

Towards real gender equality at the workplace: A case for the introduction of paternity leave in Zimbabwe

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Abstract

This article examines the right of male employees to paternity leave, a contentious issue in many jurisdictions, including Zimbabwe. Despite ongoing debates, the right to paternity leave continues to gain global attention from human rights movements advocating for workplace gender equality. The research argues that Zimbabwe should recognise and implement paternity leave, especially considering its ratification of key international and regional human rights and labour law instruments promoting gender equality. The article explores international legal frameworks on gender equality and emphasises the need to dismantle historical gender stereotypes to achieve true equality. One effective way to do so is by promoting the equitable division of caregiving responsibilities within households. While Zimbabwe's Constitution guarantees the right to non-discrimination and protection from unfair labour practices, it also permits special measures to safeguard certain groups. Notably, the Constitution explicitly guarantees women the right to maternity leave, but there is no equivalent provision for paternity leave. Similarly, Zimbabwe's Labour Act, the primary legislation governing employment rights, does not recognise the denial of paternity leave as an unfair labour practice, failing to align with the Constitution's broader equality objectives. To offer comparative insights, the article examines South Africa's legal framework, which grants male employees various forms of parental leave, including paternity and adoption leave. The analysis of South Africa's approach demonstrates a legal pathway for integrating paternity leave into Zimbabwe's labour law. Drawing from these lessons, the article advocates for Zimbabwe to extend legal recognition to paternity leave, ensuring greater gender equality in both the workplace and the home.

Keywords: Zimbabwe, employer, employee, paternity leave, Constitution of Zimbabwe, 2013, Labour Act [Chapter 28:01]

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1. Introduction

Gender equality remains a critical issue in both domestic and international human rights frameworks. Closely linked to this principle are legal measures designed to address gender discrimination and dismantle entrenched stereotypes. The legal recognition and provision of paternity leave serve as essential mechanisms for achieving full gender equality. According to Raman, true gender equality cannot be realised until both men and women share domestic and caregiving responsibilities equally.¹ Similarly, Melamed argues that the absence of paternity leave perpetuates gender stereotypes by reinforcing the notion that women are naturally suited to caregiving roles, thereby limiting their participation in the workforce.² The right to paternity leave can be inferred from various international human rights and labour law instruments, which are examined in this article. According to the International Labour Organization (ILO), nearly all countries have some form of maternity protection legislation, and many have also introduced measures supporting employees with family responsibilities, including fathers.³ Despite Zimbabwe's constitutional guarantees of non-discrimination and protection against unfair labor practices, there is no legal provision for paternity leave. The Labour Act, which serves as the principal legislation governing employment rights in Zimbabwe, remains silent on this issue. This legal gap exists despite Zimbabwe's international obligations to promote and uphold gender equality as a member of the global community. This article focuses on the Labour Act as the key legislation regulating employment relations in Zimbabwe. Its provisions will be analysed in light of international best practices and compared with South African labour laws, which afford male employees broader rights to various forms of parental leave, including paternity leave. To establish a foundation for this discussion, the article first examines gender equality within the framework of international law, providing a basis for the subsequent analysis.

2. The right to paternity leave in terms of international law

¹ D Raman 'Paternity Leave: A Human Right' (2019) Vol 10 *Supremo Amicus* 99.

² AZ Melamed 'Daddy Warriors: The Battle to Equalize Paternity Leave in the United States by Breaking Gender Stereotypes: A Fourteenth Amendment Equal Protection Analysis' (2014) Vol 21 (1) *UCLA Women's Law Journal* 55.

³ International Labour Organisation "Maternity and paternity at work, Law and practice around the world. (2014) at p2." > www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_242617.pdf (accessed on 16 August 2022).

International law on gender equality can be divided into two categories for convenience and ease of reference, that is, international human rights law and international labour law. Madhuku highlights the importance of international labour law as encompassing the following: the promotion of fair international competition; contribution to the consolidation of peace through the achievement of social justice in the workplace; achievement of social justice for its own sake; ensuring that economic development is guided by social considerations and providing a source of inspiration for national action.⁴ Section 34 of the Constitution places an obligation on the state to incorporate into national law all the conventions, treaties and agreements to which Zimbabwe is a state party. Furthermore, in terms of section 46 of the Constitution, courts are obliged to take into account international law, all treaties and conventions to which Zimbabwe is a state party when interpreting the declaration of rights. Although international treaties and conventions are not automatically binding on Zimbabwe by virtue of section 327 of the Constitution, of Zimbabwe, 2013 they lay the basis for the application and interpretation of domestic law in Zimbabwe. Thus, courts are required to adopt an interpretation of legislation that is consistent with international conventions, treaties and agreements that are binding on Zimbabwe.⁵ Further, courts should interpret legislation in line with customary international law unless it is inconsistent with the Constitution or any other legislation.⁶ Therefore there is a wider scope for the application of international law in Zimbabwe either through its domestication by legislation or through the development of local jurisprudence by courts that is based on international law.

International law, therefore, plays a crucial role in shaping Zimbabwe's legal framework, particularly in advancing gender equality and non-discrimination. Despite the requirement for formal domestication under Section 327 of the Constitution of Zimbabwe, 2013, international treaties, conventions, and customary international law significantly influence the interpretation and application of domestic laws. The constitutional mandate for courts to consider international law when interpreting the Declaration of Rights further underscores its relevance. Given Zimbabwe's obligations as a state party to key international human rights and labour law instruments,

⁴ L Madhuku *Labour Law in Zimbabwe* (2015) 519.

⁵ Section 327 (6) of the Constitution of Zimbabwe, 2013.

⁶ Section 326 of the Constitution of Zimbabwe, 2013.

analysing these sources is essential to understanding their impact on national legislation and judicial decisions, particularly in promoting workplace equality and social justice.

2.1. International human rights framework

2.1.1 Universal Declaration of Human Rights (UDHR) 1948

To begin with, gender equality is part of UDHR. The UDHR is important to Zimbabwe since the country became a member of the United Nations on 25 August 1980.⁷ It recognises “the inherent dignity and the equal and inalienable rights of all members of the human family” as the foundation of “freedom, justice and peace of the world”.⁸ Article 7 of the UDHR provides for non-discrimination which also includes gender discrimination. Article 23(2) provides for equal pay for equal work without discrimination. It is submitted that these provisions justify the legal recognition of paternity leave in Zimbabwe. The reason is that, while the UDHR does not explicitly make provision for paternity leave, the rights to equality and non-discrimination in the aforesaid articles may be construed to also include the right to paternity leave.

2.1.2 The International Covenant on Civil and Political Rights (ICCPR) 1966

This instrument is another rich source of gender equality. Zimbabwe ratified the ICCPR on 31 August 1991.⁹ Article 2(1) obligates each State to respect and ensure all persons within its territory or jurisdiction are afforded all the rights in the Covenant without any discrimination. It protects against discrimination on any ground including gender discrimination.¹⁰ Equality in Article 26 is a twofold concept in that it entitles everyone to equality before the law and it places an obligation on the legislature to guarantee equal and effective protection of the law against discrimination.

2.1.3 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966

⁷ www.sahistory.org.za (accessed 24 August 2022).

⁸ See the preamble to the UDHR.

⁹ www.hrw.org/reports (accessed 23 August 2022).

¹⁰ Article 26 provides that, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, national or social origin, property, birth or other status.”

The right to paternity leave can be deduced from the ICESCR which was ratified by Zimbabwe on 13 May 1991.¹¹ As a party to the ICESCR, Zimbabwe is required to adopt measures that ensure equal rights of men and women to the enjoyment of all economic, social and cultural rights that are set out in the ICESCR.¹² Although it recognises maternity leave as a form of special protection for women, it does not take away the right of fathers to paternity leave.¹³ Article 3 obliges State parties to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights. The Committee expounded on its views on Article 3 in General Comment No. 16 on the Equal Rights of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3). To that end, the Committee stated that “the equal rights of men and women to the enjoyment of all human rights is a fundamental principle recognized under international law and enshrined in the main international human rights instruments”.

Article 9 establishes the framework for social security and equitable access to social services. In General Comment No. 16, the Committee emphasised that the execution of Article 3 in conjunction with Article 9 necessitates that State parties ensure the provision of "sufficient maternity leave for women, paternity leave for men, and parental leave for both genders."

2.1.4 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979

This instrument is closely related to the ICCPR and ICESCR in the advancement of gender equality.. It was ratified by Zimbabwe in 1997 and the country assumed certain obligations under it.¹⁴ The CEDAW obliges State parties, including Zimbabwe, to take appropriate measures in all fields to ensure the enjoyment of human rights and fundamental freedoms by women on a basis of equality with men.¹⁵ It is clear from the wording of the CEDAW that it targeted women and made no direct provision for paternity leave. However, it has been rightly argued that gender equality can only be fully realised if men and women equally take part in family responsibilities.¹⁶ The

¹¹ www.jswhr.com (accessed 20 August 2022).

¹² Article 3 of the ICESCR.

¹³ Article 10 of the ICESCR.

¹⁴ www.cambridge.org/books (accessed 27 August 2022).

¹⁵ Article 3 of the CEDAW.

¹⁶ D Raman (n 1 above) 99.

denial of paternity leave to a man may amount to discrimination against the wife and mother of that man.¹⁷ It is in that context that CEDAW becomes relevant in the promotion of the right to paternity leave in Zimbabwe.

2.1.5 Convention on the Rights of the Child (CRC) 1989

The CRC is another important instrument which was ratified by Zimbabwe in September 1990.¹⁸ It defines a child as every human being who is below the age of eighteen unless majority status is attained earlier.¹⁹ In that regard, it covers newly born children. Importantly, it provides that in all decisions affecting children, their best interests should be the primary consideration.²⁰ To this end, State parties, including Zimbabwe, have an obligation to ensure that there is adequate protection and care for children, taking into account the rights and duties of their parents, legal guardians and other individuals responsible for them.²¹ Further, Article 9(3) provides that children have a right to have contact with both their parents unless it is detrimental to them. Also, Article 18(1) provides that State parties shall ensure the recognition of the principle that both parents share the responsibility in the upbringing of their children. Article 18 (2)-(3) then provides that States shall try to assist parents in their responsibilities and provide child-care assistance for working parents. A close analysis of these provisions leads to a plausible inference that the recognition of male employees' right to paternity leave is one of the ways by which the best interests of the child can be adequately safeguarded.

2.2 Regional human rights instruments

2.2.1 African Charter on Human and People's Rights (ACHPR) 1981

This regional instrument is useful in the promotion of gender equality in Africa. Zimbabwe ratified it in 1986 and its provisions have a direct impact on its human rights standards.²² The State has an obligation to eliminate discrimination against women and to protect the rights of women and children.²³ Such protection of the rights of

¹⁷ D Raman (n 1 above) 97.

¹⁸ <https://tbinternet.ohchr.org>layouts> (accessed 28 August 2022).

¹⁹ Article 1 of the CRC.

²⁰ Article 3 (1) of the CRC.

²¹ Article 3 (2) of the CRC.

²² F Viljoen 'Application of the African Charter on Human and People's Rights by Domestic Courts in Africa' (1991) *Journal of African Law* 1.

²³ Article 18 of the ACHPR.

women and children means the promotion and protection of the right to paternity leave becomes an important consideration.

2.2.2 Charter of Fundamental Social Rights in SADC (the SADC Charter) 2003

Zimbabwe is a member of SADC and a signatory to the SADC Charter.²⁴ It cements Zimbabwe's obligations on gender equality as espoused in international law and provides for gender equity, equal treatment and opportunities for men and women.²⁵

Thus, the international and regional framework on human rights clearly provides for gender equality. It has been highlighted that such equality can be fully realised by addressing traditional gender stereotypes. The right of male employees to paternity leave is one of the ways of addressing gender discrimination.

2.3 International labour law framework

The international labour law jurisprudence has been developed through the work of the ILO. The ILO is a specialised agency of the United Nations. Zimbabwe became an ILO member in 1980.²⁶ ILO standards are very relevant to our jurisdiction in that they influence Zimbabwe's municipal labour law. From the preamble of the Labour Act²⁷, it is apparent that it serves to implement the country's international commitments as a member state of the ILO and as a participant in other international organisations or agreements related to employment conditions that Zimbabwe has ratified.

2.3.1 Discrimination (Employment and Occupation) Convention (C111) 1958

This convention is one of the important conventions against discrimination by the ILO. It was ratified by Zimbabwe in 1999, thereby obliging the country to implement relevant legislation and to promote educational programmes aimed at ensuring acceptance and adherence to its terms.²⁸ Convention C111 requires each member state to pursue policies that are designed to promote "equality of opportunity and treatment in respect of employment and occupation, to eliminate any discrimination in respect thereof."²⁹ Although it allows for the adoption of special measures by member states which are

²⁴ See the preamble to the SADC Charter.

²⁵ Article 6 of the SADC Charter.

²⁶ www.ilo.org (accessed 20 August 2022).

²⁷ [Chapter 28:01] (Labour Act).

²⁸ See Article 3 (b) of Convention C111.

²⁹ Article 2 of Convention C111.

designed to protect certain groups such as women, it does not take away the right of male employees to paternity leave.³⁰ To that end, it can be argued that equality of opportunity and treatment can only be fully realised if there is gender equality.

2.3.2 Workers with Family Responsibilities Convention (c156) 1981

This is another important ILO convention that has a direct impact on male employees' right to paternity leave. Unfortunately, Zimbabwe has not yet ratified this important convention and it is not binding. Convention C156 is referred to in order to illustrate some of the best international practices on the right to paternity leave. It specifically obliges member states to create "effective equality of opportunity and treatment for men and women workers" and to "enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination ..."³¹ Therefore, a foundation for male employees' right to paternity leave is firmly laid in Convention C156.

3. The constitutional framework

Zimbabwe adopted a new Constitution in 2013. It is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.³² One of the founding values and principles of the Constitution of Zimbabwe, 2013 (Constitution) is gender equality.³³ In addition, one of the objectives of the Constitution is to ensure that the State promotes gender balance by taking measures to rectify gender discrimination and imbalances resulting from past practices and policies.³⁴ It can safely be argued that paternity leave has the effect of redefining gender roles and ensuring that there is equality between male and female employees.

The Constitution has a justiciable Declaration of Rights.³⁵ In terms of the Declaration of Rights, every person has a right to equality and non-discrimination.³⁶ The prohibited forms of discrimination include gender discrimination. However, the Constitution allows for the adoption of special measures to protect certain classes of people.³⁷ An

³⁰ Article 5 of Convention C111.

³¹ Article 3 of Convention C156.

³² Section 2 of Constitution of Zimbabwe, 2013.

³³ Section 3 of the Constitution of Zimbabwe, 2013.

³⁴ Section 17 of the Constitution of Zimbabwe, 2013.

³⁵ See generally Chapter 4 of the Constitution of Zimbabwe, 2013.

³⁶ Section 56 of the Constitution of Zimbabwe of Zimbabwe, 2013.

³⁷ Section 59 of the Constitution of Zimbabwe, 2013.

example of a special measure is the constitutional recognition of the right of women employees to fully paid maternity leave for a period of at least three months.³⁸ The Constitution is an important source of labour law and in particular labour rights. Examining it in its present form lacks depth, as the right to paternity leave is not explicitly recognised. However, the right can be inferred from the overarching principle of fair labour practices in the Constitution.³⁹ This constitutional right to fair labour practices is accorded to 'every person' which entails the equal protection of both female and male employees.⁴⁰

Furthermore, the constitutional right to fair labour practices introduces the concept of 'fairness' to industrial relations which means a labour practice should not be 'capricious, arbitrary, or inconsistent'⁴¹ It is submitted that granting paternity leave to male employees is a matter of fairness for both female and male employees. However, the absence of a specific provision in the Constitution of Zimbabwe that acknowledges the entitlement of male employees to paternity leave may pose difficulties if the judiciary takes a restrictive stance on interpreting unfair labour practices, potentially omitting the right to paternity leave from its scope. Hence, historical gender stereotypes can only be resolved by clearly recognising both the right to paternity and maternity leave in the constitution.

The right to paternity leave can be implied from the constitutional right to fair labour practices in Zimbabwe in several ways. First, the Constitution guarantees protection against unfair discrimination in employment, which includes ensuring that labour laws do not reinforce traditional gender roles. The absence of paternity leave unfairly affects male employees by denying them the opportunity to participate in childcare, while concurrently placing the burden of caregiving primarily on women. This creates an imbalance in employment opportunities and career progression, making the lack of paternity leave a potential violation of fair labor standards. Furthermore, the principle of substantive equality, which underpins fair labour practices, requires that both men and women be able to balance work and family responsibilities without undue

³⁸ Section 65 of the Constitution of Zimbabwe, 2013.

³⁹ Section 65 (1) of the Constitution of Zimbabwe, 2013.

⁴⁰ Ibid.

⁴¹ TG Kasuso 'Constitutional Labour Rights: Judicial Interpretation of the Right to Fair Labour Practices in Zimbabwe.' in J Tsabora (ed), *The Judiciary and the Zimbabwean Constitution* (University of Zimbabwe Press, Harare, 2022) p. 199.

disadvantage. Section 56 of the Constitution guarantees the right to equality and non-discrimination, which suggests that labour laws should not create indirect discrimination by failing to recognise the caregiving role of fathers. Without paternity leave, men are denied the opportunity to share parental responsibilities, perpetuating workplace inequality and reinforcing gender stereotypes.

International labour standards also play a key role in shaping fair labour practices. Fair labour practices require equal treatment of employees with family responsibilities. The Zimbabwean Constitution explicitly grants maternity leave to female employees, yet it fails to extend similar benefits to male employees who also have parental responsibilities. This legal gap effectively discriminates against fathers who wish to take an active role in child-rearing, contradicting the constitutional commitment to fairness in employment. By failing to explicitly recognise paternity leave, it indirectly sustains gender stereotypes and places an unfair burden on one gender, undermining the principles of fairness in employment relations.

While the Constitution does not explicitly provide for paternity leave, the constitutional right to fair labour practices, when read alongside provisions on equality, non-discrimination, and international labour standards, provides a strong legal basis for its recognition. Courts and policymakers should interpret labour laws in a way that ensures fairness for all employees, including fathers, thereby fostering workplace equality and social justice.

4. Labour legislation and gender equality

Zimbabwe has a two-tier labour relations system in terms of which private sector employees are governed by the Labour Act [Chapter 28:01] (Labour Act) whereas public sector employees are governed by the Public Service Act [Chapter 16:04] and the Health Service Act [Chapter 15:16]. However, the focus is on those employees who are covered by the Labour Act as the principal legislation on employment relations in Zimbabwe. Thus, it is necessary to discuss its provisions on gender equality that are relevant to this research.

To start with, the Labour Act prohibits discrimination on any matter that is related to employment.⁴² Thus, in terms of section 5 of the Labour Act, no employer should

⁴² Section 5 of the Labour Act [Chapter 28:01].

discriminate against any employee on the ground of gender, among other considerations.⁴³ However, it does not amount to discrimination if a law provides special conditions for female employees on the grounds of gender and pregnancy.⁴⁴ In addition, it is not discrimination if an employer implements an employment policy or practice “aimed at the advancement of persons who have been historically disadvantaged by discriminatory laws or practices”.⁴⁵ An example of a law that provides special conditions for women employees is the Labour Act itself. It provides for the rights of female employees to paid maternity leave.⁴⁶ The concerned female employee should provide evidence through the production of a certificate signed by a registered medical practitioner or State Registered Nurse certifying that she is pregnant.⁴⁷ It is an unfair labour practice for the employer to fail to comply with any of the provisions on maternity leave and benefits.⁴⁸ By clearly providing for the right to maternity leave, the Labour Act expressly excluded the right of male employees to paternity leave. It justified this decision by categorising the provision of maternity leave for female employees as a special measure rooted in gender and pregnancy-related factors. Hence, male employees can not claim that right under the provisions of the Labour Act. It equally applies to situations where the employee’s wife is either employed, unemployed or self-employed.

The antithesis of the Labour Act is that it limits the scope of the constitutional right to fair labour practices in its application. Although one of the purposes of the Labour Act is to promote fair labour standards,⁴⁹ it provides an exhaustive list of what constitutes unfair labour practices to include certain acts and omissions by employers, trade unions, workers’ committees and other persons.⁵⁰ From this closed list of unfair labour practices, failure by the employer to grant paternity leave to male employees is not included in the specified list of unfair labour practices, and therefore, it does not constitute a valid basis for an employee to seek a remedy related to unfair labour practices. The common law is unable to provide support to male employees, as the

⁴³ Section 5 of the Labour Act [Chapter 28:01].

⁴⁴ Section 5(7) (a) of the Labour Act [Chapter 28:01].

⁴⁵ Section 5(7) (c) of the Labour Act [Chapter 28:01].

⁴⁶ Section 18 of the Labour Act [Chapter 28:01].

⁴⁷ Section 18 (2) of the Labour Act [Chapter 28:01].

⁴⁸ Section 18 (9) of the Labour Act [Chapter 28:01].

⁴⁹ Section 2A of the Labour Act [Chapter 28:01].

⁵⁰ Sections 8-9 of the Labour Act [Chapter 28:01]. See also, TG Kasuso (n 41 above)188-189.

Labour Act permits employers to refuse them the entitlement to paternity leave.⁵¹ The reason for this is that common law focuses on the legality of the employer's actions rather than their inherent fairness.

It is submitted that the only possible avenue by which paternity leave may be granted is through section 14B of the Labour Act. It provides for special leave on full pay of up to twelve days in a calendar month which may be granted to any employee on any justifiable compassionate ground. A male employee may utilise this leave to support his wife at home if she is unable to perform her regular responsibilities due to complications arising from childbirth. However, this avenue depends on what a particular employer treats as a sufficient basis to grant the leave and it is not a reliable source of paternity leave. Further, the maximum period of twelve days in a year that is granted to an employee as special leave may not be sufficient to serve the purposes of paternity leave which seeks to strengthen joint parental responsibilities within families and to promote gender equality. The only consideration that may bind the employer in granting paternity leave as a form of special leave under section 14B of the Labour Act is the constitutional requirement of fair labour practices that has been discussed earlier on. Such leave should be granted if it amounts to unfair labour practices not to do so with 'fairness' being the primary consideration. This is because the phrase "any other justifiable compassionate ground" is wide enough to allow the employer to consider leave based on compassionate grounds and to then act fairly in making that decision.

The other option that may be available to male employees in Zimbabwe is to apply for vacation leave. The Labour Act provides that:

Unless more favourable conditions have been provided for in any employment contract or in any enactment, paid vacation leave shall accrue in terms of this section to an employee at the rate of one twelfth of his qualifying service in each year of employment, subject to a maximum accrual of ninety days' paid vacation leave: Provided that, if an employee is granted only a portion of the total vacation leave which may have accrued to him, he may be granted the remaining portion at a later date, together with any further vacation leave which may have accrued to him at that date, without forfeiting any such accrued leave.⁵²

⁵¹ TG Kasuso (n 41 above)189.

⁵² Section 14A of the Labour Act [Chapter 28:01].

In simple terms, an employee is entitled to a vacation leave that is at least one month long in each year of service. Further, the employee can claim other leave days that have previously accrued to him or her. Vacation leave is a general employment benefit that allows employees to take time off work for rest, recreation, or personal matters, typically accrued over time and used at the employee's discretion. It is not necessarily tied to family responsibilities or specific life events. Vacation leave is provided just to allow the concerned employee to rest. Hence, it is much easier to claim in the absence of paternity leave and then use the days to fulfil the objectives of paternity leave which include the promotion of gender equality. However, using vacation leave to fulfil parental duties which are usually performed during paternity leave would be unfair. Treating paternity leave as ordinary vacation leave undermines the recognition of parental responsibilities and reinforces traditional gender roles in caregiving. Paternity leave is a specialized form of leave granted to male employees following the birth or adoption of a child, specifically to enable them to support their partners and actively participate in childcare. Unlike vacation leave, which is often paid and can be scheduled flexibly, paternity leave is usually taken immediately after childbirth and is aimed at promoting gender equality in parenting by recognizing the role of fathers in early child-rearing.

5. The concept of paternity leave in South Africa

South Africa offers the best comparative analysis with Zimbabwe regarding the paternity leave legal framework due to several key factors, including shared legal traditions, similar constitutional commitments to gender equality, and their status as regional leaders in labour law reform. Both countries have legal systems rooted in Roman-Dutch law, adulterated by English law, with strong influences from international human rights and labour law instruments. This common legal heritage makes South Africa's approach to paternity leave particularly relevant for Zimbabwe's legal development. Additionally, South Africa's Constitution, like Zimbabwe's, enshrines the right to equality,⁵³ non-discrimination,⁵⁴ and fair labour practices,⁵⁵ ensuring that labour laws promote gender equity in the workplace. Unlike Zimbabwe,

⁵³ Section 8 of the Constitution of the Republic of South Africa, 1996.

⁵⁴ Section 8(2) and (3) of the Constitution of the Republic of South Africa, 1996.

⁵⁵ Section 27 of the Constitution of the Republic of South Africa, 1996.

however, South Africa has taken significant steps to align its labour laws with international best practices by legally recognising various forms of parental leave, including paternity leave, adoption leave, and parental leave for fathers. The introduction of the Labour Laws Amendment Act of 2018 in South Africa, which grants male employees of parental leave, demonstrates a progressive approach to ensuring that men share in caregiving responsibilities. Given that Zimbabwe faces similar gender equality challenges but lacks explicit legal recognition of paternity leave, South Africa provides a valuable model for reform. Examining South Africa's legal framework allows Zimbabwe to draw insights into how to structure its labour laws to ensure compliance with constitutional and international obligations while promoting workplace equality and social justice.

5.1 Parental leave

An employee who is a parent is entitled to a minimum of ten consecutive days of parental leave.⁵⁶ An employee is entitled to initiate parental leave on either of the following dates: the day of the birth of the employee's child; or the date on which the adoption order is issued; or a child is placed in the custody of a prospective adoptive parent by an authorised court while awaiting the finalisation of the adoption order for that child, whichever of these dates occurs first.⁵⁷ An employee is required to inform the employer in writing of the intended dates for both the commencement of parental leave and the return to work following that leave unless the employee is unable to provide such notification.⁵⁸ Notifying the employer should be done no less than one month before the anticipated birth of the employee's child; or the date on which the adoption order is issued; or a child is placed in the custody of a prospective adoptive parent by an authorised court, while awaiting the finalisation of the adoption order for that child, whichever of these dates occurs first.⁵⁹ If it is not feasible to comply with these timeframes, then an employee should comply at the earliest opportunity that is reasonably achievable.⁶⁰ This makes the provision on timeframes a bit flexible and the

⁵⁶ Section 25A (1) of the Basic Conditions of Employment Act 75 of 1997.

⁵⁷ Section 25A (2) of the Basic Conditions of Employment Act 75 of 1997.

⁵⁸ Section 25A (3) of the Basic Conditions of Employment Act 75 of 1997.

⁵⁹ Section 25A (4) of the Basic Conditions of Employment Act 75 of 1997.

⁶⁰ Section 25A (4) of the Basic Conditions of Employment Act 75 of 1997.

employer should make a value judgment by considering all the circumstances of each case.

Further, the employer is not required to pay the employee during the duration of parental leave.⁶¹ Although Section 25A of the BCEA is gender neutral, its application in practice affects male employees since a female employee who has just given birth qualifies for maternity leave and not parental leave.⁶² Thus, the female employee is entitled to four consecutive months of maternity leave but the father is only entitled to ten days of parental leave. To that end, the court in the *Van Wyk and Others* case remarked that:

To accord a paltry 10 days' leave to a father speaks to a mindset that regards the father's involvement in early parenting as marginal. In my view, this is *per se* offensive to the norms of the Constitution in that it impairs a father's dignity. Long-standing cultural norms which exalt motherhood are not a legitimate platform for a cantilever to distinguish mothers' and fathers' roles.⁶³

To that end, the court held that differentiating the durations of leave between male and female employees violated sections 9 and 10 of the South African Constitution⁶⁴ that provide for the rights of equality and dignity respectively. Therefore, a provisional order was granted by the court which entitles both female and male employees to four consecutive months of parental leave until parliament revisits the impugned provisions.⁶⁵ However, it does not mean that both parents can take the leave at the same time. They can elect to take turns with different durations. South African legislation fully acknowledges parental leave, which functions similarly to paternity leave. This represents a significant contrast to Zimbabwean law, which does not recognise parental leave within its legal framework.

⁶¹ SL Naidoo 'A Father's Right to Paternity Leave in the South African Workplace.' Unpublished LLM Thesis, University of KwaZulu-Natal, (2012) 32.

⁶² Section 25 of the Basic Conditions of Employment Act 75 of 1997 provides that an employee is entitled to at least four consecutive months' maternity leave. Further, no (female) employee is compelled to return to work for a period of six weeks following the birth of her child, unless she has received certification from a medical practitioner or midwife confirming her fitness to resume work. Furthermore, an employee who experiences a miscarriage during the third trimester of pregnancy or delivers a stillborn child is entitled to maternity leave for six weeks following the event, regardless of whether she had already begun her maternity leave at the time of the miscarriage or stillbirth.

⁶³ *Van Wyk and Others* case, para. 26.

⁶⁴ Section 9 and 10 of the Constitution of the Republic of South Africa, 1996.

⁶⁵ *Van Wyk and Others* case, para. 47.

5.2 Adoption leave

An employee who is an adoptive parent of a child under the age of two is entitled to either a minimum of ten consecutive weeks of adoption leave or the parental leave specified in section 25A of the Basic Conditions of Employment Act 75 of 1997 (BCEA).⁶⁶ Further, he or she is permitted to begin adoption leave on the date when the adoption order is issued or a child is entrusted to the care of a potential adoptive parent by a competent court while awaiting the completion of an adoption order for that child, whichever date comes first.⁶⁷ The employer must be informed of the decision to take adoptive leave in the same manner as parental leave, as previously discussed.⁶⁸ If an adoption order is issued for two adoptive parents, one of the parents is entitled to apply for adoption leave, while the other may seek parental leave as outlined in section 25A of the BCEA. It is important to note that the decision regarding who will take which type of leave must be made by mutual agreement between the two adoptive parents.⁶⁹ If a competent court orders the placement of a child under the care of two potential adoptive parents while awaiting the completion of an adoption order for that child, one of the prospective adoptive parents is entitled to request adoption leave, while the other may seek the parental leave specified in section 25A of the BCEA.⁷⁰ To that end, the decision regarding which leave to pursue must be made at the discretion of the two prospective adoptive parents.

In the *Van Wyk and Others* case, the court criticised the discrepancy that exists between adoptive parents and a birth mother.⁷¹ This is because a birth mother is entitled to four consecutive months of maternity leave in terms of section 25 of the BCEA while an adoptive parent is only entitled to at least ten weeks of adoptive leave in terms of section 25B of the same Act. Although the legislature set ten weeks as the minimum and not the maximum period for adoptive leave, it distinctly differentiated between the entitlements of adoptive parents and those of a mother who has given birth. Thus, the court ruled that it was unjustified discrimination to

⁶⁶ Section 25B (1) of the Basic Conditions of Employment Act 75 of 1997.

⁶⁷ Section 25B (2) of the Basic Conditions of Employment Act 75 of 1997.

⁶⁸ Section 25B (3) of the Basic Conditions of Employment Act 75 of 1997.

⁶⁹ Section 25B (6) of the Basic Conditions of Employment Act 75 of 1997.

⁷⁰ Section 25B (7) of the Basic Conditions of Employment Act 75 of 1997.

⁷¹ *Van Wyk and Others* case, para. 24.

maintain the different periods of leave. Just like maternity leave, adoptive parents were granted four consecutive months of adoptive leave which can be shared if there is more than one parent pending legislative amendments by parliament.⁷² Therefore, male employees who are adoptive parents are entitled to four consecutive months of adoption leave, allowing them ample opportunity to bond with their children and support their early development. In this context, adoption leave fulfills the same objectives as paternity leave.

5.3 Commissioning parental leave

An employee designated as a commissioning parent within a surrogate motherhood agreement is entitled to a minimum of ten consecutive weeks of commissioning parental leave or the parental leave specified in section 25A of the BCEA.⁷³ In addition, the employee is permitted to commence parental leave on the date a child is born pursuant to a surrogate motherhood agreement.⁷⁴ The employer ought to be informed in a manner akin to that used for parental or adoptive leave.⁷⁵ In the case of a surrogate motherhood agreement involving two commissioning parents, one parent is entitled to apply for commissioning parental leave, while the other may seek parental leave as outlined in section 25A of the BCEA.⁷⁶ It is important to note that the decision regarding which type of leave to pursue must be made at the discretion of the two commissioning parents. Just like adoptive leave, a period of ten weeks for commissioning parental leave was criticised by the court in the *Van Wyk and Others* case as amounting to unfair discrimination as it is shorter than the four months of maternity leave enjoyed by birth mothers. In this context, the remarks previously mentioned concerning adoptive leave are equally relevant to commissioning parental leave.

5.4 Comparative overview

The comparative analysis of South African legislation on parental, adoption, and commissioning parental leave offers valuable insights into how Zimbabwe can enhance its labour laws to promote gender equality and support parental involvement. In South Africa, employees are entitled to a minimum of ten consecutive days of

⁷² *Van Wyk and Others* case, para. 47.

⁷³ Section 25C (1) of the Basic Conditions of Employment Act 75 of 1997.

⁷⁴ Section 25C (2) of the Basic Conditions of Employment Act 75 of 1997.

⁷⁵ Section 25C (3-4) of the Basic Conditions of Employment Act 75 of 1997.

⁷⁶ Section 25C (7) of the Basic Conditions of Employment Act 75 of 1997.

parental leave, which can be initiated upon the birth of a child, the issuance of an adoption order, or the placement of a child in the custody of an adoptive parent. This leave allows for flexibility in notification, with employees required to inform employers in writing at least one month in advance, or as soon as reasonably possible. However, the law's application is gender-neutral, which has led to a legal challenge regarding the disparity between the leave entitlements for fathers and mothers. The court in *Van Wyk and Others* ruled that the differentiation in leave durations between male and female employees violated constitutional rights to equality and dignity, and ordered that both parents should be entitled to four consecutive months of leave, pending legislative amendments. This provision reflects a shift toward a more inclusive understanding of parental responsibilities, which contrasts sharply with Zimbabwe's labor laws, where paternity leave is not explicitly recognized. South Africa's adoption leave entitles adoptive parents to a minimum of ten weeks of leave, with the possibility of sharing it between the parents. This is similar to the provisions for biological parents, but it also highlights the inequity compared to the leave granted to birth mothers. In the *Van Wyk* case, the court further criticised the ten weeks for adoptive parents as discriminatory when compared to the four months granted to birth mothers, leading to a provision that allows adoptive parents to access four months of leave, similar to maternity leave. This adjustment recognises the critical importance of both parents' involvement in early child development, aligning with the goals of paternity leave.

In the case of commissioning parental leave, South Africa allows parents in surrogate motherhood agreements to take at least ten weeks of leave, with similar provisions for sharing leave between parents. Again, the court critiqued the disparity between the leave granted to commissioning parents and birth mothers, leading to a move toward equalising the leave duration. This recognition of various forms of parental leave, including paternity, adoption, and commissioning parental leave, establishes a comprehensive framework for supporting parental roles in a way that Zimbabwe's labour laws do not currently address. In summary, South Africa's legal framework provides a robust model for Zimbabwe to consider in terms of recognising and legislating parental rights. While Zimbabwe's laws are currently limited in terms of paternity leave, South Africa's progressive approach offers a clear pathway for creating a more inclusive and gender-neutral policy that supports both fathers and mothers in their parental roles, ensuring equality and fairness in the workplace.

6. Conclusion

The analysis of Zimbabwe's legal framework regarding paternity leave reveals significant gaps between international obligations and domestic implementation, alongside notable disparities when compared to regional peers like South Africa. While Zimbabwe's Constitution and international commitments strongly support gender equality and fair labour practices, there is a clear disconnect between these principles and the current labour legislation. The absence of paternity leave provisions in the Labour Act not only undermines Zimbabwe's constitutional commitment to gender equality and fair labour practices but also fails to fully implement Zimbabwe's obligations under ratified international instruments that promote shared parental responsibilities. The current system's offering of alternatives through special leave or vacation leave proves inadequate, failing to recognise the distinct purpose and significance of paternity leave in promoting gender equality and shared parental responsibilities. These existing options do not provide the necessary framework for systematic support of fathers' involvement in early childcare. In contrast, South Africa's comprehensive approach to parental leave, including provisions for adoption and commissioning parental leave, offers a viable model for reform. The *Van Wyk* case from South Africa particularly demonstrates the importance of ensuring equality in leave provisions between parents, while also showing that implementing paternity leave is feasible within the regional context. The lack of paternity leave in Zimbabwe's current framework perpetuates traditional gender roles and stereotypes, inadvertently reinforcing the notion that childcare is primarily a female responsibility. This situation necessitates reform through explicit recognition of paternity leave in labour legislation, aligned with constitutional principles and international obligations. Such reform should be comprehensive, covering various forms of parental leave including adoption and commissioning parental leave, while considering both the duration and conditions of leave to ensure meaningful support for fathers' involvement.

The way forward requires legislative reform that explicitly recognises paternity leave, supported by appropriate policy frameworks and implementation mechanisms. Such reform would not only fulfill Zimbabwe's international obligations but also advance gender equality in both the workplace and family life. The success of similar reforms in South Africa demonstrates that such changes are both feasible and beneficial within

the regional context. This research ultimately underscores that the introduction of paternity leave is not merely a matter of labour rights but a crucial step towards achieving genuine gender equality and social transformation in Zimbabwe. Reform in this area would represent a significant advancement in aligning Zimbabwe's labour laws with its constitutional values and international commitments while promoting more equitable family structures and workplace practices. Through such reform, Zimbabwe can move closer to realising true gender equality and creating a more inclusive and supportive environment for all parents in the workplace.

