013), which was underpinned with the aim of enabling everyone to live with human dignity. A part of this plan was for Scotland to give effect to its international obligations at home (Scottish Human Rights Commission, 2013, Outcome 3). While this related specifically to human rights, it indicated a willingness to comply with international obligations to enhance domestic law. Nevertheless, it is important to note that international obligations are entered into by the UK as the contracting state in the first instance, and so Scotland would be unable to adopt any on their own. In addition, international obligations often lack specificity and enforceable rights. Finally, even if the Scottish government were to try to adhere to international obligations to address the gap left by EU law, this would not be of specific benefit in the work-family context.

While the UK is a State Party to the UN Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) which includes sex discrimination and maternity leave (Articles 1, 2 and 11), it contains no enforceable rights to either. In addition, as its focus is on women, it does not specifically address the position of working fathers. Although Article 5 notes that 'States Parties shall take all appropriate measures … (b) To ensure that family education includes … recognition of the common responsibility of men and women in the upbringing and development of their children,' this appears to be focused on education and culture change rather than work-family rights. Ensuring that protections for women are maintained in domestic law is necessary, but without the commitment to ensuring that the double burden of work and care is not placed solely on women it does more to reinforce traditional gender roles than challenge them.

While Scotland could also look to the International Labour Organisation (ILO) to try to ensure that relevant labour standards are embedded into national law, this is unlikely to be of much benefit in practice. There are two ILO Conventions that are of potential relevance

here: the ILO Discrimination (Employment and Occupation) Convention 1958 (No.111) (ILO D(EO)C 1958), and the ILO Workers with Family Responsibilities Convention 1981 (No.156) (ILO WFRC 1981). The UK ratified the former in 1999 and this is currently in force, however they have never ratified the latter. However, the ILO D(EO)C 1958 does not offer any specific protections for working parents and could perhaps continue to reinforce gender roles. In Article 5 it recognises that special measures could be adopted to 'meet the requirements of persons who, for reasons such as … family responsibilities … are generally recognised to require special protection … shall not be deemed to be discrimination.' While this would cover maternity leave, it is not as clear whether it would apply more broadly to gender-neutral family or parental leave. In contrast, the ILO WFRC 1981 much more explicitly refers to both parents (Article 1) and extends the discrimination principles in the ILO D(EO)C 1958 to this group (Article 3). However, while the Convention encourages protection against discrimination and dismissal on the grounds of family responsibilities, there is no specific encouragement of the development of gender-neutral work-family rights. Consequently, even if international obligations offered a possible opportunity to maintain standards, the current frameworks do not contain any specific benefits to the work-family conflict.

Engaging men – could there be a distinctly Scottish approach towards the work-family conflict?

The likelihood of the various approaches noted above suggests that without significant constitutional changes Scotland will be unable to either retain EU law post-Brexit or gain control of employment and or equality law. However, were Scotland able to secure such powers, the question is then whether the Government would adopt a distinctly Scottish approach towards work-family conflict. As noted above, one of the key issues within the work-family context is the highly gendered nature of such rights, particularly in the UK. Engaging fathers and facilitating a more meaningful role in childcare is necessary to enable those fathers who want to, to care.

The approach of various UK governments to the issue of fathers' childcare role has been consistently weak, as is evident from the House of Commons Women and Equality Committee Fathers in the Workplace Inquiry (HC Women and Equality Committee, 2016a and 2017a). This inquiry found that very few fathers were likely to use the right to Shared Parental Leave (SPL) (only 2-8%), largely because of the low levels of remuneration (HC Women and

Equality Committee, 2016b). It also acknowledged that this is contributing to the gender pay gap since it places barriers before fathers, impacting negatively on their ability to take SPL and reinforcing mothers as primary caregivers. This is problematic in general, and reinforces traditional gender roles, despite the 'new fatherhood' rhetoric discussed above. Perhaps even more concerning is that this largely represents the UK's approach towards gender equality and the work-family conflict. The potential consequences of this for the work-family conflict and related rights post-Brexit are troubling. At best, this could mean a continued reinforcement of traditional gender roles by failing to challenge the primacy of maternal rights, as is the case at present. At worst, it could indicate a 'levelling down' and/or dismantling of the current package of rights, with similar gendered consequences.

This appears in contrast with the work of the Scottish Government to engage men in its gender equality agenda (Scottish Government, 2018). From the initiatives that the Scottish Government have currently pursued, in areas where they do have devolved competencies, it is evident that they have adopted an active role in recognising and valuing the role of fathers in caring for their children. This stems from their commitment in the National Parenting Strategy (2012) to better represent fathers, funding Families Need Fathers to provide advice and support follow separation, and supporting the Fathers Network Scotland deliver the Year of the Dad campaign in 2016. The Scottish Government (2018b) have also taken steps to facilitate recruitment of men in early years childcare, indicating a commitment to valuing male role models both within families and the wider childcare context.

This compares notably with the findings of the Working Families report on The Modern Families Index (2017) and the Women and Equalities inquiry, noted above, which indicates that fathers are now facing a 'fatherhood penalty' when wanting to balance work and family commitments. This, in part, is attributed to current UK legislation which reinforces traditional gender roles and is failing working fathers who want to combine work and care responsibilities. This is arguably reinforced in the Conservatives' Strengthening Families Manifesto (Bruce and Lord Farmer, 2017). While the Manifesto aims to 'promote the importance of active fatherhood' (Point C), Policy 8 refers solely to ante-natal care and preparation for fatherhood and Policy 9 on the requirement to name fathers on the birth certificate. While it is undoubtedly important to engage fathers during the ante-natal period, this does not go far enough to recognise and value their childcare role. This is particularly the case given the findings discussed above.

Here it is worth noting that the Scottish Government launched the Nordic-Baltic Policy Statement in 2014, and updated it in 2017, with the aim of strengthening relationships between Scotland and its Nordic and Baltic neighbours, as well as enhancing Scotland's international attractiveness and global outlook, and protecting Scotland's place in Europe (Scottish Government, 2017b, p.6). Since the policy statement was first adopted, the Scottish Government has adopted a number of initiatives which have been influenced by this experience (see 2017b, pp.3-5 for more details). The Baby Box initiative is one such example, which entitles every new baby in Scotland to receive a box filled with some essential items that a new baby will need. This adopts a similar Finnish policy (2017, p.3), and shows engagement with policies on children and families. This alignment with its European counterparts is particularly notable from a work-family perspective given the work-family reputation of countries within the Nordic region in particular (for an overview of legislation in this area see Blum et al., 2017).

If Scotland were to achieve control over employment and/or equality law, this alignment of policy could indicate that a like-minded future Scottish Government would be open to adopting a more Nordic approach towards the work-family conflict. This is reinforced in the Scottish Government's current plans, which include learning from the Swedish experience of shared parenting (Scottish Government, 2017b, p.7). The Swedish model of parental leave is often presented as an 'ideal type' in the work-family context (although this does not necessarily result in equal use in practice, see further Caracciolo di Torella, E, 2000 and Weldon-Johns, 2011), given its length (480 days), flexibility (it can be used in hourly blocks), and gender-neutral underpinning (Parental Leave Act SFS 1995:584, as amended by SFS 2015:760). While mothers still use the majority of the leave, working fathers are more engaged in care (Statistics Sweden, 2016, p.39). Greater alignment with this policy approach would offer the opportunity for greater commitment to gender equality and fathers' rights in the future.

While it is not clear that the Scottish Government will be able to achieve devolution of employment and/or equality law or achieve a differentiated outcome post-Brexit, what appears evident is that the current Scottish Government would prefer a different approach to the rest of the UK. This approach appears to be closer to its European, particularly Nordic, counterparts, which could indicate a potentially more 'father' friendly and gender-neutral approach towards the work-family conflict in future.

Conclusions: the implications of Brexit on work-family conflict – a Scottish perspective

The gendered implications of Brexit are particularly notable in the work-family context. While the UK has few solely EU-derived work-family rights, many others are heavily influenced by the EU position, and those which are solely UK-derived are notably gendered in practice. The position of working fathers is particularly vulnerable given their already secondary status within UK law. This vulnerability at a UK level appears to be challenged when looking at these issues from a Scottish perspective. While the legislative and constitutional mechanisms for adopting a distinctly Scottish perspective are not currently in place, this paper has argued that there could be a distinctly Scottish approach if they were. The current Scottish Government's approach is far more committed to retaining continuity with EU law post-Brexit. In addition, the Scottish Government has been more supportive of fathers in the areas where they have competence, and appear to be much closer to their European, particularly Nordic, counterparts here. This suggests that Scotland could adopt a distinct approach towards the work-family conflict should they ever have the legal mechanisms to do so, and one that would potentially adopt a more gender-neutral approach.

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