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Unpaid Care and Paid Work in European Employment Law

Introduction

The reconciliation of paid work and unpaid care is arguably the most pressing problem currently facing labour law. The need to develop suitable legal strategies that enable individuals to combine informal care-giving with paid employment matters to the individuals themselves, the recipients of their care, employers, and the State. It matters to society as a whole, to each and every citizen and is of fundamental importance in ensuring the continued sustainability of developed economies. Recognition of the need to facilitate informal care-giving within formal workplace structures has led to the development of a plethora of laws and associated policies aimed at providing support for carers to remain in paid employment, largely by assimilating into established practices and procedures. As a result, there is now a greater number of pre-school childcare places available in the EU than at any time and the provision of paid or partially paid periods of maternity leave available following the birth of a child has increased incrementally at the EU level over the last 20 years. Rather than resulting from a new political awareness of the needs of worker-carers, such recent additions to the law and policy mix are part of a slow, incremental movement towards targeted State support for the management of unpaid care and paid employment within a social welfare framework. However, despite the development of a complex and apparently sophisticated web of law and policy, worker-carers face an ongoing conflict between meeting the requirements of those for whom they care and the demands of an often inflexible working environment. In attempting to meet these competing demands, carers themselves face a deficit in support which can have many negative effects on their personal well-being. This discord between the two facets of an individual’s life can be labelled ‘the

unpaid care/paid work conflict’ and it is finding a sustainable solution to this conflict that presents labour law with its greatest challenge.

Aims of the Book

This book considers how paid work and unpaid care can be reconciled by exploring the potential for the development of a right to care in European employment law. The specific aim is to explore EU law’s response to changes that have taken place in the employment context since the Community’s inception and to assess its overall contribution to the reconciliation of the unpaid care/paid work conflict. A central claim is that the constitutional provisions of EU law already endorse a responsive approach to this conflict which, although merely implicit in the existing provisions at the present time, has the potential to be effectively utilized to provide individuals with a clear right to reconcile paid work and unpaid care. The main hurdle to be overcome is in the requirement for a change of approach to the current conceptualization of the conflict which necessitates a shift of focus from the employment rights of carers to the provision of caring rights for those who engage in paid work. It is asserted that the proposal outlined in the book, rather than requiring a complete overhaul of existing law and policy, could be incorporated into the current regulatory framework in order to bring cohesion to that framework and, if used to full effect, could have a far-reaching impact on the future of unpaid and paid work reconciliation.

Background to the Unpaid Care/Paid Work Conflict

Despite the existence of a broad and comprehensive range of relevant policies intended to assist in the reconciliation of personal and professional life, EU citizens still experience and observe dissatisfaction through related conflicts that are manifested in various ways. Within organizations, such conflict may result in inefficient working practices and, for government agencies and departments responsible for setting labour market targets, in disappointingly low economic activity rates among some sectors. In the wider society, it is possible to discern a general sense that personal and collective interests are not being adequately addressed. For the individual worker-carer, the impact of this conflict can be acute and can result in the non-achievement of personal goals and aspirations as well as in a high financial cost through low wages, lost opportunities for career advancement, and poor pension entitlement at the end of the working life.

These are all typical features of women’s labour market experiences due to the fact that worker-carers are overwhelmingly female, the largest group being comprised of mothers and, in particular, of pre-school or school-age children. Thus, the unpaid care/paid employment conflict is severely gendered although not all worker-carers are women and not all of those for whom they care are dependent children. Furthermore, contemporary family units come in many shapes and sizes reflecting a
The Care Component of Labour Law

Over the last 30 years, the concept of paid work has undergone a transformation in terms of how it is comprised, what it entails, and who engages in it. Patterns of employment have changed, as have working arrangements so that, for example, all EU Member States have witnessed significant increases in part-time work. What has been characterized as the ‘feminization of the workforce’ has taken place with more women continuing to work during the childbearing and rearing years than ever before. Added to this, developments in medical science have led to an increase in life expectancy, improved child mortality even for those born with serious disabilities, and enhanced survival rates for what were once classified as terminal illnesses, leading to a rise in the number of people requiring high levels of care. As a result of these changes, increasing numbers of workers now have competing...
responsibilities outside of their professional life due to their roles within dependency relationships.

This reconfiguration of work has, by and large, not been accompanied by any radical change to or overhaul of the regulatory framework within which the employment relationship operates. The accommodation of ‘difference’, identified by comparison with the standard worker model, has largely been attempted through protection against discrimination on the grounds of such difference rather than through the development of self-standing rights which seek to ensure its normalization. More recent additions to EU legislation aimed at prohibiting specific practices such as discrimination against part-time workers have been added to the existing framework so that the resulting system of employment and social law represents an incremental consolidation of various legal and policy instruments. This is not necessarily a criticism as the evolution of a legal system typically depends on weeding out the ineffective and supplementing and amending the tried and tested, thus enabling the emergence of a dynamic and adaptable set of rules capable of responding to future challenges without compromising its adherence to fundamental principles and so ensuring legal certainty and legitimate expectation. However, the system that emerges is not merely a product of what is legally effective, but is also shaped by external factors which emanate from the political, social, and economic system within which it operates. These factors are based on subjective decision-making which, in turn, is guided by the over-riding ideology to which their architects subscribe. This is particularly so in the case of Community law which was originally intended to regulate a specific and narrow range of activities in order to achieve a particular set of objectives. The primary aims of what has now become EU law were grounded in its economic imperative and thus conformed to the market-based notions of commercial expediency and commodification of all relevant units of exchange. In political terms, this adherence to a market order is reflected in an underlying liberal ideology within which the prioritization of certain competing factions has occurred.

The Liberal Foundations of EU Law

Despite the reorientation of EU law to embrace social as well as economic aspirations, it is this market-led philosophy that has dominated any perceived or actual conflict between the economic and the social goals of the European Union. As appealing as it may be to imagine ways in which this apparent deadlock might be broken by the institutional rejection of liberal ideology, it is simply not possible for the EU to detach itself from the very foundations on which it is based and, besides, there is much to commend further economic and social integration in the current context particularly in relation to the development of workers’ rights as a means of overcoming disadvantage and discrimination. It is, therefore, more productive to

5 See, for example, the prohibition of discrimination on the grounds of sex, discussed in Chapter 5.
6 See Chapter 5.
take a pragmatic view by seeking ways in which existing structures might be adapted and utilized in order to achieve compelling social objectives. This book aims to do that by articulating a right to care which would, in fact, enhance and give effect to the current legal and policy framework by integrating and consolidating the relevant provisions and by making them accessible to those at whom they are targeted. This proposal is, thus, compatible with the political liberalism which characterizes policy and law-making within the EU context.

Although it may seem unquestionable that any proposed amendment to a legal system should correspond with the underlying ethos on which that system is predicated, the market liberalism which characterizes EU law and policy has traditionally been viewed as irreconcilable with the qualities and values associated with care-giving. This has been perceived as presenting an insurmountable hurdle in effectively utilizing the corresponding legal system as a means of recognizing and responding to the unpaid care/paid work conflict on the basis that attempts to prioritize commercial expediency and the unyielding yet non-commodifiable demands of the care relationship within a market order will always result in the predomination of the former. However, as this book will argue, the apparent mismatch between liberalism and the reconciliation of unpaid care and paid employment is largely based on a particular conception of liberal ideology as neo-liberal which, when considered from the care-giver’s often neglected perspective, is unsustainable. Furthermore, the polarization of the competing demands of paid work and unpaid care as opposing sides of an irreconcilable dichotomy vastly oversimplifies the relationship between the two components of an individual’s life. The difficulties that arise from attempts to provide unpaid care alongside paid employment are by no means confined to a small minority of the population. On the contrary, the care relationship is neither a novel nor an alien concept but rather one with which we are all familiar and from which we have all, albeit to varying degrees, benefited. Furthermore, evidence based on labour market participation rates and predicted levels of unpaid care,⁷ suggests that more of us will have to adapt to the demands of the simultaneous provision of both in the future.

Although EU law and policy does, to some extent, recognize and seek to remedy the unpaid care/paid work conflict,⁸ its economic foundation has meant that attempts at its resolution have routinely placed emphasis on the ‘paid work’ side of the equation to the detriment of the ‘unpaid care’ aspect. The contention that such undue focus on one particular aspect of socio-economic policy is a result of choices made on ideological grounds by those to whom society has delegated decision-making is a central tenet of the analysis presented in this book. Such ideology is itself the product of perceptions concerning the relationship between care and employment and the low value ascribed to the former which are rooted in the characteristics of those who traditionally engage in both.

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⁸ See Chapter 5.
The Gender Effect

Woman’s association with care arises from her biological difference and the traditional assumption that nature has better equipped the female sex for unpaid work within the family. In Greek philosophy, on which many of our contemporary conceptions of gender are based, Plato’s conviction that the ‘female bears and the male begets’\(^9\) encapsulates the belief that the different natures of men and women result in a fundamental predisposition for their respective roles within the family. Aristotle, whose formula that ‘likes should be treated alike’\(^{10}\) is the premise on which current anti-discrimination law is based, was of the view that the male was ‘more fitted to rule than the female’\(^{11}\) placing women within the private confines of the home.

As outdated as the dichotomization expounded by the Greek School may appear in current analyses of gender relations, the ideological doctrine intended to explain the relative social positions of women and men is endemic in the philosophy underpinning contemporary social arrangements and supporting institutions. The welfare systems of most industrialized countries are stubbornly predicated on the assumption that the division of labour within families will place men in the position of main earner or ‘breadwinner’ and women in that of primary carer and ‘homemaker’, at least during the childbearing and rearing years. That such ideology continues to inform policy-making is not necessarily intentional: there are very few who would claim that men are better suited to participation in paid work than women as well-established sex discrimination legislation demonstrates. However, such beliefs are so entrenched in our psyches that they inform our individual and collective actions and enable our unquestioning acceptance of rules and institutions founded on discriminatory criteria which exist at all levels of society. Furthermore, the relationship between certain social groups and the development of legal systems has led to the furtherance of particular interests through the medium of the law. Male dominance in the ‘public sphere’, particularly within political institutions, has led to the furtherance of male interests\(^{12}\) and a corresponding adherence to the status quo in unpaid care arrangements despite overwhelming evidence that family formation and labour market participation have irrevocably changed.\(^{13}\)

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\(^{12}\) The polarization of the ‘private’ and ‘public’ spheres of civil society, discussed in Chapter 2, actually derives from the Greek school, which drew a distinction between the *polis* (public) and *oikos* (private), see further J. Swanson, *The Public and The Private in Aristotle’s Political Philosophy* (Ithaca, NY and London: Cornell University Press, 1992).  
The Care Relationship

In recent years, EU-level attempts to address the so-called ‘work-life balance’ have tended to focus on increasing the amount of paid work undertaken by women\(^{14}\) and, consequently, on reducing the level of unpaid care that takes place within families. The resulting ‘outsourcing’ of care, categorized as de-familialization,\(^{15}\) has been articulated through specific policies with increasing emphasis on formal care provision for both children and adult dependants. Through such means, care is commodified and put onto the market place, thus enabling furtherance of the dual goals of economic growth and competitiveness through both its exchange and the enhanced labour market activity of its former (female) providers. Such strategic policy-making implicitly recognizes the inequalities that persist in relation to the division of paid work and unpaid care within families and the resulting difficulties encountered by those who attempt to combine both. However, its reliance on economic growth as its underlying rationale means that much which is imperative to the nature of the care relationship, and the attachment to it of those who participate in it, is overlooked.

Contemporary investigators of the relationship\(^{16}\) concur that the intrinsically intimate nature of the exchange that takes place between a carer and a recipient of care demonstrate the inalienability of certain aspects. This central component of the relationship is crucial to the well-being of both parties and is, thus, non-commodifiable. This claim forms a basic tenet on which much of the analysis presented in this book is founded. As will become clear, the position adopted is not that care should not or cannot be commodified, but rather that ‘the full commodification of care is not possible’\(^{17}\). This, coupled with recognition of the importance of individual autonomy, informs the nature of the book’s central investigation which is to find ways in which unpaid care can successfully be combined with paid work. This does not entail a prescriptive view that, once uncovered, such a formula should be pursued by all of those with caring responsibilities. On the contrary it is the exercise of real choice that is of paramount concern. Nevertheless, recognition of the shift towards the adult worker model family demands the development of appropriate strategies to enable and facilitate such choice.

Whether performed within the private domain of the family or contracted out in the market place as a unit of exchange, care is undervalued and its importance to the well-being of all participants is overlooked. This leaves carers, who are predominantly female, with a narrow range of options regarding their life choices. What is required

\(^{14}\) See Chapter 5.


\(^{16}\) Such as Eva Feder Kittay, Martha Fineman and Kathleen Lynch \textit{et al}, all of whose work is considered in Chapter 3.

in order to successfully counter the current neglect of such issues is a viable strategy which seeks to equalize, as far as possible, the contributions made by men and women to the informal provision of care\(^\text{18}\) whilst, at the same time, recognizing the value of the care relationship to society as a whole. This requires the simultaneous maintenance of the particular protections that exist in response to the inequality experienced by women in their dual role as carer and employee and the separation of care and gender within the legal and policy framework. It is only by challenging its association with low paid ‘women’s work’ that care will acquire an enhanced status and that the paid, often precarious, work undertaken alongside it will be normalized. This, it is asserted, is possible by the application of a legally recognized right to care aimed at providing a solution to the current conflict.

### Justifying a ‘Right’ to Care

In contemporary society the language of rights is everywhere. We refer without question to our right to a specific status, for example, the right to freedom and to express ourselves in a particular way as articulated by our rights to free speech and to religious belief. The claim, conferment, and expression of rights are the processes by which our fundamental values are acknowledged. Rights are developed and invoked as a means of protecting aspects of life that, as a society, we view as being central to our individual and collective well-being. Furthermore, rights can be used to prevent harm being done to members of society on the basis of personal characteristics, such as sexuality, disability, or race or because of imbalances in power between contracting parties, so that vulnerable workers are protected against certain potential forms of exploitation by employing organizations. All of the foregoing examples of the uses to which rights might be put have currency in the current context. In its simplest form, a right is a claim on others which can be justified by its adherence to a particular standard which is acknowledged and recognized by society. In subscribing to an acceptable standard, society makes a value judgement about how we want to live which encompasses, among other things, a moral component which is defensible, not in the individual views of each and every member of society, but in collective terms by the majority.

In relation to the unpaid work of caring, it is undeniable that the effort expended in the provision of that care corresponds, at least on its face, with the necessary components for recognition as a justified claim on others. Its moral property, based on the expression of selfless love for its recipient, surely meets the necessary ethical standard. We all, to varying degrees, have gained in our well-being from ‘love labour’, usually through our experiences as dependent infants and children but also, in many cases, as the givers of such care who share in the mutually beneficial exchange of emotional support that the care relationship engenders. However, such

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relationships also exact a high price from those engaged in the provision of care. The constant requirement to anticipate and meet the needs of others can be extremely demanding both physically and emotionally; much of the effort is expended in the completion of non-intellectually challenging repetitive tasks—washing, cooking, cleaning—which add nothing to the sense of personal achievement or self-actualization of the individual undertaking them but are, nonetheless, crucial to the well-being of those in her care.

The undervaluing of care means that women, who more often than not are the providers of such unpaid work, are likely to earn significantly less in employment over their life-cycles than their male counterparts and are also less likely to be able to benefit from work-related benefits. In old age, many women bear the financial consequences of time away from the labour market or years spent in part-time and precarious work through reduced and, in some cases, non-existent, pensions. These inequalities persist, despite the longevity of well-established laws designed to protect against discrimination on the grounds of sex. The law may be sex-aware, but it is gender-blind and, thus, inadequate in addressing the unequal division of labour that takes place within families and the corresponding penalties meted out against those who provide the unpaid work of caring. If such penalties were exacted against a group of individuals on the basis of, for example, the colour of their skin or their sexuality, the sense of moral outrage felt by the wider society in such enlightened times and the resulting call for rights would surely resonate with even the most traditional legislature.

It would be misleading to suggest that the complexities inherent in attempting to provide legislative protection for those engaged in the work/care equation have been completely overlooked by the EU legislature. Alongside a well-developed framework of rights in respect of equal pay and treatment for men and women, EU law also provides directives aimed at protecting against discrimination on the grounds of part-time working and temporary contractual status. The shortcomings of these legal instruments in the current context will be considered at length in Chapter 5. What is necessary at this juncture is to distinguish them from the right encapsulated within the current proposal and to identify what the introduction of a specific right to care would add to the pre-existing framework of rights that would facilitate its effectiveness in this regard. The answer lies in its conceptual basis which, rather than acting as a replacement for such provisions, would supplement them by consolidating what already exists and identifying what is currently lacking.


The Conceptual Foundations of the Right to Care and European Union Law

The positioning of such a right within the pre-existing framework of EU law raises questions regarding care’s perceived incompatibility with liberalism and associated market ideology. However, there is a considerable body of literature in law and associated disciplines which is supportive of—and indeed has informed—the case presented here which is that the traditional values of liberalism are in fact well suited to the legal recognition of care within a legal system which is intended to regulate interplay between the individual and the institutions supporting paid work. In reorienting the regulation of paid work in line with liberalism’s core values of autonomy, freedom, and equality, it is quite possible—in fact necessary—to extend its reach to take account of the impact of unpaid care in the formulation of law and policy. Furthermore, although EU law may appear to be an unwieldy mechanism for effecting rapid social change, previous experiences over its relatively short life demonstrate that it can be surprisingly responsive and quick to adapt at times of necessity. This is such a time—the current approaches in this area are simply not effective and require reworking as a matter of urgency. It is hoped that the ideas presented in this book will contribute to that task.

The particular conception of liberalism advocated in this book is founded on the notion of sustainable social development rather than the high yield short-termism more usually associated with liberal ideology, particularly in its political neo-liberal incarnation, which is justified through adherence to a business model. Under the latter, the development of creative policy-making is often thwarted unless immediate economic benefits can be identified. The proposed alternative places greater emphasis on the social cost of not valuing care-giving appropriately which, although more difficult to quantify in the context of a business model, is rationalized on the basis of long-term sustainable development. Such an approach at least attempts to address related social problems such as the relationship between time and income poverty and related social outcomes such as child poverty and declining fertility rates. This, in turn, counters the vulnerability of measures rationalized solely by an economic imperative, the maintenance of which relies on the vagaries of the market as their justification is grounded on the assumption that they are ‘good for business’. In economic downturns, such measures are often the first to go due to their reliance on fulfilling the criteria of ‘affordability’ which, in times of market fluctuation, is a moveable feast. This marks such territory out as fertile grounds for the development of rights which are aimed at protecting the vulnerable from exploitation.

22 See, for example, the Court of Justice’s early jurisprudence on the interpretation of Art 119/EEC discussed in Chapter 6.
Scope and Structure of the Book

Rather than treading the well-worn path of EU law-making by situating the unpaid care/paid employment conflict in the context of the need to facilitate family responsibility within pre-existing work-based structures, the proposal outlined in this book takes a wider perspective. The development of a specific right to provide care alongside paid employment necessitates primary consideration of the needs of those on whom others depend for such care, whether that dependency is based on the traditional parent/child relationship, the relationship within which the provision of care for a disabled or terminally ill partner or relative takes place, or on the provision of elder care.

As outlined above, the book’s focus is on the response of labour law and, as a consequence, the relevant issues are situated within that particular paradigm. However, there is also a case to be made for entitlement to State support for those who, on the basis of their caring responsibilities, do not engage in paid employment. Whilst direct consideration of this aspect is outside of the scope of this text, it is hoped that many of the ideas presented here, particularly in relation to caring labour’s ethical nature and its corresponding social and economic value, can also be used in support of that case. The analysis focuses on the EU legal order, with particular consideration of the jurisprudence of the Court of Justice (CoJ) because of that legal system’s specific potential is this context, but it is anticipated that much of that analysis and the case presented here in support of the development of a specific right to care will have application within other legal systems.

In Chapter 2 consideration is given to the theoretical basis on which a right to care might be grounded. The liberal tradition which supports the notion of individual autonomy central to the current proposal is explored by an historical analysis of its development and application through the work of leading theorists. The early exponents’ acceptance of the notion of a social contract entered into freely between a people and the State as a means of expressing the relationship between those who govern and those who are governed. The movement has its origins in seventeenth century European society when the dissolution of the feudal system and the emergence of capitalism were accompanied by a focus on the concepts of individual autonomy and equality before the law. In political terms, the notion of individual consent became paramount so that the State retreated in matters involving personal decision-making, its main function being ‘to act as a neutral umpire between conflicting interests’. \(^{26}\) In terms of legal intervention, this model of the liberal State can be seen as the basis for the public–private divide, in which ‘the “public” State should intrude as little as possible into the sphere of individual autonomy or the “private” sphere’. \(^{27}\) The public–private divide and the emergence of legal abstentionism have had a particular and enduring relevance in the development of law and policy within the current context but their relationship to the area under review is more reflective of pre-existing divisions along gender lines, particularly within the ‘private’ sphere of the family, than indicative of some indefinably prescient ability on the part of the original social contract theorists to forecast the future.

In Chapter 3 the causes of the unpaid care/paid work conflict are explored, specifically in the context of the gendered nature of paid work within segregated labour markets and of the unregulated division of labour within families. The existing literature in this area, particularly that written from a labour law perspective, provides useful insights into the ‘paid work’ side of the equation but has tended to neglect the ‘unpaid care’ component except where it provides an explanation for deviation from the ‘standard worker’ norm. The reasons for such demarcation are explored and the care relationship itself is considered in light of its effect on carers’ labour market activity and in relation to its diversity in terms of levels of dependency and corresponding support required. It is argued that care should be recognized as an essential and everyday human activity that carries a heavy social burden which should be the subject of shared responsibility.

The gender dimension of unpaid care is considered in order to determine how best to overcome the resulting segregation of paid work along gender lines. It is argued that, as well as providing some much-needed protection for vulnerable workers, the provision of a specific right to care, which is not derived from the prohibition of sex discrimination, is important if we wish to overcome the problems associated with the ‘ghettoization’ of women’s work through the engagement of men in the provision of care and the resultant changes in working arrangements required for its accommodation. Through such reorientation, the

\(^{26}\) Ibid, 6. \(^{27}\) Ibid, 7.
'atypical' becomes normative and the precariousness associated with part-time and/or temporary work or that based on tripartite arrangements is confronted head-on. The conferment of rights in a specific area legitimizes the claims of those able to benefit. The legal recognition of care’s value to the whole of society through the provision of an individual right to protection against discrimination on the grounds of caring responsibilities would also provide an enhanced status for carers capable of encouraging and facilitating men’s engagement in unpaid care and, thus, lifting it out of the confines of gender role ascription.

The main aim of Chapter 4 is to identify the appropriate form and content of the proposed right to care which should be situated within European employment law. Although it is asserted that such a right is compatible with the prerequisites for a contract between citizens and the State, the recognition of carers’ dependency, full or partial, through a public ethos of care supported by State means would require the acknowledgement of a wider social responsibility than is usual in employment policy models. This positions the contractual nexus between the carer and the State in its agency role on society’s behalf so that the burden of support becomes part of a wider social responsibility which has both contractual and moral implications.

The enhanced intervention by the State may seem at odds with classic liberalism and its adherence to the concept of rational, autonomous decision-making. However, this proposal sits comfortably with the move towards the reconfiguration of social and labour rights which is at the heart of the current phase of the EU’s integration project within which the concept of citizenship is of central concern. Furthermore, as contemporary advocates of traditional welfare capitalism have noted, the dual concepts of autonomy and rationality, which are often heralded as the founding principles of liberalism, have limited application in the present context. As Chapter 4 argues, traditional liberal theory actually supports the assertion that recognition of responsibility for care is properly positioned within a rights framework. This is because such an approach acknowledges the need for social rights which extend beyond liberal and political rights and which are based on community membership.

In Chapter 5 the current provisions of EU law are assessed in order to consider the ‘fit’ of the proposed right to care within the pre-existing framework. It is asserted that what is proposed is not merely compatible with many of the current provisions of that framework but is in fact necessary to provide cohesion between the various strands that, together, constitute the relevant body of law and, in doing

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28 West has posited the existence of an intrinsic right to care which is implicit in the rights conferred on the subjects of constitutional democracies. Although West’s analysis focuses on the US constitution, her argument has resonance in the context of EU law, particularly in the relationship between the Treaties and the Court of Justice, see R. West, ‘The Right to Care’ in E. Feder Kittay and E. Feder (eds), The Subject of Care: Feminist Perspectives on Dependency (New York: Rowman and Littlefield, 2002).

29 See Chapter 4 and the discussion of the EU Charter of Fundamental Rights in Chapter 5.

so, to give them effect. The apparently subtle reframing of the work/care equation required in order to provide legal recognition of carer status would of course require a significant cultural shift within workplaces which is nevertheless in tune with the current move towards the recognition of diversity and the reconfiguration of working arrangements. Furthermore, although certain provisions of EU law provide a suitable base for such development, their current application in this respect depends on the appropriate interpretation by the Court of Justice. That the Court will be willing and able to rise to such a challenge is by no means a foregone conclusion. For one thing the current policy framework has moved the fulfilment of the EU's social aims away from a litigation-based approach towards the bottom-up co-ordination of national policies enforced through compliance with soft law guidance. Furthermore, the Court's decision-making in the area of work/family reconciliation has not always been as progressive or consistent as it has been in other areas.

In the consideration of the Court's jurisprudence presented in Chapter 6, it appears that the opportunity for creative judicial decision-making in this context has long been available through the referral of questions concerning the rights of so-called 'atypical' workers by national courts under the Article 267 TFEU procedure. The main difficulty inherent in attempting to mould rights to individual circumstances lies in the diversity of needs that vary, not only on the basis of specific circumstances, but over time as levels of dependency change and, in some cases, disappear. In the EU context, this challenge could potentially be met by the creative approach that is at least possible on the part of the Court through its interpretive methods which enable it to develop responsive solutions to specific issues by drawing on a wide range of legislative and policy instruments. In this respect the Court's engagement in progressive decision-making is enabled through its teleological reasoning based on the constitutional provisions of the Treaty, some of which are suitably aspirational in tone, and the non-binding nature of its judgments. The usefulness of the Court's jurisprudence to the regulatory function of the EU institutions has been seen in other areas of social policy, for example, through Directive 2004/38's codification of its decision-making on the right of residence in order to give meaning to the provision of free movement of workers under what is now Article 45 TFEU. It might, thus, be expected that the Court's apparently progressive stance on gender equality could be usefully harnessed to give effect to a right to care through its articulation of EU law's implicit acceptance of such a right. However, as the survey of cases involving attempts by workers to combine paid employment with caring responsibilities demonstrates, the reasoning underpinning the Court's jurisprudence in this area has often lacked the necessary degree of insight and empathy.

Chapter 7 concludes that, given the Court's apparent reluctance to engage in the creative application of Treaty provisions in this context, the required shift in

31 See Art 3 TEU for the general provision; Arts 157 and 151–3 TFEU and Chapter III CFR on equality; and Art 33 CFR on the reconciliation of family and professional life.
32 See Chapter 6.
emphasis could be facilitated by further regulatory activity at European level, either by legislative or soft law means. This is possible through the preservation of the existing legal framework and appropriate implementing legislation within Member States. The review of current legal provision in this area is not out of step with the over-riding strategy of the EU as the development of the policy and legislative framework relating to the reconciliation of work and family life is permanently on the EU’s political agenda.\textsuperscript{33} In relation to the Member States’ implementing legislation, the incorporation of a specific right to care would depend on the regulatory model in operation. Some existing models are considered in order to identify what a specific right to care might look like. The UK’s Disability Discrimination Act 1995 confers a duty on employers to take account of an individual’s particular disability as a basis for adapting work-related practices and procedures to suit individual needs which has been shaped through judicial interpretation of the ‘reasonable adjustment’ requirement.\textsuperscript{34} Legislation introduced by the Australian states of New South Wales and Victoria provides an example of carer-specific protection which, like the UK provisions relating to disability, places an obligation on employers to reasonably accommodate the needs of carers through workplace adjustments. The sort of adjustments relevant to the current context would include flexible work arrangements such as compressed hours, home working, and carer’s leave.

The needs-based approach amounts to what has been termed ‘responsive’\textsuperscript{35} or ‘reflexive’\textsuperscript{36} regulation which places emphasis on the involvement of those at whom it is targeted. As Hepple has argued, such engagement with stakeholders is crucial for the development of workable regulation which can be effectively enforced. The targeted approach suggested, whereby the legislative framework enables a specific response to be made to each request based on the particular needs of the individual concerned, is truly reflexive. The approach advocated, which places the needs of the carer and the recipient of care at its centre, requires legislation which is both wide in scope (in terms of both carers and needs) and conceptually flexible.

The strength of the proposal which is set out in the remaining chapters of this book lies in its flexibility and adaptability, which enable it to meet the often diverse and varying needs of those who combine unpaid care with paid employment. However, this reflexive quality also poses the greatest threat to the legal recognition of such a right which is apparently at odds with the carefully drafted and detailed legislative responses with which we are generally more familiar, particularly at national level. This aspect provides further cause for the positioning of such a

\textsuperscript{33} See, for example, COM (2008) 635 final in which the Commission sets out its plans in respect of the achievement of ‘[a] better work-life balance: stronger support for reconciling professional, private and family life’.

\textsuperscript{34} Provided by the Disability Discrimination Act 1995 (as amended) in judgments such as that by the House of Lords in \textit{Archibald v Fife Council} [2004] UKHL 32.


right at the European level at which directives are generally aspirational rather than definitive in content. Although it would still be necessary to find ways in which the right could be incorporated into the national legal systems of the Member States without losing any of its flexibility, it is submitted that, rather than obscuring the legal entitlement of the individual by adding further detail to an already complex system of rights, such an approach would improve legal certainty for employers and employees by making current provisions more accessible and cohesive.