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ROLE REVERSAL: CAN DAD STAY HOME WHILE MOM GOES TO WORK? AN ANALYSIS OF MATERNITY AND PARENTAL LEAVE IN THE UNITED KINGDOM AND EUROPEAN UNION THROUGH PRINCIPLES AND TREATIES OF INTERNATIONAL HUMAN RIGHTS LAW

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Cover Page Footnote

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INTRODUCTION

Women across the globe have a long way to go before achieving equality in the workplace. According to ongoing research by the United Nations, women are less likely to participate in the labor market than men, and women are paid less than men; women are more likely to hold places in informal and vulnerable employment positions, and women are much more likely to hold a position of unpaid or domestic work. The Convention on the Elimination of Discrimination Against Women (CEDAW) states that "Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights . . ." and goes on to address several of the inequities listed above: the right to the same

employment opportunities, the right to equal renumeration, and the right to free choice of profession and employment.[1]

CEDAW discusses specifically the relationship between employment and maternity, stating that "[i]n order to prevent discrimination against women on the grounds of . . . maternity" state parties must "introduce maternity leave with pay or with comparable social benefits without loss of former employment . . ."[2] As is clear from the title of the convention, CEDAW is an affirmation of both the equality of women and the unacceptability of discrimination on the basis of sex. The convention does not strip its subjects of their womanhood for the end of promoting equality, but rather recognizes the ability of women to procreate and care for their families and condemns this as a basis for discrimination.[3] This idea "goes to the heart of the Convention," because it acknowledges that a biological difference between men and women is more than a protected characteristic or women's issue—it is a "matter of social significance."[4] Not only should women's procreative ability not be a basis for discrimination, the convention goes a step farther to state that "the upbringing of children requires a sharing of responsibility between men and women . . ."[5]

International human rights case law and treaties, such as CEDAW, are created out of a need to provide a source for equal rights where they previously did not exist. Despite a prevailing belief in the inherent human dignity of every person dating back to the earliest modern human rights documents,[6] many marginalized and oppressed groups do not share equal rights. One group of individuals, usually a racial, religious, ethnic, and often male, majority enjoys rights; human rights law works to ensure the enjoyment of those same rights for a counterpart, marginalized minority. Often, establishing rights for peoples previously without access involves not only eliminating barriers, but in some instances, implementing policies to address these wrongs. What in the United States we call "affirmative action," the international human rights community calls "positive action measures."[7] One of the most common and controversial questions surrounding affirmative action is the question of whether positive actions to help a disadvantaged group can harm others in the process. On the

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[1] Convention on the Elimination of All Forms of Discrimination Against Women, art. 11, ¶ 1, Sept. 3, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

[2] *Id*. at art. 11, ¶ 2.

[3] *Id*. at pmbl.

[4] Christine Chinkin & Beate Rudolf, Commentary, *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, 48 Oxford University Press (2012).

[5] CEDAW, *supra* note 1, at pmbl. *See also* E. Abena Antwi, WOMEN IN THE WORLD OF WORK: AFTER EIGHTY-SIX YEARS, HAS THE INTERNATIONAL LABOUR ORGANIZATION DONE ENOUGH TO PROMOTE EQUALITY, 31 N.C.J. INT'L. & COM. REG. 793, 800–04 (2005) (assessing the development of maternity protections promulgated by the International Labor Organization).

[6]. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. *See generally* MARY ANN GLENDON, *The Longing for Freedom, in* A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

[7] Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 254–55 (1999).

issue of working mothers and maternity leave, the question is simply, "what about fathers?"

In 2019, the England Court of Appeals, Civil Division, held in the case *Capita Customer Management Ltd. v. Ali (Working Families Intervening); Hextall v. Chief Constable of Leicestershire Police (Working Families Intervening)*[8] (hereinafter "*Capita Customer Management*") that providing enhanced maternity leave pay and benefits to mothers is not discrimination against men as fathers. This case is not only example of a question of women's rights being discriminatory against men, it is a unique question because of the dual purpose of maternity leave rights: to protect the health rights to recover from pregnancy and childbirth for a mother,[9] and to protect the health and wellbeing of a newborn child.[10] The first purpose is obviously unique to women as mothers, but nevertheless, there is an opportunity for inequality in the rights of new parents when fathers do not have the same resources to partake in childcare.

This note will address two interrelated issues—first, whether it is discriminatory to provide better maternity leave benefits and higher pay to women as mothers when men as fathers are not entitled to the same benefits and pay, and second, whether full realization of parental leave rights necessarily demands identical benefits for men and women.

Part I of this paper will describe the relevant human rights treaties and principles to the rights of parents and the complexity of the issue of nondiscrimination. Part II will describe the background legal framework of maternity leave and parental leave in the United Kingdom and European Union, as well as relevant case law of the European Court of Justice.[11] Part III will analyze the legal framework and EU case law within the framework of the international human rights principles from Part I, with a particular emphasis on answering the question of whether inequality in parental leave rights violates the principle of non-discrimination. Lastly, Part IV will analyze what full realization of parental leave rights may look like, using *Capita Customer Management* as an example and describing how that case could have come out differently using my conclusions.

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[8] Mr. Madasar Ali v. Capita Customer Management Ltd.; The Chief Constable of Leicestershire Police v. Mr. Anthony Hextall (Working Families); Mr. Anthony Hextall v. The Chief Constable of Leicestershire Police, [2019] ECWA (Civ) 900 [hereinafter Capita Customer Management].

[9] For the purposes of this paper, I will be using the simplified gender dichotomy of men and women, fathers and mothers. This paper does not reference the category of "mothers" as expanded to "persons who give birth." The issue of gender and childbearing becomes more nuanced and inclusive when describing gender identity and fluidity, however this paper does not get into this issue for two reasons: (1) simplification, and (2) thus far, there is no relevant case law which discusses the complexities in gender identity and maternity leave from an international human rights perspective. Furthermore, this paper does not discuss the nuances of parental leave rights in families with two mothers or two fathers, again for simplicity and because this creates an even more nuanced and complicated side to the problem than I have ability to address here. For a discussion of the complexities in the relationship between maternity and gender, *see* Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221 (2020).

[10] *See* Miguel de la Corte Rodriguez, *Maternity Leave and Discrimination against Fathers: Current Case Law of the Court of Justice of the European Union and the Way Forward*, 4 INT'L COMPAR. JURIS. 27 (2018).

[11] Although the United Kingdom is no longer an EU member state, it was at the time of *Capita Customer Management v. Ali*, and its maternity leave principles are rooted in the EU requirements for maternity leave. For more information, *see infra* note 47.

I: PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS

A. *DISCRIMINATION*

Since 1948 and the Universal Declaration of Human Rights, the principle of nondiscrimination has been foundational to promoting international human rights. Although the UDHR uses language of "distinction" rather than discrimination, it was revolutionary in its expanded list of protected groups: "Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[12] These prohibited grounds are more comprehensive than the Declaration's predecessor, the Charter of the United Nations, which guarantees human rights and fundamental freedoms "without distinction as to race, sex, language, or religion."[13] Although the inclusion of a message of nondiscrimination in the UDHR highlights the universality of the principle,[14] nondiscrimination is ever evolving and includes even more protected groups now than it did in 1948, such as age and disability.[15]

The International Covenant on Economic, Social, and Cultural Rights contains almost identical language about discrimination as the UDHR, except that the ICESCR uses the word discrimination rather than distinction.[16] The principle of nondiscrimination also appears in the International Covenant on Civil and Political rights, as well as every other UN human rights treaty since the UDHR. This reflects not only the universality of the principle, but also its importance to the international human rights legal framework as a whole.[17] CEDAW understandably focuses its provisions on discrimination against women, defining the term "discrimination against women" as

> 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, irrespective of their marital status, on a basis of equality of men and

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[12] UDHR, *supra* note 6, at art. 2.
[13] UN Charter art. 13.
[14] *See* JOHANNES MORSINK, *The Drafting Process Explained*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT (1999). This describes how the UDHR gave birth to more covenants and a multitude of regional human rights documents, the inclusion of the principle of nondiscrimination in which "is made possible by the idea that while the standards are universal, their implementation will be the more successful the closer the attention to local circumstances." *Id.* (quoting R.J. VINCENT, HUMAN RIGHTS IN CONTEMPORARY WORLD SOCIETY (Cambridge Univ. Press 2009). *See also* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003).
[15] BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, Commentary, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 193 (Oxford University Press 2014).
[16] *See* G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social, and Cultural Rights, International Covenant on Economic, Social and Cultural Rights, at Part II art. 2(2) (Dec. 16,1966) ("The State Parties to the present Covenant undertake 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, or birth status.") [hereinafter ICESCR].
[17] SAUL, KINLEY & MOWBRAY, *supra* note 15, at 173.

> women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[18]

The ICESCR does not define discrimination as narrowly as CEDAW, the latter of which uses the strong language of "exclusion or restriction" and "effect or purpose" to bring more context to the definition. CEDAW also conveys its definition within the context of the given field of women's rights, whereas the ICESCR is more general.

To analyze the claims in *Capita Customer Management* and the line of cases from the European Court of Justice, it is important to understand the difference between direct and indirect discrimination. The way meanings of these two types of discrimination varies slightly between the ICESCR, the UK Equality Act, and the EU Equal Treatment Directive. Starting with the ICESCR, the text of which actually includes a very bare-bones definition of discrimination, we can look to UN General Comment 20 for additional substance, noting that

> discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which as the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.[19]

According to the General Comment, direct discrimination is "intention to discriminate."[20] The definition of direct discrimination references both instances where a person is treated differently in a comparable situation as well as instances where an act or omission treats one person more favorably when there is no comparable situation. For example, unequal pay for equal work would constitute direct discrimination because two people are doing the same work, but one person is paid less for no reason other than being a member of a protected class. A case where a woman is fired, or perhaps even just denied promotion, solely on the grounds that she is pregnant would also constitute direct discrimination. Although "pregnant people" is not listed as a protected group in any covenant definition of discrimination, only women can get pregnant, and therefore discrimination for pregnancy is still direct discrimination even without a comparable situation for men.

Indirect discrimination "refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination."[21] The example given by the General Comment is a policy that requires a birth certificate for school enrollment, which may seem reasonable but indirectly disadvantages ethnic minorities or non-nationals.[22] Comparatively, direct

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[18] CEDAW, *supra* note 1, at art. 1.
[19] Comm. On Economic, Social, and Cultural Rights, Gen. Comment 20, U.N. Doc. E/C.12/GC/20, at II ¶ 7. (July 2, 2009) [hereinafter CESCR].
[20] SAUL, KINLEY & MOWBRAY, *supra* note 15, at 183.
[21] CESCR, General Comment 20, *supra* note 19, at ¶10(b).
[22] *Id*.

discrimination seems easier to identify because it carries an intention to discriminate. In contrast, even if not conscious or systemic, indirect discrimination is often the passive result of "laws, policies or practices."[23] Discrimination does not need to be active or intentional; if an act or omission has the effect of discrimination, it is violative of the principle of nondiscrimination.[24]

In the European Union's Equal Treatment Directive (ETD), direct discrimination is "where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation." Indirect discrimination has a similar definition to the ICESCR, including elements of "an apparently neutral provision, criterion, or practice [that] would put persons of one sex at a particular disadvantage compared with persons of the other sex," but qualifies it, saying "unless that provision, criterion or practice is objectively justified by a legitimate aim."[25] Although these definitions vary slightly, the important theme in both direct and indirect discrimination is comparability. The definitions in the UK Equality Act closely mirror those of the ETD,[26] but the Equality Act has an interesting exception for discrimination because of pregnancy. Section 18(2) of the Act prohibits "unfavourable" treatment based on pregnancy. "The legal term 'unfavourable' makes the protection against discrimination on the basis of pregnancy or maternity particularly strong. By using the term 'unfavourable,' Parliament freed victims from having to prove discrimination by way of a comparator who lacked the characteristic but was treated better."[27] In other words, as opposed to a phrase such as "less favourable" which would imply a comparable situation, a person experiencing discrimination based on pregnancy does not have to prove that another person has been treated more favorably in a similar circumstance.[28] This distinction plays an important role in analyzing maternity discrimination, because a huge component of maternity, the biological condition of women, does not lend itself to a "comparable situation."[29]

Another difference between direct and indirect discrimination is a court's treatment of justification for violating the principle of non-discrimination. In cases of direct discrimination, "the grounds for derogation are typically specified in the relevant equality norm."[30] Conversely, justifications for indirect discrimination are more open ended.[31]

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[23] *Id*.
[24] SAUL, KINLEY & MOWBRAY, *supra* note 15, at 181.
[25] Council Directive 2006/54, art. 2, 2006 (EC).
[26] *See infra* notes 48 and 49.
[27] Susan Bisom-Rapp & Malcolm Sargeant, *It's Complicated: Age, Gender, and Lifetime Discrimination against Working Women - the United States and the U.K. as Examples*, 22 ELDER L.J. 1, 54 (2014).
[28] *Id*.
[29] *But see* Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699, 715–17 (1986) (finding that the United States uses an "equal treatment model, in which sex differences are never grounds for discrimination because there can always be an analogy, or "common denominator," between the two groups. In the case of maternity leave, the common denominator under this approach would be any other temporary disability, male or female).
[30] Sean Pager, *Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality*, 51 AM. J. INT'L L. 553, 556 (2003).
[31] *Id*.

B. *INTERDEPENDENCE, INTERRELATEDNESS, AND INDIVISIBILITY*

The ICESCR and other human rights covenants set forth rights in separate paragraphs, often grouped by category. However, it is a well-established principle of international human rights law that all rights are interlinked, corresponding to one another in a variety of ways. Even beyond rights of a certain category, the principles of indivisibility, interdependence, and interrelatedness mean that all rights are interwoven, even those in the often-juxtaposed categories of civil and political rights versus economic, social, and cultural rights.[32] A critique of this understanding of human rights is that saying that all rights are indivisible, interdependent, and interrelated does not leave room for any hierarchy, or the ability to make a normative judgment that some rights are more important than others.[33] However, these principles do not interfere with an inevitable hierarchy of human rights, but rather provide a structure by which all rights can be understood in a universal, comprehensive, and inclusive way. Rather than getting in the way of enforcing fundamental rights, the principles of indivisibility, interdependence, and interrelatedness create a framework under which a new group of protected persons or situation of discrimination that has not been previously considered, the human rights promised in international covenants can apply.[34]

Because of these principles, the right to parental leave cannot be looked at in a vacuum. In the ICESCR, the right to parental leave is guaranteed under the greater right to work. Parental leave is closely interrelated with rights to privacy and family as well. Furthermore, the principles of indivisibility, interdependence, and interrelatedness do not just describe the relationship of rights that belong to one individual; there is interaction between holders of rights as well. In the context of maternity leave, there is interdependence between a mother's right to work, right to health, and rights to privacy and family. Along with the rights of the mother, however, are the child's rights of health and wellbeing. When expanding leave rights to fathers as well, the three principles can prompt an analysis of how enhanced paternity leave benefits can advance mothers' rights in the workplace, as well as the aforementioned rights of health and wellbeing of the child.

C. *POSITIVE ACTION MEASURES*

CEDAW provides for the adoption of "temporary special measures aimed at accelerating de facto equality between men and women,"[35] or what we call in the United States "affirmative action." It is sometimes also referred to as "positive action" measures. The justification for states to actually undertake measures to ensure equality, rather than just preventing non-discrimination, is found in provisions of the ICESCR and CEDAW which obligate states to take

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[32] THEO VAN BOVEN, *Categories of Rights*, *in* INTERNATIONAL HUMAN RIGHTS LAW 173–187 (Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran & David Harris, eds., 2017).
[33] *Id*. at 181.
[34] *Id*. at 187. *See also* MORSINK, *supra* note 14.
[35] CEDAW, *supra* note 1, at art. 4.1.

positive steps to promote the enjoyment of rights.[36] No matter what they are called, positive action measures generally include "any program that takes positive actions to enhance opportunities for a disadvantaged group, with a view to bringing them into the mainstream of civic and economic life."[37] A policy such as maternity leave may not quite fit the definition of affirmative action as we know it in the United States, which generally encompasses controversial components such as preferences and quotas.[38] Another reason maternity leave may not quite fit the definition of positive action measures is that CEDAW provides for "*temporary* special measures."[39] However, the importance of affirmative action to international human rights law, and maternity leave in particular, is that states have, by signing the ICESCR or CEDAW, agreed to implement positive measures to address inequality and discrimination.[40] It is not enough for a state party to one of these covenants to refrain from discriminatory policies; they must also act against discrimination by "all appropriate means," especially legislation.[41] Furthermore, the theoretical purposes behind affirmative action are much more broad than the idea of policies that advantage certain groups. The purposes for affirmative action, "ending equality deprivations and advancing economic wellbeing," are anchors for the various policies that follow.[42]

One criticism of the use of affirmative action as a lens to view discrimination is that it "historically reinforced a 'sameness' approach to anti-discrimination law."[43] This "sameness" approach views positive action measures as exceptions to the norm, when they should in fact be "understood as an integral dimension of equality."[44] By treating members of a protected class as exceptions, rather than as a different (but just as "normal") group, positive action measures "reinforce stereotypes and prejudices about the 'natural' inequality of individuals from groups in need of different treatment."[45] In the context of maternity leave, this argument would mean that in a system where special treatment on the grounds of pregnancy and childbirth is justified as an "exception," a woman taking advantage of the protection is admitting her variation from the norm and perpetuating a stereotype that her employment is not natural, but her childbearing is. The above criticism fails to provide an alternative for guarantying maternity protection of women if not through an

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[36] *See Id*. ("States Parties. . . agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake. . .[t]o adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women[]"). *See also* ICESCR, *supra* note 16, at art. 2 ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation. . .with a view toward achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.").
[37] Ginsburg & Merritt, *supra* note 7, at 254–55.
[38] Ginsburg & Merritt, *supra* note 7, at 255.
[39] CEDAW, *supra* note 1, at art 4.1 (emphasis added).
[40] Ursula O'Hare, *Equality and Affirmative Action in International Human Rights Law and Its Relevance to the European Union*, 4 INT'L J. DISCRIMINATION & L. 3, 18 (2000).
[41] ICESCR, *supra* note 16, at art. 2.
[42] Ginsburg & Merritt, *supra* note 7, at 258.
[43] Colleen Sheppard, *Mapping anti-Discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law*, 151 INT'L LAB. REV. 1, 6 (2012).
[44] *Id*. at 6.
[45] *Id*.

exception and special treatment. There is much more going on in perpetuating that stereotype than the framework of positive action.

II: CASE LAW AND LEGAL FRAMEWORK

A. *CAPITA CUSTOMER MANAGEMENT LTD. V. ALI (WORKING FAMILIES INTERVENING); HEXTALL V. CHIEF CONSTABLE OF LEICESTERSHIRE POLICE (WORKING FAMILIES INTERVENING)*

The European Court of Justice ("ECJ")[46] has a line of case law regarding family leave policies and the specific issue of discrimination against men. The two main laws at play in these cases are the Pregnant Workers' Directive ("PWD") and the Equal Treatment Directive ("ETD"). The case under analysis in this note, *Capita Customer Management Ltd. v. Al*i, is a case decided by an appeals court in the United Kingdom in 2019, when the UK was still a member nation of the EU.[47] The UK has its own legal framework of maternity leave and shared parental leave that is in conformity with the PWD and ETD.

This 2019 case out of the England Court of Appeal, Civil Division, involved two plaintiffs claiming discrimination because of special treatment to women in connection with pregnancy. In the first case, an employee of Capita Customer Management sought time off to care for his newborn child when his wife was diagnosed with post-partum depression and advised to return to work. Capita provided twelve weeks of full pay to mothers on maternity leave, but denied the male employee the same rate of pay. Ali sued under direct discrimination,[48] and the employment tribunal held that due to an exclusion for special treatment in relation to pregnancy and childbirth, the direct discrimination claim was unsustainable. The second case involved a male police constable, Hextall, who was paid a statutory rate of pay while on shared parental leave, as opposed to a female constable who would receive "enhanced maternity pay." The plaintiff in this case brought a claim of indirect discrimination, alleging "special treatment to women in connection with pregnancy and childbirth."[49] The plaintiff's claim in this case was similarly denied on the basis that it was not actually an instance of discrimination because sex equality did not have effect in relation to special treatment afforded women in connection with pregnancy or childbirth. Both employees sued, and the Court of Appeal affirmed both decisions, finding that entitlement to maternity leave and maternity pay was not regarded as sex discrimination.

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[46] Sometimes also referred to as CJEU (Court of Justice of the European Union).

[47] Because *Capita Customer Management* was decided while the UK was still a member state, I will analyze the reasoning and outcome in the context of precedent EU cases for the purpose of applying the principles of international human rights law outlined above. At the time *Capita Customer Management* was decided, the CJEU had binding jurisdiction over UK courts. *See* Sylvia de Mars, *Brexit next steps, The Court of Justice of the EU and the UK* (Feb. 7, 2020), https://commonslibrary.parliament.uk/brexit-next-steps-the-court-of-justice-of-the-eu-and-the-uk/#:~:text=period%2C%20and%20beyond.-,The%20Court%20of%20Justice%20of%20the%20EU%20(CJEU)%20interprets%20EU,a%20role%20in%20UK%20law.

[48] *See* Equality Act 2010, UK Public General Acts 2010, c. 15, Part 2, Ch. 2, §13 (1), (6).

[49] *See id.* at §19.

The Court's judgment in this case, that a woman's enhanced pay and benefits under maternity leave does not constitute sex discrimination, is dependent upon the Court's view of the primary purpose of the leave. The Court stated that "the predominant purpose of such leave was not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth not shared by the husband and partner."[50] In England and throughout the European Union, maternity leave is understood to have two purposes—the protection of the delivering mother, and the protection of a child who needs care after birth.[51] The first of these two purposes, that women who are pregnant and give birth need to be protected through a particular period of vulnerability, is necessary to justify enhanced maternity benefits and higher pay for women than men on parental leave. To understand how the Court in *Capita Customer Management v. Ali* came to its conclusion that favorable treatment on the basis of sex is not discrimination, one has to understand the law and theory of maternity leave in the European Union, the particular statutory scheme in England, and the *Hofmann* reasons, which has shaped much of the case law in the European Union regarding family leave rights.

B. *MATERNITY LEAVE IN THE EUROPEAN UNION – THE PREGNANT WORKERS' DIRECTIVE AND THE EQUAL TREATMENT DIRECTIVE (PREDOMINANT PURPOSE)*

Of the two purposes of maternity leave, protection of women who bear children and give birth and protection of a newborn child, the Pregnant Workers' Directive (PWD) clearly concerns the former. Grounded in the principle of equality between the sexes, the fundamental right to work, and the right to a healthy workplace, the PWD guarantees measures to protect the health and safety of "pregnant workers, workers who have recently given birth or who are breastfeeding. . . ."[52] This directive ensures health and safety protections, safe breastfeeding opportunities, the right to maternity leave and pay, and protection from dismissal. The purpose of protecting women as mothers is obvious from these enumerated safeguards, but is also rooted in the type of rights themselves. As with the *Pregnant Workers Directive*, all the protections are specifically connected with the right to work and the rights of women to equality in the workplace. Rather than discussing childcare or maternal bonds with newborn children, the PWD focuses on the rights of a mother in the workplace, not her rights as a mother in private or family life.

The Equal Treatment Directive serves to implement the principle of equality of treatment for men and women, specifically "as regards access to employment, including promotion, and to vocational training and as regards working conditions…"[53] Article 2 provides exceptions to the Directive, and the latter two provisions provide the basis for determining whether maternity leave benefits can be regarded as discrimination. Article 2(3) states that "[t]his Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity" and article 2(4) states that

[50] Capita Customer Management, *supra* note 8, at 72.
[51] de la Corte Rodriguez, *supra* note 10, at 27.
[52] Council Directive 92/85, art. 1 1992 O.J. (L 348), (EEC).
[53] Council Directive 76/207, art. 1(1), 1976 O.J. (L 39), (EEC).

"[t]his Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in article 1(1)."[54] These two provisions provide important elements of interpretation of direct and indirect discrimination; in article 2(3), whether there is a "comparable situation, and in article 2(4), the mandate to implement positive action measures that do not have discriminatory effects.[55]

Although it may appear that there would never be a "comparable situation" for a man "as regards pregnancy and maternity" as stated in article 2(3), the Court of Justice of the European Union has found cases where situations are comparable.[56] There will never be a "comparable situation" in the first element of this direct discrimination test if the mother's situation has strictly to do with her health and recovery from pregnancy and childbirth; a man will never experience a similar need for recovery in his capacity as a father. However, if the mother's need for maternity leave is related to the purpose of childcare, there is more likely to be a comparable situation because the father is, theoretically, equally involved in childcare.[57] The second element, differential treatment on the grounds of sex, similarly analyzes the difference between mothers in their statuses as persons who have just been pregnant and given birth and mothers as employed persons entitled to benefits. If there is differential treatment towards mothers as employed persons in their rights to work rather than their rights to health and recovery, the treatment is likely to be discriminatory.[58]

Lastly, in understanding the dual purpose of maternity leave, it is important to note the general scheme of statutory leave requirements in the European Union. There is a minimum of fourteen weeks of maternity leave across the European Union, which is intended to cover the average six weeks incapacity that most women experience when recovering from pregnancy.[59] This minimum, which covers a six-week recovery period and a subsequent eight-week period for caring for a newborn, accounts for both fundamental purposes of maternity leave—one accounting for biological sex differences, and the other unconnected to gender.

C. *STATUTORY SCHEME IN ENGLAND – MATERNITY LEAVE AND SHARED PARENTAL LEAVE*

The scheme of maternity leave and shared parental leave in England directly accounts for both purposes of maternity leave. In England, every mother who

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[54] *Id*. at arts. 2(3)–2(4) 1976 O.J. (L 39). *See also* CEDAW, *supra* note 1. *See also* O'Hare, *supra* note 40, at 5 (describing article 2(4) as a positive action provision).
[55] *See generally* Marc De Vos, *The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law*, 20 INT'L J. OF DISCRIMINATION AND THE LAW 62 (2020).
[56] *See e.g.*, C–104/09, Pedro Roca Alvarez v. Sesa Start España ETT SA, 2010 E.C.R. I-0866, ECLI:EU:C:2010:561 (where the CJEU found mother and father, female and male workers, to be in comparable situations as regarded their childcare responsibilities).
[57] *Id*.
[58] *See* Dowd, *supra* note 29, at 739 (arguing that the Pregnancy Discrimination Act – Title VII's fundamental guarantee of equal opportunity extends to pregnancy discrimination, while at the same time requires that pregnancy disability be given equal treatment with other work).
[59] de la Corte Rodriguez, *supra* note 10, at 39.

gives birth is required to take a compulsory two weeks of maternity leave.[60] After the mandatory two weeks, a mother can then take up to fifty additional weeks of maternity leave, with pay available for thirty-nine of those weeks.[61] However, after the mandatory two weeks, or at any point during the subsequent fifty weeks, a mother can choose to relinquish the remainder of her maternity leave and use the balance as shared parental leave to be split by a mother and her partner. This leave is flexible, as it allows the parents to share leave however they want; it does not have to be taken all at once or any amount by a certain parent.[62] Although this leave is shared, the decision to opt into shared parental leave lies with the mother. A father's right to shared parental leave is completely tied to the mother; a mother must voluntarily relinquish the remainder of her maternity leave to share leave with a partner. Like statutory maternity leave, pay is available for the first thirty-nine weeks of shared parental leave.[63]

This scheme accounts for both purposes of maternity leave: the compulsory two weeks for a recovering mother is directly related to the protection of women as mothers, and protection of childcare for a newborn is present in the mother's choice to take up to an additional fifty weeks of leave and the opportunity for her to share her leave with her partner as early as the end of the compulsory two weeks.

D. *CASE LAW AND THE HOFMANN REASONS*

Several cases out of the ECJ address the relationship between maternity, childcare, benefits for fathers, and discrimination. Only two cases directly answer questions of discrimination against fathers in the context of maternity leave, specifically by interpreting the exception in Article 2(3) of the ETD: *Hofmann v. Bermer Ersatzkasse* and *Betriu Montull v. INSS*.[64] *Hofmann* is still the major precedent for cases involving discrimination against men and Article 2(3) of the ETD, and its line of thinking is present in cases involving other issues of discrimination against men in the context of maternity and childcare, including breastfeeding and adoption.

Hofmann v. Barmer Ersatzkasse involved a German plaintiff who submitted a claim for maternity pay but was refused by the Social Security Administration. At the time, maternity leave in Germany was six months long, with the first eight weeks as compulsory recovery from childbirth and the rest of the six months as optional. The plaintiff, Hofmann, took leave from his employer and cared for his child while the child's mother returned to work after the compulsory eight weeks. Hofmann's leave, however, was unpaid and he was denied maternity payment on the basis that "only mothers could claim maternity leave and the corresponding allowance."[65] Hofmann filed an administrative appeal to the

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[60] Capita Customer Management, *supra* note 8, at ¶47.
[61] *Id*.
[62] *Id*.
[63] Maternity Pay and Leave, GOV.UK, https://www.gov.uk/maternity-pay-leave/pay.
[64] de la Corte Rodriguez, *supra* note 10, at 29. Case C-184/83, Ulrich Hofmann v. Barmer Ersatzkasse, ECLI:EU:C:1984:273, 3048-3077 (December 7, 1984) [hereinafter Hofmann v. Ersatzkasse]. Case C-5/12, Marc Bertrui Montull v. Instituto Nacional de la Seguridad Social (INSS), ECLI:EU:C:2013:571, ¶¶ 1-76 (Sept. 19, 2013) [hereinafter Betriu Montull v. INSS].
[65] de la Corte Rodriguez, *supra* note 10, at 30.

German Social Court and was denied again on the basis that "the legislature deliberately did not create a period of leave capable of being granted to either parent."[66] Hofmann appealed again, arguing that after the compulsory period of eight weeks had ended, maternity leave was no longer concerned with protecting the mother's health but "exclusively with the care which she gave to the child."[67]

The question in this case was an interpretation of the exception in Article 2(3) of the ETD. The Court stated that the "decisive factor is whether maternity leave is to be regarded as a 'provision concerning the protection of women, particularly as regards pregnancy and maternity' within the meaning of Article 2(3) thereof."[68] The Court concluded that the whole period of statutory maternity leave, not just the first eight weeks of compulsory leave, is reserved to the mother "to the exclusion of any other person" because it is only the mother who experiences the effects of pregnancy and childbirth.[69] This privilege for new mothers is legitimate under Article 2(3) and the promotion of equal treatment for two reasons. First, because "it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth." Second, because "it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment."[70] These "*Hofmann* reasons" remain the prevailing standard for ECJ jurisprudence interpreting the exception in Article 2(3) of the ETD.[71]

The next ECJ case that directly interpreted the issue of discrimination and maternity leave is *Betriu Montull v. INSS*. Almost 30 years after *Hofmann*, plaintiff Betriu Montull brought suit when he was refused maternity pay under the Spanish social security scheme. The plaintiff's wife was self-employed and therefore covered by a less advantageous scheme of maternity benefits. The plaintiff, however, was an employee covered by general social security, a scheme which would provide sixteen weeks of maternity leave plus compensation.[72] The sixteen weeks included six weeks of compulsory leave following childbirth plus ten weeks of voluntary leave, and the plaintiff's request was for a benefit equivalent to the latter ten weeks.[73] This scheme of maternity leave is unique from *Hofmann* in that a father is actually entitled to share the latter ten weeks as "parental leave," however, Betriu Montull was unable to benefit from the leave because the child's mother was not covered by the same scheme. The INSS refused the leave on the grounds that "the right to leave is a right of mothers who are covered by a State social security scheme … the father does not have his own autonomous, separate right to leave, independent of the

[66] Hofmann v. Ersatzkasse, *supra* note 64, at 3050.
[67] *Id*.
[68] *Id*. at 3052.
[69] *Id*. at ¶19.
[70] *Id*.
[71] The ECJ's holding in that case must be understood in the context of deference to the member state. *See infra* notes 117 and 118 and accompanying text.
[72] Betriu Montull v. INSS, *supra* note 64, at ¶20.
[73] *Id*. at ¶21.

mother's right, but only a right which necessarily derives from that of the mother."[74]

Three decades after *Hofmann*, the ECJ had the opportunity to re-evaluate the *Hofmann* reasons. In *Betriu Montull*, the Spanish AG argued before the Court that while the first six weeks of compulsory leave was for mothers alone, who were unique in their need for recovery and to which there was no comparable situation for fathers, the latter ten weeks should not be protected under the Article 2(3) exception.[75] By providing that mothers could elect for their partner to take responsibility in either some or all of the last ten weeks of leave, the Spanish legislature had intended for maternity leave to be about the protection of the newborn child, and that child's relationship with both the mother and the father.[76] However, the ECJ declined to depart from the *Hofmann* reasons, stating that Article 2(3) recognized the legitimacy of equal treatment "first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth."[77]

Other cases of the ECJ have dealt with analogous issues of sex differences in the realm of childcare. A 1983 case related to Italian adoption leave, *Commission v. Italy*, addressed the question of whether men were entitled to adoption leave.[78] At that time, Article 6 of Law No. 903 provided that Italian women were entitled to three months of leave and maternity allowance after adopting a child under six years of age.[79] After those first three months, a mother is entitled to an additional six months of job-protected leave which the father is entitled to share either "in lieu of the working mother or where the care and custody of the children are given to the father."[80] However, it is only this second portion of leave that a father can share in; an adoptive father does not have the right to take leave during those first three months. The Court held that this was justified "by the legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a newborn child in the family during the very delicate initial period."[81]

A 2010 case from the ECJ, *Roca Alvarez v. Sesa Start España*, also dealt with an issue tangential to maternity leave, but led to a different outcome. A Spanish law called the "Workers Statute" provided for "breastfeeding leave."[82] The law states that "[f]emale workers shall be entitled to take one hour off work, which they may divide into two parts, in order to breastfeed a child under the age of nine months … This time off may be taken by the mother or the father without distinction, provided that they are both employed."[83] The plaintiff in this case tried to exercise his entitlement to the breastfeeding leave but was refused

[74] *Id*. at ¶22.
[75] de la Corte Rodriguez, *supra* note 10, at 34.
[76] *Id*.
[77] Betriu Montull v. INSS, *supra* note 64, at ¶62.
[78] de la Corte Rodriguez, *supra* note 10, at 29.
[79] Case C-163/82, Commission of the European Communities v. Italian Republic, ECLI:EU:C:1983:295, 3288 (Oct. 26, 1983).
[80] *Id*.
[81] *Id*.
[82] Roca Alvarez v. Sesa Start España, 2010 E.C.R. I-0866, at ¶7. *See also* Workers Statute art. 37(4) (B.O.E. 1995, 75) (Spain).
[83] *Id*.

on the ground that the child's mother was self-employed, and her employment was an essential condition of the father's entitlement to leave. The lower court held that breastfeeding leave is reserved for female employees and that a father is only entitled to the leave on the condition that the child's mother is employed. The ECJ, however, found that the provision was discriminatory because it established "a difference on the grounds of sex, within the meaning of Article 2(1) of Directive 76/207, as between mothers whose status is that of an employed person and fathers *with the same status*."[84] Unlike *Hofmann*, *Betriu Montull*, and *Commission v. Italy*, which held that maternity and adoption leave was a preferential benefit for mothers because of their unique relationship with their child, *Roca Alvarez* held that bottle-feeding fathers were of the same status as breastfeeding mothers. Despite the obvious biological condition of breastfeeding, the Court found that the leave itself "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 following maternity leave."[85]

It is important to note that the provision at issue in *Roca Alvarez* was Article 2(1) of the ETD, not the pregnancy exception in Article 2(3). "It was not simply because the 'breastfeeding leave' law treated men and women differently, but because this particular disparity could worsen women's employment opportunities, that the policy violated the principle of equal treatment."[86] The Court in *Roca Alvarez* takes something into account that it did not consider in *Hofmann*, *Betriu Montull*, or *Commission v. Italy*: the effect of the policy on women's employment opportunities and the principle of "reducing existing inequalities in society."[87]

E. *IS IT CONSISTENT?*

The *Hofmann* reasons generally align to the two purposes of maternity leave. The first reason, the justifiable "protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth" is uncontroversial support for the first purpose of maternity leave: health and wellbeing of the mother following pregnancy and childbirth. While the second reason, protection of "the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment" seems related to childcare and the wellbeing of the newborn, it differs in how it is very mother-centric. The second purpose of maternity leave does not make mention to one parent over another, but the wellbeing of the child.

Roca Alvarez seems like the clear outlier in these four cases, but is arguably consistent as well. The Court in *Roca Alvarez* was not interpreting the breastfeeding leave policy under the Article 2(3) exception, but the Article 2(1) prohibition on sex discrimination. Each of these four cases, *Hofmann*, *Betriu*

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[84] *Id*. at ¶25 (emphasis added).
[85] *Id*. at ¶ 28.
[86] Julie C. Suk, *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe*, 60 AM. J. COMPAR. L. 75, 83 (2012).
[87] Roca Alvarez v. Sesa Start España, 2010 E.C.R. I-0866, at ¶ 38.

Montull, *Commission v. Italy*, and *Roca Alvarez*, recognizes a clear demarcation between the purpose of maternity leave that is for a mother's medical recovery and the purpose that is caring for the child. In the former three cases, the Court found that making mothers the primary holders of the right to maternity leave properly fell within the Article 2(3) exception. In the latter case, the analysis of breastfeeding and bottle feeding as comparable situations led the Court to hold that tying the father's right to leave to the mother's employment was a discriminatory policy under Article 2(1).

III. ANALYSIS

Each of these cases alleging discrimination regarding maternity leave or other childcare benefits was brought by a male plaintiff, including the recent *Capita Customer Management* case. Applying the principles of nondiscrimination from Part I, the first question is whether there is even discrimination in any of these cases. The Court in *Capita Customer Management* explicitly found that there was no discrimination. The ECJ in *Hofmann*, *Betriu Montull*, and *Commission v. Italy* found that the discrimination fell within the scope of an exception "concerning the protection of women, particularly as regards pregnancy and maternity."[88] Lastly, in *Roca Alvarez*, the ECJ found that there was discrimination on the grounds of sex in violation of Article 2(1) of the ETD.

In *Capita Customer Management*, both Ali and Hextall brought claims of direct and indirect discrimination. When both of Hextall's claims were dismissed, he only appealed the claim on indirect discrimination. The relevant law to Ali and Hextall's claims was the UK Equality Act, which does provide for an exception to a discriminatory "provision, criterion or practice," if it is "a proportionate means of achieving a legitimate aim."[89] The appeals court denied Ali's direct discrimination claim, citing *Hofmann* and the "different purpose" served by maternity leave for a "female comparator."[90] The Court also found for the purposes of the indirect discrimination claim that even if the statutory pay scheme "creates a particular disadvantage to men . . . the justification defence must still apply so that special protection is secured to birth mothers."[91] Although it referenced *Hofmann*, the *Capita Customer Management* Court did not analyze Ali or Hextall's claims in relation to the Equal Treatment Directive. Although this particular case will never be answered using the ETD and exception under Article 2(3) because the UK is no longer an EU member state, it is not difficult to see the same legal philosophy as *Hofmann* and *Betriu Montull*.

As mentioned earlier, the definitions of direct and indirect discrimination in the UK Equality Act closely mirror those in the ETD, so it is not surprising that the Court in *Capita Customer Management* came to similar conclusions as the ECJ. Does this mean that discrimination against men in these contexts does not violate international human rights principles of nondiscrimination? Not

[88] Council Directive 76/207, *supra* note 53, at art. 2(3).
[89] *See* Equality Act 2010, *supra* note 48, at ch. 2 §19.
[90] Capita Customer Management, *supra* note 8, at ¶ 27 (Hextall did not appeal his direct discrimination claim).
[91] *Id*. at ¶ 38.

necessarily. Each of the decisions in *Hofmann*, *Betriu Montull*, *Commission v. Italy*, and *Capita Customer Management* dealt with an exception to discriminatory treatment; the courts all found that the treatment at the source of the claims was lawful. It seems clear that most of these claims could not withstand an argument of direct discrimination because of a comparability analysis. No father can claim that he has undergone a comparable situation to the pregnancy and childbirth which a mother undergoes. The claim in *Commission v. Italy* could have come out differently, because there is certainly an argument to be made that a new adoptive father is in a comparable situation to a new adoptive mother. However, the Court in *Commission v. Italy* "simply accepted at face value the Italian government's view that the discrimination was justified . . . Why only mothers, but not fathers could facilitate this assimilation [into the adoptive family] was not discussed."[92]

Nevertheless, the Court did not find indirect discrimination in any of these cases either, but given the ICESCR definition, none of the policies in these cases appear "neutral at face value." In fact, the appeals court in the UK and the ECJ in each of its opinions found explicitly that the intention of the policies was to benefit working mothers. *Roca Alvarez* would be the only case of indirect discrimination with a progressive policy that appeared beneficial for both sexes, but had the discriminatory effect of tying a father's right to leave to the mother's employment. "The universe of facially-neutral norms having differing effects on men than women encompasses a much broader spectrum than the gender-specific norms caught by the prohibition on direct discrimination."[93] Because of this spectrum, the courts interpreting indirect discrimination have a lot more freedom of interpretation to determine whether the norms are discriminatory or not, as opposed to constricting "gender-specific norms," which are "restricted to defined derogations."[94]

A criticism to the notion of discrimination against men is the controversial advocacy of advocating for "men's rights" when women experience discrimination and inequality in the majority of areas when compared with men. This argument is especially controversial because advocates for "men's rights" typically are not discussing rights where women enjoy rights at the expense of men, but rather a change in the balance that has remained the status quo for so long. This debate is often found in discussions of affirmative action, an issue which "inevitably generates opposition as an unfair turn of the tables, reverse discrimination against individuals not responsible for society's past discrimination."[95] Although this argument is a distorted understanding of human rights usually perpetrated by those who are reluctant to stray from tradition, courts have sometimes found policies that do unjustly discriminate on the basis of sex, race, or another protected characteristic, although not the traditional minority group who holds that characteristic.[96]

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[92] Pager, *supra* note 30, at 563.
[93] *Id*. at 590.
[94] *Id*. (despite this distinction where indirect discrimination has a broad interpretive scope while direct discrimination must be quite narrowly interpreted, Pager thinks that "indirect discrimination scrutiny [could be] a powerful tool to root out hidden structural biases . . . ").
[95] Ginsburg & Merritt, *supra* note 7, at 281.
[96] *See* De Vos, *supra* note 55, at 74 (arguing that positive action can operate through "positive discrimination that runs afoul of formal equality").

However, this finding may not sit quite right. How can we say that fathers are a protected group, disadvantaged by a society that prioritizes women as caregivers? In this analysis where a father's right to parental leave is not freestanding, although it has been held as not discriminatory by the ECJ in several cases, the focus is on the second purpose of maternity leave. In each case, *Capita Customer Management*, *Hofmann*, *Betriu Montull,* and *Commission v. Italy*, none of the plaintiffs contested the compulsory period of maternity leave that immediately follows childbirth. There is no question of indirect discrimination during this compulsory period of leave; a statutory period where a woman is required to remain home from work, and during which period her employer is required to pay her and hold her job, is not "neutral at face value," nor does it have a "disproportionate impact." There is no dispute that people who give birth require a period of recovery from a biological condition that men do not have. This fact is evident in the United Kingdom's statutory scheme of maternity leave, which provides that employees still qualify for leave if the child is stillborn after 24 weeks or dies after birth.[97] The first purpose of maternity leave, health and recovery after pregnancy and childbirth, is a primary objective in each of the cases discussed, where a period of compulsory leave from two to six weeks allows for recovery before a mother is even allowed to share the leave with her spouse.[98]

The question in *Capita Customer Management* and each of the ECJ cases could be expressed as a matter of whether the second purpose of maternity leave, protection and wellbeing of the newborn child, is a purpose unique to the mother as well. The ECJ in *Hofmann* unquestionably thought it was, phrasing the second purpose of maternity leave as protection of "the special relationship between a woman and her child."[99] The Court in *Hofmann* went on to say that the Article 2(3) exception of the ETD seeks to protect a woman not only in connection with the effects of pregnancy, but with motherhood as well.[100] The plaintiffs in the *Hofmann* line of cases brought suit for discrimination against their rights as fathers. Although the UK Court of Appeals and ECJ found no discrimination, the differential treatment experienced by these men seems like it could be a "provision, criterion or practice" that puts fathers at a disadvantage.[101] But now let's flip the question posed in the introduction to this paper on its head—"what about mothers?"

Though the second *Hofmann* reason is mother-centric and seems quite sexist, the *Hofmann* Court was not intending to set a legal precedent that would keep women at home and men at work. The Court justifies the second, controversial *Hofmann* reason with an intention to prevent the mother-child relationship "from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment."[102] They clearly recognize that

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[97] Statutory Maternity Pay and Leave: *Employer Guide*, GOV.UK, https://www.gov.uk/employers-maternity-pay-leave#:~:text=Statutory%20Maternity%20Leave,to%2052%20weeks'%20maternity%20leave.&text=The%20earliest%20that%20leave%20can,'re%20a%20factory%20worker.

[98] *See* Capita Customer Management, *supra* note 8; Hofmann v. Ersatzkasse, *supra* note 64.

[99] Hofmann v. Ersatzkasse, *supra* note 64, at ¶ 25.

[100] *Id*. at ¶ 26.

[101] *See* Equality Act 2010, *supra* note 48, at ch. 2 §19.

[102] Hofmann v. Ersatzkasse, *supra* note 64, at ¶ 25.

there is an element of "the mother-child" relationship, which puts women at a disadvantage in the workplace. The idea that women face obstacles in their employment, specifically in relation to pregnancy and childbearing, is visible in the laws and statutes that guarantee the maternity rights at issue in each of these cases. The ETD exception in Article 2(3) states that "[t]his directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."[103] The Pregnant Workers Directive protects pregnant employees from physical or chemical danger while pregnant and breastfeeding, and also orders that women must not be dismissed from work because of their pregnancy and maternity for the period from the beginning of their pregnancy to the end of the period of leave from work.[104] *Betriu Montull* also makes reference to Council Directive 2010/18/EU, a Framework Agreement on parental leave which states that the object of the directive is "to improve the reconciliation of work, private and family life for working parents and equality between men and women . . . "[105] The same case also cites Article 10(2) of the ICESCR for the "special protection" of mothers before and after childbirth.

Furthermore, the second *Hofmann* reason may be even more nuanced than appears at first glance. As mentioned earlier, the *Hofmann* reasons seem to map onto the two generally accepted purposes of maternity leave, except that the second purpose of maternity leave primarily focuses on the wellbeing of the child and the second *Hofmann* reason focuses on the mother-child relationship.[106] The disconnect in each case comes in when we get past the initial compulsory period of recovery which provides for the biological certainty that pregnancy and childbirth bring the need for medical recovery. At the stage of childcare, is the primary purpose for the benefit of the child, or the benefit of the mother? And if it is the former, should there be more room for fathers?

The Court in *Hofmann* made the explicit decision to authorize a gender-specific protection of "the special relationship between a woman and her child." The Court could have just as easily protected parent-child relationships by giving fathers the same right of extended leave, and even just as easily accomplished "the goal of protecting mothers against multiple burdens. . . if the father took care of the child."[107] One argument is that the Court in *Hofmann* understood the exception under Article 2(3) of the ETD to be "neutral."[108] The exception is there, and once a woman is pregnant and qualifies for special protection, the Court is extremely deferential to those protections and generally will not conduct a discrimination analysis.[109]

Because of the principles of indivisibility, interdependence, and interrelatedness of human rights, the right to maternity leave must be considered

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[103] Council Directive 76/207, *supra* note 53, at art. 2(3).
[104] Council Directive 92/85, *supra* note 52.
[105] Council Directive 2010/18, 2010 O.J. (L 68) 13, 14 (EU).
[106] *See generally* de la Corte Rodriguez, *supra* note 10; Hofmann v. Ersatzkasse, *supra* note 64.
[107] Pager, *supra* note 30, at 563 (It is important to note the importance of the margin of appreciation to the ECJ in trying to understand why the Court would be so deferential to a policy that unnecessarily perpetuates gender stereotypes but does not want to stray from the argument that gendering this outcome does more harm than good. Pager argues that the justification was the same in *Commission v. Italy*, that the Court "simply accepted at face value the Italian government's view" without a discussion of why).
[108] *Id*. at 566–67.
[109] *Id*. at 567.

in context. It is not just the right of a mother to take time off work after giving birth to care for her child. It is the right to health, both before and after pregnancy. It involves various rights in work and employment, including the right not to be discriminated against based on procreative ability, the right to obtain pay in the weeks following childbirth, and the right to take time off to care for a newborn child. It also involves the rights to private and family life.[110] The ICESCR recognizes the rights of parent to raise their children as they choose, with an adequate standard of living. Article 10 of the ICESCR says that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group of society . . . "[111]

The principles of indivisibility, interdependence, and interrelatedness do not just apply to the interconnections between rights of one rights-holder; they also include the relationship between rights of rights-holders themselves.[112] In the context of maternity leave, and as evidenced by the second purpose of maternity leave, a mother's right to leave from employment is indivisible from a newborn child's right to health and wellbeing. A family's right to an adequate standard of living is interdependent with parents' right to work. Most importantly, at least for the understanding of these cases and a father's right to childcare leave, is that a woman's right to success and nondiscrimination in the workplace is interrelated with a father's right to childcare leave, and a father's right to equal participation in childcare responsibilities.[113]

The second *Hofmann* reason, which justified denial of a father's independent right to paternity leave by enforcing "the special relationship between a woman and her child,"[114] seems to perpetuate a harmful stereotype that mothers are caregivers and fathers are breadwinners. Without spending too much time on criticism of the *Hofmann* reasons, because several articles already do,[115] I want to challenge just how sexist the ECJ in *Hofmann* really is. First of all, the protection of the "special relationship between a woman and her child" does not stand alone; it is qualified. The ECJ wants mothers to foster that relationship and also balance the "multiple burdens. . . from the simultaneous pursuit of employment."[116] *Hofmann* was decided in 1984, when a concern for fathers to balance children and work simply was not as much of a concern. Furthermore, the ECJ's holding in *Hofmann* should be understood in the context of deference to the member state. An important principle of the European Court is the margin of appreciation, a judicially created doctrine of self-restraint that is the cornerstone for respect for the diversity of nations within a human rights system.[117] While the ECJ is not an international human rights court, it is a court with jurisdiction over many member states with diverse cultures and interests. A decision of the ECJ, therefore, should not be understood as the unconditional view of the Court; it almost always includes some deference to the member state's policy. In *Hofmann*, that meant upholding the importance of the mother-

[110] CEDAW, *supra* note 1, at pmbl., art. 11.
[111] ICESCR, *supra* note 16, at art. 10.
[112] VAN BOVEN, *supra* note 32, at 173–74.
[113] CEDAW, *supra* note 1, at pmbl.
[114] Hofmann v. Ersatzkasse, *supra* note 64, at 3075.
[115] *See, e.g.*, Pager, *supra* note 30.
[116] Hofmann v. Ersatzkasse, *supra* note 64, at 3075.
[117] *See generally* Carozza, *supra* note 14.

child relationship to the policy of maternity leave that was already present in Germany's interpretation of Article 2(3) of the ETD.[118]

A. *WHAT DOES FULL REALIZATION OF PARENTAL LEAVE RIGHTS LOOK LIKE?*

First of all, compulsory leave for recovery from pregnancy and childbirth is a necessary component of fully realized parental leave rights. In the full context of parental leave, procreation is not equal. "Considering a unique role of mother with which a woman is blessed, appropriate mechanism for providing maternity benefit is required to ensure her active participation in economic activities post maternity."[119] CEDAW poses the obligation in its preamble that the upbringing of children is "the role of both parents in the family," but then immediately acknowledges women's unique role in procreation.[120] There is room for improvement in the sharing of responsibility for childcare through the means of parental leave, but the sharing is a childcare responsibility. Pregnancy, childbirth, and the recovery that follows are responsibilities for mothers alone.[121] "Raising a child is a cherished goal for parents. However, the phases of pregnancy and maternity make the working woman more vulnerable."[122]

A criticism of this compulsory period of leave for health and recovery is that it is paternalistic. In a proposed extension of the minimum compulsory period, the European Commission stated that "a longer leave will have a positive impact on the mother's health. It will help women to recover from giving birth and to create a solid relationship with the child."[123] The idea that new mothers should be required to stay at home and be told what is best for them and their children does indeed sound paternalistic. However, there is more to the paternalism and disfavor of the policy than displeasure at a mandatory period of recovery.[124] The compulsory period could also be seen as a benefit to employer-employee negotiations.[125] Another criticism is that making maternity leave mandatory "increases the competitive advantage of those who are ineligible for maternity leave, especially fathers."[126] Is the solution to make paternity leave mandatory as well?

"Fathers, too, face social and economic pressures that prevent them from taking advantage of paternity or parental leaves to which they are statutorily entitled."[127] Women voluntarily take up more leave because the law facilitates

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[118] Pager, *supra* note 30, at 559 (citing Hofmann v. Ersatzkasse, *supra* note 64, at ¶27).
[119] Nidhi Buch, *Maternity Benefit Act, 2017 - A Game Changer for Women's Economic Empowerment*, 9 G.N.L.U. J.L. DEV. & POL. 138, 139 (2019).
[120] CEDAW, *supra* note 1, at pmbl.
[121] By "alone," I don't mean they have to do it alone, but that men don't share in the physical responsibilities and recovery of mothers.
[122] Buch, *supra* note 119, at 140.
[123] Suk, *supra* note 86, at 78 (citing Council of the European Union, Proposal from the European Commission).
[124] *See* Birgitta Ohlsson, *Don't force mothers to stay at home*, THE LOCAL (Feb. 25, 2010, 4:24 PM), https://www.thelocal.se/20100225/25216/.
[125] Suk, *supra* note 86, at 79.
[126] *Id*. at 80.
[127] *Id*. For a description of the difference between paternity and parental leave, *see* Margaret O'Brien, *Fathers, Parental Leave Policies, and Infant Quality of Life: International Perspectives and Policy Impact*, 624 THE AM. ACAD. OF POL. SOC. SCI. & SOC. SCI. 190, 193–94 (2009) ("[P]aternity leave can be considered a statutory entitlement to enable a father to be absent from work for a period of time when

this through mandated periods of leave, and during this time women develop caregiving skills that men do not.[128] Paternity leave is always optional. [129] "Mandatory maternity leave does limit women's choice to resume work immediately following birth, but it protects women's ability to choose to exercise their right to an adequate maternity leave. Similarly, mandatory paternity leave may enable fathers to resist employer pressures to continue working, even when they want to stay home to care for a young child."[130]

The first purpose of maternity leave is fairly straightforward and really only has one obligation: to provide a period of recovery following pregnancy and childbirth. The second purpose, however, is not so straightforward. Put simply, the second purpose of maternity leave is "the protection of the child who needs care after birth."[131] Care for the child after birth, however, implies several actions that need to take place. Someone has to care for the child, and given that the context of this purpose is maternity leave, the assumption is that someone is the child's mother. However, the context of maternity leave also implies that the mother is taking leave from something, namely, work, and therefore has to account for payment and job retention. Furthermore, the mother is not the only one who can care for the child, and according to the ICESCR and CEDAW, should not be the only one.[132]

In each of the cases from the UK and European Union, there was some right for fathers to take leave, even if tied to the mother's employment or right to leave herself. None of the plaintiffs in these cases sued for leave because none was provided. Maybe, then, *Hofmann* was not so wrong in its second purpose; it actually progressively accounted for the interrelatedness of maternity and discrimination in the workplace, rather than analyzing childcare in a vacuum. The effect, however, may indirectly perpetuate the very discrimination it sought to remedy. By placing the emphasis on the "mother-child relationship," the Court in *Hofmann* was endorsing a traditional notion of women as caregivers, not men. "It is not always easy to separate rules that genuinely assist mothers and their children by facilitating a woman's pursuit of both paid work and parenting, from laws that operate to confine women to their traditional subordinate status, and to relieve men of their fair share of responsibility for childraising."[133] As mentioned above, the Court in *Hofmann* was deferential to the law of the member state, which led to a highly controversial ruling. The difficulty in the margin of appreciation is that it tends to be more tolerant of gender stereotypes, "favoring exceptions from formal equal treatment, which may be viewed as complements to the primary rule that in fact perfects it."[134] What is intended to be extra breathing room for a mother who finds herself

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a child is born. By contrast, parental leave is a statutory entitlement to be absent from work after early maternity and paternity leave.").

[128] Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 67 (2010).

[129] *Id*.

[130] *Id*. at 68.

[131] de la Corte Rodriguez, *supra* note 10, at 27.

[132] Some argue that CEDAW falls short in making this distinction clear. *See* Ginsburg & Merritt, *supra* note 7, at 260-61 (arguing that article 11 of CEDAW fails "to recognize that after the weeks surrounding childbirth, leave for childraising is most neutrally typed parental leave, not maternity leave.").

[133] Ginsburg & Merritt, *supra* note 7, at 258.

[134] Pager, *supra* note 30, at 562.

balancing the demands of parenting and the demands of work may actually be a perpetuation of "uneven parenting demands on mothers."[135]

It is natural to see the importance of maternity leave, for mothers and for children, but we may not pay close attention to what happens after, when the mother goes back to work. This is not to say that maternity leave is not a solution, because it is. It is to say that improved parental leave benefits for men may actually help solve any remaining discrimination or perpetuating stereotypes.

And because of the principles of indivisibility, interdependence, and interrelatedness, we cannot leave the rights-holder, that is the child, out of an analysis of fully realized parental leave rights. In addition to the benefits to the child's wellbeing, "job-protected and income-reimbursed" parental leave is financially beneficial for the whole family.[136] This is consistent with the ICESCR's right of a family to an adequate standard of living.[137] There is also empirical research to suggest that "paternity leave-taking has the potential to boost fathers' practical and emotional investment in infant care," however not in isolation.[138] "[I]t is embedded in a complex web of parenting styles, parental work practices, infant behavior, and wider socioeconomic factors."[139]

Full realization of parental leave rights involves more than the right to leave and right to maternity allowance for mothers. It even involves more than these same benefits for fathers. To be fully realized, there must be prioritization of the wellbeing of the child from both parents. Additionally, a mother does not need to be stripped of her unique procreative role for parental leave rights to be fully realized. The mother-child bond in the first months of the newborn's life is of the utmost importance; however, so is the father-child bond. The special bond between the father and the child, and a more even distribution of childcare between both parents, could alleviate some of the pressure on women by (1) giving women more flexibility in their choices of how long to take leave and when to return to work, and (2) acting against the stereotype that sometimes holds women back. "To reconcile work-family conflict without perpetuating traditional gender roles, we need employment policies that protect paternal caregiving and the special relationship between the father and the child."[140] Using the principles of indivisibility, interdependence, and interrelatedness, full realization of parental leave rights must promote the wellbeing of the child, of the mother, and of the family, while simultaneously working to achieve equality.

B. *WAS* CAPITA CUSTOMER MANAGEMENT *WRONG?*

Jurisprudentially, Capita Customer Management was not wrongly decided. At the time of the case, the United Kingdom was still a member state of the European Union, and although the relevant law was the UK Equality Act and

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[135] Cahill, *supra* note 9, at 2257. For a comparative analysis of employees who refuse to take all of their maternity leave, paternity leave, or vacation days, *see* Suk, *supra* note 86, at 79–80.

[136] O'Brien, *supra* note 127, at 191. "[I]nclusion of both parents in early years' parental leave schemes is a strong example of a child-centered social investment strategy." O'Brien also identifies parental leave schemes that are more focused on "child well-being" as supportive of gender equality. *Id*. at 192.

[137] ICESCR, *supra* note 16, at art. 11.

[138] O'Brien, *supra* note 127, at 207.

[139] *Id*. *See also* MARGARET O'BRIEN & PETER MOSS, *Towards an ECEC system in synergy with parenting leave, in* TRANSFORMING EARLY CHILDHOOD IN ENGLAND: TOWARDS A DEMOCRATIC EDUCATION (2020) (arguing for a cohesive system of parental leave and child wellbeing rights).

[140] Suk, *supra* note 128, at 68.

not the ETD, the definitions and interpretations of direct and indirect discrimination are quite similar, making the outcome in *Capita Customer Management* consistent with the *Hofmann* cases. However, the more important question is whether the outcome in *Capita Customer Management* reflects a full realization of parental leave rights.

The cases and policies throughout this analysis have focused on a dichotomy of purpose for maternity leave: the health and recovery of the mother, and the wellbeing of the child. In *Capita Customer Management*, the facts of the case were that plaintiff Ali was staying home with his newborn child while his wife returned to work because she had been diagnosed with post-partum depression.[141] At the end of the day, mothers have biological differences that necessitate a period of physical recovery; however, the health of the mother does not always get better two to six weeks after childbirth. If full realization of parental leave rights involves the wellbeing of the child, the mother, and the family, then *Capita Customer Management* may not have achieved this purpose. Of course, a law or policy can never be perfect or cover every hard case, but the importance of maternal health to maternity leave as a human right, and the inflexibility in the cases analyzed above, means that we should keep striving toward full realization of parental rights for men while simultaneously promoting women's and mothers' unique roles in society and in their children's lives.

[141] Capita Customer Management, *supra* note 8, at ¶5.7.