Combating Fathers’ Experiences of Discrimination: An Argument for the Inclusion of “Paternity” as a Protected Characteristic under Section 4 of the Equality Act 2010 and a Ground of Discrimination under Article 14 of the Human Rights Act 1998

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ABSTRACT

Fathers are a marginalised sub-group within men who experience discrimination when they attempt to be actively involved in childcare. In the United Kingdom (UK), employment law treats fathers as lesser than mothers by providing fathers with limited leave entitlements to use to undertake higher levels of caring responsibilities. The perception of fathers as secondary to mothers in employment law has consequently influenced the further stigmatisation of men in caring roles inside the workplace, outside of the workplace and in the court system to an extent.

My thesis will argue that the mistreatment of fathers should be accurately defined as paternity discrimination. The specific discriminatory practices perpetuated against fathers are on the basis of their sex and parenting status. My thesis will also examine the limitations of the current state of equality legislation in Britain and the UK to protect fathers from discrimination. Mothers are afforded specific legal protection under the protected characteristic of "pregnancy and maternity" under the Equality Act 2010 (EA 2010). Similarly, in light of the incorporation of the European Convention on Human Rights (ECHR) into UK law by the Human Rights Act 1998 (HRA 1998), pregnancy discrimination is included within the meaning of sex discrimination under art.14 of the ECHR. However, fathers within the court system in England and Wales have continued to unsuccessfully rely upon "sex" as a protected characteristic under s.4 of the EA 2010 to tackle the discrimination directed against them.

This thesis will conclude that fathers need to be afforded specific legal protection through the addition of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. If paternity discrimination fails to be sufficiently recognised under important pieces of equality legislation in Britain and the UK, the stigmatisation of fathers in caring roles will continue to persist.

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ABBREVIATIONS

Arbitration and Mediation Bill	Arbitration and Mediation Services (Equality) Bill
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
Disabled Access Bill	Equality Act 2010 (Amendment) (Disabled Access) Bill
DLA	Disability Living Allowance
EA 2010	Equality Act 2010
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ERR Bill	Enterprise and Regulatory Reform Bill
ET	Employment Tribunal
EU	European Union
GRC	Gender Recognition Certificate
HRA 1998	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBT	Lesbian, gay, bisexual, transgender
Treaty of Rome	Treaty Establishing the European Economic Community
TUC	Trades Union Congress
UK	United Kingdom
Vienna Convention	Vienna Convention on the Law of Treaties

CHAPTER 1: INTRODUCTION

I. OBJECTIVE OF THESIS

This thesis makes the case that "paternity" should be a protected characteristic under s.4 of the Equality Act 2010 (EA 2010) and a ground of discrimination under art.14 of the Human Rights Act 1998 (HRA 1998). "Paternity" needs to be included as a protected characteristic and a ground of discrimination as the employment legislation governing leave entitlements in the United Kingdom (UK) treats mothers and fathers differently. The employment legislation in the UK provides limited leave entitlements for fathers to utilise to establish their position in childcare and ultimately treats fathers as secondary to mothers with regards to their ability to fulfil caring responsibilities. The lesser treatment of fathers under legislation has consequently influenced the further stigmatisation of men in caring roles inside the workplace, outside of the workplace and in the court system to an extent. As a result, women have been encouraged to be the primary carers of their children and forced to retain the "double burden" of familial and workplace obligations.[1] This thesis will contend that the lesser treatment of fathers amounts to paternity discrimination. Currently, mothers can rely on "pregnancy and maternity" as a protected characteristic under s.4 of the EA 2010 to counter the discrimination that they experience. Similarly, in light of the incorporation of the European Convention on Human Rights (ECHR)[2] into UK law by the HRA 1998,[3] pregnant women are also provided with legal protection under art.14 of the ECHR since pregnancy discrimination is included within the meaning of sex discrimination.[4] However, minimal legal protection is provided for fathers experiencing discrimination. Fathers in Britain have currently had to rely on "sex" as a protected characteristic under s.4 of the EA 2010 to combat discrimination.[5] However, the mislabelling of paternity discrimination as sex discrimination is an incomplete approach to address the lesser treatment of fathers in childcare. The objective of this thesis will be to provide evidence that the inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 is necessary to sufficiently combat the discrimination which fathers experience.

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[1] Sandra Krapf, *Public Childcare Provision and Fertility Behavior: A Comparison of Sweden and Germany* (Budrich UniPress 2014) 15.
[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3rd September 1953) ETS 5 (ECHR).
[3] Christina Kitterman, 'The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish Its Sovereignty to Ensure Human Rights Protection in Domestic Courts' (2001) 7 ILSA Journal of International & Comparative Law 583.
[4] *Jurčić v Croatia* (2021) 73 E.H.R.R. 10 (hereafter *Jurčić*).
[5] *Shuter v Ford Motor Company Limited* [2014] 7 WLUK 1105 (hereafter *Shuter*); *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police* [2019] EWCA Civ 900 (hereafter *Ali v Capita* and *Hextall*); *Price v Powys County Council* [2021] UKEAT/0133/20 (hereafter *Price*).

II. THEORETICAL AND HISTORICAL CONTEXT

The employment law governing leave entitlements, the court system, and the culture inside and outside of the workplace stigmatise men in caring roles due to their adherence to the traditional "male breadwinner" model. The underpinning ideology of this familial model promotes the heterosexual 2-parent unit wherein the traditional role of motherhood chiefly encompasses childcare and the traditional role of fatherhood involves acting as the breadwinner.[6] Therefore, the societal perception of good fathering centres upon being the primary financial earner of the family[7] and undertaking a detached and uncaring role.[8] In contrast, mothers are culturally expected to be nurturing caretakers,[9] with the societal perception of good mothering being explained by Russo as being 'measured by the number of her children and the quantity of time she spends with them.'[10] Before my thesis begins to reconceptualise the lesser treatment of fathers as paternity discrimination in the following chapters, Section II of Chapter 1 will provide the theoretical and historical context of my research and explain the origins of the traditional "male breadwinner" model and the gender stereotypes surrounding parenting roles.

The traditional "male breadwinner" model largely originated from the sexual division of labour which arose under patriarchal capitalism.[11] First, MacKinnon explains that the patriarchy is a gender hierarchy which centres upon male dominance and female submission.[12] She explains that heterosexuality upholds the patriarchal structure, with reproduction being its consequence and family being its congealed form.[13] The sexual relations between men and women and the ability for women to become pregnant, whilst men cannot, has shaped the social roles of women to primarily undertake childcare responsibilities in the family.[14] However, Simon explains that the capitalist and patriarchal structures are seen as 'interdependent and reciprocal systems that conjointly keep women in a secondary position.'[15] Capitalism is an economic system that identifies labour power as a commodity wherein employees work for their employer for wages in order to produce output that is sold on a market for profit.[16] Becker's economic theory of the family states that efficiency within married heterosexual couples is garnered through specialisation and adherence to the

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[6] Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) 23.
[7] Richard Collier, *Men, Law and Gender: Essays on the 'Man' of Law* (Routledge 2010) 148.
[8] Chris Segrin and Jeanne Flora, *Family Communication* (2nd edn, Routledge, 2011) 160.
[9] ibid.
[10] Nancy Felipe Russo, 'The Motherhood Mandate' (1976) 32 Journal of Social Issues 148.
[11] Ray Broomhill and Rhonda Sharp, 'A New Gender (Dis)order? – Neoliberal Restructuring in Australia' in Gordon Laxer and Dennis Soron (eds), *Not for Sale: Decommodifying Public Life* (Broadview Press 2006) 138; Laurie Shrage, *Moral Dilemmas of Feminism: Prostitution, Adultery, and Abortion* (Taylor & Francis 2013) 90.
[12] Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory (1982) 7 Signs 516.
[13] ibid.
[14] Catharine MacKinnon (n 12); Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Verso Books 2015) 5-6, 8.
[15] Barbara Levy Simon, 'Social Work Responds to the Women's Movement' (1988) 3 Journal of Women and Social Work 65.
[16] Michael Merrill, 'Putting "Capitalism" in its Place: A Review of Recent Literature' (1995) 52 The William and Mary Quarterly 320; Samuel Bowles and Wendy Carlin, 'Shrinking Capitalism: Components of a New Political Economy Paradigm' (2021) 37 Oxford Review of Economic Policy 794.

traditional "male breadwinner" model.[17] Becker remarks that the most efficient marriages involved the concentration of men in the public sphere performing waged labour and women in the private sphere catering to domestic tasks and childcare.[18] Paltasingh and Tattwamasi describe patriarchal capitalism as an exploitative mode of production since the concept of work is conventionally understood as paid labour, which undervalues the domestic unpaid labour undertaken by women.[19] Mies underlines that the unfounded covert or overt biological determinism present in the sexual division of labour presents the nuclear family as a crucial institution of men-women relations and hides the hierarchical and anti-egalitarian nature of the structure.[20] The historically derived values and norms have been intergenerationally transmitted by men and women continuing to perform the same tasks and has shaped prevailing gender roles.[21]

The rise of modern capitalism during the Industrial Revolution, that had begun in the 18th century, saw some women as waged labourers that were often employed in factories.[22] Yet, women continually encountered the societal belief that they were taking employment from men, should be paid less because of the assumption that they were living with husbands or fathers that were also working, and should retire to look after their children upon marriage.[23] However, the traditional position of women was particularly challenged during World War 1 and World War 2. With regards to World War 1, the immediate outbreak of war resulted in a huge shortage of labour, as a large proportion of men were called to fight in the war.[24] Women were employed in the munitions industry in large numbers and also replaced men in private, non-munitions industries such as grain milling, building, surface mining and shipyards.[25] Additionally, women began to work non-industrial jobs and replaced the men who had previously worked in banks, business offices, postal services and the transport system, for example.[26] In 1917, 1 in 3 women were estimated to have replaced a male worker and, in 1918, the total number of women employed was nearly 5 million.[27] The number of women employed further expanded during World War 2, with there being a huge increase in the proportion of women working in male-dominated fields such as engineering, the metal

[17] Claire Kamp Dush, Jill Yavorsky and Sarah Schoppe-Sullivan, 'What Are Men Doing While Women Perform Extra Unpaid Labor? Leisure and Specialization at the Transitions to Parenthood' (2017) 78 Sex Roles 715.
[18] ibid.
[19] Tattwamasi Paltasingh and Lakshmi Lingam, ''Production' and 'Reproduction' in Feminism: Ideas, Perspectives and Concepts' (2014) 3 IIM Kozhikode Society & Management Review 45-47.
[20] Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (Zed Books 1998) 45-46.
[21] Akanksha Marphatia and Rachel Moussié, 'A Question of Gender Justice: Exploring the Linkages Between Women's Unpaid Care Work, Education, and Gender Equality' (2013) 33 International Journal of Educational Development 586.
[22] Paul Hawken, Amory B Lovins and L Hunter Lovins, *Natural Capitalism: The Next Industrial Revolution* (Earthscan 2010) 2; Roger Lloyd-Jones and M J Lewis, *British Industrial Capitalism since the Industrial Revolution* (Taylor and Francis 2014) 1; Gail Braybon, *Women Workers in the First World War* (Routledge 2013) 15-18.
[23] Braybon (n 22).
[24] ibid 44-47.
[25] ibid 44-47.
[26] ibid 44-47.
[27] ibid 44-47.

and the chemical industries, and vehicle building.[28] In 1943, an estimated 7.5 million women were employed.[29]

The proportion of women in the workforce steadily increased over the following decades,[30] with 15.7 million women reported to be in employment in 2022.[31] However, the workplace has continued to be structured in accordance with the fully committed worker model.[32] This model dictates that a worker should primarily focus on paid work and assume minimal caring responsibilities.[33] Women struggle more than men with conforming to the fully committed worker model because the primary responsibility for domestic tasks and childcare is currently placed upon women. Coates explains that the division of household labour is heavily gendered and that women experience 'the double burden of performing paid labour while still retaining prime responsibility for the domestic care of… the young.'[34] Kamp Dush, Yavorsky and Schoppe-Sullivan recognise that the transition to parenthood can be classified as an 'intensive gendered time period'[35] wherein social and financial factors make it seemingly easier for many men and women to adhere to the parenting roles described under the traditional "male breadwinner" model.[36] In present-day society, James elaborates that strict adherence to the familial model can be juxtaposed by the "male-breadwinner/female part-time carer" model in which a departure from the traditional role of motherhood can be noted, but there is very little change in the childcare responsibilities assigned to mothers and fathers.[37] As a result, women have struggled to maintain their position in the labour market like men.

Since childcare responsibilities have been chiefly placed on women to fulfil, they have consequently experienced high levels of mistreatment in the workplace. The Women and Equalities Committee has found that an estimated 260,000 mothers every year believed that motherhood had a negative impact upon their career.[38] They also reported that 100,000 mothers experienced harassment or negative comments in relation to their pregnancy, 53,000 women were discouraged by their employers from attending antenatal appointments and 54,000 women were dismissed, made compulsorily redundant or felt pressured to leave their jobs because of the mistreatment.[39] The Trades Union Congress (TUC) revealed that mothers

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[28] Penny Summerfield, *Women Workers in the Second World War* (Routledge 2013) 29-31.
[29] ibid.
[30] Helen McCarthy, Social Science and Married Women's Employment in Post-War Britain' (2016) 233 Past and Present 269-270.
[31] Isabel Buchanan, Alison Pratt and Brigid Francis-Devine, 'Women and the UK Economy' <https://researchbriefings.files.parliament.uk/documents/SN06838/SN06838.pdf> accessed 16 July 2023 6.
[32] Gemma Mitchell, 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (2019) 41 Journal of Social Welfare and Family Law 408; Nicole Busby, The Evolution of Gender Equality and Related Employment Policies: The Case of Work–Family Reconciliation' (2018) 18 International Journal of Discrimination and the Law 106.
[33] ibid.
[34] David Coates, *Capitalism: The Basics* (Routledge 2016) 126.
[35] Kamp Dush, Yavorsky and Schoppe-Sullivan (n 17).
[36] Medora Barnes, 'Gender Differentiation in Paid and Unpaid Work During the Transition to Parenthood' (2015) 9 Sociology Compass 348.
[37] Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge-Cavendish 2011) 107.
[38] Women and Equalities Committee, *Pregnancy and Maternity Discrimination* (HC 2016-17, 90) para 26.
[39] ibid.

experience a “motherhood pay penalty”, which is term that describes the occurrence of mothers earning less than their female counterparts without children.[40] Benard and Correll contend that many employers uphold the conscious or subconscious belief that successful employees should embody masculine traits such as that of assertiveness or dominance.[41] However, the characteristics shown by mothers of being nurturing or warm are found to be culturally inconsistent with the workplace[42] and that women who engage in paid work are likely untrustworthy, selfish or cold because they are acting outside of the societally perceived concept of good mothering.[43] As a consequence, mothers are viewed as weak and uncommitted employees because of their need to fulfil childcare responsibilities alongside workplace tasks and are habitually denied job opportunities, higher salaries and promotions.[44]

Legal attempts have been made to protect the position of mothers in the workplace. For instance, the Employment Protection Act 1975 first provided 3 important statutory maternity rights which were the right to maternity pay, the right to return to work after pregnancy or childbirth and the right against unfair dismissal.[45] The Employment Act 1980 further extended the Employment Protection Act 1975 and included the right to take time off work to attend antenatal appointments.[46] The UK membership of the European Union (EU) strongly influenced a change in employment law to address the issue of cultivating a work-family balance for parents through the implementation of European directives.[47] For example, the domestic incorporation of the Pregnant Workers’ Directive 1992[48] under the Trade Union Reform and Employment Rights Act 1993[49] increased the minimum length of maternity leave to 14 weeks and provided increased protection against dismissal on the grounds of pregnancy or childbirth.[50] When the Labour government came into power in 1997, a greater focus was placed on introducing “family-friendly” measures that helped employees cultivate a work-family balance.[51] Since then, maternity rights has substantially expanded.[52] Mothers are currently allocated 52 weeks of maternity leave from the start of employment.[53] They receive

[40] Trades Union Congress, 'The Motherhood Pay Penalty' (Trades Union Congress 2016) 2.
[41] Stephen Benard and Shelley Correll, 'Normative Discrimination and the Motherhood Penalty' (2010) 24 Gender & Society 617.
[42] ibid.
[43] ibid.
[44] ibid.
[45] Ian Smith and Aaron Baker, *Smith & Wood’s Employment Law* (12th edn, Oxford University Press 2015) 272; Employment Protection Act 1975, ss.34, 36, 48.
[46] Smith and Baker (n 45); Employment Act 1980, s.13.
[47] Joanne Conaghan, ‘Women, Work, and Family: A British Revolution?’ in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), Labour Law in an Era of Globalization: Transformative Practices and Possibilities (Oxford University Press 2004) 59.
[48] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 348/1 (Pregnant Workers’ Directive).
[49] David Cabrelli, *Employment Law in Context* (4th edn, Oxford University Press 2020) 318.
[50] Smith and Baker (n 45) 273; Trade Union Reform and Employment Rights Act 1993, ss.23-24.
[51] Smith and Baker (n 45) 271; Government of the United Kingdom, *Fairness at Work* (Cm 3968, 1998) 55.
[52] Roberta Guerrina, *Mothering the Union: Gender Politics in the EU* (Manchester University Press 2005) 139.
[53] The Maternity and Parental Leave (Amendment) Regulations 2002, reg.8; The Maternity and Parental Leave etc. Regulations 1999, reg.4.

39 weeks of pay and, if ineligible, can access state maternity allowance.[54] Moreover, "pregnancy and maternity" is recognised as a separate protected characteristic under s.4 of the EA 2010, which pregnant women and mothers can rely upon to tackle the specific discriminatory practices directed against them.

Although there have been some improvements in strengthening the position of women in the workforce,[55] there has been a significant increase in the reported rates of pregnancy discrimination within the past decade.[56] The development of maternity rights has not seemingly tackled, as Krapf describes, the 'double burden of family and work'[57] placed upon women. The interrelationship between mothers and fathers has often been ignored in policymaking decisions, as an obvious way in which to alleviate the disproportionate level of childcare given to mothers is to alter the law to support the equal sharing of these responsibilities with fathers. At present, equally shared childcare between mothers and fathers has been difficult to achieve since the sole father-only entitlement allocated to men in the UK is 2 weeks of paid paternity leave.[58] Busby and Weldon-Johns purport that the traditional role of fatherhood tends to dominate policy discussions and that there is minimal serious discussion about how to support the role of men in the context of parenting.[59]

The changing role of fatherhood has largely not been considered by policymakers. Margaria identifies 3 models of fatherhood: "conventional fatherhood"; "fragmenting fatherhood" and "new fatherhood".[60] The model of "conventional fatherhood" perceives fathers as the family breadwinner who undertakes minimal childcare responsibilities.[61] "Fragmenting fatherhood" is a model that has developed to acknowledge the wider changes to the family structure that has societally evolved wherein the conventional paternal features is split between 2 or more individuals.[62] The model recognises the proliferation of non-traditional families in which children might be cared for in more than 1 household and children could establish bonds with 2 or more father figures.[63] Margaria underlines that the concept of good fathering has gradually evolved to adhere to the model of "new fatherhood".[64] This model signifies a combination of the conventional characteristics of fatherhood, such as economic breadwinning, with an active engagement in childrearing.[65] Modern fathers in the UK have shown an increasing interest in actively participating in childcare that reflects the features of

[54] Social Security Contributions and Benefits Act 1992, s.35, s.166; The Social Security Benefits Up-rating Order 2022, art.10.
[55] Sylvia Walby, 'Transformations of the Gendered Political Economy: Changes in Women's Employment in the United Kingdom' (1999) 4 New Political Economy 196.
[56] Women and Equalities Committee, *Pregnancy and Maternity Discrimination* (n 38).
[57] Krapf (n 1).
[58] The Paternity and Adoption Leave Regulations 2002, reg.5; The Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002, reg.2; The Social Security Benefits Up-rating Order 2022, art.11.
[59] Nicole Busby and Michelle Weldon-Johns, 'Fathers as Carers in UK Law and Policy: Dominant Ideologies and Lived Experience' (2019) 41 Journal of Social Welfare and Family Law 283.
[60] Alice Margaria, *The Construction of Fatherhood* (Cambridge University Press 2019) 13.
[61] ibid 13-14.
[62] ibid 14-15.
[63] ibid 15.
[64] ibid 15-16.
[65] ibid 15-16.

"fragmenting fatherhood" and "new fatherhood", but the current legislation does little to support the needs of modern fathers.[66]

Without the legal support and protection of the position of fathers in childcare, fathers struggle to bond with, and care for, their children. Furthermore, the primary allocation of childcare responsibilities to mothers contributes towards their experiences of discrimination since they have to make use of leave entitlements more frequently than fathers. Barnett rightly opines that the assumption that work-family issues are women's issues should be called into question.[67] I acknowledge that mothers and fathers do not experience identical forms of discrimination since they are not identically situated. Mothers can experience discrimination because they need to use entitlements more often than fathers due to the societal expectation that they should be the primary carer of their children and typically need time to recover from the physical aspects of pregnancy and childbirth. However, fathers can experience discrimination because leave entitlements facilitate an increasingly outdated, conventional model of fatherhood that views men as secondary parents to women and limits their ability to actively participate in childcare. As I will further detail in Section III of Chapter 3, these differences in the experiences of discrimination for mothers and fathers are important to retain in the pursuit of substantive equality. My research underlines that work-family issues are also encountered by fathers and that their limited participation in childcare can be attributed to the lesser treatment of them under law and in society. My thesis advocates that one tool to tackle the mistreatment of fathers is to reconceptualise it as paternity discrimination, which needs to be particularly tackled by the EA 2010 and the HRA 1998. Such legal reform would also promote the equality of women since the increased participation of men in childrearing would help to alleviate the "double burden" of workplace and familial obligations currently placed upon women.[68] The specific recognition of paternity discrimination by equality law would help to promote gender equality within the context of parenting that would benefit fathers and mothers.

III. RESEARCH QUESTIONS AND THESIS OVERVIEW

My thesis aims to answer the following 3 primary research questions:

(i) What is paternity discrimination?
(ii) Does the current state of equality legislation provide fathers with adequate legal protection from paternity discrimination?
(iii) How can we increase the legal protection provided to fathers through the inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998?

[66] Women and Equalities Committee, *Fathers and the Workplace* (HC 2017-19, 358) paras 1, 4; *Shuter* (n 5); *Ali v Capita* and *Hextall* (n 5); *Price* (n 5).
[67] Rosalind Chait Barnett, 'Work-Family Balance' in Judith Worell (ed), *Encyclopedia of Women and Gender: Sex Similarities and Differences and the Impact of Society on Gender: Volume 2* (Academic Press 2001) 1182.
[68] Krapf (n 1).

The objective of each thesis chapter is to provide evidence to support the addition of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Each chapter will provide evidence to support the argument that the EA 2010 and the HRA 1998 need to protect fathers by effectively countering the stigmatisation of men who perform care work. Chapters 2 and 3 serve to answer the first research question. Chapter 2 will demonstrate how the differential treatment of mothers and fathers under employment law, the court system, and the culture inside and outside of the workplace stigmatises and marginalises fathers in caring roles. This chapter will also detail how the promotion of the equality of fathers in childcare will consequently promote the equality of mothers in the workplace due to its encouragement of equally shared childcare responsibilities between mothers and fathers. Chapter 3 will reconceptualise the lesser treatment of fathers as a form of paternity discrimination. Chapter 3 will conclude that the response of the court system towards the discrimination claims made by fathers undertakes a formal equality approach. The use of formal equality prevents adequate recognition of paternity discrimination. Chapter 3 will instead uphold that a substantive equality approach would better redress the paternity discrimination perpetuated against fathers.

Chapters 4 and 5 aim to answer the second research question. Chapter 4 will discuss how the current state of the EA 2010 and the HRA 1998 is insufficient for fathers to rely upon to adequately combat the discrimination that they experience. Chapter 4 will particularly focus upon the issues arising from the reliance by fathers in the court system on "sex" as a protected characteristic under s.4 of the EA 2010 to counter paternity discrimination.[69] Case law that is analysed in Section VI of Chapter 2 will demonstrate that the reliance upon "sex" as a protected characteristic under s.4 of the EA 2010 by fathers to combat discrimination has been unable to offer fathers adequate redress. Chapter 4 will evaluate landmark judgments made within America, Canada, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) to illustrate the limited protection "sex" as a ground of discrimination has historically offered certain minority and marginalised groups. Additionally, Chapter 4 will explore how the historically limited protection offered by "sex" as a ground of discrimination has led to the inclusion of other grounds of discrimination to counter the specific discriminatory practices perpetuated against some of these groups. The analysis undertaken in Chapter 4 will provide evidence of the limited protection that "sex" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA similarly provide to fathers experiencing discrimination. Chapter 4 will conclude that "paternity" needs to be included as a protected characteristic and a ground of discrimination in order to counter the specific discriminatory practices directed against fathers.

Chapter 5 will demonstrate the international and comparative approach in providing legal protection for fathers and will seek to acquire knowledge that could be beneficial for the development of the law in Britain and the UK. This chapter will provide explanation of the amalgamated equality and employment law approach currently introduced by Sweden to

[69] *Shuter* (n 5); *Ali v Capita* and *Hextall* (n 5); *Price* (n 5).

combat parental discrimination. Chapter 5 will critique the successes and shortcomings of the approach in being able to effectively counter all instances of paternity discrimination. Chapter 5 will also analyse the approach adopted by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[70] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[71] towards paternity discrimination. This chapter will underline that the current outlook adopted internationally regarding the protection of the position of fathers in childcare under equality legislation is that the development of paternity rights is largely viewed as a function of promoting women's equality. Chapter 5 will conclude that, if the equality legislation in Britain and the UK followed the current equality approach adopted internationally, fathers will continue to experience stigmatisation as carers and struggle to actively participate in childcare.

Chapter 6 will answer the final research question. Chapter 6 will make a positive case on how to include "paternity" as a protected characteristic under s.4 of the EA 2010 and as a ground of discrimination under art.14 of the HRA 1998. This chapter will explore the relevant jurisprudence regarding the previous inclusion of protected characteristics under s.4 of the EA 2010 and grounds of discrimination interpreted within the ambit of the term "other status" under art.14 of the HRA 1998. The aim of Chapter 6 will be to gather evidence to demonstrate the process which needs to be followed to include "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Chapter 6 will conclude that a legislative amendment is necessary to include "paternity" as a protected characteristic under s.4 of the EA 2010. However, a successful legislative amendment to the EA 2010 is fairly difficult to introduce and the few legislative amendments that have been previously successful have been because of a huge level of political and social support. This chapter will also discuss the conceptual uncertainty surrounding the legal test to interpret new grounds of discrimination within the meaning of the term "other status" under art.14 of the HRA 1998. A ground of discrimination will gain recognition under art.14 of the HRA 1998 if the ground is strictly or loosely viewed as a personal characteristic. Due to the flexible nature of the legal test, Chapter 6 will underline that "paternity" would be highly likely to be accepted as a ground of discrimination within the meaning of the term "other status" under art.14 of the HRA 1998.

Lastly, Chapter 7 will present the conclusion of my thesis. This chapter will provide a summary of the research conducted in each chapter of my thesis. In addition, Chapter 7 will discuss the thesis limitations, the future research implications that need to be further investigated and the policy implications of including "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Chapter 7 will outline that the main argument of my thesis is that fathers belong to a marginalised group in society who experience paternity discrimination when attempting to actively participate in childcare. Chapter 7 will determine that a significant way to tackle the

[70] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).
[71] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

issue of paternity discrimination is to protect the position of fathers in childcare under the EA 2010 and the HRA 1998.

IV. METHODOLOGY

My thesis undertakes a secondary data analysis, where I have used existing data to answer my 3 primary research questions. I largely present a doctrinal legal and policy analysis of the current state of the law to show how Britain and the UK does not adequately support or protect the position of fathers in childcare. As Hutchinson acknowledges, doctrinal analysis lies at the core of legal research[72] since the methodology generally consists of finding answers to legal questions by analysing existing case law, legislation, legal institutions, and commentary on these sources within literature.[73] However, my thesis also contains sociolegal elements because my research focuses on how equality law in Britain and the UK has provided minimal legal protection against the societal disadvantage experienced by fathers who are actively involved in childcare. Darian-Smith explains that the primary objective of sociolegal scholarship is to better understand the social, cultural, political, and economic contexts in which law operates in practice in the hopes of making law more widely equitable and just.[74] Sociolegal research studies the 'gap between law… and law in action as it plays out among and between peoples, places, histories, and institutions.'[75] Yet, Cownie and Bradney rightly note that the boundary between socio-legal and doctrinal research is not clear-cut.[76] My research is primarily doctrinal with some socio-legal elements, as my thesis strongly evaluates the surrounding case law, legislation and secondary literature in order to provide evidence on how the law currently perpetuates the discrimination of fathers and how equality law could be altered to better protect fathers from social inequality.

I have also specifically relied upon various methodological approaches to conduct the research presented in some of my thesis chapters. In Chapter 3, I have detailed how the application of the theory of formal equality by the court system in England and Wales to discrimination claims introduced by fathers has been insufficient at successfully combating their experiences of mistreatment. Formal equality entails an Aristotelian approach[77] 'comparing like with like'[78] wherein a relevant comparator is relied upon to establish

[72] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor & Francis 2013) 13.
[73] S. N. Jain, 'Doctrinal and Non-Doctrinal Legal Research' (1982) 24 Journal of the Indian Law Institute 341; Marnix Snel, 'Source-Usage within Doctrinal Legal Inquiry: Choices, Problems, and Challenges' (2014) Law and Method 2.
[74] Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge University Press 2013) 2.
[75] ibid.
[76] Fiona Cownie and Anthony Bradney, 'Socio-legal Studies' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor & Francis 2013) 47.
[77] Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2005) 25.
[78] Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 1477.

discrimination between discriminated and non-discriminated groups.[79] Under formal equality, any inconsistent treatment found between groups deemed identically situated will be sufficient evidence to establish discrimination.[80]

Chapter 3 instead advocated that the theory of substantive equality needed to be implemented to effectively recognise and redress instances of paternity discrimination. Substantive equality aims to tackle the historical disadvantage perpetuated by social hierarchies towards individuals belonging to marginalised or minority groups.[81] I acknowledge that the modern-day definition of substantive equality is currently vague, and that the terminology used to describe the equality theory is often of a vacuous nature.[82] I have instead used Fredman's 4-dimensional definition of substantive equality, which has condensed the theory to 4 dimensions which are more practical to apply.[83] The 4 dimensions include: (i) redistribution; (ii) recognition; (iii) participation; and (iv) transformation.[84] The redistributive dimension focuses upon dismantling the disadvantage perpetuated against minority and marginalised groups under hierarchical social structures.[85] The recognition dimension aims to eliminate the stigma, stereotyping and violence perpetrated against individuals based upon gender, sexual orientation, disability, race or any other status.[86] The participative dimension intends to enhance the voice and participation of minority and marginalised groups that have typically faced social exclusion.[87] Lastly, the transformative dimension aims to modify existing social structures to create an environment that accommodates for the needs of marginalised and minority groups.[88]

I have additionally undertaken a comparative legal methodology to demonstrate the weaknesses of the practical application of formal equality and the strengths of substantive equality in the court system. Section II of Chapter 3 investigates the formal equality lens adopted by the CJEU and the substantive equality lens that has been increasingly favoured as a means of interpretation by the ECtHR[89] and the CJEU in later case law.[90] I have examined the CJEU jurisprudence since the current stance adopted by the courts in England and Wales in recent case law on fathers' experiences of discrimination is heavily influenced by the judgment of *Ulrich Hofmann v Barmer Ersatzkasse*.[91] In *Hofmann*, the CJEU ruled that the

[79] Oddný Árnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights,* (Kluwer Law International 2003) 23.
[80] Anne Smith and Rory O'Connell, 'Transition, Equality and Non-Discrimination' in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights* (Cambridge University Press 2011) 189.
[81] Joanna Radbord, 'Equality and the Law of Custody and Access' (2004) 6 Journal of the Association for Research on Mothering 29.
[82] Colm O'Cinneide, 'Completing the Picture: The Complex Relationship Between EU Anti-Discrimination Law and 'Social Europe'' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 135.
[83] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 713.
[84] ibid 728-734.
[85] ibid 728-730.
[86] ibid 730-731.
[87] ibid 731-732.
[88] ibid 732-734.
[89] Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law* (Routledge 2015) 50.
[90] Thomas Giegerich, The European Union as Protector and Promoter of Equality (Springer Nature 2020) 265.
[91] C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1986] 1 C.M.L.R. 242 (hereafter *Hofmann*).

denial of a request by a father to gain access to an optional period of maternity leave that was granted to mothers 8 weeks post-birth was not discrimination.[92] The legal reasoning in *Hofmann* was cited in the recent cases in England and Wales on fathers' experiences of discrimination to justify the differential treatment of fathers.[93] Furthermore, s.6 of the European Union (Withdrawal) Act 2018 has stipulated that the UK courts may pay some regard to any relevant decisions made by the CJEU after the departure of the UK from the EU. I have also analysed the ECtHR jurisprudence, as the HRA 1998 incorporates the ECHR into UK law[94] and, the UK courts must take into account any judgments, decisions, declarations or advisory opinions made by the ECtHR under s.2(1)(a) of the HRA 1998.

Siems explains that a comparative methodology can be highly beneficial in displaying how effective different legal rules are in addressing a particular problem.[95] Griffiths similarly contends that the examination of 2 or more legal systems in order to uncover common patterns and distinctions under a comparative method has been seen as a powerful tool to humanist study.[96] Although there are several different types of comparative methodologies, the type of comparative analysis that will be undertaken in Chapter 3 relies on the "functional method".[97] Van Hoecke describes functionalism as 'look[ing] at the way practical problems of solving conflicts of interest are dealt with in different societies according to different legal systems.'[98] The functional method recognises that there are societal problems that exist in most societies and that different jurisdictions have introduced similar or identical pieces of legislation to help resolve these issues.[99] Examples of these societal problems include how the law can resolve issues relating to accidents, theft and murder.[100] The methodology investigates how effectively different types of laws address these societal problems.[101]

However, the comparative functional method has been critiqued for its limitations. First, Michaels portrays the methodology as a triple misnomer since there is not 1 functional method that can be applied, not every application of the functional method is "functional" and research that has claimed adherence to the functional method has not seemingly followed any recognisable method.[102] Michaels explains that functionalism serves a multitude of different goals, which include understanding the law, comparing legal systems, determining the 'better law', unifying law and critically appraising the law.[103] Second, Landman notes that the 'most difficult objective of comparative politics is…to make predictions about outcomes in other countries based on the generalizations from the initial comparison.'[104] Landman

[92] ibid paras 2-4, 25-29.
[93] *Shuter* (n 5) [38]; *Ali v Capita* and *Hextall* (n 5) [45]-[46]; *Price* (n 5) [34].
[94] Kitterman (n 3).
[95] Mathias Siems, Comparative Law (3rd edn, Cambridge University Press 2022) 4.
[96] Devin Griffiths, 'The Comparative Method and the History of the Modern Humanities' (2017) 2 History of Humanities 474, 478.
[97] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 8-9.
[98] ibid 9.
[99] ibid 9-10.
[100] ibid 9-10.
[101] ibid 10.
[102] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press 2006) 342.
[103] ibid 364-380.
[104] Todd Landman, *Issues and Methods in Comparative Politics: An Introduction* (2nd edn, Routledge 2003) 10.

further underlines that '[p]rediction in comparative politics tends to be made in probabilistic terms.'[105] Van Hoecke notes that functionalism makes the implicit assumption that societal problems are experienced in the same manner everywhere, but not all jurisdictions worldwide will encounter the same problems due to their different historical and socio-economic backgrounds.[106] Additionally, different types of law can generate similar solutions.[107]

Nevertheless, McCrudden states that one of the common underlying purposes as to why a comparative method is appropriate is because of the concept of "theory- (or model-) building".[108] The theory involves a methodology wherein 'comparison is used as a method of generating a category from particulars (model building).'[109] McCrudden cites the European Commission as a practical example of adopting a comparative methodology for this purpose, as the European Commission compiles information about the practices that each member state carries out with regards to a particular issue so that similarities and differences can be identified.[110] The comparative analysis methodology provides the European Commission with the knowledge that, where there are differences, difficulties may be present in achieving a particular aim and allows a strategy to be developed to accomplish an assumed objective.[111] Likewise, Darian-Smith asserts that the discussion of human rights related matters in comparative terms is particularly helpful in investigating the effectiveness of human rights initiatives.[112] In light of the objective of Chapter 3 being to compare the approaches undertaken by the ECtHR and the CJEU to the courts in England and Wales to demonstrate how the application of substantive equality would help to effectively combat paternity discrimination, the functional comparative method is the most suitable to use to achieve this goal.

In Chapter 4, I have used Cabrelli's 2-part thematic observation to show how the current reliance upon "sex" as a protected characteristic under s.4 of the EA 2010 in discrimination claims made by fathers has resulted in a lack of success in the court system and the provision of limited legal protection. Cabrelli's theory observes that 8 of the 9 protected characteristics contained under s.4 of the EA 2010 are interlinked on the basis of a recurring 2-part thematic pattern.[113] He acknowledges that the protected characteristic of "disability" is an exception to being developed as a product of the thematic pattern,[114] as the protected characteristic is typically supplementary to mainstream equality legislation surrounding disability rights.[115] Cabrelli describes the recurring 2-part thematic pattern as: (i) a "boundary dispute"; and (ii)

[105] ibid.
[106] Van Hoecke (n 97) 10.
[107] ibid 11.
[108] Christopher McCrudden, 'What Does it Mean to Compare, and What Should it Mean?' in Samantha Besson, Lukas Heckendorn Urscheler, and Samuel Jubé (eds) *Comparing Comparative Law* (Schulthess Editions Romandes 2017) 72.
[109] ibid 75.
[110] ibid 76.
[111] ibid 76.
[112] Darian-Smith (n 74) 267.
[113] Cabrelli (n 49) 421.
[114] ibid.
[115] ibid 474.

the "spin out."[116] Case law has largely shown that certain marginalised and minority groups have not been provided with an adequate level of legal protection within equality legislation. A "boundary dispute" would occur between the ground which these groups would rely upon and the ground which named the specific type of discrimination that they had experienced.[117] Due to the social, political and cultural pressures generated by members of marginalised and minority groups, particularly within the court system,[118] the "boundary dispute" gave rise to the "spin out."[119] The "spin out" entailed the addition of a new protected characteristic which adequately identified and tackled the specific discriminatory practices perpetuated against some of these societal groups.[120]

In addition to the original contribution of my thesis reconceptualising the lesser treatment of fathers as paternity discrimination, my thesis makes a second original contribution by developing Cabrelli's theory. I recognise that the sole focus of Cabrelli's observation is the development of the protected characteristics under s.4 of the EA 2010. However, I will illustrate how the jurisprudence in other jurisdictions indicates that this theory is similarly followed wherein a "boundary dispute" would occur between a ground relied upon by a member of a marginalised and minority group in a discrimination claim and the ground which would specifically name the type of discrimination that they have experienced. Following the "boundary dispute", a "spin out" would occur in which these jurisdictions would introduce other pieces of equality legislation which would provide specific legal protection over these marginalised and minority groups.

Akin to Chapter 3, Chapter 4 uses a functional comparative method to show how the limited legal protection provided to fathers through the reliance on "sex" as a protected characteristic under s.4 of the EA 2010 in discrimination claims has been similarly experienced by certain marginalised and minority groups. Chapter 4 will show how jurisprudence in various jurisdictions has shown evidence of Cabrelli's 2-part thematic observation and prompted the introduction of equality legislation that specifically aimed to protect these societal groups. The groups that will be focused on in Chapter 4 will be pregnant women, mothers, people of a queer sexual orientation and members of the trans community. Case law on the discrimination of these societal groups have exposed the limited legal protection offered by the legal prohibition of sex discrimination. The discrimination claims introduced by these societal groups have shown the need, and prompted the introduction, of newer pieces of equality law that identified and tackled the specific practices of discrimination directed against them. A comparison has been drawn between fathers and pregnant women, mothers, people of a queer sexual orientation and members of the trans community to provide evidence that the successes associated with the implementation of stronger equality legislation for each of these groups within Britain, the UK and other jurisdictions will be similarly mirrored for fathers. Fathers would greatly benefit from the development of equality law being inclusive

[116] ibid 421-422.
[117] ibid 421-422.
[118] ibid 421-427.
[119] ibid 421-422.
[120] ibid 421-422.

of combatting paternity discrimination, rather than continuing to unsuccessfully rely upon the legal prohibition of sex discrimination.

Case law highlighting the discrimination of pregnant women, mothers, people of a queer sexual orientation and members of the trans community from America, Canada, the CJEU and the ECtHR will be analysed in Chapter 4. As I have previously explained, I have studied the CJEU jurisprudence because the legal reasoning from the CJEU case of *Hofmann* has been heavily influential in justifying the differential treatment of mothers and fathers in case law in England and Wales.[121] Additionally, under s.6 of the European Union (Withdrawal) Act 2018, the UK courts may pay some regard to any relevant decisions made by the CJEU after the departure of the UK from the EU. Likewise, I have explored the ECtHR jurisprudence since the HRA 1998 incorporates the ECHR in the UK and the courts must take into account any judgments, decisions, declarations or advisory opinions made by the ECtHR under s.2(1)(a) of the HRA 1998.

Although I have chosen to examine American and Canadian case law since their jurisprudence provides evidence on how equality law which specifically protects certain minority and marginalised groups is more effective, I understand that their legal systems are not identical to the legal system in England and Wales. Cotterrell notes that the concept of legal culture has become prominent in comparative legal research.[122] He explains that the theory of legal culture purports that the law should be recognised as embedded in a broader culture of some kind, which Cotterrell describes as a general consciousness or experience of the law that is shared by those who inhabit a specific legal environment such as a particular region, nation, or a group of nations.[123] Husa recognises that many comparativists use the concept of legal culture and legal tradition synonymously.[124] For example, Glenn prefers the use of legal tradition as a conceptual tool and describes the theory as a 'loose conglomeration of data, organized around a basic theme or themes.'[125] Glenn has further pinpointed 7 transnational legal traditions, which include chthonic law, Talmudic law, civil law, Islamic law, common law, Hindu law, and Asian law.[126]

The legal system in England and Wales abides by a common law system wherein many of our primary legal principles have been developed by judges in case law.[127] Darbyshire explains that the common law system in England and Wales has been similarly modelled by America and Canada.[128] Additionally, Darbyshire recognises that law in England and Wales has been influenced by American and Canadian jurisprudence at points because judges in

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[121] *Shuter* (n 5) [38]; *Ali v Capita* and *Hextall* (n 5) [45]-[46]; *Price* (n 5) [34].
[122] Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *Comparative Law* (2nd edn, Oxford University Press 2019) 710.
[123] ibid.
[124] Jaako Husa, 'Legal Culture vs. Legal Tradition – Different Epistemologies?' (2012) Maastricht European Private Law Institute Working Paper 2012/18 < https://ssrn.com/abstract=2179890> accessed 08 July 2023 4.
[125] H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (2nd edn, Oxford University Press 2004) 16.
[126] H. Patrick Glenn, 'Are Legal Traditions Incommensurable?' (2001) 49 The American Journal of Comparative Law 140.
[127] Penny Darbyshire, *Darbyshire on the English Legal System* (9th edn, Sweet & Maxwell 2008) 9. ibid 10-11.
[128] ibid 10-11.

England and Wales have relied upon case precedent in America or Canada in some instances where no precedent existed prior.[129] Despite the similarities between the legal systems established in England and Wales, America, and Canada, the legal culture in these jurisdictions are distinctive to one another. For instance, Heifetz highlights that American legal culture adopts 'a backward-looking, Burkean conservatism.'[130] Heifetz describes Burkean conservatism as the assumption that actions carried out in the past should dictate what actions ought to be undertaken in the future, which he believes undermines the capacity for American legal culture to achieve equality.[131] Yet, Van Hoecke underlines that the functional comparative method may be suitable when comparing countries with a similar historical and socio-economic background.[132] Siems opines that the functional comparative method requires comparability and that the legal systems compared should be at the same stage of political and economic development.[133] Therefore, my thesis adopts a Western-centric focus of analysis since the comparison of the laws of Western countries is advantageous because the stage of development can be controlled, whilst the remaining differences can be explored amongst a baseline of similarity in terms of historical and socio-economic factors.[134]

Similar to Chapters 3 and 4, I have relied on a functional comparative method in Chapter 5 to show the differences between the legal protection for the position of fathers in childcare in Britain and the UK detailed in Chapter 2 and internationally. A comparative analysis will show that an equality law approach is essential in protecting fathers from discrimination and that the benefits associated with an equality law approach can be predicted to be similarly mirrored in Britain and the UK if introduced. Chapter 5 will initially focus on examining the amalgamation of an employment and equality law approach adopted by Sweden wherein legal protection provided under their legal framework is limited to working parents.[135] I have chosen Sweden to be a case study in Chapter 5 because the country has a strong reputation for the development of progressive leave policies. The country was the first to introduce equal access to paid leave for mothers and fathers and has also been commended for introducing an individualised right to a period of well-paid leave for fathers that has successfully increased their participation in childcare.[136] Although Sweden does not adopt a "complete equality" law approach that entails a standalone right to equality for fathers that is not related to an employment relationship that they are in, the comparison between Sweden, Britain and the UK will be made to highlight the benefits of introducing equality legislation that protects fathers. The analysis of Sweden will provide evidence for the argument that the adoption of a "complete equality" law perspective towards paternity rights will help to adequately protect the rights of fathers to participate in childcare.

[129] ibid 11.
[130] Stephen R. Heifetz, 'Blue in the Face: The Bluebook, the Bar Exam, and the Paradox of Our Legal Culture' (1999) 51 Rutgers Law Review 695-6.
[131] ibid.
[132] Van Hoecke (n 97) 10.
[133] Siems (n 95) 33.
[134] ibid.
[135] Parental Leave Act 1995, ss.16-17.
[136] Women and Equalities Committee, *Fathers and the Workplace* (n 66) para 73.

Despite Sweden being a helpful case study to display the advantages of introducing equality law which protects fathers from discrimination, I acknowledge that the legal culture in Sweden is different to the legal culture in England and Wales. In contrast to the common law system in England and Wales, Sweden has a civil law system.[137] The most prominent distinction between the civil and common law systems is that the civil law system is a codified system that derives its main principles and rules from statute, whereas law is primarily developed by case law under common law systems.[138] However, Siems recognises that Western common and civil law countries are not too similar or too different for the purposes of comparison.[139] As I have discussed earlier, the analysis in my thesis undertakes a Western-centric focus because the legal systems in Western countries share a similar historical and socio-economic background.[140] Comparing the laws in Western countries additionally allows for the stage of development to be controlled, whilst the remaining differences in the laws between both jurisdictions can be ascertained.[141]

Chapter 5 will additionally explore key international human rights frameworks which recognise that the right to equality and protection from discrimination is a universal right. First, this chapter will make a comparison between the equality approach undertaken by CEDAW, the UK and Britain. The objective of CEDAW has been to influence States Parties to undertake the appropriate measures which would help to alleviate the effects of gender inequality within the political, social, economic, and cultural realms.[142] However, CEDAW adopts an asymmetric approach to equality by only focusing on enhancing and protecting the societal position of women wherein paternity rights are viewed as a function of women's equality.[143] Despite my agreement that CEDAW needs to adopt an asymmetric approach to counter the discrimination which women experience, the comparison between CEDAW, the UK and Britain has been made to highlight the dangers of introducing an asymmetric approach that excludes the legal protection of fathers under UK and British equality law. Second, this chapter will make a comparison between the equality approach undertaken by the ICESCR, the UK and Britain. The objective of the ICESCR is to reinforce and protect the economic, social and cultural rights of all individuals so that they can be exercised without being subject to discrimination.[144] Although the right to non-discrimination contained under art.2(2) of the ICESCR has been interpreted by the CESCR to conceptualise the refusal to grant paternity leave as sex discrimination, the other treaty provisions have interpreted the strengthening of paternity rights as a function of women's equality and child development. The comparison between the ICESCR, the UK and Britain has been made to show the

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[137] Darbyshire (n 127); Bernard Michael Ortwein II, 'The Swedish Legal System: An Introduction' (2003) 13 Indiana International & Comparative Law Review 406.
[138] Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal' (2001) 155 Poredbeno Pomorsko Pravo 9 -10.
[139] Siems (n 95) 18.
[140] Van Hoecke (n 97) 10.
[141] Siems (n 95) 33.
[142] Judith Resnik, 'Comparative (In)Equalities: CEDAW, The Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production' (2012) 10 International Journal of Constitutional Law 537.
[143] CEDAW, Introduction [3]; CEDAW Committee, 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) HRI/GEN/1/Rev.7 [14].
[144] Robert Hoag, 'International Covenant on Economic, Social, and Cultural Rights' in Deen Chatterjee (ed), *Encyclopedia of Global Justice* (Springer 2011) 546; ICESCR, pmbl. [1], [3].

dangers of wrongly identifying paternity discrimination as sex discrimination and how the mislabelling contributes towards inconsistent and minimal legal protection being provided to fathers.

V. CHALLENGES AND LIMITATIONS

Although my thesis advocates that "paternity" needs to be included as a protected characteristic under s.4 of the EA 2010 and a ground under art.14 of the HRA 1998 to protect fathers from discrimination, I recognise that there are limitations to this proposal for reform. The EA 2010 and the HRA 1998 can be critiqued on whether the current design and interpretation of the Acts adequately protect individuals from discrimination in application. For instance, I acknowledge that the closed list of grounds contained under s.4 of the EA 2010 provides limited protection for individuals in Chapter 6.[145] Hepple explains that equality legislation which contains a closed list of grounds 'treats status inequality as atomised, and restricts legal protection to a defined number of specific characteristics.'[146] The EA 2010 currently protects individuals on the basis of 9 protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.[147] If a person experiences discrimination on the basis of a characteristic outside of the 9 protected characteristics, they cannot initiate a discrimination claim under the Act. The UK Government has explained that the sole recognition of the 9 protected characteristics is because these characteristics are regarded as core and innate aspects of the social identity of an individual and strongly relate to 'what a person is',[148] rather than 'what a person does.'[149]

I also recognise how the design and interpretation of current equality law in Britain and the UK can also be an issue in relation to how my proposal for legal reform would impact different types of families. My thesis largely focuses on how the addition of "paternity" as a protected characteristic and a ground would impact different-sex parent families. As I have further examined in Chapter 2, the addition of "paternity" as a protected characteristic and a ground would help to effectively tackle the mistreatment of fathers in employment law, the workplace, policies outside of the workplace and the court system. Chapter 2 has also demonstrated that the promotion of the equality of fathers in childcare will consequently promote the equality of mothers in the workplace due to its encouragement of equally shared childcare between mothers and fathers. Mothers would experience pregnancy and maternity discrimination to a lesser extent because they would no longer have to be regarded as the primary carer of their children and would not have to exercise leave entitlements as frequently as they currently do.

[145] Malcolm Sargeant, *Discrimination and the Law* (2nd edn, Routledge 2017) 9.
[146] Bob Hepple, *Equality: The Legal Framework* (2nd edn, Hart Publishing 2014) 35.
[147] EA 2010, s.4.
[148] Government of the United Kingdom, The Equality Bill – Government Response to the Consultation (Cm 7454, 2008) 179-180.
[149] ibid.

However, my thesis does not heavily explore how the addition of "paternity" as a protected characteristic and a ground would impact families operating outside of the heterosexual 2-parent unit. I understand that fathers can experience other forms of intersectional discrimination from a product of several of their individual characteristics intersecting one another.[150] For example, fathers who are working class, belong to an ethnic or sexual minority group or are lone parents experience further social barriers which prevent them from gaining the necessary support in childrearing.[151] The addition of "paternity" as a protected characteristic and a ground could provide increased legal protection for all types of fathers and greater recognition of their social marginalisation in childcare. Nevertheless, my thesis does not seek to conflate or categorise the discrimination which fathers in different types of families experience as solely paternity discrimination. In Section III of Chapter 3 and Section IV of Chapter 4, I have included discussion on how gay fathers experience discrimination due to the intersection between their sex, sexual orientation, and parenting status.[152] Additionally, I note that fathers in different types of families will not receive adequate legal protection until intersectional discrimination claims are more widely recognised under the equality legislation in Britain and the UK. In Chapter 6, I have discussed how s.14 of the EA 2010, which prohibits dual discrimination on the basis of 2 protected characteristics, has not been implemented. Similarly, the wording of art.14 of the HRA could have the potential to address intersectional discrimination cases but has not been too sought after.[153]

I am aware that fundamental transformation to the design and interpretation of equality legislation in Britain and the UK needs to be undertaken to strengthen the legal protection provided to those experiencing discrimination. The limitations to the EA 2010 and the HRA 1998 should prompt further radical legal change. Whilst I accept that further research needs to be conducted to explore how the equality legislation in Britain and the UK can be altered and interpreted to effectively protect individuals from discrimination, my thesis adopts a more pragmatic stance in its proposal for reform. The objective of my thesis is not to evaluate how effective the EA 2010 and the HRA 1998 is in protecting individuals from discrimination or to suggest an alternative piece of equality legislation that should be

[150] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 8 University of Chicago Legal Forum 140.

[151] Andrew Behnke and William Allen, 'Beating the Odds: How Ethnically Diverse Fathers Matter' in Joseph White and Sean Brotherson (eds), *Why Fathers Count: The Importance of Fathers and Their Involvement with Children* (Men's Studies Press 2007) 328-329; Jorge Armesto, 'Developmental and Contextual Factors That Influence Gay Fathers' Parental Competence: A Review of the Literature' (2002) 3 Psychology of Men & Masculinity 71; Emanuela Lombardo and Petra Meier, 'Policy' in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press 2016) 616; Margaria (n 59) 130; Graeme Russell, 'Fatherhood in Australia' in Michael Lamb (ed), The Father's Role: Cross-Cultural Perspectives (Why Fathers Count: The Importance of Fathers and Their Involvement with Children (Lawrence Erlbaum Associates 1987) 352.

[152] *Salgueiro Da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 (hereafter *Salgueiro*).

[153] Shrey Atrey, *Intersectional Discrimination* (Oxford University Press 2019) 143; Kristina Koldinská, 'EU Non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma Women in Central and Eastern Europe' in Dagmar Schiek and Anna Lawson (eds), European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination (Routledge 2016) 256.

implemented. The primary focus of my thesis is to propose one way in which current equality law can be reformed to increase the protection of fathers in childcare.

CHAPTER 2: BRIDGING THE GAP BETWEEN PATERNITY RIGHTS AND EQUALITY LAW

I. INTRODUCTION

A comparative study of the parental leave regulations adopted by different European countries found that leave entitlements in the United Kingdom (UK) strongly promoted the gender division of labour established under the traditional "male breadwinner" model.[1] The familial model has been described by McGlynn as a heterosexual 2-parent unit wherein the father is primarily responsible for the provision of the household income and the mother is chiefly responsible for childcare.[2] The issue with this familial model is that it supports the strict separation of men and women into the public and the private sphere respectively.[3] There have previously been strides made to include women into the public sphere, but a similar level of support has not been made to include men into the private sphere.[4] An important example of the lack of legal support provided to fathers is the limited leave entitlements allocated to fathers under the employment legislation in the UK. The Women and Equalities Committee has recognised that the legal framework governing leave entitlements is inefficient at meeting the needs of modern fathers and contemporary families.[5] The Women and Equalities Committee has argued that there are a number of weaknesses found within the employment legislation providing leave entitlements for fathers in the UK.[6] For instance, they have highlighted that the 3 primary weaknesses of the 2 weeks of paternity leave[7] presently provided to fathers are the: (i) strict eligibility requirements; (ii) low levels of replacement pay; and (iii) short-term length.[8] The 2015 policy of shared parental leave, which allows mothers to end their maternity leave early and transfer the remainder of their leave for fathers to utilise,[9] has also been similarly critiqued for requiring maternal permission in order for fathers to access the leave entitlement.[10] However, some of the criticisms made by the Women and Equalities Committee also explain the lack of significant success associated with all of the leave entitlements that have been allocated to fathers. Section II of Chapter 2 will

[1] Rossella Ciccia and Mieke Verloo, 'Parental Leave Regulations and the Persistence of the Male Breadwinner Model' (2012) 22 Journal of European Social Policy 14.
[2] Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) 23.
[3] Alice Eagly, *Sex Differences in Social Behaviour: A Social-Role Interpretation* (Lawrence Erlbaum Associates 1987) 20.
[4] Vicki Coppock, Deena Haydon and Ingrid Richter, *The Illusions of 'Post-Feminism': New Women, Old Myths* (Taylor & Francis 1995) 170.
[5] Women and Equalities Committee, *Fathers and the Workplace* (HC 2017-19, 358) para 1.
[6] ibid paras 36-55.
[7] The Paternity and Adoption Leave Regulations 2002, reg.5.
[8] Women and Equalities Committee, *Fathers and the Workplace* (n 5) paras 41-56.
[9] The Shared Parental Leave Regulations 2014, regs.4-5.
[10] Women and Equalities Committee, *Fathers and the Workplace* (n 5) paras 65-68.

discuss these criticisms in relation to emergency leave, unpaid parental leave, flexible working hours, additional paternity leave and leave to attend antenatal appointments.[11]

Leave entitlements are designed to provide limited support for the active participation of fathers in childcare, which illustrate how fathers are treated as secondary parents to mothers under the employment legislation in the UK. One potential tool to redress the differential treatment of mothers and fathers under employment legislation is through equality legislation. By recognising that fathers experience discrimination, equality legislation can act as a guide for employment legislation to sufficiently accommodate for the childcare responsibilities which mothers and fathers undertake. Although much research has centred upon the difficulties mothers have had in maintaining their position in the workplace,[12] the legal adherence to the traditional "male breadwinner" model has limited fathers from establishing their position in childcare. Mothers consequently have had to largely remain in the home to tend to childcare. The absence of "paternity" as a protected characteristic under s.4 of the Equality Act 2010 (EA 2010) and as a ground of discrimination under art.14 of the Human Rights Act (HRA 1998) has further legally facilitated the social exclusion of men from caring roles in the home and the social exclusion of women from the workplace.

Chapter 2 will argue that the employment legislation in the UK treats fathers as lesser than mothers in relation to childcare. This chapter will also investigate how the differential treatment of mothers and fathers under employment law has further influenced the stigmatisation of men in caring roles in the court system, inside the workplace and outside of the workplace to an extent. Chapter 2 will be divided into the following sections. Section II will discuss the differences in the leave entitlements provided to mothers and fathers under the employment legislation in the UK. Section III will consider how the employment legislation has contributed towards the stigmatisation of men in caring roles in the workplace. Section IV will discuss how the position of fathers in childcare is additionally stigmatised outside of the workplace. Section V will observe the implications of the legal protection of fathers as carers in the home upon the position of mothers in the workplace. Section VI will examine how fathers in the court system have tried and failed to argue that the differential treatment under employment legislation amounts to discrimination. Section VII will conclude that the role of fatherhood is perceived as secondary to motherhood in relation to childcare by employment legislation, the court system, inside the workplace and outside of the workplace. Additionally, Section VII will also underline that the promotion of the equality of fathers in

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[11] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC OJ L 145/4 (Parental Leave Directive 1996), cl.2(1); The Maternity and Parental Leave etc. Regulations 1999, reg.14; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance) OJ L 68/13 (Parental Leave Directive 2010), cl.2(2); The Parental Leave (EU Directive) Regulations 2013, reg.3; The Additional Paternity Leave Regulations 2010, regs.4-5; Work and Families Act 2006, ss.3, 12; The Flexible Working Regulations 2014, reg.3; Employment Act 2002, s.47; Children and Families Act 2014, s.127.

[12] Women and Equalities Committee, *Pregnancy and Maternity Discrimination* (HC 2016-17, 90) paras 26, 31; Trades Union Congress, 'The Motherhood Pay Penalty' (Trades Union Congress 2016) 2-3; Brigid Francis-Devine and Douglas Pyper, *The Gender Pay Gap* (House of Commons Library Briefing Paper 7068) <https://commonslibrary.parliament.uk/research-briefings/sn07068/> 6 April 2022 11; Stephen Benard and Shelley Correll, 'Normative Discrimination and the Motherhood Penalty' (2010) 24 Gender & Society 617.

childcare would support the equal sharing of childcare responsibilities between parents and would consequently promote the equality of mothers in the workplace.

II. PATERNITY RIGHTS AS AN EMPLOYMENT LAW CONCEPTION

The purpose of Section II is to demonstrate the differential treatment of mothers and fathers under the employment legislation in the UK. Mothers are typically allocated stronger leave entitlements, whilst fathers are generally allocated very limited leave entitlements. For example, the policy objectives underpinning paternity leave for fathers in the UK are to: (i) increase the involvement of fathers within childcare; and (ii) increase the rate at which mothers reintegrate themselves into the labour market after childbirth.[13] The policy objectives of paternity leave hold a dual focus on the promotion of the position of fathers as carers in the home and of mothers as employees in the workplace. Similarly, the underlying purposes of maternity leave entitlements are to: (i) promote the protection of maternal and infant health; and (ii) increase the level at which mothers reintegrate themselves into the labour market after pregnancy, childbirth, and maternity leave.[14] The central focus of the purposes of maternity and paternity leave are not primarily concerned with the protection and promotion of the position of fathers in childcare. The purpose of maternity leave is to protect the health of the mother and support her reintegration into the workplace. However, the purpose of paternity leave serves to achieve dual goals of increasing the participation of fathers in childcare so that mothers are further supported in their reintegration into the workplace. Paternity leave is not designed with the sole policy objective of promoting father-child bonding, but also has another policy objective of advancing the position of women in the workplace. The inclusion of men in childcare should be given more weight in the policy objectives underpinning paternity leave in order to truly protect the position, and reinforce the importance, of men in childcare.

The example of the current focal point of maternity leave and paternity leave in the UK being the protection of mothers correspondingly highlights why "pregnancy and maternity" is listed as a protected characteristic under s.4 of the EA 2010 and "paternity" is not. The focus on the protection of mothers ignores how fathers are a marginalised sub-group within men who are not legally supported in fully establishing their position in childcare. The aims of maternity leave and paternity leave expose the perception that the role of fatherhood is viewed as secondary to the role of motherhood with regards to childcare. The purposes of maternity and paternity leave still largely adhere to the parenting roles established under the traditional "male breadwinner" model wherein only mothers are recognised as the primary carers of children.

[13] Women and Equalities Committee, *Fathers and the Workplace* (n 5) paras 7-8.
[14] European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, 'Maternity, Paternity and Parental Leave: Data Related to Duration and Compensation Rates in the European Union' (European Union 2015) 21.

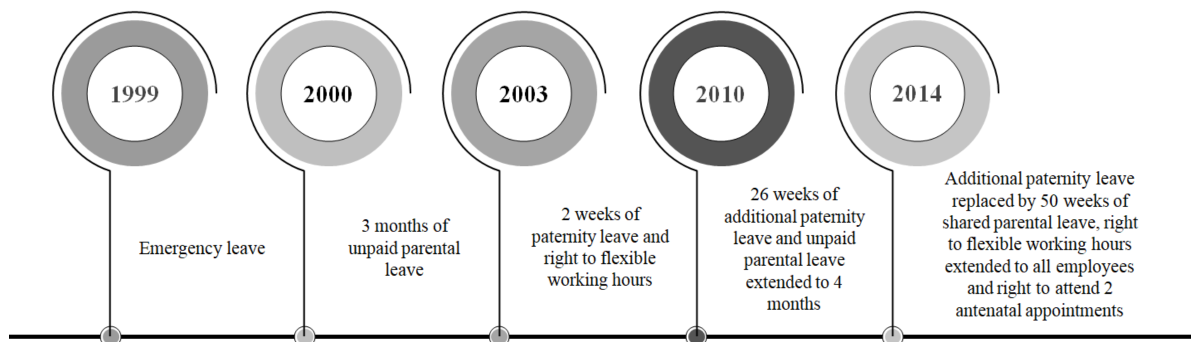

Figure 1: Timeline of Leave Entitlements for Fathers to Use in the UK

As indicated above in Figure 1, a number of leave entitlements have been introduced in the UK to increase the participation of fathers in childcare. However, many of these policies have been relatively unsuccessful. Since the Labour Party was elected to government in 1997, legislation has been introduced to support employed parents so that they can balance their workplace and childcare responsibilities.[15] Although this body of legislation is presently termed work-life balance policies,[16] I will describe these policies as reconciliation legislation similar to Busby and James and Caracciolo di Torella.[17] Reconciliation legislation is defined as a shift from the complete focus being placed upon childcare to an understanding that the body of legislation covers a breadth of policies designed to address possible conflicts between paid work and care.[18] Fathers firstly benefitted from reconciliation legislation in 2000 wherein they were provided with 3 months of unpaid parental leave.[19] In light of the lack of pay, only 3% of parents, which were mostly fathers, used the leave entitlement within its first year of operation.[20] Thereafter, fathers with children under the age of 6 had also been given the right to flexible working hours in 2003,[21] but to date there has been a low uptake by fathers of the entitlement.[22] Fathers were also allocated 2 weeks of paternity leave in 2003.[23]

[15] Gemma Mitchell, 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (2019) 41 Journal of Social Welfare and Family Law 409.
[16] Jane Lewis and Mary Campbell, 'Work/Family Balance Policies in the UK since 1997: A New Departure?' (2007) 36 Journal of Social Policy 365-366.
[17] Nicole Busby and Grace James, 'Introduction' in Nicole Busby and Grace James (eds), *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar Publishing 2011) 4, 8; Eugenia Caracciolo di Torella, 'Is There a Fundamental Right to Reconcile Work and Family Life in the EU?' in Nicole Busby and Grace James (eds), *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar Publishing 2011) 56-59.
[18] Caracciolo di Torella, 'Is There a Fundamental Right to Reconcile Work and Family Life in the EU?' (n 17).
[19] Parental Leave Directive 1996, cl 2(1); The Maternity and Parental Leave etc. Regulations 1999, reg.14.
[20] Jane Lewis, *Work-Family Balance, Gender and Policy* (Edward Elgar Publishing 2009) 169.
[21] The Flexible Working (Procedural Requirements) Regulations 2002, reg.3.
[22] Rose Cook and others, 'Fathers' Perceptions of the Availability of Flexible Working Arrangements: Evidence from the UK' (2021) 35 Work, Employment and Society 1017.
[23] The Paternity and Adoption Leave Regulations 2002, reg.5.

Despite fathers having to satisfy the eligibility requirements of having been in continuous employment for 26 weeks,[24] and the low rate of replacement pay being at 90% of weekly earnings or currently £172.48 (whichever is lower) per week,[25] there was a comparatively substantial uptake by fathers of paternity leave. In 2015, O'Brien et al reported that 49% of fathers used this leave entitlement and 50% of those fathers used the full 2 weeks.[26]

Yet, the success of paternity leave was short-lived as many of the leave entitlements that were subsequently introduced had little uptake from fathers. Unpaid parental leave that was initially introduced in 2000 was extended to 4 months of leave for parents in 2010,[27] but the effectiveness of the leave entitlement in increasing the participation of fathers in childcare was questionable as there was still no provision for replacement pay.[28] Additional paternity leave was also introduced in 2010, which allowed mothers at 20 weeks post-birth to transfer 26 weeks of their maternity leave for fathers to utilise.[29] Only fathers who had been in continuous employment for 26 weeks were eligible for the leave entitlement and would be paid a low statutory rate of replacement pay.[30] Consequently, the take-up rate amongst fathers was minimal, with 0.6% of eligible fathers using the leave entitlement in 2011 and 2012.[31]

Additional paternity leave was later replaced by the Coalition government with shared parental leave in 2014.[32] The leave entitlement allowed mothers who had completed 2 weeks of statutory maternity leave to transfer the remaining 50 weeks of their leave for fathers to use.[33] Again, fathers were only eligible for the leave entitlement if they had been continuously employed for 26 weeks and would be paid the rate of statutory shared parental pay at 90% of weekly earnings or currently £172.48 (whichever is lower) per week.[34] Despite the lengthening of the leave entitlement under shared parental leave being regarded as ostensibly a positive step to recognise mothers and fathers as equally capable of fulfilling childcare responsibilities,[35] the take-up rate amongst fathers was only between 2-8%.[36]

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[24] The Paternity and Adoption Leave Regulations 2002, reg.4.

[25] The Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002, reg.2; The Social Security Benefits Up-rating Order 2023, art.11.

[26] Margaret O'Brien and others, 'The United Kingdom' in Marina Adler and Karl Lenz (eds), *Father Involvement in the Early Years: An International Comparison of Policy and Practice* (Policy Press 2017) 164.

[27] Parental Leave Directive 2010, cl 2(2); The Parental Leave (EU Directive) Regulations 2013, reg.3.

[28] Samantha Currie, 'Unjoined-up Policy Making and Patchy Promotion of Gender Equality: Free Movement and Reconciliation of Work and Family Life in the EU' in Maribel Pascual and Aida Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017) 239.

[29] The Additional Paternity Leave Regulations 2010, regs.4-5; Work and Families Act 2006, s.3.

[30] Eurofound, 'Promoting Uptake of Parental and Paternity Leave among Fathers in the European Union' (Publications Office of the European Union 2015) 5; The Additional Paternity Leave Regulations 2010, regs.4, 36.

[31] Eurofound (n 30).

[32] Simonetta Manfredi, 'Equality and Diversity at Work under the Coalition' in Steve Williams and Peter Scott (eds), *Employment Relations under Coalition Government: The UK Experience, 2010-15* (Routledge 2016) 116; Children and Families Act 2014, s.125; The Shared Parental Leave Regulations 2014.

[33] The Shared Parental Leave Regulations 2014, reg.6; The Maternity and Parental Leave etc. Regulations 1999, reg.8.

[34] The Shared Parental Leave Regulations 2014, regs.5, 35; The Statutory Shared Parental Pay (General) Regulations 2014, reg.40; The Social Security Benefits Up-rating Order 2023, art.11.

[35] Gemma Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (2015) 44 Industrial Law Journal 128.

[36] Women and Equalities Committee, *Fathers and the Workplace* (n 5) para 62.

Moreover, the Coalition government extended the right to flexible working hours to all employees who had been in continuous employment for 26 weeks,[37] but recent data has shown that only 10.6% of fathers have used this entitlement.[38] Furthermore, s.127 of the Children and Families Act 2014 provided fathers with the right to take unpaid leave to attend 2 antenatal appointments. The legislation is commendable for supporting the involvement of fathers during the early stages of pregnancy, as the Fatherhood Institute reported that their 2018 survey indicated that 93.7% of men had attended at least 1 appointment.[39] Conversely, this provision fails to acknowledge or facilitate the long-term responsibility of childcare for fathers.[40] In addition, fathers can access unpaid emergency leave for a reasonable period of time if their child is ill.[41] Nevertheless, the leave does not enable employees to take time off to provide longer-term care, but to take a limited period of time off to arrange alternative care.[42] Despite many pieces of reconciliation legislation having been introduced to support the involvement of fathers during the early stages of pregnancy and to fulfil childcare responsibilities to a degree, the law largely facilitates short-term absences for fathers from paid employment and limits them from being able to actively participate in childcare for extended periods of time.[43]

Although the purposes of leave entitlements were to help parents reconcile work and caring responsibilities[44] and equally share childcare within the first year after childbirth,[45] these policy aims cannot be achieved without introducing leave entitlements which adequately facilitate long-term absences for fathers from paid employment. Anderson has described many leave entitlements which were designed to support the position of fathers in childcare as "sound-bite legislation."[46] This term was explained by Weldon-Johns to describe legislation that had 'all the positive publicity and appearance of a novel and innovative right, but in reality offered little of substance for the majority of working families.'[47] The Women and Equalities Committee has highlighted that the 3 primary weaknesses of paternity leave are the: (i) strict eligibility requirements; (ii) low levels of replacement pay and (iii) short-term length. [48] Additionally, the Women and Equalities Committee critiqued the maternal

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[37] Manfredi (n 32); The Flexible Working Regulations 2014, reg.3; Work and Families Act 2006, s.12; Employment Act 2002, s.47.
[38] Cook and others (n 22).
[39] Nicole Busby and Michelle Weldon-Johns, 'Fathers as Carers in UK Law and Policy: Dominant Ideologies and Lived Experience' (2019) 41 Journal of Social Welfare and Family Law 293; Adrienne Burgess and Rebecca Goldman, 'Who's the Bloke in the Room?: Fathers During Pregnancy and at the Birth in the UK' (Fatherhood Institute 2018) 28.
[40] Busby and Weldon-Johns (n 39) 293-294.
[41] Employment Relations Act 1999, s.8; Employment Rights Act 1996, s.57A.
[42] *Qua v John Ford Morrison Solicitors* [2003] ICR 482 [16]-[18]; Eugenia Caracciolo di Torella, 'New Labour, New Dads—The Impact of Family Friendly Legislation on Fathers' (2007) 36 Industrial Law Journal 321-322.
[43] Busby and Weldon-Johns (n 39) 290.
[44] Home Office, 'Supporting Families: A Consultation Document' (Stationery Office 1998) 24; Government of the United Kingdom, *Fairness at Work* (Cm 3968, 1998) 55.
[45] Women and Equalities Committee, *Fathers and the Workplace* (n 5) para 57.
[46] Lucy Anderson, 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working 'Rights' for Parents' (2003) 32 Industrial Law Journal 41-42.
[47] Michelle Weldon-Johns, 'The Additional Paternity Leave Regulations 2010: A New Dawn or More "Sound-Bite" Legislation?' (2011) 33 Journal of Social Welfare and Family Law 25.
[48] Women and Equalities Committee, *Fathers and the Workplace* (n 5) paras 41-56.

permission fathers must receive to access shared parental leave.[49] Yet, some of the reasons cited by the Women and Equalities Committee offer explanation as to why all of the leave entitlements have not been significantly successful in notably increasing the participation of fathers in childcare. In order to demonstrate the inadequacy of the leave entitlements for fathers, Section II will be divided into the following 4 sub-sections: 1. Strict Eligibility Requirements; 2. Low Levels of Replacement Pay; 3. Short-Term Leave; and 4. Maternal Permission to Access Leave. Each of these sub-sections will provide an explanation detailing how the inefficiency of the employment legislation governing leave entitlements has contributed towards fathers being viewed as secondary parents to mothers in relation to childcare.

1. STRICT ELIGIBILITY REQUIREMENTS

Firstly, fathers have to satisfy strict eligibility requirements to gain access to leave entitlements. Fathers are only entitled to access leave entitlements if they have an established employment status.[50] Currently, paternity leave, shared parental leave and the application to work flexible hours require fathers to have worked continuously for the same employers for 26 weeks.[51] Moreover, fathers are required to have been in continuous employment for a year to access unpaid parental leave.[52] In contrast, mothers can access statutory maternity leave if they satisfy the less stringent eligibility requirement of being an employee.[53] Mothers do not have to be employed for any specific period of time and can access statutory maternity leave as a day-one right from the start of their employment.[54] On the other hand, fathers need to strongly establish a labour market connection before their status as a parent with childcare responsibilities is acknowledged.[55] This was particularly recognised by the Minister for Employment Relations and Consumer Affairs, Jo Swinson, who was responsible for the introduction of shared parental leave.[56] Swinson maintained during the Committee Debates that an eligibility requirement needed to be satisfied for parents to access shared parental leave in order to provide 'employers a greater degree of certainty that any new employee they take on will not immediately be absent from the workplace on shared parental leave.'[57] The need for fathers to have an established employment status places fathers as secondary parents to mothers.[58] Fathers are firstly recognised as workers and only secondly identified as parents. Reconciliation legislation for fathers fails to support those who want to be more actively involved in childcare and do not want to be regarded as secondary parents in relation

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[49] ibid paras 65-68.
[50] Busby and Weldon-Johns (n 39) 290.
[51] The Paternity and Adoption Leave Regulations 2002, reg.4; The Shared Parental Leave Regulations 2014, reg.35; The Flexible Working Regulations 2014, reg. 3.
[52] The Maternity and Parental Leave etc. Regulations 1999, reg.13.
[53] The Maternity and Parental Leave etc. Regulations 1999, reg.4.
[54] The Maternity and Parental Leave etc. Regulations 1999, reg.4.
[55] Busby and Weldon-Johns (n 39) 290.
[56] Rachel Brooks and Paul Hodkinson, *Sharing Care: Equal and Primary Carer Fathers and Early Years Parenting* (Bristol University Press 2021) 65-66.
[57] Committee Debate: 18th Sitting House of Commons, 23 April 2013, col 706.
[58] The Maternity and Parental Leave etc. Regulations 1999, reg.4.

to the fulfilment of care work. Establishing a stricter eligibility requirement for fathers to access leave than mothers creates a structural barrier which obstructs fathers from being able to maintain their position in childcare like mothers.

A key reason behind fathers having to establish a labour market connection is due to the legal facilitation of the traditional "male breadwinner" model wherein the concept of good fathering involves undertaking minimal caring responsibilities and becoming the economic provider.[59] McGlynn describes the familial model as the 'dominant ideology of the family.'[60] The ideology promotes the heterosexual 2-parent unit wherein the traditional role of motherhood primarily encompasses childcare and the traditional role of fatherhood chiefly involves acting as the breadwinner.[61] In present-day society, James elaborates that strict adherence to the familial model can be juxtaposed by the "male-breadwinner/female part-time carer" model in which a departure from the traditional role of motherhood can be noted, but there is very little change in the childcare responsibilities assigned to mothers and fathers.[62] Both household arrangements adhere to the gender division of labour in which men dominate the workplace and women largely preside over tasks relating to childcare and the home.[63]

The care-less conception of fatherhood[64] has been adopted in the creation and design of leave entitlements for fathers. Collier portrays the traditional role of fatherhood as 'a curiously masculine notion of unconnectedness.'[65] Despite fatherhood being stereotyped as an emotionally detached and uncaring role, mothers have been stereotyped as nurturing caretakers.[66] Collier highlights that the societal perception of good fathering by men, women and children consistently includes the adoption of the breadwinner role to some extent.[67] The need for fathers to prove that they have an established employment status in order to access leave entitlements exemplifies the legal facilitation of the concept of good fathering under the traditional "male breadwinner" model. The gender stereotype of fathers being unable to perform care work in the same way that mothers can has informed policy discussions regarding the legal development of leave entitlements.[68] The erection of stricter eligibility requirements for fathers to satisfy incentivises fathers to adhere to the care-less conception of good fathering and largely remain in the workplace to generate higher levels of household income.

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[59] Busby and Weldon-Johns (n 39) 289.
[60] McGlynn (n 2).
[61] ibid.
[62] Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge-Cavendish 2011) 107.
[63] ibid.
[64] Busby and Weldon-Johns (n 39) 287; Jonathan Herring, 'Making Family Law More Careful' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014) 52.
[65] Richard Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)' (2001) 28 Journal of Law and Society 538.
[66] Chris Segrin and Jeanne Flora, *Family Communication* (2nd edn, Routledge, 2011) 160.
[67] Richard Collier, *Men, Law and Gender: Essays on the 'Man' of Law* (Routledge 2010) 148.
[68] Charlie Lewis, 'A Man's Place in the Home: Fathers and Families in the UK' (Joseph Rowntree Foundation 2000) 7.

The Trades Union Congress (TUC) analysed the Labour Force Survey and found that 1 in 4 fathers did not satisfy the eligibility requirements to gain access to paternity leave in 2016.[69] Out of the fathers that were deemed ineligible for paternity leave, 44,000 of the fathers were recognised as ineligible because they had not worked for the same employer for 26 weeks.[70] Eerola et al identified that parental leave policies would achieve greater success if eligibility requirements were removed.[71] The dismantling of eligibility requirements would encourage shared childcare responsibilities between parents and recognise that the care work performed by fathers is not secondary, or of lesser value, than that performed by mothers.

2. LOW LEVELS OF REPLACEMENT PAY

Secondly, fathers have been dissuaded from undertaking leave due to the lack of pay associated with unpaid parental leave and the low level of replacement pay provided to fathers on paternity leave and shared parental leave.[72] Likewise, low-income fathers have been found to not attend antenatal appointments due the lack of replacement pay.[73] Research has not shown that pay has had a significant impact on the use of emergency leave, but parents were found on average to only use 2 days of the entitlement.[74] The statutory rate of pay on paternity leave and shared parental leave is 90% of weekly earnings, or currently £172.48 (whichever is lower) per week.[75] However, mothers are entitled to 90% of weekly earnings for the first 6 weeks, and 90% of weekly earnings, or currently £172.48 (whichever is lower) per week, for the following weeks under statutory maternity leave, for example.[76] If mothers are ineligible for statutory maternity pay, mothers can also access state support through the provision of state maternity allowance.[77] This allowance can be accessed by mothers if a number of scenarios arise, which include having been employed or self-employed for 26 weeks during the 66 weeks prior to the birth of their child, or if the baby is stillborn from the 24th week of pregnancy.[78] James places emphasis upon the fact that the low level of replacement pay for fathers is currently less than the minimum wage.[79] In light of the

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[69] Women and Equalities Committee, *Fathers and the Workplace* (n 5) para 41.
[70] ibid.
[71] Petteri Eerola and others, 'Fathers' Leave Take-Up in Finland: Motivations and Barriers in a Complex Nordic Leave Scheme' (2019) 9 SAGE Open 4.
[72] James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 62); Lewis (n 68); Currie (n 28).
[73] Brooks and Hodkinson (n 56) 71.
[74] Naomi Finch, 'Family Policies in the UK' in Ilona Ostner and Christoph Schmitt (eds), *Family Policies in the Context of Family Change: The Nordic Countries in Comparative Perspective* (Springer 2008) 148.
[75] The Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002, reg.2; The Social Security Benefits Up-rating Order 2023, art.11; The Statutory Shared Parental Pay (General) Regulations 2014, reg.40; The Social Security Benefits Up-rating Order 2023, art.11.
[76] Social Security Contributions and Benefits Act 1992, s.166; The Social Security Benefits Up-rating Order 2023, art.10; The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006, reg.3.
[77] Social Security Contributions and Benefits Act 1992, s.35.
[78] Social Security Contributions and Benefits Act 1992, s.35; Welfare Reform and Pensions Act 1999, s.53; Still-Birth (Definition) Act 1992, s.1.
[79] James, *The Legal Regulation of Pregnancy And Parenting In The Labour Market* (n 62).

gender pay gap,[80] most families rely upon fathers to be the breadwinner and primarily earn the household income.[81] Fathers who are the breadwinner are unable to take leave on such low replacement pay[82] or limit the number of hours they work to flexible working hours, as the costs for childcare necessities, such as clothing and food, still need to be paid for. Shared parental leave, for example, could be beneficial for families where the mothers are the breadwinners or for wealthier families who are in the position to sacrifice wages without experiencing financial hardship.[83] Yet, these make up the minority of families.[84]

Due to the higher replacement pay provided under annual leave, the Women and Equalities Committee reported that 41% of employers in the manufacturing sector identified that fathers took annual leave instead of paternity leave, whereas 7% of employers in the defence sector and public administration found that fathers do the same.[85] Similarly, many couple households with 2 or more children increasingly follow traditional household arrangements.[86] The "male-breadwinner/female part-time carer" model was adopted by 41% of families with 2 children and the "male-breadwinner/female-care-giver" model was adopted by 41% of families with 3 or more children.[87] As childcare responsibilities and costs increase with more children, the strict eligibility requirements and low rate of replacement pay provided to fathers on leave limits them from being able to remain in the home to share caring responsibilities with mothers. The provision of lower financial support for fathers impacts the decision upon whether mothers or fathers stay in the home to tend to childcare. The differences in the level of financial support which mothers and fathers receive promotes adherence to the traditional "male breadwinner" model. Under this familial model, mothers are financially supported to remain in the home to tend to childcare, whilst fathers are provided limited financial support to remain in the home because their role is to be the breadwinner. However, not every 2-parent household wants to share responsibilities as dictated to them under the traditional "male breadwinner" model. Many fathers want to actively participate in childcare and are forced to use other forms of leave to financially support their position in the home and develop their bond with their child.

Guerrina argues that the equality and employment law provisions which protect and promote the reintegration of mothers into the labour market after childbirth are underpinned by the domestic ideology that the participation of women in the labour market is secondary to their role as a wife and a mother.[88] Similarly, the participation of men in childcare is secondary to their role as a breadwinner.[89] The legal adherence to the traditional "male breadwinner" model in the UK queries whether a work-family balance is attainable for parents. Leave

[80] Office for National Statistics, 'Gender Pay Gap in the UK: 2022' (Office for National Statistics) 3-8.
[81] Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (n 35) 130.
[82] ibid 130-131.
[83] ibid 131.
[84] ibid 131.
[85] Women and Equalities Committee, *Fathers and the Workplace* (n 5) para 47.
[86] Bright Horizons and Working Families, 'Modern Families Index' (Working Families 2020), 4.
[87] Bright Horizons and Working Families (n 86); James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 62) 107.
[88] Roberta Guerrina, *Mothering the Union: Gender Politics in the EU* (Manchester University Press 2005) 131.
[89] Ross Parke, *Fatherhood* (Harvard University Press 1996) 1.

entitlements in the UK are designed in a manner in which 1 parent is tasked with the fulfilment of childcare responsibilities, whilst the other parent focuses upon the completion of workplace tasks. Despite replacement pay being given to fathers on 2 weeks of paternity leave,[90] mothers are paid for 39 weeks of maternity leave.[91] Mothers receive pay for 37 weeks more than fathers to undertake childcare. Additionally, only mothers receive other forms of state support if they are deemed ineligible for maternity leave, which further protects their position in childcare.[92] The introduction of paternity leave has satisfied the first underlying policy objective of the UK Government to increase the participation of fathers in childcare. Conversely, paternity leave could be viewed as tokenistic because the length of the leave entitlement is short and the replacement pay is low. The increased involvement of fathers in care work is to a limited extent, as the legal framework governing paternity rights does not allow fathers to firmly establish their position in childcare.

Income related leave would practically incentivise fathers to take leave, as they would not have to sacrifice their wages or experience financial hardship to do so.[93] One of the reasons for the high take-up rates of parental leave by fathers in Scandinavian countries is due to the high replacement pay.[94] For example, the replacement pay awarded under parental leave in Sweden is roughly 80%[95] and collective agreements have resulted in top-ups which can provide up to 90% of replacement pay.[96] However, the current legal framework governing leave entitlements in the UK does not provide adequate financial support for fathers to assume childcare, as only mothers are stereotyped to be nurturing.[97] Unlike fathers, the fulfilment of caring responsibilities by mothers is perceived as instinctive and natural.[98] The low levels of replacement pay provided to fathers only serves to undervalue the caring responsibilities fulfilled by them. Fathers have formerly explained that they should be able to access enhanced pay because childcare is a gender-neutral responsibility[99] and that awarding differential pay to fathers places them in a weaker financial position to mothers to undertake primary responsibility for childcare.[100] Yet, the court system, as will be further discussed in Section VI, has not interpreted that the higher remuneration for the care work performed by

[90] The Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002, reg.2; The Social Security Benefits Up-rating Order 2023, art.11.
[91] Social Security Contributions and Benefits Act 1992, s.166; The Social Security Benefits Up-rating Order 2023, art.10.
[92] Social Security Contributions and Benefits Act 1992, s.35.
[93] Lewis and Campbell (n 16) 14.
[94] Grace James, 'Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities' (2009) 31 Journal of Social Welfare and Family Law 271, 276; Rangita de Silva de Alwis, 'Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation' (2011) 18 Duke Journal of Gender Law and Policy 305, 326.
[95] Social Insurance Code 2010, ch.25, s.5.
[96] Ann-Zofie Duvander and others, 'Income Loss and Leave Taking: Increased Financial Benefits and Fathers' Parental Leave Use in Sweden' (published online ahead of print 13 June 2022) 2.
[97] Segrin and Flora (n 66).
[98] Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)' (n 65) 536, 538.
[99] *Ali v Capita* and *Hextall* (n 4) [22].
[100] ibid [25].

mothers as sex discrimination against fathers under the EA 2010.[101] Similar to the strict eligibility requirements imposed upon fathers, the low level of replacement pay provided to fathers erects a structural barrier which limits them from establishing their position in childcare.

3. SHORT-TERM LEAVE

Thirdly, the short-term length of the 2-week paternity leave entitlement prevents fathers from long-term engagement in childcare. In addition, the limited length of emergency leave is unlikely to allow fathers to actively participate in childcare and have long-term consequences in addressing the gender stereotypes surrounding motherhood and fatherhood.[102] Moreover, fathers can typically only take unpaid parental leave, shared parental leave and apply for flexible working hours on a short-term basis due to the lack of and low levels of replacement pay. Unlike unpaid leave, shared parental leave and the policy of flexible working hours, paternity leave is the only paid standalone entitlement that fathers are allocated.[103]

Paternity leave had initial success in increasing the presence of men in childcare, as the take-up rate for the entitlement was the highest of all of the entitlements introduced in the UK.[104] O'Brien et al published in 2015 that 49% of fathers undertook paternity leave, 25% took paternity leave plus other paid leave, 18% took other paid leave and 5% took unpaid leave.[105] Furthermore, 50% of fathers who took paternity leave used the full 2 weeks that they were entitled to.[106] The introduction of paternity leave has also increased the participation of fathers in childcare activities. The Fatherhood Institute has reported that fathers in 1961 spent 12-15% of the time mothers had spent taking care of their children in pre-school, whilst fathers in 2017 had spent almost 50% of the time mothers had spent.[107] Similarly, Tanaka and Waldfogel found that fathers who undertook paternity leave in the UK were 19% more likely to feed their baby, 25% more likely to change the diapers of their baby and 19% more likely to tend to their child at night.[108] Contrastingly, fathers who did not use any leave were found to be 22% less likely to feed their baby, 18% less likely to change diapers and 10% less likely to tend to their child at night.[109] Although these statistics do not demonstrate the increased participation of fathers in various aspects of childcare as equivalent to the time mothers spend in childcare, a link can be established between the statistical trend of fathers undertaking

[101] *Shuter v Ford Motor Company Limited* [2014] 7 WLUK 1105 (hereafter *Shuter*) [94], [102]; *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police* [2019] EWCA Civ 900 (hereafter *Ali v Capita* and *Hextall*) [77], [126]; *Price v Powys County Council* [2021] UKEAT/0133/20 (hereafter *Price*) [43], [55].
[102] Caracciolo Di Torella, 'New Labour, New Dads—The Impact of Family Friendly Legislation on Fathers' (n 42).
[103] Mitchell 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (n 15).
[104] O'Brien and others (n 26).
[105] ibid.
[106] ibid.
[107] Adrienne Burgess and Jeremy Davies, 'Cash or Carry?' (Fatherhood Institute 2017) 37.
[108] Sakiko Tanaka and Jane Waldfogel, 'Effects of Parental Leave and Work Hours on Fathers' Involvement with Their Babies' (2007) 10 Community, Work & Family 420.
[109] ibid.

paternity leave and the increased involvement of fathers within care work. The data suggests that the introduction of longer leave entitlements can be used as a tool to gradually shift the cultural attitudes concerning the role of fatherhood defined under the traditional "male breadwinner" model. The strengthening of leave entitlements under employment legislation in the UK could potentially promote a familial model that encourages and legally accommodates for shared childcare responsibilities between mothers and fathers.

While there are some positive trends, the success associated with the first governmental objective to increase the participation of fathers in childcare under paternity leave is largely limited. James recognised that fathers on paternity leave are provided 'with a brief insight into the ecstasy of parenthood… only to be catapulted back into full-time work.'[110] Likewise, fathers who can only take unpaid parental leave, shared parental leave and work flexible hours for a limited period of time due to the low levels of replacement pay share a similar experience. The Fatherhood Institute details that employers in 43% of workplaces reported that fathers took additional forms of leave after completing the 2 weeks of paternity leave.[111] The proportion of fathers who had to add other types of leave increased to 77% for those employed in larger workplaces.[112] Fathers who worked in the field of health and social care undertook the greatest amount of extended leave.[113] The differential legal treatment in providing 2 weeks of paternity leave to fathers[114] and 52 weeks of maternity leave to mothers[115] promotes the perception that the role of fathers is less valued than the role of mothers in childcare. The short-term length of leave allocated to fathers under paternity leave limits fathers from being able to fully engage in childcare. The need for fathers to add others forms of leave to the 2 weeks allocated to them under paternity leave displays the desperation which fathers experience in wanting to participate in childcare and the necessity for the length of leave to be increased. In spite of the concept of good fathering under the traditional "male breadwinner" model involving minimal childcare, [116] the reality is that childcare is long-term. With fathers only being able to take paternity leave in a period of time which overlaps with mothers undertaking potentially 39 weeks of maternity leave,[117] the law reinforces that fathers take on a supportive and secondary role to mothers in relation to childcare. Despite paternity leave being arguably the most successful policy introduced in the UK, the law continues to facilitate the parenting role of fathers as defined under the traditional "male breadwinner" model.

[110] Grace James, 'All That Glitters Is Not Gold: Labour's Latest Family-Friendly Offerings' (2003) 3 Web Journal of Current Legal Issues 7.
[111] Burgess and Davies (n 107) 31.
[112] ibid.
[113] ibid.
[114] The Paternity and Adoption Leave Regulations 2002, reg.5.
[115] The Maternity and Parental Leave (Amendment) Regulations 2002, reg.8.
[116] Busby and Weldon-Johns (n 39) 289.
[117] Busby and Weldon-Johns (n 39) 294; The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006, reg.3.

4. MATERNAL PERMISSION TO ACCESS LEAVE

Lastly, the inability of fathers to be able to access shared parental leave until mothers have provided their permission to transfer the remainder of their maternity leave heavily restricts fathers from actively participating in childcare.[118] Weldon-Johns describes shared parental leave as placing mothers as the 'gatekeepers of fathers' participation in care.'[119] Shared parental leave places the responsibility on mothers to dictate the level of involvement which fathers have in childcare.[120] The prerequisite of maternal permission in order for fathers to access the entitlement positions fathers as secondary to mothers in relation to childcare, as mothers are able to decide how caring responsibilities are divided between them. Mitchell advocates that a non-transferable period of leave for fathers would have been more beneficial in recognising fathers as equally capable to mothers in providing care to their children and that mothers should not be prioritised as the primary caregiver.[121] The low take-up rate of only 2-8% by fathers of shared parental leave can be attributed to the fact that it is not a father-only entitlement.[122] Even when fathers were provided with the opportunity to take shared parental leave, the Women and Equalities Committee reported that many fathers felt too guilty to disrupt leave that was originally allocated for mothers to use to take care and bond with their children.[123]

In placing fathers as secondary to mothers under shared parental leave, the objective of shared parental leave being the promotion of shared childcare responsibilities between mothers and fathers during the first year after childbirth[124] fails to be achieved. Shared childcare responsibilities between mothers and fathers after childbirth would have more likely been attained if fathers were provided with a longer-term non-transferable leave entitlement.[125] Arnalds, Eydal and Gíslason determined that the introduction of a non-transferable father-only entitlement increases the take-up rate amongst fathers of leave,[126] as the entitlement would have otherwise been lost.[127] For instance, Sweden introduced paid leave that could be equally accessed by mothers and fathers in 1974.[128] Once a 30-day father-only leave entitlement was introduced in 1995, the take-up rate amongst fathers increased from 9% to 47% over an 8-year period.[129] The approach adopted in Sweden shows that the

[118] Margaret O'Brien and Peter Moss, 'Towards an ECEC System in Synergy with Parenting Leave' in Claire Cameron and Peter Moss (eds), *Transforming Early Childhood in England: Towards a Democratic Education* (UCL Press 2020) 211.
[119] Weldon-Johns (n 47) 34.
[120] Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (n 35) 131-132.
[121] Mitchell, 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (n 15) 412.
[122] Women and Equalities Committee, *Fathers and the Workplace* (n 5) paras 62, 65-68.
[123] ibid para 65.
[124] ibid para 57.
[125] Mitchell, 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (n 15) 412.
[126] Ásdís Arnalds, Guðný Eydal and Ingólfur Gíslason, 'Equal Rights to Paid Parental Leave and Caring Fathers-The Case of Iceland' (2013) 9 Icelandic Review of Politics and Administration 327.
[127] Busby and Weldon-Johns (n 39) 291.
[128] Lídia Farré, 'Parental Leave Policies and Gender Equality: A Survey of the Literature' (2016) 34 Studies of Applied Economics 52.
[129] ibid.

introduction of a father-only entitlement would have recognised the equal importance of motherhood and fatherhood in childcare. Childcare would have more likely been viewed as a gender-neutral responsibility under this policy measure. Akin to the strict eligibility requirements that fathers have to satisfy and the lack of, or low level of, replacement pay provided to fathers on leave, the need for maternal permission for fathers to access shared parental leave erects another structural barrier which limits their ability to care for their children. The prioritisation of the caring role of mothers[130] prevents fathers who do not subscribe to the concept of good fathering, as defined under the traditional "male breadwinner" model,[131] from being more involved in childcare.

III. FATHERS IN THE WORKPLACE

Although I have discussed the significant weaknesses found within the employment legislation governing leave entitlements for fathers in Section II, Section III will analyse the lived experiences of fathers in the workplace. The purpose of Section III is to investigate how the workplace culture perceives and understands men who want to undertake childcare. Within the workplace, fathers are subject to receive negative comments, demotion, and job loss if they request to take leave to participate in childcare.[132] Section III will display how the current workplace culture stigmatises men in caring roles and treats fathers lesser than mothers with regards to childcare.

The Women and Equalities Committee has acknowledged that fathers incur harm in the workplace due to the organisational culture fathers are employed under.[133] The Women and Equalities Committee describes the culture in the workplace as reflective of a "macho culture"[134] wherein fathers who requested part-time work or flexible working hours in order to accommodate for childcare were found to be mocked as being "soft" for undertaking typically female-oriented labour.[135] Moreover, Maternity Action has explained that the negative repercussions of job loss, negative feedback and demotion which working fathers experience as a response to utilising leave entitlements has ultimately served as a deterrent to fathers who want to actively participate in childcare.[136] Correspondingly, Miyajima and Yamaguchi argue that fathers who request to take leave suffer workplace harassment in the form of receiving poorer evaluations on their work and organisational commitment from their superiors or colleagues than women would.[137] The Women and Equalities Committee also found that many fathers who were the primary caregiver or equally shared childcare responsibilities with mothers were often automatically assumed to be the secondary

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[130] Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (n 35) 129.
[131] Busby and Weldon-Johns (n 39) 289.
[132] Women and Equalities Committee, *Fathers and the Workplace* (n 5) paras 20-21.
[133] ibid para 21.
[134] ibid para 21.
[135] ibid para 21.
[136] ibid para 20.
[137] Takeru Miyajima and Hiroyuki Yamaguchi, 'I Want to but I Won't: Pluralistic Ignorance Inhibits Intentions to Take Paternity Leave in Japan' (2017) 8 Frontiers in Psychology 2.

caregiver.[138] The organisational culture which fathers are presently employed under provides a hostile working environment for fathers who want to actively participate in childcare. The cultural attitudes adopted by employers and co-workers promote adherence to the traditional "male breadwinner" model wherein employed fathers are pressurised to not take leave to tend to childcare and to continue working to earn the household income. Superiors and colleagues reinforce the ideology that fathers are secondary to mothers with regards to childcare and limit them from using leave. The actions undertaken by superiors and colleagues ultimately contribute towards the workplace culture stigmatising fathers in caring roles.

Many fathers have been prevented from relying upon policies that are designed for parents to further participate in childcare and cultivate a work-family balance. For instance, in 2011, employed mothers had a higher statistical probability to request flexible working hours as 57% of working parents that made this request were women.[139] Female employees also had a higher success rate in the approval of their requests for flexible working hours, as 66% of women and 53% of men were reported to be successful.[140] Moreover, the 2017 Modern Families Index reported that 44% of fathers were found to have either lied or twisted the truth to their employers by stating that they were ill, for example, in order to undertake childcare.[141] Fathers stated that they lied because they feared that requesting leave for childcare purposes would negatively impact their career.[142] The statistical trend of mothers gaining more success in their requests for flexible working hours than fathers shows how fathers are stigmatised from undertaking caring roles and are perceived as secondary parents to mothers with regards to childcare. Furthermore, the higher rejection rate from employers for requests to take leave made by fathers and the pressure for fathers to lie about the reasons that they take leave highlights how the current workplace culture promotes adherence to the traditional "male breadwinner" model. The workplace culture erects further structural barriers wherein fathers cannot access limited leave entitlements because employers and colleagues will prevent them from doing so.

Miyajima and Yamaguchi attribute the behaviour displayed by colleagues and superiors as an example of the socio-psychological phenomenon of "pluralistic ignorance."[143] The concept describes how many male employees privately reject, but publicly accept, the cultural norm that men should not be involved in childcare because they uphold the assumption that the majority of their male co-workers adhere to the cultural norm privately.[144] The private acceptance and public rejection of fatherhood being inclusive of a caring role is indicative of the fact that many fathers want to use leave to be more involved in childcare, but are afraid of the mistreatment that they will experience if they do so. The lack of support provided to

[138] Women and Equalities Committee, *Fathers and the Workplace* (n 5) para 22.
[139] Department for Business, Innovation and Skills, 'Extending the Right to Request Flexible Working to All: Impact Assessment' (The National Archives 2011) 16.
[140] ibid.
[141] Working Families, 'The Modern Families Index' (Bright Horizons Family Solutions LLC 2017) 26.
[142] ibid.
[143] Miyajima and Yamaguchi (n 137).
[144] ibid 2-3.

working fathers who want to be more involved in childcare has resulted in the stigmatisation of fathers in caring roles.

IV. FATHERS OUTSIDE OF THE WORKPLACE

Although I have detailed how fathers experience mistreatment in the workplace in Section III, Section IV will discuss case examples of instances where fathers were treated as secondary parents to mothers outside of the workplace as well. The very limited breadth of case law in England and Wales on the mistreatment of fathers largely relates to the current workplace culture, which will be discussed in Section VI.[145] However, Section IV will rely upon the judgments made by the European Court of Human Rights (ECtHR) that exemplify the issues with solely framing paternity rights as an employment law conception. I will be using ECtHR case law because the HRA 1998 incorporates the European Convention on Human Rights (ECHR)[146] into UK law.[147] Additionally, under s.2(1)(a) of the HRA 1998, the UK courts must take into account any judgments, decisions, declarations or advisory opinions made by the ECtHR. Section IV will demonstrate that the differential treatment of fathers is apparent under other areas of the law outside of employment legislation.

The first example of fathers being treated differently to mothers outside of the workplace is in the case of *Weller v Hungary.*[148] Mr Weller and his twin sons, Daniel and Máté, had been deemed ineligible from accessing a maternity benefit due to the nationality of the mother of the children and the parental status of Mr Weller.[149] The applicants argued that being prevented from accessing the maternal benefit amounted to a violation of arts.8 and 14 of the ECHR, which contained the right to respect private and family life and the right to non-discrimination respectively, and the ECtHR agreed.[150] Similarly, the case of *Salgueiro da Silva Mouta v Portugal*[151] involved a gay father, Mr Salgueiro da Silva Mouta, who was prevented by his ex-wife to visit his daughter.[152] The Portuguese court stated that his request to visit his daughter would be rejected unless he concealed from his daughter his sexual orientation and his relationship with another man that he had also been living with.[153] Mr Salgueiro da Silva Mouta declared that being coerced into concealing his sexual orientation

[145] *Shuter* (n 101); *Ali v Capita* and *Hextall* (n 101); *Price* (n 101).
[146] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3rd September 1953) ETS 5 (ECHR).
[147] Christina Kitterman, 'The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish Its Sovereignty to Ensure Human Rights Protection in Domestic Courts' (2001) 7 ILSA Journal of International & Comparative Law 583.
[148] *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009).
[149] ibid paras 1-3.
[150] ibid paras 3, 39.
[151] *Salgueiro Da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 (hereafter *Salgueiro*).
[152] ibid para 10.
[153] ibid para 14.

was a violation of his rights contained under arts.8 and 14 of the ECHR[154] and the ECtHR assented that there had been a violation.[155]

Likewise, the case of *Alexandru Enache v Romania*[156] involved a father who had argued that it was sex discrimination that the national legislation allowed mothers of children under the age of 1 to postpone their prison sentence, but disallowed fathers from doing the same.[157] However, the ECtHR did not find a violation of art.14 in conjunction with art.8 of the ECHR.[158] The Court found that the differential treatment under the policy measure was said to be justified in preserving the special bond between a mother and their child, particularly during the first year of the life of that child.[159] Additionally, the case of *Sommerfeld v Germany*[160] concerned a father who had argued that the denial of visitation rights to his daughter was rooted in the national legislation favouring fathers of children born in wedlock over fathers like himself who had a child outside of wedlock.[161] The ECtHR agreed and determined that the differential treatment amounted to a violation of arts.8 and 14 of the ECHR.[162] Furthermore, the case of *Rasmussen v Denmark*[163] involved a father who had argued that the time limits placed upon fathers to initiate paternity testing over a child under national legislation and the lack of time limits imposed upon mothers to do the same amounted to sex discrimination.[164] Moreover, he argued that there was a violation of the right to non-discrimination under art.14 of the ECHR taken in conjunction with the right to a fair trial under art.6 and the right to respect private and family life under art.8.[165] However, the ECtHR failed to find a violation of the ECHR, as State Parties were allowed to enjoy a margin of appreciation.[166] Unlike the interests of the father, the Court determined that the interests of the mother typically coincide with the interests of the child and so a time limit imposed on mothers was unnecessary.[167]

All of the above case examples demonstrated the instances wherein fathers were treated differently to mothers outside of the workplace and had taken issue with legislation outside of employment law. These experiences shared by fathers in matters relating to nationality, visitation rights, prison sentencing, social benefits and paternity testing highlight the many examples wherein fathers are treated as secondary to mothers in relation to childcare. The view that paternity rights are currently viewed as an employment law conception bars recognition of the fact that fathers are treated differently to mothers inside and outside of the workplace. Moreover, these cases highlight the need for fathers to be supported by legislation

[154] ibid para 21.
[155] ibid para 31.
[156] *Alexandru Enache v Romania* App no 16986/12 (ECtHR, 3 October 2017) (hereafter *Alexandru Enache*).
[157] ibid paras 3-4, 8, 49.
[158] ibid para 79.
[159] ibid para 76.
[160] *Sommerfeld v Germany* (2004) 38 E.H.R.R. 35 (hereafter *Sommerfield*).
[161] ibid paras 11, 31, 77.
[162] ibid para 94.
[163] *Rasmussen v Denmark* App no 8777/79 (ECtHR, 28 November 1984) (hereafter *Rasmussen*).
[164] ibid paras 18-19, 25.
[165] ibid paras 25-26.
[166] ibid paras 40-42.
[167] ibid para 41.

outside of employment law. In most of these cases, the legislation and the court system has accommodated for the childcare responsibilities mothers may have. Yet, the care work performed by fathers is overlooked and ignored to an extent. Similar to the workplace mistreatment of fathers described in Section III, the lack of support provided to fathers outside of employment has further stigmatised fathers as carers. The differential treatment of fathers under the legislation imposed upon them and the court system has constructed structural barriers that promote the stance that fatherhood is secondary to motherhood in relation to the fulfilment of childcare activities.

V. THE POSITION OF WOMEN IN THE HOME AND WORKPLACE

In Section II, I have discussed the harms that fathers incur from employment legislation providing them with limited leave entitlements. In Sections III and IV, I have shown that fathers are mistreated inside and outside the workplace. The purpose of Section V is to demonstrate how the position of fathers in childcare needs to be protected as the promotion of the equality of fathers will impact the equality of mothers. The employment legislation governing leave entitlements and the mistreatment of fathers inside and outside of the workplace has provided stronger support for mothers to be more involved in childcare than fathers. However, Section V will explore how the preferential treatment of mothers in childcare has negative repercussions upon the positions that mothers occupy within the workplace. In addition, Section V will expand upon how the increased support for the position of fathers in childcare could positively impact the status of mothers in the workplace.

A significant problem with providing mothers with the legal support to primarily undertake childcare is that it creates issues for mothers who are seeking to cultivate a work-family balance. Krapf describes the simultaneous fulfilment of childcare and workplace responsibilities placed upon mothers as a 'double burden of family and work.'[168] The disproportionate level of childcare allocated to mothers prevents them from being able to fully engage in workplace activities. The complete responsibility of childcare given to mothers has contributed towards the current pregnancy and maternity discrimination which mothers experience in the workplace and the marginalisation of women in the labour force. Although "pregnancy and maternity" has been included as a protected characteristic under s.4 of the EA 2010, mothers continue to experience discrimination in the workplace. Due to the interrelationship between the roles of motherhood and fatherhood, the position of fathers in childcare needs to be legally protected and supported in the same fashion that the position of women in the workplace is protected under equality legislation. Furthermore, the legal protection of the position of fathers in childcare would consequently provide increased legal support for shared childcare responsibilities and would subsequently allow mothers the opportunity to firmly establish their position in the workplace.

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[168] Sandra Krapf, *Public Childcare Provision and Fertility Behavior: A Comparison of Sweden and Germany* (Budrich UniPress 2014) 15.

The current framing of maternity rights under employment and equality legislation has not been a complete solution to the pregnancy and maternity discrimination which mothers experience in the workplace. Maternity Action has noted that there has been a 'significant increase in [the] rates of pregnancy discrimination'[169] in the last 10 years. The Women and Equalities Committee has found that an estimated 260,000 mothers every year believed that motherhood had a negative impact upon their career.[170] They also reported that 100,000 mothers identified that they had experienced harassment or negative comments in instances involving issues related to their pregnancy.[171] An example of mothers experiencing harassment or negative remarks was found to be as a response to their requests for flexible working hours from their employer.[172] Moreover, 53,000 women reported that their employer discouraged them from attending their antenatal appointments and 54,000 reported having been dismissed, made compulsorily redundant or having undergone such poor treatment that they felt pressured into leaving their jobs.[173] The TUC revealed that the discrimination that mothers experience in the workplace has given rise to the "motherhood pay penalty"; a term which describes the occurrence of mothers earning less than their female counterparts without children.[174] From the use of the data provided by the 1970 British Cohort Study, an ongoing study which follows the lives of an estimated 17,000 people born in 1970 within Britain, the TUC reported that full-time employed mothers who had reached the age of 42 earned 11% less than women who were similarly situated to them without children.[175] In addition, the House of Commons found that the pay gap between mothers and fathers after the birth of their first child amounted to 10% between 1991 and 2015.[176] By the time that same child reached the age of 13, the pay gap between mothers and fathers increased to 30%.[177]

Benard and Correll argue that many employers uphold the conscious or subconscious belief that successful employees tend to embody masculine characteristics such as that of assertiveness or dominance, whilst the traits displayed by mothers of being nurturing or warm are found to be culturally inconsistent within the workplace.[178] Many employers uphold a cultural bias that mothers who engage within paid work are untrustworthy, selfish or cold because they are acting outside of the typical social norm surrounding motherhood.[179] As a consequence, mothers are habitually denied work opportunities, higher salaries and job promotions.[180] Additionally, mothers who prioritise childcare over workplace duties are more likely to be perceived as weak and uncommitted employees since childcare is viewed by employers as of lesser importance than workplace tasks.[181]

[169] Women and Equalities Committee, *Pregnancy and Maternity Discrimination* (n 12) para 31.
[170] ibid para 26.
[171] ibid para 26.
[172] ibid para 26.
[173] ibid para 26.
[174] Trades Union Congress (n 12) 2.
[175] ibid 2-3.
[176] Francis-Devine and Pyper (n 12).
[177] ibid.
[178] Benard and Correll (n 12).
[179] ibid.
[180] ibid.
[181] ibid.

In light of mothers undertaking primary responsibility for childcare, they experience workplace discrimination to a harsher extent than fathers, as they have to utilise their leave entitlements more often and for longer. Due to the interrelationship between paternity and maternity rights, any weaknesses in the former are likely to undermine the successes of the latter. The provision of legal support and protection for shared childcare responsibilities between mothers and fathers would also potentially positively impact women's equality in the workplace. The ability for fathers to establish their position in childcare would result in mothers not needing to use leave as frequently and would allow mothers to have more time to participate in workplace activities.

The perception adopted by employers that childcare responsibilities are of lesser importance than workplace duties can be best explained by England's devaluation theory.[182] The theory denotes that patriarchal capitalism only views work that generates monetary gain as of value.[183] Therefore, the female-oriented responsibility of unpaid childcare is looked upon as insignificant when compared to fathers who participate in paid work.[184] The 'double burden of family and work'[185] which mothers undertake continues to be overlooked. Milkie, Raley and Bianchi studied 2 representative samples of modern families with preschoolers and reported that mothers worked more weekly hours than fathers.[186] Mothers who were full-time employees with young children worked on average 73 hours a week, which included 37 hours of paid work, 15 hours of childcare and 21 hours of other domestic labour.[187] Conversely, fathers who were similarly situated worked 68 hours per week on average, which included 46 hours of paid work, 9 hours of childcare and 15 hours of other domestic labour.[188] Similarly, Kamp Dush, Yavorsky and Schoppe-Sullivan conducted a study on 182 dual-earner couples transitioning to parenthood and found that mothers on working days performed paid work 25% of the time and childcare 32% of the time respectively.[189] Contrastingly, fathers completed paid work 51% of the time and childcare responsibilities 13% of the time.[190] On non-working days, mothers had spent 21% of their time on fulfilling childcare and household work, whilst fathers had spent 6% of their time on childcare and 8% of their time on the completion of domestic tasks.[191]

In relation to the fulfilment of workplace and childcare responsibilities, the data demonstrates that fathers undertake less work than mothers do weekly. Due to the fact that only paid labour is perceived as valuable under patriarchal capitalism, fathers are incorrectly depicted as

[182] Paula England, 'The Gender Revolution: Uneven and Stalled' (2010) 24 Gender & Society 151.
[183] ibid.
[184] ibid.
[185] Krapf (n 168).
[186] Melissa Milkie, Sara Raley and Suzanne Bianchi, 'Taking on the Second Shift: Time Allocations and Time Pressures of U.S. Parents with Preschoolers' (2009) 88 Oxford University Press 487-488.
[187] Medora Barnes, 'Gender Differentiation in Paid and Unpaid Work During the Transition to Parenthood' (2015) 9 Sociology Compass 350.
[188] ibid.
[189] Claire Kamp Dush, Jill Yavorsky and Sarah Schoppe-Sullivan, 'What Are Men Doing While Women Perform Extra Unpaid Labor? Leisure and Specialization at the Transitions to Parenthood' (2017) 78 Sex Roles 724.
[190] ibid.
[191] ibid 725.

working harder because men tend to work longer hours within paid employment than tending to childcare. Employers fail to recognise the difficulties attached to balancing childcare and workplace responsibilities. Additionally, employers fail to identify that the negative stereotypes attached to mothers wrongly portray mothers as weak and uncommitted employees. The negative stereotypes serve to further perpetuate the discrimination against mothers in the workplace. The strengthening of paternity rights under employment and equality legislation would primarily help fathers to establish their position in childcare. The legal protection and support for stronger leave entitlements for fathers would consequently promote shared childcare responsibilities, alleviate the complete responsibility of childcare being placed upon mothers and allow mothers more time to perform workplace tasks. In light of mothers being able to actively participate in the workplace, the perception of working mothers by employers would begin to gradually shift from the currently negative stereotypes attached to them.

The TUC has supported the encouragement of shared childcare responsibilities between mothers and fathers as a solution to lessening the effects of pregnancy and maternity discrimination.[192] The TUC has gathered that the introduction of better paid paternity leave without any eligibility requirements attached could reduce the extent to which mothers experience discrimination in the workplace.[193] The TUC has particularly highlighted that the legal accommodation of equal parenting could help to tackle pregnancy and maternity discrimination.[194] The primary purpose of introducing stronger employment and equality legislation surrounding paternity rights is to protect and support the increased participation of fathers in childcare. Yet, the promotion of the equality of fathers in childcare would positively impact the equality of mothers in the workplace. The strengthening of paternity rights would consequently allow for an equal distribution of childcare responsibilities to be shared between mothers and fathers. Therefore, mothers would not need to frequently request to use leave from their employers and experience pregnancy and maternity discrimination to the extent that they presently do.

VI. FATHERS IN THE COURT SYSTEM IN ENGLAND AND WALES

In light of Section III exploring the detrimental effects that the current workplace culture has upon fathers, Section VI will examine some of the notable attempts made by fathers to illustrate the stigmatisation of fathers in caring roles within the court system in England and Wales. Section VI will investigate how fathers have attempted to use the court system to show how fatherhood has been legally treated as of lesser importance. This section will examine the key cases within the past decade wherein fathers have attempted to argue that a father being viewed as a secondary parent to a mother under employment legislation is an equality harm and a form of sex discrimination.

[192] Trades Union Congress (n 12) 6.
[193] ibid.
[194] ibid.

The first example can be seen in the 2014 case of *Shuter*. The case involved a male employee for Ford Motor Company Ltd, Mr Shuter, who was offered statutory pay whilst taking additional paternity leave.[195] However, mothers working for the same company were offered 100% replacement pay on maternity leave.[196] The differential pay awarded to mothers and fathers was argued by Mr Shuter to 'act as a significant disincentive to fathers from taking this leave'[197] because he had lost approximately £18,000 in pay whilst he was on leave, which would not have happened if he was paid the same rate as mothers on maternity leave.[198] Mr Shuter further underlined that only providing statutory pay for fathers on additional paternity leave failed to meet the purpose of the entitlement which was to provide fathers with 'a proper and equal opportunity to participate in the upbringing of their children.'[199] Mr Shuter claimed that the differential treatment between mothers and fathers constituted either direct or indirect sex discrimination under the EA 2010.[200]

The Employment Tribunal (ET) disappointingly asserted that a claim for direct or indirect sex discrimination could not be established. Firstly, direct discrimination was not justifiable to the ET as s.13(6)(b) of the EA 2010 stipulated that men cannot rely upon the protected characteristic of sex if it is in relation to the special treatment afforded to women in connection with pregnancy or childbirth.[201] The ET advocated that a mother on maternity leave was not the correct comparator, but rather a female applicant on additional paternity leave was.[202] Secondly, indirect discrimination was unjustifiable as the objective in providing women with full replacement pay on maternity leave was to increase the number of women in the company workforce.[203] Enhanced maternity pay was statistically shown to increase the number of women who would return to work and remain for over a year after completing maternity leave within the company.[204] The ET found that the aim underpinning enhanced maternity pay was proportionate, even if men experienced disadvantage as a consequent factor.[205]

As discussed in Section V, women experience greater levels of discrimination than fathers in the workplace and the introduction of policies to specifically support the number of employed mothers in the workplace is commendable. However, the legal reasoning adopted by the ET fails to acknowledge that the purpose of additional paternity leave was to provide fathers with an equal level of support to mothers to participate in childcare. The provision of statutory pay for fathers and enhanced pay for mothers only incentivises mothers to remain within the home. As critiqued in Section II, the lack of success associated with the uptake of leave entitlements in the UK by fathers is attributed to the provision of low levels of replacement

[195] *Shuter* (n 101) [1]-[4].
[196] ibid [5].
[197] ibid [6].
[198] ibid [6].
[199] ibid [6].
[200] ibid [6].
[201] ibid [48].
[202] ibid [89].
[203] ibid [98].
[204] ibid [100].
[205] ibid [101].

pay.[206] Income related leave would incentivise more fathers to participate in the home without having to sacrifice their wages,[207] in the way that Mr Shuter had to on additional paternity leave. Moreover, financially supporting the position of fathers in childcare would support mothers recovering from childbirth on maternity leave, as they would be able to share childcare responsibilities. For example, mothers would be given time to recover from the biological effects of pregnancy and childbirth without having to undertake the full responsibility of childcare simultaneously. Nevertheless, the ET failed to recognise the interrelationship shared between mothers and fathers with regards to the fulfilment of childcare tasks.

A second example can be seen in the 2019 joined appeals of *Ali v Capita* and *Hextall*. The case of *Ali v Capita* involved an employee of Capita, Mr Ali, who wanted to take shared parental leave.[208] Mr Ali was refused equivalent pay to mothers under enhanced maternity pay, and was offered the statutory rate of pay on leave.[209] Mr Ali argued that the differential levels of pay awarded to mothers and fathers amounted to direct sex discrimination because the first 2 weeks of maternity leave was primarily intended for mothers to physically recover from the biological effects of childbirth, but the purpose of the following 12 weeks centred upon the gender-neutral responsibility of childcare.[210] The case of *Hextall* concerned a police constable for the Leicestershire Police Force, Mr Hextall, who similarly took shared parental leave.[211] Mr Hextall claimed that he had been subject to indirect sex discrimination because he was paid statutory pay, whilst mothers benefitted from the policy of "occupational maternity pay" that provided mothers with 18 weeks of maternity leave on full pay.[212] Mr Hextall claimed that the differential pay awarded to parents placed fathers in a financially disadvantaged position to mothers to act as the primary carer for their children.[213]

The Employment Appeal Tribunal (EAT) upheld the dismissal made initially by the ET of the claim made by Mr Hextall.[214] The EAT reiterated that Mr Hextall was not disadvantaged because of his gender, but due to the fact that he cannot satisfy the conditions to access full pay on maternity leave which are to be pregnant, give birth or breastfeed.[215] With regards to Mr Ali, the ET initially determined that Mr Ali had been subject to direct sex discrimination.[216] The ET had surprisingly affirmed that the 12-week time period subsequent to the initial 2 weeks of maternity leave was unrelated to the special treatment in connection with pregnancy or childbirth, but was related to the special treatment for caring for a newborn

[206] James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 62); Lewis (n 68); Currie (n 28); Brooks and Hodkinson (n 56) 71.
[207] Jane Lewis and Mary Campbell, 'UK Work/Family Balance Policies and Gender Equality, 1997–2005' (2007) 14 Social Politics 14.
[208] *Ali v Capita* and *Hextall* (n 101) [21].
[209] ibid.
[210] ibid [22].
[211] ibid [24].
[212] ibid [23]-[25].
[213] ibid [25].
[214] ibid [126].
[215] ibid [92].
[216] ibid [26].

child.[217] The EAT also overturned the initially successful claim of direct sex discrimination made by Mr Ali.[218] The EAT followed the approach in *Shuter*, which was labelled by Busby and Weldon-Johns as 'a backwards step in the recognition of fathers as worker-carers.'[219] The EAT argued that the ET had misinterpreted the purpose of paid maternity leave because the leave was designed for a number of reasons, which included to cope with the later stages of pregnancy, to recover from the effects of childbirth, and to develop a strong mother-child bond.[220] Therefore, maternity leave did not centre upon solely care-giving after the first 2 weeks[221] and mothers on maternity leave could not be the relevant comparator for a father on shared parental leave.[222]

The EAT judgment in the joined appeals of *Ali v Capita* and *Hextall* exposes the weaknesses of the design of employment legislation governing leave entitlements in the UK. The EAT has adopted a highly contradictory approach with regards to their interpretation of the purpose of maternity leave. If a significant proportion of maternity leave was to allow mothers to prepare for the later stages of pregnancy, to recover from childbirth and to breastfeed, why does shared parental leave allow maternity leave to be transferred to the father after the compulsory 2 weeks of maternity leave has been completed? If the purpose of maternity leave centres upon the physical aspects of pregnancy and childbirth, why does the legal framework governing leave entitlements allow mothers who have children through adoption or surrogacy to receive pay equal to maternity pay?[223] The stronger legal support for mothers tending to childcare under the employment legislation in the UK promotes and encourages families to adhere to the traditional "male breadwinner" model. The provision of enhanced pay for mothers and statutory pay for fathers provides stronger financial support for mothers to establish their position in childcare and for fathers to return to the workplace to contribute towards the household income. If fathers attempt to be the primary carer of their children and take shared parental leave with statutory pay, the family will incur heavier financial disadvantage than if mothers were to become the primary carer under maternity leave. The employment legislation governing leave entitlements erect structural barriers which prevent fathers from establishing their position in childcare. The stigmatisation of fathers in caring roles under employment legislation has been further reinforced by the court system within the judgments of *Ali v Capita* and *Hextall.*

Lastly, a third example can be seen in the 2021 case of *Price*. The case involved a male employee, Mr Price, who had received statutory pay on shared parental leave, whilst mothers on adoption leave received enhanced pay.[224] Mr Price argued that the different levels of pay awarded to mothers and fathers amounted to direct sex discrimination.[225] In addition, the

[217] ibid [26].
[218] ibid [77].
[219] Busby and Weldon-Johns (n 39) 295.
[220] ibid [66].
[221] ibid [73].
[222] ibid [77].
[223] Grace James, 'The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?' (2006) 35 Industrial Law Journal 274.
[224] *Price* (n 101) [3]-[4].
[225] *Price* (n 101) [4]; EA 2010, s.13.

lengthy and delayed process in obtaining information regarding pay entitlements for fathers was maintained by Mr Price to be disadvantageous to men, and to give rise to indirect sex discrimination.[226] Mr Price claimed that a mother on maternity or adoption leave could be identified as the relevant comparators for a father on shared parental leave.[227]

The ET found a claim of indirect sex discrimination to be unjustifiable, as the delayed process in attaining information concerning the pay entitlements provided to fathers was attributed to genuine error.[228] The ET firstly deliberated that a mother on maternity leave could not be the relevant comparator to a father on shared parental leave due to the reasoning laid out by the EAT in the joined appeals of *Ali v Capita* and *Hextall* that the leave entitlements were for different purposes. The objective of shared parental leave was recognised to be for the facilitation of childcare, but the purposes of maternity leave were to: (1) prepare for the final stages of pregnancy; (2) recuperate from pregnancy; (3) recuperate from the effects of childbirth; (4) develop a mother-child relationship; (5) breastfeed their newborn child; and (6) care for their newborn child.[229] The ET secondly identified that a mother on adoption leave could not be a relevant comparator to a father on shared parental leave due to the following procedural differences: (1) adoption leave was partially compulsory, unlike shared parental leave being optional; (2) adoption leave commenced before placement unlike shared parental leave; (3) adoption leave was an immediate entitlement unlike shared parental leave; (4) fathers could only access shared parental leave if granted maternal permission unlike adoption leave; and (5) shared parental leave could be "dipped in and out" within the 52 weeks from placement unlike adoption leave.[230] The EAT stated the ET erred in their recognition of the first procedural difference, but that the rest justified the differential treatment of mothers on adoption leave and fathers on shared parental leave.[231]

Like the judgments of *Shuter* and the joined appeals of *Ali v Capita* and *Hextall*, the EAT failed to identify the limited ability for leave entitlements in the UK to incentivise fathers to participate in childcare. Fathers find difficulty in maintaining their position in childcare if they do not have the sufficient financial support to do so. Most fathers continue to be the familial breadwinner and cannot afford to sacrifice their wages to undertake childcare. Furthermore, the EAT fixated upon the procedural differences between adoption leave and shared parental leave to justify the differential treatment of fathers. However, adoption leave and shared parental leave share similar underlying purposes to facilitate childcare. The provision of enhanced pay for mothers on adoption leave encouraged and legally facilitated their position within childcare. Conversely, the provision of statutory pay for fathers on shared parental leave limited the length at which fathers can remain in the home before they have to return to the workplace to earn the household income. The employment legislation governing leave entitlements in the UK and the inability for the court system to comprehend

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[226] *Price* (n 101) [4]; EA 2010, s.19.
[227] *Price* (n 101) [7].
[228] ibid [9].
[229] *Ali v Capita* and *Hextall* (n 101) [66].
[230] *Price* (n 101) [7].
[231] ibid [43], [55].

the mistreatment which fathers experience erect structural barriers against fathers remaining within childcare. The judgment again stigmatised fathers in caring roles.

VII. CONCLUSION

Chapter 2 has shown that the employment legislation governing leave entitlements for fathers in the UK, the mistreatment of fathers inside and outside of the workplace and the judgments determined by the court system in England and Wales collectively perceive the role of fatherhood as secondary to motherhood with regards to childcare. The viewpoint that fatherhood is lesser than motherhood stigmatises men who want to actively participate in childcare. The employment legislation which governs leave entitlements in the UK promotes legal adherence to the parenting roles defined under the traditional "male breadwinner" model and provides limited support for fathers to participate in childcare. The differential treatment of mothers and fathers under employment legislation has acted as a guide for the court system in England and Wales. In cases where fathers have argued that the provision of limited legal support under employment legislation is a form of sex discrimination, court judgments have ruled in favour of the parenting roles defined under the traditional "male breadwinner" model.[232] Furthermore, the current workplace culture stigmatises fathers who want to engage in caring roles by mocking fathers as "soft," providing negative feedback, and demoting or dismissing fathers from employment who want to prioritise childcare.[233] Additionally, fathers are further stigmatised from caring roles outside of the workplace in matters pertaining to nationality, visitation rights, prison sentencing, social benefits and paternity testing, for example.[234]

Chapter 2 has also explored the impact of promoting the equality of fathers in childcare on the equality of mothers in the workplace. Due to the legal support under employment and equality legislation for mothers to be primarily responsible for childcare, mothers find greater difficulty in balancing the fulfilment of childcare responsibilities with workplace tasks. Mothers have to request to use leave significantly more than fathers and are consequently labelled as weak, uncommitted employees who are denied job opportunities, promotions and higher salaries.[235] The legal protection of the position of fathers in childcare is primarily to allow fathers to actively participate in childcare. However, shared childcare responsibilities would also consequently be promoted and lessen the level of childcare currently placed upon mothers. The equal distribution of childcare between mothers and fathers would provide mothers with more time to fulfil workplace tasks, dismantle the negative stereotypes surrounding working mothers and firmly establish their position in the workplace.

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[232] *Shuter* (n 101); *Ali v Capita* and *Hextall* (n 101); *Price* (n 101).
[233] Women and Equalities Committee, *Fathers and the Workplace* (n 5) paras 20-21.
[234] *Weller v Hungary* (n 148); *Salgueiro* (n 151); *Alexandru Enache* (n 156); *Sommerfeld* (n 160); *Rasmussen* (n 163).
[235] Benard and Correll (n 12).

CHAPTER 3: A SUBSTANTIVE EQUALITY APPROACH TO FATHERHOOD

I. INTRODUCTION

Chapter 2 detailed how the employment legislation governing leave entitlements for fathers in the United Kingdom (UK), the mistreatment of fathers inside and outside of the workplace and the court system collectively perceive the role of fatherhood as secondary to motherhood in relation to childcare. The recognition of fatherhood as less than motherhood stigmatises men who want to assume a caring role and actively participate in childcare. The objective of Chapter 3 is to reconceptualise the lesser treatment of fathers in childcare under employment legislation and the stigmatisation of fathers in caring roles inside and outside of the workplace as forms of paternity discrimination and substantive inequality. The differential treatment between mothers and fathers will first be considered as a matter of formal inequality. Chapter 3 will discuss how the current formal equality approach adopted by the court system to address the discrimination claims made by fathers is insufficient at combating paternity discrimination. Conversely, Chapter 3 will advocate that paternity discrimination should be addressed through the lens of substantive equality in order to adequately recognise and offer redress to fathers experiencing discrimination.

The formal equality approach presently undertaken by the court system can be particularly seen in the practical application of the Equality Act 2010 (EA 2010). Formal equality entails an Aristotelian approach[1] 'comparing like with like'[2] wherein a relevant comparator is relied upon to establish discrimination between discriminated and non-discriminated groups.[3] Under formal equality, any inconsistencies found between groups deemed identically situated will be sufficient evidence to the court to establish discrimination.[4] Although aspects of the EA 2010 can be commended for its introduction of transformative equality because of the attempts made by some of the provisions to eliminate discrimination through structural reform, the bulk of the EA 2010 consists of traditional concepts of discrimination.[5] An example of the adoption of formal equality can be seen in the definition of direct discrimination under s.13 of the EA 2010. Butler explains that direct discrimination 'rests on the notion that alike must be treated alike, and…is usually viewed through comparing the treatment of a person with a particular protected characteristic against the treatment of a person without that same protected characteristic.'[6] Formal equality has been held to be

[1] Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2005) 25.
[2] Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 1477.
[3] Oddný Árnadóttir, *Equality and Non-Discrimination under the European Convention on Human Rights,* (Kluwer Law International 2003) 23.
[4] Anne Smith and Rory O'Connell, 'Transition, Equality and Non-Discrimination' in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights* (Cambridge University Press 2011) 189.
[5] Mark Butler, *Equality and Anti-Discrimination Law* (Spiramus Press 2016) 30.
[6] ibid 37.

widely discredited in resolving matters of discrimination.[7] The weaknesses of formal equality have been attributed to the requirement of identical treatment whereas substantive equality advocates, amongst other things, for a more nuanced understanding of the impact on the individual.[8] Substantive equality has become increasingly favoured as a means of interpretation,[9] as the theory aims to tackle the historical disadvantage perpetuated by social hierarchies towards individuals belonging to marginalised or minority groups.[10]

Tenets of substantive equality have gradually become more preferable as a means of interpretation by the European Court of Human Rights (ECtHR)[11] and the Court of Justice of the European Union (CJEU).[12] The Human Rights Act 1998 (HRA 1998) incorporated the European Convention on Human Rights (ECHR)[13] into domestic law.[14] Traditionally, art.14 of the ECHR has been interpreted through a formal equality lens by the ECtHR but, within the last decade, the judicial construction of substantive equality has become gradually more preferred.[15] O'Connell states that the ECtHR has begun to embody a substantive equality approach which emphasises the need to protect vulnerable and disadvantaged groups in society.[16] Moreover, the central focus of the substantive equality doctrine that the ECtHR has started to apply queries whether the law has the effect of furthering disadvantage, discrimination, exclusion or oppression.[17] Additionally, in instances where it is not possible to identify a "wrongdoer" who has discriminated against a claimant, the substantive equality approach adopted by the ECtHR draws attention to the effects of structural inequality perpetuating discrimination.[18] Similarly, De Vos recognises that the CJEU has increasingly retooled formal European Union (EU) equality legislation to include substantive equality aims.[19] However, De Vos labels the approach the CJEU adopts as 'a blended 'substantive formal equality' approach.'[20] The CJEU pursues substantive equality objectives by considering results, impact, purpose, policy, dynamics, groups or society.[21] Yet, the CJEU

[7] Fenwick (n 2) 1470-1471.
[8] Butler (n 5) 26-27.
[9] Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law* (Routledge 2015) 50.
[10] Joanna Radbord, 'Equality and the Law of Custody and Access' (2004) 6 Journal of the Association for Research on Mothering 29.
[11] Nikolaidis (n 9).
[12] Thomas Giegerich, The European Union as Protector and Promoter of Equality (Springer Nature 2020) 265.
[13] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3rd September 1953) ETS 5 (ECHR).
[14] Christina Kitterman, 'The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish Its Sovereignty to Ensure Human Rights Protection in Domestic Courts' (2001) 7 ILSA Journal of International & Comparative Law 583.
[15] Nikolaidis (n 9).
[16] Rory O'Connell, 'Substantive Equality in the European Court of Human Rights?' (2009) 107 Michigan Law Review First Impressions 133.
[17] ibid 129.
[18] ibid 129.
[19] Marc De Vos, 'The European Court of Justice and the March Towards Substantive Equality in European Union Anti-Discrimination Law' (2020) 20 International Journal of Discrimination and the Law 82.
[20] ibid 66.
[21] ibid 65-66.

considers these substantive equality aims through the interpretation and application of the simplistic definition of non-discrimination under formal equality.[22]

In order to demonstrate that the lesser treatment of fathers should be reframed as substantive inequalities, Chapter 3 will undertake a comparative legal methodology to illustrate the weaknesses of the practical application of formal equality and substantive equality in the court system. As I have detailed in Section IV of Chapter 1, the type of comparative analysis that will be undertaken in Chapter 3 relies on the "functional method".[23] Van Hoecke describes functionalism as 'look[ing] at the way practical problems of solving conflicts of interest are dealt with in different societies according to different legal systems.'[24] The methodology investigates how effectively different types of laws address these societal problems to ascertain and develop a legal solution.[25] Section II of this chapter argues that formal equality continues to be used by the courts in England and Wales in adjudicating the claims made by fathers for equality and non-discrimination. Section II will offer explanation as to what the theory of formal equality entails and will argue that it is unable to account for the harms which fathers experience when assuming caring roles. One of the ways that formal equality is inefficient is in its reliance upon comparators and difficulty in determining a relevant comparator to establish discrimination. In an effort to investigate the ineffectiveness of formal equality, this section will explore the utilisation of mothers as the relevant comparator in cases where fathers have initiated discrimination claims. Section II will draw upon the CJEU and the ECtHR case law which showcase the traditional formal equality stance previously adopted towards the discrimination claims made by fathers. The approach adopted by both court systems will be analysed to illustrate how the application of formal equality theory prevents the discrimination which fathers experience from being understood.

Section III of Chapter 3 will advocate for the use of Fredman's 4-dimensional definition of substantive equality[26] as a more effective approach to tackle paternity discrimination. The modern-day definition of substantive equality is currently vague and the terminology used to describe the equality theory is often of a vacuous nature.[27] The definition of substantive equality by Fredman will instead be used in this chapter, as this definition has condensed the theory to 4 dimensions which are more practical to apply. Fredman's 4-dimensional approach encompasses the aim of: (i) redressing disadvantage (the redistributive dimension); (ii) addressing stigma, stereotyping, prejudice and violence (the recognition dimension); (iii) enhancing voice and participation from marginalised groups (the participative dimension); and (iv) accommodating for differences through the inclusion of structural change (the transformative dimension).[28] The ways in which each of these 4 elements have aided in recognising, remedying and reconceptualising the harms which fathers experience as equality

[22] ibid 65.
[23] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 8-9.
[24] ibid 9.
[25] ibid 10.
[26] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 713.
[27] Colm O'Cinneide, 'Completing the Picture: The Complex Relationship Between EU Anti-Discrimination Law and 'Social Europe'' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 135.
[28] Fredman, 'Substantive Equality Revisited' (n 26) 728-734.

harms will be demonstrated through the separate examination of each element within the following 4 sub-sections: 1. Redistribution; 2. Recognition; 3. Participation; and 4. Transformation. These sub-sections will particularly focus upon analysing the case evolution of the more recent adoption of a substantive equality approach to cases concerning discrimination by the ECtHR and the CJEU. The discussion in Section III will be undertaken to further illustrate the strength that a substantive equality approach has had in lessening the effects of paternity discrimination and protecting the position of fathers in childcare.

Section IV will present an overall conclusion of Chapter 3 which reinforces that the use of Fredman's 4-dimensional approach to substantive equality[29] aids best in reconceptualising the harms which fathers experience as equality harms and eliminating the discrimination which fathers face. Substantive equality would better understand that the mistreatment of fathers lie within the cultural norms and structural barriers that have been created by the legal and cultural adherence to the traditional "male breadwinner" model. This familial model refers to the heterosexual 2-parent unit wherein the father is the breadwinner and the mother is the caregiver.[30]Although equality legislation has focused upon the inclusion of dismantling the structural barriers which prevent women from entering the workplace,[31] Fredman's substantive equality perspective[32] would help to dismantle the structural barriers that prevent men from actively participating in childcare.

II. THE CURRENT APPROACH OF FORMAL EQUALITY

Formal equality has been described by Manfredi as the 'neutral application of the law [which] does nothing to compensate marginalized groups for the accumulated disadvantages of past exclusion.'[33] The underlying concept underpinning formal equality is that individuals that are similarly situated should be treated alike, whilst individuals that are differently situated should be treated differently.[34] Formal equality focuses upon the equality concept of sameness-difference where there is 'same treatment if one is the same, [and] different treatment if one is different.'[35] The issue with applying a formal equality approach to cases involving the discrimination of fathers is that the theory fails to observe that the cause of their discrimination emanates from the gender division of labour underpinning the traditional "male breadwinner" model.[36] In the search for sameness-difference under formal equality, this theory is largely unsuccessful at dismantling the social structures which perpetuate

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[29] ibid 713.
[30] Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) 23.
[31] EA 2010, s.4; HRA 1998, art.14.
[32] Fredman (n 26) 713.
[33] Christopher Manfredi, 'The Judicialization of Politics: Rights and Public Policy in Canada and the United States' in Keith Banting, George Hoberg and Richard Simeon (eds), *Degrees of Freedom: Canada and the United States in a Changing World* (McGill-Queen's University Press 1997) 330.
[34] Robin West, *Civil Rights: Rethinking Their Natural Foundation* (Cambridge University Press 2019) 109.
[35] Catharine MacKinnon, *Women's Lives, Men's Laws* (Harvard University Press 2005) 46.
[36] Cristina Solera, *Women in and Out of Paid Work: Changes Across Generations in Italy and Britain* (Policy Press 2009) 39.

discrimination against fathers. Formal equality also has limited impact upon transforming the overall gender relations between parents and fails to acknowledge the continued devaluation of care work within the home.

Historically, the theory of formal equality was favoured in the past in Britain. Examples of the initial endeavours of the application of formal equality under previously prominent pieces of equality legislation can be found under the Equal Pay Act 1970 and the Sex Discrimination Act 1975. Jowell and O'Cinneide maintain that the chief advantage of formal equality theory is that the approach had the ability to offer certainty and clarity within its application and interpretation due to its format being a clear, written set of consistent rules and principles.[37] Jowell and O'Cinneide argue that the advantages gained from the application of formal equality seemed to serve the purpose of what anti-discrimination legislation should provide.[38] Similarly, Smith and O'Connell underline that the requirement for the same and equal treatment of all individuals under formal equality protected against any harms that could be incurred from the inclusion of arbitrary criterions that could have, otherwise, been necessary to satisfy within the judicial decision-making process.[39] Although formal equality is currently widely discredited in being able to resolve all matters of discrimination,[40] the important advantage of simplicity and clarity within its definition and application reinforces why the equality model continues to be a favoured approach to some extent. The positives associated with formal equality illustrate why it is still heavily relied upon as an approach to understanding the discrimination which fathers experience by the court system.

However, Árnadóttir asserts that a key issue with the Aristotelian approach[41] of formal equality is its reliance upon a relevant comparator to establish discrimination between discriminated and non-discriminated groups.[42] Smith and O'Connell argue that a relevant comparator is a necessity when investigating whether discrimination has taken place under formal equality as, if there are any inconsistencies found within the treatment of both specified parties, discrimination can be established.[43] A formal equality approach adopted by the court system when addressing claims of discrimination made by fathers would involve a comparison being made between fathers and mothers. Once the relevant comparator has been established, any inconsistency in treatment detected between both groups can subsequently lead to the establishment of discrimination. The requirement of a relevant comparator has consistently allowed the biological differences between mothers and fathers within reproduction to justify the differential treatment of fathers.[44] Moreover, the social expectations surrounding the roles of motherhood and fatherhood as defined under the

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[37] Jeffrey Jowell and Colm O'Cinneide, 'Values in the UK Constitution' in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence Of Global Values: Through the Lens of Comparative Constitutional Law* (Bloomsbury Publishing 2015) 383-384.
[38] ibid.
[39] Smith and O'Connell (n 4).
[40] Fenwick (n 2) 1470-1471.
[41] Tobler (n 1).
[42] Árnadóttir (n 3).
[43] Smith and O'Connell (n 4).
[44] *Shuter v Ford Motor Company Limited* [2014] 7 WLUK 1105 [89] (hereafter *Shuter*); *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police* [2019] EWCA Civ 900 [66], [92] (hereafter *Ali v Capita* and *Hextall*); *Price v Powys County Council* [2021] UKEAT/0133/20 [7] (hereafter *Price*).

traditional “male breadwinner” model have served to further justify the differential treatment of both parents.[45]

The need for a relevant comparator to establish discrimination in the cases of *Shuter, Ali v Capita* and *Hextall* and *Price* shows that the EA 2010 continues to adopt many aspects of formal equality. As discussed in Section VI of Chapter 2, in the case of *Shuter*, Mr Shuter relied upon the relevant comparator being a mother on maternity leave in receipt of enhanced pay in order to demonstrate that fathers on additional paternity leave in receipt of statutory pay was sex discrimination.[46] However, the Employment Tribunal (ET) determined that a mother on maternity leave was not identically situated as mothers ‘will have been pregnant, given birth, and is likely to have cared for the child since birth and possibly breastfed it.’[47] In the joined appeals of *Ali v Capita* and *Hextall*, Mr Ali and Mr Hextall relied upon the relevant comparator being a mother on maternity leave to provide evidence that it was sex discrimination that they could not access enhanced pay like mothers.[48] The Employment Appeal Tribunal (EAT) established that the differential treatment of Mr Ali was justified as the purposes of shared parental leave and maternity leave differed. Unlike shared parental leave, maternity leave provided mothers with the time to cope with the later stages of pregnancy, recover from the effects of childbirth and to develop a strong mother-child bond.[49] Similarly, the EAT particularly determined that Mr Hextall was not subject to discrimination because he could not satisfy the conditions to access full pay on maternity leave which are to be pregnant, give birth or breastfeed.[50] The sentiment was similarly echoed in the case of *Price*, as the EAT upheld the judgment of *Ali v Capita* and *Hextall* when determining that a mother on maternity leave and a mother on adoption leave receiving enhanced pay could not be the relevant comparator to a father on shared parental leave receiving statutory pay.[51] The biological differences between mothers and fathers and the distinctions in the social expectations surrounding traditional motherhood and fatherhood were used by the ET and the EAT to affirm that the role of fatherhood is secondary to motherhood.

The fixation by the ET and the EAT upon the differences between mothers and fathers in the cases of *Shuter*, *Ali v Capita* and *Hextall* and *Price* to legitimise the lesser treatment of fathers was heavily influenced by the formal equality approach adopted by the CJEU in the judgment of *Hofmann v Barmer Ersatzkasse*.[52] In *Hofmann*, the CJEU ruled that the denial of a request by a father to gain access to an optional period of maternity leave that was granted to mothers 8 weeks post-birth was not discrimination.[53] The CJEU justified their legal reasoning by purporting that maternity leave was to provide time for mothers to recover from the physical aspects of childbirth and to protect the special relationship between a mother and

[45] ibid.
[46] *Shuter* (n 44) [1]-[6].
[47] ibid [89].
[48] *Ali v Capita* and *Hextall* (n 44) [21]-[25].
[49] ibid [66].
[50] ibid [92].
[51] *Price* (n 44) [7].
[52] C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1986] 1 C.M.L.R. 242 (hereafter *Hofmann*).
[53] ibid paras 2-4, 25-29.

their child.[54] The judgment in *Hofmann* was cited in the cases of *Shuter*, *Ali v Capita* and *Hextall* and *Price* to justify the differential treatment of fathers.[55] The ET and the EAT supported lesser pay being awarded to fathers, which consequently limited the financial support for fathers to assume higher levels of childcare. The formal equality perspective adopted by the ET and the EAT recognised fathers as different to mothers. The judgments did not understand how fathers experienced disadvantage and stigma when attempting to actively participate in childcare due to the traditional role of fatherhood being largely seen as an uncaring role. The requisite of a relevant comparator under formal equality reinforces one of the many ways the equality model offers little guidance in being able to either understand or adequately address the root cause of the inequality perpetuated against fathers.

In order to further investigate the reasoning behind why formal equality is a limited framework to analyse the discrimination claims made by fathers, the following section will explore the use of mothers as the relevant comparator in cases where fathers have claimed to experience discrimination. The following section will particularly examine the CJEU case law as there have been prominent examples within the CJEU jurisprudence which showcase the traditional stance adopted towards cases regarding the discrimination which fathers experience. Despite future interpretative guidance by the CJEU being no longer binding for the UK courts since the departure of the UK from the EU, past interpretative guidance of the CJEU remain part of the UK law.[56] Additionally, s.6 of the European Union (Withdrawal) Act 2018 has declared that the UK courts may still have regard to any decisions made by the CJEU after the exit of the UK from the EU as long as they are of relevance. In light of the influence of the CJEU jurisprudence upon the UK courts, the increasing incorporation of elements of substantive equality within its judgments is relevant to the objective of Chapter 3. The jurisprudence of the CJEU will be examined to further underline the reasoning behind why regional courts have transitioned from a completely formal equality approach to including aspects of a substantive equality approach within their judgments. Through the examination of the CJEU case law, the overall lack of success associated with the formal equality approach adopted by the courts in England and Wales in tackling the discrimination against fathers will be better understood.

1. FORMAL EQUALITY APPROACH OF THE CJEU

An example of formal equality being inefficient at resolving the discrimination experienced by fathers can be seen within the infamous judgment of *Ulrich Hofmann v Barmer Ersatzkasse*.[57] The case involved the denial of a request made by a father for the German provision that granted mothers 8 weeks post-birth an optional period of maternity leave to be similarly extended to fathers.[58] Despite the argument that the exclusion of fathers from the

[54] ibid para 25.
[55] *Shuter* (n 44) [38]; *Ali v Capita* and *Hextall* (n 44) [45]-[46]; *Price* (n 44) [34].
[56] Paula Giliker, 'Interpreting Retained EU Private Law Post-Brexit: Can Commonwealth Comparisons Help Us Determine the Future Relevance of CJEU Case Law?' (2019) 48 Common Law World Review 16.
[57] C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1986] 1 C.M.L.R. 242 (hereafter *Hofmann*).
[58] ibid paras 2-4.

leave entitlement could amount to sex discrimination in the workplace under the Equal Treatment Directive 1976,[59] the CJEU interpreted in the preliminary ruling that the German provision was not incompatible.[60] The reasoning adopted was that maternity leave was not intrinsically linked with that of childcare purposes.[61] The CJEU acknowledged that childcare was a responsibility shared by mothers and fathers, but that there were 2 purposes of maternity leave which ultimately justified the differential treatment.[62] The first purpose was the protection of a woman's 'biological condition'[63] during pregnancy wherein optional maternity leave introduced under the German provision allowed time post-birth for mothers to recover their 'physiological and mental functions.'[64] The second purpose of the German provision was 'to protect the special relationship between a woman and her child… by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.'[65]

The formal equality perspective adopted by the CJEU failed to identify the discrimination which the claimant was experiencing. The Court relied upon the use of a relevant comparator to determine whether he had been subject to discrimination. However, the Court determined that the comparison between a father on leave and a mother on leave could not be made as both were not similarly situated. The judgment cited the biological differences between mothers and fathers as a reason to justify the differential treatment of fathers. The CJEU stated that the purposes of maternity leave included recovery from the biological and mental effects of pregnancy, which fathers did not experience. Moreover, the Court maintained that the social expectations surrounding the role of motherhood and fatherhood is different to one another with regards to childcare. Their legal reasoning stressed that a special relationship is created between a mother and their child but did not discuss whether a father-child bond was similarly special. McGlynn contends that the CJEU privileges the parenting roles defined under the traditional "male breadwinner" model.[66] The different societal expectations surrounding the roles of motherhood and fatherhood under this familial model has led to the justification of the differential treatment of fathers. Mothers are socially required to perform a different role to fathers in which mothers are primarily responsible for childcare. Fathers are socially required to perform a secondary role with regards to childcare and chiefly focus upon earning the household income.

The formal equality approach implemented within the judgment of *Hofmann* is problematic in providing adequate redress to fathers experiencing discrimination. The search for an identically situated comparator has prevented the CJEU from recognising the wider context

[59] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 039/40 (Equal Treatment Directive).
[60] *Hofmann* (n 52) paras 25-29.
[61] ibid para 25.
[62] ibid para 25.
[63] ibid para 25.
[64] ibid para 25.
[65] ibid para 25.
[66] Clare McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 European Law Journal 37.

of the discrimination perpetuated against fathers. Despite the differences in the biological make-up and social expectations surrounding mothers and fathers, the purposes of leave undertaken by mothers and fathers is primarily for childcare purposes. Leira recognises that the traits associated with childcare, such as rearing and nurturing, are assumed to be found naturally within women.[67] Furthermore, Margaria explains that an important element in defining the role of fatherhood under the traditional "male breadwinner" model is that 'parental care is neither a feature of nor a prerequisite for obtaining legal fatherhood.'[68] However, fathers are capable of rearing and being nurturing like mothers. Fathers also can develop a special relationship with their child through childcare as mothers presently do. Fathers are currently prevented from being able to do so because the limited leave entitlements provided to them erect structural barriers which prevent them from actively particpating in childcare and bonding with their child to the same level that mothers can. The design of the leave entitlements allocated to fathers are rooted in the gender stereotypes found under the traditional "male breadwinner" model which perceive fathers as uncaring and unfeeling.[69] The issue with the CJEU applying a sameness-difference equality concept is that the Court does not identify the discriminatory effects of the employment legislation governing leave entitlements and the consequent stigmatisation of fathers in caring roles. The formal equality perspective implemented by the CJEU within their judgment further perpetuates the stigmatisation of fathers who want to actively partcipate in childcare. This judgment exposes the weaknesses of formal equality being used as a tool which inadequately recognises the discrimination that fathers experience and provides legal support that implicitly encourages women to solely and primarily undertake childcare.

Over a decade later, the CJEU continued to adopt a formal equality perspective towards fathers experiencing discrimination in the judgment of *Abdoulaye v Regie Nationale des Usines Renault SA*.[70] This case concerned a percentage of male workers at Renault who had raised an issue with a legal provision relating to social benefits within the workplace.[71] The provision granted female employees undertaking maternity leave a sum of FRF 7500 and was argued by the male employees at Renault to be incompatible with the principle of equal pay under art.119 of the Treaty Establishing the European Economic Community (Treaty of Rome)[72], as men were not offered the same.[73] The claimant argued that, 'although the birth of a child concerns women alone from a strictly physiological point of view, it is… a social event which concerns the… father, and to deny him the same allowance amounts to unlawful discrimination.'[74] However, the Court maintained that the differential treatment of male and

[67] Arnlaug Leira, *Welfare States and Working Mothers* (Cambridge University Press 1992) 12.
[68] Alice Margaria, *The Construction of Fatherhood* (Cambridge University Press 2019) 14.
[69] Nicole Busby and Michelle Weldon-Johns, 'Fathers as Carers in UK Law and Policy: Dominant Ideologies and Lived Experience' (2019) 41 Journal of Social Welfare and Family Law 287; Jonathan Herring, 'Making Family Law More Careful' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014) 52.
[70] C-218/98 *Abdoulaye v Regie Nationale des Usines Renault SA* [2001] 2 C.M.L.R. 18 (hereafter *Abdoulaye*).
[71] ibid para 3.
[72] Treaty Establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 3 (Treaty of Rome), art.119.
[73] *Abdoulaye* (n 70) paras 3-4.
[74] ibid para 7.

female employees under this provision did not amount to discrimination as the purpose of this provision was to help women 'offset the occupational disadvantages which arise… as a result of their being away from work.'[75] Occupational disadvantages that employed mothers undertaking maternity leave were said to incur included a lack of workplace promotions, reductions in their period of service upon their return, the unlikelihood of claiming performance-related salary increases, absences from certain types of training and possible failure of adaptation to new technology installed.[76] The rationale underpinning the exclusive access of social benefits to mothers on maternity leave could be perceived to be a measure to overcome the disadvantage perpetuated against mothers. Nevertheless, the Court should be able to simultaneously acknowledge the disadvantage directed against fathers without undoing the progress made to eradicate the discrimination which mothers experience. The CJEU should be able to identify that the measure promotes the parenting roles defined under the traditional "male breadwinner" model and largely excludes fathers from actively participating in childcare. Yet, the Court determined that the objective underpinning the exclusive access of social benefits to mothers on maternity leave did not breach art.119 of the Treaty of Rome 1957 as 'male and female workers are… in different situations.'[77]

Similar to the case of *Hofmann,* the CJEU utilised a formal equality approach in the judgment of *Abdoulaye*. The Court relied upon the relevant comparator of a mother on maternity leave to ascertain whether barring the access to social benefits from fathers amounted to discrimination. The CJEU made the assumption in their judgment that the position of mothers and fathers were different to one another in relation to childcare due to the social expectations surrounding traditional motherhood and fatherhood. The application of the equality concept of sameness-difference led the Court to determine that a mother on maternity leave was not identically situated to fathers, as only mothers are primarily responsible for childcare under the traditional "male breadwinner" model. In light of the caring responsibilities solely undertaken by mothers under this familial model, the CJEU assumed that only mothers would experience occupational disadvantages from being absent from the workplace for an extended period of time and would be in need of financial support. Therefore, the differential treatment of mothers and fathers was justified because only mothers would experience the negative repercussions from undertaking childcare.

However, the Court made the incorrect assumption that fathers would not need access to social benefits upon childbirth because fathers do not have additional caring responsibiltites to undertake under the traditional "male breadwinner" model. The CJEU wrongly postulated that the responsibilities assumed by fathers would be unaffected by childbirth because fathers are presumed to continue to maintain their position in paid employment upon childbirth. The Court did not take into account that not every family adheres to the traditional "male breadwinner" model and that childcare responsibilities could be shared differently between parents within various families. Furthermore, the Court failed to recognise that the legal support for the increased participation of fathers in childcare would help to dismantle the

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[75] ibid para 22.
[76] ibid para 19.
[77] ibid para 20.

normative force of the traditional “male breadwinner” model. The responsibilities which fathers occupy in the home could change upon childbirth because many fathers who are similarly situated to the claimant could undertake flexible working hours or engage in part-time employment to help mothers on maternity leave with childcare. Fathers would be in need of financial support through social benefits as the level of household income earned by fathers would be less under these circumstances. The legal reasoning adopted by the Court prevented fathers who want to actively participate in childcare from accessing a similar level of financial support that mothers could. Moreover, the judgment further served to stigmatise fathers who want to adopt caring roles.

The requisite for an identically situated relevant comparator under formal equality prevented the CJEU from being able to recognise the discrimination which fathers experience in *Abdoulaye*. The justification of offsetting the occupational disadvantages which mothers could potentially experience through the provision of social benefits promotes the outlook that the role of fatherhood does not involve childcare. McGlynn explains that the CJEU upheld a “dominant ideology of motherhood”, which entails that the mother-child relationship is sacrosanct and that the completion of workplace tasks is secondary to childcare.[78] The protection of the mother-child relationship is rooted in outdated concepts such as Bowlby’s theory of monotropy,[79] which he later expanded to encompass the premise of ‘maternal deprivation.’[80] Bowlby believed that children who lacked a rewarding relationship with their mothers within the early years of childhood could suffer from partial maternal deprivation wherein they could develop acute anxiety and depression.[81] Children could also suffer from complete deprivation which could affect their character development and their ability to construct relationships.[82]

Bowlby’s theory has since been heavily critiqued and deemed outdated, as positive paternal engagement has been recognised as increasing the cognitive competence, empathy and self-control of children.[83] Furthermore, the increased involvement of fathers in childcare has been positively correlated with children developing fewer beliefs that are rooted in gender stereotypes.[84] The positive effects of paternal care upon children evidences the fact that care work performed by fathers is as valuable as that performed by mothers. Additionally, the father-child relationship is as sacrosanct as the mother-child relationship. The fixation upon the differences in the social expectations surrounding motherhood and fatherhood has

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[78] McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (n 66) 31.
[79] Vivien Prior and Danya Glaser, *Understanding Attachment and Attachment Disorders* (Jessica Kingsley Publishers 2006) 63.
[80] Wayne Morrison, *Theoretical Criminology from Modernity to Post-Modernism* (Cavendish Publishing 2014) 143.
[81] John Bowlby, 'Maternal Care and Mental Health' (World Health Organisation 1951) 11-12.
[82] ibid.
[83] Michael Lamb, ‘How do Fathers Influence Children’s Development?’ in Michael Lamb (ed), *The Role of the Father in Child Development* (5th edn, Wiley 2010) 7; Joseph Pleck, ‘Paternal Involvement: Levels, Sources, and Consequences’ in Michael Lamb (ed), The Role of the Father in Child Development (3rd edn, Wiley 1997) 96-97; Kyle Pruett, ‘Infants of Primary Nurturing Fathers’ (1983) 38 Psychoanalytic Study of the Child 257-277; Kyle Pruett, ‘Oedipal Configurations in Young Father-Raised Children’ (1985) 40 Psychoanalytic Study of the Child 435-456.
[84] ibid.

prevented the CJEU from being able to recognise the discrimination which fathers experience and has further stigmatised fathers in childcare.

A few years after the decision of *Abdoulaye*, a formal equality approach continued to be adopted by the CJEU in the case of *Lommers v Minister Van Landbouw, Natuurbeheer En Visserij.*[85] This case concerned a male employee who raised an issue after his request was denied by his employer for access to the subsidised nursery scheme, as the measure was reserved only for female employees or men in cases of emergency.[86] Despite a preliminary ruling being made with regards to the interpretation of art.2(1) and art.2(4) of the Equal Treatment Directive 1976, which prohibits sex discrimination, the Court held that the purpose of the subsidised nursery scheme was to 'tackle extensive under-representation of women.'[87] The CJEU argued that the scheme was a measure that was 'designed to eliminate the causes of women's reduced opportunities of access to employment and careers and intended to improve the ability of women to compete on the labour market and pursue a career on an equal footing with men.'[88] The Court believed that the policy design underpinning the subsidised nursery scheme was not in breach of the Equal Treatment Directive.[89]

Similar to the cases of *Hoffman* and *Abdoulaye,* the CJEU adopted a formal equality perspective to determine whether fathers were discriminated against in the case of *Lommers.* The Court relied upon mothers as a relevant comparator to fathers, but determined that both parents were differently situated and that discrimination could not be established. Akin to the previous discussion of the judgment of *Abdoulaye,* the CJEU applied the "dominant ideology of motherhood" and determined that the primary responsibility of childcare placed upon mothers creates negative consequences for them in the workplace.[90] For instance, the Court stated that the differential treatment of fathers was justified as the 'insufficiency of suitable and affordable nursery facilities is likely to induce more… female employees to give up their jobs.'[91] Although affirmative action measures have been primarily introduced 'as a means of breaking down barriers to employment'[92] for women, similar measures could simultaneously be introduced to support the dismantling of barriers to childcare for men. Preventing fathers from being able to access subsidised childcare facilities erects a structural barrier which limits their involvement in childrearing. Allowing fathers to use childcare facilities would reinforce that mothers and fathers are similarly placed to care and that the responsibility of childcare does not need to be chiefly placed upon mothers. Introducing measures which support shared childcare responsibilities between mothers and fathers would aid mothers in combating the workplace discrimination that they experience, as they would have more time

[85] C-476/99 *Lommers v Minister Van Landbouw, Natuurbeheer En Visserij* [2004] 2 C.M.L.R. 49 (hereafter *Lommers*).
[86] ibid para 2.
[87] ibid para 50.
[88] ibid para 33.
[89] ibid para 50.
[90] McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (n 66) 31; *Lommers* (n 85) para 37.
[91] *Lommers* (n 85) para 37.
[92] Stephen Keyes, 'Affirmative Action for Working Mothers: Does Guerra's Preferential Treatment Rationale Extend to Childrearing Leave Benefits' (1991) 60 Fordham Law Review 314.

to participate in paid work. Additionally, these measures would help counter the disadvantage perpetuated against fathers that limits their participation in childcare.

Furthermore, the perception that mothers cannot be relevant comparators to fathers due to both parents being differently situated reinforces that fathers are secondary parents to mothers in relation to childcare. The CJEU explained that 'the measure at issue does not totally exclude male officials from its scope but allows the employer to grant requests from male officials in cases of emergency.'[93] The reasoning of the CJEU creates the assumption that the care work performed by fathers is of lesser value than that undertaken by mothers and is only possibly needed in emergency situations to support mothers with caring responsibilities. The Court does not only prevent fathers from establishing their position in childcare, but relies upon the social expectations surrounding traditional motherhood and fatherhood to justify that fathers do not need support for childcare during early childhood. As highlighted in Section II of Chapter 2, the issue with paternity leave in the UK is that the law supports the position of fathers in the home for the first 2 weeks after childbirth.[94] However, childcare is a long-term responsibility which fathers receive little legal support to participate in. The formal equality perspective adopted by the CJEU in *Lommers* fails to challenge the parenting roles as defined under the traditional "male breadwinner" model. Instead, the Court strongly relies upon the ideology underpinning the familial model to differentiate fathers from mothers and stigmatise fathers performing care work.

III: THE THEORY OF SUBSTANTIVE EQUALITY

In response to the inadequacies of formal equality, the alternative model of substantive equality has since been developed[95] and increasingly favoured as a means of interpretation by the ECtHR[96] and the CJEU.[97] Radbord describes substantive equality as 'considering the full social, political, and historical context of the case with an eye to the realities of historic discrimination and disadvantage.'[98] Radbord states that substantive equality is central to understanding the root cause of discrimination, remedying the historical disadvantage and ensuring that the law respects the human dignity of all individuals from an equality perspective.[99] Although substantive equality seeks to address the fundamental source of discrimination, the practical application of substantive equality within law is of a vague nature.[100] The UK courts have found that incorporating substantive equality into their decision-making in a clear and consistent manner has been challenging.[101] Fredman explains that there have been various interpretations of the core meanings of substantive equality which have primarily included equality of results, equality of opportunity and dignity, but

[93] *Lommers* (n 85) para 45.
[94] The Paternity and Adoption Leave Regulations 2002, regs.4-5.
[95] Susan Williams, *Constituting Equality* (Cambridge University Press 2009) 57.
[96] Nikolaidis (n 9).
[97] Giegerich (n 12).
[98] Radbord (n 10).
[99] ibid.
[100] O'Cinneide (n 27).
[101] ibid.

that the nature of substantive equality cannot be captured by a single principle like formal equality.[102] Fredman has proposed a 4-dimensional definition of substantive equality[103] which I will be applying throughout Section III to further explore how this equality model could help fathers combat discrimination. The 4 dimensions include: 1. Redistribution; 2. Recognition; 3. Participation; and 4. Transformation.[104] The redistributive dimension focuses upon dismantling the disadvantage perpetuated against minority and marginalised groups under hierarchical social structures.[105] The recognition dimension aims to eliminate the stigma, stereotyping and violence perpetrated against individuals based upon gender, sexual orientation, disability, race or any other status.[106] The participative dimension intends to enhance the voice and participation of minority and marginalised groups that have typically faced social exclusion.[107] Lastly, the transformative dimension aims to modify existing social structures to create an environment that accommodates for the needs of marginalised and minority groups.[108]

The objective for gender equality for the last 3 decades has been to constitutionally shift from a formal equality perspective to a substantive equality approach.[109] Byrnes maintains that a substantive equality approach is increasingly preferred because the equality model adequately addresses the 'asymmetrical structures of power, dominance and disadvantage at work in society.'[110] Árnadóttir states that the success associated with substantive equality is heavily linked to the fact that it does not rely upon a relevant comparator to establish discrimination.[111] Instead, the theory focuses upon tackling the historical disadvantage perpetuated by structural hierarchies in society towards individuals belonging to marginalised or minority groups.[112] As explored in Section II, a formal equality approach towards the discrimination which fathers experience relies upon the relevant comparator being a mother. A formal equality perspective fails to identify the discrimination which fathers are subject to because the theory concludes that mothers and fathers are not identically situated in childcare. Factors such as the differences in biological sex and distinctions in the social expectations surrounding motherhood and fatherhood have been cited as reasons to justify the differential treatment of fathers. However, substantive equality will be upheld as a tool which can adequately recognise that fathers are a marginalised sub-group within men who experience discrimination in Section III. Substantive equality will identify that the discrimination which fathers experience is rooted in the legal and cultural adherence to the parenting roles defined under the traditional "male breadwinner" model. In addition to the breadwinning role

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[102] Fredman, 'Substantive Equality Revisited' (n 26).
[103] ibid.
[104] ibid 728-734.
[105] ibid 728-730.
[106] ibid 730-731.
[107] ibid 731-732.
[108] ibid 732-734.
[109] Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (UBC Press 2004) 35.
[110] Andrew Byrnes 'Article 1' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms Of Discrimination Against Women* (Oxford University Press 2012) 55.
[111] Árnadóttir (n 3) 25.
[112] Radbord (n 10).

associated with fatherhood, substantive equality will recognise that the role of fatherhood should be inclusive of a caring role as well.

Section III will examine the case law of the ECtHR and the CJEU to show the reasoning behind why a substantive equality approach has become increasingly favoured. In light of the preference of the UK courts to follow Strasbourg jurisprudence,[113] the analysis of the case law by the ECtHR will be particularly relevant to the discussion of the HRA 1998. Under s.2(1)(a) of the HRA 1998, the courts in the UK are obligated to take into account any judgments, decisions, declarations or advisory opinions made by the ECtHR in relation to the ECHR. Fredman's 4-dimensional definition of substantive equality[114] will be applied to the analysis of the case law to highlight how the different aspects of substantive equality could provide adequate redress for fathers experiencing discrimination. Section III will investigate each dimension of the 4-dimensional definition of substantive equality by Fredman[115] within the following sub-sections: 1. Redistribution; 2. Recognition; 3. Participation; and 4. Transformation. The purpose of Section III is to illustrate the successes associated with substantive equality in lessening the effects of the discrimination directed against fathers and protecting their position in childcare.

1. REDISTRIBUTION

Fredman describes the redistributive dimension as providing redress for the disadvantage perpetuated against minority and marginalised groups that have been caused by an imbalance of power established under a number of hierarchical social systems.[116] The nature of disadvantage can take the form of socio-economic disadvantage which can entail under-representation in the job sector, under-payment for work of equal value to those belonging to privileged societal groups or limitations on access to property or credit, for example.[117] However, the nature of disadvantage is not purely limited to the above, as the disadvantage dimension also aims to tackle any political, social, economic or physical constraints[118] that is not the product of 'an individual's status or group identity… but the detrimental consequences attached to that status.'[119]

Despite men belonging to a privileged group in society, the redistributive dimension can be used to show fathers as having been marginalised from childcare. A key example of the redistributive dimension of substantive equality helping to recognise the discrimination which fathers experience can be seen within the dissenting opinion of *Petrovic v Austria*.[120] The case concerned a father, Mr Petrovic, whose request for parental leave allowance was denied under the Austrian provision of s.26(1) of the Unemployment Benefit Act 1977, as only

[113] ibid 67.
[114] Fredman, 'Substantive Equality Revisited' (n 26).
[115] ibid.
[116] ibid 729.
[117] ibid 729.
[118] ibid 730.
[119] ibid 729.
[120] *Petrovic v Austria* (2001) 33 E.H.R.R. 14.

mothers were eligible for the entitlement.[121] Mr Petrovic argued that the exclusion of fathers from accessing parental leave allowance was discriminatory, as the lack of financial support prevented their ability to take time off work to actively participate in childcare.[122] Mr Petrovic argued that mothers and fathers were treated differently on the basis of sex and that the differential treatment amounted to a violation of arts.8 and 14 of the ECHR, which contained the rights to respect for private and family life and to non-discrimination.[123] Although the majority opinion of the ECtHR found no violation, the dissenting opinions of Judges Bernhardt and Spielmann undertook a substantive equality approach and maintained that Mr Petrovic had been discriminated against.[124] The judges held that the prevention of fathers from accessing parental leave allowance was discriminatory as, if a mother 'continues her professional activity and agrees that the father stay at home, the family loses the parental leave allowance to which it would be entitled [to] if she stayed at home.'[125] In providing limited financial support for fathers to remain in childcare, fathers would find it difficult to maintain their position as carers for their children for a long period of time without having to return to work.

The practical application of the redistributive dimension of substantive equality within the dissenting opinion of *Petrovic v Austria* recognised that the lack of financial support for fathers to participate in childcare is a form of disadvantage. The exclusion of fathers from accessing parental leave allowance promotes legal adherence to the gender division of labour established under the traditional "male breadwinner" model. By providing mothers with exclusive access to parental leave allowance, fathers experience economic constraints to similarly care for their children. Mothers would have to tend to childcare and fathers would have to continue to work in order to maximise the level of household income. The implicit use of the redistributive dimension of substantive equality in the dissenting opinions of *Petrovic v Austria* identified that fathers experience disadvantage in the form of less financial support to be in childcare as a result of the detrimental consequences attached to being a father. The lack of monetary support provided to fathers to assume childcare responsibilities wrongly perpetuates the concept that maternal care is the most important and valued. The lack of financial support deprives fathers of the ability to sufficiently care and bond with their child.

Likewise, another notable example of the redistributive dimension of substantive equality identifying the discrimination which fathers experience can be seen in *Weller v Hungary.*[126] As discussed in Section IV of Chapter 2, the case involved Mr Weller and his twin sons, Daniel and Máté, who had been deemed ineligible from accessing a maternity benefit due to the nationality of the mother of the children.[127] The applicants claimed that their exclusion from accessing the maternity benefit amounted to discrimination on the ground of the

[121] ibid paras 9-16.
[122] ibid para 16.
[123] ibid para 16.
[124] ibid, Dissenting Opinions of Judge Bernhardt and Judge Spielmann.
[125] ibid, Dissenting Opinions of Judge Bernhardt and Judge Spielmann.
[126] *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009).
[127] ibid paras 1-3.

nationality of the mother of the twin sons and the parental status of Mr Weller.[128] The applicants explained that being prevented from accessing the maternal benefit amounted to a violation of arts.8 and 14 of the ECHR, which contained the rights to respect for private and family life and to non-discrimination respectively.[129] The ECtHR determined that there had been a violation and that the refusal to allow Mr Weller and his twin sons to access the maternity benefit amounted to discrimination.[130] The Court explained that 'while differences may exist between [the] mother and father in their relationship with the child, both parents are "similarly placed" in taking care of the unborn child.'[131] Moreover, the Court underlined that the purpose of the allowance is to support newborn children and the family raising them and is not wholly for the purpose of reducing the hardship of childbirth experienced by mothers.[132] The ECtHR observed that there was no reasonable ground to justify the exclusion of fathers from receiving a benefit that was aimed to support individuals raising newborn children, such as adoptive parents and guardians.[133] The Court concluded that Mr Weller had been treated differently on the grounds of his parental status.[134] Furthermore, the Court observed that the twin sons had been discriminated against because the entitlement to the maternity benefit should not be dependent upon the nationality of the mother.[135]

Similar to the dissenting opinions of *Petrovic v Austria,* the practical application of the redistributive dimension in *Weller v Hungary* recognised that the lack of financial support for fathers to participate in childcare is a form of disadvantage. The design of the maternity benefit promoted legal adherence to the traditional "male breadwinner" model, as it was created on the assumption that fathers do not care for newborn children and that caring responsibilities are primarily undertaken by mothers. The measure was not inclusive of supporting the caring responsibilities of fathers as the fulfilment of the traditional role of fatherhood is being the breadwinner. The adherence to the traditional "male breadwinner" model in the design of the maternity benefit obstructed fathers from being able to maintain their position in childcare. The exclusion of fathers from accessing maternity benefits impeded their participation in childcare due to the lack of financial support. Many fathers would typically have to continue to work to earn the household income to be able to afford childcare necessities such as nappies, formula milk and clothes, for example. Allowing fathers to have access to the maternity benefit would allow them to take time off work to tend to childcare without the financial stress or worry that they would not be able to afford childcare necessities. The application of the redistributive dimension in *Weller v Hungary* identified that the disadvantage which fathers experienced through the limited financial support provided to them arose from the detrimental consequences associated with their social status as fathers.

[128] ibid para 3.
[129] ibid para 3.
[130] ibid para 39.
[131] ibid para 33.
[132] ibid para 31.
[133] ibid para 35.
[134] ibid para 33.
[135] ibid paras 38-39.

2. RECOGNITION

The recognition dimension is described by Fredman to redress 'stigma, stereotyping, humiliation, and violence on grounds of gender, race, disability, sexual orientation, or other status.'[136] The dimension recognises that the identity of individuals is constructed through social norms which dictate their social status.[137] Each identity has social implications in which some group identities hold social privilege and other group identities are subject to certain forms of social inequality, such as humiliation, devaluation and denigration, for example.[138] The recognition dimension largely helps in identifying and dismantling the stereotypes surrounding certain group identities. This dimension could be particularly helpful in eradicating the gender stereotypes surrounding fatherhood, as fathers in the workplace are often mocked and regarded as "soft" for wanting to assume female-oriented labour such as childcare.[139] Moreover, the gender stereotypes surrounding fatherhood have contributed towards fathers being often automatically assumed to be the secondary caregiver even if they were the primary caregiver or childcare was equally shared between both parents.[140] Instead of purely focusing upon the identity of the individual, the recognition dimension aims to tackle the social consequences that arise from their social identity.[141]

A. GENDER STEREOTYPES BETWEEN MOTHERS AND FATHERS

An example of the recognition dimension helping to redress the discrimination that fathers experience can be seen in the judgment of *Markin v Russia*.[142] This case concerned a military serviceman, Mr Markin, who was denied access to 3 years of parental leave under the Russian Military Service Act 1998 because the leave entitlement was only accessible to military servicewomen. Mr Markin claimed that his denial of access to parental leave amounted to discrimination. Unfortunately, the Russian Constitutional Court argued that the denial could not amount to discrimination, as the purpose of the leave entitlement was to support the 'special social role of women associated with motherhood.'[143] Mr Markin brought his claim to the ECtHR stating that his denial of access to parental leave amounted to a violation of his right to private and family life under art.8 of the ECHR and his right to non-discrimination under art.14 of the ECHR. The ECtHR agreed that Mr Markin had been subject to discrimination by being denied access to the leave entitlement, as the difference in treatment was founded on 'gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners.[144] Although the Russian Constitutional Court had explained that servicemen who wished to undertake childcare had the freedom to

[136] Fredman, 'Substantive Equality Revisited' (n 26) 730.
[137] ibid 731.
[138] ibid 731.
[139] Women and Equalities Committee, *Fathers and the Workplace* (HC 2017-19, 358) para 21.
[140] ibid para 22.
[141] Fredman, 'Substantive Equality Revisited' (n 26) 731.
[142] *Markin v Russia* (2013) 56 E.H.R.R. 8 (hereafter *Markin*).
[143] ibid para 34.
[144] ibid para 143.

resign,[145] the ECtHR understood that fathers were forced 'to make a difficult choice between caring for their new-born children and pursuing their military career, [in which] no such choice [was] being faced by servicewomen.'[146]

In light of the recognition dimension under substantive equality, the ECtHR acknowledged that the exclusive access of servicewomen to parental leave strongly adhered to the gender stereotypes surrounding motherhood and fatherhood that was established under the traditional "male breadwinner" model. The legislation placed fathers in a position where they had to choose between childcare and career responsibilities. However, fathers would most likely have to choose to continue their military career because they would financially struggle to afford childcare necessities, for example. The ECtHR judgment further aimed to depart from the role of fatherhood as defined under the traditional "male breadwinner" model, as the Court stated that the purpose of 'parental leave and parental leave allowances relate to the subsequent period [after childbirth] and are intended to enable a parent… to stay at home to look after an infant personally.'[147] Furthermore, the Court reaffirmed that 'society had moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role had gained recognition.'[148]

With reference to the recognition dimension under substantive equality, the Court aimed to dismantle the gender stereotypes associated with motherhood and fatherhood. The role of fatherhood under the traditional "male breadwinner" model is stereotyped as the family breadwinner, whilst the role of motherhood is stereotyped as the primary carer of children. The traditional role of fatherhood is exclusionary of care work and the ECtHR perceived that legal adherence to the gender stereotypes attached to traditional fatherhood discriminated against the position of fathers in childcare. The recognition dimension of substantive equality comprehends that not every family assigns childcare responsibilities in accordance with the traditional "male breadwinner" model. Moreover, the recognition dimension realises that not every father wants to adhere to the traditional role of fatherhood and that many fathers want to be actively involved in childcare. The focus upon deconstructing the gender stereotypes surrounding motherhood and fatherhood by the ECtHR in *Markin* eliminated the discriminatory effect that the eligibility requirements to access parental leave had upon fathers wanting to participate in childcare. Additionally, the ECtHR affirmed that fathers can undertake caring roles to the same extent, and perform care work of the same value, as mothers. The Court ultimately ensured the legal protection of fathers in childcare within their judgment.

B. HETERONORMATIVE STEREOTYPES IN CARING RELATIONSHIPS

Although I have argued that fathers belong to a marginalised group in society, Haag argues that fathers of a sexual orientation, or exist within families, that do not fit the heteronormative

[145] ibid para 101.
[146] ibid para 101.
[147] ibid para 132.
[148] ibid para 99.

standards of the traditional "male breadwinner" model are particularly subject to discrimination.[149] There is limited case law by the CJEU and the ECtHR on successful discrimination claims involving gay fathers who were initially denied parental or custody rights over their children due to their sexual orientation. However, a key example of the recognition dimension of substantive equality helping to redress the social inequality that gay fathers experience can be seen in the case of *Salgueiro da Silva Mouta v Portugal.*[150] As discussed in Section IV of Chapter 2, the case involved a gay father, Mr Salgueiro da Silva Mouta, who was prevented by his ex-wife from visiting his daughter.[151] In an attempt by Mr Salgueiro da Silva Mouta to legally gain parental responsibility over his daughter, the Portuguese court stated that his request would be rejected unless he concealed his sexual orientation and his relationship with another man that he was living with from his daughter.[152] Mr Salgueiro da Silva Mouta declared that being coerced into concealing his sexual orientation was a violation of his rights contained under arts.8 and 14 of the ECHR, which contained the rights to respect for private and family life and to non-discrimination respectively.[153]

The ECtHR criticised the legal reasoning adopted by the Portuguese court as their 'judgment demonstrably shows that the decision to grant custody to the mother was based essentially on the sexual orientation of the father, which inevitably led to discriminatory treatment.'[154] The ECtHR asserted that the judgment by the Portuguese court was rooted in the belief that a 'child has to live within ... a traditional Portuguese family'[155] and that the sexual orientation of the father should be concealed because being gay is 'an abnormality and children should not grow up in the shadow of abnormal situations.'[156] With reference to the recognition dimension under substantive equality, the ECtHR understood that gay fathers experience discrimination on the basis of their sex, sexual orientation and parenting status intersecting. Stewart explains that the typical stereotypes associated with gay parents is that they are unfit to parent, that they will molest their children and that they will influence their children to be gay.[157] Stewart further highlights that the sexual identity of a parent is considered an important factor by the court system with regards to custody cases and that custody tends to be awarded to the straight parent regardless of whether that parent may be abusive.[158] The court system has gradually evolved to allow children to be placed with gay parents, but sometimes only under the conditions that the parent is not open about their sexual identity, is not politically active in the gay community and does not have a partner that they live with.[159] The ECtHR identified the specific discriminatory practices perpetuated against gay fathers

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[149] Christian Haag, *Emergence of a New Type of Family? Parenting Intentions of Homosexual Women and Men* (University of Bamberg Press 2016) 97.
[150] *Salgueiro Da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 (hereafter *Salgueiro*).
[151] ibid para 10.
[152] ibid para 14.
[153] ibid para 21.
[154] ibid para 31.
[155] ibid para 34.
[156] ibid para 34.
[157] Chuck Stewart, *Gay and Lesbian Issues: A Reference Handbook* (ABC-CLIO 2003) 40.
[158] ibid 42.
[159] ibid 43.

and used explicit anti-stereotyping language in their judgment to reinforce that gay fathers can provide adequate paternal care in the same manner in which a mother can offer maternal care. The recognition dimension helps to tackle the issue of heteronormativity being deeply rooted within the patriarchal structure in society,[160] which has consequently prevented familial models that fail to adhere to heteronormative standards from gaining adequate social recognition and legal protection. The ECtHR in *Salgueiro* can be highly commended for their use of substantive equality in their judgment to encourage community acceptance and the normalisation of familial structures operating outside of the traditional "male breadwinner" model.

The recognition dimension is important in lessening the effects of discrimination which gay fathers experience, as Lombardo and Meier maintain that a critique of the parental leave regulations that support the traditional "male breadwinner" model is that it overlooks parenting units outside of the heteronormative paradigm.[161] Due to many gay fathers having to operate within parenting units that do not wholly align with heteronormative parenting norms, many gay fathers suffer from harmful stereotypes that bring into question their ability to parent when compared to heterosexual parents.[162] The recognition dimension under substantive equality is particularly significant for gay fathers because the dimension helps to provide greater understanding of the discrimination that gay fathers personally experience, which will contribute to creating and introducing adequate legal protection for gay fathers. Through allowing gay fathers greater legal protection, the stigma and negative stereotypes associated with the parenting ability of gay fathers will lessen and the familial models operating outside of the traditional "male breadwinner" model will become increasingly legally accommodated for.

3. PARTICIPATION

The participative dimension is concerned with 2 aspects. The first aspect focuses upon increasing the political representation of marginalised and minority groups.[163] The second aspect aims to promote the social cohesion of these social groups.[164] Fredman explains that the lack of political representation of marginalised and minority groups has led to their needs having been overlooked by the law and fails to sufficiently support their inclusion in aspects of society.[165] The participative dimension is particularly helpful in highlighting how the needs of modern fathers and their social inclusion in childcare has not been currently adequately addressed by the law.

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[160] Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory' (1982) 7 Signs 533.
[161] Emanuela Lombardo and Petra Meier, 'Policy' in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press 2016) 616.
[162] Margaria (n 68) 130.
[163] Fredman, 'Substantive Equality Revisited' (n 26) 731-732.
[164] ibid.
[165] ibid.

The participative dimension helps to legally facilitate the social cohesion of the position of fathers in childcare, as they belong to a socially marginalised sub-group within men. The dimension acknowledges that mothers and fathers should have decision-making power in childcare and the workplace. However, the current lack of legal support for the position of fathers in childcare has confined fathers to the workplace and has largely excluded them from exercising decision-making powers in relation to childcare. As discussed in Section II of Chapter 2, the Women and Equalities Committee has found that the current employment legislation governing leave entitlements in the UK was inefficient at meeting the needs of modern fathers and contemporary families.[166] For instance, paternity leave has been critiqued for being short-term, providing low replacement pay and not being a day-one right from the start of employment.[167] Paternity leave is currently designed in an asymmetric fashion to maternity leave. Fathers are presently granted access to paternity leave for up to 2 weeks,[168] whilst mothers are allocated up to 52 weeks of statutory maternity leave.[169] Statutory paternity pay is paid at 90% of weekly earnings[170] or currently £172.48 (whichever is lower) per week,[171] whilst statutory maternity pay is paid at 90% of weekly earnings for the first 6 weeks and 90% of weekly earnings or currently £172.48 (whichever is lower) per week for the following weeks.[172] Fathers receive no other form of state financial support, whilst mothers can access state maternity allowance.[173] Fathers can only access paternity leave if they satisfy the eligibility requirement of having worked for the same employer for 26 weeks,[174] whilst mothers can access maternity leave by satisfying the less stringent eligibility requirement of being an employee.[175]

The development of maternity rights has largely been the focus of Parliament as mothers have been publicly prohibited from the workplace in the past and still continue to receive insufficient legal support to balance workplace and familial obligations.[176] However, fathers continue to be largely excluded from childcare through the insufficient legal support provided to them to balance their workplace and familial obligations. As critiqued in Section II of Chapter 2, fathers are provided with limited leave entitlements that they can only access through satisfying stringent eligibility requirements, which influences them to continue to

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[166] Women and Equalities Committee, *Fathers and the Workplace* (n 139) para 1.
[167] Women and Equalities Committee, *Fathers and the Workplace* (n 139) paras 41-55; The Paternity and Adoption Leave Regulations 2002, reg.5.
[168] The Paternity and Adoption Leave Regulations 2002, reg.5.
[169] The Maternity and Parental Leave etc. Regulations 1999, reg.7; The Maternity and Parental Leave (Amendment) Regulations 2002, reg.8.
[170] The Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002, reg.2.
[171] The Social Security Benefits Up-rating Order 2023, art.11.
[172] Social Security Contributions and Benefits Act 1992, s.166; The Social Security Benefits Up-rating Order 2023, art.10; The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006, reg.3.
[173] Social Security Contributions and Benefits Act 1992, s.35; Welfare Reform and Pensions Act 1999, s.53.
[174] The Paternity and Adoption Leave Regulations 2002, reg.4.
[175] The Maternity and Parental Leave etc. Regulations 1999, reg.4.
[176] Sylvia Law, 'Women, Work, Welfare, and the Preservation of Patriarchy' (1983) 131 University of Pennsylvania Law Review 1249; Women and Equalities Committee, *Pregnancy and Maternity Discrimination* (HC 2016-17, 90) para 7.

fulfil workplace responsibilities and prevents them from actively participating in childcare.[177] The employment legislation that governs leave entitlements in the UK adheres to the traditional “male breadwinner” model. The gender division of labour underpins this familial model and supports the segregation of mothers into the home and fathers into the workplace.[178] This segregation erects structural barriers that prevent mothers from undertaking male-oriented tasks, such as workplace responsibilities, and limits fathers from assuming female-oriented tasks like child-rearing. The traditional “male breadwinner” model ultimately discriminates against the position of fathers in childcare and the position of mothers in the workplace. Placing the full responsibility of being the breadwinner upon fathers provides them with very little ability to actively participate in childcare. The participative dimension understands that the position of fathers in childcare needs to be legally facilitated under the employment legislation governing leave entitlements. Overall, the participative dimension encourages the social cohesion of fathers in childcare who operate within familial structures which promote shared childcare responsibilities.

4. TRANSFORMATION

Fredman explains that the transformative dimension aims to alter existing social structures to accommodate for differences found amongst minority and marginalised groups in society.[179] Fredman states that currently ‘society… bear[s] the cost of the specific characteristics of dominant groups,’[180] whilst ‘members of out-groups… conform to the dominant norm.’[181] In an effort to conform, minority and marginalised groups have to bear the brunt of the costs to be legally accommodated for. An example can be found with parents who have to accept the costs of childcare,[182] as childcare is not accommodated for or normalised in the workplace.

A key example of the transformative dimension aiming to modify social structures to accommodate for fathers can be seen in the case of *Roca Alvarez v Sesa Start Espana ETT SA.*[183] This case involved a male employee whose request for “breastfeeding” leave under a Spanish provision was denied.[184] The specific leave was designed so that only mothers with children aged less than 9 months old or fathers, if the mother was engaged in employment, were made eligible for the leave entitlement.[185] A preliminary ruling was made to interpret arts.2 and 5 of the Equal Treatment Directive 1976, which prohibits sex discrimination in the workplace, in relation to the Spanish provision governing “breastfeeding” leave. The CJEU declared that the denial of fathers from accessing the leave cannot be considered to be a

[177] The Paternity and Adoption Leave Regulations 2002, reg.4; The Shared Parental Leave Regulations 2014, reg.35; The Flexible Working Regulations 2014, reg. 3; The Maternity and Parental Leave etc. Regulations 1999, reg.13.
[178] Solera (n 36).
[179] Fredman, ‘Substantive Equality Revisited’ (n 26) 733.
[180] ibid 734.
[181] ibid 733.
[182] ibid 734.
[183] C-104/09 *Roca Alvarez v Sesa Start Espana ETT SA* [2011] 1 C.M.L.R. 28 (hereafter *Roca Alvarez*).
[184] ibid para 2.
[185] ibid para 1.

policy that promotes substantive equality.[186] The Court explained that the "breastfeeding" leave 'has been detached from the biological fact of breastfeeding, so that it can be considered as time purely devoted to the child and as a measure which reconciles family life and work.'[187] Therefore, the Court concluded that the measure should be inclusive of fathers, as employed fathers can feed and devote time to their child in the same way employed mothers can.[188]

The transformative dimension of substantive equality helped to tackle the discrimination perpetuated against fathers in the case of *Roca Alvarez*. The CJEU understood that the design of the "breastfeeding" leave adhered to the traditional "male breadwinner" model and recognised the discriminatory effect that the design of the legal provision had upon fathers who wanted to share childcare responsibilities. The transformative dimension takes issue with the concept that the workplace is structured around the fully committed worker model wherein a worker should focus on paid work and undertake minimal caring responsibilities.[189] In addition, the transformative dimension disagrees with the lack of strong leave entitlements provided to fathers and the encouragement for fathers to work full-time with minimal breaks to assume childcare. The judgment established by the Court advocated that the structure of the workplace needs to be changed in order to legally and financially support the position of fathers in childcare. The CJEU required that equal access for mothers and fathers to the "breastfeeding" leave was necessary in order to dismantle the implicit structure of the gender division of labour underpinning the traditional "male breadwinner" model. The Court identified that fathers are equally capable of performing care work and cultivating a bond with their child in the same fashion that mothers can. Moreover, the legal reasoning adopted in the judgment of *Roca Alvarez* emphasised that the quality of care work performed by fathers is the same as mothers. By providing parents with equal access to the "breastfeeding" leave, the transformative dimension of substantive equality reaffirms the value and importance of paternal care, instead of allowing fathers to continue to be structurally marginalised.

The transformative dimension of substantive equality is important in recognising that the legal adherence to the traditional "male breadwinner" model has influenced the structure of the workplace to only support mothers with childcare. Mahon explains that the workplace only views women as responsible for childcare.[190] Miles further elaborates that the policy measures introduced in the UK have particularly focused upon facilitating the involvement of mothers in the workplace and not on encouraging the participation of fathers in childcare.[191] However, fathers are unable to actively engage in childcare if the structure of the workplace

[186] ibid para 38.
[187] ibid para 28.
[188] ibid para 31.
[189] Gemma Mitchell, 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (2019) 41 Journal of Social Welfare and Family Law 408.
[190] Evelyn Mahon, 'Changing Gender Roles, State, Work and Family Lives' in Eileen Drew, Ruth Emerek and Evelyn Mahon (eds), *Women, Work and the Family in Europe* (Routledge 1998) 157.
[191] Joanna Miles, 'Responsibility in Family Finance and Property Law' in Jo Bridgeman, Heather Keating and Craig Lind (eds), *Regulating Family Responsibilities* (Ashgate 2011) 102.

is less accommodating of men taking leave[192] and is hostile to the concept of shared childcare responsibilities between mothers and fathers.[193] Anderson maintains that the structure of the workplace needs to be altered in order to accommodate for fathers who want to actively participate in childcare and allow parents to develop a work-family balance.[194] The transformative dimension of substantive equality is aware that the introduction of legal policies that help mothers and fathers cultivate a work-family balance is necessary to offset the structural barriers that prevent fathers from establishing their position in childcare. The success associated with the transformative dimension in aiding fathers to combat discrimination was evident in *Roca Alvarez.* This dimension helped the CJEU to identify the root cause of the structural discrimination perpetuated against fathers and established that the structure of the workplace needed to be changed to allow fathers to be fully supported in undertaking childcare.

IV. CONCLUSION

The primary objective of Chapter 3 has been to reconceptualise the harms that fathers experience as discrimination that can only be redressed through the implementation of equality and non-discrimination legislation. A formal equality approach towards paternity discrimination remains to be commonly utilised within Britain and the UK, but has been increasingly falling out of favour in exchange for a substantive equality approach amongst regional courts, such as the ECtHR and the CJEU. Formal equality has been critiqued for the way in which it adopts a neutral and symmetrical approach to equality through its reliance upon an identically situated comparator in order to establish discrimination. Relying upon a mother as a relevant comparator has failed to eliminate the discrimination which fathers experience. The formal equality perspective adopted by the court system perceives mothers and fathers as different to one another because of the biological sex differences and the distinctions in social expectations surrounding the traditional roles of motherhood and fatherhood. Mothers are primarily responsible for childcare under the traditional "male breadwinner" model and the court system promotes the belief that a mother and their child have a uniquely special bond. Due to the differences found between mothers and fathers, the court system has determined that mothers and fathers are not similarly situated and that the differential treatment of fathers is justified. However, formal equality fails to recognise that fathers who want to actively participate in childcare experience discrimination from the differential treatment of mothers and fathers inside and outside of the workplace. Similarly, formal equality overlooks how fathers are treated lesser than mothers within the legal provisions providing leave entitlements and childcare support.

[192] Djuna Hallsworth, *Danish Mothers On-Screen* (Springer Nature 2021) 30.
[193] David Anderson, 'From the Leverage Ethic and the Leverage Mean to a National Paid Parental Leave Policy' in David Anderson (ed), *Leveraging: A Political, Economic and Societal Framework* (Springer International Publishing 2014) 169.
[194] ibid.

A substantive equality model has become gradually more favoured by the ECtHR and the CJEU, as the theory addresses the inadequacies present within a formal equality approach. Substantive equality has been largely successful in helping fathers to achieve equality, as the theory aims to tackle the disadvantage that is rooted within and perpetuated by hierarchical social structures. From the cases analysed in Section III of Chapter 3, substantive equality has helped to identify and counter the inequality propagated against fathers under the gender division of labour that underpins the traditional "male breadwinner" model. The structure of the gender division of labour currently privileges mothers in establishing their position within childcare and marginalises fathers from being able to do the same. Through the application of Fredman's 4-dimensional approach to substantive equality,[195] each dimension helps in providing a framework that further refines and narrows down the definition of substantive equality. Implementing substantive equality in Britain and the UK provides a more effective approach of supporting the recognition of fathers as a marginalised group within men. In addition, substantive equality has become increasingly successful in tackling the discrimination perpetuated against fathers that inhibits their ability to actively participate in childcare.

[195] Fredman, 'Substantive Equality Revisited' (n 26).

CHAPTER 4: THE LIMITATIONS OF "SEX" AS A PROTECTED CHARACTERISTIC AND A GROUND OF DISCRIMINATION

I. INTRODUCTION

The present inclusion of "sex" as a protected characteristic under s.4 of the Equality Act 2010 (EA 2010) and a ground of discrimination under art.14 of the Human Rights Act 1998 (HRA 1998) has provided limited protection for fathers. In Chapter 2, I detailed how the employment legislation governing leave entitlements in the United Kingdom (UK), the mistreatment of fathers inside and outside of the workplace and the courts view fathers as secondary parents to mothers. In Chapter 3, I reconceptualised the lesser treatment of fathers as substantive inequality. Both chapters lay the groundwork for advocating for the inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Providing specific protection to fathers under equality legislation would allow instances of paternity discrimination to be sufficiently recognised and addressed. In Section VI of Chapter 2, I particularly discussed how fathers within the court system have unsuccessfully relied upon "sex" as a protected characteristic under s.4 of the EA 2010 to tackle paternity discrimination.[1] Chapter 4 seeks to explore the limits of relying upon "sex" as a protected characteristic and a ground of discrimination to protect fathers. The general limitations of "sex" as a ground of discrimination have been increasingly publicised within past case law. These cases typically concerned claimants belonging to minority or marginalised groups who have had to previously rely upon "sex" as a ground to combat the discrimination that they have experienced. This can be particularly seen within cases that concerned the discrimination of pregnant women, mothers, people of a queer sexual orientation and members of the trans community. Chapter 4 seeks to provide evidence that the legal prohibition of sex discrimination has historically provided limited protection to these marginalised and minority groups. This past history of sex discrimination indicates that it would be a shaky foundation for remedying the discrimination experienced by fathers. Chapter 4 will also examine how the insufficient level of protection has prompted the inclusion of newer protected characteristics, grounds of discrimination and equality law provisions, which specifically combat the discrimination that each of these groups have experienced. Similarly, this chapter will argue that the only satisfactory response to alleviate paternity discrimination is through the inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998.

"Sex" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 has provided fathers with limited protection because sex discrimination does not encapsulate the definition of paternity discrimination. As discussed in Chapters 2 and 3, fathers in the cases of *Shuter*, *Ali v Capita* and *Hextall* and *Price*

[1] *Shuter v Ford Motor Company Limited* [2014] 7 WLUK 1105 (hereafter *Shuter*); *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police* [2019] EWCA Civ 900 (hereafter *Ali v Capita* and *Hextall*); *Price v Powys County Council* [2021] UKEAT/0133/20 (hereafter *Price*).

unsuccessfully relied upon "sex" as a protected characteristic under s.4 of the EA 2010 to combat their experiences of paternity discrimination. The reliance upon the legal prohibition of sex discrimination under the EA 2010 prevented the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) from recognising and understanding the harms which fathers experience when attempting to actively participate in childcare. The judgments in *Shuter*, *Ali v Capita* and *Hextall* and *Price* failed to identify fathers as a marginalised sub-group within men. The lack of recognition of paternity discrimination within equality legislation limited the understanding of the court system in England and Wales of the particular harms perpetuated against fathers. Paternity discrimination refers to the experiences of specific discriminatory practices perpetuated against fathers on the basis of their sex *and* parenting status intersecting. The EA 2010 and the HRA 1998 do not provide the necessary legal protection that fathers require to adequately combat the corresponding stigma and structural disadvantage that alienates the position of fathers in childcare. Since fathers experience discrimination on the basis of their sex and parenting status, the possibility of intersectional discrimination claims made by fathers on these grounds will be discussed later in this chapter.

Akin to Chapter 3, Chapter 4 will use a functional comparative method to show how the limited legal protection provided to fathers through the reliance on "sex" as a protected characteristic under s.4 of the EA 2010 in discrimination claims has been similarly experienced by certain marginalised and minority groups. The functional comparative method looks at how different societies have attempted to resolve societal problems through law.[2] The comparative analysis investigates how effectively different types of laws have addressed these societal problems in order to create an effective legal solution.[3] The groups that will be focused on in Chapter 4 will be pregnant women, mothers, people of a queer sexual orientation and members of the trans community. Case law from various jurisdictions will be used to show how the legal prohibition of sex discrimination provided limited legal protection to these marginalised and minority groups. Chapter 4 will illustrate how these limitations consequently prompted the introduction of equality legislation which specifically targeted the discrimination that each of these groups had experienced. This chapter will predict that the successes associated with the implementation of stronger equality legislation for each of these groups within Britain, the UK and other jurisdictions will be similarly mirrored for fathers. Fathers would greatly benefit from the development of equality legislation which particularly combats paternity discrimination, rather than continue to unsuccessfully rely upon the legal prohibition of sex discrimination. Despite the factor of probability being a common difficulty associated with a comparative analysis methodology, this methodology is best suited to demonstrate the argument that fathers need to be afforded specific legal protection under equality legislation which can effectively counter the discrimination that they experience.

[2] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 9.
[3] ibid 10.

The following chapter will be divided into the following sections. Section II will provide explanation of Cabrelli's 2-part thematic observation.[4] Cabrelli maintains that the inclusion of the protected characteristics under s.4 of the EA 2010 are interlinked based on a recurring 2-part thematic pattern which involves: (i) a "boundary dispute"; and (ii) the "spin out."[5] He notes that the 2-part thematic pattern is evident when scrutinising past case law.[6] These cases involved claims made by members of some marginalised and minority groups who had to rely upon grounds of discrimination within equality legislation that did not provide them with adequate legal protection.[7] The inability for the ground to sufficiently protect these groups resulted in a "boundary dispute" between the ground relied upon and the ground which specifically named the type of discrimination that they had experienced.[8] In light of the cultural, political and social pressure created by these marginalised and minority groups, particularly within the court system,[9] Cabrelli explains that the "boundary dispute" gave rise to the "spin out" wherein a separate protected characteristic was added under s.4 of the EA 2010.[10] The new protected characteristic would better represent and provide adequate redress for the specific discriminatory practices perpetuated against these groups.[11] Cabrelli's 2-part thematic observation will be primarily utilised in Chapter 4 to analyse past landmark judgments which involved discrimination claims made by pregnant women, mothers, people of a queer sexual orientation and members of the trans community. These cases have publicised the limitations of relying upon "sex" as a ground of discrimination and have prompted the consequent introduction of stronger pieces of equality legislation to an extent. I argue that this theory can be particularly helpful in explaining how "sex" as a ground offers limited protection to marginalised and minority groups. I also acknowledge that Cabrelli's 2-part thematic observation only focuses upon the EA 2010, but I will be using this theory as a lens to analyse how jurisprudence from England and Wales, the UK and other jurisdictions prompted the introduction of specific legal protection over marginalised and minority groups in other pieces of equality legislation as well.

Section III will explore the limitations of "sex" as a ground of discrimination for pregnant women and mothers and the subsequent addition of "pregnancy and maternity" as a protected characteristic under s.4 of the EA 2010. Since the HRA 1998 incorporates the European Convention on Human Rights (ECHR)[12] into UK law,[13] under s.2(1)(a) of the HRA 1998, the UK courts are obligated to take into account any judgments, decisions, declarations or advisory opinions made by the European Court of Human Rights (ECtHR). Therefore, this section will also critique how "sex" as a ground of discrimination includes discrimination on

[4] David Cabrelli, *Employment Law in Context* (4th edn, Oxford University Press 2020) 421-422.
[5] ibid.
[6] ibid 421-427.
[7] ibid 421-427.
[8] ibid 421-422.
[9] ibid 421-427.
[10] ibid 421-422.
[11] ibid 421-422.
[12] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3rd September 1953) ETS 5 (ECHR).
[13] Christina Kitterman, 'The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish Its Sovereignty to Ensure Human Rights Protection in Domestic Courts' (2001) 7 ILSA Journal of International & Comparative Law 583.

the basis of pregnancy under art.14 of the ECHR, but does not largely recognise it as a separate ground.[14] Section III will apply Cabrelli's 2-part thematic observation to landmark judgments made within America, Canada and the Court of Justice of the European Union (CJEU) to demonstrate how there either previously was, or continues to be, a "boundary dispute" between "sex" and "pregnancy and maternity" as grounds of discrimination.[15] Although interpretative guidance by the CJEU is no longer binding since the UK has left the European Union (EU), case law from the CJEU will be examined in this chapter because past interpretative guidance of the CJEU remain part of the UK law.[16] Furthermore, s.6 of the European Union (Withdrawal) Act 2018 has stipulated that the UK courts may pay some regard to any relevant decisions made by the CJEU after the departure of the UK from the EU. Nevertheless, each of the landmark judgments discussed in this section has resulted in legislation being introduced to provide specific legal protection for pregnant women and mothers. Under s.4 of the EA 2010, the "spin out" has resulted in "pregnancy and maternity" being recognised as a separate protected characteristic, but there potentially continues to be a "boundary dispute" under art.14 of the ECHR.[17]

Section IV will discuss the limitations of "sex" as a ground of discrimination for people of a queer sexual orientation to rely upon for protection and the addition of "sexual orientation" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the ECHR.[18] Similarly, Cabrelli's 2-part thematic observation will be used to analyse landmark judgments made by the ECtHR, which have effectively demonstrated a "boundary dispute" between "sex" and "sexual orientation" as grounds of discrimination.[19] Each of these judgments has resulted in the strengthening of equality legislation to provide specific legal protection for those of a queer sexual orientation. Under s.4 of the EA 2010 and art.14 of the ECHR, the "spin out" has resulted in the separate recognition of "sexual orientation" as a protected characteristic and a ground of discrimination.[20]

Section V will investigate the limitations of "sex" as a ground of discrimination for members of the trans community to rely upon and how this has resulted in the addition of "gender reassignment" as a protected characteristic under s.4 of the EA 2010 and "gender identity" under art.14 of the ECHR.[21] Cabrelli's 2-part thematic observation will be applied to landmark judgments made by the CJEU and the ECtHR in order to better understand the "boundary dispute" between "sex" and "gender reassignment" or "gender identity" as grounds of discrimination.[22] Each of these judgments prompted the introduction of stronger specific legal protection for the trans community under equality legislation. This "boundary dispute" has led to a "spin out," which recognised "gender reassignment" as a protected

[14] *Jurčić v Croatia* (2021) 73 E.H.R.R. 10 (hereafter *Jurčić*).
[15] Cabrelli (n 4) 421-422.
[16] Paula Giliker, 'Interpreting Retained EU Private Law Post-Brexit: Can Commonwealth Comparisons Help Us Determine the Future Relevance of CJEU Case Law?' (2019) 48 Common Law World Review 16.
[17] Cabrelli (n 4) 421-422, 425-427.
[18] *Salgueiro Da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 (hereafter *Salgueiro*).
[19] Cabrelli (n 4) 416-417, 421-422.
[20] ibid 421-422.
[21] *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 (hereafter *Identoba*) para 96.
[22] Cabrelli (n 4) 421-422.

characteristic under s.4 of the EA 2010 and "gender identity" as a ground of discrimination under art.14 of the ECHR.[23] Section V will discuss how there may be an ongoing "boundary dispute" under the EA 2010, as the Women and Equalities Committee has advocated that "gender identity" needs to be included as a protected characteristic under s.4 of the EA 2010 to provide adequate legal protection for all trans individuals.[24] Section VI will provide a conclusion which underlines that "sex" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 has limited scope to adequately protect fathers from the discrimination directed against them. Section VI will also highlight how the case law in England and Wales discussed in Chapters 2 and 3 similarly follows the pattern of displaying a "boundary dispute" between "sex" and "paternity" as protected characteristics and grounds of discrimination. Section VI will conclude that the ongoing "boundary dispute" should potentially result in a "spin out," which recognises "paternity" as an additional protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998.

II. CABRELLI'S 2-PART THEMATIC OBSERVATION

Cabrelli observes that 8 of the 9 protected characteristics contained under s.4 of the EA 2010 are interlinked on the basis of a recurring 2-part thematic pattern.[25] He acknowledges that the protected characteristic of "disability" is an exception to being developed as a product of the thematic pattern,[26] as the protected characteristic is typically supplementary to mainstream equality legislation surrounding disability rights.[27] Cabrelli describes the recurring 2-part thematic pattern as: (i) a "boundary dispute"; and (ii) the "spin out."[28] Case law has largely shown that certain marginalised and minority groups have not been provided with an adequate level of legal protection within equality legislation. A "boundary dispute" would occur between the ground which these groups would rely upon and the ground which named the specific type of discrimination that they had experienced.[29] Cabrelli stresses that protected characteristics should not be perceived as "fixed" with rigid boundaries but, rather, 'malleable with outside walls that oscillate in line with changes in social, political, and cultural attitudes.'[30] Due to the social, political and cultural pressures generated by members of marginalised and minority groups, particularly within the court system,[31] the "boundary dispute" gave rise to the "spin out."[32] The "spin out" entailed the addition of a new protected

[23] Cabrelli (n 4) 421-425; *Identoba* (n 21).
[24] Women and Equalities Committee, *Transgender Equality* (HC 2015-16, 390) para 108.
[25] Cabrelli (n 4) 421.
[26] ibid.
[27] ibid 474.
[28] ibid 421-422.
[29] ibid 421-422.
[30] ibid 421.
[31] ibid 421-427.
[32] ibid 421-422.

characteristic which represented and adequately redressed the specific discriminatory practices perpetuated against some of these societal groups.[33]

Chapter 4 will apply Cabrelli's 2-part thematic observation to show the limited legal protection offered to marginalised and minority groups who have relied upon "sex" as a ground of discrimination. Case law has exposed the limitations associated with "sex" as a ground of discrimination being relied upon by these groups and the consequent "boundary dispute" that has arisen between "sex" and the ground that adequately describes the type of discrimination that they had experienced. This can be particularly seen within landmark judgments that concerned discrimination claims initiated by pregnant women, mothers, people of a queer sexual orientation and members of the trans community. Cabrelli's 2-part thematic observation will be primarily used in Chapter 4 to analyse these landmark cases. I acknowledge that the sole focus of Cabrelli's observation is the development of the protected characteristics under s.4 of the EA 2010. Yet, I will be using this theory as a lens to analyse how jurisprudence from America, Canada, the CJEU and the ECtHR also influenced the implementation of other pieces of equality legislation which provided specific legal protection over certain marginalised and minority groups. Chapter 4 will identify how the pressure created by the landmark discrimination claims initiated by pregnant women, mothers, people of a queer sexual orientation and members of the trans community has resulted in a "spin out" which has prompted the recognition of new grounds of discrimination which sufficiently named the type of discrimination that they had experienced. Under s.4 of the EA 2010, "pregnancy and maternity," "sexual orientation" and "gender reassignment" are now protected characteristics, which these groups can now rely upon. Likewise, there was initial debate on whether "sex" as a ground discrimination under the ECHR included discrimination on the basis of sexual orientation and gender identity.[34] However, "sexual orientation" and "gender identity" are now recognised as grounds of discrimination under art.14 of the ECHR.[35] Conversely, under art.14 of the ECHR, the ground of "pregnancy" is included within the meaning of "sex" as a ground of discrimination,[36] which will be later critiqued for the potential definitional disputes that may arise.

The purpose behind using Cabrelli's 2-part thematic observation is to highlight that a "boundary dispute" is currently occurring between "sex" and "paternity" as protected characteristics and grounds of discrimination. With reference to the cases of *Shuter*, *Ali v Capita* and *Hextall* and *Price*, the mistreatment of fathers demonstrated the specific discriminatory practices directed against them. Paternity discrimination is rooted in the gender bias found within the parenting roles defined under the traditional "male breadwinner" model, which does not support the position of fathers in childcare. The ET and the EAT failed to recognise that fathers belong to a marginalised group which exist within men. Similar to the paternity discrimination cases discussed in Chapters 2 and 3, the reliance upon

[33] ibid 421-422.
[34] Council of Europe, 'Second Part of the Thirty-Third Ordinary Session of the Parliamentary Assembly, Tenth Sitting (1 Oct 1981)' in *Official Report of Debates, Vol II, Sittings 8 to 19* (Council of Europe 1982) 260, 274; C-13/94 *P v S and Cornwall County Council* [1996] I.C.R. 795 (hereafter *P v S*).
[35] *Salgueiro* (n 18); *Identoba* (n 21).
[36] *Jurčić* (n 14).

"sex" as a protected characteristic under s.4 of the EA 2010 by fathers was insufficient to adequately represent and target the specific practices related to paternity discrimination. Therefore, in light of Cabrelli's observation, I argue that a potential "spin out" could occur that includes "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998.

III. PREGNANCY AND MATERNITY AS A PROTECTED CHARACTERISTIC AND PREGNANCY AS A GROUND OF DISCRIMINATION

In order to truly comprehend the limitations of "sex" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 for fathers to rely upon, Section III will focus on understanding the legal rationale behind the addition of "pregnancy and maternity" as a protected characteristic under s.4 of the EA 2010. Section III will explore the history behind the previous reliance upon "sex" as a ground of discrimination by pregnant women and mothers to combat the specific discriminatory practices perpetuated against them and the inadequate legal protection that the ground provided. Following Cabrelli's 2-part thematic observation, past case law has exposed a "boundary dispute" between "sex" and "pregnancy and maternity" as grounds of discrimination.[37] The "boundary dispute" eventually led to a "spin out" which included "pregnancy and maternity" as a new protected characteristic under s.4 of the EA 2010 for pregnant women and mothers to exclusively rely upon.[38] The new protected characteristic provided pregnant women and mothers with increased legal protection to combat the specific discriminatory practices directed against them. However, pregnancy discrimination is currently included within the meaning of sex discrimination under art.14 of the ECHR.[39]

I will be applying Cabrelli's 2-part thematic observation to landmark American, Canadian and CJEU judgments to demonstrate the limitations of "sex" as a ground of discrimination. I will explain how the "boundary dispute" has led to the introduction of equality legislation which specifically targeted the type of discrimination which pregnant women and mothers experience. The purpose of Section III is to show that the limited protection which pregnant women and mothers have received from the legal prohibition of sex discrimination is comparable to what fathers are currently experiencing. Current case law exposes an ongoing "boundary dispute" between "sex" and "paternity" as protected characteristics and grounds of discrimination. An eventual "spin out" will need to take place to resolve this "boundary dispute" wherein "paternity" needs to be recognised as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Section III will use the development of equality legislation in relation to pregnancy and maternity rights as evidence that a similar development needs to occur to protect paternity rights.

[37] Cabrelli (n 4) 421-422, 425-427.
[38] ibid 421-422.
[39] *Jurčić* (n 14).

In the past, the legal gaps in equality legislation failed to address that the specific discriminatory practices that were directed against pregnant women and mothers were not experienced by all women. McGlynn recognised that comparison formed an important component of discrimination law and that this was unfortunately also applied to cases relating to pregnancy discrimination.[40] Fredman identified that various jurisdictions have previously relied upon an "ill male comparator" to decipher whether a pregnant woman has undergone unfavourable treatment and been discriminated against.[41] Earlier cases such as *Hayes v Malleable Working Men's Club & Institute*[42] have shown the EAT comparing the treatment of a pregnant woman to that of a "sick man" which, at the time, allowed pregnant women to come under the protection of the Sex Discrimination Act 1975.[43] Although the inclusion of pregnancy discrimination under sex discrimination provided pregnant women and mothers with limited legal standing, pregnancy was ultimately stigmatised as "unhealthy" due to its equivalence to an illness.[44] Here, the function of discrimination law solely focused upon the ability of a pregnant woman or a mother to work, rather than the associated medical and social positives such as breastfeeding and developing a mother-child relationship.[45]

After a series of landmark judgments advocated that an "ill male" comparator was unnecessary to demonstrate the discrimination perpetuated against pregnant women and mothers, Fredman remarks that a gateway was provided for adequate legal protection to be attained.[46] For instance, under s.4 of the EA 2010, "pregnancy and maternity" is now currently recognised as a separate protected characteristic to "sex." Under s.17(3) of the EA 2010, pregnancy and maternity discrimination is defined as pregnant women or mothers undergoing unfavourable treatment within the period of the subsequent 26 weeks after childbirth. Under s.17 and s.18 of the EA 2010, unfavourable treatment includes being discriminated against as a result of a woman's pregnancy, any pregnancy-related illnesses, childbirth, breast-feeding or maternity leave, for example. Legal protection for specifically pregnant women and mothers has also been found within the Pregnant Workers' Directive 1992,[47] which provided specific health and safety regulations to protect female employees that have recently given birth or are breast-feeding. The increased legal protection for pregnant women and mothers has initiated a gradual departure from the past requisite of a comparator to establish discrimination in cases relating to pregnancy and maternity to some extent.[48] Moreover, the legal protection has helped to dismantle the stigma surrounding

[40] Clare McGlynn, 'Pregnancy Discrimination in EU Law: Comments on Jenny Julén's Article' in Ann Numhauser-Henning (ed) *Legal Perspectives on Equal Treatment and Non-Discrimination: Studies in Employment and Social Policy* (Kluwer Academic Publishers 2001) 211.
[41] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 170.
[42] *Hayes v Malleable Working Men's Club & Institute* [1985] IRLR 367.
[43] Ian Smith and Aaron Baker, *Smith & Wood's Employment Law* (11th edn, Oxford University Press 2013) 291.
[44] Fredman (n 41).
[45] ibid.
[46] ibid 170-171.
[47] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 348/1 (Pregnant Workers' Directive).
[48] Fredman (n 41) 171.

pregnancy as that of an "illness" by focusing upon providing protection over the positives associated with pregnancy and childbirth.

In an effort to understand the limitations of "sex" as a ground of discrimination for fathers to rely upon, a series of landmark court decisions within various jurisdictions will be further explored. The analysis of these cases will help to understand how these judgments have influenced the introduction of equality legislation which specifically protects pregnant women and mothers. The first case that highlights a "boundary dispute"[49] between "sex" and "pregnancy and maternity" as grounds of discrimination can be seen in the case of *General Electric Company v Gilbert*.[50] The American case involved the refusal of disability benefits for absences related to pregnancy and childbirth to a number of female employees working for General Electric Company, which included Ms Gilbert.[51] The claimants argued that the inclusion of benefit payments for non-occupational sickness and accidents, whilst excluding the benefits surrounding disabilities relating to pregnancy, miscarriage and childbirth, amounted to sex discrimination under Title VII of the Civil Rights Act 1964.[52] The Supreme Court was heavily influenced by the judgment of *Geduldig v Aiello,*[53] which involved similar facts to *Gilbert*. The facts in *Geduldig* concerned the dismissal of a sex discrimination claim from a group of women who had maintained that the state exclusion of benefits for pregnancy-related disabilities under the Californian statutory disability insurance plan was in violation of the Equal Protection Clause found within the Fourteenth Amendment of the United States Constitution.[54] The Court in *Gilbert* relied upon *Geduldig* and dismissed the sex discrimination claim on the basis that the insurance plan sufficiently covered legitimate state interests, with pregnancy not significantly amounting to one.[55] Cohen explains that the Court drew particular emphasis to "footnote 20"[56] in the case of *Geduldig*, which asserted that 'while it is true that only women can become pregnant [,] it does not follow that every legislative classification concerning pregnancy is a sex-based classification.'[57]

The legal reasoning in *Geduldig* reinforces how the Court separated pregnancy discrimination from sex discrimination, as pregnancy was perceived to be a temporary state that not all women would be in. The Court in *Gilbert* utilised "footnote 20"[58] and concluded that there was a distinction between sex discrimination and pregnancy discrimination. Pregnancy discrimination did not fall under the scope of sex discrimination as the case did not centre upon 'men versus women but pregnant women versus nonpregnant persons',[59] which implies that the establishment of sex discrimination can only occur if a situation arose where every

[49] Cabrelli (n 4).
[50] *General Electric Company v Gilbert* [1976] 429 U. S. 125 (hereafter *Gilbert*).
[51] Marcia Cohen, 'General Electric Company v. Gilbert: The Plight of the Working Woman' (1977) 11 The John Marshall Law Review 218-220.
[52] ibid.
[53] *Geduldig v Aiello* [1974] 417 U.S. 484 (hereafter *Geduldig*).
[54] Cohen (n 51) 221.
[55] ibid 220-221.
[56] ibid 222-223.
[57] *Geduldig* (n 53) para 20.
[58] Cohen (n 51) 222-223.
[59] ibid 223.

woman was disadvantaged and every man was advantaged based upon their sex.[60] Although people who do not identify as a woman can get pregnant,[61] the distinction between sex discrimination and pregnancy discrimination stripped the role of gender from pregnancy. The exclusion of pregnancy discrimination from the meaning of sex discrimination failed to recognise the gender power dynamics which perpetuate disadvantage to those that are pregnant and are women.

The judgment of *Gilbert* highlighted the limitations of mothers and pregnant women relying upon "sex" as a ground of discrimination. In light of Cabrelli's 2-part thematic observation,[62] the distinction made between sex discrimination and pregnancy discrimination exposed the "boundary dispute" between these grounds. Despite women belonging to a marginalised group, expectant mothers and mothers form a marginalised sub-group within women that experience discrimination that non-mothers do not. Instances where mothers can experience discrimination are through the provision of inadequate maternity leave, childcare provision, breast-feeding leave, and leave for antenatal appointments.[63] Additionally, mothers can experience discrimination through a lack of workplace support to balance workplace and childcare responsibilities.[64] Non-mothers largely do not experience these forms of discrimination. Moreover, the fact that not all women experience pregnancy discrimination could be argued to have further confused the Court and prevented them from being able to comprehend the gender dimensions underpinning pregnancy discrimination. Bernstein noted that the Court decision resulted in a lot of social and political dissent because, 'despite the fact that not all women become pregnant,… [many] women experience pregnancy-related discrimination.'[65] As a response, a lot of social and political pressure in the 1970s was generated from women's groups and labour unions to petition for an amendment to Title VII of the Civil Rights Act 1964 to recognise pregnancy and maternity discrimination.[66] This pressure resulted in the introduction of the Pregnancy Discrimination Act 1978, which amended Title VII of the Civil Rights Act 1964 to include pregnancy discrimination within the meaning of sex discrimination.[67] Zieglar and Harbach maintained that the Act was ground-breaking, as the Act removed the ability for employers to exclude women from workplace policies and provided a more stringent examination upon pregnancy discrimination.[68] Drawing upon Cabrelli's observation, cultural, political and social change

[60] ibid 223.
[61] Olivia Fischer, 'Non-binary Reproduction: Stories of Conception, Pregnancy, and Birth' (2021) 22 International Journal of Transgender Health 77-78.
[62] Cabrelli (n 4).
[63] Joan C. Chrisler and Ingrid Johnston-Robledo, 'Pregnancy Discrimination' in Michele A. Paludi, Carmen A. Paludi Jr., Eros R. DeSouza (eds) Praeger Handbook on Understanding and Preventing Workplace Discrimination: Volume 1 (Praeger 2011) 117-118.
[64] ibid.
[65] Anya Bernstein, *The Moderation Dilemma: Legislative Coalitions and the Politics of Family and Medical Leave* (University of Pittsburgh Press 2001) 42.
[66] ibid.
[67] United States Commission on Civil Rights and Mary Frances Berry, 'Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts' (United States Commission on Civil Rights 2000) 17.
[68] Mary Zieglar and Meredith Harbach, 'Young v. UPS, 135 S. Ct. 1338 (2015)' in Kimberly Mutcherson (ed) *Feminist Judgments: Reproductive Justice Rewritten* (Cambridge University Press 2020) 314.

had placed pressure upon America to legally recognise that “sex” was insufficient as a ground of discrimination for pregnant women and mothers to rely upon.[69] Although “pregnancy and maternity” was not recognised as a separate ground of discrimination to “sex”, increased legal protection was introduced to counter the specific discriminatory practices directed against pregnant women and mothers. The narrow understanding of “sex” as a ground of discrimination by the Court in *Gilbert* prompted the creation of the Pregnancy Discrimination Act 1978 to explicitly and textually clarify that pregnancy is a subset of sex discrimination.

The second case that showed Cabrelli’s “boundary dispute”[70] between sex discrimination and pregnancy and maternity discrimination is *Brooks v Canada Safeway Ltd..*[71] The Canadian case concerned 3 part-time pregnant female employees who claimed that the lack of full disability benefits to cover maternity leave under the insurance plan of their workplace at Safeway amounted to sex discrimination.[72] The facts of the case were similar to the judgment of *Bliss v Canada*[73] that took place 10 years earlier. *Bliss* involved a woman who had experienced sex discrimination because she could not claim either maternity benefits due to her unemployed status or regular unemployment insurance benefits due to the prohibition to provide such for a period of 6 weeks post-birth.[74] The Court ruled that sex discrimination could not be established as pregnant women had experienced different treatment ‘because they are pregnant and not because they are women,’[75] and that ‘any inequality between the sexes in this area is not created by legislation but by nature.’[76] In contrast, the Court in *Brooks* surprisingly concluded that the exclusion of pregnant women from the insurance plan constituted sex discrimination.[77] The Court asserted that ‘the capacity to become pregnant is unique to the female gender... [and] [d]istinctions based on pregnancy can be nothing other than distinctions based on sex or, at least, strongly ‘sex-related.’’[78]

Leishman maintains that the inclusion of pregnancy discrimination within the interpretive definition of sex discrimination ‘not only broke with precedent, but also expanded the legal definition of sex discrimination.’[79] On the other hand, the judgment in *Gilbert* failed to recognise the gendered reality of pregnancy and that pregnancy-related discrimination is heavily interrelated with sex discrimination. In the judgment of *Brooks*, the Court departed from past case precedent established under the earlier infamous judgment of *Bliss* that had argued that pregnancy discrimination did not fall within the scope of sex discrimination because not all women could or would become pregnant.[80] Regardless of whether women are

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[69] Cabrelli (n 4).
[70] ibid 421-422.
[71] *Brooks v Canada Safeway Ltd.* [1989] 1 SCR 1219 (hereafter *Brooks*).
[72] Lorna Turnbull, 'The Promise of Brooks v. Canada Safeway Ltd: Those Who Bear Children Should Not Be Disadvantaged' (2005) 17 Canadian Journal of Women and the Law 153.
[73] *Bliss v Attorney General of Canada* [1979] 1 SCR 183 (hereafter *Bliss*).
[74] ibid 189.
[75] ibid 190-191.
[76] ibid 184.
[77] *Brooks* (n 71) 1250.
[78] ibid 1244.
[79] Rory Leishman, Against Judicial Activism: The Decline of Freedom and Democracy in Canada (McGill-Queen's University Press 2006) 38.
[80] Margot Young, ‘‘Blissed Out: Section 15 at Twenty’’ (2006) 33 Supreme Court Law Review 50.

or are not pregnant, the cases of *Gilbert* and *Bliss* overlooked the reality that pregnancy is a sex-unique feature to many women. Chief Justice Brian Dickson in the judgment of *Brooks* cited that the decision made in *Bliss* was incorrect, as in reality 'the inequality was created by legislation.'[81] He stated that the Canadian Unemployment Insurance Act 1971 which provided disability benefits and the discriminatory practices perpetuated by employers collectively amounted to partial discrimination.[82] Discrimination was established in *Brooks* because 'most women are treated equally with men, [but] a certain class, namely those women who are pregnant, are treated more harshly because they are pregnant.' [83] Although women can experience disadvantage because of social marginalisation, the judgment importantly recognised that pregnant women are a sub-group within women that are further marginalised and experience different discriminatory practices that not all women face.

Following Cabrelli's 2-part thematic observation,[84] the judgment of *Brooks* revealed a "boundary dispute" between "sex" and "pregnancy and maternity" as grounds of discrimination. Despite the case having influenced the expansion of the legal scope of sex discrimination to also include pregnancy discrimination,[85] increased legal protection was subsequently introduced to specifically protect pregnant women and mothers from discrimination. For instance, the Canadian Human Rights Commission declared that the definition of sex discrimination in the Canadian Human Rights Act 1985 has been extended to also encompass pregnancy discrimination.[86] Similarly, within provincial human rights legislation, an amendment was made under s.44(2) of the Alberta Human Rights Act 2000 to extend gender-based discrimination to include pregnancy-based discrimination. Chief Justice Brian Dickson maintained in the judgment of *Brooks* that the departure from the precedent established in *Bliss* had been due to the 'benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom.'[87] The 10 year difference between *Bliss* and *Brooks* arguably displayed an ongoing "boundary dispute" between discrimination on the grounds of "sex" and "pregnancy." The number of claims within the court system could have been reflective of the social, political and economic change occurring at the time and could have potentially placed pressure upon legislators to address the discrimination pregnant women experienced under equality law. The Canadian and American jurisprudence of *Bliss* and *Gilbert* has influenced the introduction of specific legal protection for pregnant women and mothers to combat the specific discriminatory practices exhibited against them, particularly within the Alberta Human Rights Act 2000. There has been a history of pregnancy not being viewed as sex discrimination, which has led to the separate implementation of equality law to recognise that pregnancy and maternity discrimination needs to be adequately addressed.

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[81] *Brooks* (n 71) 1244.
[82] ibid 1248.
[83] ibid 1248.
[84] Cabrelli (n 4).
[85] Leishman (n 79).
[86] Canadian Human Rights Commission, 'Pregnancy & Human Rights in The Workplace – Policy and Best Practices' (Canadian Human Rights Commission 2011) <https://canlii.ca/t/szk1> accessed 14 July 2022 15.
[87] *Brooks* (n 71) 1243.

Lastly, the third case that demonstrated Cabrelli's "boundary dispute"[88] between sex discrimination and pregnancy and maternity discrimination can be seen in the case of *Webb v EMO Air Cargo Ltd*.[89] The case concerned Mrs Webb who was hired at EMO Air Cargo to take over the responsibilities of another employee on maternity leave, Mrs Stewart, and continue her employment thereafter.[90] However, Mrs Webb was dismissed from her employment after she had found out that she was also pregnant and her due date was roughly similar to Mrs Stewart's.[91] Mrs Webb claimed that her dismissal constituted sex discrimination under s.1(1) of the Sex Discrimination Act 1975, whilst EMO Air Cargo argued that their dismissal of her was justified on the basis that she would not be able to carry out the relevant tasks related to the job whilst pregnant.[92] The CJEU relied upon the earlier judgment of *Habermann-Beltermann v Arbeiterwohlfahrt*[93] which concerned a qualified nurse whose employment contract was terminated on account of her pregnancy.[94] The Court held in *Habermann-Beltermann* that the dismissal amounted to sex discrimination as 'the termination of an employment contract on account of the employee's pregnancy, whether by annulment or avoidance, concerns women alone and constitutes, therefore, direct discrimination on grounds of sex.'[95] Similarly, the Court in *Webb* concluded that her dismissal amounted to sex discrimination.[96]

The legal reasoning adopted by the CJEU displays how they have expanded the definition of sex discrimination to also encompass the definition of pregnancy discrimination. Pregnancy was recognised as heavily interrelated to sex and that the experience of pregnancy discrimination was largely a gendered experience. Although *Webb* provided increased legal protection for pregnant women and mothers, the judgment exposed a "boundary dispute"[97] between "sex" and "pregnancy and maternity" as grounds of discrimination. There was debate surrounding whether the use an "ill male" comparator was necessary to establish pregnancy and maternity discrimination under the scope of sex discrimination, such as in the case of *Handels-og Kontorfunktionaerernes Forbund i Danmark (Union of Clerical and Commerical Employees) (for Hertz) v. Dansk Arbejdsgiverforening (Danish Employers Association) (for AldiMarked K/S)*.[98] However, Micklitz notes how the Court opted to follow the judgment found in *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*.[99] This judgment involved the refusal to employ a

[88] Cabrelli (n 4) 421.
[89] C-32/93 *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR 1-3567 (hereafter *Webb*).
[90] ibid para 3.
[91] ibid para 4.
[92] ibid paras 5 -11.
[93] *Webb* (n 89) para 19; C-421/92 *Habermann-Beltermann v Arbeiterwohlfahrt* [1994] ECR 1-1657 (hereafter *Habermann-Beltermann*).
[94] *Habermann-Beltermann* (n 93) paras 3-4.
[95] ibid para 15.
[96] *Webb* (n 89) para 19.
[97] Cabrelli (n 4) 421.
[98] C-179/88 *Handels-og Kontorfunktionaerernes Forbund i Danmark (Union of Clerical and Commerical Employees) (for Hertz) v Dansk Arbejdsgiverforening (Danish Employers Association) (for AldiMarked K/S)* [1990] ECR 1-3979 (hereafter *Hertz*) paras 14-18.
[99] C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR 1-3941 (hereafter *Dekker*).

woman as an instructor in a youth training centre upon discovering that she was pregnant.[100] The Court in *Dekker* rightly determined that discrimination could not be established through the use of an "ill male" comparator.[101] The Court in *Webb* reconfirmed the judgment in *Dekker* by asserting that 'pregnancy is not in any way comparable with a pathological condition.'[102] The judgment in *Webb* made strides in including pregnancy discrimination within the meaning of sex discrimination and maintaining that pregnant women do not need to rely upon a "sick man" as the relevant comparator for a discrimination claim.

With regards to Cabrelli's 2-part thematic observation,[103] the judgment of *Webb* showed that there was a "boundary dispute" between "sex" and "pregnancy and maternity" as grounds of discrimination. "Sex" as a ground does not specifically name the type of discrimination which pregnant women and mothers experience. O'Leary states that the CJEU judgments have established ground-breaking decisions which could be said to have influenced members of the EU to legally protect pregnant workers and those on maternity leave.[104] Towers explains that the social and political pressure from the UK membership of the EU strongly influenced the UK to implement measures that specifically protected pregnant women and mothers.[105] For example, the Pregnant Workers' Directive 1992 was introduced which implemented the increased regulation of the terms of employment contracts, protection against unfair dismissal and extension of maternity leave to 14 weeks.[106] The Court in *Webb* failed to observe that pregnancy discrimination is separate to sex discrimination and address the difficulty of previous discrimination law understanding intra-group differences. Britain subsequently introduced "pregnancy and maternity" as a separate protected characteristic to "sex" under s.4 of the EA 2010. The "boundary dispute" between sex discrimination and pregnancy and maternity discrimination resulted in a "spin out" which recognised "pregnancy and maternity" as a separate protected characteristic.[107]

The discussion of the judgments in *Gilbert*, *Brooks* and *Webb* within Section III reveal the limitations of "sex" as a ground of discrimination for pregnant women and mothers to rely upon, as the ground does not describe or address the specific discriminatory practices that mothers experience and that non-mothers do not. The judgments of *Gilbert*, *Brooks* and *Webb* also highlight the need to explicitly and, sometimes textually, include "pregnancy" as the basis for discrimination under equality legislation. Although women belong to a marginalised group which experience discrimination on the basis of their sex, the definition of sex

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[100] Hans-Wolfgang Micklitz, *The Politics of Judicial Co-Operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press 2005) 197.
[101] ibid.
[102] *Webb* (n 89) para 25.
[103] Cabrelli (n 4).
[104] Siófra O'Leary, *Employment Law at the European Court of Justice: Judicial Structures, Policies and Processes* (Hart Publishing 2002) 3.
[105] Brian Towers, *The Representation Gap: Change and Reform in the British and American Workplace* (Oxford University Press 1997) 42.
[106] Rebecca Ray, Janet Gornick and John Schmitt, 'Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries' (2010) 20 Journal of European Social Policy 198; Roberta Guerrina, 'Mothering in Europe: Feminist Critique of European Policies on Motherhood and Employment' (2002) 9 The European Journal of Women's Studies 56.
[107] ibid.

discrimination does not acknowledge that mothers form a sub-group within women that are also socially marginalised. The gendered form of discrimination confused the courts, as they struggled to understand the relationship between pregnancy and maternity discrimination and sex discrimination. The meaning of sex discrimination, as particularly understood by the courts, does not sufficiently capture the fact that the discrimination that mothers experience is rooted within the intersection of their sex *and* parenting status.

Under art.14 of the ECHR, pregnancy discrimination is currently included within the definition of sex discrimination under the judgment of *Jurčić*. This case involved a woman whose request was rejected for payment of salary whilst on sick-leave after experiencing pregnancy-related complications.[108] She argued that this was a violation of her right to protection of property under art.1 of Protocol No.1 of the ECHR taken in conjunction with her right to non-discrimination under art.14 of the ECHR.[109] She argued that she had experienced discrimination on the basis of her sex and the in vitro fertilisation procedure that she had undergone to become pregnant.[110] The Court found a violation, but recognised that pregnancy discrimination came under the definition of sex discrimination, which was already prohibited under art.14 of the ECHR.[111] The ECtHR relied upon the judgments of *Webb* and *Dekker* and likewise observed that 'only women could become pregnant.'[112] Therefore, the Court concluded that 'only women can be treated differently on grounds of pregnancy, [with] such a difference in treatment… amount[ing] to direct discrimination on [the] grounds of sex.'[113] The recognition of pregnancy discrimination by the ECtHR is commendable in providing increased legal protection to pregnant women. However, the application of Cabrelli's 2-part thematic observation also potentially demonstrates an ongoing "boundary dispute" between "pregnancy" and "sex" as grounds of discrimination. There was confusion by the Court and the applicant as to whether pregnancy discrimination was distinct from sex discrimination, but the Court ultimately concluded that pregnancy discrimination is a subset of sex discrimination. Similar to the judgments of *Brooks* and *Webb*, there is a concern that the definition of sex discrimination might not adequately capture the discrimination which pregnant women experience on the basis of their sex, pregnancy and expectant parenting status intersecting. This perspective could obscure the intersectional dimensions of pregnancy discrimination and potential definitional disputes could arise in the future.

Likewise, the unsuccessful reliance upon "sex" as a ground of discrimination by fathers within the paternity discrimination cases discussed in Chapters 2 and 3 exposed the court system for failing to adequately provide redress for the discrimination directed against fathers. The American and Canadian case law provides warning that there could be definitional disputes on whether the discrimination which fathers experience falls within the meaning of sex discrimination. The court system in England and Wales does not comprehend that fathers are a sub-group within men that experience discrimination on the basis of their

[108] *Jurčić* (n 14) paras 9-13.
[109] ibid para 46.
[110] ibid para 55.
[111] ibid paras 84, 69-70.
[112] ibid para 70.
[113] ibid para 69.

sex *and* parenting status intersecting. Despite the introduction of "pregnancy and maternity" as a protected characteristic for pregnant women and mothers to rely upon under s.4 of the EA 2010, the Act does not provide fathers with a protected characteristic that they can also effectively rely upon. Additionally, fathers do not have a separate ground of discrimination that they can use to combat their experiences of paternity discrimination under art.14 of the HRA 1998. If fathers are not provided with specific legal protection from important pieces of British and UK equality legislation, fathers cannot satisfactorily combat the structural disadvantage which prevents fathers from firmly establishing their position within childcare. In light of Cabrelli's 2-part thematic observation,[114] there is currently a "boundary dispute" between "sex" and "paternity." Without the recognition of "paternity" as a separate protected characteristic and a ground of discrimination, fathers will be unable to actively participate in childcare and the role of fatherhood will continue to be placed as secondary to motherhood.

IV. SEXUAL ORIENTATION AS A PROTECTED CHARACTERISTIC AND A GROUND OF DISCRIMINATION

In order to understand the limitations of "sex" as a protected characteristic and a ground of discrimination, the legal rationale behind the addition of "sexual orientation" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the ECHR needs to be understood.[115] Since the partial decriminalisation of male same-sex sexual activity under the Sexual Offences Act 1967, Channing and Ward maintain that homophobia persists in the form of 'structural, systemic and social inequalities.'[116] The perpetuation of homophobia is arguably historically rooted in the lack of adequate legal protection provided for people of a queer sexual orientation. The definition of sex discrimination failed to explicitly describe or identify the type of discrimination which those of a queer sexual orientation experienced and provided them with limited scope to counter the specific systemic discrimination directed against them. In light of Cabrelli's 2-part thematic observation, Section IV will discuss landmark judgments that has exposed a "boundary dispute" between "sex" and "sexual orientation" as grounds of discrimination.[117] Section IV will discuss how the "boundary dispute" has contributed towards an eventual "spin out" wherein "sexual orientation" was included as a protected characteristic under s.4 of the EA 2010[118] and a ground of discrimination under art.14 of the ECHR.[119] Cabrelli's observation will be applied in an effort to provide greater understanding over the presently limited protection that "sex" as a protected characteristic and a ground of discrimination provide fathers to combat discrimination.

[114] Cabrelli (n 4).
[115] *Salgueiro* (n 18).
[116] Iain Channing and Jonathan Ward, 'Homophobia, Brexit and Constitutional Change' (2017) 16 Safer Communities 167.
[117] Cabrelli (n 4) 421-422, 439-440.
[118] ibid.
[119] *Salgueiro* (n 18).

The inclusion of "sexual orientation" as a separate ground of discrimination to "sex" was notably discussed in relation to art.14 of the ECHR by the Parliamentary Assembly of the Council of Europe in the 1981 report, *Discrimination against Homosexuals.*[120] Johnson maintains that the most radical aspect of these recommendations was their support towards modifying art.14 of the ECHR to include "sexual preference" as a ground of discrimination.[121] During the debate, Mr Berrier, a rapporteur of the Legal Affairs Committee, was against the inclusion of "sexual preference" as a ground of discrimination because "sex" as a ground 'has a much wider significance than merely making a distinction between men and women, and may well cover notions such as "sexual orientation" or "sexual preference."'[122] Likewise, the Chairman of the Legal Affairs Committee, Mr Grieve, advocated that such change was unnecessary, as discrimination on the basis of sexual orientation was already within the scope of art.14 of the ECHR.[123]

However, Mr Berrier's sentiment was opposed by another member of the Legal Affairs Committee, Mr Stoffelen. He maintained that "sexual preference" was highly unlikely to be included in the interpretation of "sex" under art.14 of the ECHR by either the Commission or the Court.[124] Mr Stoffelen stated that, '[i]f we want to ban discrimination on the ground of sexual preference, we have to make that absolutely clear.'[125] Mr Stoffelen's argument that "sex" as a ground of discrimination provides limited scope for individuals with a queer sexual orientation to rely upon for legal protection is praiseworthy. Mr Stoffelen recognised that the legal prohibition of discrimination on the basis of sexual orientation has to be communicated clearly. In order to eliminate discrimination on the basis of sexual orientation, equality legislation must include "sexual orientation" as a separate ground of discrimination. After nearly 2 decades, the Parliamentary Assembly of the Council of Europe decided in 2000 that, in response to providing its opinion on a draft of Protocol No.12 of the Convention, "sexual orientation" should be included as art.14 of the ECHR provides a non-exhaustive list of grounds that tackle forms of discrimination that are particularly odious.[126] The Council of Europe also reconfirmed that "sexual orientation" can be interpreted as a ground of discrimination within the meaning of "other status" under art.14 of the ECHR.[127] Johnson remarks that individuals heavily relied upon the Convention and the ECtHR as a means to challenge the regulation of the gay community by the UK.[128] Through the influence of a series of landmark ECtHR decisions,[129] which will be later discussed within Section IV,

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[120] Council of Europe, *Report on Discrimination against Homosexuals* (Doc 4755, 1981).
[121] Paul Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford University Press 2016) 29; Council of Europe, 'Second Part of the Thirty-Third Ordinary Session of the Parliamentary Assembly, Tenth Sitting (1 Oct 1981)' (n 34) 276.
[122] Council of Europe, 'Second Part of the Thirty-Third Ordinary Session of the Parliamentary Assembly, Tenth Sitting (1 Oct 1981)' (n 34) 260.
[123] ibid 274.
[124] ibid 262.
[125] ibid 262.
[126] Council of Europe, Parliamentary Assembly, Opinion 216 (2000), para 6.
[127] European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (Council of Europe 2020) para 155.
[128] Paul Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (Oxford University Press 2016) 13.
[129] ibid 74.

Britain has since introduced “sexual orientation” as a protected characteristic under s.4 of the EA 2010. Under s.12 of the EA 2010, “sexual orientation” has been defined as being attracted to (a) persons of the same sex, (b) persons of the opposite sex or (c) persons of either sex.

ECtHR jurisprudence has exposed the limitations of “sex” as a ground of discrimination for those with a queer sexual orientation to rely upon. The influence of landmark ECtHR judgments will be analysed to display the legal rationale underpinning the addition of “sexual orientation” as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. The first case that demonstrates Cabrelli’s “boundary dispute”[130] between “sex” and “sexual orientation” as grounds of discrimination is in the case of *Dudgeon v The United Kingdom.*[131] The case concerned a direct complaint made by Jeffrey Dudgeon against Northern Irish legislation which criminalised consensual sexual acts between adult men.[132] Mr Dudgeon argued that the criminalisation of consensual sexual acts between men was a violation of his right to respect for private and family life under art.8 of the ECHR.[133] Similarly, he claimed that there was a violation of his right to non-discrimination under art.14 of the ECHR on the basis of his sex, sexuality and residence.[134] Mr Dudgeon argued that the policy of criminalisation had led to him experiencing anxiety and distress after being subject to a police investigation on the basis of his sexual orientation in 1976.[135] He also explained that he had experienced general fear since he was 17 that he may eventually be convicted on the basis of his sexual orientation.[136] Despite the argument made by the State that the criminalisation of sexual acts between men was for the ‘“protection of morals,”’[137] the Court found that there had been a violation under art.8 of the ECHR because the criminalisation of sexual acts between men was disproportionate to the aim of Northern Ireland maintaining its perceived standard of social morality.[138] However, the Court did not engage in detailed discussion regarding the applicability of art.14 of the ECHR.[139] After finding a violation of art.8 of the ECHR, the Court found ‘no useful legal purpose to be served in determining whether he… suffered discrimination.’[140]

The Court failed to use the case of *Dudgeon* as an opportunity to discuss the discrimination that Mr Dudgeon had experienced in relation to his sexual orientation. As mentioned in the introduction of Section IV, Mr Berrier had argued in the 1981 report, *Discrimination Against Homosexuals,* that “sex” as a ground of discrimination could be interpreted to also include “sexual preference” or “sexual orientation” under art.14 of the ECHR. [141] Such an

[130] Cabrelli (n 4) 421.
[131] *Dudgeon v The United Kingdom* (1982) 4 E.H.R.R. 149 (hereafter *Dudgeon*).
[132] ibid para 13.
[133] ibid para 34.
[134] ibid para 34.
[135] ibid para 71.
[136] ibid para 71.
[137] ibid para 46.
[138] ibid paras 60-63.
[139] ibid paras 64-70.
[140] ibid para 69.
[141] Council of Europe, ‘Second Part of the Thirty-Third Ordinary Session of the Parliamentary Assembly, Tenth Sitting (1 Oct 1981)’ (n 34) 260.

interpretation would render the inclusion of "sexual orientation" as a separate ground of discrimination unnecessary.[142] Despite the statement being made within the same year that *Dudgeon* was decided, the application of "sex" as a ground of discrimination was not once mentioned in the judgment to be interpreted to protect individuals from discrimination on the basis of sexual orientation. If "sex" as a ground of discrimination could be interpreted to also include discrimination on the basis of sexual orientation, why was the ground not applied within the majority judgment by the Court? Despite there being discussion that "sex" as a ground was potentially inclusive of the ground of "sexual orientation,"[143] the lack of discussion concerning this argument in the judgment delivered in *Dudgeon* revealed a "boundary dispute"[144] between "sex" and "sexual orientation" as grounds of discrimination. The ground of "sex" offers limited legal protection, as it does not explicitly name the discrimination which people of a queer sexual orientation experience. Therefore, the definition of sex discrimination failed to adequately recognise and provide redress for the specific discriminatory practices perpetuated against them. The judgment of *Dudgeon* reinforced the need to introduce equality legislation that specifically identified the type of discrimination which those of a queer sexual orientation experienced, as "sex" as a ground cannot fully capture discrimination on the basis of sexual identity.

The case of *Dudgeon* shows that reliance upon "sex" as a ground of discrimination provides limited legal protection for people of a queer sexual orientation. In light of Cabrelli's 2-part thematic observation, the pressure of social, political and cultural change[145] had started to recognise that individuals of a specific sexual orientation should no longer be criminalised and should be afforded adequate legal protection.[146] The Court in *Dudgeon* recognised that, 'as compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour in the great majority of the member States of the Council of Europe.'[147] Johnson argued that the judgment had an extensive impact because *Dudgeon* was the first ECtHR case that was successful in countering the criminalisation of consensual sexual acts between men.[148] The case also prompted the partial decriminalisation of those acts in Northern Ireland under the Homosexual Offences (Northern Ireland) Order 1982. [149] Furthermore, the case established legal precedent and underpinned future cases brought to the Court regarding the criminalisation of sexual acts between men in other States.[150] Northern Irish legislation had previously not provided sufficient redress for the specific discriminatory practices perpetuated against people of a queer sexual orientation. The judgment in *Dudgeon* supported

[142] ibid.
[143] ibid.
[144] Cabrelli (n 4) 421.
[145] ibid 421-422.
[146] Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (n 128) 27.
[147] *Dudgeon* (n 131) para 60.
[148] Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (n 128) 27.
[149] ibid.
[150] *Norris v Ireland* (1991) 13 E.H.R.R. 186; *Modinos v Cyprus* (1993) 16 E.H.R.R. 485.

and understood that the introduction of legislation which provided specific protection to those of a queer sexual orientation was necessary.

The second case that displays a "boundary dispute"[151] between "sex" and "sexual orientation" as grounds of discrimination is in the case of *Sutherland v United Kingdom.*[152] This case involved Mr Euan Sutherland who had his first sexual encounter at 16 with another man who was the same age as him.[153] Despite never having been prosecuted, he feared that he could be because the age of consent for sexual activity amongst gay men was 18, whilst the age of consent for sexual activity for straight men was 16.[154] He argued that the different ages of consent was discriminatory and violated his rights contained under arts.8 and 14 of the ECHR, which contained the right to respect private and family life and the right to non-discrimination.[155] The UK put forth 2 principle arguments in favour of enforcing different minimum ages for legal sexual activity between straight and gay men. Firstly, 'young men between the ages of 16 and 18 do not have a settled sexual orientation and that the aim of the law is to protect such vulnerable young men'[156] and, secondly, 'society is entitled to indicate its disapproval of homosexual conduct.'[157]

The Court found a violation of art.8 of the ECHR, taken in conjunction with art.14 of the ECHR.[158] However, the Court displayed confusion over which ground of discrimination to apply to the facts of the case, as they stated that 'it is not clear whether this difference is a difference based on "sex" or on "other status."'[159] Though they did not provide explicit reasoning as to why they felt that the application of "sex" as a ground of discrimination was unclear, art.14 of the ECHR did not explicitly list "sexual orientation" as a ground. Due to the lack of equality legislation to reference, the Court was potentially confused over how to approach discrimination on the basis of sexual orientation. The Court cited that the Human Rights Committee, which is a body that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR),[160] considered the legal prohibition of sex discrimination under art.26 of the ICCPR to include discrimination on the basis of sexual orientation.[161] Therefore, the Court decided that they did not need to decide whether "sexual orientation" was a ground within the meaning of "other status" under art.14 of the ECHR.[162] The Court maintained that the specific ground of discrimination that Mr Sutherland relied upon was not necessary to determine and instead focused on whether there had been a difference in treatment that would amount to a violation of art.14 of the ECHR. Nevertheless, the Court reiterated that the difference in treatment of enforcing different minimum ages for

[151] Cabrelli (n 4) 421.
[152] *Sutherland v United Kingdom* (1997) 24 E.H.R.R. CD22 (hereafter *Sutherland*).
[153] ibid para 18.
[154] ibid para 18.
[155] ibid para 4.
[156] ibid para 63.
[157] ibid para 63.
[158] ibid para 67.
[159] ibid para 50.
[160] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[161] *Sutherland* (n 152) para 50; *Toonen v Australia,* (1994) CCPR/C/50/D/488/1992.
[162] *Sutherland* (n 152) para 50.

legal sexual activity was discriminatory, as the differential legal treatment perpetuated disadvantage against gay people.[163] The objective of the legislation, which implemented different legal minimum ages for sexual activity between straight and gay people, was contradictory. The purpose of the differential legal treatment was to 'protect morals,'[164] but provided little protection for gay people experiencing discrimination.[165] Legislation that enforced inadequate protection for gay people was found to conflict with the rights contained under art.14 of the ECHR, as the legislation legitimised discriminatory practices within a wider social context which consequently placed gay people at a greater risk of suffering from discrimination.[166]

The judgment within *Sutherland* shows the limitations of relying upon "sex" as a ground of discrimination. The Court showed confusion in attempting to decipher which ground to apply to the facts of the case. The Court was aware that there was a "boundary dispute"[167] between "sex" and "sexual orientation" as grounds because they noted that sex discrimination did not adequately describe the experience of differential treatment on the basis of sexual orientation.[168] The recognition of discrimination on the basis of sexual orientation can be seen to be influenced by social, political and cultural change,[169] as the Court acknowledged that their judgment factored in 'modern developments and… current medical opinion.'[170]

The decision in *Sutherland* hugely influenced the ECtHR's approach to future case law. The Court cited the opinion of the Council of British Medical Association who stated that they 'believed that sexual orientation was usually established before the age of puberty in… boys and girls and… that the age of consent for homosexual men should be set at 16 since the… existing law might inhibit efforts to improve the sexual health of young homosexual and bisexual men.'[171] The evidence influenced the Court to maintain that the differential legal treatment was discriminatory.[172] Johnson noted that the judgment had led to the introduction of an equal minimum age of 16 for straight and gay people under s.1 of the Sexual Offences (Amendment) Act 2000.[173] Furthermore, the judgment established legal precedent in the form of narrowing the ability for Member States to exercise the margin of appreciation to implement policies that are discriminatory on the basis of sexual orientation.[174] There is clear evidence that illustrates the Court's confusion over whether "sex" as a ground of discrimination should be interpreted to also include discrimination of the basis of sexual orientation. Moreover, the confusion also highlights the importance of explicitly naming the type of discrimination that those of a queer sexual orientation experience. The identification

[163] ibid paras 65-66.
[164] ibid para 47.
[165] ibid paras 64-66.
[166] ibid paras 36, 66.
[167] Cabrelli (n 4) 421.
[168] *Sutherland* (n 152) para 50.
[169] Cabrelli (n 4).
[170] *Sutherland* (n 152) para 60.
[171] ibid para 59.
[172] ibid paras 59, 66-67.
[173] Johnson, *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights* (n 128) 51-52.
[174] *Sutherland* (n 152) paras 56-57.

of the particular form of discrimination which they experience will provide clarity within the legal system that discrimination on the basis of sexual identity is prohibited. "Sexual orientation" being clearly recognised as a ground of discrimination would allow reliance on a ground which adequately addressed the specific discriminatory practices that they face.

The third example that shows a "boundary dispute"[175] between "sex" and "sexual orientation" as grounds of discrimination is the combined judgment of *Lustig-Prean and Beckett v United Kingdom.*[176] The first case involved the dismissal of a former Royal Navy officer, Mr Lustig-Prean, after the knowledge that he was gay had been revealed.[177] The second case similarly concerned the dismissal of a former Royal Navy Weapons Engineer, Mr Beckett, after the fact that he was gay was disclosed to a military chaplain.[178] Both applicants argued that the combination of the intrusive nature of the Military Police investigations regarding their sexual orientation and their ultimate dismissal violated their rights to private and family life and non-discrimination contained under arts.8 and 14 of the ECHR respectively.[179] The Court found a violation of art.8 of the ECHR, as the actions undertaken by the UK Government in supporting the dismissal of gay people from the UK armed forces was disproportionate to their aim of sexual identity being an issue of national security.[180] Yet, they did not find a violation under art.14 of the ECHR, as they maintained that the discrimination of the applicants on the basis of sexual orientation had already been considered under art.8.[181] Although the Court seemed aware of discrimination on the basis of sexual orientation, they chose not to engage in detailed discussion over whether "sexual orientation" could be a recognised ground. Similar to the case of *Dudgeon,* the case was a missed opportunity for the Court to explore how "sexual orientation" as a ground of discrimination could either be interpreted to be included within the meaning of sex discrimination or be separately recognised.

As examined in Section III of Chapter 3, the Council of Europe has cited the case of *Salgueiro* as evidence to show that art.14 of the ECHR now recognises "sexual orientation" as a ground of discrimination under the term "other status."[182] In this case, the Court decided that a gay father being prevented from visiting his daughter by his ex-wife and being advised by the Portuguese courts that he could visit his daughter if he concealed his sexual orientation and his relationship with another man that he was living with was a violation of art.14 of the ECHR.[183] The Court stated that 'there was a difference of treatment between the applicant and… [the] mother, which was based on the applicant's sexual orientation, [and was] a concept which is undoubtedly covered by Article 14 of the Convention.'[184] Though the judgment of *Salgueiro* was decided a year earlier, the Court in *Lustig-Prean and Beckett*

175 Cabrelli (n 4) 421.
176 *Lustig-Prean and Beckett v United Kingdom* (2000) 29 E.H.R.R. 548 (hereafter *Lustig-Prean and Beckett*).
177 ibid paras 11-16.
178 ibid paras 17-21.
179 ibid para 2.
180 ibid paras 70, 103-105.
181 ibid para 108.
182 European Court of Human Rights (n 127).
183 *Salgueiro* (n 18) para 14.
184 ibid para 28.

opted to not address the discriminatory aspect of these cases under art.14 of the ECHR. The failure of equality legislation to not explicitly name the type of discrimination that Mr Lustig-Prean and Mr Beckett experienced left the Court confused over whether art.14 of the ECHR is applicable to cases relating to discrimination on the basis of sexual orientation. The Court consequently avoided dealing with the matter, which provided gay people with limited protection within key pieces of equality legislation to combat the discrimination directed against them.

The judgment in *Lustig-Prean and Beckett* highlights the limitations of relying upon "sex" as a ground of discrimination. In applying Cabrelli's 2-part thematic observation,[185] the Court recognised that there had been increasing pressure from social and cultural change that "sexual orientation" should be recognised as a ground of discrimination within the meaning of "other status" under art.14 of the ECHR. The ECtHR noted that 'European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority [and that] the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of… States on this issue.'[186] The judgment shows that being a person of queer sexual orientation is becoming increasingly culturally accepted throughout Europe.

The increasing cultural acceptance has been reflected in the evolution of research measures applied to researching different sexual identities. Galupo notes that the typically used Kinsey scale, a 7-point scale ranging from exclusively heterosexual (0), bisexual (1-5) and exclusively homosexual (6), was incredibly limiting.[187] The Kinsey scale recognised only 3 identity-based categories in which (1-5) were not necessarily a homogenous group that fit under bisexuality.[188] The Kinsey scale has since been modernised by Savin-Williams' Sexual Orientation Label Scale, which adapted the Kinsey Scale to include contemporary language to label various sexual identities.[189] The (1) to (5) scale now ranged from mostly heterosexual (1), bisexual leaning heterosexual (2), bisexual (3), bisexual leaning gay/lesbian (4) and mostly gay/lesbian (5).[190] The need for equality legislation to specifically name the type of discrimination which people of a queer sexual orientation experience is important, as "sex" as a ground of discrimination cannot fully capture the diversity of sexual identity and the discrimination experienced as a consequence. Nevertheless, Kavey maintains that the impact of the judgment was striking, as the case led to the UK repealing s.146(4) of the Criminal Justice and Public Order Act 1994 and lifting the ban on gay people entering the armed forces.[191] There was a strong "boundary dispute"[192] present within this case between "sex"

[185] Cabrelli (n 4) 421-422.
[186] *Lustig-Prean and Beckett* (n 176) para 97.
[187] M. Paz Galupo, 'Mental Health for Individuals with Pansexual and Queer Identities' in Esther Rothblum (ed), *The Oxford Handbook of Sexual and Gender Minority Mental Health* (Oxford University Press 2020) 333.
[188] ibid.
[189] ibid.
[190] ibid.
[191] Michael Kavey, 'The Public Faces of Privacy: Rewriting Lustig-Prean and Beckett v. United Kingdom' in Eva Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2013) 297.
[192] Cabrelli (n 4) 421.

and "sexual orientation" as grounds of discrimination. The change to legislation to support gay members of the armed forces displays the increasing pressure and need for art.14 of the ECHR to be more specific over how the provision addresses discrimination on the basis of sexual orientation.

The analysis of *Dudgeon, Sutherland,* and the combined judgment of *Lustig-Prean and Beckett* depict the limited protection which "sex" as a ground of discrimination offers to those of a queer sexual orientation. The definition of sex discrimination fails to explicitly capture and label the type of discrimination experienced by people of a queer sexual orientation on the basis of their sexual identity, as sex discrimination describes the discrimination experienced due to being a man or a woman. However, "sexual orientation" as a ground of discrimination cannot solely capture the discrimination experienced by gay fathers. As discussed earlier in this section, the case of *Salgueiro* involved a gay father having to explain that he had been discriminated against on the basis of his sexual orientation. Yet, gay fathers experience discrimination on the basis of their sex, sexual orientation *and* parenting status intersecting. The limited legal protection provided to fathers may influence gay fathers to rely upon "sexual orientation" as a ground of discrimination, but the discrimination pertaining to their sex and parenting status is not satisfactorily acknowledged. The EA 2010 and the ECHR largely does not address claims of intersectional discrimination on the basis of multiple grounds.[193] Instances of dual discrimination are addressed under s.14 of the EA 2010, but the provision has yet to be enforced.[194] Similarly, the wording of art.14 of the ECHR could have the potential for intersectional discrimination cases to be heard but, to date, has not been too sought after.[195] The inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 should provide gay fathers with a wider scope to adequately combat the discrimination that they experience when establishing their position in childcare.

V. GENDER REASSIGNMENT AS A PROTECTED CHARACTERISTIC AND GENDER IDENTITY AS A GROUND OF DISCRIMINATION

In order to comprehend the limitations of "sex" as a protected characteristic and a ground of discrimination for fathers to rely upon under s.4 of the EA 2010 and art.14 of the HRA 1998, the legal rationale behind the addition of "gender reassignment" as a protected characteristic under s.4 of the EA 2010 will also be examined. With regards to art.14 of the HRA 1998, the European Commission in their 2018 report*, Trans and Intersex Equality Rights in Europe*, highlighted that the ECtHR has clearly underlined that "gender identity" falls within the non-

[193] Shrey Atrey, *Intersectional Discrimination* (Oxford University Press 2019) 143; Kristina Koldinská, 'EU Non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma Women in Central and Eastern Europe' in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Routledge 2016) 256.
[194] Rand Shahin, ''Intersectionality': A Blind-Spot Missed in the British Equality Framework?' (2020) 6 LSE Law Review 51-52; Atrey (n 193).
[195] Atrey (n 193); Koldinská (n 193).

exhaustive list of grounds contained under art.14 of the ECHR.[196] Additionally, the ECtHR has also affirmed that States Parties to the ECHR have an obligation placed upon them to provide legal recognition to the preferred gender of an individual.[197] However, the conditions for an individual to obtain recognition for their gender identity largely fall within the margin of appreciation which State Parties enjoy.[198] Section V aims to apply Cabrelli's 2-part thematic observation to landmark judgments in order to better understand the "boundary dispute" between "sex" and "gender reassignment" or "gender identity" as grounds of discrimination.[199]

Van den Brink remarks that, although there are only a few international instruments that explicitly reference gender identity outside of the common references to sex, meaning cis women and men, there have been attempts made to introduce legislation that specifically protects trans rights.[200] "Sex" as a ground of discrimination has provided limited protection for trans individuals, as the ground does not capture the type of discrimination directed against them. "Trans" is an umbrella term which describes people whose gender identity and/or gender expression is different to the sex that they were assigned with at birth such as transgender, genderfluid and genderqueer, for example.[201] I will be using the term "trans" as an umbrella term throughout Section V. Initial examples of trans recognition in equality legislation can be found in the EU Recast Directive where the preamble declares that the scope of the principle of equal treatment for men and women is inclusive of discrimination that arises from an individual's gender reassignment.[202] A second EU Directive that is found to explicitly refer to gender identity, rather than solely gender reassignment, is within the preamble and art.10(1)(d) of the EU Qualification Directive on asylum policies.[203] Here, gender identity is listed as one of the reasons to be considered when offering asylum.[204] Likewise, under the Victims' Rights Directive, the scope of the definition of gender-based violence widened to include violence on the basis of an individual's gender, gender identity or gender expression.[205]

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[196] Marjolein Van den Brink and Peter Dunne, 'Trans and Intersex Equality Rights in Europe – A Comparative Analysis' (European Commission 2018) 8; *Identoba* (n 21).
[197] Van den Brink and Dunne (n 196) 8-9; *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 (hereafter *Goodwin*); *AP, Garçon and Nicot v France* [2017] ECHR 338.
[198] Van den Brink and Dunne (n 196) 9.
[199] Cabrelli (n 4) 421-425.
[200] Marjolein Van den Brink, *'The Legitimate Aim of Harmonising Body and Soul' Changing Legal Gender: Family Life and Human Rights* in Katharina Boele-Woelki and Angelika Fuchs (eds), *Same-Sex Relationships and Beyond* (Intersentia 2018) 233-234.
[201] Julie A. Greenbery, 'Unequal Protection for Sex and Gender Nonconformists' in Anne Richardson Oakes (ed), *Controversies in Equal Protection Cases in America: Race, Gender and Sexual Orientation* (Routledge 2015) 203; Van den Brink (n 200) 232.
[202] Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation OJ L 204/23 (Recast Directive), recital 3.
[203] Van den Brink (n 200) 234.
[204] Ibid.
[205] Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315/57 (Victims' Rights Directive), pmbl., recital 17.

Yet, Kavanagh maintains that the UK has been extremely slow to implement specific equality law provisions that protect trans rights in instances such as allowing trans individuals to record their preferred sexual identity on passports, driving licenses or wills, for example.[206] By the time these policies were introduced, they were not particularly innovative as they could have been introduced 11 years earlier.[207] In light of case law, particularly from the ECtHR, specific legal protection was afforded to trans individuals in the UK within the Gender Recognition Act 2004.[208] This Act enabled people that were trans to apply for a Gender Recognition Certificate (GRC), which provided legal recognition to individuals with gender dysphoria of the gender identity that they felt appropriate.[209] Cabrelli notes that subsequently "gender reassignment" was recognised as a separate protected characteristic from "sex" under s.4 of the EA 2010.[210] Under s.7(1) of the EA 2010, the protected characteristic can be relied upon 'if the person is to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.'

However, the Women and Equalities Committee's 2015-16 report, *Transgender Equality*, found that the protected characteristic of "gender reassignment" under s.4 of the EA 2010 has been heavily criticised for its adoption of outdated terminology.[211] The term "gender reassignment" confused many into believing that trans individuals can only seek protection under this protected characteristic if they have medically transitioned into the gender that they identify as, which is not the case.[212] Moreover, this terminology has misled employers, service providers and some trans individuals to believe that the Act only protects those who have obtained a GRC.[213] The ET in the judgment of *Taylor v Jaguar Land Rover Ltd* had to expressly explain that gender identity was a spectrum and that the meaning of "gender reassignment" was meant by Parliament to protect those with any gender identity on the spectrum, such as non-binary and gender fluid.[214] The limitations can be speculated to be rooted within the fact that the EA 2010 protects people from discrimination if it arises from them being recognised as male or female, which fails to represent people who consider themselves neither gender or fall within a broader definition of trans identity.[215]

Even so, the Women and Equalities Committee report that the inclusion of "gender reassignment" as a separate protected characteristic to "sex" under s.4 of the EA 2010 has been effective in encouraging employers and service providers to accommodate the needs of the trans community.[216] "Sex" as a ground of discrimination can be evidently perceived as

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[206] Paul Kavanagh, 'Slipping Quietly into the Crowd – UK Transsexuals Finally out of Exile' (2005) 9 Mountbatten Journal of Legal Studies 36; *Rees v United Kingdom* (1987) 9 E.H.R.R. 56; *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622; Gender Recognition Act 2004, ss.1, 9.
[207] ibid.
[208] Van den Brink (n 200) 236-239.
[209] Gender Recognition Act 2004, ss.1-2.
[210] Cabrelli (n 4).
[211] Women and Equalities Committee (n 24) para 92.
[212] ibid para 93.
[213] ibid para 94.
[214] *Taylor v Jaguar Land Rover Ltd*, Case No 1304471/2018 [78] (hereafter *Taylor*).
[215] Women and Equalities Committee (n 24) paras 95, 97.
[216] ibid para 90.

too binary for trans individuals to rely upon and does not adequately reflect the trans experience of sex and gender. The Women and Equalities Committee has voiced that the term "gender reassignment" should be exchanged for the term "gender identity," as the change would make it clearer that protection is offered to anyone who experiences discrimination due to their gender identity.[217] In order to provide further evidence of the limitations of "sex" as a protected characteristic and a ground of discrimination, Section V will investigate the "boundary dispute"[218] between "sex" and "gender reassignment "and how the "spin out" led to the recognition of "gender reassignment" under s.4 of the EA 2010.[219] In light of the judgment of *Taylor*, there may also be an ongoing "boundary dispute" between "gender reassignment" and "gender identity" as protected characteristics under the EA 2010. Similarly, in relation to art.14 of the ECHR, Section V will also investigate the "boundary dispute"[220] between "sex" and "gender identity" and how the "spin out" led to the recognition of "gender identity" as a ground.[221] The objective of Section V is to demonstrate the limited protection offered under the legal prohibition of sex discrimination and how the current "boundary dispute" between "sex" and "paternity" should result in a "spin out" which recognises "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998.

The first case that shows Cabrelli's "boundary dispute"[222] between "sex" and "gender reassignment" as grounds of discrimination is *P v S*. This case involved the dismissal of a male-to-female trans woman from her role as a manager in an educational establishment maintained by Cornwall County Council.[223] She maintained that the dismissal amounted to sex discrimination because she was subject to unfavourable treatment after disclosing her true identity as a woman.[224] Furthermore, she argued that, if the Equal Treatment Directive 1976 was supposed to protect her as a man and as a woman, 'there is no reason to exclude the intermediate state of transsexuality.'[225] The UK Government argued that the dismissal did not constitute sex discrimination within the context of the Sex Discrimination Act 1975, as the legislation 'took cognisance only of situations in which men or women were treated differently because they belonged to one sex or the other, and did not recognise a transsexual condition in addition to the two sexes.'[226] This interpretation of the legal prohibition of sex discrimination displays the inadequacy of "sex" as a ground of discrimination for trans individuals to rely upon. The definition of sex discrimination is too binary to capture the definition of discrimination on the basis of being trans, which operates outside of strictly identifying with the biological sex a person is assigned with at birth.

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[217] ibid para 108.
[218] Cabrelli (n 4) 421.
[219] ibid 421-425.
[220] ibid 421.
[221] ibid 421-425.
[222] ibid 421.
[223] *P v S* (n 34) paras 5-6.
[224] ibid para 13.
[225] ibid para 14.
[226] ibid para 7.

The CJEU found there to be a violation in this case and concluded that the definition of sex discrimination included discrimination on the basis of gender reassignment, as trans identity is conceptually related to sex and gender.[227] The Court noted that the ECtHR had previously argued that being trans 'was a fairly well-defined and identifiable group.'[228] The ECtHR defined being trans as 'those who, whilst belonging physically to one sex, feel convinced that they belong to the other;… [and/or] undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature.'[229] The CJEU consequently believed that 'such discrimination is based, essentially if not exclusively, on the sex of the person concerned.'[230] The CJEU reiterated that 'where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.'[231] The legal reasoning adopted by the CJEU expanded art.5(1) of the Equal Treatment Directive 1976, which condemned sex discrimination in the workplace, to also be inclusive of discrimination on the basis of gender reassignment.[232] Van den Brink explains that discrimination on the basis of gender reassignment was identified by the CJEU as a form of sex discrimination, which required the same strict level of protection against discrimination as sex discrimination.[233] In addition, the European Commission recognised that EU primary legislation does not explicitly reference gender expression or gender identity and that the CJEU may apply an extensive interpretation of the legal prohibition of sex discrimination.[234]

The judgment of *P v S* reaffirms the limited protection offered under "sex" as a ground of discrimination to trans individuals. The UK Government recognised that the Sex Discrimination Act 1975 was only inclusive of sex discrimination on the basis of being male or female, with no reference being made to tackle discrimination on the basis of gender identity. This posed great difficulties for trans people to rely upon, as sex discrimination holds a binary meaning which is difficult to depart from when advancing trans rights and providing legal protection over the gender identity of a person. The inclusion of discrimination on the basis of gender reassignment within the meaning of sex discrimination was arguably influenced by the concept of social, political and cultural change.[235] For example, in the Opinion of the Advocate General Tesauro, he urged the Court to include gender reassignment within the scope of sex discrimination in order to keep with 'modern legal traditions and… the constitutions of the more advanced countries.'[236] Moreover, he justified the expansion of art.5(1) of the Equal Treatment Directive 1976 because the legislation, 'which dates from 1976, took account of what may be defined as "normal" reality

[227] ibid para 21.
[228] ibid para 16.
[229] ibid para 16.
[230] ibid para 21.
[231] ibid para 21.
[232] ibid para 24.
[233] Van den Brink (n 200) 234.
[234] ibid.
[235] ibid.
[236] *P v S* (n 34), Opinion of AG Tesauro, para 24.

at the time of its adoption [but]… should be construed in a broader perspective, including therefore all situations in which sex appears as a discriminatory factor.'[237]

However, the inclusion of discrimination on the basis of gender reassignment within the definition of sex discrimination paid no regard to the general necessity for the inclusion of a separate ground that rejected the gender binary and recognised multiple gender identities. Monro maintains that there has been increasing awareness that the rigidity of the gender binary system is being exchanged for a "gender spectrum" that provides a broader set of identities.[238] Steele and Nicholson explain that the adoption of the concept of a gender spectrum gives rise to the recognition of multiple gender identities.[239] The opposite ends of a spectrum typically involve male and female identities and allow individuals who do not strictly adhere to either identity to position themselves at any appropriate point within the middle.[240] Steele and Nicholson note that the position of an individual on the spectrum could be subject to change and could potentially move along the spectrum, which would give rise to gender fluidity.[241] The position of an individual could also remain fixed, which could entail retaining a fixed gender identity.[242] This illustrates the "boundary dispute"[243] between "sex" and "gender reassignment" as grounds of discrimination. The definition of sex discrimination is too binary to take into account discrimination on the basis of gender diversity and calls for a stronger ground of discrimination to be created that trans individuals can adequately rely upon.

The second case that displays a "boundary dispute"[244] between sex discrimination and discrimination on the basis of gender reassignment can be seen in the case of *Goodwin.* This case concerned a male-to-female trans woman, Christine Goodwin, who claimed that she experienced sexual harassment at work after undergoing gender reassignment.[245] Additionally, due to the inability for her to change her National Insurance number, employers discovered her old name and gender identity which had furthered the problems she had experienced at work.[246] For instance, other employees stopped speaking to her and began talking about her behind her back.[247] She also stated that she experienced issues with eligibility for pension entitlements, for example, as she was informed that she would not be awarded these at the age of 60 similar to other women but at the age of 65 similar to other men.[248] She stated that the failure to legally recognise her true gender identity amounted to a violation of arts.8, 12, 13 and 14 of the ECHR, which contained her right to respect for

[237] ibid para 23.
[238] Surya Monro, 'Beyond Male and Female: Poststructuralism and the Spectrum of Gender' (2005) 8 International Journal of Transgenderism 15.
[239] Katie Steele and Julie Nicholson, *Radically Listening to Transgender Children: Creating Epistemic Justice through Critical Reflection and Resistant Imaginations* (Lexington Books 2019) 69-70.
[240] ibid.
[241] ibid 70.
[242] ibid 70.
[243] Cabrelli (n 4) 421.
[244] ibid.
[245] *Goodwin* (n 197) paras 1-15.
[246] ibid para 16.
[247] ibid para 16.
[248] ibid para 17.

private and family life, right to marry, right to an effective remedy and right to non-discrimination respectively.[249]

The ECtHR found that there was a violation under arts.8 and 12 of the ECHR.[250] The Court recognised that the UK Government had failed to recognise the true gender identity of Christine Goodwin on her birth certificate.[251] Similarly, the Court acknowledged that her ability to marry had been obstructed under s.11(b) of the Matrimonial Causes Act 1973, which established that marriages between parties that are not respectively male and female are void.[252] In response to whether a discrimination claim could be established under art.14 of the ECHR, the Court stated that these issues were already discussed under art.8 and that there was no need to examine them separately.[253] There is inconsistency between the judgments of *P v S* and *Goodwin*. Despite both cases containing a similar set of facts, art.14 of the ECHR was discussed in relation to *P v S* and not to the case of *Goodwin* 6 years later. By failing to explicitly name the type of discrimination that Christine Goodwin experienced under art.14 of the ECHR, one can speculate that the Court had insufficient legal clarity over how to apply "sex" as a ground of discrimination in relation to cases concerning gender identity. As a result, the Court avoided addressing art.14 and ultimately limited trans individuals from gaining adequate legal protection from important pieces of equality legislation.

The case of *Goodwin* underlines the limitations of relying upon "sex" as a ground of discrimination for trans individuals. The definition of sex discrimination is too binary to capture the specific discriminatory practices that are perpetuated towards individuals that identify as a range of gender identities outside of male and female.[254] The discrimination that trans people experience is unique and necessitates a ground to be included that provides specific legal protection which combats the type of discrimination that they experience. The influence of social, political and cultural change was apparent in this judgment, as the Court stated that '[i]n the twenty first century the right of transsexuals to personal development and to physical and moral security … cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved.'[255] In addition, the Court maintained that there is 'clear and uncontested evidence of a continuing international trend in favour… of increased social acceptance of transsexuals… [and] legal recognition of the new sexual identity of post-operative transsexuals.'[256] Examples can be found in Australia and New Zealand where the legal framework in both countries have departed from the viewpoint that biological sex at birth should solely be a factor in marriage.[257] As a response to the judgment of *Goodwin*, Davy explains that the Gender Recognition Act 2004 was introduced which provided legal recognition over the true gender identity of trans individuals.[258] The

[249] ibid para 3.
[250] ibid para 113.
[251] ibid para 22.
[252] ibid para 22.
[253] ibid paras 107-108.
[254] Monro (n 238).
[255] *Goodwin* (n 197) para 90.
[256] ibid para 85.
[257] ibid para 84.
[258] Zowie Davy, *Recognizing Transsexuals* (Taylor and Francis 2016) 37.

introduction of the Gender Recognition Act 2004 reinforces that "sex" as a ground of discrimination was insufficient to tackle the specific discriminatory practices directed against the trans community.

Similarly, specific legal protection for trans individuals was introduced under the addition of "gender reassignment" as a protected characteristic under s.4 of the EA 2010. Likewise, "gender identity" was also later recognised as a ground of discrimination under art.14 of the ECHR in the case of *Identoba*.[259] This case concerned the verbal abuse and physical attacks of members of the LGBT community who had taken part in a peaceful march in Georgia to honour the International Day Against Homophobia.[260] The Court upheld that there was a violation of arts.3, 11 and 14 of the ECHR,[261] as Georgian authorities had failed to provide sufficient police protection and that the violence perpetrated was motivated by homophobia and transphobia.[262] The Court did not enter into debate as to whether this was sex discrimination and expressly underlined that 'the prohibition of discrimination under… the Convention duly covers… gender identity.'[263] In light of Cabrelli's 2-part thematic observation,[264] this judgment clearly demonstrates that the ongoing "boundary dispute" between "sex" and "gender identity" had resulted in a "spin out" which explicitly identified "gender identity" as a separate ground. The Court recognised that the specific legal recognition and protection of trans people was needed to help advance trans rights and combat the social disadvantage directed against them.

The limited protection offered by the legal prohibition of sex discrimination for trans people is comparable to the position of fathers in childcare. The paternity discrimination cases analysed in Chapters 2 and 3 show how "sex" as a protected characteristic continually fails to adequately protect fathers from discrimination.[265] These cases did not explicitly identify the type of discrimination that the fathers were experiencing, which is rooted within the intersection of their sex and parenting status. Despite the criticism of "gender reassignment" as a protected characteristic under s.4 of the EA 2010,[266] stronger legal protection was provided than was offered under "sex" as a protected characteristic. Additionally, "gender identity" has also been identified as a ground of discrimination within the meaning of "other status" under art.14 of the ECHR,[267] which has provided specific legal protection that the trans community can rely upon. This is a legal direction that needs to be similarly adopted within equality legislation surrounding paternity rights. Currently, the exclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 has legally facilitated the exclusion of fathers from active participation in childcare. With reference to Cabrelli's 2-part thematic

[259] *Identoba* (n 21).
[260] ibid paras 6-13.
[261] ECHR, arts.3, 11, 14.
[262] *Identoba* (n 21) paras 64, 72, 110.
[263] ibid para 96.
[264] Cabrelli (n 4) 421-422.
[265] *Shuter* (n 1); *Ali v Capita* and *Hextall* (n 1); *Price* (n 1).
[266] Women and Equalities Committee (n 24) paras 92-93.
[267] *Identoba* (n 21).

observation,[268] the limited legal protection currently provided to fathers highlights the present "boundary dispute" between "sex" and "paternity" as, without implementing a ground that clearly identifies the type of discrimination which fathers experience, paternity discrimination will continue to not be adequately addressed.

VI. CONCLUSION

The primary objective of Chapter 4 has been to provide evidence of the limited legal protection offered under "sex" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Fathers have continued to unsuccessfully rely upon the legal prohibition of sex discrimination to counter the paternity discrimination that they experience.[269] Chapter 4 undertook a comparative analysis using Cabrelli's 2-part thematic observation[270] to examine how the inclusion of newer protected characteristics, grounds of discrimination and equality law provisions have been introduced to specifically combat the discrimination that some marginalised and minority groups have experienced. This methodology was implemented to show that the limited legal protection fathers are provided with under "sex" as a ground of discrimination has been previously experienced by other marginalised and minority groups. The groups discussed in this chapter included pregnant women, mothers, people of a queer sexual orientation and members of the trans community. Landmark judgments were analysed to demonstrate the limitations of "sex" as a ground of discrimination and how fathers also currently experience limited protection from the legal prohibition of sex discrimination.

Cabrelli's 2-part thematic observation argues that most of the protected characteristics listed under s.4 of the EA 2010 have been included through a "boundary dispute" with another protected characteristic.[271] Due to the pressure of social, political and cultural change, this "boundary dispute" would result in a "spin out" wherein a new protected characteristic was recognised.[272] Although the theory focuses upon the addition of protected characteristics under the EA 2010, I have used this theory to investigate how jurisprudence from America, Canada, the CJEU and the ECtHR has prompted the introduction of specific legal protection over marginalised and minority groups in other pieces of equality legislation as well. "Sex" as a ground of discrimination firstly shared a "boundary dispute" with the type of discrimination pregnant women, mothers and members of the LGBT community individually experienced, as the definition of sex discrimination provided limited scope to adequately redress the discrimination directed against them.[273] This was apparent within the landmark judgments discussed throughout this chapter and, due to the pressure of social, political and cultural change, it was made necessary to include a new ground of discrimination that

[268] Cabrelli (n 4) 421-422.
[269] *Shuter* (n 1); *Ali v Capita* and *Hextall* (n 1); *Price* (n 1).
[270] Cabrelli (n 4) 421-422.
[271] ibid.
[272] ibid.
[273] ibid.

addressed the specific discriminatory practices perpetuated against each group.[274] Following the second part of Cabrelli's 2-part thematic observation, a "spin out" occurred wherein "pregnancy and maternity," "sexual orientation" and "gender reassignment" were legally recognised under s.4 of the EA 2010.[275] In applying the theory to the ECHR, which the HRA 1998 incorporated into UK law,[276] the "spin out" involved "sexual orientation" and "gender identity" being recognised as grounds of discrimination under art.14 of the ECHR.[277] Each of these grounds specifically named the type of discrimination which pregnant women, mothers, people with a queer sexual orientation and trans individuals experienced. However, it could be argued that there is potentially an ongoing "boundary dispute" between "sex" and "pregnancy" as grounds under art.14 of the ECHR, as pregnancy discrimination is presently included within the definition of sex discrimination.[278] Including pregnancy discrimination under the definition of sex discrimination could potentially give rise to definitional disputes in the future since pregnant women experience discrimination on the basis of their sex, pregnancy and expectant parenting status intersecting.

In applying Cabrelli's 2-part thematic observation[279] to paternity discrimination, the case law discussed within Chapters 2 and 3 show a "boundary dispute" between "sex" and "paternity" as grounds of discrimination.[280] Over the past decade, Margaria explains that the concept of "new fatherhood" has become increasingly visible in society.[281] "New fatherhood" has been described by Magaria as a model of fatherhood which combines greater participation in childcare and conventional characteristics such as breadwinning.[282] Childcare is becoming increasingly perceived as a gender-neutral responsibility wherein fathers are equally placed to mothers to fulfil this responsibility.[283] With the pressure of social, political and cultural change, it is apparent that "sex" will become increasingly recognised as insufficient to adequately redress the specific discriminatory practices directed against fathers. Similar to mothers and those belonging to the LGBT community, a "spin out" of "paternity" being included as a protected characteristic under s.4 of the EA 2010 and a ground under art.14 of the HRA 1998 is necessary for fathers to sufficiently tackle paternity discrimination.

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[274] ibid.
[275] ibid 421-427.
[276] Kitterman (n 13).
[277] *Salgueiro* (n 18); *Identoba* (n 21).
[278] *Jurčić* (n 14).
[279] Cabrelli (n 4) 421-422.
[280] *Shuter* (n 1); *Ali v Capita* and *Hextall* (n 1); *Price* (n 1).
[281] Alice Margaria, *The Construction of Fatherhood* (Cambridge University Press 2019) 15.
[282] ibid 16.
[283] *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009), para 33; *Markin v Russia* (2013) 56 E.H.R.R. 8, para 99; C-104/09 *Roca Alvarez v Sesa Start Espana ETT SA* [2011] 1 C.M.L.R. 28, para 31.

CHAPTER 5: THE INTERNATIONAL APPROACH TO PATERNITY DISCRIMINATION

I. INTRODUCTION

The Women and Equalities Committee contend that the international experiences of leave policies suggest that an individualised right to a period of well-paid leave for fathers is crucial to their higher take-up rates of leave and fuller participation in childcare.[1] Sweden is viewed as a practical example of successfully introducing leave entitlements which increased the participation of fathers in childcare.[2] In 1974, Sweden was the first country to equally grant mothers and fathers access to paid leave.[3] Sweden strengthened their leave policies for fathers in 1995 by providing them with a 1 month non-transferable paid leave entitlement, which increased the take-up rate amongst fathers of leave from 9% to 47% over the subsequent 8-year period.[4] Following Sweden's introduction of parental leave in 1974, Norway implemented similar measures in 1978, Iceland in 1981, Denmark in 1984 and Finland in 1985.[5] The consistently similar approach many Nordic countries have undertaken towards parental leave has often been characterised as the "Nordic model."[6] The model is typically described as a dual earner/carer model[7] wherein Nordic countries provide long parental leave periods and high replacement pay rates.[8] The dual earner/carer model supports degendered parenting roles by allowing responsibilities for earning and caregiving to be symmetrically assumed by mothers and fathers.[9] The overarching aim of this model is to promote gender equality within childcare.[10]

In Sweden, Kamerman and Kahn have observed that, 'job protection, a major feature of the right to a leave, is rigorously implemented and enforced.'[11] The focus upon job protection references the fact that equality legislation in Sweden prohibits discrimination against employed parents exercising their leave entitlements.[12] Sweden currently adopts an

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[1] Women and Equalities Committee, *Fathers and the Workplace* (HC 2017-19, 358) para 73.
[2] ibid.
[3] ibid.
[4] ibid.
[5] Nordic Information on Gender (NIKK), 'The Nordic Gender Effect at Work: Nordic Experiences on Parental Leave, Childcare, Flexible Work Arrangements, Leadership and Equal Opportunities at Work' (Nordic Council of Ministers 2019) 27.
[6] Ingólfur Gíslason and Guðný Björk Eydal, 'Parental Leave, Childcare and Gender Equality in the Nordic Countries' (Nordic Council of Ministers 2011) 172.
[7] ibid 161.
[8] Julian Johnsen and Katrine Løken, 'Nordic Family Policy and Maternal Employment' in Torben Andersen and Jesper Roine (eds) *Nordic Economic Policy Review* (Nordic Council of Ministers 2016) 120.
[9] Janet Gornick and Marcia Meyers, *Families that Work: Policies for Reconciling Parenthood and Employment* (Russell Sage Foundation 2003) 12.
[10] Guðný Björk Eydal and Tine Rostgaard, 'Gender Equality Revisited – Changes in Nordic Childcare Policies in the 2000s' (2011) 45 Social Policy & Administration 163.
[11] Sheila Kamerman and Alfred Kahn, 'Trends, Issues and Possible Lessons' in Sheila Kamerman and Alfred Kahn (eds) *Child Care, Parental Leave, and the Under 3's: Policy Innovation in Europe* (Auburn House 1991) 206.
[12] Parental Leave Act 1995, ss.16-17.

amalgamation of an employment and equality law perspective towards parental rights wherein legal protection provided under their legal framework is limited to working parents.[13] Sweden does not adopt a "complete equality" law approach, as the legal protection offered is inapplicable to parents generally. A "complete equality" law approach is where a standalone right to equality is provided to fathers and is not related to an employment relationship that they are in. The approach understands that an equality right for fathers to not to be discriminated against is inclusive of employed and unemployed fathers. As discussed in Section IV of Chapter 2 and in Section III of Chapter 3, the dispute surrounding the access by fathers to social benefits in *Weller v Hungary*[14] and the prevention of a gay father from visiting his daughter in *Salgueiro da Silva Mouta v Portugal*[15] are examples of fathers experiencing paternity discrimination outside of the field of employment.

Chapter 5 will examine the benefits of introducing legal protection for employed fathers and the shortcomings of failing to similarly extend legal protection to unemployed fathers. Although Sweden does not take a "complete equality" law approach, Sweden will be used as a case study to demonstrate how fathers will be provided with adequate legal protection to establish their position in childcare if equality legislation were to take a "complete equality" law approach. The United Kingdom (UK) currently perceives paternity rights as an employment law issue. However, Sweden has recognised the importance of introducing equality legislation which protects the parental rights granted under employment legislation. The viewpoint that paternity rights are solely an employment law conception is ill-equipped to tackle the discrimination which fathers experience when exercising leave entitlements. Conversely, equality legislation is ultimately designed to identify, counter and offer redress for the discrimination perpetuated against marginalised societal groups. Swedish case law that shows fathers effectively relying upon equality legislation to tackle the discrimination that they experience within the Swedish court system will be discussed later within this chapter.

Similar to the methodology undertaken in Chapters 3 and 4, Chapter 5 will also use a functional comparative method. The methodology investigates how different societies have attempted to remedy societal problems through the law.[16] The functional comparative analysis investigates how effectively different types of laws have addressed these societal problems in order to create an effective legal solution.[17] Chapter 5 will implement a comparative analysis methodology in order to show the differences between the legal perspectives adopted towards the protection for the position of fathers in childcare by Britain and the UK detailed in Chapter 2 and internationally. A comparative analysis will show that an equality law approach is essential in protecting fathers from discrimination and that the benefits associated with an equality law approach can be predicted to be similarly mirrored in Britain and the UK if introduced.

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[13] ibid.
[14] *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009).
[15] *Salgueiro Da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 (hereafter *Salgueiro*).
[16] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 9.
[17] ibid 10.

Chapter 5 will be structured in the following manner. Section II will investigate how Sweden has currently undertaken an amalgamation of an employment and equality law approach, which provides legal protection for employed parents to counter the discrimination that they experience. The study of Sweden in Section II will provide evidence for the argument that the adoption of a "complete equality" law perspective towards parental rights will adequately protect the rights of fathers to participate in childcare. In light of the fact that the right to equality and protection against discrimination is a universal right that is recognised by key international human rights frameworks such as the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW),[18] Section III of Chapter 5 will provide an analysis of CEDAW. Section III will demonstrate that CEDAW does not provide fathers with a protected individual right to adequate paternity leave and pay. Additionally, Section III will highlight that paternity rights are viewed as a function of women's equality under CEDAW. Section IV will evaluate the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[19] and will show that the ICESCR does provide fathers with a protected individual right to paternity leave.[20] However, similarities will be drawn between the ICESCR and CEDAW within Section IV to show how the recent interpretation of both treaties by the Committee on Economic, Social and Cultural Rights (CESCR) and the CEDAW Committee view paternity rights predominantly as a function of women's equality. Section V will provide a conclusion that the current equality law approach which Sweden undertakes towards parental rights has been beneficial in protecting fathers within the Swedish court system. Section V will conclude that the development of this approach into a "complete equality" law approach would be highly beneficial to fathers that are combating discrimination within Britain and the UK. This section will also discuss how the ICESCR and CEDAW largely interpret the strengthening of paternity rights as a function of women's equality. The analysis of both of these treaties will highlight the dangers of failing to recognise the discrimination perpetuated against fathers under important pieces of equality legislation in Britain and the UK.

II. SWEDEN

In order to truly comprehend how an amalgamation of an employment and equality law approach towards paternity rights has been beneficial in helping fathers to maintain their position in childcare, Section II will explore the policy objectives and legal measures implemented within Sweden. Sweden has reframed the debate surrounding paternity rights as an equality and employment law issue by only providing legal protection to working parents experiencing discrimination.[21] The Nordic Council of Ministers maintained that an

[18] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).
[19] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[20] Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/20 [20].
[21] Parental Leave Act 1995, ss.16-17.

underlying focus behind the parental leave system that governed maternity and paternity rights in Sweden was on gender equality.[22] Sweden is often highly praised for how progressive their policies surrounding paternity rights have been, as Kaufman notes that Sweden was the first country in the world to introduce parental leave in 1974.[23] Sweden sought to understand how the implications of role theory contributed towards gender inequality, particularly within the context of parenting.[24] Role theory is a concept in social psychology that denotes that people act within the socially defined categories that they are placed in.[25] For instance, men are socially expected to prioritise their careers, whilst mothers are socially expected to assume the main responsibility of childcare.[26] Sweden identified that this theory provided fathers with the ability to opt out of the role of undertaking parental leave to tend to childcare, whilst mothers could not do the same.[27] Sweden determined that leave entitlements needed to be reformed to incentivise fathers to take leave.[28]

The introduction of stronger leave entitlements in Sweden was rooted in the following 3 factors: (i) the prevention of declining birth rates; (ii) the encouragement of women's participation within the labour market; and (iii) supporting the departure of men from their traditionally assigned gender roles.[29] These factors arguably demonstrated how the role of motherhood and fatherhood are entwined with one another, as there is a prominent focus in promoting the departure of men and women from traditional gender roles. Understanding the interrelationship shared between the roles of motherhood and fatherhood is crucial in eliminating the discrimination that both parents experience. The encouragement of shared childcare responsibilities would help parents to cultivate a better work-family balance. For example, by providing legal support for fathers to establish their position in childcare, mothers would be able to maintain their position in the workplace because they would no longer be regarded as the primary caregiver for their children and would have more time to engage in workplace activities.

In an effort to fully explore how efficient Swedish policy has been at supporting the increased participation of fathers in childcare, Section II will evaluate how effective the Swedish legal framework has been in protecting the position of fathers as carers for their children. The following section will be divided into 3 sub-sections: 1. Legal Framework on Parental Rights; 2. Limitations to the Swedish Approach; and 3. Response of the Court System to Fathers' Discrimination. These subsections will help to display the successes and shortcomings associated with the adoption by Sweden of an amalgamation of an employment and equality law approach. Moreover, Section II will further examine whether the Swedish legal

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[22] Frida Valdimarsdóttir, 'Nordic Experiences with Parental Leave and Its Impact on Equality Between Women and Men' (Nordic Council of Ministers 2006) 30.
[23] Gayle Kaufman, *Fixing Parental Leave: The Six Month Solution* (New York University Press 2020) 9.
[24] Anders Chronholm, 'Sweden: Individualisation or Free Choice in Parental Leave?' in Sheila Kamerman and Peter Moss (eds), *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Policy Press 2011) 228, 238.
[25] Victor Karandashev, *Cultural Models of Emotions* (Springer 2020) 12.
[26] Chronolm (n 24) 238.
[27] ibid.
[28] ibid.
[29] Valdimarsdóttir (n 22).

framework surrounding paternity rights offers them adequate legal protection to combat the discrimination that they experience.

1. LEGAL FRAMEWORK ON PARENTAL RIGHTS

Sweden has introduced an amalgamation of an equality and employment law approach by protecting working fathers from discrimination. Under employment legislation, Sweden has introduced key provisions that have given fathers access to certain leave entitlements. Sweden offers 480 days of parental leave in total.[30] Mothers and fathers are entitled to 240 days each of paid parental leave[31] wherein parental leave pay is paid at roughly 80% of wage replacement pay.[32] Each employee is insured to receive parental benefits from their first day of employment.[33] However, the insurance will not apply to individuals 3 months after the day they become unemployed and could end earlier if that individual begins work in another country and is covered by the corresponding insurance of that country.[34] In light of altering the way in which role theory operated and to encourage shared childcare responsibilities between parents, Sweden implemented stronger leave entitlements that incentivised fathers to use it.[35] Sweden introduced the individualisation of parental leave, which prompted the development of a father-only quota.[36] Parents can share their allocated leave if they wish, but only in light of the exception that mothers and fathers each have an exclusive right to 90 of those days.[37] The policy objective behind the introduction of a father-only entitlement with regards to parental leave can be seen to help alleviate the gender roles men and women are made to traditionally perform in society. The ability for the Swedish policy to promote shared childcare responsibilities resulted in mothers being able to attain more freedom to participate within the workplace and for fathers to engage in childcare.[38]

Sweden has also assumed an equality law approach which protects employed parents from experiencing discrimination when exercising leave entitlements. The legal protection for working fathers is promoted under the Swedish Discrimination Act 2008. The purpose of the Act is to eliminate discrimination and uphold equal rights and opportunities amongst all individuals.[39] Moreover, with regards to the working conditions of employees, '[e]mployers are to help enable both female and male employees to combine employment and parenthood.'[40] Furthermore, employed fathers are afforded further legal protection under the Parental Leave Act 1995. Under s.16 of the Parental Leave Act 1995, an employer is

[30] Social Insurance Code 2010, ch.12, s.12.
[31] Social Insurance Code 2010, ch.12, s.35.
[32] Social Insurance Code 2010, ch.25, s.5.
[33] Social Insurance Code 2010, ch.6, ss.6-8.
[34] Social Insurance Code 2010, ch.6, s.8.
[35] Chronholm (n 24).
[36] ibid 238.
[37] Social Insurance Code 2010, ch.12, s.12a.
[38] Lilja Mósesdóttir, *The Interplay Between Gender, Markets and the State in Sweden, Germany and the United States* (Routledge 2018) 48.
[39] Discrimination Act 2008, ch.1, s.1.
[40] Discrimination Act 2008, ch.3, s.5.

prohibited from disfavouring a job applicant or an employee because of reasons relating to parental leave. These include instances where an employer selects a job applicant for an interview, considers an employee for either promotion or training for promotion, implements measures concerning vocational training or vocational counselling, manages or distributes work responsibilities or gives notice of termination or dismissal.[41] Additionally, in instances where an employee is given notice of termination or dismissal for reasons relating to parental leave, the notice of termination or dismissal will be declared as invalid upon the request of an employee.[42] The equality law provisions that protect working fathers in Sweden can be partially commended. Sweden recognised that working fathers are a sub-group within men that experience social marginalisation. The role of fatherhood defined under the traditional "male breadwinner" model has contributed towards the discrimination which fathers experience. The equality legislation in Sweden protects employed fathers from the discriminatory workplace culture[43] detailed in Section III of Chapter 2. The Swedish legal framework ensures that the position of working fathers in childcare is protected.

Furthermore, the current legal framework surrounding parental leave in Sweden adopts gender-neutral language.[44] Sweden neither introduces explicit maternity or paternity leave measures, but rather, implements general parental leave measures that both parents can access.[45] Baker applauds the gender-neutral approach that the country has undertaken because it promotes the perspective that childbirth is not only an event that happens to women, but both men and women.[46] Baker explains that the approach could further help to alleviate the 'conflict of "production-reproduction" inherent in a capitalist society'[47] wherein the gender-neutral approach could encourage shared childcare responsibilities between parents and, in turn, slowly alter the workforce from being male-dominated to becoming more gender equal.[48] An equal distribution of childcare between parents is also beneficial in countering the discrimination which fathers experience. Helping to change traditional parenting roles promotes the notion that childcare is not a female-oriented responsibility, but rather a gender-neutral responsibility. The gender-neutral language used by Sweden could be argued to provide legal recognition of the role of fathers in childcare. The identification of the importance of fathers in childcare could gradually develop into social acceptance wherein employers are less likely to discriminate against fathers in the workplace that want to take leave.

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[41] Parental Leave Act 1995, s.16.
[42] Parental Leave Act 1995, s.17.
[43] Women and Equalities Committee (n 1) paras 20-21; Takeru Miyajima and Hiroyuki Yamaguchi, 'I Want to but I Won't: Pluralistic Ignorance Inhibits Intentions to Take Paternity Leave in Japan' (2017) 8 Frontiers in Psychology 2.
[44] Ulla Jurviste, Martina Prpic and Giulio Sabbati, 'Maternity and Paternity Leave in the EU' (European Parliamentary Research Service 2019) <https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635586/EPRS_ATA(2019)635586_EN.pdf> accessed 18 July 2022 2.
[45] ibid.
[46] Maureen Baker, 'Parental Benefit Policies and the Gendered Division of Labor' (1997) 71 Social Service Review 61.
[47] ibid.
[48] ibid 61-62.

The individualisation of parental leave for fathers being a legally protected right can be seen to be a successful policy that has helped fathers in establishing their position within childcare. Arnalds, Eydal and Gíslason argue that the individualisation of parental leave in developing a father-only quota was a largely successful policy as the quota helped Sweden to achieve the policy objective of increasing the involvement of fathers in childcare through its high uptake.[49] Arnalds, Eydal and Gíslason found that eligible fathers used 100 days of their leave entitlement on average.[50] Farré highlights that there is a direct correlation between the individualisation of parental leave for fathers and their increased participation in childcare.[51] Only in 1995, when Sweden introduced equal access to paid leave for mothers and fathers and initially provided a non-transferable father-only quota for 30 days, did the take-up rate amongst fathers increase from 9% to 47% over the span of 8 years.[52] Similarly, Chronholm found that 51% of fathers of children born in 1992 undertook some form of parental leave.[53] However, this figure increased after 1995 to77% of fathers of children born in 1996 using some form of parental leave.[54] Moreover, the promotion of the concept that childcare is a gender-neutral responsibility is seemingly only further encouraged through the introduction of a father-only quota. The individualisation of parental leave for fathers reinforces the ideology that the roles of fatherhood and motherhood are equally important within childcare. The father-only quota helps to alleviate the traditional gender roles surrounding parenthood and encourages the social acceptance of the role of fathers in childcare. The policy normalises the prospect of employed fathers using leave. This measure could ultimately help combat the workplace culture[55] that contributes towards the discrimination which fathers experience, as fathers are less likely to experience social disadvantage if the role of fathers in childcare is increasingly socially recognised and accepted.

2. LIMITATIONS TO THE SWEDISH APPROACH

Although the Swedish approach of introducing equality legislation that protects employed fathers from discrimination can be partially commended, it can be improved by extending the legal protection to fathers that are unemployed and experience inequalities outside of the workplace as well. In Section IV of Chapter 2, I have explained that fathers experience paternity discrimination in matters outside of employment. For instance, fathers can experience discrimination in matters relating to nationality, visitation rights, prison sentencing, social benefits and paternity testing.[56] Fathers who experience mistreatment in

[49] Ásdís Arnalds, Guðný Eydal and Ingólfur Gíslason, 'Equal Rights To Paid Parental Leave And Caring Fathers- The Case Of Iceland' (2013) 9 Icelandic Review of Politics and Administration 327.
[50] ibid.
[51] Lídia Farré, 'Parental Leave Policies and Gender Equality: A Survey of the Literature' (2016) 34 Studies of Applied Economics 52.
[52] ibid.
[53] Chronholm (n 24) 235.
[54] ibid.
[55] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi (n 43).
[56] *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache v Romania* App no 16986/12 (ECtHR, 3 October 2017) (hereafter *Alexandru Enache*); *Sommerfeld v Germany* (2004) 38 E.H.R.R. 35 (hereafter *Sommerfield*); *Rasmussen v Denmark* App no 8777/79 (ECtHR, 28 November 1984) (hereafter *Rasmussen*).

these matters outside of the workplace are excluded from the legal protection offered under Swedish equality legislation. In addition, there is a strong labour focus within the Swedish equality legislation that is designed to protect working parents from discrimination. Sweden prohibits discrimination in instances where employers fail to enable fathers from being able to reconcile workplace and childcare responsibilities.[57] Employers are also prohibited from discriminating against fathers for jobs or workplace promotions and dismissing fathers from employment for reasons relating to parental leave.[58] The equality law approach that Sweden has undertaken within an employment context does not offer legal protection to fathers who are unemployed. The equality legislation also fails to specify what type of employment is protected, as the provisions do not explicitly state whether the legal protection offered also covers independent contractors, those that are self-employed and gig workers. The Swedish approach raises the issue of whether the legal protection that is offered in Sweden is also limited to certain types of employment, which prevents certain employed fathers from being able to rely upon these equality law provisions as well.

Furthermore, the legal framework surrounding parental leave in Sweden can be arguably critiqued for the gender-neutral language used in the employment legislation governing leave entitlements.[59] MacKinnon has criticised gender-neutral legislation for enabling gender stereotypes and supporting gender inequality.[60] Collier explains that the differences between the gendered lives of men and women have to be accounted for in order to successfully promote social justice, rather than through gender-neutral policies made for an ungendered citizen.[61] Similarly, Young underlines that 'where social group differences exist… social justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression.'[62] Although Sweden can be commended for attempting to achieve the policy objective of alleviating traditional gender roles and reframing childcare as a gender-neutral responsibility, whether the equality law provisions offer adequate protection for fathers is questionable. The discrimination which fathers experience is rooted in the intersection between their sex and parenting status. Yet, the equality legislation in Sweden is designed to protect fathers from discrimination solely on the basis of their parenting status. Sweden does not offer legal protection for fathers to specifically rely upon to counter the specific discriminatory practices that are perpetuated against them.

The discrimination that mothers and fathers experience differs from one another. Fathers experience discrimination due to their parenting role being defined under the traditional "male breadwinner" model as the primary financial earner of the household income. Adherence to this familial model prevents the role of fatherhood from being perceived as a caring role. The type of discrimination mothers face is different to what fathers experience, as

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[57] Discrimination Act 2008, ch.3, s.5.
[58] Parental Leave Act 1995, ss.16-17.
[59] Social Insurance Code 2010, ch.12, s.12.
[60] Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 658; Gemma Mitchell, 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (2019) 41 Journal of Social Welfare and Family Law 416.
[61] Richard Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)' (2001) 28 Journal of Law and Society 536-537.
[62] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 3.

their parenting role under the same familial model dictates that they should be chiefly responsible for childcare and domestic tasks.[63] The traditional role of motherhood inhibits mothers from successfully establishing their position in the workplace. The use of gender-neutral language may not be able to sufficiently identify occasions when fathers are experiencing discrimination due to the intersection between their sex and parenting status. The meaning of parental discrimination could also be compounded to mean pregnancy and maternity discrimination, as historically the focus has primarily been upon the development of pregnancy and maternity rights within the workplace.[64] The gender-neutral language used in the Swedish employment legislation governing leave entitlements could be debated to not adequately address the gender stigmatisation that continues to surround the role of fatherhood. Gender-neutrality could perpetuate the ideology that fathers are secondary to mothers with regards to childcare and could result in fathers taking less time off work than mothers to undertake childcare.

There has been some evidence that motherhood and fatherhood are still not perceived as equally important within childcare in Sweden. Hobson argues that cultural norms that adhere to the traditional “male breadwinner” model are still deeply embedded within Swedish society.[65] In 2010, only 8.7% of fathers shared leave equally with mothers (defined as a 40/60 split) and only a fifth of fathers interviewed wanted childcare responsibilities to be split 50/50 with mothers.[66] Evertsson reports that there is still a prominent gender gap in household work that is present within Swedish families because mothers spend 15 hours a week completing household tasks, whilst men spend 10 hours a week.[67] The gap is further widened when factoring in children aged less than 8 years old.[68] Despite the gender-neutral language used and the legal protection offered to employed fathers, the policy design may not have been sufficient to tackle the presiding cultural norms that place fathers as secondary parents to mothers. The way in which the employment and equality legislation surrounding fathers’ rights have been framed has arguably failed to fully alleviate the cultural attitudes towards what proportion of responsibility mothers and fathers should undertake in the home.

Due to the fact that fathers still largely view themselves as the secondary parent, fathers continue to use leave entitlements to a lesser degree than mothers. Haas and Hwang note that, although men have the right to work flexible hours in order to balance workplace and childcare responsibilities, many fathers do not use this entitlement.[69] Haas and Hwang report that 43% of mothers worked part-time during the early years of childcare in 2013, whilst only 10% of fathers used this benefit.[70] When fathers were interviewed about their apparent

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[63] Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) 23.
[64] ibid.
[65] Barbara Hobson, ‘Fathers’ Capabilities for Work-Life Balance in Sweden: The Unfinished Revolution’ (2016) 28 Japanese Journal of Family Sociology 202-203.
[66] ibid 202.
[67] Marie Evertsson, 'The Importance of Work: Changing Work Commitment Following the Transition to Motherhood' (2013) 56 Acta Sociologica 144; Hobson (n 65) 202.
[68] ibid.
[69] Linda Haas and C. Philip Hwang, '“It's About Time!”: Company Support for Fathers' Entitlement to Reduced Work Hours in Sweden' (2016) 23 Social Politics 150-151; Parental Leave Act 1995, s.3.
[70] ibid 143-144.

hesitancy in reducing their working hours, fathers reported that they felt as if part-time work was typically undertaken by women and would feel uncomfortable working those hours.[71] Despite Sweden having achieved much success in increasing the involvement of fathers within childcare, many fathers still have gendered attitudes about the roles in which mothers and fathers should undertake in relation to parenting. Many men still seemingly share the perspective that mothers should be more responsible for the fulfilment of childcare and household tasks.[72] The gender-neutral language used and the legal protection offered to employed fathers does not convincingly provide full legal protection of all fathers participating in childcare. Hayden importantly recognises the limitations in law being able to effect change, as '[l]aw alone may not be a driving force or an incentive for social change, but rather it punctuates change that is already underway.'[73] Yet, the gender-neutral language used in the policy measure could potentially contribute towards the erasure of the recognition of the discrimination which fathers experience in childcare. Without adequate legal protection for all fathers, the concept of fatherhood encompassing a caring role will continue to be difficult to normalise in society.

3. RESPONSE OF THE COURT SYSTEM TO FATHERS' EXPERIENCES OF DISCRIMINATION

Despite the limitations to the legal protection that is offered to fathers in Sweden, this sub-section will explore the case law where working fathers have successfully relied upon Swedish equality legislation to counter the discrimination that they have experienced. The equality law provisions under the Parental Leave Act 1995 have been recently relied upon by fathers within the court system. The first notable example of fathers effectively relying upon the Parental Leave Act 1995 to combat discrimination can be seen in the case of *Discrimination Ombudsman (on behalf of PHG) v Försäkringskassan*.[74] This case involved the claimant, PHG, who was employed to work for an initial probationary period of 6 months at the Swedish Social Insurance Agency starting from April 2019.[75] PHG had informed his employer that he and his wife were expecting a child and was intending on using parental leave for 10 days in May, but the birth of his child was difficult and he undertook parental leave for the month of May.[76] He returned to work in June but his wife developed postpartum depression and was unable to take care of their child.[77] In response to his wife being unable to undertake childcare, PHG decided to use parental leave to look after their child.[78] PHG was informed in September 2019 that his probationary employment would be terminated because his absence for most of the probationary period, which he was initially employed for,

[71] ibid 150-151.
[72] Hobson (n 65) 202; Evertsson (n 67) 144.
[73] Karen Hayden, *Society and Law* (Rowman & Littlefield 2020) 218.
[74] *Discrimination Ombudsman (on behalf of PHG) v Försäkringskassan* AD 2020 No.53 (hereafter *PHG* v *Försäkringskassan*).
[75] ibid 4.
[76] ibid 4.
[77] ibid 4.
[78] ibid 4.

prevented his employer from being able to assess his performance and approve his continued employment.[79]

The Court found that PHG's termination was not a necessary consequence of parental leave, as his probationary employment could have potentially been extended or renewed.[80] An extension or renewal of PHG's probationary employment would have allowed Försäkringskassan to fully assess PHG's performance in the workplace and determine whether he could have been given permanent employment.[81] The Court implemented elements of a substantive equality approach by recognising that '[n]o comparison with another person is required to establish a violation of the prohibition of direct discrimination or of the prohibition of disadvantage in a case such as this.'[82] If PHG had not taken the parental leave which had prompted his termination, the Court held that there was at least a 92% chance that Försäkringskassan would have offered PHG permanent employment based on the proportion of probationary employees that had received permanent employment.[83] The Court held that there was a violation of s.16 of the Parental Leave Act 1995, as the provision stipulated that an employer cannot terminate or dismiss an employee for reasons relating to parental leave.[84] The Court further identified that there is an obligation placed upon Försäkringskassan to 'ensure the right of an employee on parental leave to return to work with the same conditions and rights as he or she had when the leave began.'[85] The Court, therefore, concluded that PHG was entitled to any damages for the loss incurred and for the violation of s.16 of the Parental Leave Act 1995.[86]

Although s.16 of the Parental Leave Act 1995 adopts an amalgamation of an equality and employment law approach by providing legal protection to only working parents, the case of *PHG v Försäkringskassan* demonstrates the importance for equality legislation to provide legal protection for fathers to rely upon. Without the legal protection under the Parental Leave Act 1995 offered to employed fathers, PHG would not have been able to counter the discrimination that he had experienced when attempting to exercise his leave entitlements. The judgment of *PHG v Försäkringskassan* is in stark contrast to the judgments discussed in Section VI of Chapter 2 of *Shuter v Ford Motor Company Limited*,[87] *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police*[88] and *Price v Powys County Council*.[89] In these cases, the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) failed to recognise that fathers had been discriminated against when being paid statutory pay on leave, whilst mothers on leave could receive enhanced pay.[90]

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[79] ibid 4.
[80] ibid 5-6.
[81] ibid 5-6.
[82] ibid 5.
[83] ibid 6.
[84] ibid 18.
[85] ibid 5.
[86] ibid 23.
[87] *Shuter v Ford Motor Company Limited* [2014] 7 WLUK 1105 (hereafter *Shuter*).
[88] *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police* [2019] EWCA Civ 900 (hereafter *Ali v Capita* and *Hextall*).
[89] *Price v Powys County Council* [2021] UKEAT/0133/20 (hereafter *Price*).
[90] *Shuter* (n 87) [94], [102]; *Ali v Capita* and *Hextall* (n 88) [77], [126]; *Price* (n 89) [43], [55].

Unlike the tenets of substantive equality implemented by the Court in the judgment of *PHG v Försäkringskassan*,[91] the Equality Act 2010 (EA 2010) and the court system in England and Wales failed to understand that fathers can experience discrimination due to the adoption of a formal equality perspective.[92] Formal equality requires fathers who experience discrimination to identify a relevant comparator that is identically situated to them and to provide evidence that they have experienced lesser treatment than the comparator in order to substantiate a claim for discrimination.[93] However, as discussed in Section II of Chapter 3, the requisite for a relevant comparator has resulted in the biological differences between mothers and fathers within reproduction and the social expectations surrounding the traditional roles of motherhood and fatherhood to justify the differential treatment of fathers.[94] Despite the case of *PHG v Försäkringskassan* sharing similar facts to the cases of *Shuter*, *Ali v Capita* and *Hextall* and *Price*, the Swedish equality legislation has guided the Court to provide a judgment which recognised that fathers can experience discrimination. In spite of the combined equality and employment law approach towards the protection of working fathers from discrimination, the judgment underlined the necessity of introducing legal protection for fathers within equality legislation.

Nevertheless, the case of *PHG v Försäkringskassan* also exposes the improvements that could be made to the Swedish legal framework governing parental leave. The gender-neutral language used in the Parental Leave Act 1995 that was relied upon by the Court provided guidance for them to establish that PHG had experienced discrimination because of his parenting status. Yet, the legislation in question had led to the failure of the Court in being able to establish that PHG had experienced discrimination because he is a father. *PHG v Försäkringskassan* reveals how Swedish legislation could be argued to not adequately address the gender stigmatisation of fathers in childcare. The Parental Leave Act 1995 does not acknowledge that the discrimination which fathers experience is rooted in the intersection between their sex and parenting status. The Swedish equality legislation presently focuses upon combating the discrimination which parents experience due to their parenting status, rather than tackling the specific discriminatory practices directed against fathers. This judgment does not explicitly mention the gender stereotypes associated with fathers, such as the care-less conception of fatherhood discussed in Section II of Chapter 2, or the overall stigmatisation of fathers in caring roles.[95] The lack of clear and extensive discussion upon the specific type of discrimination which fathers face provides evidence that Sweden does not largely recognise the inequalities which fathers experience stems from the intersection between their sex and parenting status. The success in the judgment of *PHG v Försäkringskassan* may not be similarly reflected in every judgment involving a father being

[91] *PHG v Försäkringskassan* (n 74) 5.
[92] EA 2010, ss.13, 19; *Shuter* (n 87) [89]; *Ali v Capita* and *Hextall* (n 88) [66], [92]; *Price* (n 89) [7].
[93] ibid.
[94] *Shuter* (n 87) [89]; *Ali v Capita* and *Hextall* (n 88) [66], [92]; *Price* (n 89) [7].
[95] Nicole Busby and Michelle Weldon-Johns, 'Fathers as Carers in UK Law and Policy: Dominant Ideologies and Lived Experience' (2019) 41 Journal of Social Welfare and Family Law 287; Jonathan Herring, 'Making Family Law More Careful' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014) 52; Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi (n 43).

discriminated against. Swedish legislation does not seemingly identify the discrimination which fathers encounter as distinct to that which is experienced by mothers.

The combined equality and employment law approach that was established under the Parental Leave Act 1995 was similarly relied in the case of *Discrimination Ombudsman (on behalf of DS) v Denny's Home AB*.[96] The case concerned an employee, DS, who applied for parental leave in April 2015 for the period of July 2015 to August 2016 at the company he was employed by, Denny's Home AB.[97] Prior to DS's application for parental leave, DS was called into a meeting where he was notified that he had used too much of his parental leave entitlement to care for his sick child.[98] Additionally, in response to DS's declaration of his intention to apply for parental leave in the future, DS was told, '"I thought it was your wife who would give birth."'[99] Regardless, DS emailed the company with his application for parental leave.[100] In May 2015, DS was informed that his employment contract had been terminated and the reason cited for DS's dismissal was that DS was creating difficulties with regards to working hours.[101] The company later changed their reasoning to DS's lack of work.[102] DS hired a lawyer who had sent an email notifying the company that DS had intended to claim damages and an annulment of his dismissal.[103] The company responded to the email stating that DS's dismissal was withdrawn.[104] However, DS undertook parental leave from July 2015 onwards and resigned from his employment during that leave period.[105]

The Court found that there was a causal link between DS's application for parental leave and his dismissal.[106] The Court determined that a temporal connection could be established between both, as there was a close time connection between DS's application for parental leave and the termination of his employment contract.[107] The actions and the statements that were made during the meeting prior to DS making an application for parental leave also indicated to the Court that DS's dismissal was influenced by his intention to assume parental leave in the future.[108] Moreover, the reasoning cited by the company that DS's dismissal was connected to a lack of work was not mentioned before the dismissal and further suggested to the Court that DS's dismissal was related to his decision to take parental leave.[109] The Court considered that the actions undertaken by the company amounted to a violation of s.16 of the Parental Leave Act 1995, which stipulates that an employer cannot disadvantage or dismiss an employee for reasons relating to parental leave.[110] Therefore, it was concluded that DS

[96] *Discrimination Ombudsman (on behalf of DS) v Denny's Home AB* AD 2017 No.7 (hereafter *DS v Denny's Home AB*).
[97] ibid 1.
[98] ibid 2.
[99] ibid 2.
[100] ibid 2.
[101] ibid 2.
[102] ibid 2.
[103] ibid 2.
[104] ibid 2.
[105] ibid 2.
[106] ibid 2.
[107] ibid 2.
[108] ibid 2.
[109] ibid 2.
[110] ibid 7-8.

was entitled to financial damages, which covered DS's legal expenses and general damages due to his unfair dismissal.[111]

The case of *DS v Denny's Home AB* demonstrates the necessity of introducing equality legislation which provides legal protection for fathers to rely upon to tackle the discrimination perpetuated against them. The amalgamation of an equality and employment law approach adopted under the Swedish legal framework recognises and provides redress to fathers, such as DS, who are disadvantaged because of their parenting role. Similar to the judgment of *PHG v Försäkringskassan*, the judgment of *DS v Denny's Home AB* upheld a substantive understanding of equality. The judgment did not include discussion of a discrimination claim needing to be substantiated by evidence that showed that the claimant experienced lesser treatment than an identically situated comparator. This arguably confirmed that there was no need for fathers to prove that they had been subject to discrimination by nominating a mother as the relevant comparator under the Parental Leave Act 1995. Akin to the case of *PHG v Försäkringskassan,* the judgment of *DS v Denny's Home AB* reinforces that fathers would not be able to counter the discrimination that they experience when exercising their leave entitlements if equality legislation did not legally protect their position in childcare. Both of these cases depict how the Swedish court system has consistently shown recognition, in recent years, of the fact that fathers in the position of PHG and DS can be subject to discrimination. Although the case of *DS v Denny's Home AB* shared similar facts to the cases in England and Wales of *Shuter*, *Ali v Capita and Hextall* and *Price,* the judgment in *DS v Denny's Home AB* was different. The Court in *DS v Denny's Home AB* was guided by the combined equality and employment law approach in Sweden, which showed them that working parents needed to be provided legal protection and that the mistreatment of DS amounted to discrimination.

Yet, improvements could be made to the Swedish legal framework governing parental leave. The Court could have brought more attention to the fact that DS experienced discrimination because of the intersection between his sex and parenting status. When DS had declared his intention to apply for parental leave in the future, he was told, '"I thought it was your wife who would give birth."'[112] The statement was a clear example that the discrimination which DS experienced was largely due to the workplace culture.[113] As I explained in Section III of Chapter 2, workplace culture is reminiscent of a "macho culture" wherein fathers who request to use leave entitlements suffer workplace harassment and are subject to receive negative comments, demotion, poorer work evaluations and job loss.[114] DS was discriminated against because the company that he had worked for perceived that only a mother should be the parent tending to childcare. The gender-neutral language used in the Swedish equality legislation that protected working parents from discrimination arguably fails to recognise the specific discriminatory practices directed against fathers. The Court failed to understand that

[111] ibid 8.
[112] ibid 2.
[113] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[114] ibid.

the types of discrimination which mothers and fathers experience are distinct from one another.

Furthermore, s.16 of the Parental Leave Act 1995 offers protection for employed parents solely and does not provide adequate protection for fathers that are unemployed or experience discrimination outside of the workplace. Without Sweden undertaking a "complete equality" law approach to counter the discrimination which fathers experience, they will continue to struggle to establish their position in childcare. If the legal protection in Sweden is currently directed specifically towards working fathers and is not extended to unemployed fathers, the Swedish legal framework will be unable to sufficiently identify every case of discrimination perpetuated against them. The current legal framework potentially fails to eliminate all forms of discrimination that is currently experienced by fathers.

Nevertheless, the amalgamation of an equality and employment law approach under the Swedish legal framework illustrates the successes equality law provisions have had in combating the discrimination which fathers experience and supporting the position of fathers in childcare. In the UK, the leave entitlements provided to fathers under employment legislation are not protected by equality legislation. The lack of legal protection for the position of fathers in childcare has resulted in the court system in England and Wales continually determining that fathers do not experience discrimination in instances where they have.[115] The examination of the case study of Sweden in this section has demonstrated the benefits of an equality law approach protecting and encouraging the participation of fathers in childcare. Likewise, paternity discrimination needs to be recognised under key pieces of equality legislation in Britain and the UK. "Paternity" needs to be included as a protected characteristic under s.4 of the EA 2010 and art.14 of the Human Rights Act 1998 (HRA 1998) in order to sufficiently describe, identify and combat the specific discriminatory treatment of fathers.

III. CEDAW

CEDAW has often been described as the "international bill of rights for women."[116] The treaty was introduced in 1981 as a way to influence States Parties to undertake the appropriate measures which would help alleviate the effects of gender inequality within the political, social, economic and cultural realms.[117] The Introduction to CEDAW reaffirms the objective of gender equality being the primary purpose of the treaty, as the Introduction states that CEDAW 'takes an important place in bringing the female half of humanity into the focus of human rights concerns.'[118] The CEDAW Committee has explained that CEDAW aims to

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[115] *Shuter* (n 87); *Ali v Capita* and *Hextall* (n 88); *Price* (n 89).
[116] Jennifer Templeton Dunn, Katherine Lesyna and Anna Zaret, 'The Role of Human Rights Litigation in Improving Access to Reproductive Health Care and Achieving Reductions in Maternal Mortality' (2017) 17 BMC Pregnancy and Childbirth 73.
[117] Judith Resnik, 'Comparative (In)Equalities: CEDAW, The Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production' (2012) 10 International Journal of Constitutional Law 537.
[118] CEDAW, Introduction [3].

practically achieve the objective of gender equality within States Parties by firstly implementing measures that target the 'discriminatory dimensions of past and current societal and cultural contexts which impede women's enjoyment of their human rights and fundamental freedoms.'[119] Secondly, CEDAW also aims to enforce policies which promote 'the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality.'[120]

With regards to the recognition and protection of parenting rights under CEDAW, Kismödi et al identify that CEDAW contains explicit references within its provisions that an obligation is placed upon States Parties to protect the rights of women during pregnancy and childbirth.[121] For example, art.12(1) of CEDAW declares that 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.' Similarly, art.12(2) also stipulates that 'States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.' Under art.12, legal protection is expressly offered for women to gain access to healthcare if they are planning on having children, are undergoing pregnancy and during the postpartum period. Pregnant women and mothers are similarly afforded legal protection under art.4(2) of CEDAW, as the provision affirms that special measures adopted by States Parties that are designed to protect maternity shall not be seen as discriminatory. The legal protection over pregnant women and mothers is also particularly reinforced under art.11. The provision stipulates that the dismissal of female employees in the workplace on the grounds of pregnancy or maternity is prohibited and that adequate maternity leave or comparable social benefits for mothers should be introduced without them incurring the risk of job loss. CEDAW recognises that pregnant women and mothers belong to a marginalised sub-group within society and has introduced provisions that aim to support their societal position and combat any discrimination that they may experience.

Holtmaat and Post assert that the asymmetrical nature of CEDAW in focusing solely upon the elimination of discrimination against women has been argued to be beneficial and necessary.[122] Holtmaat and Post observe that the drafters of CEDAW recognised that women predominantly experience sex discrimination, which ultimately led to the essential introduction of a Convention that specifically aimed to address the discrimination that women suffer from.[123] The objective of CEDAW is supported by Brown who highlights that 'the more gender-neutral or gender-blind a particular right (or any law or public policy) is, the

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[119] CEDAW Committee, 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) HRI/GEN/1/Rev.7 [14].
[120] ibid.
[121] Eszter Kismödi and others, 'Human Rights Accountability for Maternal Death and Failure to Provide Safe, Legal Abortion: The Significance of Two Ground-Breaking CEDAW Decisions' (2012) 20 Reproductive Health Matters 33.
[122] Rikki Holtmaat and Paul Post, 'Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?' (2015) 33 Nordic Journal of Human Rights 321-322.
[123] ibid 321.

more likely it is to enhance the privilege of men and eclipse the needs of the women as subordinates.'[124] Holtmaat and Post explain that the asymmetrical approach that underpins CEDAW helps to promote the substantive equality of women, as the treaty 'not only… put[s] an end to unfair or unjustifiable classifications of individuals on the basis of a particular characteristic, but also… put[s] an end to [the] oppression and exclusion of groups that are subordinated in society.'[125] The obligations CEDAW places upon States Parties to implement policy measures that counter the discrimination which women undergo are vital. Without particular legal focus upon the inequality of women, the specific discriminatory practices perpetuated against women will largely fail to be recognised and adequately redressed. The inequality of women being a focal point of CEDAW could potentially explain the relatively quiet role of fathers in the text of the treaty.

In accordance with the aim of CEDAW being to combat the inequality of women, the treaty explicitly references the strengthening of paternity rights as a function of advancing women's equality. CEDAW does not provide legal protection for fathers exercising leave entitlements to rely upon, but rather views the strengthening of paternity rights as a tool to achieve women's equality. A notable example can be found under paragraphs 13-14 of the preamble of CEDAW. Here, the preamble states that CEDAW recognises 'the social significance of maternity and the role of both parents in the family and in the upbringing of children.'[126] Moreover, the preamble asserts that CEDAW is 'aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.'[127] Overall, the treaty concludes that it is '[a]ware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.'[128] The preamble evidently focuses upon the elimination of discrimination against women and perceives the advancement of paternity rights as a means in which to achieve the objective of eradicating women's inequality. The preamble can be commended for the encouragement of dismantling the gender division of labour which supports the role of men presiding over the workplace and the role of women remaining in the home. The preamble can also be praised for its encouragement of shared childcare responsibilities between parents. However, the preamble fails to acknowledge the type of discrimination which fathers experience when wanting to assume higher levels of childcare and does not promote an objective of tackling paternity discrimination.

The significance of the preamble to a treaty has been debated upon.[129] Under art.31(2) of the Vienna Convention on the Law of Treaties (Vienna Convention),[130] the provision states that the context of the purpose and interpretation of a treaty can be gained through the text of the treaty, its preamble and its annexes. Gardiner similarly interprets that art.31(2) of the Vienna

[124] Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7 Constellations 231.
[125] Holtmaat and Post (n 122) 322.
[126] CEDAW, pmbl. [13].
[127] ibid.
[128] ibid [14].
[129] Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 216-217.
[130] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention), art.31(2).

Convention stipulates that the whole treaty must be read to correctly interpret the treaty overall.[131] Gardiner notes that the preamble 'may be used as the source of a convenient summary of the object and purpose of a treaty.'[132] The function of a preamble is typically viewed as not creating legally binding obligations[133] upon States Parties, but is rather perceived as an interpretative force. In application of this interpretation of the preamble of a treaty, the preamble of CEDAW outlines the purpose of the treaty as ultimately being the promotion of women's equality and that the strengthening of paternity rights is a function that helps advance that primary objective.

There has been criticism that the text of CEDAW does not adequately account for the role of men in parenting. Rosenblum maintains that the failure to introduce provisions that offer fathers individualised protected rights, in the same manner that it does mothers, 'fosters continued stereotypes of women as caretakers and men as unsuited to family and caretaking roles.'[134] Rosenblum explains that '[t]his harmful male stereotype impairs women as well as men, by acting as an "impediment to the equal division of childcare responsibilities."'[135] Importantly, Rosenblum highlights how CEDAW fails to recognise that gender inequality can be partly resolved if men, particularly in their roles as fathers, are also included within the dialogue of the treaty with the same level of importance as mothers. Men and women suffer harm from the traditional gender division of labour.[136] Mothers and fathers share an interrelationship and the encouragement of shared childcare responsibilities could simultaneously alleviate the pregnancy and maternity discrimination which mothers experience and the paternity discrimination which fathers experience. However, the text of CEDAW has seemingly failed to adequately address paternity discrimination with a similar level of significance as pregnancy and maternity discrimination within the substantive obligations the treaty has placed upon States Parties.

In order to determine whether the interpretation of the preamble correctly outlined that CEDAW views paternity rights as a function of women's equality, Section III will further examine the relevant provisions contained under the treaty. Section III will be divided into 3 sub-sections: 1. Arts.1-3 of CEDAW; 2. Art.5 of CEDAW; and 3. Art.11 of CEDAW. Each subsection will analyse the text of the relevant article provisions discussed. Additionally, each subsection will examine the 3 most recent sessions held by the CEDAW Committee, including and prior to March 2021, wherein the CEDAW Committee has provided concluding observations on the reports submitted by States Parties. The discussion in Section III will include analysis of the CEDAW Committee's 78th Session (15 February 2021 - 25 February 2021), 75th Session (10 February 2020 - 28 February 2020) and 74th Session (21 October 2019 - 08 November 2019). Analysis of the recent sessions held by the CEDAW

[131] Gardiner (n 129) 218.
[132] ibid.
[133] Justin Frosini, *Constitutional Preambles at a Crossroads between Politics and Law* (Maggioli 2012) 118.
[134] Darren Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20 Columbia Journal of Gender and Law 189.
[135] ibid.
[136] ibid 177.

Committee will provide a more detailed outlook upon the extent to which paternity rights are perceived as a function of women's equality under CEDAW.

1. ARTS.1-3 OF CEDAW

Byrnes asserts that arts.1-3 of CEDAW promote, in various ways, that States Parties are under a requirement to implement policy measures that aid in the elimination of discrimination against women.[137] These policy measures are to be implemented in the pursuit of providing women the full enjoyment of their human rights.[138] First, art.1 stipulates that 'the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women,… on a basis of equality of men and women, of human rights and fundamental freedoms.'[139] Although art.1 references the promotion of equality between men and women, General Recommendation No.28 underlines that the definition of the right to non-discrimination under art.1 primarily focuses upon alleviating the effects of discrimination against women.[140]

The objective of eliminating the discrimination which women experience is similarly reiterated in the concluding observations of the 3 most recent sessions held by the CEDAW Committee. The CEDAW Committee explain that the definition of the right to non-discrimination should include the prohibition of direct and indirect discrimination against women.[141] Campbell outlines that '[d]irect discrimination is explicit differential treatment that perpetuates disadvantage… [whilst] indirect discrimination… is when differential treatment is based on an apparently neutral rule but when applied disproportionately disadvantages a group that shares a protected characteristic.'[142] General Recommendation No.28 depicts that art.1 prohibits the 'identical or neutral treatment of women and men [that] might constitute discrimination against women if such treatment resulted in… women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face.'[143] The objective of art.1 is to tackle direct and indirect discrimination against women, as the provision prohibits the treatment of women that is explicitly discriminatory or that may be neutral in format but in application disproportionately disadvantages women.[144] The primary focus of art.1 being the elimination of discrimination against women is a recurring concept within the 3 most recent sessions held

[137] Andrew Byrnes, 'Article 2' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention On The Elimination Of All Forms Of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 183.
[138] ibid.
[139] CEDAW, art.1.
[140] CEDAW Committee, 'General Recommendation No.28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) CEDAW/C/GC/28 [5].
[141] CEDAW Committee, 'Concluding Observations: Andorra' (2019) CEDAW/C/AND/CO/4 [11].
[142] Meghan Campbell, *Women, Poverty and Equality: The Role of CEDAW* (Hart Publishing 2018) 95.
[143] CEDAW Committee, 'General Recommendation No.28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (n 140).
[144] Campbell (n 142) 103.

by the CEDAW Committee. The CEDAW Committee states that the right to non-discrimination under art.1 can be interpreted to prohibit discrimination that creates disadvantage for women in the private and public sphere.[145] Moreover, the CEDAW Committee commends State Parties for clarifying that the prohibition of discrimination against women encompasses pregnancy and maternity discrimination as well.[146]

The focus of art.1 of CEDAW is designed to protect women from experiencing discrimination. Yet, the CEDAW Committee has not expressed whether the purpose of art.1 also encompasses the elimination of discrimination against fathers. The lack of reference to fathers could potentially be explained by the fact that there is a textual limit to the definition of discrimination, as art.1 explicitly focuses upon defining the discrimination directed against women. The exclusion of fathers from the definition of discrimination shows how CEDAW does not account for the discrimination which fathers experience. The treaty does not acknowledge or understand how the discriminatory workplace culture affects fathers, which is a concept that I have previously discussed in Section III of Chapter 2.[147] Employers in the workplace assume that men are primarily responsible for providing the household income for their family than women.[148] Furthermore, when fathers attempt to engage in higher levels of childcare by exercising leave entitlements, they risk experiencing negative comments, demotion and job loss.[149]Additionally, fathers can experience discrimination outside of the workplace in matters relating to nationality, visitation rights, prison sentencing, social benefits and paternity testing, for instance.[150] However, CEDAW is not designed to provide redress for fathers experiencing discrimination and only addresses paternity rights as a function of women's equality. Nevertheless, the asymmetrical equality approach adopted under CEDAW highlights the dangers of failing to recognise the discrimination perpetuated against fathers and the need for the inequalities which fathers experience to be recognised and addressed under equality legislation.

The CEDAW Committee has discussed that the definition of discrimination against women should be inclusive of pregnancy and maternity discrimination.[151] The CEDAW Committee recognised that the childcare responsibilities associated with pregnant employees and employed mothers is a contributory factor towards the discrimination that they experience. Conversely, the CEDAW Committee does not acknowledge or comprehend that the childcare responsibilities associated with employed fathers also largely causes them to be subject to discrimination. In light of the primary objective of art.1 being the elimination of discrimination against women, the right to maternity leave is framed as a legally protected right. On the contrary, the lack of recognition of paternity discrimination under art.1 prevents the right to paternity leave from being similarly framed as a legally protected right. The definition of discrimination being only inclusive of women under this provision is

[145] CEDAW Committee, 'Concluding Observations: Andorra' (n 141).
[146] CEDAW Committee, 'Concluding Observations: Lithuania' (2019) CEDAW/C/LTU/CO/6 [4(a)].
[147] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[148] Linda Haas and C. Philip Hwang, 'Company Culture and Men's Usage of Family Leave Benefits in Sweden' (1995) 44 Family Relations 28.
[149] Women and Equalities Committee (n 1) para 20.
[150] *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfeld* (n 56); *Rasmussen* (n 56).
[151] CEDAW Committee, 'Concluding Observations: Lithuania' (n 146).

understandable, as the definition aligns with the purpose of the treaty, which is to eliminate discrimination against women. Yet, the asymmetrical approach adopted by CEDAW exposes the risk of excluding fathers from equality legislation, as fathers will continue to be subject to paternity discrimination and struggle to firmly establish their position in childcare if they do not receive adequate legal protection.

The primary focus of art.1 being the elimination of discrimination against women is similarly echoed under art.2. Only 2 of the 7 paragraphs under this provision reference men. The first reference to men is under art.2(a), wherein the provision declares that States Parties should implement policy measures that 'embody the principle of the equality of men and women in their national constitutions or other appropriate legislation …and to ensure, through law and other appropriate means, the practical realization of this principle.' Similarly, the second reference to men is under art.2(c), which asserts that States Parties should 'establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.' Byrnes explains that art.2 places 3 essential obligations upon States Parties.[152] These include eliminating the direct and indirect discrimination perpetuated by public authorities and private individuals, implementing policies and programs that improve the position of women and addressing the current gender relations and gender stereotypes prevalent in society.[153]

The ultimate focus of art.2 is on tackling the social structures that perpetuate discrimination against women in order to enhance their position in society. For example, the beginning of art.2 outlines that States Parties should 'condemn discrimination against women in all its forms, [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.' Campbell explains that art.2 requires States Parties to 'immediately assess the situation of women and take concrete steps to formulate and implement a policy to eliminate discrimination and achieve gender equality so that women can enjoy their human rights.'[154] Moreover, Campbell underlines that policy measures should be implemented and built upon within States Parties in light of any newly found issues regarding women's equality.[155] Whilst the aim of art.2 is evidently to improve the position of women in society, the text of this provision does not make any reference towards the protection of men or fathers. In addition, discussion of alleviating the effects of paternity discrimination under this provision is taken no notice of by the CEDAW Committee within the 3 most recent sessions.

Likewise, art.3 of CEDAW reinforces that the right to non-discrimination hones in upon the elimination of discrimination against women. Under art.3, 'States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures… to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on

[152] Byrnes, 'Article 2' (n 137) 184.
[153] ibid.
[154] Campbell (n 142) 271.
[155] ibid.

a basis of equality with men.' Chinkin explains that art.3 obligates States Parties to identify instances where gender inequality exists and implement policy measures and practices that enhance the position of women within society.[156] Campbell explains that policy measures are to be introduced by States Parties in order to promote 'the full advancement and development of women so that they can enjoy their human rights.'[157] Raday notes the importance of the underlying aim of art.3, as the provision 'locates women as rights-holders, not just as objects or prospective beneficiaries of development policy.'[158] Similar to art.2, art.3 upholds the principle of equality between men and women as a way in which to promote a woman's right to non-discrimination. The focus of art.3 is upon alleviating the effects of discrimination perpetuated against women. This provision views women as rights-holders that should receive non-discriminatory and equal treatment to men within the political, social, economic and cultural spheres. However, the text of art.3 is not seemingly interpreted to provide similar protection from discrimination for men or, more specifically, fathers. Furthermore, discussions of implementing measures which help to lessen the effects of paternity discrimination under this provision have again been largely overlooked by the CEDAW Committee within the 3 most recent sessions that they have held.

With regards to how arts.2 and 3 address paternity rights, both provisions can be said to implicitly challenge the role of fatherhood under the traditional "male breadwinner" model. Byrnes explains that one of the obligations that art.2 places upon States Parties is to address the current gender relations and gender stereotypes that are prevalent in society.[159] Additionally, art.3 obligates States Parties to ensure the progression of women in order for them to be able to exercise and enjoy their fundamental human rights on an equal basis with men. Although the focus is upon eliminating the discrimination which women experience and improving the position of women in society, tackling the gender stereotypes of men and women could help to lessen discrimination against women and the effects of paternity discrimination. The role of fatherhood is typically seen as the primary financial earner of the household income under the traditional "male breadwinner" model[160] and enhancing the position of women in the workplace, for example, could help the role of fatherhood be seen as inclusive of a caring role as well.

However, the text contained under arts.2 and 3 does not explicitly acknowledge, or offer redress to, fathers experiencing paternity discrimination. The CEDAW Committee has also not been found to recently interpret these provisions as being inclusive of protecting fathers from experiencing discrimination. Both of these provisions recognise that gender stereotypes have contributed towards women experiencing negative repercussions, as the traditional role of women is typically viewed as fulfilling domestic tasks and childcare in the home.[161] On the

[156] Christine Chinkin, 'Article 3' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 211.
[157] Campbell (n 142) 116.
[158] Frances Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW' (2012) 10 International Journal of Constitutional Law 525.
[159] Byrnes, 'Article 2' (n 137) 184.
[160] McGlynn (n 63).
[161] ibid.

contrary, arts.1, 2 and 3 of CEDAW seemingly fail to take into account that fathers experience negative repercussions for using leave entitlements to assume childcare responsibilities. The text contained under these provisions and the CEDAW Committee do not seem to comprehend how gender relations and gender stereotypes have negatively impacted men and have contributed towards their experiences of workplace discrimination. These provisions do not acknowledge the discriminatory treatment of fathers under the current workplace culture[162] or the instances of discrimination which fathers can experience outside of the workplace.[163] The lack of reference to fathers further illustrates how the asymmetrical approach adopted by CEDAW, in solely focusing upon women's equality, exposes the dangers of excluding fathers from other pieces of equality legislation. Fathers are currently provided with minimal legal standing to protect themselves from experiencing paternity discrimination when exercising their leave entitlements under equality legislation. If all pieces of equality legislation introduced an asymmetrical approach that only took into account the discrimination which women experience, fathers will struggle to assume childcare responsibilities.

With regards to the preamble of CEDAW outlining that the treaty views paternity rights as a function of women's equality, arts.1, 2 and 3 have not explicitly referenced within its text that these provisions offer protection for fathers experiencing discrimination. In addition, these provisions have not been seemingly interpreted by the CEDAW Committee to offer legal protection for fathers. Byrnes highlights that a number of States took issue with the sole focus of CEDAW being the elimination of discrimination against women because the current interpretation of the right to non-discrimination under CEDAW was not inclusive of men.[164] States Parties advocated that CEDAW should generally address discrimination on the basis of sex so that men could also similarly exercise the right to non-discrimination.[165] Yet, Byrnes maintains that most States Parties felt that 'a symmetrical approach would fail to recognize the pervasive discrimination against women on the basis of their sex, and that an asymmetric guarantee was needed in the form of a sex-specific instrument.'[166] The purpose and underlying rationale of CEDAW is to primarily focus and eliminate the discrimination directed against women. Campbell notes that arts.1 and 2 obligate States Parties to eliminate discrimination, whilst art.3 ensures the development and advancement of the position of women within all fields of life.[167] These provisions collectively align with the purpose of the treaty, which is to alleviate the effects of discrimination against women. Holtmaat and Post contend that the asymmetrical nature of CEDAW in focusing upon the elimination of discrimination against women has been beneficial and necessary.[168] For example, General Recommendation No.28 identifies that combating the indirect discrimination directed against

[162] Women and Equalities Committee, *Fathers and the Workplace* (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[163] *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).
[164] Andrew Byrnes, 'Article 1' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention On The Elimination Of All Forms Of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 52.
[165] ibid.
[166] ibid.
[167] Campbell (n 142) 252.
[168] Holtmaat and Post (n 122).

women was to dismantle the 'existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.'[169] The discrimination that women experience stems from the unequal power distribution under the patriarchal structure currently present in society.[170] In order to eradicate such discrimination, CEDAW needs to adopt an asymmetric approach which focuses upon understanding and countering the type of discrimination that women particularly experience.

However, the evaluation of the asymmetric approach of CEDAW is reflective of the wider societal approach towards maternity and paternity rights. Typically, the focus is placed upon the development of maternity rights and the legal protection of individuals from pregnancy and maternity discrimination.[171] The approach CEDAW has undertaken shows how paternity discrimination will continue to be perpetuated if fathers are excluded from all pieces of equality legislation. Without the adequate recognition of paternity discrimination under equality law, fathers will continue to have limited legal standing to protect themselves.

2. ART.5 OF CEDAW

More space is created for considering the role of men under art.5 of CEDAW. Although the right to non-discrimination under art.1 does not explicitly reference the gender stereotypes surrounding parenthood, Holtmaat observes that art.5 'acknowledges that gender stereotypes and fixed parental gender roles lie at the basis of discrimination against women.'[172] First, art.5(a) declares that States Parties should implement policy measures that 'modify the social and cultural patterns of conduct of men and women.' These policy measures should be introduced with the aim of 'achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'[173] Under art.5(a), an obligation is imposed on States Parties to introduce gender-neutral policies that aim to dismantle the gender division of labour and allow fathers to further engage in childcare.[174] Cook and Cusack assert that art.5 was designed to 'honor the basic choices women make (or would like to make) about their own lives, and enable them to shape… their own identities.'[175]

The overarching aim of art.5(a) is to promote the equality of women by requiring States Parties to implement policy measures that help to alleviate the gender stereotypes

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[169] CEDAW Committee, 'General Recommendation No.28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (n 140) [16].
[170] Mimi Abramovitz, *Under Attack: Fighting Back: Women and Welfare in the United States* (Monthly Review Press 2000) 88.
[171] EA 2010, s.4; HRA 1998, art.14.
[172] Rikki Holtmaat, 'Article 5' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention On The Elimination Of All Forms Of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 239.
[173] CEDAW, art.5(a).
[174] Rikki Holtmaat, 'Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination' (Ministry of Social Affairs and Employment 2004) 58.
[175] Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) 68.

surrounding the roles of men and women. With regards to parenting roles, the level of childcare responsibilities men and women are stereotyped to undertake on the basis of their gender is defined under the traditional "male breadwinner" model.[176] The aim of art.5(a) is to support the position of women in society by altering the social and cultural ideals concerning the traditional roles of men and women. Herring explains that a central role of the law is to protect the rights to individualistic autonomy by tackling 'unwanted intrusions into a person's freedom of choice.'[177] The rights contained under art.5(a) seemingly promote the individual autonomy of women within the family. The promotion of individualistic autonomy for women would help them to make autonomous decisions regarding whether they want to be primarily responsible for childcare or desire a more established position in the workplace. Allowing women the autonomy to make such a decision would improve the overall social mobility of women to move between the private and the public sphere.

Raday maintains that art.5(a), in combination with art.2(f), 'gives superior force to the right to gender equality in the case of a clash with cultural practices or customs.'[178] Under art.2(f), States Parties are obligated to 'modify or abolish existing laws, regulations, customs and practices'. The purpose of art.5(a) particularly centres upon alleviating the discrimination which women experience. This provision acknowledges that much of the discrimination perpetuated against women is rooted within the gender stereotypes that limit the role of women to solely being responsible for the fulfilment of childcare responsibilities and household tasks. Yet, with regards to how fathers are perceived under art.5(a), the textual provision does not perceive men as independent rights-holders and does not acknowledge how the gender stereotypes that surround men have contributed towards their experiences of paternity discrimination. However, the aim to challenge the role of women in the home under art.5(a) implicitly challenges the role of men in the workplace. This provision implicitly advocates that the gender stereotypes which limit the role of men to being largely perceived as the main financial provider of the household income should also be alleviated. The application of this provision would indirectly help to lessen the overall effects of paternity discrimination inside and outside of the workplace[179] and would allow fatherhood to be viewed as a caring role like motherhood.

However, art.5(a) only supports the dismantling of the traditional role of men as a means to further women's equality. If childcare responsibilities are shared between men and women, women would have greater freedom to participate in workplace activities. Yet, art.5(a) does not explicitly provide legal protection to fathers to protect them from paternity discrimination. The asymmetrical approach to equality adopted under art.5(a) shows that the exclusion of fathers from all pieces of equality legislation would result in them experiencing limited legal protection from discrimination. This provision does not expressly discuss the contributory effects that the gender stereotypes of men and women have upon fathers inside

[176] McGlynn (n 63).
[177] Jonathan Herring, *Relational Autonomy and Family Law* (Springer 2014) 3.
[178] Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW' (n 158) 520.
[179] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43); *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).

and outside of the workplace[180] and how these gender stereotypes have consequently contributed towards the paternity discrimination which fathers experience. If all pieces of equality legislation fail to view men as independent rights-holders who experience discrimination, fathers will continue to struggle to maintain their position within childcare.

Nevertheless, Holtmaat notes that art.5(b) particularly deals with the gender stereotypes and expectations surrounding the roles of motherhood and fatherhood.[181] This provision stipulates that States Parties should 'ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children.' Holtmaat explains that art.5 focuses upon altering the cultural patterns embedded within society, as culture contributes towards the construction of gender identities and the harmful gender stereotypes that surround these.[182] The effect that gender stereotypes have upon perpetuating mistreatment can be particularly seen with regards to the discrimination directed against mothers and fathers. These gender stereotypes, which have been maintained by legal policies and government practices, have been promoted under the traditional "male breadwinner" model.[183] Raday explains that the importance of art.5(b) should be remarked upon, as the provision 'goes beyond the conventional limits of equal opportunity in economic and employment markets by requiring that equal opportunity begin at home.'[184] Similarly, Campbell asserts that the preamble and art.5(b) of CEDAW collectively 'stresses seeing maternity as a positive value and challenges social norms which dictate that women have sole responsibility for childcare.'[185]

Similar to art.5(a), the focus of art.5(b) is to alleviate the gender stereotypes surrounding motherhood and fatherhood as a means to promote women's equality. The aim of art.5(b) is to ensure that women are granted the ability to make autonomous decisions regarding their role in motherhood. This provision upholds that a way that autonomous decision-making can be granted is by encouraging shared childcare responsibilities between mothers and fathers. Yet, the text contained in art.5(b) does not recognise men as independent rights-holders and does not comprehend the way in which the gender stereotypes that surround men have contributed towards fathers experiencing paternity discrimination. Although art.5(b) implicitly challenges the gender stereotypes surrounding men like art.5(a), this provision is ultimately designed to promote women's equality. Under art.5(b), shared childcare is encouraged as a means to combat the workplace discrimination which women experience. This provision does not consider that fathers also face negative repercussions in the workplace for undertaking childcare responsibilities.[186] The asymmetric approach adopted by CEDAW, in exclusively focusing upon eradicating the discrimination which women experience, highlights the risks of excluding fathers from every piece of equality legislation.

[180] ibid.
[181] Holtmaat, 'Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination' (n 174) 8.
[182] Holtmaat, 'Article 5' (n 172) 244.
[183] ibid 250, 254.
[184] Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW' (n 158) 526.
[185] Campbell (n 142) 100.
[186] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi (n 43).

If fathers are not recognised as independent rights-holders under equality legislation, they will struggle to receive adequate legal protection to combat paternity discrimination.

Even so, the perception of paternity rights being viewed as a function of women's equality has been similarly advocated for by the CEDAW Committee when monitoring State compliance under art.5 of CEDAW. In the concluding observations that the CEDAW Committee has recently provided on the reports submitted by States Parties, they have commended the implementation of information campaigns that encourage fathers to use paternity or parental leave entitlements.[187] Moreover, the CEDAW Committee has made recommendations that educational policies should be introduced that raise awareness of the impact that negative gender stereotypes have on women and that help promote the concept of equally shared childcare responsibilities between mothers and fathers.[188] In addition, the CEDAW Committee has recommended that harmful gender stereotypes surrounding women can be tackled through implementing policy measures that 'promote the equal sharing of domestic and childcare responsibilities, as well as responsible fatherhood, … [and] encouraging fathers to use their paid paternity leave.'[189] Despite the promotion of the concept of equally shared childcare between mothers and fathers by the CEDAW Committee, the details upon how to equally distribute childcare between parents are vague. Furthermore, the CEDAW Committee has not advocated for States Parties to implement legal measures that protect the role of men in parenting. The Committee could arguably provide more specific recommendations on the types of policy measures that States Parties could introduce to ensure that fathers are included in childcare. Nonetheless, the Committee does view the strengthening of paternity rights as a means to achieve women's equality.

Holtmaat explains that arts.5(a) and 5(b) conjunctly 'make it clear that a distinction should be drawn between [the] physical aspects of motherhood and the (culturally determined) role of a mother.'[190] Byrnes further underlines that the CEDAW Committee, in relation to art.5, have been critical of 'general policy statements or particular social arrangements which give primacy to motherhood, to the neglect of women's other roles and of men's responsibilities as fathers.'[191] This interpretation of art.5 reinforces that the focus of this provision is to eliminate the negative gender stereotypes surrounding women which solely depict their role as a wife or a mother.[192] The CEDAW Committee has argued that one of the ways in which to provide women the autonomy to adopt a role outside of being a wife or a mother is to encourage shared childcare with men. The equal distribution of childcare between parents would be achieved through dismantling the gender stereotypes that surround men and promoting leave policies that are inclusive of the active participation of fathers in childcare.

[187] CEDAW Committee, 'Concluding Observations: Latvia' (2020) CEDAW/C/LVA/CO/4-7 [21].
[188] CEDAW Committee, 'Concluding Observations: Kazakhstan' (2019) CEDAW/C/KAZ/CO/5 [24(b)].
[189] ibid [23], [24(d)].
[190] Holtmaat, 'Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination' (n 174).
[191] Andrew Byrnes, 'The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women' (1989) 14 The Yale Journal of International Law 31.
[192] Holtmaat, 'Article 5' (n 172) 240.

Similar to the preamble of CEDAW detailing that the treaty views paternity rights as a function of women's equality, art.5 also perceives the strengthening of paternity rights as a measure to improve the position of women in society. The sole focus on women's equality under CEDAW does expose multiple reasons as to why paternity rights need to be protected by equality legislation. CEDAW shows that the roles of motherhood and fatherhood share an interrelationship. In order to alleviate pregnancy and maternity discrimination and encourage shared childcare between parents, paternity discrimination needs to be addressed. This provision unfortunately does not address the social stigma or structural barriers fathers face in establishing their position in childcare.[193] Fathers need to be able to firmly establish their position in childcare in order for mothers to gain a stronger position in the workplace.

The CEDAW Committee also fails to discuss paternity rights in depth. Their interpretation of the treaty primarily discusses the encouragement of fathers using paternity leave, but not of other entitlements, such as paid time off work to attend antenatal appointments, parenting classes or other relevant medical appointments. The lack of textual depth with regards to the discussion of leave entitlements for fathers exposes a greater issue. Fathers currently also experience paternity discrimination under employment legislation as they are provided with access to limited leave entitlements when compared to mothers. The equality approach that is presently undertaken towards protecting mothers under CEDAW is likewise needed to protect fathers. Fathers need to be recognised as independent rights-holders under equality legislation in order to combat the discrimination that they experience, or else they will continue to struggle to maintain their position in childcare. However, the elimination of discrimination against fathers does not necessarily have to be independently addressed under CEDAW, as that requests a great deal from a treaty whose primary purpose was designed to promote women's equality. The analysis of the asymmetric approach to equality undertaken by CEDAW demonstrates the issues that will arise if all pieces of equality legislation adopt the same approach. Britain and the UK does not adopt an asymmetric approach to equality, as legal protection is offered to a wide cross-section of marginalised and minority groups under the EA 2010 and the HRA 1998. However, solely focusing upon the discrimination which mothers experience provides fathers with limited legal protection to combat the various forms of paternity discrimination that limits their ability to firmly establish their position in childcare.

3. ART.11 OF CEDAW

Holtmaat highlights that the elimination of gender stereotyping that is advocated for under art.5(a) is further developed under art.11, as the provision aims to tackle the practical manifestation of these gender stereotypes as workplace discrimination against women.[194] Holtmaat discusses that art.5(a), in particular, 'has 'supportive' significance in the sense that it serves as a provision that helps to fill in the content of Article 11… [and] indicates that

[193] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[194] Holtmaat, 'Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination' (n 174) 59.

when implementing this (latter) provision, habits and customs based on gender stereotypes should be eliminated.'[195] Legal protection over pregnant women and mothers is provided under art.11. This provision stipulates that adequate maternity leave, or comparable social benefits, for mothers should be provided without women fearing job dismissal[196] and any such dismissal on the grounds of pregnancy or maternity is prohibited.[197] Furthermore, art.11(1)(f) declares that adequate health and safety standards should be introduced within the workplace in order to protect 'the function of reproduction.' Raday notes that art.11(1)(f) is interpreted to offer legal protection for women who are employed in poorly paid and precarious work that could potentially expose them to dangerous and harmful working conditions.[198]

Campbell particularly identifies that art.11(2)(c) is one of the provisions under CEDAW that has 'the potential to transform oppressive structures'[199] against women. Under art.11(2)(c), States Parties are obligated to implement policy measures that provide 'the necessary supporting social services [that]… enable parents to combine family obligations with work responsibilities and participation in public life.' Moreover, this is to be done particularly 'through promoting the establishment and development of a network of child-care facilities.'[200] Raday explains that the gender stereotype of a woman's role being exclusively perceived as a mother and a wife has prevented women from having equal access to employment opportunities.[201] Campbell highlights that art.11(2)(c) could be interpreted to require States Parties to introduce flexible working hours for employed parents that have childcare responsibilities and establish childcare facilities that parents can use.[202] The alleviation of pregnancy and maternity discrimination in the workplace is especially focused upon under art.11(2)(c). This provision aims to challenge the prevailing gender stereotypes that characterise the role of women as being primarily responsible for childcare and household tasks. States Parties are also further obligated to provide legal support that help parents reconcile work and familial obligations under art.11(2)(c).

The gender-neutral language used under art.11(2)(c) could be inclusive of developing paternity rights, but as a function of women's equality. This provision encourages that policies should be introduced to support parents to achieve a work-family balance. The use of the term "parents" could be interpreted to address mothers and fathers. Similar to art.5 of CEDAW, art.11 challenges the gender stereotypes surrounding women that prevent them from strongly establishing their position in the workplace. However, the text of art.11 also implicitly challenges the gender stereotypes that surround the traditional role of fatherhood as

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[195] ibid.
[196] CEDAW, art.11(2)(b).
[197] CEDAW, art.11(2)(a).
[198] Frances Raday, 'Article 11' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention On The Elimination Of All Forms Of Discrimination Against Women: A Commentary* (Oxford University Press 2012) 296.
[199] Campbell (n 142) 101.
[200] CEDAW, art.11(2)(c).
[201] Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW' (n 158) 518-519.
[202] Campbell (n 142) 101.

exclusively being seen as the economic breadwinner. The application of this provision could be used to support the evolution of the role of fatherhood to include caring responsibilities.

Yet, the primary focus of art.11 is to alleviate the workplace discrimination which women experience. Under this provision, the strengthening of paternity rights encourages shared childcare between parents which, in turn, allows women the ability to undertake greater workplace responsibilities. The aim of art.11 ultimately aligns with the preamble of CEDAW, which outlined that the treaty recognises the improvement of paternity rights as a function of women's equality. This provision does not explicitly acknowledge the access of fathers to paternity leave as an express right. The provision also does not clearly reference men as being independent rights-holders. Furthermore, art.11(2)(a) expressly prohibits pregnancy and maternity discrimination in the workplace, but does not address paternity discrimination against fathers in a similar way. This provision does not acknowledge or understand the equality harms directed against fathers inside and outside of the workplace.[203] Although the gender-neutral language used in art.11(2)(c) can be interpreted to benefit fathers, the text is ultimately vague upon what policy measures States Parties should introduce to help fathers reconcile work and familial responsibilities. In addition, this provision does not expressly state whether fathers can receive support to achieve a work-family balance through solely paternity leave or other leave entitlements where fathers can take a more active role before childbirth, such as through antenatal appointments.

In order to fully comprehend whether paternity rights are largely perceived as a function of women's equality under art.11 of CEDAW, the recent interpretation of this provision made by the CEDAW Committee needs to be analysed. Within the recent sessions held by the CEDAW Committee, they observed that women experience high unemployment rates and an unequal division of childcare responsibilities between themselves and fathers.[204] Even where there is a higher participation of women in the labour force, the Committee has also recognised that there are '[l]imited opportunities for women to pursue their careers in the formal employment sector owing to the disproportionate burden of household and childcare responsibilities placed on them.'[205] They recommended that the gender inequality within the labour market can be resolved through the promotion of the 'equal sharing of family and care responsibilities between women and men.'[206] The CEDAW Committee maintained that the equal distribution of childcare between parents can be achieved if States Parties '[e]nsure that women and men can benefit from paid maternity, paternity or parental leave.'[207] The recommendation made to States Parties by the Committee is one of the few examples where it seems to be implicitly arguing for men to have a legal entitlement to parenting rights. The Committee also recommended 'introducing flexible working arrangements, increasing the number of childcare facilities and introducing innovative measures to increase the social acceptance of men taking care of their children and of women choosing to return to work

[203] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43); *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).
[204] CEDAW Committee, 'Concluding Observations: Eritrea' (2020) CEDAW/C/ERI/CO/6 [37].
[205] CEDAW Committee, 'Concluding Observations: Cambodia' (2019) CEDAW/C/KHM/CO/6 [36].
[206] CEDAW Committee, 'Concluding Observations: Pakistan' (2020) CEDAW/C/PAK/CO/5 [41], [42(b)].
[207] CEDAW Committee, 'Concluding Observations: Eritrea' (n 204) [38(e)].

following childbirth.'[208] The encouragement over the increased acceptance of fathers being actively involved in childcare acknowledges the impact that the current workplace culture has had upon preventing fathers from utilising leave entitlements.[209] Similarly, this recommendation recognises the way in which fatherhood is treated as secondary to motherhood outside of the workplace.[210] The CEDAW Committee has further commended States Parties for introducing paternity leave entitlements[211] and showing evidence of an increased uptake by fathers of paternity and/or parental leave entitlements.[212]

The CEDAW Committee has interpreted the objective of art.11 to be the alleviation of the gender stereotypes that surround men and women so that pregnancy and maternity discrimination is less prevalent within the workplace. The CEDAW Committee considers that dismantling the gender stereotypes, particularly surrounding men, would encourage shared childcare between mothers and fathers. The equal distribution of childcare responsibilities between parents could improve the work-family balance for women. The CEDAW Committee has advised States Parties that policy measures which introduce paternity leave, flexible working arrangements and childcare facilities, for example, could support the increased participation of fathers in childcare, allow more time for mothers to actively engage in workplace activities and lessen the workplace discrimination which mothers experience.

Despite the fact that the Committee seems to have recently argued that men should be provided a legal entitlement to parenting rights, they continue to frame the strengthening of paternity rights as a way to alleviate the workplace discrimination which women experience. The asymmetric approach to equality adopted by CEDAW demonstrates the limits of exclusively viewing the role of fatherhood and the strengthening of paternity rights as a function of women's equality. The asymmetric approach to equality excludes fathers from being viewed as parents who experience discrimination and, in turn, prevents fathers from receiving adequate legal protection from other pieces of equality legislation. Although the policy measures that were recommended by the CEDAW Committee could implicitly challenge the gender stereotypes that surround the role of fatherhood, the Committee has failed to extensively discuss the discrimination which fathers experience when undertaking childcare. The Committee does not acknowledge the equality harms fathers incur when they attempt to exercise leave entitlements in the workplace.[213] Similarly, the Committee does not explicitly recognise that fathers experience mistreatment outside of the workplace wherein the caring responsibilities performed by fathers is viewed as secondary to that fulfilled by mothers.[214] The CEDAW Committee also fails to discuss paternity rights in sufficient depth, as they focus solely upon flexible working arrangements and paternity or parental leave entitlements that fathers can utilise. The Committee could have also encouraged the participation of fathers during the earlier stages of pregnancy through the introduction of

[208] CEDAW Committee, 'Concluding Observations: Pakistan' (n 206) [42(b)].
[209] Women and Equalities Committee (n 1) paras 20-21.
[210] *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).
[211] CEDAW Committee, 'Concluding Observations: Andorra' (n 141) [4(d)].
[212] CEDAW Committee, 'Concluding Observations: Lithuania' (n 146) [40].
[213] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[214] *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).

leave entitlements to attend antenatal appointments, parenting classes and other relevant medical appointments. This provision ultimately frames women as independent rights-holders, unlike fathers, as the aim of the provision is to eliminate the discrimination which women experience. The strengthening of paternity rights is largely viewed as a means to achieve that objective.

The lack of legal protection that art.11 offers to fathers has been critiqued by the Swedish Government in the 1973 report, *Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Eliminate Discrimination Against Women: Working Paper by the Secretary-General.* Here, the Swedish Government asserted that 'it [was] essential that any new instrument should reflect the requirement that men should assume and be given the opportunity of exercising their share of the responsibility for the family provision… and care of the children.'[215] The Government remarked that '[u]nless responsibility is shared, it would appear impossible to achieve equality on the labour market.'[216] Likewise, Resnik questioned whether the mention of maternity leave under art.11, without any explicit reference to paternity leave, established a legal framework that promoted egalitarian progress.[217] The criticism of art.11 is understandable, as the provision fails to address the inequality which fathers experience. Paternity discrimination limits fathers from being able to exercise leave entitlements the way that they would wish to and needs to be addressed. Moreover, the underlying objective of alleviating pregnancy and maternity discrimination under art.11 will fail to be achieved, as paternity discrimination prevents fathers from sharing childcare responsibilities with mothers.

Nevertheless, art.11 does not need to address paternity discrimination. This provision aligns with the purpose of the treaty, which is to promote women's equality. Paternity discrimination needs to be independently addressed by equality legislation, but CEDAW does not need to independently address the discrimination against fathers because the primary objective of the treaty is to improve the position of women within society. However, the analysis of the asymmetric approach adopted by CEDAW highlights the dangers of excluding fathers from legal protection under other pieces of equality legislation. Despite Britain and the UK not adopting an asymmetric approach to equality under the EA 2010 and the HRA 1998, legal protection is provided to mothers and not fathers.[218] "Paternity" needs to be recognised as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 because fathers are currently provided with limited protection. Fathers in Britain and the UK need equality legislation that they can sufficiently rely upon to tackle any equality harms directed against them and to protect their position in childcare. Fathers will continue to experience discrimination if equality legislation does not view them as individual rights-holders in need of protection. The examination of

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[215] Commission on the Status of Women, 'Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Eliminate Discrimination Against Women: Working Paper by the Secretary-General' (1973) E/CN.6/573 [89].
[216] ibid.
[217] Resnik (n 117) 544.
[218] EA 2010, s.4; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3rd September 1953) ETS 5 (ECHR), art.14; *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 (hereafter *Identoba*).

CEDAW exposes the interrelationship between motherhood and fatherhood and how the role of men is a factor in furthering women's equality. Despite CEDAW's perspective on paternity rights being relatively limited, the treaty illustrates the benefits of adopting an equality law approach, as art.11 has provided women with legal protection that they can rely upon to counter pregnancy and maternity discrimination. This provision illustrates how an equality law approach that offers redress for fathers experiencing paternity discrimination could be highly beneficial.

IV. ICESCR

The ICESCR is described by Hoag as an international human rights treaty which governs rights in areas such as the family, employment, living standards, healthcare and education.[219] The preamble of the ICESCR identifies the purpose of the treaty as being the protection of the 'inherent dignity and…the equal and inalienable rights of all.'[220] The preamble affirms that 'the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.'[221] In light of the significance of the preamble in the interpretation and purpose of a treaty under art.31(2) of the Vienna Convention, the underlying objective of the ICESCR is to place an obligation upon States Parties to reinforce and protect the economic, social and cultural rights of all individuals so that they can be exercised without being subject to discrimination.

With regards to the recognition and protection of parenting rights under the ICESCR, Kismödi and others underline that the treaty shares similarities with CEDAW.[222] Both treaties expressly reference that States Parties operate under an obligation to protect women's rights during pregnancy and childbirth.[223] Under art.10(2) of the ICESCR, '[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth… [and] [d]uring such period working mothers should be accorded paid leave or leave with adequate social security benefits.' This provision explicitly offers legal promotion and protection of the socio-economic rights of mothers during pregnancy, childbirth and the postpartum period. Legal support to mothers is provided under art.10(2) by allowing mothers the ability to access adequate leave, pay and any additional related social security benefits without experiencing discrimination.

However, paternity rights are neither explicitly referenced nor offered legal protection within the text of the ICESCR. Saul, Kinley and Mowbray explain that the CESCR has not generally advised States Parties to introduce paternity leave.[224] Nonetheless, paternity leave has been

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[219] Robert Hoag, 'International Covenant on Economic, Social, and Cultural Rights' in Deen Chatterjee (ed), *Encyclopedia of Global Justice* (Springer 2011) 546.
[220] ICESCR, pmbl. [1].
[221] ICESCR, pmbl. [3].
[222] Kismödi and others (n 121).
[223] ibid.
[224] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant On Economic, Social And Cultural Rights: Commentary, Cases and Materials* (Oxford University Press 2014) 783.

increasingly introduced within States Parties and may be arguably justified as legal measures under arts.10(1) and 10(3) of the ICESCR.[225] Under art.10(1), the widest possible protection and support should be provided to the family in order for dependent children, in particular, to be provided with sufficient care and education. Under art.10(3), special measures of protection and support should be introduced on behalf of all children without any discrimination for reasons relating to parentage or other conditions. The CESCR also recommended that, where paternity leave has been introduced under the national laws of States Parties, parents should be given access to it on a non-discriminatory basis.[226] The encouragement of protecting the right for fathers to access paternity leave would support the position of all fathers in childcare, which is also inclusive of gay fathers who do not adhere to the heteronormative traditional "male breadwinner" model. The CESCR provided an example of paternity leave being provided on a discriminatory basis when national laws only allowed fathers access to paternity leave subject to their marital status.[227] The CESCR has also explicitly referenced fathers as rights-holders under the ICESCR, as the Committee has expressed that the right to paternity leave can potentially be seen as a legally protected right. In General Comment No.20, the CESCR stated that the prohibition of non-discrimination contained under art.2(2) of the ICESCR can be interpreted to also include the protection of fathers, as the '[r]efusal to grant paternity leave may also amount to discrimination against men.'[228]

Despite the focus of CEDAW being on the promotion of women's equality and its perception that paternity rights are a function of that, men are viewed as rights-holders under the ICESCR. First, the preamble of the treaty underlines that the overall aim of the ICESCR is inclusive of the rights of men, as the purpose of the treaty is to protect the economic, social and cultural rights of all individuals. Secondly, the discussion by the CESCR that the refusal of paternity leave to fathers may be categorised as sex discrimination under art.2(2) of the ICESCR[229] shows that the treaty differs from CEDAW. The main objective of CEDAW is to eliminate the discrimination which women experience, whereas the ICESCR prohibits discrimination on a much wider basis.[230] Due to the broad range of discrimination grounds contained under the ICESCR, fathers can gain more legal protection in combating the discrimination that they experience.[231] This treaty could be able to potentially better illustrate how an equality law approach may be beneficial in protecting fathers from discrimination.

In an effort to establish whether the provisions contained within the ICESCR have been interpreted to provide legal protection for fathers, the approach of the CESCR to paternity rights will be further explored in Section IV. This section will be divided into the following 3 sub-sections: 1. Arts.2(2) and 3 of the ICESCR; 2. Arts.6 and 7 of the ICESCR; and 3. Art.10

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[225] ibid.
[226] CESCR, 'Concluding Observations: Mauritius' (2010) E/C.12/MUS/CO/4 [21].
[227] ibid.
[228] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).
[229] ibid.
[230] ICESCR, art.2(2).
[231] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).

of the ICESCR. Each subsection will analyse the text of the relevant article provisions discussed and the General Comments which demonstrate the interpretation of these article provisions by the CESCR. Thereafter, an examination will be undertaken of the 3 most recent sessions held by the CESCR, including and prior to March 2021, wherein the Committee has provided concluding observations on the reports submitted by States Parties. Section IV will include analysis of the CESCR's 69th Session (15 February 2021 - 05 March 2021), 67th Session (17 February 2020 - 06 March 2020) and 66th Session (30 September 2019 - 18 October 2019). The examination of the recent sessions held by the CESCR will illustrate how paternity rights and fathers' experiences of discrimination are addressed by the CESCR.

1. ARTS.2(2) AND 3 OF THE ICESCR

The importance of arts.2 and 3 of the ICESCR is encapsulated by Hoag.[232] He illustrates that both provisions serve to promote the principle of gender equality by prohibiting discrimination on a range of characteristics which have been recognised as preventing individuals from fully exercising their social, economic and cultural rights.[233] The CESCR in General Comment No.16 particularly asserted that arts.2(2) and 3 are 'integrally related and mutually reinforcing.'[234] Sepúlveda explains that arts.2(2) and 3 jointly serve to protect the equal right of men and women to enjoy their economic, social and cultural rights.[235] In first examining art.2(2), the provision stipulates that States Parties are obligated to 'guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' In light of the rights contained within this treaty, Sepúlveda underlines that art.2(2) imposes obligations upon States Parties to eliminate discrimination on 10 defined grounds.[236] Sepúlveda stresses that these grounds are 'merely illustrative and not exhaustive,'[237] as the meaning of the term "other status" is open-ended. The CESCR in General Comment No.20 reaffirmed the open-ended nature of the grounds of discrimination listed under art.2(2), as the term "other status" has been used to interpret new grounds of discrimination, such as disability, age, nationality, marital and family status and sexual orientation and gender identity.[238]

Saul, Kinley and Mowbray note that art.2(2) shows the dominant theme of non-discrimination within the treaty,[239] which the CESCR describes as an 'immediate and cross-

[232] Hoag (n 219).
[233] ibid.
[234] CESCR, 'General Comment No.16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3 of the International Covenant on Economic, Social and Cultural Rights)' (2005) E/C.12/2005/4 [3].
[235] Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant On Economic, Social, and Cultural Rights* (Intersentia 2003) 407.
[236] ibid 391.
[237] ibid 391.
[238] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20) [27]-[32].
[239] Saul, Kinley and Mowbray (n 224) 174.

cutting obligation in the Covenant.'[240] An example can be seen in the initial preamble of the ICESCR, wherein the purpose of the treaty was shown to provide the legal recognition and protection of the economic, social and cultural rights of all individuals.[241] In General Comment No.20, the CESCR states that the purpose of art.2(2) was to extend the application of the provision beyond the confines of formal equality and adopt substantive equality.[242] The Committee explained that substantive equality involves 'paying sufficient attention to groups of individuals which suffer historical or persistent prejudice… [and that] States [P]arties must… immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive… discrimination.'[243] The CESCR maintained that substantive equality relates to combating systematic discrimination, which involves States Parties eliminating policies, practices and cultural attitudes in the public or private sector that disadvantages some societal groups and privileges others.[244] Moreover, the CESCR highlights that the prohibition of sex discrimination, as stipulated under art.2(2), has evolved to extend the definition of sex discrimination to include 'not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles.'[245] In that respect, the CESCR states that art.2(2) could also be interpreted to include protection from fathers against discrimination, as the CESCR explicitly states that the '[r]efusal to grant paternity leave may also amount to discrimination against men.'[246]

Yet, the textual provision of art.2(2) does not explicitly list "paternity" as a ground of discrimination. Due to the list of grounds under art.2(2) being non-exhaustive in nature, there could be instances where "paternity" could be potentially later interpreted as a ground of discrimination. Unlike CEDAW, the CESCR's interpretation of art.2(2) includes fathers as rights-holders under the treaty and provides legal recognition that fathers can be subject to discrimination if they are not granted paternity leave.[247] Nevertheless, the Committee interpreted that the discrimination which fathers experience is included within the definition of sex discrimination under art.2(2). In Chapter 4, I discussed how "sex" as a ground of discrimination offers limited legal protection and understanding of the specific discriminatory practices that are directed against fathers. This provision offers fathers a limited scope of legal protection because "sex" as a ground of discrimination cannot sufficiently comprehend the type of discrimination which fathers experience inside and outside of the workplace.[248] Currently, fathers in Britain have unsuccessfully relied upon "sex" as a protected characteristic under s.4 of the EA 2010.[249] Fathers have been provided with limited protection

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[240] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20) [7].
[241] Saul, Kinley and Mowbray (n 224) 174; ICESCR, pmbl. [1]-[4].
[242] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20) [8].
[243] ibid.
[244] ibid [12].
[245] ibid [20].
[246] ibid [20].
[247] ibid [20].
[248] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43); *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).
[249] *Shuter* (n 87); *Ali v Capita* and *Hextall* (n 88); *Price* (n 89).

from the legal prohibition of sex discrimination because the type of equality harms that they experience is rooted in the intersection between their sex and parenting status. Although the refusal to grant paternity leave has been interpreted by the CESCR to amount to discrimination under art.2(2) of the ICESCR,[250] this provision does not prohibit the specific type of discrimination that is directed against fathers. Despite the CESCR offering legal protection to fathers under this provision, they may receive limited legal protection from art.2(2) in practice.

Saul, Kinley and Mowbray highlight that the theme of non-discrimination which is dominant throughout the rights contained within the ICESCR is further reinforced under art.3.[251] Sepúlveda asserts that the prohibition of sex discrimination under art.2(2) is additionally, and more specifically, protected under art.3.[252] Klerk notes that both provisions jointly prevent States Parties from implementing discriminatory policy measures.[253] Under art.3, States Parties are obligated to 'ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.' Saul, Kinley and Mowbray contend that the focus of art.3 is seemingly upon the pressing need to tackle the discrimination which women experience.[254] Similarly, in General Comment No.16, the CESCR asserts that the focus of this provision is to combat the discrimination directed against women and have adopted the definition of discrimination against women contained under art.1 of CEDAW.[255] Here, the CESCR explains that '[d]iscrimination against women is "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women… on a basis of equality of men and women, of human rights and fundamental freedoms."'[256] The CESCR further provides examples of sex discrimination, which include the refusal to hire women due to the likelihood that they may become pregnant, or placing women in low-level occupations due to the stereotypical assumption that women are less likely to commit as much time to completing their work as men.[257]

In General Comment No.16, the CESCR underlined that art.3 adopts a substantive equality approach, wherein States Parties should take into account that substantive equality cannot be achieved through the introduction of policies that use gender-neutral language.[258] The

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[250] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).
[251] Saul, Kinley and Mowbray (n 224) 174.
[252] Sepúlveda (n 235) 407.
[253] Yvonne Klerk, 'Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 265.
[254] Saul, Kinley and Mowbray (n 224) 221.
[255] CESCR, 'General Comment No.16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3 of the International Covenant on Economic, Social and Cultural Rights)' (n 234) [11].
[256] CESCR, 'General Comment No.16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3 of the International Covenant on Economic, Social and Cultural Rights)' (n 234) [11]; CEDAW, art.1.
[257] CESCR, 'General Comment No.16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3 of the International Covenant on Economic, Social and Cultural Rights)' (n 234) [11].
[258] ibid [8].

CESCR explained that these types of policies do not address the existing economic, social and cultural inequalities and can ultimately fail to address, or could even further perpetuate, the inequality between men and women.[259] The CESCR describes the term "gender" as referring 'to [the] cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women.'[260] The Committee highlights the importance of focusing upon addressing gender inequality, as these gender-based assumptions place women in a disadvantageous position with respect to the enjoyment of their socio-economic rights.[261] The CESCR further emphasises that '[g]ender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality.'[262] This provision could implicitly challenge the role of fatherhood under the traditional "male breadwinner" model and provide fathers with the increased ability to participate in childcare. The interpretation of art.3 by the CESCR argues that gender-based assumptions exclude men and women from equally sharing workplace and childcare responsibilities. The dismantling of these gender stereotypes would allow men and women to equally share childcare. Women would also be able to assume greater workplace obligations because they are not placed with a disproportionate level of childcare responsibility. The sharing of childcare would allow, and normalise, fathers as carers.

Similar to art.2(2), there is a strong focus on combating the discrimination which women specifically experience under art.3. Although the discrimination which women experience needs to be addressed, the textual provision of art.3 fails to explicitly identify that fathers also experience negative repercussions for attempting to access leave entitlements, social benefits and visitation rights, for example.[263] There is also a slight inconsistency in the level of legal protection afforded to fathers under arts.2(2) and 3. The CESCR described the focal point of art.2(2) being on the elimination of the discrimination directed against women,[264] but continued to state that fathers were independent right-holders under the treaty and could experience discrimination if they were refused access to paternity leave.[265] On the other hand, the CESCR did not explicitly describe fathers as independent rights-holders who can experience discrimination under art.3. The ICESCR should be more consistent in their legal protection of fathers, as the purpose of the treaty is broader than CEDAW and provides protection of the economic, social and cultural rights of all individuals.[266] The limited legal protection provided to fathers reveals the risks of disallowing fathers from being rights-holders under equality legislation. For instance, the minimal legal protection afforded to

[259] ibid [8].
[260] ibid [14].
[261] ibid [14].
[262] ibid [14].
[263] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43); *Alexandru Enache* (n 56); *Sommerfield* (n 56).
[264] CESCR, 'General Comment No.16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3 of the International Covenant on Economic, Social and Cultural Rights)' (n 234) [11].
[265] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).
[266] ICESCR, pmbl. [3].

fathers under the EA 2010 and the HRA 1998 limits fathers in Britain and the UK from being able to undertake higher levels of childcare. Equality legislation needs to recognise, and redress, the particular type of discrimination directed against fathers.

The concluding observations of the 3 most recent sessions held by the CESCR have not expressly discussed paternity rights or paternity discrimination in relation to art.2(2). However, some references to paternity rights have been made with regards to art.3. The recent interpretation by the CESCR of art.3 has shown concern over the gender disparity within the labour market, the educational system and how women are primarily responsible for childcare.[267] The CESCR has recommended that one of the ways in which to combat gender inequality is to '[r]eview the parental leave system and consider introducing nontransferable parental leave for either parent, with a view to encouraging men to take up care responsibilities.'[268] However, the recommendations are vague on what type of policy measures need to be implemented to achieve this objective. Despite the fact that treaty bodies typically tend to be vague in their interpretation of the provisions contained in relevant treaties, the lack of discussion made by the Committee on paternity discrimination seemingly overlooks the type of discrimination directed against fathers.[269] The lack of recognition concerning paternity discrimination has arguably prevented the CESCR from being able to specifically identify the type of policy measures that should be introduced to increase the participation of men in childcare. Moreover, the dangers of adopting an asymmetric approach to maternity and paternity rights is highlighted through the failure of the CESCR to frame the right to paternity leave as a legally protected right for fathers within their recent interpretation of art.3. The Committee has particularly described that childcare responsibilities are disproportionately placed upon mothers to fulfil and that the introduction of leave policies that incentivise fathers' uptake would help to resolve this issue. Yet, the sole reason for supporting the position of fathers in childcare is to enhance the position of women in society. The strengthening of paternity rights as a function of women's equality is reflective of the domestic system that we currently live in where paternity discrimination is not adequately legally addressed. If equality legislation does not provide fathers with legal protection from discrimination, fathers will continue to struggle to undertake higher levels of childcare.

Additionally, in relation to the recent interpretation by the CESCR of art.3, States Parties have been commended for tackling gender-based stereotypes through the introduction of paternity and parental leave entitlements.[270] Likewise, the Committee has underlined the need to 'intensify… efforts towards [the] equal sharing of responsibilities between men and women in their balancing of work and family life.'[271] The recommendations made by the Committee to challenge the gender stereotypes that are prevalent within the context of parenting[272] could be implicitly beneficial to fathers. The encouragement of fathers in

[267] CESCR, 'Concluding Observations: Finland' (2021) E/C.12/FIN/CO/7 [18].
[268] ibid [19(e)].
[269] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43); *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).
[270] CESCR, 'Concluding Observations: Denmark' (2019) E/C.12/DNK/CO/6 [30].
[271] ibid [31].
[272] CESCR, 'Concluding Observations: Finland' (n 267) [19(e)]; CESCR, 'Concluding Observations: Denmark' (n 270) [31].

childcare promotes the fulfilment of care work by fathers and provides fathers with the ability to adopt a caring role. The CESCR has also recommended that comprehensive time-use surveys should be conducted to identify the factors underpinning the low take-up rate amongst fathers of leave and the disproportionate level of childcare responsibilities placed upon mothers.[273] The recommendation made by the Committee of conducting time-use surveys could be a highly beneficial tool in illustrating the level at which mothers and fathers individually assume childcare and workplace responsibilities. Time-use surveys would help compile data that would help inform States Parties over the types of policy measures that should be implemented to successfully integrate fathers into childcare. However, the CESCR could provide further details upon how to incentivise fathers to use paternity leave entitlements that they have been allocated. As discussed in Section II of this chapter, non-transferable leave entitlements have been successful in increasing fathers' uptake of leave in Sweden.[274] The CESCR could have also discussed how other factors, such as income related leave, could also incentivise fathers to take leave.[275] Solely introducing leave entitlements does not guarantee the dismantling of gender-based stereotypes and the promotion of equally shared childcare responsibilities between mothers and fathers. The CESCR fails to address the discrimination which fathers experience that prevents them from exercising any leave entitlements to participate in childcare in the first instance.

The primary focus of the recommendations made by the CESCR is upon the elimination of the discrimination perpetuated against mothers. The recent interpretation by the Committee of art.3 has encouraged equally shared childcare responsibilities as a means to alleviate the discrimination which women experience. The CESCR has also advocated that States Parties should introduce leave entitlements that aim to challenge the gender stereotypes surrounding motherhood and fatherhood. Although the development of paternity rights is seen as a measure to promote women's equality, these recommendations do support the integration of fathers within childcare. In the context of parenting, the dismantling of gender stereotypes would allow fathers to incorporate the fulfilment of childcare responsibilities as part of their role as a parent. In spite of the fact that the CESCR has stated that fathers could experience sex discrimination and are provided legal protection under art.2(2) of the ICESCR,[276] the interpretation of this provision in their 3 most recent sessions does not discuss fathers' experiences of inequality. Under art.2(2), a nascent understanding that men experience discrimination as fathers is provided. Yet, the ICESCR does not understand, or expressly address, the concept of paternity discrimination, which greatly limits the level of legal protection afforded to fathers. The examination of arts.2(2) and 3 illustrate how the ICESCR and other pieces of equality legislation need to be further developed so that paternity discrimination is sufficiently tackled. Similar to the ICESCR, paternity discrimination is not recognised under important pieces of British and UK equality legislation, such as the EA 2010 and the HRA 1998. Fathers will be largely unable to participate in childcare if the

[273] CESCR, 'Concluding Observations: Denmark' (n 270) [30]-[31].
[274] Women and Equalities Committee (n 1).
[275] Jane Lewis and Mary Campbell, 'UK Work/Family Balance Policies and Gender Equality, 1997–2005' (2007) 14 Social Politics 14.
[276] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).

specific type of discrimination which fathers experience is not redressed under equality legislation. In order to provide adequate protection for fathers in Britain and the UK, “paternity” needs to be recognised as a protected characteristic and a ground of discrimination under s.4 of the EA 2010 and art.14 of the HRA 1998.

2. ARTS.6 AND 7 OF THE ICESCR

In General Comment No.18, the CESCR recognised arts.6 and 7 of the ICESCR as interdependent provisions.[277] The right to just and favourable working conditions propagated under art.7 further advances the individual dimension of the right to work contained under art.6.[278] Saul, Kinley and Mowbray recognised that the right to non-discrimination promoted under arts.2 and 3 is further reinforced under arts.6 and 7.[279] The principle of non-discrimination in relation to employment rights is upheld by arts.6 and 7.[280] In first examining art.6, art.6(1) stipulates that States Parties are obligated to ‘recognize the right to work, which includes the right of everyone to…. gain his living by work which he freely chooses or accepts, and… take appropriate steps to safeguard this right.’ Moreover, art.6(2) declares that States Parties are required to introduce technical and vocational guidance, training programmes and policies that safeguard the fundamental political and economic freedoms of all individuals in employment.

In General Comment No.18, the CESCR explains that art.6 dictates that ‘[t]he right to work is an individual right that belongs to each person… [which] encompasses all forms of work, whether independent work or dependent wage-paid work [, and] … includes the right of every human being to decide freely to accept or choose work.’[281] Craven believes that this provision imposes an obligation on States Parties to ensure that all individuals retain a right to achieve full employment, that forced labour is prohibited[282] and that individuals are guaranteed the freedom from becoming arbitrarily dismissed.[283] In General Comment No.18, the CESCR assert that the core obligation of art.6 is for States Parties to ensure that individuals enjoy the rights covered within the ICESCR to a minimum standard.[284] The Committee explained that the core obligations of art.6 are to guarantee the right to employment, particularly of those belonging to disadvantaged and marginalised groups, and to avoid introducing policy measures that have a discriminatory effect against disadvantaged and marginalised people.[285] In addition, the CESCR has underlined that States Parties should

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[277] CESCR, ‘General Comment No.18: Article 6 of the International Covenant on Economic, Social and Cultural Rights’ (2006) E/C.12/GC/18 [8].
[278] ibid [2].
[279] Saul, Kinley and Mowbray (n 224) 289-295.
[280] ibid.
[281] CESCR, ‘General Comment No.18: Article 6 of the International Covenant on Economic, Social and Cultural Rights’ (n 277) [6].
[282] Matthew Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights' (1993) 40 Netherlands International Law Review 389.
[283] ibid 395.
[284] CESCR, ‘General Comment No.18: Article 6 of the International Covenant on Economic, Social and Cultural Rights’ (n 277) [31].
[285] ibid.

adopt a national employment strategy that addresses the concerns of all workers on the basis of a transparent and participatory process that includes employers' and workers' organizations.[286]

The CESCR discussed that the principle of non-discrimination under art.2(2) is relevant to art.6.[287] The Committee maintained that the core obligation of art.6 'encompasses the obligation to ensure non-discrimination and equal protection of employment'[288] and that 'any discrimination in access to the labour market… on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth … constitutes a violation.'[289] Saul, Kinley and Mowbray note that the CESCR has interpreted this provision with a particular focus upon enhancing the position of women, as the Committee has continually expressed concern over the disproportionate level of women that are unemployed and the overrepresentation of women in irregular employment, part-time employment and in the informal economy.[290] Furthermore, the Committee has honed in upon the workplace discrimination which women experience in the form of the dismissal of pregnant employees and unequal pay.[291] In General Comment No.18, the CESCR affirmed that the interpretation of art.6, in conjunction with arts.2 and 3, protects women's rights, as 'pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment.'[292] The Committee has also stated that there is a need to combat gender discrimination, ensure equal treatment, guarantee equal opportunity and equal pay between men and women in the labour market and acknowledge that women have comparatively less access to education than men, which hinders their job success.[293] Similar to the principle of non-discrimination and the equal treatment between men and women under arts.2 and 3 respectively, the CESCR has interpreted art.6 with a particular focus upon eliminating the discrimination which women experience. For example, the objective of art.6 includes protecting a woman's right to work without being subject to sex discrimination and combating unequal opportunity and pay in employment.

Yet, the Committee has not seemingly interpreted art.6 as being inclusive of combating paternity discrimination in the workplace or providing legal protection to employed fathers exercising leave entitlements. The gender-neutral language used within the textual provision of art.6 could be inclusive of fathers, but the interpretation of this provision by the CESCR focuses primarily upon tackling the discrimination which women experience. Although many pregnant women and employed mothers experience structural barriers that limit the job opportunities that they can access, the interpretation of art.6 by the CESCR can be critiqued for not expressly combating paternity discrimination. The Committee fails to explicitly acknowledge the current discriminatory workplace culture and the negative repercussions

[286] ibid.
[287] ibid [33].
[288] ibid [31].
[289] ibid [33].
[290] Saul, Kinley and Mowbray (n 224) 292-293.
[291] ibid.
[292] CESCR, 'General Comment No.18: Article 6 of the International Covenant on Economic, Social and Cultural Rights' (n 277) [13].
[293] ibid.

which fathers experience if they attempt to exercise their already limited leave entitlements.[294] The lack of recognition concerning the discrimination which fathers experience limits the scope of protection art.6 offers to fathers. Due to the lack of discussion surrounding fathers' rights by the CESCR, the status of fathers as independent rights-holders under this provision is questionable. The ICESCR offers inconsistent legal protection to fathers, as the CESCR previously interpreted that men are independent rights-holders under art.2(2).[295] However, the principle of non-discrimination towards fathers has not been equally promoted under art.6 to protect fathers from workplace discrimination.

Secondly, in examining art.7 of the ICESCR, this provision stipulates that States Parties are obligated to 'recognize the right of everyone to the enjoyment of just and favourable conditions of work.' The objective of art.7 is reflected in art.7(a)(i), as this provision underlines that States Parties need to introduce '[f]air wages and equal remuneration for work of equal value without distinction of any kind[,]… [with] in particular women being guaranteed conditions of work not inferior to those enjoyed by men.' Likewise, art.7(c) asserts that States Parties have to ensure the equal opportunity of everyone to receive workplace promotions solely on the basis of their competence and seniority. In addition, art.7(d) declares that States Parties should ensure that working individuals are entitled to rest, leisure and periodic holidays with pay.

In General Comment No.23, the CESCR explains that art.7 contains the right to just and favourable working conditions.[296] The CESCR further asserts that this provision contributes towards the enjoyment by individuals to 'the right to the highest attainable standard of physical and mental health, by avoiding occupational accidents and disease, and an adequate standard of living through decent remuneration.'[297] The Committee explains that art.7(a)(i) provides that States Parties should, at minimum, provide equal remuneration for work of equal value and particularly ensure that women receive equal treatment to men with regards to pay.[298] Furthermore, the CESCR discusses that art.7(c) asserts that obligating States Parties to ensure equal opportunity between individuals within the labour market alludes to the fact that people being hired, promoted and terminated should not be carried out in a discriminatory manner.[299] The CESCR states that this provision is particularly relevant for workers who are women, disabled, ethnic or national minorities, gay, transgender and old, for example.[300] The Committee underlines that States Parties should recognise that equality in job promotion requires understanding of the indirect and direct obstacles certain individuals face.[301] Likewise, the CESCR advocates that States Parties should introduce policy measures to help offset these obstacles, such as initiatives that help parents reconcile work and familial

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[294] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[295] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).
[296] CESCR, 'General Comment No.23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)' (2016) E/C.12/GC/23 [1].
[297] ibid.
[298] ibid [9].
[299] ibid [31].
[300] ibid [31].
[301] ibid [32].

obligations and establishing affordable childcare facilities.[302] The CESCR, with regards to art.7(d), affirms that '[l]egislation should identify other forms of leave, in particular entitlements to maternity, paternity and parental leave, to leave for family reasons and to paid sick leave.'[303] Moreover, the CESCR highlights that '[w]orkers should not be placed on temporary contracts in order to be excluded from such leave entitlements.'[304]

Sepúlveda highlights that arts.6 and 7 of the ICESCR collectively place emphasis upon protecting women from workplace discrimination and ensuring that they are working under just and favourable conditions.[305] Sepúlveda explains that these provisions require States Parties to provide women with equal pay, equal access to employment or job promotions, maternal benefits and measures that they can rely upon which discourages discriminatorily dismissing pregnant employees.[306] In General Comment No.16, the CESCR maintained that, when art.7 is interpreted in conjunction with the principle of gender equality upheld under art.3, the gender biases with regards to working parents should be eliminated.[307] The Committee further declared that States Parties 'should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare.'[308] The CESCR similarly affirmed that 'States parties should … introduce incentives to overcome the gender pay gap, [by] including… initiatives to alleviate the burden of reproductive work on women,… promoting access to…. day-care facilities and [introducing] non-transferable parental leave for men.'[309]

This provision provides a complicated picture of the parenting roles of men under the ICESCR. Similar to art.6, the interpretation made by the CESCR of art.7 focuses upon tackling the discrimination which women experience. The gender-neutral language used within the textual provision of art.7 could potentially offer legal protection for fathers to combat discrimination. However, the CESCR seemingly promotes the right to paternity leave under the provision as a means to eliminate the discrimination which women currently experience in the workplace. The CESCR references the introduction of stronger parental leave entitlements for fathers as a way in which to tackle the gender pay gap and alleviate the full responsibility for childcare from being wholly placed upon mothers. Arguably, the perspective upon paternity rights under art.7 of the ICESCR is similar to my earlier discussion of the viewpoint shared under art.11 of CEDAW in Section III of this chapter, as art.11 also advocated for the elimination of the workplace discrimination directed against women in a similar way. In light of the fact that the CESCR has interpreted the improvement of paternity rights as a function of women's equality under art.7 of the ICESCR, the status of

[302] ibid [32].
[303] ibid [44].
[304] ibid [44].
[305] Sepúlveda (n 235).
[306] ibid 407-408.
[307] CESCR, 'General Comment No.16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Article 3 of the International Covenant on Economic, Social and Cultural Rights)' (n 234) [24].
[308] ibid.
[309] CESCR, 'General Comment No.23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights) (n 296) [62].

fathers as independent rights-holders is again questionable. The CESCR does not take into account the workplace discrimination that fathers experience, which ultimately restricts their ability to exercise their leave entitlements to tend to childcare.[310]

Although art.7(d) has been interpreted by the CESCR to obligate States Parties to introduce leave entitlements for fathers, the Committee can be critiqued for the lack of sufficient depth that their discussion on paternity rights engages in. For example, the CESCR does not discuss fathers' rights to take an active role before childbirth through paid time off work to attend antenatal appointments, other relevant medical appointments and parenting classes, for example. The Committee also does not discuss measures to incorporate the presence of fathers in childcare for lengthier periods of time since childcare is a long-term responsibility. Similar to my discussion of art.6, art.7 also highlights the inconsistent legal protection that the ICESCR generally offers fathers. Despite the refusal to grant paternity leave being interpreted by the CESCR as an instance of sex discrimination under art.2(2),[311] the Committee encouraged the introduction of non-transferable leave for men as a means to alleviate the disproportionate level of childcare responsibilities placed upon mothers.[312] The interpretation of art.7 by the CESCR does not perceive fathers as independent rights-holders, as the strengthening of paternity rights is viewed as a function of women's equality. The inconsistent protection offered by the ICESCR provides fathers with limited legal standing to combat the discrimination that they experience.

In relation to the recent interpretation by the CESCR of arts.6 and 7, the Committee has shown concern regarding the underrepresentation of women in the workplace, the gender segregation of women within the labour market and the gender pay gap.[313] The Committee has recommended that one of the ways in which to resolve the workplace discrimination perpetuated against women is to '[p]romote women's full participation in the labour market, including by developing adequate and affordable day-care solutions and encouraging men to use their right to paternity leave and paid parental leave.'[314] In addition, the CESCR has expressed concern in other instances over the gender pay gap and the low uptake of parental leave by fathers.[315] The Committee has recommended that the necessary steps should be taken to 'ensure that parents fully use the parental leave period reserved for them with a view to ensuring the equitable distribution of care responsibilities between men and women.'[316]

The recent interpretation of arts.6 and 7 by the CESCR aligns with the interpretation of art.7 in General Comment No.23, which asserted that the strengthening of paternity rights should be viewed as a function of promoting women's equality.[317] Although the Committee supports

[310] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[311] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).
[312] CESCR, 'General Comment No.23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights) (n 296) [62].
[313] CESCR, 'Concluding Observations: Ukraine' (2020) E/C.12/UKR/CO/7 [19].
[314] ibid [20(b)].
[315] CESCR, 'Concluding Observations: Norway' (2020) E/C.12/NOR/CO/6 [22].
[316] ibid [23].
[317] CESCR, 'General Comment No.23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights) (n 296) [62].

the use of leave entitlements by fathers and their increased participation in childcare, the CESCR seemingly only references the promotion of paternity rights as a way in which to alleviate the discrimination which women experience. Shared childcare responsibilities is encouraged by the CESCR, as the primary responsibility of childcare being placed upon mothers perpetuates the gender stereotype that women should tend to domestic tasks and childcare and should not engage in workplace activities. These provisions recognise that mothers are prevented from gaining equal access to job opportunities and equal pay when compared to men.

Nevertheless, eliminating the gender stereotypes surrounding men could also potentially aid fathers in becoming more involved in childcare. An equal distribution of childcare between parents would help to alleviate the gender stereotype that fathers should be the family breadwinner and demonstrates that fatherhood can include the fulfilment of caring responsibilities. However, the CESCR could be more explicit in their discussion regarding how to eliminate these gender stereotypes surrounding men. The Committee could further explain in more detail how States Parties can incentivise fathers to use their leave entitlements and undertake a more active role in childcare. For example, in Section II of Chapter 2, I discussed how the removal of strict eligibility requirements to access leave and the provision of higher replacement pay would incentivise fathers to take leave without experiencing financial hardship.[318] The lack of details provided by the CESCR outlines that arts.6 and 7 provide a limited scope of protection for fathers to rely upon.

Under these provisions, the support by the Committee for the introduction of leave entitlements for fathers as a function of women's equality does not depict men as independent rights-holders that can use these provisions to tackle the discrimination that they experience. Unlike CEDAW, the ICESCR does not take an asymmetric approach to equality so fathers' experiences of discrimination and their status as rights-holders could be more strongly recognised. The failure of the CESCR to recognise the workplace discrimination which fathers experience[319] has prevented the scope of protection offered to fathers from being fully developed. The Committee also did not expand their discussion to discuss the development of paternity rights so that fathers could assume a more active role before and after childbirth, such as through paid leave to attend antenatal appointments and long-term leave entitlements. The insufficient legal protection offered to them under arts.6 and 7 highlight how they have limited legal standing to combat the discrimination that they experience. Similarly, the workplace discrimination which fathers in Britain and the UK experience is not recognised under the EA 2010 and the HRA 1998. Fathers have attempted to argue that they have been subject to workplace discrimination but have been unsuccessful due to the lack of recognition of paternity discrimination under the EA 2010.[320] The examination of arts.6 and 7 exposes the risks of excluding fathers from the type of legal protection that they require to counter paternity discrimination. "Paternity" needs to be included as a protected characteristic and a

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[318] Petteri Eerola and others, 'Fathers' Leave Take-Up in Finland: Motivations and Barriers in a Complex Nordic Leave Scheme' (2019) 9 SAGE Open 4; Lewis and Campbell (n 275).
[319] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[320] *Shuter* (n 87); *Ali v Capita* and *Hextall* (n 88); *Price* (n 89).

ground of discrimination under s.4 of the EA 2010 and art.14 of the HRA 1998, or else fathers will struggle to undertake higher levels of childcare.

3. ART.10 OF THE ICESCR

Saul, Kinley and Mowbray underline that the protected right to equal access to work and pay contained under arts.6 and 7 of the ICESCR is further developed in relation to the family, mothers and children under art.10.[321] They recognise that the legal protection of the family is a separate protected right under art.10, as 'economic and social rights manifest uniquely in family and parental relationships.'[322] In first examining art.10(1), this provision stipulates that '[t]he widest possible protection and assistance should be accorded to the family, … particularly for its establishment and while it is responsible for the care and education of dependent children.' The focal point of art.10(1) is for the care and education of children.[323] Todres explains that art.10 requires States Parties to, not only introduce policy measures which provide children with access to adequate healthcare and education, but also to provide children with legal protection from economic and social exploitation.[324] In General Comment No.18, the CESCR asserted that art.10, in conjunction with art.6, promotes 'the need to protect children from economic exploitation… [and] enable them to pursue their full development and acquire technical and vocational education.'[325] Saul, Kinley and Mowbray recognise that, under art.10, States Parties adopt a subsidiary role in implementing measures that protect and assist families.[326] These include State provision of financial support, childcare services and paternity, parental and adoption leave.[327] The introduction of such leave entitlements is viewed as 'part of the continuum of support for the family from childbirth into the child's early life.'[328]

With regards to whether art.10(1) provides fathers with legal protection, the textual provision and its interpretation by the CESCR does not discuss the effects of paternity discrimination. The explanation of art.10(1) shows how the underlying aim of this provision is to provide special legal assistance and protection for families with young and dependent children. However, the interpretation of art.10(1) illustrates that this provision seemingly only encourages States Parties to introduce leave entitlements for fathers as a means to safeguard the protection and development of their children. The right to paternity leave has not been framed under this provision as a legally protected right that fathers are entitled to. The focus upon the protection and development of children makes it highly questionable whether fathers are viewed as independent rights-holders under art.10(1). This provision does not

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[321] Saul, Kinley and Mowbray (n 224) 723.
[322] ibid.
[323] ibid 766.
[324] Jonathan Todres, 'Birth Registration: An Essential First Step toward Ensuring the Rights of All Children' (2003) 10 Human Rights Brief 34.
[325] CESCR, 'General Comment No.18: Article 6 of the International Covenant on Economic, Social and Cultural Rights' (n 277) [15].
[326] Saul, Kinley and Mowbray (n 224) 773.
[327] ibid 776.
[328] ibid 783.

recognise the importance of providing legal protection over fathers, as the treaty overlooks the instances in which fathers experience discrimination.[329] The objective of this provision being the protection of children has prevented the interpretation of art.10(1) from protecting the position of fathers in childcare. The type and design of leave entitlements which incentivise fathers[330] have also not been discussed in sufficient depth under this provision. The interpretation of this provision fails to include the encouragement of a fathers' legally protected right to other leave entitlements, such as flexible working hours, for example, which would accommodate for the long-term responsibility of childcare. The support for increased paternal involvement as a means to promote the protection and development of children would be unable to be achieved, as adequate legal protection is not provided to fathers to counter paternity discrimination under this provision. Without sufficient legal protection for the position of fathers in childcare, fathers will be unable to sufficiently combat paternity discrimination.

In secondly examining art.10(2), this provision declares that '[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth… [wherein] working mothers should be accorded paid leave or leave with adequate social security benefits.' Cremin explains that art.10 places a duty upon States Parties to provide special legal protection over mothers.[331] The focus on protecting mothers is similarly affirmed by the CESCR in General Comment No.20.[332] Saul, Kinley and Mowbray note that the underlying objective of art.10(2) is specifically to promote the health and well-being of mothers and children.[333] Additionally, this provision further obligates States Parties to introduce legal measures which aid mothers in reconciling workplace and familial responsibilities.[334] However, Saul, Kinley and Mowbray observe that the legal protection offered to mothers under art.10(2) is confined to a reasonable period of time surrounding childbirth.[335]Therefore, this provision does not seem to extend legal protection to fathers, adoptive mothers or foster mothers, for example, as art.10(2) aims to protect mothers who have undergone the physical experience of childbirth.[336]

The explanation and interpretation of art.10(2) demonstrates that the underlying aim of this provision is to provide special legal protection for mothers. This provision further obligates States Parties to implement policy measures, such as adequately paid leave, to help further protect the position of mothers within childcare. The purpose of art.10(2) shares similarities with arts.11 and 12 of CEDAW. As discussed in Section III of this chapter, under art.11(2)(a) of CEDAW, the focal point of this provision is upon providing legal protection over pregnant

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[329] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43); *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).
[330] Eerola and others (n 318); Lewis and Campbell (n 275).
[331] Kevin Cremin, 'Article 28: Adequate Standard of Living and Social Protection' in Ilias Bantekas, Michael Stein and Dimitris Anastasiou (eds), *The UN Convention On The Rights Of Persons With Disabilities: A Commentary* (Oxford University Press 2018) 812.
[332] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20) [4].
[333] Saul, Kinley and Mowbray (n 224) 801.
[334] ibid.
[335] ibid 796.
[336] ibid 796.

women and mothers since this provision prohibits pregnancy and maternity discrimination. Moreover, art.11(2)(b) of CEDAW advocates for the implementation of adequate maternity leave, or comparable social benefits, for mothers without fear of dismissal. Under art.12 of CEDAW, the focus of this provision is to legally protect women's rights to access adequate healthcare if they are planning on having children, if they are undergoing pregnancy and during the postpartum period. However, in relation to whether this provision offers legal protection for fathers, the text of art.10(2) of the ICESCR and the interpretation of the provision by the CESCR does not seemingly acknowledge, or offer redress for, fathers experiencing paternity discrimination. Although equality legislation needs to protect mothers, this provision overlooks fathers' experiences of discrimination.[337] The failure to recognise paternity discrimination under art.10(2) has prevented this provision from providing fathers with a legally protected right to take leave and participate in childcare. With the focus of this provision being seemingly exclusively upon mothers, fathers are not framed as independent rights-holders who have been offered legal protection to combat the discrimination directed against them under this provision.

Within the 3 most recent sessions held by the CESCR, their recent interpretation of art.10 has been upon how the use of parental leave by parents supports the care and education of children. The Committee has expressed concern in some instances over the number of children in foster care, given that many of those children have been diagnosed with serious mental health conditions.[338] The Committee has recommended, in instances such as these, that States Parties should '[p]rovide parents with the necessary assistance and support for them to exercise their parental role and responsibilities in the upbringing and education of their children.'[339] Moreover, in other instances, the CESCR has shown concern over the lack of enrolment of children in preschool education, the limited support families receive to acquire a work-family balance and the continued persistence of gender stereotypes.[340] The Committee has recommended in these cases that States Parties should 'effectively balance provisions for parental leave …. and [provide] support for families to balance family and working responsibilities.'[341] The CESCR has expressed concern over the lack of adequate childcare services and parental leave and has recommended 'review[ing] the paternity leave system with a view to extending it and introducing shared parental leave in order to improve the equal sharing of responsibilities within the family and in society.'[342] The recent interpretation of art.10 by the CESCR is partly commendable, as this provision supports the development of leave entitlements for fathers to use. The Committee has encouraged the introduction of policies which could help fathers foster a work-family balance and gain access to stronger leave entitlements. These policies implicitly provide support for the increased participation of fathers in childcare.

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[337] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43); *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).
[338] CESCR, 'Concluding Observations: Norway' (n 315) [30].
[339] ibid [31(d)].
[340] CESCR, 'Concluding Observations: Slovakia' (2019) E/C.12/SVK/CO/3 [48]-[49].
[341] ibid [49(b)].
[342] CESCR, 'Concluding Observations: Switzerland' (2019) E/C.12/CHE/CO/4 [40]-[41].

However, the CESCR perceives paternity rights as a function to safeguard the protection and development of children under art.10. The recommendations to introduce paternity leave, shared parental leave and equally shared childcare between parents is to legally support parents being more present within the home to adequately care for their children. Yet, the Committee fails to understand that fathers will struggle to participate in childcare if the discrimination that is directed against them is not addressed. Many fathers struggle to exercise their already limited leave entitlements that they are allocated, as they would receive negative repercussions from employers and colleagues if they opt to fulfil childcare responsibilities than workplace tasks.[343] Similarly, fathers have encountered difficulty in accessing social benefits and visitation rights that would support their presence in caring for their children, for example.[344] The lack of recognition of paternity discrimination under art.10 has prevented the Committee from engaging in in-depth discussions regarding the development of leave entitlements for fathers to include measures such as flexible working hours so that they can be more present in childcare in the long-term.

An inconsistent level of legal protection is offered to fathers under the ICESCR. The refusal to offer fathers paternity leave can amount to discrimination under art.2(2), which would frame fathers as independent rights-holders under the treaty.[345] Conversely, the aim of art.10 is to largely promote the health and well-being of mothers and children. Despite fathers being able to benefit from the principle of non-discrimination under art.2(2),[346] art.10 fails to identify fathers as independent rights-holders. The failure of this provision to sufficiently recognise fathers as a marginalised group that experience discrimination illustrates the harms of excluding fathers from key pieces of equality legislation. Fathers will continue to encounter many obstacles inside and outside of the workplace,[347] which will limit their ability to engage in childcare activities. The minimal legal protection provided to fathers under the ICESCR is similar to the limited protection provided to fathers in Britain and the UK under the EA 2010 and the HRA 1998. Fathers struggle to successfully rely upon the current British and UK equality legislation to counter the discrimination that they experience. "Paternity" needs to be included as a protected characteristic and a ground of discrimination under s.4 of the EA 2010 and art.14 of the HRA 1998 so that the concept of paternity discrimination is recognised under important pieces of equality legislation and can help to dismantle the structural barriers erected against fathers participating in childcare.

V. CONCLUSION

The primary objective of Chapter 5 has been to undertake a comparative analysis to demonstrate the international approach towards the debate surrounding the legal protection

[343] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[344] *Alexandru Enache* (n 56); *Sommerfield* (n 56).
[345] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).
[346] ibid.
[347] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43); *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).

and reinforcement of paternity rights. Chapter 5 has explored whether an equality law approach is presently adopted under key international treaties and to what extent an amalgamation of an equality and employment law approach in Sweden has been successful in protecting fathers from discrimination. Section II of Chapter 5 has examined how Sweden offers legal protection to working fathers from discrimination on the basis of their parental status. The amalgamation of an equality and employment law approach in Sweden has been proven to be relatively successful in helping working fathers maintain their position in childcare. However, the protection offered to fathers is limited in Sweden, as only employed parents are legally protected from discrimination. Sweden does not assume a "complete equality" law approach, which is where fathers are provided with a standalone right to equality that is not related to an employment relationship that they are in. Additionally, the gender neutrality of the Swedish legal framework governing parental leave might be potentially unable to adequately address the specific discriminatory practices perpetuated against fathers. The legislation focuses upon combating the discrimination which working parents experience due to solely their parenting status. Yet, fathers experience discrimination on the basis of their sex *and* parenting status intersecting. The gender neutrality of the Swedish legal framework governing leave entitlements has overlooked the fact that the type of discrimination which mothers and fathers experience is distinct from one another.

Nonetheless, the combined employment and equality law approach adopted by Sweden has helped to protect working fathers in the court system. The Swedish courts have been found to implement the tenets of substantive equality within their judgments, wherein they do not require fathers to identify a mother as a relevant comparator in order to establish a successful discrimination claim. Chapter 5 has examined Sweden as a case study to show that the implementation of a substantive equality law approach is highly beneficial in tackling the discrimination directed against fathers. In Britain, fathers struggle to establish a successful discrimination claim because paternity discrimination is not recognised under equality legislation and there is a formalistic interpretation of equality in Britain that requires fathers to identify a mother that is identically situated to them as a relevant comparator to demonstrate that they have been discriminated against. [348] A "complete equality" law approach is necessary to implement in Britain and the UK so that fathers are protected from discrimination when they undertake higher levels of childcare. "Paternity" needs to be included as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998.

Section III of Chapter 5 has demonstrated that CEDAW does not provide fathers with a protected individual right to adequate paternity leave and pay. The treaty contains no explicit references to paternity rights or paternity discrimination within its text. The lack of reference to men in CEDAW is largely unsurprising, as the underlying focus of the treaty is for the promotion of women's equality. Nevertheless, the analysis in Section III of the concluding observations of the 3 most recent sessions held by the CEDAW Committee includes discussion of paternity rights. However, the CEDAW Committee views the strengthening of paternity rights from an employment law perspective as a function of women's equality. The

[348] *Shuter* (n 87); *Ali v Capita* and *Hextall* (n 88); *Price* (n 89); EA 2010, ss.13, 19.

treaty ultimately does not view men as independent rights-holders. The Committee recognises that the gender stereotypes surrounding the traditional roles of motherhood and fatherhood are prevalent in present society. The traditional "male breadwinner" model defines the role of motherhood as being wholly responsible for childcare and the role of fatherhood as being the primary financial earner of the household income.[349] The CEDAW Committee notes that childcare responsibilities are thereby largely placed upon mothers to fulfil, which limits their ability to participate in workplace activities. This largely contributes towards the workplace discrimination experienced by women. The Committee seemingly indicates that the strengthening of the employment law provisions surrounding paternity rights is a means by which to encourage shared childcare responsibilities between mothers and fathers. The equal distribution of childcare between parents is encouraged under CEDAW, with the purpose of alleviating the primary responsibility of childcare from being wholly placed upon mothers and eliminating the workplace discrimination which women experience.

The asymmetric approach to equality under CEDAW exposes the dangers of excluding fathers from legal protection under equality law. Without protection, fathers will continue to experience workplace discrimination, wherein they experience negative repercussions from employers and colleagues if they attempt to use leave to tend to childcare.[350] Fathers will also continue to face discrimination outside of the workplace in matters pertaining to nationality, visitation rights, prison sentencing, social benefits and paternity testing, for example.[351] The EA 2010 and the HRA 1998 do not adopt an asymmetric approach to equality, but they do largely exclude fathers from protection from paternity discrimination. Both of these Acts need to introduce provisions that legally prohibit paternity discrimination.

Section IV of Chapter 5 evaluated the ICESCR to show that fathers are provided with a protected individual right to paternity leave.[352] The CESCR has interpreted that the refusal to provide fathers with access to paternity leave could be potentially viewed as sex discrimination under art.2(2) of the ICESCR.[353] Yet, the protection provided under this provision is limited. In Chapter 4, I previously discussed how "sex" as a ground of discrimination offers limited legal protection and understanding of the specific mistreatment of fathers in childcare. In Britain, fathers have unsuccessfully relied upon "sex" as a protected characteristic under s.4 of the EA 2010 to combat paternity discrimination[354] because the type of equality harms that they experience is rooted in the intersection between their sex and parenting status. Nevertheless, this interpretation by the CESCR of art.2(2) provides a nascent understanding that fathers can experience discrimination and shows that fathers are specifically rights-holders under this treaty.

However, the development of paternity rights was viewed by the CESCR as a means to enhance women's equality and the care of children under the ICESCR. The treaty evidently

[349] McGlynn (n 63).
[350] Women and Equalities Committee (n 1) paras 20-21; Miyajima and Yamaguchi, (n 43).
[351] *Weller v Hungary* (n 14); *Salgueiro* (n 15); *Alexandru Enache* (n 56); *Sommerfield* (n 56); *Rasmussen* (n 56).
[352] CESCR, 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (n 20).
[353] ibid.
[354] *Shuter* (n 87); *Ali v Capita* and *Hextall* (n 88); *Price* (n 89).

provides inconsistent legal protection for fathers, as the examination of the other provisions outside of art.2(2) favour the strengthening of paternity rights as a function of women's equality and children's development. The other provisions do not seemingly view fathers as rights-holders. Likewise, the examination of the concluding observations of the 3 most recent sessions held by the CESCR does not refer to fathers' experiences of discrimination under any of the treaty provisions. The minimal legal protection provided to fathers under the ICESCR is reflective of the minimal level of protection provided to fathers in Britain and the UK under the EA 2010 and the HRA 1998. Paternity discrimination needs to be recognised and prohibited under these Acts in order to dismantle the structural barriers that prevent fathers from establishing their position in childcare.

CHAPTER 6: PAST INCLUSION OF PROTECTED CHARACTERISTICS UNDER S.4 OF THE EQUALITY 2010 AND GROUNDS OF DISCRIMINATION UNDER ART.14 OF THE HUMAN RIGHTS ACT 1998

I. INTRODUCTION

"Paternity" as a protected characteristic under s.4 of the Equality Act 2010 (EA 2010) and a ground of discrimination under art.14 of the Human Rights Act 1998 (HRA 1998) has yet to be recognised. In Chapters 2, 3 and 4, I have discussed how legislation in Britain and the United Kingdom (UK) has failed to provide legal protection which sufficiently addresses the effects of paternity discrimination upon fathers. The aim of Chapter 6 is to construct a persuasive legal argument that "paternity" should be added as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Chapter 6 will create this argument by exploring the relevant jurisprudence regarding the past inclusion of newer protected characteristics under s.4 of the EA 2010 and grounds of discrimination under art.14 of the HRA 1998. Chapter 6 will conclude that a legislative amendment may be relatively difficult to make to s.4 of the EA 2010 to include "paternity" as an additional protected characteristic. However, the inclusion of "paternity" as a ground of discrimination under art.14 of the HRA 1998 may be easier.

Hepple outlines that there are 2 potential approaches that can be undertaken with defining the types of statuses and identities that are protected by equality legislation.[1] The first approach is 'general and open-ended, and regards all forms of arbitrary exclusion or stereotyping of 'outsiders' as interconnected.'[2] Examples Hepple cites of open-ended equality legislation includes art.14 of the European Convention on Human Rights (ECHR),[3] as the treaty extends legal protection to a list of specific grounds and an open list of grounds which can be interpreted under the term "other status."[4] The HRA 1998 is a domestic incorporation of the ECHR and thereby also contains an open list of grounds as well.[5] The second approach is depicted as legislation which 'treats status inequality as atomised, and restricts legal protection to a defined number of specific characteristics.'[6] Examples of legislation which contains a closed list of grounds include s.4 of the EA 2010, as the provision currently lists 9 protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.[7]

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[1] Bob Hepple, *Equality: The Legal Framework* (2nd edn, Hart Publishing 2014) 35.
[2] ibid.
[3] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3rd September 1953) ETS 5 (ECHR), art.14.
[4] Hepple (n 1).
[5] Christina Kitterman, 'The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish Its Sovereignty to Ensure Human Rights Protection in Domestic Courts' (2001) 7 ILSA Journal of International & Comparative Law 583.
[6] Hepple (n 1).
[7] ibid.

The differences between legislation that adopts a closed or open list of grounds are important to identify in Chapter 6, as each distinctive approach provides guidance over the procedure that is necessary to follow in including "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Examination of both approaches would give a better indication of the difficulties that may be associated with attempting to include a new protected characteristic or ground of discrimination to the EA 2010 and the HRA 1998 respectively. Sargeant recognises that the closed list of grounds contained under s.4 of the EA 2010 provides limited protection for individuals.[8] If a person experiences discrimination on the basis of a characteristic outside of the 9 protected characteristics currently listed under the EA 2010, they cannot initiate a discrimination claim under the Act. Additionally, the EA 2010 does not contain any provisions that address intersectional discrimination, which concerns instances where an individual experiences discrimination on the basis of multiple protected characteristics.[9] The lack of legal recognition by the EA 2010 of intersectional discrimination prevents many claimants from being able to initiate a claim that specifically describes the type of discrimination that they experience. For instance, Crenshaw explains that black women experience disadvantage due to the intersection between their race and sex, but are 'sometimes excluded from feminist… and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender.'[10] Similarly, fathers experience intersectional discrimination on the basis of their sex and parenting status, but are pushed to unsuccessfully rely upon the legal prohibition of sex discrimination to combat the discrimination that they experience.[11]

Although a closed list of grounds can be inclusive of claims of intersectional discrimination, s.14 of the EA 2010, which addresses instances of dual discrimination, has failed to be implemented.[12] This provision explicitly prohibits discrimination that is found on the basis 'of a combination of two relevant protected characteristics',[13] which are currently listed under s.4 of the EA 2010. However, Shahin notes that s.14 of the EA 2010 was not enforced because it was perceived as being too costly for businesses to have to handle the legal costs incurred with new cases, the compensation awarded from successful cases and the out-of-court settlements.[14] The inability for the EA 2010 to address claims of intersectional discrimination demonstrates the difficulty of being able to include "paternity" as a protected characteristic under the Act, as paternity discrimination is rooted in the intersection between the sex and parenting status of a father. "Paternity" needs to gain recognition as a protected

[8] Malcolm Sargeant, *Discrimination and the Law* (2nd edn, Routledge 2017) 9.
[9] ibid 10.
[10] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 140.
[11] *Shuter v Ford Motor Company Limited* [2014] 7 WLUK 1105 (hereafter *Shuter*); *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police* [2019] EWCA Civ 900 (hereafter *Ali v Capita* and *Hextall*); *Price v Powys County Council* [2021] UKEAT/0133/20 (hereafter *Price*).
[12] Rand Shahin, ''Intersectionality': A Blind-Spot Missed in the British Equality Framework?' (2020) 6 LSE Law Review 51-52.
[13] EA 2010, s.14(1).
[14] Shahin (n 12) 52.

characteristic as it specifically addresses discrimination on the basis of this intersection. There are currently no protected characteristics under the EA 2010 which adequately describe the specific discriminatory practices perpetuated against fathers. Some fathers are forced to initiate sex discrimination claims,[15] but "sex" as a protected characteristic under s.4 of the EA 2010 only partially describes the discrimination which fathers experience.

Conversely, Hepple highlights that there are several advantages to adopting an equality law approach that embodies an open approach.[16] Firstly, the approach can sufficiently recognise and offer redress to individuals experiencing discrimination on more than one ground.[17] Secondly, the approach can identify the way in which different types of social disadvantage relate to one another and engender solidarity amongst the various protected groups.[18] For example, mothers and fathers experience discrimination because the workplace is structured to accommodate for those who adhere to the fully committed worker model.[19] The model describes employees who chiefly undertake workplace responsibilities and assume minimal childcare responsibilities.[20] Although the experiences of pregnancy and maternity discrimination and paternity discrimination are distinct, the different types of social disadvantage relate to one another and can invoke solidarity amongst parents experiencing discrimination. Thirdly, the equality perspective allows for flexibility which ensures that courts and tribunals develop equality legislation in relation to changing social attitudes towards equality.[21] For example, the wording of art.14 of the ECHR could have the potential for intersectional discrimination cases to be heard but, to date, has not been too sought after.[22] In light of the closed list of grounds contained under s.4 of the EA 2010, the addition of "paternity" as a protected characteristic may be difficult to introduce because a legislative amendment would have to be made in order for a new protected characteristic to be recognised.

In contrast, "paternity" as a ground of discrimination appears more likely to be accepted by the courts within the open list of grounds contained under art.14 of the HRA 1998 because the ground can be interpreted by the court system to fall within the term "other status." A key authority to test for discrimination under art.14 can be found in the case of *R (on the application of Stott) v Secretary of State for Justice.*[23] Lady Black reiterated in the judgment of *Stott* that the test for discrimination constitutes a 4-stage approach.[24] The test comprises

[15] *Shuter* (n 11); *Ali v Capita* and *Hextall* (n 11); *Price* (n 11).
[16] Hepple (n 1).
[17] ibid.
[18] ibid.
[19] Gemma Mitchell, 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (2019) 41 Journal of Social Welfare and Family Law 408.
[20] ibid.
[21] Hepple (n 1) 35-37.
[22] Shrey Atrey, *Intersectional Discrimination* (Oxford University Press 2019) 143; Kristina Koldinská, 'EU Non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma Women in Central and Eastern Europe' in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Routledge 2016) 256.
[23] *R (on the application of Stott) v Secretary of State for Justice* [2018] UKSC 59 (hereafter *Stott*).
[24] Faith Gordon, 'Pre-Charge Identification of a Minor and Article 14 of the ECHR: Judgment in the Matter of an Application by JKL (A Minor)' (2020) 71 Northern Ireland Legal Quarterly 533.

that: (i) the difference in treatment complained of must fall within the ambit of one of the rights contained in the Convention; (ii) the difference in treatment must be on one of the grounds of discrimination listed under art.14 of the ECHR, or fall under the term "other status"; (iii) the claimant and the person who has been treated differently must be in an analogous situation; and (iv) there is a lack of objective justification behind the difference in treatment.[25] However, the Court in *Stott* noted that the third and fourth components are difficult to address separately, as both categories overlap to some extent.[26] The frequency at which the Court solely comments upon the test for justification in cases, rather than first addressing whether a claimant is in an analogous situation to another individual, is not uncommon.[27] The continued focus by the Court upon the fourth component shows that much of their analysis regarding the test for discrimination is centred upon the test for justification. Solely focusing upon the test for justification glosses over what might be the harm of inequality and could lead to much legal uncertainty concerning what is the necessary test to satisfy the other 3 components. In particular, the test to determine whether a ground of discrimination falls under the term "other status" has not potentially been given adequate attention by the court system.

The ECHR is characteristically vague in nature, difficult to interpret and is inconsistently applied throughout case law.[28] Greer details that '[a] number of studies by jurists, lawyers, judges, and Strasbourg officials have attempted to describe the complex contours created in the Convention.'[29] Greer argues that the Convention can be difficult to interpret as 'no simple formula can describe how it works.'[30] Moreover, despite there being a wide breadth of jurisprudence, Greer maintains that 'its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature.'[31] However, the unpredictable disposition is evidenced through the interpretation by the European Court of Human Rights (ECtHR) of the term "other status" under art.14 of the ECHR. The Court has encountered extensive legal uncertainty and inconsistency in being able to establish broadly what the legal test is for a ground of discrimination to be accepted under the term "other status" from case to case.[32]

In an effort to determine what would need to be proven in order for "paternity" to be accepted as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998, Chapter 6 will be divided into the following sections. In recognition of the fact that a legislative amendment is necessary to include a new protected characteristic under s.4 of the EA 2010, Section II of Chapter 6 will detail what the legal process to make a legislative amendment entails. Section II will also discuss the difficulty of being able to make

[25] *Stott* (n 23) [8].
[26] ibid.
[27] ibid.
[28] *Stott* (n 23) [8]; Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing 2000) 5.
[29] Greer (n 28).
[30] ibid.
[31] ibid.
[32] Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 103, 122; *Engel and Others v The Netherlands* [1976] ECHR 3 (hereafter *Engel*); *Clift v The United Kingdom* [2010] ECHR 1106 (hereafter *Clift*); *Carson and Others v The United Kingdom* [2010] ECHR 338 (hereafter *Carson*).

a legislative amendment to the EA 2010 and will discuss the previous successful and failed attempts made to amend the Act. Section III of Chapter 6 will examine the jurisprudence relating to the interpretation by the Supreme Court of the past inclusion of grounds of discrimination that have fallen within the term "other status" under art.14 of the HRA 1998. Additionally, Section III will analyse the jurisprudence regarding the interpretation by the ECtHR of the previous inclusion of grounds that have fallen within the term "other status" under art.14 of the ECHR. The Supreme Court relies upon Strasbourg jurisprudence as a guide to interpret the ECHR.[33] Moreover, s.2(1)(a) of the HRA 1998 stipulates that the courts in the UK must take into account any judgments, decisions, declarations or advisory opinions made by the ECtHR. The investigation of the ECtHR jurisprudence is important in recognising how the Supreme Court has interpreted previous grounds within the term "other status" under art.14 of the HRA 1998. The analysis of the surrounding jurisprudence will help to establish the recurring legal concepts and underlying themes that the Supreme Court has deemed necessary to show in order for a new ground to be recognised under the open list of grounds contained under art.14 of the HRA 1998.

Lastly, Section IV will provide a conclusion regarding the acceptance of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Section IV will conclude that more difficulty may be encountered in introducing a legislative amendment to s.4 of the EA 2010 to include "paternity" as an additional protected characteristic. Conversely, Section IV will surmise that "paternity" as a ground of discrimination may be easier to satisfy the legal test to become accepted within the term "other status" under art.14 of the HRA 1998.

II. INCLUDING A NEW PROTECTED CHARACTERISTIC UNDER S.4 OF THE EA 2010

Sargeant describes s.4 of the EA 2010 as containing a closed list of grounds which are referred to as "protected characteristics."[34] Feast and Hand similarly describe the provision as a clear list of protected characteristics,[35] which encompasses the following 9 characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race, religion or belief; sex; and sexual orientation.[36] Due to the nature of s.4 of the EA 2010 containing a closed list of grounds, Sargeant recognises that the provision provides limited legal protection for individuals.[37] The EA 2010 does not provide legal protection for individuals who experience discrimination outside of the 9 protected characteristics currently listed under the Act. Moreover, intersectional discrimination is not recognised under the EA

[33] Joanna Radbord, 'Equality and the Law of Custody and Access' (2004) 6 Journal of the Association for Research on Mothering 67; Roger Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the UK Human Rights Act* (Cambridge University Press 2007) 59.
[34] Sargeant (n 8).
[35] Pat Feast and James Hand, 'Enigmas of the Equality Act 2010 - "Three Uneasy Pieces"' (2015) 1 Cogent Social Sciences 2.
[36] EA 2010, s.4.
[37] Sargeant (n 8).

2010,[38] which prevents the recognition of the intersectional discrimination that fathers experience from their sex and parenting status intersecting.[39] Although a closed list of grounds can address claims of intersectional discrimination, the prohibition of dual discrimination under s.14 of the EA 2010 has yet to be implemented.[40] The Act currently only allows claimants to rely upon 1 listed protected characteristic.[41] The lack of provisions under the EA 2010 to address claims for intersectional discrimination prevents the court system from understanding the complexities of paternity discrimination. As discussed in Chapter 4, "sex" as a protected characteristic is insufficient for fathers to solely rely upon because fathers experience discrimination due to the intersection between their sex and parenting status. If s.4 of the EA 2010 offers legal protection to only those experiencing discrimination on the basis of 1 protected characteristic, rather than multiple protected characteristics, the protection that the provision offers is limited and cannot be adequately relied upon by fathers.

Dhanda and others assert that a closed list of grounds inevitably leads to demands for the list of protected characteristics to be expanded, or for the existing protected characteristics to be interpreted to include types of discrimination which are not explicitly covered.[42] However, only 1 notable legislative amendment has been made to the EA 2010 in recent years.[43] Under s.9(5)(a) of the EA 2010, caste discrimination was included as an aspect of racial discrimination.[44] Most bills proposing for a number of legislative amendments to be made to the EA 2010 have failed to be enacted. In order to depict what is necessary for a successful bill to make a legislative amendment, the following section will be divided into 2 separate subsections: 1. Successful Legislative Amendments made to the EA 2010; and 2. Failed Attempts to Legislatively Amend the EA 2010. The investigation of successful and unsuccessful bills will be undertaken in order to illustrate that past legislative amendments made to the EA 2010, such as the inclusion of caste discrimination, was an exceptional case of political mobilisation. Section II will aim to demonstrate how a bill to add "paternity" as a protected characteristic under s.4 of the EA 2010 will only be successful if the bill is also supported by immense political mobilisation.

1. SUCCESSFUL LEGISLATIVE AMENDMENTS MADE TO THE EA 2010

In order for a new protected characteristic to be recognised under s.4 of the EA 2010, a legislative amendment would have to be made to the provision. UK constitutional laws and

[38] Shahin (n 12).
[39] *Shuter* (n 11); *Ali v Capita* and *Hextall* (n 11); *Price* (n 11).
[40] Shahin (n 12).
[41] EA 2010, ss.13, 19.
[42] Meena Dhanda and others, *Caste in Britain: Socio-legal Review* (Equality and Human Rights Commission 2014) 12.
[43] Annapurna Waughray, 'Capturing Caste in Law: Caste Discrimination and the Equality Act 2010' (2014) 14 Human Rights Law Review 360-361.
[44] ibid.

rules can be amended by Parliament using ordinary legislative procedures.[45] Typically, the proposal to amend existing legislation is introduced through the creation of a bill.[46] The bill would later be presented for debate before Parliament to be accepted.[47] Bills are first introduced to either the House of Commons or the House of Lords, wherein both Houses have to provide their support and agreement to the proposal of the legislative amendment contained within the bill.[48]

As stated in the introduction of Section II, the only notable bill that has been successful in amending the EA 2010 is the Enterprise and Regulatory Reform Bill (ERR Bill).[49] The contents of the ERR Bill stipulated that s.97 of the Enterprise and Regulatory Reform Act 2013 requires the UK Government to enforce a legal prohibition of caste discrimination.[50] The bill proposed the prohibition of caste discrimination to be introduced as an aspect of racial discrimination under s.4 of the EA 2010. The reasoning behind why a legislative amendment was introduced to prohibit caste discrimination was because, as Waughray describes, 'caste is a source of social exclusion, inequality, marginalisation, and discrimination.'[51] Castes are social groups that individuals belong to based on the family that they were born in.[52] Waughray outlines that the caste that an individual belongs to is intrinsic to their social identity, as each caste 'entails the idea of innate characteristics and hierarchically graded distinctions based on notions of purity and pollution, with some social groups considered to be ritually pure, and others ritually impure.'[53] Caste distinctions can be found amongst South Asian communities and have been historically perpetuated against those who particularly identify as Dalits because they take the lowest position under the hierarchical structure.[54]

Some members in the House of Commons agreed that there was a need to introduce equality legislation which offered legal protection to those who experienced caste discrimination.[55] Members of the House of Commons showed support because 'caste has absolutely no place in our society, and that if there is even one case of such discrimination, proper action must be taken and there must be proper access to redress.'[56] In addition, the House of Commons highlighted that legislation should not be enforced in a manner in which caste identifiers are entrenched into day-to-day employment or other services, as the aim was to reduce the number of individuals who currently identify themselves by caste.[57] The House of Lords shared a similar sentiment wherein they affirmed that '[t]he Government have always said

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[45] Political and Constitutional Reform Committee, *Consultation on A New Magna Carta?* (HC 2014-15, 599) 24.
[46] Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press 2017) 1.
[47] ibid.
[48] ibid 14.
[49] Enterprise and Regulatory Reform HC Bill (2012-13) 163 (ERR Bill).
[50] Meena Dhanda, 'Anti-Castism and Misplaced Nativism' (2015) 192 Radical Philosophy 33.
[51] Waughray (n 43) 362.
[52] ibid.
[53] ibid.
[54] ibid 363.
[55] HC Deb 23 April 2013, vol 561, col 791.
[56] ibid.
[57] ibid col 792.

that…[they] are against any form of caste prejudice or discrimination… [and] [w]hat has been at issue is how best to tackle any such prejudice and discrimination that may occur.'[58] The ERR Bill was rejected twice by the House of Commons and voted in favour of twice by the House of Lords.[59] Due to the pressure of losing the Bill if both Houses could not reach an agreement, the Government in April 2013 proposed their own legislative amendment to be made to s.9(5)(a) of the EA 2010 to include caste discrimination as an aspect of racial discrimination.[60]

Although caste discrimination is a social phenomenon that only affects a relatively small proportion of the general public in Britain, Shah notes that the addition of caste discrimination to the EA 2010 could be attributed as part of the political campaign to internationalise the cause of Dalit activism.[61] The aim of such activism was to ensure that at least another country outside of India would be able to acknowledge, and offer redress to, many Indians and people of South Asian descent that experience caste discrimination.[62] Kumar further explains that Dalit activism has entered the ambit of various international human rights forums to bring the issue of caste discrimination to the forefront within Europe.[63] For example, in the 2001 World Conference against Racism, there was an attempt to legislate caste and race together under the framework of international law.[64] The inclusion of the legal prohibition of caste discrimination as an aspect of racial discrimination under the EA 2010 was a case of political mobilisation. Due to the level of activism surrounding caste discrimination, there was much legal discussion and influence from an international perspective that helped politicise the need for the legal prohibition of caste discrimination to be included under the EA 2010.

In light of the legislative amendment made to the EA 2010, if a bill was to be successful in amending the provision so that "paternity" would be included as a protected characteristic, immense political mobilisation must be shown. With regards to the activism surrounding the strengthening of the position of fathers in childcare, the fathers' rights movement has continued to grow since their initial emergence in the 1970s.[65] The aim of the movement has been to campaign against the unequal treatment and bias which fathers experience from the application of the law in family courts.[66] Fathers' rights activists believe that fathers are socially marginalised in matters relating to childcare because only mothers have been historically recognised as caregivers.[67] Similarly, the strengthening of paternity rights has

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[58] HL Deb 24 April 2013, vol 744, col 1474.
[59] Waughray (n 43).
[60] ibid 361.
[61] Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010* (Palgrave Macmillan 2015) 25.
[62] ibid.
[63] Shailendra Kumar, 'Impact of Dr Ambedkar's Philosophy on International Activism of the Dalit Diaspora' (2021) 71 Sociological Bulletin 128.
[64] Shah (n 61) 12.
[65] Thomas Keith, *Masculinities in Contemporary American Culture: An Intersectional Approach to the Complexities and Challenges of Male Identity* (Taylor & Francis 2017) 102; Ana Ottman and Rebekah Lee, 'Fathers' Rights Movement' in Claire Renzetti and Jeffrey Edleson (eds) *Encyclopaedia of Interpersonal Violence*, vol 1 (SAGE Publications 2008) 252.
[66] Ottman and Lee (n 65).
[67] ibid.

been recognised from an international perspective.[68] For example, as discussed in Section II of Chapter 5, Sweden has notably introduced stronger leave entitlements for fathers to encourage their active participation in childcare.[69] On the other hand, fathers' rights groups have been heavily critiqued for aiming to entrench the patriarchy, undoing the advancements of women's rights and that the overall bias against fathers does not exist.[70] As identified in Section II of Chapter 2, leave policies in the UK continue to primarily focus upon the role of mothers. For example, the purpose of paternity leave serves to achieve the dual goals of increasing the participation of fathers in childcare so that mothers are further supported in their reintegration into the workplace.[71] However, the inclusion of men in childcare should be the primary objective of paternity leave in order to emphasise the importance of fathers in caring roles. The current lack of understanding surrounding paternity discrimination indicates that there is not as much support for a legislative amendment to be made to include "paternity" as a protected characteristic under s.4 of the EA 2010 as there was to include caste discrimination as an aspect of racial discrimination. Nonetheless, a degree of grassroots and international activism could be important in influencing Britain to acknowledge that "paternity" must be included as a protected characteristic under s.4 of the EA 2010.

2. FAILED ATTEMPTS TO LEGISLATIVELY AMEND THE EA 2010

Most bills that have proposed for a number of legislative amendments to be made to the EA 2010 have failed to be implemented. Examples of the failed attempts are important to discuss in order to illustrate how difficult and narrow the scope is for a bill to be successful in amending parts of the EA 2010. In light of the lack of success of many bills, the introduction of a potential bill which proposes a legislative amendment to be made to include "paternity" as a protected characteristic under s.4 of the EA 2010 may be unsuccessful. In order to show the problems that may be encountered in attempting to successfully amend the EA 2010, this subsection aims to exemplify the narrow scope of success bills have had in the past in being able to introduce a legislative amendment.

A primary example of the failed attempts for bills to generally amend the EA 2010 is the Equality Act 2010 (Amendment) (Disabled Access) Bill (Disabled Access Bill), which was a private member's Bill that was introduced by Lord Blencathra.[72] The Bill aimed to amend s.20 of the EA 2010 in order to improve access for wheelchair users to enter into public buildings.[73] The legislative amendment would have allowed buildings to be accessed by a

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[68] Margaret O'Brien, Berit Brandth and Elin Kvande, 'Fathers, Work and Family Life: Global Perspectives and New Insights' (2007) 10 Community, Work & Family 375.
[69] Anders Chronholm, 'Sweden: Individualisation or Free Choice in Parental Leave?' in Sheila Kamerman and Peter Moss (eds), *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Policy Press 2011) 238; Social Insurance Code 2010, ch.12, ss.12, 35.
[70] Ottman and Lee (n 65).
[71] Women and Equalities Committee, *Fathers and the Workplace* (HC 2017-19, 358) paras 7-8.
[72] Equality Act 2010 (Amendment) (Disabled Access) HL Bill (2017-19) 9 (hereafter Disabled Access Bill).
[73] Nicola Newson, 'Library Briefing: Equality Act 2010 (Amendment) (Disabled Access) Bill [HL] HL Bill 9 of 2017–19' < https://researchbriefings.files.parliament.uk/documents/LLN-2017-0081/LLN-2017-0081.pdf> accessed 19 August 2022 1.

single step and would have placed an obligation to replace steps with a suitable ramp for wheelchair users.[74] The Disabled Access Bill was entered in for debate in every Parliamentary session from Session 2013-14 to Session 2017-19.[75] The Bill managed to make it to the Second Reading in the House of Lords in Session 2014-15 and Session 2017-19, but had failed to make further progress both times.[76] Lord Blencartha in the Second Reading of the Bill in the House of Lords in Session 2014-15 stated that he believed that the reasoning behind the failure of the Bill was that 'disability is very low down the agenda of the Equalities Office… [as] [o]f the hundreds of announcements made by the office over the whole of 2013-14,… [Lord Blencartha] could find only two related to disability.'[77] Moreover, during the Second Reading in the House of Lords in Session 2017-19, Parliament seemed to be of the view that the current wording of s.20 of the EA 2010 has been intentionally created to gain flexibility in the interpretation and application of the provision.[78] The failure of the Bill demonstrates the limited scope of success many bills have had in attempting to make a legislative amendment to the EA 2010, as further attempts to alter the law to promote disability access under the Bill failed. The failure of the Bill depicts how a potential bill proposing the addition of "paternity" as a protected characteristic under s.4 of the EA 2010 may also fail if there is insufficient political mobilisation to support the legislative amendment.

A second notable example of failed attempts for bills to amend the EA 2010 is the Arbitration and Mediation Services (Equality) Bill (Arbitration and Mediation Bill), which was a private member's bill that was initially introduced by Baroness Cox in 2011.[79] The Bill sought to amend the EA 2010, the Arbitration Act 1996 and the Family Law Act 1996.[80] Baroness Cox explains that the purpose of the Bill was to address 2 interrelated issues which were, first, the arguably discriminatory procedures that Sharia councils adopt which unfairly affect married Muslim women and, secondly, the overall supposed misuse of the Arbitration Act 1996 by Sharia councils.[81] Baroness Cox believed that Sharia councils misused the Arbitration Act 1996 by enforcing discriminatory procedures at the expense of women.[82] Examples included resolving inheritance disputes on the principle that women only deserved half of the inheritance a man could receive and the coercion of Muslim women into agreeing to arbitration when the agreement should be voluntarily made.[83] Thompson and Sandberg note

[74] ibid.
[75] Equality Act 2010 (Amendment) HL Bill (2013-14) 28; Equality Act 2010 (Amendment) HL Bill (2014-15) 11; Equality Act 2010 (Amendment) HL Bill (2015-16) 47; Disabled Access Bill (n 72).
[76] HL Deb 21 November 2014, vol 757, cols 661-664; HL Deb 24 November 2017, vol 787, cols 426-429.
[77] HL Deb 21 November 2014, vol 757, col 654.
[78] HL Deb 24 November 2017, vol 787, col 426.
[79] Amin Al-Astewani, 'Reflections on the Rise and Fall of the Arbitration and Mediation Services (Equality) Bill' (2017) Public Law 544; Arbitration and Mediation Services (Equality) HL Bill (2016-17) 18 (hereafter Arbitration and Mediation Bill).
[80] Charley Coleman, 'Library in Focus: Arbitration And Mediation Services (Equality) Bill [HL] (HL Bill 18 of 2016–17)' <https://researchbriefings.files.parliament.uk/documents/LIF-2017-0003/LIF-2017-0003.pdf> accessed 19 August 2022 1.
[81] Al-Astewani (n 79) 545-546; Arbitration and Mediation Bill (n 79); HL Deb 19 October 2012, vol 739, cols 1683-1686.
[82] Caroline Cox, 'A Parallel World: Confronting the Abuse of Many Muslim Women in Britain Today' (The Bow Group 2015) 6.
[83] Cox (n 82) 6, 8; Al-Astewani (n 79) 545-546.

that this Bill has throughout the years been repeatedly reintroduced, but with slight amendments made to it.[84] The Bill was entered in for debate in every Parliamentary session from Session 2010-12 to Session 2016-17.[85] The Bill managed to make particular progress when it reached the Second Reading in the House of Lords in Session 2012-13 and Session 2016-17.[86] However, the Bill failed to progress further both times because the essential implementation of the contents of the Bill were questionable in light of the fact that the House of Lords argued that there was legislation that already provided the necessary legal safeguards.[87] Additionally, the Bill would have a minimal effect upon religiously based dispute resolution, as the UK does not legally recognise Sharia councils as part of the court system and only a small number of Sharia councils carry out arbitration within extremely limited circumstances.[88]

Similar to the reasoning behind why the Disabled Access Bill failed, a key reason as to the failure of the Arbitration and Mediation Bill was seemingly due to the proposal made by the Bill to restrict the flexible interpretation of the Arbitration Act 1996 that was intentionally created by Parliament. The failure of the Bill again underlines the limited scope of success many previous bills have had in attempting to introduce a legislative amendment to the EA 2010, as the Arbitration and Mediation Bill debatably does not seem to have had widespread political support. Unlike the ERR Bill, which was introduced by the Department for Business Innovation and Skills,[89] the Arbitration and Mediation Bill was initially introduced as a private member's bill.[90] Al-Astewani discusses that the failure of private members' bills could be attributed to 'bureaucratic hurdles.'[91] Bills are typically more successful if they have been introduced and promoted by Government itself. However, a private member's bill usually concerns sensitive topics that are of specific interest to those promoting the bill.[92] The reality is that a small minority of private members' bills are successful because they are allocated a very limited amount of time in the parliamentary timetable.[93] Similar to the comment made by Lord Blencartha that disability rights were not at the top of the Government's agenda,[94] the lack of interest by the Government to enact the Arbitration and Mediation Bill shows that the scope of that Bill may also be unimportant according to the concerns shared by the Government. The success of a bill is highly dependent upon whether there has been sufficient political mobilisation and support surrounding the proposal of the bill for a legislative

[84] Sharon Thompson and Russell Sandberg, 'Common Defects of the Divorce Bill and Arbitration and Mediation Services (Equality) Bill 2016-17' (2017) 47 Family Law 3.
[85] Arbitration and Mediation Services (Equality) HL Bill (2010-12) 72; Arbitration and Mediation Services (Equality) HL Bill (2012-13) 7; Arbitration and Mediation Services (Equality) HL Bill (2013-14) 20; Arbitration and Mediation Services (Equality) HL Bill (2014-15) 21; Arbitration and Mediation Services (Equality) HL Bill (2015-16) 136; Arbitration and Mediation Bill (n 79).
[86] HL Deb 19 October 2012, vol 739; HL Deb 27 January 2017, vol 778.
[87] HL Deb 19 October 2012, vol 739, cols 1706-1707; HL Deb 27 January 2017, vol 778, col 920.
[88] HL Deb 27 January 2017, vol 778, cols 919-920.
[89] ERR Bill (n 49).
[90] Christoph Van der Elst, 'Answering the Say for No Pay' in Susan Watson, P. M. Vasudev (eds) *Innovations in Corporate Governance: Global Perspectives* (Edward Elgar Publishing 2017) 155; Al-Astewani (n 79).
[91] Al-Astewani (n 79).
[92] ibid.
[93] ibid.
[94] HL Deb 21 November 2014, vol 757, col 654.

amendment. If a potential bill proposing the inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 is not politically supported and is not introduced by the Government, the bill is highly unlikely to be successful. For example, the Fatherhood Institute has campaigned that the discrimination which fathers experience should be included under the definition of sex discrimination under s.4 of the EA 2010.[95] Similarly, Barnardo's has campaigned that "paternity" should be included as a protected characteristic under s.4 of the EA 2010.[96] However, combating paternity discrimination through the inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 has yet to be at the top of the Government's agenda.

III. INCLUDING A NEW GROUND OF DISCRIMINATION UNDER ART.14 OF THE HRA 1998

Having argued that the introduction of a successful legislative amendment to s.4 of the EA 2010 to include "paternity" as a protected characteristic would be relatively difficult, I will now consider the necessary procedure to include "paternity" as a ground of discrimination under art.14 of the HRA 1998. Although contemporary anti-discrimination law is required to provide legal clarity upon complex social issues, the courts struggle to interpret the open-ended nature of some equality law provisions.[97] There has been no substantive normative consensus on how to apply open-ended equality legislation.[98] An example of the legal uncertainty associated with open-ended equality legislation is seen with the interpretation of the term "other status," listed amongst the grounds contained under art.14 of the HRA 1998. The legal uncertainty as to how to interpret art.14 of the HRA 1998 was further noted in the case of *R (on the application of DA and others) v Secretary of State for Work and Pensions* and *R (on the application of DS and others) v Secretary of State for Work and Pensions.*[99] The Court stated in their judgment that 'the boundaries of "other status" in article 14, [is] a subject on which there is… little clarity.'[100] In light of art.14 of the HRA 1998 being the incorporation of art.14 of the ECHR into UK law,[101] Gerards explains that the recent case law surrounding the interpretation of art.14 of the ECHR 'discloses that… clarity [,] consistency and transparency is currently lacking.'[102] Gerards highlights that the lack of legal certainty reflects an uncertainty over the theoretical principles that underpin art.14 of the ECHR.[103]

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[95] Adrienne Burgess and Jeremy Davies, 'Cash or Carry?' (Fatherhood Institute 2017) 48.
[96] Women and Equalities Committee (n 71) para 114.
[97] Colm O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 International Journal of Discrimination and the Law 21.
[98] ibid.
[99] *R (on the application of DA and others) v Secretary of State for Work and Pensions* and *R (on the application of DS and others) v Secretary of State for Work and Pensions* [2019] UKSC 21 (hereafter *R (DA and others) v SSWP*).
[100] ibid [126].
[101] Kitterman (n 5).
[102] Gerards (n 32) 103.
[103] ibid.

With regards to the interpretation of new grounds of discrimination within the term "other status" under art.14 of the ECHR by the ECtHR, Gerards states that 2 distinct categories of case law have been seen to emerge since the 1970s.[104] The first category involves the Court accepting nearly all differences in treatment as grounds of discrimination under art.14 of the ECHR.[105] The second category reveals the ECtHR accepting grounds of discrimination which are solely rooted within the personal status or the personal characteristics of an individual.[106] Árnadóttir notes that these terms have been interpreted differently by the ECtHR depending upon whether the grounds of discrimination in question are suspect grounds.[107] If the personal characteristic in question relates to a suspect ground, Árnadóttir states that the characteristic has been interpreted to mean the 'core choices that have a significant influence on a person's identity and existence.'[108] However, in relation to grounds that are not suspect, Árnadóttir contends that these personal characteristics could involve those that 'make a real difference in a person's life.'[109] Personal characteristics outside of suspect grounds could also 'have little or no connection with personal statuses and generally do not affect daily life or hinder participation in society on an equal footing with others.'[110]

O'Connell notes that there is a stricter test to establish discrimination on the basis of the suspect grounds of sex, sexual orientation, nationality, race, religion and potentially birth outside of marriage.[111] He adds that the Strasbourg court, for example, would have to uncover "very weighty reasons" to justify discrimination on these suspect grounds.[112] For instance, the Strasbourg court in the case of *JD and A v The United Kingdom* highlighted that, in relation to gender, 'very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.'[113] The need for very weighty reasons is because discrimination on the basis of a suspect ground is viewed to be particularly offensive, as the type of discrimination perpetuates high levels of social disadvantage. For example, the Court adopted a similar approach towards racial discrimination in the case of *Cyprus v Turkey* by asserting that 'special importance should be attached to discrimination based on race.'[114] Similarly, in the case of *Timishev v Russia*, the Court reiterated that '[r]acial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.'[115]

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[104] ibid 122.
[105] ibid 122.
[106] ibid 122.
[107] Oddný Árnadóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (2014) 14 Human Rights Law Review 654-655.
[108] ibid 655.
[109] ibid 655.
[110] ibid 655.
[111] Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 214.
[112] ibid.
[113] *JD and A v The United Kingdom* (2020) H.L.R. 5, para 89.
[114] *Cyprus v Turkey* (2002) 35 E.H.R.R. 30, para 306.
[115] *Timishev v Russia* (2007) 44 E.H.R.R. 37, para 56.

Árnadóttir also contends that certain grounds of discrimination are subject to stricter review because cases relating to discrimination on the basis of sex, race and sexual orientation, for instance, are the most common cases that are presented to the Court and for violations to be found under art.14 of the ECHR.[116] Conversely, claims of discrimination on other grounds tend to be presented to the Court less frequently and violations within case law are less common to find.[117] The reasoning behind why suspect grounds are subject to stricter review is due to the fact that the consequences of such discrimination are, from the perspective of the Strasbourg Court, quite severe and should be addressed in a serious manner.[118]

The different interpretation between grounds of discrimination that are suspect and not suspect under art.14 of the ECHR has arguably contributed towards a great deal of conceptual uncertainty. Árnadóttir notes that some grounds that are not suspect will be characteristics that have no tangible connection to a personal status.[119] Gerards recognises that the Court in the case of *Carson* attempted to reconcile both categories of case law, but the reconciliation created further legal uncertainty, inconsistency and confusion.[120] The Court explained in *Carson* that the term "other status" has been given a wide meaning so that differential treatment on the basis of a personal characteristic, such as place of residence, can be accepted.[121] Yet, the explanation has only further added to the conceptual uncertainty pertaining to the interpretation of the term "other status" under art.14 of the ECHR, as the Court stated in *Clift* that the grounds interpreted within the meaning of the term "other status" can be personal characteristics that are and are not innate and inherent.[122]

The flexible interpretation of the term "other status" under art.14 of the ECHR by the ECtHR is similarly adopted by the UK Supreme Court in relation to the term "other status" under art.14 of the HRA 1998. O'Connell recognises that the Court similarly adopted a broad interpretation of the necessary criteria to satisfy for a ground of discrimination to be accepted within the meaning of the term "other status."[123] The Supreme Court jurisprudence demonstrates that discrimination on the basis of a personal characteristic can be accepted as a ground under the term "other status." However, there is minimal jurisprudential clarity over the necessary criteria to satisfy for a ground to be accepted under the term "other status," as a general overview of the recent key discrimination cases displays a subtle variation from one another as to what the criteria should be.[124]

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[116] Oddný Árnadóttir, 'Cross-Fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights – The Case of the Discrimination Grounds under Article 14 ECHR' (2015) 33 Nordic Journal of Human Rights 228.
[117] ibid.
[118] ibid 227-228.
[119] ibid 226.
[120] Gerards (n 32) 122.
[121] *Carson* (n 32) para 70.
[122] *Clift* (n 32) para 59.
[123] O'Connell (n 111) 223-224.
[124] *R (on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 (hereafter *R (RJM) v SSWP*); *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 (hereafter *Mathieson*); *Stott* (n 23); *R (DA and others) v SSWP* (n 99).

In order to gain a stronger understanding of how the term "other status" is interpreted under art.14 of the HRA 1998 by the Supreme Court, Section III will first examine the relevant jurisprudence associated with the interpretation adopted by the ECtHR of the term "other status" under art.14 of the ECHR and, secondly, the interpretation by the Supreme Court. The ECtHR jurisprudence will be explored, as the HRA 1998 is the domestic incorporation of the ECHR and the UK courts rely upon Strasbourg jurisprudence as a guide to interpret the ECHR.[125] The analysis of ECtHR jurisprudence is important in identifying how the Supreme Court has interpreted previous grounds of discrimination within the meaning of the term "other status" under art.14 of the HRA 1998. Section III will be divided into the following sub-sections: 1. Interpretation of the Term "Other Status" by the ECtHR; and 2. Interpretation of the Term "Other Status" by the UK Supreme Court.

1. INTERPRETATION OF THE TERM "OTHER STATUS" BY THE ECTHR

The Council of Europe declared that the ECtHR has 'developed a rich body of case-law which has expanded the number of protected grounds by interpreting the expression "other status" in an extensive way and in light of present-day conditions.'[126] The Council of Europe has cited that cases such as *Engel, Carson* and *Clift* are all prominent examples of the term "other status" under art.14 of the ECHR being interpreted to include a new ground of discrimination that is not already currently listed.[127] For example, "military rank" in *Engel*,[128] "residence" in *Carson*[129] and "status" as an individual who has been sentenced to be imprisoned for a term of at least 15 years in *Clift*[130] were grounds that were accepted within the meaning of the term "other status" under art.14 of the ECHR. The following subsection will explore these judgments in order to determine the necessary criteria to satisfy for a new ground to be accepted under the term "other status."

The first example of a ground of discrimination being interpreted within the term "other status" under art.14 of the ECHR is the case of *Engel* in 1976. The case concerned a number of applicants who were conscripted soldiers serving in different ranks of the armed forces in the Netherlands.[131] On various occasions, a number of penalties had been given to these applicants by each of their respective commanding officers for offences against military discipline.[132] The applicants argued that the penalties that had been imposed upon them had

[125] Joanna Radbord, 'Equality and the Law of Custody and Access' (2004) 6 Journal of the Association for Research on Mothering 67; Roger Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the 'Convention Rights' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning Under the UK Human Rights Act* (Cambridge University Press 2007) 59; HRA 1998, s.2(1)(a).
[126] European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (Council of Europe 2020) para 89.
[127] European Court of Human Rights (n 126).
[128] *Engel* (n 32) para 72.
[129] *Carson* (n 32) para 66.
[130] ibid paras 50-54.
[131] *Engel* (n 32) para 12.
[132] ibid para 12.

violated their right to liberty and security contained under art.5 of the ECHR.[133] In addition, the proceedings held by the military authorities and the Supreme Military Court about the penalties imposed upon the applicants and the discriminatory manner the applicants believed to have been treated was argued to have violated the right to a fair trial under art.6 and the right to non-discrimination under art.14 of the ECHR.[134] The Court accepted that '[a] distinction based on rank may run counter to Article 14'[135] and that the term "other status" was sufficiently broad enough to include rank.[136] However, the Court found the unequal treatment justifiable and held that there was no breach.[137]

To begin with, the Court considered the issue of whether a breach of arts.5 and 14 of the ECHR together could be found in relation to the facts of the case. The distinction in treatment between different servicemen was complained about by 3 of the claimants.[138] The Court stipulated that 'provisional arrest imposed in the form of strict arrest was served by officers in their dwellings, tent or quarters whereas non-commissioned officers and ordinary servicemen were locked in a cell… [and,] [a]s for committal to a disciplinary unit, privates alone risked this punishment.'[139] The Court determined that the term "other status" was sufficiently broad that a distinction based on military rank could be a recognised ground under art.14 of the ECHR.[140] The reasoning adopted by the Court in accepting military rank as a ground within the meaning of the term "other status" was because 'a distinction that concerns the manner of execution of a penalty or measure occasioning deprivation of liberty does not on that account fall outside the ambit of Article 14 …, for such a distinction cannot but have repercussions upon the way in which the "enjoyment" of the right enshrined in Article 5 para. 1… is "secured".'[141] However, the Court found that there was no breach, as the unequal treatment was justifiable because the distinctions in military rank served a legitimate aim.[142] The preservation of different disciplinary methods tailored to each rank of servicemen was necessary, as the legal regime enforced discipline amongst each rank of servicemen. [143] The Court concluded that the conditions and demands associated with military life were different to that associated with civilian life.[144] Therefore, the penalties that were imposed upon the applicants in relation to their military rank satisfied the principle of proportionality.[145]

Despite the Court being unable to apply a distinction based upon military rank as a ground of discrimination in relation to the facts of *Engel*, the Court did generally assert that military rank could be viewed as a separate ground of discrimination under the open list of grounds contained under art.14 of the ECHR. Machetti explains that military rank would fall within

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[133] ibid para 52.
[134] ibid para 52.
[135] ibid para 72.
[136] ibid para 72.
[137] ibid paras 74, 91-92.
[138] ibid para 72.
[139] ibid para 72.
[140] ibid para 72.
[141] ibid para 72.
[142] ibid paras 72, 74.
[143] ibid para 72.
[144] ibid para 73.
[145] ibid para 72.

the ambit of the term “other status” under art.14 of the ECHR, as the Court interpreted the term to entail the prohibition of ‘discriminatory treatment based on personal characteristics that individuals or groups of individuals use to make distinctions between themselves.’[146] Gerards outlines that the judgment in *Engel* confirmed that ‘each difference in treatment can be brought before the Court, as long as it relates to the exercise of one of the Convention rights.’[147] The Court stated in *Engel* that the explanation behind why no violation could be established under art.14 of the ECHR was because the penalties and measures imposed supposedly did not involve any deprivation of liberty under art.5 of the ECHR and, therefore, did not amount to a violation.[148] The ECtHR seemingly believes that, for a ground of discrimination to be accepted within the meaning of the term “other status” under art.14 of the ECHR, the ground has to be broadly perceived as relating to a personal characteristic. However, the Court seems to shift their focus from determining whether a ground of discrimination can be interpreted under the term “other status” to placing more emphasis upon the test for justification to establish whether there has been differential treatment that could amount to discrimination.

In order for “paternity” as a ground of discrimination to gain recognition within the meaning of the term “other status” under art.14 of the ECHR, the judgment in *Engel* seemingly demonstrates that the ground would have to be viewed by the Court as a personal characteristic. “Paternity” could arguably be accepted as a personal characteristic under the term “other status,” as Tan recognises that fatherhood can transform and is closely related to personal identity.[149] Bornstein identifies parenthood as an opportunity for personal growth and perceives it as being defined by a series of parenting functions.[150] The first set concerns nurturant functions wherein they have to care for the biological, physical and health requirements of their children.[151] The second set relates to the parental responsibility of the social development of their children and the third consists of demonstrating to children the various ways of learning about life and the world they live in.[152] The fourth set of parenting functions involves material functions wherein a parent becomes responsible for the provision of food, clothing, shelter, healthcare and education for their children.[153] Pratt, Lawford and Allen underline the particular transformation in the personal identities of men once they become fathers since they have reported becoming more giving, responsible and adopting a generative attitude (hoping to see their children do better than them) towards their children.[154] The discrimination which fathers experience obstructs the transformation which fathers

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[146] Encarna Carmona Cuenca, ‘The Prohibition on Discrimination: New Content (Art.14 ECHR and Protocol 12)’ in Pablo Santolaya Machetti and Javier García Roca (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Martinus Nijhoff 2012) 472-473.
[147] Gerards (n 32) 104.
[148] *Engel* (n 32) para 71.
[149] Allen Tan, 'Four Meanings of Fatherhood' (1994) 42 Philippine Sociological Review 32-33.
[150] Marc Bornstein, ‘Refocusing on Parenthood’ in Jack Westman (ed), *Parenthood in America: Undervalued, Underpaid, Under Siege* (University of Wisconsin Press 2001) 6-8.
[151] ibid 7.
[152] ibid 7.
[153] ibid 8.
[154] Michael Pratt, Heather Lawford and James Allen, ‘Young Fatherhood, Generativity, and Men’s Development: Travelling a Two-Way Street to Maturity’ in Jessica Ball and Kerry Daly (eds), *Father Involvement in Canada: Diversity, Renewal, and Transformation* (UBC Press 2012) 112.

experience in their personal identity as a parent and the personal relationship that they share with their children. In light of the transformation of the personal identity of men when they become fathers, "paternity" could be viewed as a personal characteristic and therein be interpreted as a ground of discrimination within the meaning of the term "other status" under art.14 of the ECHR. However, the case of *Engel* placed stronger focus upon the test for justification by the Court in order for a discrimination claim to be successful. In light of gender being regarded as a suspect ground,[155] "paternity" may also be viewed in a similar fashion because paternity discrimination is partly rooted in the gender stereotypes surrounding fathers and both grounds have an impact upon personal identity and the position that an individual occupies in society. Therefore, in order for the Court to establish a claim for paternity discrimination, it could be argued that States would also need to provide weighty reasons to justify treating fathers differently.

The need for grounds to be broadly perceived as a personal characteristic in order to be accepted within the meaning of the term "other status" was similarly adopted in the 2010 case of *Carson*. This case concerned 13 applicants that had complained that their right to protection of property under art.1 of Protocol No.1 to the ECHR and their right to non-discrimination under art.14 of the ECHR had been violated because the UK State pensions to which they were entitled to were not increased in line with current inflation rates by UK authorities.[156] All of the applicants in *Carson* had earned their pensions through working in the UK but, upon retirement, had emigrated to Canada, South Africa, or Australia.[157] With the exception of 1 applicant who remained an Australian national,[158] the remainder of the applicants were British nationals.[159] The Court determined that 'ordinary residence, like domicile and nationality, was to be seen as an aspect of personal status and that place of residence, applied as a criterion for… a ground falling within the scope of Article 14.'[160] Nevertheless, the Court found that the treatment of the claimants was justifiable and held there to be no breach.[161]

In relation to the criteria needed for a ground to be accepted under the term "other status", the case of *Carson* added further legal inconsistency between the domestic courts and the ECtHR. The approach adopted by the UK Government in *Carson* contradicted the approach that was undertaken in the case of *Engel.* With regards to when *Carson* was firstly addressed by the domestic courts, the UK Government put forth the argument that the ground of "foreign residence" would fall within the meaning of the term "other status" under art.14 of the ECHR.[162] Yet, the UK Government before the ECtHR asserted that place of residence could not be interpreted as a ground under the term "other status", 'since it was a matter of choice, rather than an inherent personal characteristic or deeply held conviction or belief.'[163]

[155] O'Connell (n 111); *JD and A v The United Kingdom* (n 113).
[156] *Carson* (n 32) para 3.
[157] ibid paras 10-24.
[158] ibid para 21.
[159] ibid paras 10-24.
[160] ibid para 66.
[161] ibid paras 85-90.
[162] ibid para 68.
[163] ibid para 68.

The argument made by the UK Government could be problematic in interpreting "paternity" as a ground of discrimination under the term "other status" because becoming a father may not be seen as a personal characteristic, but rather a personal choice to have children. However, the reasoning adopted by the UK Government fails to comprehend how the personal choice to become a father is constrained in some instances. For example, in the case of *Paton v United Kingdom*, a man cannot be involved in the decision-making process over whether a woman chooses to have an abortion.[164] Even so, the ECtHR upheld that residence was an aspect of personal status and could be accepted as a ground of discrimination under the term "other status."[165] The Court found that, in order to determine whether someone has been subject to discrimination under the scope of art.14 of the ECHR in past case law, there has to be evidence of 'differences in treatment based on a personal characteristic (or "status") by which persons or groups of persons are distinguishable from each other.'[166] The ECtHR in *Carson* seems to place particular emphasis upon the fact that a ground needs to be perceived as a personal characteristic in order to be accepted within the meaning of the term "other status." The Court has underlined in this judgment that personal characteristics can be widely interpreted, wherein residence could also be included as one.

Nonetheless, the claim for discrimination under art.14 of the ECHR failed in *Carson* because the Court felt that the claimants were not in an analogous position to British pensioners who remained in the UK.[167] Given that the social security and pension systems in the UK was chiefly designed to provide a minimum standard of living for those in the UK, the Court determined that the claimants were not similarly placed to British pensioners who continued to reside in the UK.[168] Therefore, the Court concluded that the National Insurance contributions which the applicants had made were not of huge significance.[169]

Despite the Court being unable to establish a similarity between individuals receiving a UK state pension residing in other countries and those residing in the UK, the Court did confirm that "residence" could be viewed as a separate ground of discrimination under the open list of grounds contained in art.14 of the ECHR. "Residence" as a ground of discrimination was seen to satisfy the legal test that the Court had outlined in *Carson* of the ground being viewed as a personal characteristic. However, Gerards notes the confusion that the Court created within the judgment of *Carson*. The Court had detailed that differential treatment on the basis of a personal characteristic would amount to discrimination, but also 'further [recalled] that the words "other status" … have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence.'[170] Gerards underlines that the statement made by the Court does not offer much clarity.[171] The Court in *Carson* has seemingly upheld that personal characteristics can be broadly interpreted and that there are no specific criteria as to the type of grounds which can be recognised. In light of the reasoning

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[164] *Paton v United Kingdom* (1981) 3 E.H.R.R. 408, para 27.
[165] *Carson* (n 32) para 66.
[166] ibid para 70.
[167] ibid para 85.
[168] ibid para 85.
[169] ibid para 85.
[170] ibid para 70.
[171] Gerards (n 32) 106.

adopted in *Carson*, fathers would need to provide evidence concerning how paternity discrimination has obstructed the developmental changes in their personal identity as a father and the personal relationship that they share with their children. In light of the judgment of *Carson,* there is a lot of flexibility in the interpretation of the term "personal characteristic," which potentially makes this level of evidence sufficient to establish "paternity" as a ground of discrimination within the meaning of the words "other status" under art.14 of the ECHR.

Following the decision made in the case of *Carson*, Árnadóttir noted that the UK Government again 'raised the defence that only inherent personal characteristics or deeply held convictions or beliefs could classify as 'other status'.'[172] Árnadóttir argues that this interpretation of the term "other status" held by the UK Government was particularly seen in the case of *Clift.*[173] The case involved Mr Clift, who had been sentenced to 18 years imprisonment for various serious crimes, which included attempted murder.[174] The Parole Board recommended that Mr Clift should be released once he had completed half of his sentence.[175] The Secretary of State would not be able to reject such a recommendation if he was serving a sentence that was less than 15 years or a life sentence.[176] However, due to the fact that Mr Clift received a sentence for 18 years, the Secretary of State had the power to reject the recommendation put forward by The Parole Board and did so.[177] Mr Clift alleged that the Secretary of State having the right to reject the recommendations made by the Parole Board was discriminatory and was contrary to his right to non-discrimination under art.14 of the ECHR and his right to liberty and security contained under art.5 of the ECHR.[178]

Mr Clift asserted that the discrimination that he had experienced was on the ground of his "status" as an individual who had been sentenced to be imprisoned for a term of at least 15 years.[179] Mr Clift argued that his "status" as an individual should be recognised as a separate category because the purpose of the ECHR was to 'maintain and promote the ideals and values of a democratic society.'[180] Mr Clift argued that, although his proposed "status" as an individual who had been sentenced to be imprisoned for a term of at least 15 years was not a personal characteristic, it could still be recognised as a separate ground of discrimination in light of previous ECtHR jurisprudence.[181] Mr Clift cited the example of the word "property" being accepted as a ground of discrimination and the Court's conclusion in *Chassagnou and Others v France* wherein the differential treatment between landowners with different sized property was accepted within the meaning of the term "other status" under art.14 of the ECHR.[182]

[172] Árnadóttir, 'Cross-Fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights the Case of the Discrimination Grounds under Article 14 ECHR' (n 116) 230.
[173] ibid.
[174] *Clift* (n 32) para 6.
[175] ibid para 7.
[176] ibid para 8.
[177] ibid para 8.
[178] ibid para 3.
[179] ibid paras 50-54.
[180] ibid para 50.
[181] ibid para 51.
[182] *Clift* (n 32) para 51; *Chassagnou and Others v France* [1999] ECHR 22, para 95 (hereafter *Chassagnou*).

Mr Clift asserted that the correct test for deciding whether a ground of discrimination could be recognised under the open list of grounds contained in art.14 of the ECHR was 'whether there was a distinct legal situation which was inextricably bound up with the individual's personal circumstances and existence.'[183] Mr Clift was regarded as 'a member of a group to whom a differential legal regime applied, which was a regime that controlled his release into society and his relationships with his family, which were clearly matters of personal circumstances and existence.'[184] Mr Clift further discussed how the length of his sentencing had significant consequences.[185] For instance, his sentencing affected his prison security categorisation and therein his ability to contact his family.[186] Therefore, Mr Clift had underlined that his "status" should be regarded as a separate ground of discrimination because '[h]is personal circumstances were affected by various aspects of the legal regime to which he was subjected by virtue of the length of his sentence.'[187]

The Court agreed with Mr Clift that a ground of discrimination did not necessarily have to be a personal characteristic to be accepted. Previous ECtHR case law had illustrated that "property" was also broadly recognised as a ground of discrimination.[188] The Court determined that the protection offered under art.14 of the ECHR 'is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent.'[189] They explained that inherent characteristics are those that are 'linked to the identity or the personality of the individual, such as sex, race and religion.'[190] The Court concluded that the "status" of an individual with a 15-year sentence could be recognised as a ground because Mr Clift '[did] not allege a difference of treatment based on the gravity of the offence he committed, but one based on his position as a prisoner serving a determinate sentence of more than fifteen years.'[191] Discrimination was ultimately established in *Clift*, as the Court found that the differential treatment could not be justified.[192] The Court observed that the imposition of a determinate, rather than an indeterminate, sentence posed a lower risk upon release.[193] The Court also highlighted that the early release scheme was greatly flawed, as there was a higher risk posed by life prisoners despite the scheme being less stringent on them in application.[194] The differential treatment was seen as an 'indefensible anomaly.'[195] The Court determined that there was no objective justification to only provide individuals serving long-term sentences less than 15 years and indeterminate sentences early release following a positive recommendation by the Parole Board.[196] The differential treatment failed

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[183] *Clift* (n 32) para 51.
[184] ibid.
[185] ibid para 53.
[186] ibid para 53.
[187] ibid para 54.
[188] *Clift* (n 32) para 56; *James and Others v The United Kingdom* [1986] ECHR 2, para 74.
[189] *Clift* (n 32) para 59.
[190] ibid para 56.
[191] ibid para 61.
[192] ibid para 75.
[193] ibid para 75.
[194] ibid para 75.
[195] ibid para 77.
[196] ibid para 78.

to satisfy the test for justification and the Court established a violation of arts.5 and 14 of the ECHR.[197]

The flexible interpretation by the Court of the term “other status,” which accepted grounds that related to personal characteristics that were not necessarily innate and inherent, could help “paternity” as a ground of discrimination be recognised. If fathers provided evidence demonstrating how paternity discrimination has obstructed the developmental changes in their personal identity as a father and the personal relationship that they share with their children, “paternity” could be regarded as a personal characteristic. Moreover, in light of the Court accepting that grounds that relate to personal circumstances and existence could also be accepted,[198] limiting the development of fathers’ relationships with their children could also be regarded by the court system to affect their personal circumstances and existence. Therefore, the flexible interpretation of the grounds that are accepted within the meaning of the term “other status” could be of benefit to fathers countering paternity discrimination.

The need for a ground of discrimination to relate to a personal connection in some fashion was heavily underlined by the Court in the judgment of *Clift.* The Court reiterated that art.14 of the ECHR ‘does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or “status”, by which persons or groups of persons are distinguishable from one another.’[199] Árnadóttir argues that this clear identification of “objective or personal characteristic” was based on an extensive analysis of the case law by the Court, which led them to declare that grounds did not have to be personal characteristics that were innate or inherent in nature in order to be accepted.[200] The Court noted that the adoption of a strict test that required only “inherent personal characteristics” to be accepted as grounds of discrimination under the term “other status” was inflexible.[201] A strict test would prevent grounds, such as “property,” from being recognised which would therein prevent certain claimants from being able to receive legal protection.[202] For example, in *Chassagnou* small landowners who were against hunting were made to transfer the hunting rights concerning their land for others to use.[203] The Court’s adoption of a flexible interpretation in *Chassagnou* found a violation of art.1 Protocol 1 and art.11, taken in conjunction with art.14 of the ECHR, which contained the rights to the protection of property, freedom of expression and non-discrimination respectively.[204] The Court also cited that the reasoning behind adopting a broader interpretation of the term “other status” is because art.14 of the ECHR aims to guarantee that the rights contained under the Convention are practical and effective, rather than theoretical and illusory.[205] The adoption of a stricter

[197] ibid para 79.
[198] ibid para 51.
[199] ibid para 55.
[200] Árnadóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' (n 107) 659.
[201] *Clift* (n 32) para 58.
[202] ibid para 56.
[203] *Chassagnou* (n 182) paras 16-17.
[204] ibid para 131.
[205] *Clift* (n 32) para 60.

approach hindered the effectiveness of the legal protection offered to claimants under art.14 of the ECHR.

Nonetheless, the broad interpretation of grounds that are accepted within the term "other status" under art.14 of the ECHR makes it relatively difficult to identify what types of grounds would be accepted under this provision. Gerards asserts that the flexible interpretation that the Court has adopted of the term "other status" has left the interpretation of art.14 of the ECHR in a confused state.[206] Additionally, the vague nature of the test for what types of grounds fall within the meaning of the term "other status" under art.14 of the ECHR generates confusion over whether "paternity" as a ground could satisfy the test to be accepted. Conversely, the conceptual uncertainty provides for flexibility in what types of grounds can be recognised under the term "other status." If the criteria for grounds to be recognised within the meaning of the term "other status" relates to whether the ground can be viewed as personal characteristics that are inherent and innate and those that are not, the test is very loosely applied. "Paternity" could be potentially accepted under this test, as the ground of discrimination satisfies the necessary criteria by being an innate and inherent personal characteristic. Fatherhood alters, and is intimately connected to, personal identity. The differential treatment of fathers in childcare obstructs the developmental changes in the personal identity of them as a parent and the personal relationship shared with their children. Alternatively, if fathers argue that the obstruction of the development of their relationship with their children affects their personal circumstances and existence, "paternity" could be accepted as a personal characteristic that is not innate or inherent. This evidence could be sufficient to demonstrate that "paternity" should be regarded as a personal characteristic which satisfies the criteria of being recognised as a ground of discrimination. In light of the flexible nature of the test to accept new grounds under the term "other status," "paternity" could potentially be accepted as a ground of discrimination under art.14 of the ECHR.

2. INTERPRETATION OF THE TERM "OTHER STATUS" BY THE UK SUPREME COURT

The UK Supreme Court has adopted a similar approach to the ECtHR in their interpretation of the term "other status" under art.14 of the HRA 1998. The surrounding Supreme Court jurisprudence shows that differential treatment on the basis of a personal characteristic can be accepted as a ground of discrimination within the meaning of the term "other status." However, a number of discrimination cases decided by the Supreme Court have provided minimal clarity over the necessary criteria to satisfy for a ground to be accepted within the meaning of the term "other status" and how to determine the categorisation of a personal characteristic.[207] This subsection will examine the recent key discrimination cases to illustrate the subtle variation each judgment has between one another in determining the necessary criteria to satisfy for a ground to be included under the term "other status." This will be

[206] Gerards (n 32) 107.
[207] *R (RJM) v SSWP* (n 124); *Mathieson* (n 124); *Stott* (n 23); *R (DA and others) v SSWP* (n 99).

undertaken to determine the criteria that would need to be satisfied for “paternity” to be accepted as a ground of discrimination within the meaning of the term “other status.”

The first example of a ground being interpreted under the term “other status” within art.14 of the HRA 1998 is the case of *Mathieson.* The case concerned the claimant, Mr Mathieson, who brought forward a case on the behalf of his deceased son, Cameron Mathieson, concerning how the Disability Living Allowance (DLA) that he was in receipt of was suspended by the Secretary of State for Work and Pensions.[208] His son, who had been severely disabled from birth, was hospitalised due to having developed chronic bowel obstruction and had consequently become an in-patient at the hospital for over 84 days.[209] According to regs.8, 10, 12A and 12B of The Social Security (Disability Living Allowance) Regulations 1991, if an individual below 16 years of age remains an in-patient at a hospital for more than a period of 84 days free of charge, that individual would no longer be eligible to receive DLA.[210] Mr Mathieson asserted that the suspension of DLA had breached art.1 of Protocol 1 of the ECHR and art.8 of the ECHR, which provided his son the right to protection of property and respect of his private and family life.[211] Mr Mathieson also argued that there was a violation of art.14 of the ECHR on the basis of there being differential treatment of his severely disabled son, who was in need of lengthy hospitalisation, and other severely disabled children, who were not in need of lengthy hospitalisation.[212] The Court determined that the DLA suspension had amounted to a violation of the rights of Cameron Mathieson contained under art.14 of the ECHR, when interpreted in conjunction with art.1 of Protocol 1 of the ECHR.[213] The Court stated that the ground Mr Mathieson had relied upon was ‘that of a severely disabled child who was in need of lengthy in-patient hospital treatment.’[214] The Court affirmed that the status of being a severely disabled child who was in need of lengthy in-patient hospitalisation was a ground of discrimination that fell within the ambit of the term “other status.”[215]

The Court explored previous cases that had discussed the necessary criteria to include a ground under the term “other status” within art.14 of the HRA 1998. The Court held that the status of a severely disabled child in need of lengthier hospital treatment was a ground of discrimination because disability was a personal characteristic to Cameron.[216] The Court discussed the 2008 case of *R (RJM) v SSWP,* wherein Lord Walker argued that “personal characteristics” can be seen as ‘more like a series of concentric circles.’[217] The first concentric circle encompassed ‘most personal characteristics [which] are those which are innate, largely immutable, and closely connected with an individual’s personality: gender,

[208] *Mathieson* (n 124) [2].
[209] ibid [1], [3]-[4].
[210] ibid [12].
[211] ibid [17].
[212] ibid [17], [19].
[213] ibid [48(a)].
[214] ibid [19].
[215] ibid [23].
[216] ibid.
[217] *Mathieson* (n 124) [21]; *R (RJM) v SSWP* (n 124) [5].

sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities.'[218] The second concentric circle included '[n]ationality, language, religion and politics'[219] and the third was 'more concerned with what people do, or with what happens to them, than with who they are.'[220] Lord Walker cited that examples of grounds that fit within the third concentric circle included military status, residence or domicile, past employment and homelessness.[221] The 3 concentric circles were not just a way to perceive identity, but also related to how closely the Court would review the disadvantage experienced by the claimant during the test for justification.[222] Suspect grounds of discrimination, such as some of the characteristics listed in the first and second concentric circle, required weighty reasoning to establish discrimination and would be subject to stricter examination.[223] Contrastingly, grounds that were not suspect were more likely to be subject to less scrutiny.[224]

The Court in *Mathieson* interpreted that his disability was, or had become, innate and that 'in the RJM case [where] Lord Walker seems to have had three circles in mind, Cameron's case falls either within the narrowest of them or at least within the one in the middle.'[225] The Court also relied upon ECtHR jurisprudence, wherein the judgment of *Clift* stipulated that there must be a flexible interpretation of the personal characteristics that can be accepted under the term "other status" in order to guarantee the rights provided under the ECHR in a practical and effective manner.[226] The legal reasoning adopted by the Court is understandable. The symptoms and complications that were experienced by Mr Mathieson's son due to his disability affected the way that he exists because he needed a higher level of care. The severity of his disability ultimately makes him subject to social disadvantage. Additionally, the Court referenced Lord Walker's conceptualisation of the potential grounds that could be interpreted under art.14 of the ECHR falling within 3 concentric circles. The Court stipulated that the status of a severely disabled child in need of lengthier hospital treatment was accepted as a ground of discrimination which could fall within the first, or possibly the second, concentric circle.[227] There is some blurriness associated with the application of Lord Walker's conceptualisation, as the Court has shown difficulty in knowing which grounds of discrimination would fall under certain concentric circles in later decisions. However, the grounds which can be interpreted under the term "other status" within art.14 of the HRA 1998 should be viewed as a personal characteristic to some extent.

If Lord Walker's conceptualisation continued to be adopted in some format in future decisions, there is difficulty in knowing whether "paternity" would be recognised as a ground of discrimination that falls within the ambit of the term "other status" under art.14 of the HRA 1998. The first 2 concentric circles can be inferred, under Lord Walker's

[218] *R (RJM) v SSWP* (n 124) [5].
[219] ibid.
[220] ibid.
[221] ibid.
[222] *Mathieson* (n 124) [21]; *R (RJM) v SSWP* (n 124) [5].
[223] ibid.
[224] ibid.
[225] *Mathieson* (n 124) [23].
[226] ibid [22].
[227] ibid [23].

conceptualisation, to relate to grounds of discrimination that concern 'who they are.'[228] The description by Lord Walker of the third concentric circle is that the circle relates to 'what people do, or with what happens to them, than with who they are.'[229] The first 2 concentric circles can be interpreted to mean that these grounds are concerned with the personal identity of an individual. "Paternity" could be viewed as falling under the first or second concentric circle, as paternity discrimination is experienced by fathers as a result of the intersection between their gender and parenting status. Paternity discrimination is partially perpetuated on the basis of the sex of the father, which is closely related to the currently accepted ground of "gender" that is categorised under the first concentric circle. Similar to the legal reasoning adopted by the Court in *Mathieson,* "paternity" as a ground of discrimination is potentially more likely to be regarded as a core personal characteristic. As discussed in the previous subsection, fatherhood transforms and is closely related to personal identity. In light of the first 2 concentric circles being associated with who an individual is, "paternity" satisfies that criterion as fatherhood is intimately connected to who men are. The differential treatment of fathers in being able to actively undertake higher levels of childcare prevents the development of the personal identity of a father and the growth of the personal relationship that they share with their child.

The interpretation by the Court that grounds must be broadly perceived as a personal characteristic to be accepted within the meaning of the term "other status" was similarly adopted in the 2018 case of *Stott*. However, the judgment did not strongly apply Lord Walker's conceptualisation of the grounds accepted under the term "other status" falling within 3 concentric circles. The case involved the appellant, Frank Stott, who had been convicted on account of multiple sexual offences.[230] In May 2013, he received an extended determinate sentence under s.226A of the Criminal Justice Act 2003, which provided an extended period to which an offender is subject to serve in addition to their "appropriate custodial term."[231] Mr Stott collectively received an appropriate custodial term of 21 years and an additional extension period of 4 years, which were supposed to be served concurrently.[232] Mr Stott claimed that s.246A of the Criminal Justice Act 2003, which handled the early release of prisoners from serving extended determinate sentences, was discriminatory for not being able to be applied to him until he had served two-thirds of his given custodial term.[233] However, a different category of prisoners which Mr Stott did not belong to could apply for release at an earlier stage of their custodial terms.[234] Mr Stott argued that he was subject to differential treatment that would fall within the ambit of the term "other status" on the basis that 'he was in an analogous situation to other prisoners who were treated differently.'[235] Mr Stott concluded that that the contents of s.246A of the Criminal Justice Act 2003 were discriminatory and violated his right to non-discrimination

[228] *R (RJM) v SSWP* (n 124) [5].
[229] ibid.
[230] *Stott* (n 23) [2].
[231] ibid [2].
[232] ibid [2].
[233] ibid [1].
[234] ibid [1].
[235] ibid [10].

under art.14 of the ECHR, in conjunction with his right to liberty and security under art.5 of the ECHR.[236]

With regards to the interpretation of the term "other status" under art.14 of the HRA 1998, Padfield notes that the Court 'struggled to find a rational criterion for interpreting the scope of "status" in Article 14.'[237] Padfield observed that the Court undertook lengthy reviews of the relevant case law, which included the judgment of *Clift*.[238] In the case of *Clift,* the Court accepted that the "status" of Mr Clift as an individual who had been sentenced to imprisonment for a term of at least 15 years fell within the ambit of the term "other status" under art.14 of the ECHR.[239] The Court in *Clift* maintained that grounds that are accepted under the term "other status" should be generously interpreted, or the necessary criteria that needed to be satisfied would be unduly restrictive.[240] The Court also reviewed judgments by the domestic courts and the ECtHR that were decided before and after the judgment of *Clift*.[241] They examined the relevant jurisprudence in order to compile the necessary criteria that needed to be satisfied for a ground of discrimination to be interpreted within the meaning of the term "other status."[242] The Court brought particular attention to the 7-criterion approach that was adopted by the House of Lords prior to the decision of *Clift*.[243] The Court in *Stott* only believed that the first 3 criterions were still applied subsequent to the approach adopted by the House of Lords and the present-day interpretation of the term "other status."[244] The criteria can be been summarised as:

(i) The potential grounds under art.14 of the ECHR are not unlimited but a generous meaning should be given to the term "other status";
(ii) The case of *Kjeldsen, Busk Madsen and Pedersen v Denmark*[245] outlined that searching for a "personal characteristic" wherein groups of individuals are distinguishable from one another should be applied; and
(iii) Personal characteristics do not necessarily need to be innate and characteristics that are a matter of personal choice can be still accepted under the term "other status."[246]

The judgment of *Stott* also examined Lord Walker's conceptualisation of the potential grounds that could be interpreted under art.14 of the ECHR falling within 3 concentric circles. The Court in *Stott* referenced the 3 concentric circles and described the conceptualisation made by Lord Walker as instructive[247] and that 'Lord Walker was perhaps slightly more ready… to accept that what someone was doing, or what was being done to

[236] ibid [1].
[237] Nicola Padfield, When Will I Get Out?' (2019) 78 The Cambridge Law Journal 12-13.
[238] ibid 13.
[239] *Clift* (n 32) [61], [63].
[240] *Stott* (n 23) [80]-[81].
[241] ibid [45]-[63].
[242] ibid [56]-[63].
[243] ibid [56].
[244] ibid [63].
[245] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 E.H.R.R. 711.
[246] *Stott* (n 23) [56].
[247] ibid [54].

him, could be a personal characteristic.'[248] The Court also observed that 'the "more peripheral or debateable" the characteristic, the easier it would be to justify differential treatment.'[249] However, the approach adopted by Lord Walker was not explicitly applied to the facts of *Stott* and the Court did not specify which concentric circle the ground Mr Stott relied upon would fall under. The legal reasoning adopted by the Court in *Stott* concerning the interpretation of the term "other status" was more heavily influenced by the ECtHR jurisprudence.

Despite *Clift* and *Stott* having similar facts, the claim for discrimination made by Mr Stott failed to satisfy the justification test because the early release provisions were viewed as proportionate to achieving the Government's legitimate aim.[250] Nevertheless, the Supreme Court did examine the ECtHR jurisprudence in relation to the interpretation of the term "other status" and applied it to the facts of the case. Through the analysis undertaken by the Court of past judgments, the criteria necessary for a ground of discrimination to fall within the ambit of the term "other status" has evolved into the adoption of a more flexible interpretation. For a ground to be interpreted under the term "other status", it should relate to a personal characteristic. Similar to the ECtHR, the term "other status" is interpreted to have a broad meaning, as personal characteristics can encompass those that are inherent to an individual and those that are resultant from the personal choice an individual has made.

In light of the ECtHR jurisprudence discussed by the Court in *Stott*, "paternity" could be accepted as a ground of discrimination that could fall within the ambit of the term "other status" under art.14 of the HRA 1998. Fatherhood would most likely be viewed as a core personal characteristic, as parental status is closely related to the personal identity of an individual. Additionally, the relationship a father shares with their child can be transformative to their personal identity. Even if the Court fails to view "paternity" as a core personal characteristic, personal choice is also loosely perceived as a personal characteristic and the personal choice to be a father who wants to actively participate in childcare could support the inclusion of "paternity" as a ground under the term "other status."

Lastly, the 2019 case of *R (DA and others) v SSWP* again adopted the criteria that grounds have to be broadly perceived as a personal characteristic in order to be accepted under the term "other status." However, this case largely did not apply Lord Walker's conceptualisation of the grounds accepted within the meaning of the term "other status" under art.14 of the HRA 1998 falling within 3 concentric circles. This case involved various appeals that were brought forward to dispute the legal provisions governing the revised "benefit cap."[251] The current "benefit cap," which was introduced under the Welfare Reform and Work Act 2016, stands at £23,000 for a household in London and £20,000 for a household based elsewhere.[252] Individuals that are single, which is also inclusive of lone parents, are exempt from being

[248] ibid [55].
[249] ibid [55].
[250] *Stott* (n 23) [155].
[251] ibid [1], [10].
[252] ibid [4]-[5].

subject to the "benefit cap" if they can show that they have worked for 16 hours a week.[253] The reason why the exemption was subject to the eligibility criteria was to encourage individuals to work.[254] However, the conditions attached to the exemption were viewed as discrimination by the 3 appellants, who were lone mothers of young children, because lone parents with children under the age of 2 had significantly greater difficulty in being able to work due to the costs and complications associated with childcare.[255] A different impact could be seen between those that were lone parents and those that were single non-parents.[256] The claimants argued that the differential treatment on the basis of being lone parents with young children amounted to a violation of their right to non-discrimination under art.14 of the ECHR, taken together with the right to protection of property under art.1 of Protocol 1 of the ECHR and their right for respect of private and family life under art.8 of the ECHR.[257]

With regards to whether lone parents with young children could be viewed as a ground of discrimination under the term "other status" within art.14 of the ECHR, the Court relied upon the decisions made in the judgments of *Mathieson* and *Stott.* In the case of *Mathieson*, the status of a severely disabled child in need of lengthier hospital treatment was accepted as a ground under the term "other status".[258] In the case of *Stott*, a prisoner that was subject to a specific type of sentencing was identified as a ground within the meaning of the term "other status."[259] The Court highlighted, in *R (DA and others) v SSWP*, that the case of *Mathieson* indicated that 'the concept of status generally comprised personal characteristics and that inquiry into it should concentrate "on what somebody is, rather than what he is doing or what is being done to him".'[260] Conflictingly, the Court determined that the case of *Stott* confirmed that the meaning of the term "other status" was broad.[261] *Stott* established that personal characteristics do not necessarily need to be innate and that characteristics which are a matter of personal choice could be still accepted under the term "other status."[262] Similarly, *Mathieson* relied more heavily upon Lord Walker's conceptualisation of personal characteristics being categorised into 3 concentric circles.[263] The first 2 concentric circles concerned personal characteristics that referenced who an individual was and the third concentric circle related to 'what people do, or with what happens to them, than with who they are.'[264] The judgment of *R (DA and others) v SSWP* contradicted previous judgments discussing the necessary criteria to satisfy in order for grounds of discrimination to be accepted under the term "other status" by underlining that personal characteristics focus more upon who an individual is. This interpretation of personal characteristics is less flexible than

[253] ibid [6].
[254] ibid [7(c)].
[255] Charlotte O'Brien, '"Done Because We Are Too Menny": The Two-Child Rule Promotes Poverty, Invokes a Narrative of Welfare Decadence, and Abandons Children's Rights' (2018) 26 International Journal of Children's Rights 711.
[256] *R (DA and others) v SSWP* (n 99) [9].
[257] ibid [13(b)].
[258] *Mathieson* (n 124) [23].
[259] *Stott* (n 23) [81].
[260] *R (DA and others) v SSWP* (n 99) [39].
[261] ibid.
[262] *Stott* (n 23) [56].
[263] *R (RJM) v SSWP* (n 124) [5].
[264] ibid.

the approach undertaken in *Mathieson* and *Stott*, as only personal characteristics that seemingly fit the first concentric circle of Lord Walker's conceptualisation would be accepted as grounds.

The conceptual uncertainty associated with not knowing what the necessary criteria were to establish a ground of discrimination under the term "other status" was recognised by the Court. They stated that 'questions on the boundaries of "other status" in article 14, [was] a subject on which there is… little clarity.'[265] Ultimately, the judgment concluded that lone parents could be viewed as a ground of discrimination under the term "other status," as the ground was 'more obviously composed of personal characteristics than were those recognised in the cases of Mathieson and Stott.'[266] However, the claim for discrimination was dismissed in *R (DA and others) v SSWP*, as the justification test could not be satisfied because of the appellants' failure to enter into 'any substantial challenge to the government's belief that there are better long-term outcomes for children who live in households in which an adult works.'[267] The legal reasoning adopted in *R (DA and others) v SSWP* illustrates that the Court adopted a stricter interpretation of the personal characteristics that could be accepted as a ground of discrimination within the meaning of the term "other status." The judgment also did not engage in much detail over whether the term "personal characteristic" could be broadly interpreted in future cases. The case of *R (DA and others) v SSWP* creates further confusion over whether the test for a ground to be recognised under the term "other status" is strictly or loosely related to a personal characteristic.

In light of the stricter interpretation of the personal characteristics that could be accepted under the term "other status" within art.14 of the HRA 1998, "paternity" could still be likely to be included as a ground. "Paternity" as a ground of discrimination shares similarity with lone parents with young children being viewed as a ground in the case of *R (DA and others) v SSWP*. This case particularly reinforced that lone parents with young children was a stronger personal characteristic than the ground of a severely disabled son in need of lengthier in-hospital treatment in *Mathieson*, or a prisoner that was subject to a specific type of sentencing in *Stott*.[268] "Paternity" could likewise be viewed as a stronger personal characteristic that could be a ground under the term "other status," as being a parent is intrinsic to the personal identity of an individual. In addition, to inhibit the changes that occur to the personal identity of a father throughout parenthood is discrimination on the basis of a core personal characteristic.

IV. CONCLUSION

The objective of Chapter 6 has been to construct a persuasive legal argument that "paternity" should be included as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. Chapter 6 sought to understand how newer

[265] *R (DA and others) v SSWP* (n 99) [126].
[266] ibid [39].
[267] ibid [88].
[268] ibid [39].

protected characteristics and grounds of discrimination were included under both Acts. In light of the surrounding jurisprudence, "paternity" may be easier to include as a ground of discrimination under the open list of grounds contained under art.14 of the HRA 1998 than as a protected characteristic under s.4 of the EA 2010 by a legislative amendment.

With regards to the previous addition of newer protected characteristics to s.4 of the EA 2010, the evidence presented within Chapter 6 has shown that making a legislative amendment to the Act would be relatively difficult. The most notable successful legislative amendment that has been made was the amendment of s.9(5) of the EA 2010 to include caste discrimination as an aspect of racial discrimination. However, the addition of caste discrimination was a case of immense political mobilisation. Within the past decade, there have been a number of failed bills. In order for a successful legislative amendment to be introduced to include "paternity" as a protected characteristic, immense political mobilisation is needed. In spite of this, the current level of support to include "paternity" as a protected characteristic is limited and could make it relatively difficult for the proposal for a legislative amendment to succeed.

Chapter 6 explored the jurisprudence concerning the inclusion of newer grounds of discrimination under the term "other status" within art.14 of the ECHR by the ECtHR and art.14 of the HRA 1998 by the UK Supreme Court. The ECtHR and the UK Supreme Court jurisprudence provide legal uncertainty concerning the necessary criteria to accept a ground of discrimination under the term "other status." First, in relation to determining the necessary criteria for a ground to be accepted within the meaning of the term "other status" under art.14 of the ECHR, the ECtHR has adopted a very broad legal test wherein grounds that relate to personal characteristics can be accepted. The interpretation of personal characteristics includes those that are, and are not, innate and inherent. Secondly, the Supreme Court has similarly adopted a very broad legal test wherein grounds that also relate to personal characteristics can be accepted under the term "other status" within art.14 of the HRA 1998. Yet, there has been conflict between how personal characteristics should be interpreted within recent Supreme Court jurisprudence. The flexible interpretation of personal characteristics adopted by the ECtHR has been adopted by the UK Supreme Court wherein personal choice, what people do and what has happened to people can also be included as personal characteristics. Conversely, recent UK Supreme Court jurisprudence has also stipulated that a stricter interpretation of personal characteristics, which primarily focuses upon who an individual is, should be perceived as a recognised ground under the term "other status."

Although there continues to be a lot of conceptual uncertainty regarding the necessary criteria for a ground to be accepted under the term "other status," "paternity" would likely be recognised as a ground under art.14 of the HRA 1998 by the UK Supreme Court. If a claimant argued that "paternity" should be included as a ground due to it being a personal characteristic, "paternity" could be accepted as such. Fatherhood is a core personal characteristic which is intimately connected with personal identity. Evidence would need to particularly show that the paternity discrimination which fathers experience is in the form of fathers being prevented from participating in higher levels of childcare, which has obstructed

the transformation of their personal identity and the development of the personal relationship that they share with their child. Conversely, even if the evidence above is not convincing of the fact that "paternity" is a core personal characteristic, the Supreme Court has seemingly adopted within recent jurisprudence a broad legal test wherein personal choices can also amount to personal characteristics. Therefore, fatherhood being viewed as a personal choice to become a parent could still be seen as a personal characteristic. Overall, "paternity" being regarded as a personal characteristic by the Supreme Court would lead to the likelihood that "paternity" would be successfully accepted as a ground of discrimination under the term "other status" within art.14 of the HRA 1998.

CHAPTER 7: CONCLUSION

I. OVERALL AIM OF THESIS

The objective of this thesis has been to provide evidence to demonstrate that "paternity" should be included as a protected characteristic under s.4 of the Equality Act 2010 (EA 2010) and a ground of discrimination under art.14 of the Human Rights Act 1998 (HRA 1998). The inclusion of "paternity" as a protected characteristic and a ground of discrimination are necessary to combat the current forms of paternity discrimination which fathers experience. Paternity discrimination appears as the lesser treatment of fathers under employment legislation in the United Kingdom (UK) and the mistreatment of fathers inside and outside of the workplace. Fathers are provided with limited leave entitlements, which do not adequately support fathers who want to undertake higher levels of childcare.[1] Fathers in the workplace who request to take leave suffer from workplace harassment, negative comments, demotion, poorer work evaluations and job loss.[2] Within the context of childcare, fathers are also treated as secondary to mothers outside of the workplace in matters relating to nationality, visitation rights, prison sentencing, social benefits and paternity testing, for example.[3] The effects of paternity discrimination are further exacerbated by the court system in England and Wales, which has consistently ruled that it is not sex discrimination if a mother on leave receives enhanced pay, whilst a father on leave receives statutory pay.[4] Examples of these judgments can be found in the cases of *Shuter*, *Ali v Capita* and *Hextall* and *Price.* Fathers have introduced discrimination claims into the court system to gain redress for the lesser treatment that they have experienced. However, the lack of legal recognition and understanding

[1] Women and Equalities Committee, *Fathers and the Workplace* (HC 2017-19, 358) paras 41-55; Petteri Eerola and others, 'Fathers' Leave Take-Up in Finland: Motivations and Barriers in a Complex Nordic Leave Scheme' (2019) 9 SAGE Open 4; Grace James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge-Cavendish 2011) 107; Charlie Lewis, 'A Man's Place in the Home: Fathers and Families in the UK' (Joseph Rowntree Foundation 2000) 7; Samantha Currie, 'Unjoined-up Policy Making and Patchy Promotion of Gender Equality: Free Movement and Reconciliation of Work and Family Life in the EU' in Maribel Pascual and Aida Pérez (eds), *The Right to Family Life in the European Union* (Routledge 2017) 239; Rachel Brooks and Paul Hodkinson, *Sharing Care: Equal and Primary Carer Fathers and Early Years Parenting* (Bristol University Press 2021) 71; Grace James, 'All That Glitters Is Not Gold: Labour's Latest Family-Friendly Offerings' (2003) 3 Web Journal of Current Legal Issues 7; Michelle Weldon-Johns, 'The Additional Paternity Leave Regulations 2010: A New Dawn or More "Sound-Bite" Legislation?' (2011) 33 Journal of Social Welfare and Family Law 34.

[2] Women and Equalities Committee, *Fathers and the Workplace* (n 1) paras 20-21; Takeru Miyajima and Hiroyuki Yamaguchi, 'I Want to but I Won't: Pluralistic Ignorance Inhibits Intentions to Take Paternity Leave in Japan' (2017) 8 Frontiers in Psychology 2.

[3] *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009); *Salgueiro Da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 (hereafter *Salgueiro*); *Alexandru Enache v Romania* App no 16986/12 (ECtHR, 3 October 2017) (hereafter *Alexandru Enache*); *Sommerfeld v Germany* (2004) 38 E.H.R.R. 35 (hereafter *Sommerfield*); *Rasmussen v Denmark* App no 8777/79 (ECtHR, 28 November 1984) (hereafter *Rasmussen*).

[4] *Shuter v Ford Motor Company Limited* [2014] 7 WLUK 1105 (hereafter *Shuter*) [48], [89]; *Ali v Capita Customer Management* and *Hextall v Chief Constable of Leicestershire Police* [2019] EWCA Civ 900 (hereafter *Ali v Capita* and *Hextall*) [77], [92]; *Price v Powys County Council* [2021] UKEAT/0133/20 (hereafter *Price*) [43], [55].

surrounding the concept of paternity discrimination in equality legislation has prompted the court system to fail to recognise the discrimination which fathers experience.

The current design of the employment legislation governing leave entitlements in the UK, the court judgments in England and Wales and, the mistreatment of fathers inside and outside of the workplace are rooted in the legal and societal promotion of the traditional "male breadwinner" model. This familial model is a heterosexual 2-parent unit wherein the father is primarily responsible for the provision of the household income and the mother is chiefly responsible for childcare.[5] Research on gender and parenting has largely centred its focus upon the high levels of pregnancy and maternity discrimination which mothers experience[6] as a consequence of the traditional "male breadwinner" model segregating men into the workplace and women into the home.[7] For instance, mothers have experienced discrimination in the form of harassment and negative comments in relation to their pregnancies and when requesting flexible working hours.[8] Additionally, mothers have undergone discouragement from attending antenatal appointments, dismissal and compulsory redundancy.[9] Mothers are also subject to the "motherhood pay penalty," which is a term that describes how mothers earn less than their female counterparts without children.[10]

However, fathers share some similar experiences to mothers of workplace discrimination when attempting to be more involved in childcare. "Pregnancy and maternity" has since been introduced as a protected characteristic under s.4 of the EA 2010 to provide specific legal protection to pregnant women and mothers experiencing discrimination. Yet, fathers in Britain can only rely upon "sex" as a protected characteristic under s.4 of the EA 2010 in order to combat discrimination.[11] Furthermore, the application of formal equality by the court system to discrimination claims made by fathers prevents the discrimination which fathers experience from being recognised. The court system perceives fathers as different to mothers, which justifies their differential treatment.[12] The misidentification of paternity discrimination as sex discrimination ultimately fails to specifically describe the discrimination which fathers experience because of the intersection between their sex *and* parenting status. The aim of this thesis has been to provide evidence to support the inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground under art.14 of the HRA 1998 in order to sufficiently eliminate the discrimination which fathers experience.

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[5] Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism* (Cambridge University Press 2006) 23.
[6] Women and Equalities Committee, *Pregnancy and Maternity Discrimination* (HC 2016-17, 90) paras 26, 31; Trades Union Congress, 'The Motherhood Pay Penalty' (Trades Union Congress 2016) 2-3; Brigid Francis-Devine and Douglas Pyper, *The Gender Pay Gap* (House of Commons Library Briefing Paper 7068) <https://commonslibrary.parliament.uk/research-briefings/sn07068/> 6 April 2022 11; Stephen Benard and Shelley Correll, 'Normative Discrimination and the Motherhood Penalty' (2010) 24 Gender & Society 617.
[7] McGlynn (n 5).
[8] Women and Equalities Committee, *Pregnancy and Maternity Discrimination* (n 6) para 26.
[9] ibid.
[10] Trades Union Congress (n 6) 2.
[11] *Shuter* (n 4); *Ali v Capita* and *Hextall* (n 4); *Price* (n 4).
[12] *Shuter* (n 4) [89]; *Ali v Capita and Hextall* (n 4) [66], [92]; *Price* (n 4) [7].

II. SUMMARY OF THESIS FINDINGS

My thesis pursued 3 primary research questions which included:

(i) What is paternity discrimination?
(ii) Does the current state of equality legislation provide fathers with adequate legal protection from paternity discrimination?
(iii) How can we increase the legal protection provided to fathers through the inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998?

Chapters 2 and 3 served to answer the first research question. In Chapter 2, I demonstrated how the limited leave entitlements for fathers under employment legislation,[13] the discouragement of fathers from using leave entitlements in the workplace[14] and the perception that fathers are secondary parents to mothers outside of the workplace[15] were examples of the lesser treatment which fathers experienced. Fathers are unable to actively engage in long-term childcare due to the low replacement pay and short-term length of leave entitlements.[16] In addition, fathers have to satisfy eligibility requirements in order to access entitlements,[17] such as unpaid parental leave, paternity leave, shared parental leave and flexible working hours.[18] In Chapter 3, I reframed the mistreatment of fathers under employment legislation, inside the workplace and outside the workplace as instances of paternity discrimination. Through my application of the functional comparative method[19] to analyse the recent case law in England and Wales, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), I explained that the court system in England and Wales currently adopts a formal equality approach, which further exacerbates the discrimination that fathers experience.

The theory of formal equality entails a neutral approach to equality wherein a relevant comparator is relied upon to determine whether differential treatment and, therefore, discrimination can be established.[20] Formal equality has failed to eliminate paternity

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[13] Women and Equalities Committee, *Fathers and the Workplace* (n 1); Eerola and others (n 1); James, *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 1); Lewis (n 1); Currie (n 1); Brooks and Hodkinson (n 1); James, 'All That Glitters Is Not Gold: Labour's Latest Family-Friendly Offerings' (n 1); Weldon-Johns (n 1).
[14] Women and Equalities Committee, *Fathers and the Workplace* (n 1) paras 20-21.
[15] *Weller v Hungary* (n 3); *Salgueiro* (n 3); *Alexandru Enache* (n 3); *Sommerfeld* (n 3); *Rasmussen* (n 3).
[16] Gayle Kaufman, 'Barriers to Equality: Why British Fathers Do Not Use Parental Leave' (2017) 21 Community, Work & Family 313; Gemma Mitchell, 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (2019) 41 Journal of Social Welfare and Family Law 412; Ann-Zofie Duvander and others, 'Gender Equality: Parental Leave Design and Evaluating its Effects on Fathers' Participation' in Peter Moss, Ann-Zofie Duvander and Alison Koslowski (eds), *Parental Leave and Beyond: Recent International Developments, Current Issues and Future Directions* (Policy Press 2019) 199.
[17] ibid.
[18] The Maternity and Parental Leave etc. Regulations 1999, reg.13; The Paternity and Adoption Leave Regulations 2002, reg.4; The Shared Parental Leave Regulations 2014, regs.5, 35; The Flexible Working Regulations 2014, reg.3
[19] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 Law and Method 8-9.
[20] Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2005) 25; Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 1477; Oddný Árnadóttir, *Equality and Non-Discrimination under the*

discrimination, as fathers have to demonstrate their mistreatment through reliance upon a mother as the relevant comparator.[21] Under a formal equality lens, mothers and fathers are viewed as different to one another due to the biological sex differences and the distinctions in social expectations surrounding the roles of motherhood and fatherhood under the traditional "male breadwinner" model.[22] For example, the Employment Appeal Tribunal (EAT) had reasoned in the joined appeals of *Ali v Capita* and *Hextall* that fathers on leave that received lesser pay than mothers on leave were not disadvantaged because of their gender, but were disadvantaged due to their inability to satisfy the conditions to access full pay on maternity leave which are to be pregnant, give birth or breastfeed.[23] Although leave is primarily used for childcare purposes, the differential treatment of mothers and fathers was seemingly justifiable to the EAT in light of the biological differences between mothers and fathers. In my examination of the case law in England and Wales, the ECtHR and the CJEU, I acknowledged that the reliance upon a relevant comparator under formal equality viewed men and women as different to one another and, therefore, incomparable. The different perceptions of men and women ultimately justified the differential treatment of fathers. Formal equality ultimately fails to identify that fathers are a marginalised group, childcare is a gender-neutral responsibility and that the special bond fathers share with their children should be afforded legal protection.

I advocated that a substantive equality approach towards cases regarding fathers' experiences of discrimination should be introduced into the court system in England and Wales instead. Substantive equality has become increasingly favoured by the ECtHR and the CJEU in case law, as this equality theory combats the root cause of discrimination, which is the disadvantage perpetuated by our current hierarchical social structures.[24] I accepted that the definition of substantive equality is vague because there have been various interpretations of the core meaning of substantive equality, which have chiefly included equality of results, equality of opportunity and dignity.[25] However, I have recognised that substantive equality cannot be captured by a single principle like formal equality and have promoted the application of the 4-dimensional definition of substantive equality provided by Fredman.[26] The 4 dimensions include: (i) redistribution; (ii) recognition; (iii) participation; and (iv) transformation.[27] The redistributive dimension hones in upon deconstructing the disadvantage perpetuated under hierarchal social structures towards members of minority and marginalised

European Convention on Human Rights, (Kluwer Law International 2003) 23; Anne Smith and Rory O'Connell, 'Transition, Equality and Non-Discrimination' in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights* (Cambridge University Press 2011) 189.

[21] *Shuter* (n 4); *Ali v Capita* and *Hextall* (n 4); *Price* (n 4).

[22] *Shuter* (n 4) [89]; *Ali v Capita and Hextall* (n 4) [66], [92]; *Price* (n 4) [7].

[23] *Ali v Capita* and *Hextall* (n 4) [92].

[24] Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law* (Routledge 2015) 50; Marc De Vos, 'The European Court of Justice and the March Towards Substantive Equality in European Union Anti-Discrimination Law' (2020) 20 International Journal of Discrimination and the Law 82; Joanna Radbord, 'Equality and the Law of Custody and Access' (2004) 6 Journal of the Association for Research on Mothering 29.

[25] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 713.

[26] ibid.

[27] ibid 728-734.

groups.[28] The objective of the recognition dimension is to eradicate the stigma, stereotyping and violence directed against individuals on the basis of their gender, sexual orientation, disability, race or any other status.[29] The participative dimension focuses upon increasing the political representation of minority and marginalised groups who have typically experienced social exclusion.[30] Lastly, the transformative dimension aims to alter existing social structures to construct an environment which caters to the needs of minority and marginalised groups.[31] I applied the definition of substantive equality provided by Fredman[32] to the ECtHR and CJEU case law and underlined how the different dimensions of substantive equality illuminates how fathers experience substantive inequality that should be legally recognised and redressed under equality legislation. Substantive equality recognises that childcare is a gender-neutral responsibility and that the mistreatment of fathers who want to actively participate in childcare amounts to discrimination.

The objectives of Chapters 4 and 5 were to answer the second research question concerning whether the current state of equality legislation provided fathers with adequate legal protection from paternity discrimination. In Chapter 4, I detailed that equality legislation presently only includes "sex" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 for fathers to rely upon to combat discrimination. I acknowledged that fathers belong to a marginalised sub-group within men who experience discrimination and that the limitations of the legal protection provided under the prohibition of sex discrimination had also been experienced by other marginalised and minority groups. I highlighted that pregnant women, mothers, people of a queer sexual orientation and members of the trans community had previously relied upon the legal prohibition of sex discrimination to counter their experiences of discrimination. However, the legal prohibition of sex discrimination provided pregnant women, mothers and members of the LGBT community with minimal legal protection, as the definition of sex discrimination did not capture the definition of the specific discriminatory practices perpetuated against them because of their social identity.

I used a functional comparative method[33] in Chapter 4 to draw a comparison between fathers and other marginalised and minority groups. I examined case law from various jurisdictions that concerned discrimination claims made by pregnant women, mothers and members of the LGBT community. I explained that many of these judgments subsequently resulted in the introduction of newer pieces of equality legislation which provided specific legal protection from the discriminatory practices directed against pregnant women, mothers, people of a queer sexual orientation and members of the trans community. Examples of the additional pieces of equality legislation provided to pregnant women, mothers and the LGBT community can be found under s.4 of the EA 2010, wherein "pregnancy and maternity," "sexual orientation" and "gender reassignment" are listed as protected characteristics which

[28] ibid 728-730.
[29] ibid 730-731.
[30] ibid 731-732.
[31] ibid 732-734.
[32] ibid 728-734.
[33] Van Hoecke (n 19).

cannot be discriminated against. Similarly, "sexual orientation" and "gender identity" are recognised as grounds of discrimination under art.14 of the European Convention on Human Rights (ECHR).[34] However, pregnancy discrimination is included under the definition of sex discrimination under art.14 of the ECHR, which I critiqued for the potential definitional disputes that may arise.[35] I believe that Cabrelli's 2-part thematic observation provides the best explanation concerning how these protected characteristics and grounds of discrimination were recognised.[36] Under s.4 of the EA 2010, he explains that pregnant women, mothers and members of the LGBT community found that the legal prohibition of sex discrimination provided limited scope to adequately counter the discrimination that they had experienced.[37] A "boundary dispute" would thereby occur between the ground of "sex" and the ground that specifically named the type of discrimination that they had faced. Due to the pressure of social, political and cultural change, newer protected characteristics were included which addressed the specific discriminatory practices perpetuated against each societal group.[38] This led to the second part of Cabrelli's 2-part thematic observation, involving the "spin out," wherein grounds such as "pregnancy and maternity," "sexual orientation" and "gender reassignment" were legally recognised[39] under s.4 of the EA 2010. Although I acknowledged that the focus of this theory is only on the EA 2010, I argued that Cabrelli's observation can be used as a lens to analyse how jurisprudence from America, Canada, the CJEU and the ECtHR also influenced the implementation of specific legal protection over pregnant women, mothers and members of the LGBT community in other pieces of equality legislation.

In light of Cabrelli's 2-part thematic observation, I argue that "paternity" will be included as a protected characteristic under s.4 of the EA 2010 and a ground under art.14 of the HRA 1998. As discussed in Chapters 2 and 3, fathers have unsuccessfully relied upon the legal prohibition of sex discrimination like pregnant women, mothers, people of a queer sexual orientation and trans individuals.[40] Cabrelli recognises that the cultural, political and social pressure created by marginalised and minority groups, particularly within the court system, have helped to support the development of equality legislation which aims to combat the specific discriminatory practices perpetuated against each group.[41] Similarly, I contend that the cases regarding fathers' experiences of discrimination have placed a level of pressure upon Parliament to develop equality legislation that sufficiently combats the specific discriminatory practices perpetuated against fathers who want to be more involved in childcare. I argue that the pressure of social, political and cultural change will eventually prompt a "spin out," wherein "paternity" would be included as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998.

[34] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3rd September 1953) ETS 5 (ECHR); *Salgueiro* (n 3); *Identoba and Others v Georgia* (2018) 66 E.H.R.R. 17 (hereafter *Identoba*).
[35] *Jurčić v Croatia* (2021) 73 E.H.R.R. 10 (hereafter *Jurčić*).
[36] David Cabrelli, *Employment Law in Context* (4th edn, Oxford University Press 2020) 421-422.
[37] ibid 421-427.
[38] ibid 421-422.
[39] ibid 421-427.
[40] *Shuter* (n 4); *Ali v Capita* and *Hextall* (n 4); *Price* (n 4).
[41] Cabrelli (n 36) 421-427.

However, we are currently at the first stage of Cabrelli's 2-part thematic observation and have not yet reached the second stage.

The aim of Chapter 5 was to show the international approach towards the legal development, and protection, of paternity rights. I applied a functional comparative method[42] to investigate the differences between the approaches adopted in Britain and the UK detailed in Chapter 2 and the amalgamation of an equality and an employment law approach undertaken by Sweden. Sweden was used a case study to demonstrate how an equality law approach is essential to protect fathers from discrimination and that the benefits derived from this approach adopted would be similarly mirrored in Britain and the UK if implemented. I also examined key international treaties like the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[43] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[44] to show the risks of excluding fathers from legal protection.

First, I recognised that Sweden has introduced equality legislation which provided legal protection to working fathers experiencing discrimination.[45] The Swedish equality law approach has been successful at combating the workplace discrimination experienced by working fathers to an extent.[46] However, I critiqued the legal framework for adopting an amalgamation of an equality and employment law approach. Legal protection is only provided to working fathers and minimal legal protection is given to fathers who experience discrimination outside of the workplace.[47] I identified the need for Sweden to introduce a "complete equality" law approach, wherein a standalone right to equality is provided to fathers that is unrelated to any employment relationship that they are in. Despite the shortcomings of the Swedish legal framework, it marks out how equality law could be used to effectively combat the discrimination perpetuated against fathers.

Secondly, I identified that CEDAW does not view men as rights-holders under the treaty and contains no explicit references to paternity rights or paternity discrimination within its textual provisions. In the concluding observations of the 3 most recent sessions held by the CEDAW Committee, including and prior to March 2021, some references were made about paternity rights by the CEDAW Committee. The Committee recognised the gender stereotypes surrounding the roles of motherhood and fatherhood and advocated instead for equally shared childcare responsibilities between parents.[48] However, they perceived the strengthening of paternity rights under employment law as a means to promote women's equality. I

[42] Van Hoecke (n 19).
[43] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).
[44] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
[45] Social Insurance Code 2010, ch.12, s.12a; Parental Leave Act 1995, ss.16-17.
[46] *Discrimination Ombudsman (on behalf of PHG) v Försäkringskassan* AD 2020 No.53; *Discrimination Ombudsman (on behalf of DS) v Denny's Home AB* AD 2017 No.7.
[47] *Weller v Hungary* (n 3); *Salgueiro* (n 3); *Alexandru Enache* (n 3); *Sommerfeld* (n 3); *Rasmussen* (n 3).
[48] CEDAW Committee, 'Concluding Observations: Kazakhstan' (2019) CEDAW/C/KAZ/CO/5 [23], [24(b)], [24(d)].

acknowledged that the objective of CEDAW is to promote women's equality,[49] but the asymmetrical approach adopted by the treaty demonstrates the negative repercussions fathers will experience if all pieces of equality legislation do not recognise fathers as rights-holders and victims of discrimination. The sole focus on women in equality legislation would entail minimal legal recognition of fathers as a marginalised group and no grounds of discrimination for fathers to rely upon to tackle paternity discrimination.

Although the purpose of CEDAW is to enhance the position of women in society,[50] the purpose of the ICESCR has a broader scope to legally reinforce and protect the economic, social and cultural rights of all individuals.[51] I established that the Committee on Economic, Social and Cultural Rights (CESCR) perceived men as rights-holders, as they had interpreted the refusal to grant paternity leave for fathers as potentially sex discrimination under art.2(2) of the ICESCR.[52] Although this provision does provide a nascent understanding that fathers can experience discrimination, I have discussed the limited protection offered to fathers under the legal prohibition of sex discrimination in Chapter 4. Moreover, the ICESCR also provides inconsistent legal protection for fathers, as the examination of the other provisions outside of art.2(2) favour the strengthening of paternity rights as a means to enhance the position of women in society and do not seemingly view fathers as rights-holders. In the concluding observations of the 3 most recent sessions held by the CESCR, including and prior to March 2021, the Committee did not refer to fathers' experiences of discrimination under any of the treaty provisions. The CESCR predominantly viewed the development of paternity rights as a function of women's equality and the care of children. The Committee advocated that paternity rights should be strengthened to support equally shared childcare between parents in order to enhance the position of women in the workplace and education.[53] Similarly, the development of paternity rights has been interpreted to support the care and education of children.[54] The ICESCR does not acknowledge that limited leave entitlements and the mistreatment of fathers inside and outside of the workplace are forms of paternity discrimination. The minimal legal protection provided to fathers under the ICESCR exposes the risks of largely excluding fathers from all pieces of equality legislation, as fathers will struggle to actively participate in childcare if their position in it is not protected.

The aim of Chapter 6 was to answer the final research question, regarding how to increase the legal protection provided to fathers by including "paternity" as a protected characteristic

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[49] CEDAW, pmbl. [13]; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention), art.31(2); Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 216-217.
[50] ibid.
[51] ICESCR, pmbl. [1], [3]; Vienna Convention (n 49); Gardiner (n 49).
[52] Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No.20: Non-discrimination in Economic, Social and Cultural Rights (art.2, para.2, of the International Covenant on Economic, Social and Cultural Rights)' (2009) E/C.12/GC/20 [20].
[53] CESCR, 'Concluding Observations: Finland' (2021) E/C.12/FIN/CO/7 [18]-[19(e)]; CESCR, 'Concluding Observations: Ukraine' (2020) E/C.12/UKR/CO/7 [19]- [20(b)]; CESCR, 'Concluding Observations: Norway' (2020) E/C.12/NOR/CO/6 [22]-[23]; ICESCR, arts.2,3,6,7.
[54] CESCR, 'Concluding Observations: Norway' (n 50) [30]-[31(d)]; CESCR, 'Concluding Observations: Slovakia' (2019) E/C.12/SVK/CO/3 [48]-[49]; CESCR, 'Concluding Observations: Switzerland' (2019) E/C.12/CHE/CO/4 [40]-[41]; ICESCR, art.10.

under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998. In Chapter 6, I explored the relevant jurisprudence regarding the past inclusion of the current list of protected characteristics under s.4 of the EA 2010 and grounds of discrimination under art.14 of the HRA 1998. I established that a legislative amendment being made to s.4 of the EA 2010 to add "paternity" as a protected characteristic would be relatively difficult, as numerous bills have failed to amend the EA 2010 within the last decade. The most notable legislative amendment that was recently made was to amend s.9(5) of the EA 2010 to include caste discrimination as an aspect of racial discrimination. However, the amendment was supported by immense political mobilisation.[55] I determined that a legislative amendment being made to s.4 of the EA 2010 to include "paternity" as a protected characteristic could be successful if the amendment is similarly supported by political mobilisation.

On the other hand, I theorised that the inclusion of "paternity" as a separate ground under the term "other status" within art.14 of the HRA 1998 could be easier, as the court system has the ability to interpret new grounds under the open list of grounds contained under this provision. The HRA 1998 integrated the rights contained under the ECHR into UK domestic law.[56] However, the current ECtHR and UK Supreme Court jurisprudence provide minimal clarity concerning the necessary criteria to accept a ground of discrimination under the term "other status." The ECtHR and the Supreme Court adopt a very broad legal test, wherein grounds that relate to personal characteristics can be accepted under the term "other status." A flexible interpretation of personal characteristics has been introduced in case law, wherein those that are not inherent and innate can also be included.[57] For example, personal characteristics can involve those that relate to personal choice, what people do and what has happened to people.[58] However, recent UK jurisprudence is slightly conflicting since the Supreme Court has also stipulated that a stricter interpretation of personal characteristics should be adopted which primarily focuses upon who an individual is.[59]

Despite the ongoing conceptual uncertainty regarding what the necessary criteria should be for a ground to be accepted within the meaning of the term "other status," "paternity" would likely be recognised as a ground under art.14 of the HRA 1998 by the court system. If a father argued that "paternity" is a personal characteristic that should be included as a ground of discrimination, "paternity" could be accepted as such. Fatherhood is a core personal characteristic which is intimately connected with personal identity. Fathers would need to present evidence which demonstrated to the courts that the paternity discrimination which

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[55] Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010* (Palgrave Macmillan 2015) 25; Shailendra Kumar, 'Impact of Dr Ambedkar's Philosophy on International Activism of the Dalit Diaspora' (2021) 71 Sociological Bulletin 128.

[56] Christina Kitterman, 'The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish its Sovereignty to Ensure Human Rights Protection in Domestic Courts' (2001) 7 ILSA Journal of International & Comparative Law 583.

[57] *Clift v The United Kingdom* [2010] ECHR 1106, para 59.

[58] *R (on the application of Stott) v Secretary of State for Justice* [2018] UKSC 59 (hereafter *Stott*) [56]; *R (on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 (hereafter *R (RJM) v SSWP*) [5].

[59] *R (on the application of DA and others) v Secretary of State for Work and Pensions* and *R (on the application of DS and others) v Secretary of State for Work and Pensions* [2019] UKSC 21 (hereafter *R (DA and others) v SSWP*) [39].

they have experienced is in the form of being restricted from participating in higher levels of childcare. Evidence would have to be shown that this has consequently obstructed the transformation of their personal identity upon becoming a father and limited the development of the personal relationship that they share with their child. Conversely, even if the evidence presented is not convincing of the fact that "paternity" is a core personal characteristic, the Supreme Court has seemingly adopted a broad legal test within recent jurisprudence wherein personal choices can also be perceived as personal characteristics.[60] If fatherhood is viewed as a personal choice to have children, "paternity" could still be regarded as a personal characteristic. Therefore, if "paternity" was seen as a personal characteristic by the court system, the successful inclusion of "paternity" as a ground under the term "other status" within art.14 of the HRA 1998 would be likely.

III. THESIS LIMITATIONS AND FUTURE RESEARCH IMPLICATIONS

1. INTERSECTIONAL DISCRIMINATION

Although my thesis has gathered evidence to highlight the need for "paternity" to be a recognised protected characteristic and a ground of discrimination, I have not included extensive discussion around how fathers can experience multiple sources of disadvantage if they belong to numerous minority and marginalised groups, as that falls outside of the scope of my research. The focus of my thesis has been to provide explanation of the concept of paternity discrimination. I described fathers as a marginalised sub-group within men who experience discrimination due to the intersection between their sex and parenting status as an attempt to explain the concept of paternity discrimination. However, I recognise that fathers can experience other forms of intersectional discrimination from a product of a number of their individual characteristics intersecting one another.[61] For example, fathers who are working class, belong to an ethnic or sexual minority group or are lone parents experience social barriers which prevent them from gaining the necessary support in childrearing.[62] The primary focus of my thesis does not seek to conflate or categorise the experiences of discrimination which all fathers experience as solely paternity discrimination. In Section III of Chapter 3 and Section IV of Chapter 4, I have included discussion on how gay fathers

[60] *Stott* (n 58) [56].

[61] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 8 University of Chicago Legal Forum 140.

[62] Andrew Behnke and William Allen, 'Beating the Odds: How Ethnically Diverse Fathers Matter' in Joseph White and Sean Brotherson (eds), *Why Fathers Count: The importance of Fathers and Their Involvement with Children* (Men's Studies Press 2007) 328-329; Jorge Armesto, 'Developmental and Contextual Factors That Influence Gay Fathers' Parental Competence: A Review of the Literature' (2002) 3 Psychology of Men & Masculinity 71; Emanuela Lombardo and Petra Meier, 'Policy' in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press 2016) 616; Alice Margaria, *The Construction of Fatherhood* (Cambridge University Press 2019) 130; Graeme Russell, 'Fatherhood in Australia' in Michael Lamb (ed), The Father's Role: Cross-Cultural Perspectives (Why Fathers Count: The Importance of Fathers and Their Involvement with Children (Lawrence Erlbaum Associates 1987) 352.

experience discrimination due to the intersection between their sex, sexual orientation and parenting status.[63] In Chapter 6, I have additionally considered the limited legal protection offered to those experiencing intersectional discrimination in Britain and the UK. For instance, s.14 of the EA 2010, which prohibits dual discrimination on the basis of 2 protected characteristics, has yet to be implemented. Likewise, the wording of art.14 of the ECHR could have the potential for intersectional discrimination cases to be heard but has not yet been too sought after.[64] Nevertheless, further research needs to be undertaken to explore the full extent to which intersectional discrimination affects fathers who also belong to other marginalised and minority groups.

2. DIFFICULTY IN SHIFTING CULTURAL NORMS SURROUNDING TRADITIONAL PARENTING ROLES

Another limitation of my thesis is that the inclusion of "paternity" as a protected characteristic and a ground of discrimination does not guarantee a cultural departure from the traditional "male breadwinner" model. In Section II of Chapter 5, I determined that a limitation to the combined equality and employment law approach undertaken by Sweden is that there have been difficulties in significantly shifting the cultural norms surrounding the traditional roles of motherhood and fatherhood as a short-term outcome.[65] Despite the increased uptake by fathers of the leave entitlements introduced in Sweden,[66] only a minority of fathers shared leave entitlements equally with mothers and believed that the fulfilment of childcare responsibilities should be equally divided between parents.[67] Many fathers do not utilise their entitlement to work flexible hours,[68] or work part-time, as fathers have felt discomfort assuming working hours which typically women undertake.[69] Similarly, there continues to be a significant gender disparity in the level of household tasks completed by mothers and fathers in Sweden.[70]

Although Sweden has been successful in increasing the participation of fathers in childcare,[71] the level of caring responsibility which fathers assume during the child's first year influences

[63] *Salgueiro* (n 3).
[64] Shrey Atrey, *Intersectional Discrimination* (Oxford University Press 2019) 143; Kristina Koldinská, 'EU Non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma Women in Central and Eastern Europe' in Dagmar Schiek and Anna Lawson (eds), European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination (Routledge 2016) 256.
[65] Barbara Hobson, 'Fathers' Capabilities for Work-Life Balance in Sweden: The Unfinished Revolution' (2016) 28 Japanese Journal of Family Sociology 202.
[66] Women and Equalities Committee, *Fathers and the Workplace* (n 1) para 73; Li Ma and others, 'Fathers' Uptake of Parental Leave: Forerunners and Laggards in Sweden, 1993-2010' (2020) 49 Journal of Social Policy 364.
[67] Hobson (n 65).
[68] Linda Haas and C. Philip Hwang, '"It's About Time!": Company Support for Fathers' Entitlement to Reduced Work Hours in Sweden' (2016) 23 Social Politics 150-151; Parental Leave Act 1995, s.3.
[69] Haas and Hwang (n 68) 143-144, 150-151.
[70] Marie Evertsson, 'The Importance of Work: Changing Work Commitment Following the Transition to Motherhood' (2013) 56 Acta Sociologica 144; Hobson (n 65).
[71] Women and Equalities Committee, *Fathers and the Workplace* (n 1) para 73; Ma and others (n 66).

the level of responsibility parents undertake in the long term.[72] The current gender gap in the fulfilment of childcare responsibilities and domestic tasks establishes that Swedish fathers still view themselves as secondary parents to mothers.[73] If fathers do not effectively use their leave entitlements to actively participate in childcare during the early years of their children's lives, a cultural departure from the traditional "male breadwinner" model will be difficult to initiate. However, the lack of cultural changes concerning the roles of motherhood and fatherhood in Sweden could be attributed to the fact that legislation cannot initiate huge cultural changes in the short-term, but rather in the long-term.

The objective of my thesis has been to promote the ways in which equality legislation can be strengthened to eliminate paternity discrimination. The inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 is one way to increase the participation of fathers in childcare. The recognition of paternity discrimination under equality legislation would prompt the removal of social barriers which may have previously restricted their involvement in childcare. However, I acknowledge that the successes associated with increasing the legal protection of fathers in childcare could be limited. Further research needs to be conducted into how countries can effectively depart from the cultural norms surrounding the traditional parenting roles and dismantle the perception that fathers are secondary parents to mothers.

3. COST IMPLICATIONS

The inclusion of "paternity" as a protected characteristic under s.4 of the EA 2010 and a ground of discrimination under art.14 of the HRA 1998 would create higher costs for the public and employer purse. There would be an upsurge in the number of cases submitted to the court system by fathers to combat discrimination and legal costs would be incurred. Furthermore, the legal protection of fathers from paternity discrimination would entail changes having to be made to the currently limited leave entitlements allocated to fathers. In Section II of Chapter 2, I discussed that longer-term non-transferable father-only leave entitlements which provided high income replacement pay without having to satisfy strict eligibility requirements are the most effective in supporting fathers to take leave.[74] Implementing changes to extend the length of paternity leave, increase the level of replacement pay provided and remove the strict eligibility requirements which fathers have to satisfy to access the leave entitlement would be costly. Additionally, providing stronger leave entitlements for fathers to take paid time off work to attend multiple paid antenatal appointments, parenting classes and other relevant medical appointments would be a cost.

However, the factor of costs should not limit the ability of fathers to be able to rely upon equality legislation to combat the discrimination perpetuated against them. Adjin-Tettey purports that '[c]oncerns about litigation costs… are not unique to the human rights context

[72] Women and Equalities Committee, *Fathers and the Workplace* (n 1) para 60.
[73] Hobson (n 65); Evertsson (n 70).
[74] Kaufman (n 16); Mitchell (n 16); Duvander and others (n 16).

and do not justify limiting redress for discrimination to administrative bodies.'[75] Sevenhuijsen explains that care should be recognised as an issue of public policy in order to achieve equality between men and women.[76] Eradicating paternity discrimination would involve making changes to the legal design of leave entitlements for fathers, which would create long-term benefits to families in Britain and the UK. For example, the public purse currently finances the replacement pay being provided to fathers who undertake paternity leave. Yet, only fathers from wealthier families tend to be in receipt of paternity pay, as the rate of replacement pay is so low that some working class fathers cannot afford to stop working or use paternity leave.[77] Changes to the regulations governing paternity leave would allow the expenditure of the public purse to be more effectively used to support low-income families.

Moreover, other long-term benefits that can be gained from changing the legal design of leave entitlements include fathers being able to develop a stronger relationship with their children and being able to actively participate in childcare without being restricted by instances of discrimination. Similarly, the public purse could save on financing maternity pay for mothers who return to employment early because of the stronger presence of fathers in childcare.[78] Mothers would also find it easier to establish their position in the workplace and gain greater long-term financial security.[79] Children would also benefit from being cared by fathers, as positive paternal engagement has been associated with eliciting better self-control, self-esteem and social competence within children.[80] Despite the cost implications associated with strengthening equality legislation to legally prohibit paternity discrimination, the long-term benefits to be gained by families in Britain and the UK are essential to support. This thesis provides evidence to show that very little has been done to protect fathers in childcare, as they are yet to be adequately protected by equality legislation. The last leave policy that effectively supported the participation of fathers in childcare was when paternity leave was introduced in 2003 2 decades ago.[81] This thesis demonstrates that one of the ways to truly achieve the governmental objective of increased paternal involvement in childcare[82] is for equality legislation to recognise and protect fathers from paternity discrimination.

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[75] Elizabeth Adjin-Tettey, 'Picking Up Where Justice Wilson Left Off: The Tort of Discrimination Revisited' in Kim Brooks (ed), *Justice Bertha Wilson: One Woman's Difference* (UBC Press 2009) 125-126.
[76] Selma Sevenjuijsen, 'The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy' (2003) 4 Feminist Theory 187, 190.
[77] Women and Equalities Committee, *Fathers and the Workplace* (n 1) para 49.
[78] ibid para 84.
[79] ibid para 84.
[80] Michael Lamb, 'How do Fathers Influence Children's Development?' in Michael Lamb (ed), *The Role of the Father in Child Development* (5th edn, Wiley 2010) 7; Joseph Pleck, 'Paternal Involvement: Levels, Sources, and Consequences' in Michael Lamb (ed), The Role of the Father in Child Development (3rd edn, Wiley 1997) 96-97; Kyle Pruett, 'Infants of Primary Nurturing Fathers' (1983) 38 Psychoanalytic Study of the Child 257-277; Kyle Pruett, 'Oedipal Configurations in Young Father-Raised Children' (1985) 40 Psychoanalytic Study of the Child 435-456.
[81] Margaret O'Brien and others, 'The United Kingdom' in Marina Adler and Karl Lenz (eds), *Father Involvement in the Early Years: An International Comparison of Policy and Practice* (Policy Press 2017) 164; The Paternity and Adoption Leave Regulations 2002, reg.5.
[82] Women and Equalities Committee, *Fathers and the Workplace* (n 1) paras 7-8.

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