

Shared Parental Leave: can transferable maternity leave ever encourage fathers to care?

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ABSTRACT

Shared parental leave made some maternity leave transferable in the UK. The aim was to improve the position of working parents, particularly mothers, by encouraging fathers to take on more of a caring role. It has been widely acknowledged that the legislation has failed to achieve this. This article considers whether the reasons for this failure are due to the specifics of the UK's legislative scheme itself, or the model of transferable maternity leave. Comparing the experience of other countries with transferable maternity leave shows that solving many of the issues with the UK legislation would not be enough to encourage fathers to care. Instead, such comparison shows that the model of transferable maternity leave can never be the most effective tool to encourage fathers to care because it will always prioritise mothers' caring role.

KEYWORDS

Reconciliation legislation; transferable maternity leave; fathers; care; heteronormativity.

1. INTRODUCTION

Legislation which helps employees balance their childcare and paid work commitments has been widely regarded as a keyway to challenge gender inequality across the globe. The traditional approach to these leave patterns remains the most prominent: a long period of maternity leave, often complemented by a shorter period of leave reserved for fathers or the

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mother's partner when a child is born or adopted.¹ Increasingly, paternity leave is being supplemented with different types of leave available to fathers, as legislators aim to improve the position of working mothers and include fathers more in unpaid care work. The most well-established of these are individual, non-transferable rights to leave reserved for each parent. Such entitlements are associated with Scandinavian countries and have been the focus of much academic writing.² The main focus of this article will be on the UK's supplementary legislation, named shared parental leave. Despite its gender-neutral appearance, I will argue that this legislation reflects a second model of supplementary legislation, which makes some maternity leave transferable to the father or mother's partner. Much has already been written on shared parental leave and its failings.³ This paper will add to the existing literature by comparing it with other countries transferable leave models, to consider whether the legislation should be improved, or abandoned. The other countries which have adopted transferable maternity leave are Bulgaria, Chile, Croatia, Czech Republic, Israel, Poland, Portugal and Serbia. I will also refer to Spain, as transferable maternity leave was available there until 2021.⁴ Although the UK legislation is particularly problematic, the article will argue that transferable maternity leave is a flawed way to encourage father's caring role.

¹ A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 7. Paid paternity leave remains less common than maternity leave; eight of the 41 OECD and EU countries do not offer any paid leave for fathers (Y. Chzhen, A. Gromada and G. Rees *Are the world's richest countries family friendly? Policy in the OECD and EU* (Florence; UNICEF Office of Research, 2019)).

² See G. 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; S. Harris-Short, 'Building a House Upon Sand: Post-Separation Parenting, Shared Residence and Equality - Lessons from Sweden' (2011) 23 *Child and Family Law Quarterly* 344.

³ See G. Mitchell 'Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care' (2019) 41 *Journal of Social Welfare and Family Law* 406.

⁴ G. Meil, I. Lapuerta and A. Escobedo 'Spain' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 556.

Heteronormativity will be a key theoretical foundation of this article. This is the system which demands, rewards and privileges heterosexual identity, or those which closely conform.⁵ Heteronormativity delivers a range of inter-linked presuppositions. It firstly assumes a gender binary. Secondly, it adopts a system of gendered behaviour (stereotyping) aligning with that binary. Finally, it normalizes a sexual orientation between the two opposite genders. One of the consequences of this is that homosexuality is then seen as deviant. This paper will consider these three assumptions but will focus primarily on the second; that men and women are different. Femaleness is associated with caring labour, in contrast with masculinity. This aspect of heteronormativity will be the main focus because shared parental leave does aim to challenge gender conformance, even if this is not the main ambition. The legislation is primarily focused on improving the position of working mothers and, like all similar legislation, benefitting business.⁶ The way the legislation aims to achieve this does nonetheless have implications for challenging the heteronormative gendered assumptions; by encouraging “working fathers to take a more active role in caring for their children and [for] working parents to share the care of their children.”⁷ As a consequence, the legislation does challenge the constraining gendered expectations.

The paper will firstly summarise the development of shared parental leave. This is the latest addition to a substantive body of UK legislation which has aimed to help parents reconcile their paid work and caring commitments. I will refer to this body of legislation as reconciliation legislation. This definition was adopted by Busby and James to cover the wide variety of

⁵ S. Chambers ‘‘An Incalculable Effect’’: Subversions of Heteronormativity’ (2007) 55 *Political Studies* 656, 665.

⁶ S. Fredman ‘Women at Work: The Broken Promise of Flexicurity’ (2004) 33 *Industrial Law Journal* 299.

⁷ Department for Business, Innovation and Skills *Consultation on Modern Workplaces: Flexible Parental Leave, Flexible Working, Working Time Regulations, Equal Pay* (London: Crown, 2011) 3.

policies that deal with the perceived work/care conflict.⁸ The impact of heteronormativity of shared parental leave will then be examined, before it is compared with the transferable maternity leave available in other countries. This will highlight numerous problems with the UK legislation, as well as the overriding issue with transferable maternity leave; it unduly prioritises mothers' as the primary carer. Despite the positive introduction of a "sharing bonus" in Portugal, I will conclude that this legislative model remains a weak instrument to encourage father's caring role and challenge gender inequality.

The focus of this article will be on parents because this is the sole focus of shared parental leave. An appraisal of this legislation is particularly timely as the Covid-19 pandemic has exacerbated the unequal situation of women in the workplace.⁹ Not only were women more likely to lose their jobs in the UK, they also disproportionately shouldered the increased childcare demands.¹⁰ Therefore, it is important to consider if the existing legislation is best placed to challenge gender inequality.

2. DEVELOPMENT OF SHARED PARENTAL LEAVE

The first reconciliation legislation made available in the UK was maternity leave. It enabled women to recover from pregnancy and childbirth and also aimed to remove obstacles to paid work.¹¹ This remains an important ambition because paid work is of central worth to social morality in the UK, so women are increasingly expected to balance paid work and care. After extensions and amendments, all pregnant employees are now entitled to 52 weeks of maternity

⁸ N. Busby and G. James *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Cheltenham: Edward Elgar, 2011).

⁹ UN Women *From Insight to Action: Gender Equality in the Wake of Covid-19* (New York: UN Women, 2020).

¹⁰ House of Commons Women and Equalities Committee *Unequal Impact? Coronavirus and the Gendered Economic Impact* (Fifth Report of Session 2019–21 HC 385 House of Commons, 2021).

¹¹ J. Lewis *Work, Family Balance, Gender and Policy* (Cheltenham: Edward Elgar, 2009) 71.

leave as a day one employment right.¹² Eligible employees are entitled to 39 weeks of paid leave; the first six weeks is paid at 90% of their wages and the next 33 weeks are paid at the low flat rate of statutory maternity pay, which is currently £151.97 a week, or if it is less, 90% of their earnings.¹³ If women are not eligible for statutory maternity pay, they can claim maternity allowance as a social security benefit.¹⁴ Thirty-nine weeks of maternity allowance is payable at £151.97 a week or 90% of their earnings if that is less. Adoption leave and pay was equalised with the maternity leave entitlements in 2014.¹⁵ Employers can choose to pay more than the statutory minimum for all reconciliation entitlements.

Comparing the length of maternity leave available in the countries which make transferable maternity leave available, the UK looks very generous; only Bulgaria offers more, at 410 days.¹⁶ However, the UK's statutory maternity pay is one of the least generous. All the other countries with transferable maternity leave make the whole period of maternity pay income related. The only exception is Israel, where the last eleven weeks are unpaid, following fifteen weeks of full-pay (subject to a cap).¹⁷

¹² See G. James 'The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?' (2006) 35 *Industrial Law Journal* 272.

¹³ Eligibility is dependent on the mother being employed by their employer "for a continuous period of at least 26 weeks" at the fourteenth week before the expected week of childbirth (Social Security Contributions and Benefits Act 1992, s 164(2)(a)).

¹⁴ Eligibility is dependent on the mother being "engaged in employment or as an employed or self-employed earner" for any part of twenty-six weeks of the last sixty-six weeks (Social Security Contributions and Benefits Act 1992, s 35(1)(b)). Mothers must also earn over the maternity allowance threshold, which is currently at least £30 a week, over any thirteen-week period (Social Security (Maternity Allowance) (Earnings) Regulations 2000, reg 5(a)).

¹⁵ See Paternity and Adoption Leave (Amendment) Regulations 2014 and Children and Families Act 2014, s 124.

¹⁶ E. Dimitrova, T. Kotzeva and K. Ilieva 'Bulgaria' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 126.

¹⁷ N. Perez-Vaisvidovsky 'Israel' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 336.

After developing a long period of maternity leave, the focus of reconciliation legislation has changed in the UK. Increasingly, the legislation has focused on encouraging father's performance of unpaid care. This reflects an increasing emphasis on gender equality, particularly in terms of enabling mothers to maintain a positive workforce connection. The first entitlement was paternity leave, introduced in 2002. This is available for two weeks to eligible employees and is paid at the same flat rate as statutory maternity pay (£151.97).¹⁸ Paternity leave, as well as all the other entitlements available to fathers, are also available to the mothers'¹⁹ or adopters' spouses, partners or civil partners who expect to have the main responsibility (apart from the mother) for childcare.²⁰ I will refer to these parents as "co-parents" throughout this paper.

There are considerable differences in the length of paternity leave and the level of payment in all the countries with transferable maternity leave. Serbia is the least generous, as there is no entitlement to paternity leave.²¹ All the other countries make some leave available. The Czech Republic and Chile are the only countries to give fathers less leave than the UK; fathers are entitled to seven and five days respectively.²² However, in both these countries, along with Bulgaria, Poland and Portugal, fathers are entitled to income related pay.²³ The low flat rate of UK statutory paternity pay is therefore, comparatively, far from generous.

¹⁸ To be eligible, parents must have been employed for a minimum period of continuous employment of twenty-six weeks at the relevant week (fifteen weeks before the expected week of birth) (The Paternity and Adoption Leave Regulations 2002, reg 4(2)(a)).

¹⁹ Paternity and Adoption Leave (Amendment) Regulations 2014, reg 4(2)(b)(ii) and(c)(ii).

²⁰ Paternity and Adoption Leave (Amendment) Regulations 2014, reg 8(2)(b)-(c).

²¹ M. Pantelić 'Serbia' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 511.

²² J. Kocourková 'Czech Republic' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 215; M. Jose Bosch 'Chile' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 178.

²³ J. Kocourková 'Czech Republic' (n 22) 215; M. Jose Bosch 'Chile' (n 22) 479; E. Dimitrova et al 'Bulgaria' (n 16) 129; A. Kurowska, B. Godlewska-Bujok and P. Michoń 'Poland' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at:

In response to criticism about the vastly unequal leave available for mothers and fathers, the former New Labour Government implemented a power in the Work and Families Act 2006 to introduce transferable maternity leave.²⁴ The first UK transferable leave entitlement was introduced in 2010, called additional paternity leave, which has since been repealed and replaced.²⁵ Additional paternity leave enabled eligible mothers to transfer up to twenty-six weeks of maternity or adoption leave, along with the relevant pay, to the father or co-parent, twenty weeks after the child was born. This meant that the first twenty weeks of maternity leave remained ring-fenced for mothers or adopters only. The mother or adopter must have returned to work or be treated as if they had returned to work, to have been able to transfer their leave.²⁶

Additional paternity leave was replaced by shared parental leave in 2014. Despite two decades passing between the introduction of maternity leave and shared parental leave, the ambition remains consistent; to create a society where work and family complement one another.²⁷ Shared parental leave was to achieve this by making 50 of the 52 weeks of maternity leave transferable. This means after the mandatory two weeks of maternity leave, the father or co-parent could take any of the remaining leave. Parents must give eight weeks' notice to take any shared parental leave.²⁸ Eligibility depends on fathers and co-parents meeting the continuity of employment test.²⁹ They must have been employed by their respective employer for twenty-

http://www.leavenetwork.org/lp_and_r_reports/ 462; R. Correia, K. Wall and M. Leitão 'Portugal' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 477.

²⁴ Equality and Human Rights Commission *Working Better: Meeting the Changing Needs of Families, Worker and Employers in the 21st Century* (London: Equality and Human Rights Commission, 2009) 8.

²⁵ Children and Families Act 2014, s117.

²⁶ Additional Paternity Leave Regulations 2010, reg 4(5) and 14(4)(b).

²⁷ Department for Business Innovation and Skills *Consultation on Modern Workplaces* (n 7).

²⁸ The Shared Parental Leave Regulations 2014, reg 8(1), 9(1), 24(1) and 25(1).

²⁹ The Shared Parental Leave Regulations 2014, reg 5(2)(a) and 21(2)(a).

six weeks by the fifteenth week before the expected week of childbirth.³⁰ To transfer their leave, the mother must have “been engaged in employment as an employed or self-employed earner for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the calculation week.”³¹

The much longer period of transferable leave is a key difference between shared parental leave and additional paternity leave. Another important difference is that mothers can take shared parental leave. This would involve fathers or co-parents transferring leave back. Parents can request to take shared parental leave in up to three non-continuous periods, as long as they give eight weeks written notice.³² Employers can consent, propose alternative dates, or refuse without proposing alternative dates, resulting in the leave being taken in one continuous block.³³ To be eligible to take shared parental leave, mothers must meet the more onerous continuity of employment test.³⁴ Therefore, some pregnant employees would be entitled to maternity leave but would not be eligible to transfer their leave or take shared parental leave.

That mothers can take shared parental leave highlights a key difference from additional paternity leave. Additional paternity leave was straightforwardly transferable maternity leave; mothers could transfer over any remaining leave, twenty weeks after the child was born, if she had returned to work. It could not be transferred back to the mother, as only this one transfer was permitted under the legislation. Therefore, additional paternity leave lacked flexibility. This is the same model adopted in most of the comparative countries; only in Czech Republic

³⁰ The Shared Parental Leave Regulations 2014, reg 35(1) and (3)(a).

³¹ The Shared Parental Leave Regulations 2014, reg 5(3)(a) and 36(1)(a). These are the same requirements to achieve the most basic maternity payment, maternity allowance.

³² The Shared Parental Leave Regulations 2014, reg 16(1), reg 12(1)-(2).

³³ The Shared Parental Leave Regulations 2014, reg 14(2).

³⁴ The Shared Parental Leave Regulations 2014, reg 4(2)(a) and 20(2)(a).

and Portugal can parents transfer leave between themselves.³⁵ As shared parental leave can be transferred and shared between parents, it is a gender-neutral entitlement. This is also something that has been made explicit in Portugal, as maternity leave has been renamed “initial parental leave.”³⁶ Shared parental leave is therefore not straightforward transferable maternity leave in the same way that additional paternity leave was. Nonetheless, I argue that it can still be accurately described as transferable maternity leave. This is because shared parental leave only exists if the mother transfers her maternity leave. That fathers and co-parents can transfer their leave back, does not fundamentally change the entitlement. Just like additional paternity leave, taking shared parental leave requires not only that the mother is eligible, but also that she consents to her leave being transferred.³⁷ Fathers and co-parents only standalone entitlement remains the two weeks of paternity leave. Therefore, despite being gender neutral, shared parental leave remains transferable leave.

3. HETERONORMATIVITY IN THE LEGISLATION

As noted in the introduction, heteronormativity is based on a number of assumptions. Firstly, it assumes there are two genders and secondly, that these two genders are different. As Butler notes, heterosexuality requires and produces the two genders; men are associated with “maleness” and women with “femaleness.”³⁸ A number of assumptions follow from this: “a man's partner will be a woman, that a woman will be the main carer of the child, that a woman would prefer to remain within the home than to enter the economic sphere, and that she is only able to opt for one of those endeavours as her predominant life role.”³⁹ These gendered ideas

³⁵ J. Kocourková ‘Czech Republic’ (n 22) 214-5; R. Correia et al ‘Portugal’ (n 23) 475.

³⁶ R. Correia et al ‘Portugal’ (n 23) 473.

³⁷ The Shared Parental Leave Regulations 2014, reg 8(3)(b)(iii).

³⁸ J. Butler *Gender Trouble: Feminism and the Subversion of Identity* (New York and London: Routledge, 2006) 30-31.

³⁹ C. Bendall ‘Some are More ‘Equal’ than Others: Heteronormativity in the Post-White Era of Financial Remedies’ (2014) 36 *Journal of Social Welfare and Family Law* 260, 261.

have long made motherhood a key aspect of femininity.⁴⁰ The final assumption made by heteronormativity is that heterosexuality is the normal way of life.⁴¹ It stigmatises, marginalises and makes invisible those which contradict these norms. These assumptions are reflected in the UK reconciliation legislation in two main ways.

Firstly, the shared parental leave legislation is based on the assumption there are two parents: a mother and father. Across all the comparative countries, the leave is limited to two people performing the parenting role. The heterosexual assumption is reflected in shared parental leave's preceding policy documents, which mentions things like how important fathers are for children's welfare.⁴² Therefore, despite shared parental leave being available to co-parents, including those raising children in same-sex relationships in the UK, heterosexuality is still presented as the norm. That parents in same-sex relationships are eligible for shared parental leave may lead some to argue that the legislation does not marginalise those in same-sex relationships. When compared to the other countries with transferable maternity leave, only Portugal has also made transferable leave accessible to same-sex parents.⁴³ Although including same-sex parents is clearly a positive step forward when compared with these other entitlements, I would argue that the legislation remains problematic. Despite the huge strides taken in the UK to better recognise and legally support those in same-sex relationships, heterosexual dominance has not been seriously undermined.⁴⁴ This is in part because the law has increasingly recognised those relationships which conform to heteronormative ideals;

⁴⁰ See for example, E. Nakano Glenn 'Social Constructions of Mothering: A Thematic Overview' in E. Nakano Glenn, G. Chung and L. Rennie Forcey *Mothering: Ideology Experience and Agency* (London and New York; Routledge, 1994); C. McGlynn 'European Union Family Values: Ideologies of 'Family' and 'Motherhood' in European Union Law' (2001) *Social Politics* 325; R. Cain 'Confessions of the New Capitalist Mother: Twenty First Century Writing on Motherhood as Trauma' (2007) 18 *Women: A Cultural Review* 19.

⁴¹ S. Jackson 'Gender, Sexuality and Heterosexuality: The Complexity (and Limits) of Heteronormativity' (2006) 7 *Feminist Theory* 105, 107.

⁴² Department for Business, Innovation and Skills *Consultation on Modern Workplaces* (n 7) 7.

⁴³ R. Correia et al 'Portugal' (n 23) 476.

⁴⁴ S. Jackson 'Gender, Sexuality and Heterosexuality' (n 41) 110.

shared parental leave remains predicated on two people, joined in a monogamous, sexual union, raising children. This fails to challenge the pervasiveness of heteronormativity. The most that can be said about laws like shared parental leave is that they make it easier for some people to live outside heterosexuality, rather than challenging heteronormativity.

The second way the body of legislation reinforces heteronormative assumptions is that it conforms to the gendered expectations imposed by heteronormativity. Jackson notes that a keyway heterosexual couples “do” gender and heterosexuality, is through their household labour and division of resources. The long period of maternity leave, supplemented by the substantially shorter two weeks of paternity leave, which is the only standalone entitlement available to fathers and co-parents, divides household labour and resources down traditional gendered divisions. It affirms the gendered expectation of “femininity”; women are natural caregivers and provide domestic labour. The two weeks of paternity leave reflects how “manliness” is not associated with caring labour, and that their role is to be in the paid workforce.

It is clear that the initial reconciliation legislation in the UK followed and prescribed gendered roles. This should perhaps, come as no surprise. After all, “law is central to the creation, maintenance and reproduction of heteronormativity within contemporary societies.”⁴⁵ This is partly because the law appears neutral, which enables heteronormativity to be concealed.⁴⁶ This also makes any critical analysis of heterosexuality and heteronormativity challenging.

⁴⁵ P. Johnson ‘Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority’ (2011) 20 *Social and Legal Studies* 349, 350.

⁴⁶ C. Smart *Feminism and the Power of Law* (London and New York: Routledge, 1989) 8.

Against this backdrop, shared parental leave might be seen as a considerable surprise. Although it does not challenge the dominance of the heterosexual norm, it does still mark an improvement to the UK reconciliation legislation. Transferable maternity leave enables parents to negotiate and contest these gendered conventions, by allowing women to prioritise something other than domesticity and motherhood. Shared parental leave could even be understood as a challenge to heteronormative gendered ideas. This is because it aimed to encourage fathers to take on a more active caring role.⁴⁷ Although this was mainly to facilitate and encourage mothers' workplace participation, it is still positive that the legislation could undermine repressive gendered expectations.

In addition to introducing transferable maternity leave, some of the other countries compared have also extended paternity leave to further challenge the gendered ideals. Portugal makes 25 days of paternity leave available, which is a much bigger proportion of the 120 or 150 days available as initial parental leave.⁴⁸ Spain did have 12 weeks of paternity leave when maternity leave was transferable, but this has since been repealed and replaced with 16 weeks of paternity leave.⁴⁹ This matches the maternity leave entitlement in Spain. Furthermore, in both countries, paternity pay is 100% of income.⁵⁰ This ensures that fathers are entitled to more than just a brief insight into parenthood. A longer length of paternity leave sends a clear symbolic message that fathers have a vital parenting role at the start of a child's life.

⁴⁷ Department for Business, Innovation and Skills *Consultation on Modern Workplaces* (n 7) 3.

⁴⁸ Mothers in Portugal can choose to take either 120 days at 100 per cent of earnings or 150 days at 80 per cent of their earnings. (R. Correia et al 'Portugal' (n 23) 474 and 477).

⁴⁹ G. Meil, I. Lapuerta and A. Escobedo 'Spain' in P. Moss *16th International Review of Leave Policies and Related Research 2020* (International Network on Leave Policies and Research, 2020) 540; G. Meil et al 'Spain' (2021) (n 4) 558.

⁵⁰ G. Meil et al 'Spain' (2021) (n 4) 558; R. Correia et al 'Portugal' (n 23) 477.

Portugal and Spain, along with Bulgaria and Chile, have also made certain periods of paternity leave mandatory. This means that employers can be held liable if their workers do not take the leave. In Portugal, 20 of the 25 days of fathers-only parental leave is now mandatory.⁵¹ Spain has recently made six of the 16 weeks obligatory.⁵² In Bulgaria, the whole 15 days of paternity leave is mandatory, as is the five days in Chile.⁵³ This sends a symbolic message that fathers are expected to participate in childcare and can therefore help challenge the restrictive heteronormative gendered assumptions. As has been noted at EU level, mandatory leave would also “ensure that men will not be made, on account of social pressure, to forgo their entitlement.”⁵⁴

Some have argued that the two weeks of UK paternity leave should be made mandatory.⁵⁵ I agree that this would be a welcome change, as would increasing the length of paternity leave. It would challenge the gendered ideals that continue to associate men with paid work and demonstrate that all parental care is important. A longer period of leave would also allow parents a genuine opportunity to bond and gain some experience in caring for their child. Such an insight might help to recover a notion of masculinity which includes care work.⁵⁶ However, the take-up in Portugal and Bulgaria warn against such optimism (there is no information available on the take-up in Chile and in Spain).⁵⁷ In Bulgaria, approximately a third of the

⁵¹ Law No. 90/2019, art 43.

⁵² G. Meil et al ‘Spain’ (2021) (n 4) 558.

⁵³ E. Dimitrova et al ‘Bulgaria’ (n 16) 141; M. Jose Bosch ‘Chile’ (n 22) 178.

⁵⁴ See the Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on amending Council Directive 92/85/EEC 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 ([COM\(2008\)0637](#) – C6-0340/2008 – [2008/0193\(COD\)](#)) Amendment 19.

⁵⁵ S. Fredman ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10 *International Journal of Law in Context* 442, 451.

⁵⁶ J. Nelson ‘Husbandry: A (Feminist) Reclamation of Masculine Responsibility for Care’ (2016) 40 *Cambridge Journal of Economics* 1, 5.

⁵⁷ M. Jose Bosch ‘Chile’ (n 22) 188. In Spain, there was an increase in fathers taking leave in 2019, but “it is not possible to disentangle how much of this increase correspond to changes in uptake and how much to the splitting of the optional period.” (G. Meil et al ‘Spain’ (2021) (n 4) 570-1).

population's children had a father take some paternity leave in 2020.⁵⁸ The uptake is higher in Portugal; 74.6% of eligible fathers took the mandatory leave in 2020.⁵⁹ These numbers have increased since first introduced in both countries, and are likely to continue to do so, despite a dip in numbers in 2020. This is because some fathers taking leave leads to more doing so.⁶⁰ This peer effect increases over time, “with each subsequent birth exhibiting a snowball effect in response to the original reform.”⁶¹ Nonetheless, uptake is far from universal. In Portugal, this is because some employees are excluded from taking mandatory leave (this includes, amongst others, civil servants and bank workers) and some employees fail to meet eligibility requirements (record of six months of social security contributions, which can be continuous or intermittent).⁶² More importantly for this paper, the non-universal uptake highlights the pervasiveness of the heteronormative gendered assumptions. Fathers seem to remain reluctant to take leave, even when it is mandatory and any financial obstacles have been removed. This is because masculinity and being a “good father” is still “bound up with the role of breadwinner.”⁶³

This is not to say that such changes should be avoided. Mandatory paternity leave should still be implemented in the UK because of the symbolic importance noted earlier. Furthermore, even if it only makes it easier for a few fathers to access paternity leave, this is still a clear benefit. The issues with mandatory leave highlight that piece-meal legislative change will not substantively challenge heteronormative gendered expectations. Reconciliation legislation is a weak tool to change people's sense of identity and pre-existing values. Accordingly, some

⁵⁸ E. Dimitrova et al 'Bulgaria' (n 16) 141.

⁵⁹ R. Correia et al 'Portugal' (n 23) 487.

⁶⁰ G. Dahl, K. Løken and M. Mogstad 'Peer Effects in Program Participation' (2014) 104 *American Economic Review* 2049, 2051.

⁶¹ *Ibid.*

⁶² R. Correia et al 'Portugal' (n 23) 487.

⁶³ R. Collier and S. Sheldon *Fragmenting Fatherhood: A Socio-Legal Study* (Oxford: Hart Publishing Ltd, 2008) 130.

academics have argued that legislative efforts to encourage fathers to care should be abandoned.⁶⁴

4. PROBLEMS WITH RELYING ON RECONCILIATION LEGISLATION

A substantive body of academic work highlighting the inherent weaknesses of reconciliation legislation has developed.⁶⁵ The specific weaknesses of this legislation's ability to encourage father's caring roles has also been explored in depth in academic work.⁶⁶ It is not my ambition to address these arguments in depth in this paper because they have been dealt with comprehensively elsewhere. Instead, I will simply outline them, before drawing on existing work to show why such legislation which encourages fathers to care is still be important.

The most fundamental criticism of reconciliation legislation is that it merely intervenes at the margins of employment law; it offers no fundamental change to the workplace.⁶⁷ As Busby notes, the terminology commonly used of family-friendly or work-life legislation suggests that all other labour policies are inherently family or even life unfriendly.⁶⁸ The interdependent nature of caring relationships and paid work remains obscured, despite reconciliation legislation demonstrating how intertwined they are.⁶⁹ Busby and James also note that the

⁶⁴ M. Fineman *The Autonomy Myth: A Theory of Dependency* (New York: The New Press, 2004) 171.

⁶⁵ See for example G. James and N. Busby *A History of Regulating Working Families: Strains, Stereotypes, Strategies and Solutions* (Oxford: Hart Publishing Ltd, 2020); J. Conaghan 'Gender and the Labour of Law' in H. Collins, G. Lester and V. Mantouvalou *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018); G. James 'Family-Friendly Employment Law (Re)assessed: The Potential of Care Ethics' (2016) 45 *Industrial Law Journal* 477; G. Mitchell 'A Right to Care: Putting Care Ethics at the Heart of UK Reconciliation Legislation' (2019) 49 *Industrial Law Journal* 199.

⁶⁶ See E. Caracciolo Di Torella 'New Labour, New Dads—The Impact of Family Friendly Legislation on Fathers' (2007) 36 *Industrial Law Journal* 316; G. Mitchell 'Shared Parental Leave and the Sexual Family' (n 3); M. 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; E. Caracciolo di Torella 'Brave New Fathers for a Brave New World?' (2014) 20 *European Law Journal* 88.

⁶⁷ J. Conaghan 'Feminism and Labour Law: Contesting the Terrain' in A. Morris and T. O'Donnell *Feminist Perspectives on Employment Law* (London, Cavendish, 1999) 14.

⁶⁸ N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford: Oxford University Press, 2011) 49.

⁶⁹ J. Conaghan 'Women, Work and Family: A British Revolution?' in J. Conaghan, R. Fischl and K. Klare *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002) 72.

employment rights-based model disregards the social value of care work, which we all need to survive.⁷⁰ Caring is not only life-sustaining work, it also “gives life its point, provides it with meaning, and returns to those who give it some measure of security and emotional sustenance.”⁷¹

Furthermore, the ambition of reconciliation legislation has never really been about helping families or achieving gender equality in the UK. It is much more focused on promoting workplace productivity and easing burdens on businesses.⁷² This is reflected in UK reconciliation legislations continued exclusive focus on employees, which excludes many workers, including the most vulnerable precarious workers.⁷³ This is one of the reasons that this legislation has been a weak tool when it comes to encouraging fathers to care; too many are unable to access these entitlements. A final criticism of reconciliation legislation is that it is a weak tool to challenge gender inequality and ingrained stereotypes. Parents choices about childcare are influenced and often restricted by their moral and socially negotiated views, which mostly remain steadfast despite legal changes.⁷⁴

Despite these considerable issues, I have argued previously that such legislation should not be abandoned.⁷⁵ This is partly because, as noted above, to some extent, it does challenge heteronormative gendered ideas. Furthermore, if fathers actually use transferable maternity leave, not only would the private sphere of the home be changed, but the workplace could also

⁷⁰ G. James and N. Busby *A History of Regulating Working Families* (n 65) 51. On the value of care see J. Herring *Care and the Law* (Oxford: Hart Publishing Ltd, 2013); P. Bowden *Caring: Gender-Sensitive Ethics* (London and New York: Routledge, 1997); N. Noddings *Starting at Home: Caring and Social Policy* (Berkeley, Los Angeles and London: University of California Press, 2002).

⁷¹ R. West ‘The Right to Care’ in E. Feder Kittay and E. Feder *The Subject of Care: Feminist Perspectives on Dependency* (Lanham, Boulder, New York and Oxford: Rowman & Littlefield, 2002) 89.

⁷² S. Fredman ‘Women at Work’ (n 6).

⁷³ G. Mitchell ‘Shared Parental Leave and the Sexual Family’ (n 3).

⁷⁴ A. Barlow and S. Duncan ‘Supporting families? New Labour’s Communitarianism and the ‘Rationality Mistake’: Part 1’ (2000) 22 *Journal of Social Welfare and Family Law* 23, 35.

⁷⁵ G. Mitchell ‘Shared Parental Leave and the Sexual Family’ (n 3).

be revolutionised. This is because “nurturing and caretaking [would become] a central responsibility of the nonfamily arenas of life.”⁷⁶ Encouraging fathers to care would recognise that childcare is distinct from childbearing, and all parents can provide childcare. Employers would therefore have no reason to discriminate against women, as men would be considered equally likely to provide care. It would also challenge the pervasive “standard worker” employment model, which assumes that all workers focus is on paid work and that someone else meets their caring responsibilities.⁷⁷ This would better avoid a “mommy track,” where mothers are forced into lower paid jobs because of the need for flexibility or fewer working hours.⁷⁸ It is the emphasis upon changing both the workplace and the private sphere of the home, that means this model could be truly transformative.

Another advantage of this reconciliation legislation is that fathers’ involvement can benefit children.⁷⁹ This however can be, and often is, overstated; research does not suggest that fathers in particular play a significant role in promoting a child’s welfare.⁸⁰ Instead, it is more accurate to state that the legislation could improve children’s welfare by enabling two parents to be more actively involved in a child’s life, regardless of gender. Shared parental leave and transferable maternity leave generally could play an important role in encouraging closeness between the child and their parents. It is also clear that it could enable fathers to enjoy more of the extensive social benefits of caring. As Nelson notes, the association of men with paid work which has dominated since the Industrial Revolution has “stripped them of their full humanity.”⁸¹

⁷⁶ M. Fineman *The Autonomy Myth* (n 64) 201.

⁷⁷ See M. Freedland, N Kountouris *The Legal Construction of Personal Work Relations* (Oxford and New York: Oxford University Press, 2011).

⁷⁸ C. McGlynn ‘Work, Family and Parenthood: The European Union Agenda’ in J. Conaghan and K. Rittich *Labour Law, Work and Family* (Oxford: Oxford University Press, 2005) 220.

⁷⁹ E. Caracciolo di Torella ‘Men in the Work/Family Reconciliation Discourse: The Swallows That Did Not Make a Summer’ (2015) 37 *Journal of Social Welfare and Family Law* 334, 336.

⁸⁰ T. Biblarz and J. Stacey ‘How Does the Gender of Parents Matter?’ (2010) 72 *Journal of Marriage and Family* 3.

⁸¹ J. Nelson ‘Husbandry’ (n 56) 9.

Transferable maternity leave is just one way to challenge the damaging disassociation of men from care. Therefore, as well as being necessary economically, fathers providing care has individual and societal benefits.

It is important to note that simply making leave available will not achieve these results. The various benefits will only be realised if fathers use the leave made available to them. Indeed, unused leave “may serve to institutionalize women’s disadvantage in the labour market.”⁸² The key consideration of this paper will therefore be whether shared parental leave, and transferable maternity leave generally, can encourage fathers to care.

5. THE POSITIVE ASPECT OF SHARED PARENTAL LEAVE

There is one clear advantage of shared parental leave when compared to the other countries with transferable leave. That is the long period of 50 weeks of maternity leave being transferable as shared parental leave, despite shorter periods being proposed to protect women.⁸³ It provides eligible mothers with the chance to assess their own needs after childbirth, rather than prescribing a set recovery time. Furthermore, the argument that a shorter period of transferable leave safeguards mothers, is unconvincing. Mothers remain entitled to 52 weeks of maternity leave, which they can choose not to transfer if needed. This is one of the general benefits of transferable maternity leave. The long period of transferable leave also sends a symbolic message that childcare is separate from childbearing. This is particularly important for adoptive parents, who do not require leave to recover from childbirth and pregnancy.

⁸² P. Evans and N. Pupo ‘Parental Leave: Assessing Women’s Interests’ (1993) 6 *Canadian Journal of Women’s Interests* 402, 412.

⁸³ The original proposal was that eighteen weeks of leave should be reserved for mothers. The Equality and Human Rights Committee recommended that this was extended to twenty-six weeks (Equality and Human Rights Commission *Response of the Equality and Human Rights Commission to the Consultation on Modern Workplaces* (Equality and Human Rights Commission, 2011) 13-14).

Reserving a longer period of leave for one adopter would have reinforced the outdated notion that one parent, normally the mother, must be the primary carer.

The UK makes the longest period of leave transferable, as well as the biggest proportion of maternity leave transferable, when compared to other countries with transferable maternity leave. There are clear advantages to this approach, so the comparative countries might benefit from extending their entitlements. Portugal would be excluded from this, because of the generous 25 days of paternity leave, paid at 100% of income.⁸⁴ Such generous paternity leave negates many of the advantages of extending transferable maternity leave.⁸⁵

Although shared parental leave clearly improves the UK body of reconciliation legislation, uptake has remained low. Available research suggests that only 1-2% of eligible fathers have used it.⁸⁶ As a result, few of the benefits of transferable maternity leave have been realised in the UK. This is because shared parental leave has many problems.

6. WEAKNESSES OF SHARED PARENTAL LEAVE

A. Lack of pay

A major criticism of shared parental leave UK is the lack of pay. The low flat rate of statutory pay, currently £151.97, is less than minimum wage. The state meets most of the costs; employers with over twenty employees can recover 92% of statutory maternity pay, whilst small employers can reclaim 103%.⁸⁷ This means fathers are unable to access income related

⁸⁴ R. Correia et al 'Portugal' (n 23) 477.

⁸⁵ The UK Women and Equalities Committee have recommended that the UK Government consider something similar and proposed that shared parental leave is replaced with a standalone entitlement of 12 weeks of paternal leave. (The Women and Equalities Committee *Fathers and the workplace First Report of Session 2017–19* (House of Commons, HSC 358, 2018) 26).

⁸⁶ See H. Birkett and S. Forbes 'Where's Dad? Exploring the Low Take-Up of Inclusive Parenting Policies in the UK' (2019) 40 *Policy Studies* 205, 207.

⁸⁷ <https://www.gov.uk/recover-statutory-payments> accessed 19.05.2021.

pay. This will deter fathers from taking leave because as a result of gender inequality, they remain more likely to be the breadwinner in heterosexual families; the gender pay gap is 15.4%.⁸⁸ Furthermore, the legislation has an “inbuilt financial penalty.”⁸⁹ If fathers or co-parents take any of the first four weeks of shared parental leave, the income related rate of maternity pay is lost. The first four weeks of shared parental leave are therefore unusable in practice. The gender pay gap also impacts the remainder of the leave, as only partners who earn less than the mother will be incentivised to take leave. Although research shows that the number of female breadwinners is rising, a number of these will be unable to transfer their maternity leave because they are lone mothers.⁹⁰ This means shared parental leave is practically inaccessible to many UK families.

This issue is further exacerbated by the 65% of UK employers who voluntarily increase maternity pay.⁹¹ Whilst such policies make it easier for mothers to access longer periods of maternity leave, they will likely reduce the number of fathers taking shared parental leave. This is because far fewer employers (25%) report offering enhanced shared parental pay.⁹² As few families could afford to sacrifice enhanced maternity pay, such generosity for mothers alone makes shared parental leave even less accessible.

The Court of Appeal found in *Capita Customer Management Ltd v Ali (Working Families intervening)* and *Hextall v Chief Constable of Leicestershire Police (Working Families intervening)* that enhancing maternity pay without doing the same to shared parental

⁸⁸ Office for National Statistics ‘Gender Pay Gap in the UK: 2021’ (Office for National Statistics, 2021) 1.

⁸⁹ M. Baird and M. O’Brien ‘Dynamics of Parental Leave in Anglophone countries: The Paradox of State Expansion in Liberal Welfare Regimes’ (2015) 18 *Community, Work & Family* 198, 211.

⁹⁰ D. Ben-Galim and S. Thompson *Who’s Breadwinning? Working Mothers and the New Face of Family Support* (London: Institute for Public Policy Research, 2013) 2.

⁹¹ F. Churchill *Two-thirds of Businesses Now Provide Enhanced Maternity Pay, Poll Finds* accessed at <https://www.peoplemanagement.co.uk/news/articles/two-thirds-of-businesses-now-provide-enhanced-maternity-pay#gref> on 08.07.2021.

⁹² *Ibid.*

pay is neither direct nor indirect discrimination.⁹³ This is because women on maternity leave are in a materially different situation to those taking shared parental leave. A number of purposes for maternity leave were identified, in addition to caring for a child, which are only relevant to mothers. These included preparing, coping and recovering from pregnancy and childbirth, breastfeeding and developing “the special relationship between the mother and the newborn child.”⁹⁴

The court was right to protect mothers in the workplace. If the court had decided this constituted discrimination, many employers would have been forced to remove the now unaffordable enhanced maternity pay to avoid liability. This would clearly disadvantage mothers. Nonetheless, the judgment is flawed and disadvantages all women by reinforcing gendered expectations. The decision means that mothers will remain the primary carer, as most fathers will remain excluded from shared parental leave in practice. This denies some mothers from the support they need, as in *Ali*, where the mother had been encouraged to return to work to help her recover from postnatal depression. The joint judgment also problematically refers to a “special relationship” between mother and child.⁹⁵ Such language undermines the progressive aims of shared parental leave, as it perpetuates traditional and outdated notions that women are natural caregivers.⁹⁶ Another flaw with the judgment is that it fails to recognise that “enhanced maternity pay provided by an employer has a different purpose to maternity leave and the maternity allowance mandated by the state.”⁹⁷ As Court-Brown notes, the main reason for enhancing maternity pay is to encourage women’s continued employment.⁹⁸ Therefore, this

⁹³ [2019] EWCA Civ 900, [2020] I.C.R. 87.

⁹⁴ *Ibid* 107.

⁹⁵ *Ibid* 107.

⁹⁶ C. McGlynn ‘Ideologies of Motherhood in European Community Sex Equality Law’ (2000) 60 *European Law Journal* 29, 38.

⁹⁷ S. Court-Brown ‘Is Lower Pay for Shared Parental Leave Discrimination? *Ali v Capita Customer Management Ltd; Hextall v Chief Constable of Leicestershire Police*’ (2020) 49 *Industrial Law Journal* 626, 635.

⁹⁸ *Ibid*.

is not necessarily a key element of maternity protection (without it, the mothers would still be entitled to maternity leave and basic pay). On this basis, it is harder to justify that enhanced maternity pay is special and distinct to enhanced shared parental pay.

A final issue with the judgment in *Ali and Hextall* is its implications for adoption leave. Adoptive parents do not require leave to recover from pregnancy and childbirth, or to breastfeed. Indeed, the Employment Appeals Tribunal has found that the purpose of adoption leave is quite different to maternity and shared parental leave, as it “goes far beyond the provision of childcare.”⁹⁹ It is clear that those taking adoption leave and shared adoption leave are in the same material position. Therefore, if employers enhance adoption pay, then it must surely be discrimination to deny the same enhancements to shared adoption pay. This may mean that in the future, employers deny adopters enhanced pay to save costs. This is despite the obvious fact that the work involved in caring for an adopted child is no less important or challenging. Indeed, those who adopt are more likely to face certain experiences and obstacles, including raising a child of different racial, ethnic or cultural identity, or with emotional or psychological issues.¹⁰⁰ Yet traditionally, successive UK Governments have made adoption pay less than maternity pay; this was only equalised in 2014.¹⁰¹ This may set a precedent for employers to do the same.

If the two unsuccessful employees in *Ali and Hextall* applied to the European Court of Human Rights (ECtHR), they would have a strong case. Although article 8 does not expressly refer to leave provisions, the Court has ruled that “measures which enable one of the parents to stay at home to look after the children promote family life and necessarily affect the way in

⁹⁹ *Price v Powys County Council* UKEAT/0133/20/LA (V), [38].

¹⁰⁰ K. McKay and L. Ross ‘The Transition to Adoptive Parenthood: A Pilot Study of Parents Adopting in Ontario, Canada’ (2010) 32 *Children and Youth Services Review* 604, 604.

¹⁰¹ Paternity and Adoption Leave (Amendment) Regulations 2014, reg 7.

which it is organised” so such measures come within the article’s scope.¹⁰² Therefore, domestic laws which provide a right to take leave must be implemented “in a manner which is compatible with Article 14 of the Convention.”¹⁰³ Positive discrimination measures benefitting women can be justified, but only if they mitigate disadvantages suffered by women.¹⁰⁴ The ECtHR have found that making leave inaccessible to men does the opposite of challenging existing disadvantages, and instead “has the effect of perpetuating gender stereotypes and is disadvantageous both to women’s careers and to men’s family life.”¹⁰⁵ The reasoning on the “special relationship” would likely also be considered problematic as the ECtHR has confirmed that states cannot impose traditional gender roles and gender stereotypes.¹⁰⁶ However, as the issue in *Ali and Hextall* relates to enhanced payment, not eligibility, it cannot be said with certainty that the ECtHR would overturn the judgment, but it could be one way of challenging shared parental pay.

The other countries with transferable maternity pay avoid these issues as income related pay is available for both parents for the whole duration (except Israel, where the last 11 weeks are unpaid for both parents). This avoids pitting women’s and men’s interests against each other. Pay is capped in Bulgaria, Czech Republic, Israel and Serbia.¹⁰⁷ This ensures that limited resources mainly benefit those in lower paid work. As long as the cap is at a high enough level, this is justified because those with higher earnings are best placed to have accrued the necessary savings to live on a reduced income. Nonetheless, caps may deter some higher earners from

¹⁰² *Trizio v Switzerland* App no. 7186/09, [61].

¹⁰³ *Konstantin Markin v Russia* no. 30078/06, [130].

¹⁰⁴ See *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, [37] and [40]-[43] and *Stec and Others v. the United Kingdom*, no. 65731/01.

¹⁰⁵ *Konstantin Markin v Russia* no. 30078/06, [141].

¹⁰⁶ See *Ünal Tekeli v. Turkey*, no. 29865/96.

¹⁰⁷ The caps are €1,533.90, €1,700.11, a month in Bulgaria and Czech Republic respectively (E. Dimitrova et al ‘Bulgaria’ (n 16) 127; J. Kocourková ‘Czech Republic’ (n 22) 214.) In Israel, the cap is €382.46 daily (N. Perez-Vaisvidovsky ‘Israel’ (n 17) 336).

taking leave.¹⁰⁸ The Czech Republic's cap is the lowest when compared to the minimum wage, but it is still over two and a half times higher.¹⁰⁹ Serbia's cap is three-times the average salary.¹¹⁰ Israel has the most generous cap, at five times the average salary.¹¹¹ In Bulgaria, the payment is around four times the minimum wage (but the Bulgarian minimum wage is low).¹¹² This suggests that these countries have set the cap high enough for most families to live on, although the leave is comparably more unaffordable in the Czech Republic. Although the caps may deter some fathers from taking leave, the entitlements are more accessible than the UK equivalent. The rate of shared parental pay is about half the UK minimum wage (£151.97 a week compared to £324.39 before income tax and national insurance contributions).¹¹³ This reflects how caring work is undervalued in the UK and makes shared parental leave inaccessible for most parents.

This comparative exploration shows that making shared parental pay income related would resolve a number of problems. It would enable more fathers to access shared parental leave, challenge gender inequality and recognise the importance of caring labour. Therefore, making pay income related would grant parents more choice and flexibility over how they balance their caring responsibilities.

¹⁰⁸ See the experience of Sweden in M. Sundström and A. Duvander 'Gender Division of Childcare and the Sharing of Parental Leave among New Parents in Sweden' (2002) 18 *European Sociological Review* 433.

¹⁰⁹ Minimum wage statistics found at

https://ec.europa.eu/eurostat/databrowser/view/earn_mw_cur/default/table?lang=en accessed 15.06.2021.

¹¹⁰ M. Pantelić 'Serbia' (n 21) 511.

¹¹¹ N. Perez-Vaisvidovsky 'Israel' (n 17) 336.

¹¹² Minimum wage statistics (n 109).

¹¹³ This is worked out by multiplying the minimum wage for over 25s, which is £8.72 an hour, by the average number of hours worked a week by full-time workers in the UK in 2019, which was 37.2 hours

(<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/timeseries/ybuy/lms> accessed 28/04/20).

B. Lack of flexibility

The ability to take shared parental leave in non-continuous blocks appears to be an advantage of the legislation as such flexibility could benefit all parties. Both parents can maintain a participative connection to the paid workplace, and employers' costs would be reduced. This is because leave is most costly when it is taken for over six continuous months.¹¹⁴ However, this flexibility is inaccessible in practice for two reasons. Firstly, the notice requirements are prescriptive. Although parents can amend their start and end dates three times,¹¹⁵ this is cumbersome, as each employer must be given notice, along with the permission of each parent. Employers obviously require some notice, but these onerous requirements "are insensitive to the realities of parenting."¹¹⁶ Secondly, employers can refuse requests without justification.¹¹⁷ The needs of employers are obviously important, but both these issues highlight how the legislation unduly prioritises employers, at the cost of parents' needs.

The legislation's lack of genuine flexibility undermines parents' usage of shared parental leave. This is unsatisfactory because some of the other comparative countries have shown that such flexibility can be afforded. In the Czech Republic, Poland and Portugal, parents can take non-continuous blocks of leave.¹¹⁸ In the Czech Republic, the leave can be transferred between parents an unlimited amount of time.¹¹⁹ Furthermore, the leave in Chile, Croatia and Poland can be taken on a part-time basis.¹²⁰ Such flexibility is key if fathers are to take more leave.

¹¹⁴ Fatherhood Institute *Fatherhood and the Childhood and Families Taskforce: A Briefing by the Fatherhood Institute* (Fatherhood Institute, 2010) 5 <http://www.fatherhoodinstitute.org/2010/fatherhood-institute-evidence-to-the-childhood-and-families-taskforce/> accessed 20.04.2022.

¹¹⁵ The Shared Parental Leave Regulations 2014, reg 16(1) and 32(1).

¹¹⁶ G. James 'Family-friendly Employment Laws (Re)assessed' (n 65) 484.

¹¹⁷ The Shared Parental Leave Regulations 2014, reg 13(2)(c) and 30(2)(c).

¹¹⁸ J. Kocourková 'Czech Republic' (n 22) 214-5; A. Kurowska et al 'Poland' (n 23) 464; R. Correia et al 'Portugal' (n 23) 475.

¹¹⁹ J. Kocourková 'Czech Republic' (n 22) 215.

¹²⁰ M. Jose Bosch 'Chile' (n 22) 177; I. Dobrotić 'Croatia' in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 197; A. Kurowska et al 'Poland' (n 23) 464.

This is because it enables fathers to maintain a workplace connection whilst providing care.¹²¹ In the comparative countries, there is no financial need for them to maintain this connection, as the leave is all income-related. However, it might make leave more accessible to fathers in practice, as it enables them to maintain their sense of identity as a worker. In the UK, this flexibility would be even more important because of the low level of shared parental pay. Due to gender pay gap, sacrificing the father's income to take shared parental leave is not a practical possibility for many UK families. Taking leave part-time would enable fathers to supplement the low flat rate of statutory shared parental pay, so it could be financially accessible.

This shows that part-time leave would have been particularly important to encourage uptake of transferable maternity leave in the UK. Such flexibility was rejected on the basis that it would be too complex to calculate because payroll systems work on a weekly basis.¹²² This reasoning is problematic for two reasons. Firstly, it unduly prioritises employers, with no regard for the importance of care work. Secondly, it is unclear how this would create administrative burdens for employers. If hourly pay can be calculated, then the system should surely be flexible enough to deal with less-than-week blocks. After all, part-time work is widely accepted in the UK; the part-time employment rate is 22.4%.¹²³ A further reason for the rejection was that keep in touch days could be used by employees to effectively work part-time.¹²⁴ This is also problematic because keep in touch days are paid at the low, flat rate of statutory shared parental leave pay.¹²⁵ Therefore, using keep in touch days will not enable fathers to supplement their income whilst accessing leave. This shows that there was no compelling reason for rejecting part-time shared parental leave.

¹²¹ E. Carricolo Di Torella 'New Labour, New Dads' (n 66) 325.

¹²² Children and Families Bill Deb 23rd April 2013, 17th sitting, 713; HL Children and Families Bill Deb 20th November 2013, twelfth day, col. GC424.

¹²³ Part-time employment rate <https://data.oecd.org/emp/part-time-employment-rate.htm> accessed 08.03.2022.

¹²⁴ Children and Families Bill Deb 23rd April 2013, 17th sitting, 713.

¹²⁵ The Shared Parental Leave Regulations 2014, reg 37.

C. Eligibility requirements

Shared parental leave's eligibility requirements further discourage fathers from taking leave and prioritise mothers' caring role. Eligibility is dependent on meeting the continuity of employment test.¹²⁶ This unduly restricts access to shared parental leave and prioritises mothers' caring role, as maternity leave is the only day one employment right.¹²⁷ This clearly undermines attempts to promote father's caring role. In parliamentary debates, removal of the eligibility requirement was rejected because it would compel mothers to take less maternity leave when they were still physically and emotionally vulnerable from childbirth.¹²⁸ This justification is unconvincing as mothers remain entitled to 52 weeks of maternity leave. Even if such pressure did exist, it is unclear why it would cease once fathers or co-parents have worked for a specified time. The main reason mothers do report feeling pressurised to return to work is financial; the cost of raising a child combined with the loss of their wages.¹²⁹

I argue that a second justification provided in the parliamentary debates better reflects the Coalition Government's reasoning for introducing the eligibility requirements; they "give 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."¹³⁰ Not only does this explanation prioritise employers' interests over caring relationships, it risks legitimising workplace discrimination against women of childbearing age. This is because employers do not have the certainty when hiring, that women employees will not "let them down" by taking

¹²⁶ The Shared Parental Leave Regulations 2014, reg 5(2)(a), 21(2)(a).

¹²⁷ Maternity and Parental Leave etc. Regulations 1999, reg 4.

¹²⁸ Children and Families Bill Deb 23rd April 2013, 18th sitting, col. 705.

¹²⁹ Equality and Human Rights Commission *Response of the Equality and Human Rights Commission to the Consultation on Modern Workplaces* (n 83) 13-14.

¹³⁰ Children and Families Bill Deb 23rd April 2013, 18th sitting, col. 706.

leave soon after as appointment. This problematic reasoning shows that shared parental leave's eligibility requirement must be removed.

All transferable maternity leave requires the mother to consent to the transfer, but as noted earlier, under UK law the mother must also meet eligibility requirements.¹³¹ These requirements are not mentioned in the parliamentary debates. This might be because they are quite flexible, so are considered unproblematic. Nonetheless, the requirements should be removed as they do restrict access and make eligibility needlessly complex. They also achieve no discernible purpose; if mothers are eligible for maternity leave, they should be eligible to transfer it.

Mothers must meet the more onerous continuity of employment test eligibility to take shared parental leave themselves.¹³² These requirements may have been introduced to formally equalise the legislation; each parent's eligibility is determined by them meeting the continuity of employment test and the other parent satisfying the employment and earnings test. If this is the reasoning, it is nonsensical. Mothers who transfer their own entitlement should be able to access it again. Such unnecessary complexity is liable to deter parents from accessing shared parental leave. The requirements could also lead to indirect discrimination, as they restrict father's access to leave. Furthermore, mothers may be less likely to meet these requirements due to existing childcare commitments. This is, accordingly, another ground on which shared parental leave could be challenged in the ECtHR under article 8 and 14.

¹³¹ The Shared Parental Leave Regulations 2014, reg 8(3)(b)(iii).

¹³² The Shared Parental Leave Regulations 2014, regs 4(2)(a) and 20(2)(a).

Shared parental leave is the only transferable maternity leave with such eligibility requirements. In Croatia, Poland and Serbia, all employed or self-employed workers are eligible for maternity leave and pay, and to have it transferred to them.¹³³ In Bulgaria, Chile, Czech Republic and Portugal there are some eligibility requirements to at least access the payment, but these are not as strict as the UK.¹³⁴ Eligibility in these nations is determined by work over a longer period, allowing for breaks and different employers, as well as being self-employed. Israel is the only other country which requires dedication to just one employer and this is only to access the whole 26-week period; all employees are entitled to the first 15 weeks of leave (six of which are reserved for the mother).¹³⁵ Furthermore, all the countries have the same eligibility requirements for both parents. This shows that the UK eligibility requirements are unnecessary. They only deter parents from accessing shared parental leave.

7. TAKE-UP OF TRANSFERABLE MATERNITY LEAVE IN OTHER JURISDICTIONS

The comparative analysis shows that UK shared parental leave could be improved. Nonetheless, the take-up of transferable maternity leave is negligible in most countries. Information is unavailable in the Czech Republic, Poland and Serbia but in Bulgaria, Chile, Croatia and Israel fewer than 1% of fathers use the transferable leave available.¹³⁶ The low take-up is despite greater flexibility, accessibility and pay than the UK equivalent.

Some might argue that introducing such legislative improvements in the UK may lead to more fathers taking leave than in the other countries compared. This is because the UK

¹³³ I. Dobrotić ‘Croatia’ (n120) 198; A. Kurowska et al ‘Poland’ (n 23) 462; M. Pantelić ‘Serbia’ (n 21) 512.

¹³⁴ E. Dimitrova et al ‘Bulgaria’ (n 16) 128; M. Bosch ‘Chile’ (n 22) 177-8; J. Kocourková ‘Czech Republic’ (n 22) 215; R. Correia et al ‘Portugal’ (n 23) 475-6.

¹³⁵ N. Perez-Vaisvidovsky et al ‘Israel’ (n 17) 337.

¹³⁶ E. Dimitrova et al ‘Bulgaria’ (n 16) 141; M. Bosch ‘Chile’ (n 22) 188; I. Dobrotić ‘Croatia’ (n 120) 205; N. Perez-Vaisvidovsky et al ‘Israel’ (n 17) 341.

population highly values gender equality. 92% of the UK population consider gender equality to be important, as opposed 69% in Poland and 70% in the Czech Republic, for example.¹³⁷ Furthermore, 91% of fathers in the UK take some leave after the birth of a child.¹³⁸ This might be suggestive of a cultural change to fatherhood and show that fathers in the UK want to spend time with their children. Some may therefore conclude that fathers would make more use of transferable maternity leave, if it was accessible.

However, this argument can be overstated. Firstly, the UK population's commitment to gender equality does not necessarily include egalitarian parenting models. 76% of the UK population prefer equal parental roles over the traditional roles, where mothers are caregivers and fathers are breadwinners.¹³⁹ This shows that for many, gender equality may not necessarily mean equal caring roles. Furthermore, there is a discrepancy between what people report wanting, and what they do. Although ideals of fatherhood have changed, focusing more on caring, most identities remain tied to paid work.¹⁴⁰ Fathers consider an intimate relationship with their children important, yet their childcare activities tend to be limited in time, facilitated by others, and fitted around paid work.¹⁴¹ Therefore, UK fathers may be less willing to engage in equal parenting than they report.

The argument that well-paid, flexible transferable leave would lead to more fathers in the UK taking leave is further weakened by Spain's experience with transferable leave. 90% in Spain

¹³⁷ R. Wike, J. Poushter, L. Silver, K. Devlin, J. Fetterolf, A. Castillo and C. Huang 'Gender equality' in Pew Research Centre *European Public Opinion Three Decades After the Fall of Communism* (Pew Research Centre, 2019) <https://www.pewresearch.org/global/2019/10/15/european-public-opinion-three-decades-after-the-fall-of-communism/> accessed 08.04.2020. 90.

¹³⁸ J. Chanfreu, S. Gowland, Z. Lancaster, E. Poole, S. Tipping and M. Toomse *Maternity and Paternity Rights Survey and Women Returners Survey 2009/10* (Department for Work and Pensions, 2011) 151.

¹³⁹ R. Wike et al 'Gender Equality' (n 137) 92-3.

¹⁴⁰ R. Collier and S. Sheldon *Fragmenting Fatherhood* (n 63) 129-131.

¹⁴¹ R. Collier 'Fatherhood, Gender and the Making of Professional Identity in Large Law Firms: Bringing Men into the Frame' (2019) 15 *International Journal of Law in Context* 68.

support egalitarian marriage, so support is higher than in the UK; amongst those aged 18-34, this rises to 96%.¹⁴² Despite this, fewer than 2% of fathers accessed transferable maternity leave, which was paid at 100% income, up to a generous cap.¹⁴³ The low uptake no doubt was one factor which led to transferable maternity leave being repealed by Spain's left-wing coalition Government.¹⁴⁴ In a proactive attempt to challenge gender inequality, paternity leave (renamed "birth and childcare leave for the parent other than the biological mother") was instead equalised with maternity leave (renamed "birth and childcare leave"), so fathers and co-parents are now entitled to 16 weeks of leave.¹⁴⁵ Spain's experience demonstrates that it is unlikely that initiating similar reforms to shared parental leave, would vastly increase the number of fathers taking leave in the UK. Instead, it suggests there are more general problems with transferable maternity leave.

8. OVERRIDING ISSUES WITH TRANSFERABLE MATERNITY LEAVE

Transferable maternity leave is a limited way to challenge heteronormativity and gender inequality. Mothers' caring roles will always be prioritised, as they are the only ones entitled to leave. Fathers' and eligible co-parents' rights are dependent not only upon the mother's eligibility for maternity leave, but also her consent to transfer the leave. The legislation fails to challenge the normative idea that mothers should take leave and provide childcare.

Relying on mothers transferring their leave is problematic, as there are a number of reasons why they may not want to. One is that they need to recover from pregnancy and childbirth. However, this alone does not explain why mothers would not transfer their leave, as Foubert's review of the medical literature suggests that, for most women, recovery takes only six to eight

¹⁴² R. Wike et al 'Gender Equality' (n 137) 92-93.

¹⁴³ €4,070.10 a month. G. Meil et al 'Spain' (n 49) (2020) 537.

¹⁴⁴ G. Meil et al 'Spain' (n 4) (2021) 563.

¹⁴⁵ G. Meil et al 'Spain' (n 4) (2021) 555.

weeks.¹⁴⁶ Breastfeeding is another potential reason. However, this is something that might be positively impacted by the Covid-19 pandemic, as working from home looks likely to continue for many.¹⁴⁷ This may better enable mothers to continue breastfeeding, whilst the co-parent takes leave. They would be further assisted by fully paid breastfeeding leave, which is available in all the comparative countries except the UK, Czech Republic and Israel. This support for breastfeeding would enable mothers in these countries to transfer their leave, if they wanted. Clearly then, biological differences between the sexes cannot fully explain why mothers are not transferring their leave.

I argue that the main constraint is societal. Gendered expectations, discrimination in the workplace and the gender pay gap mean that many mothers will be unwilling, or unable, to transfer their leave. These same issues, as well as heteronormative expectations to prioritise work, also impact fathers. Some may rightly worry that taking leave will damage their career. Transferable maternity leave, which requires positive action by both parents, will be particularly impacted by these persistent stereotypes, as both parents would have to reject the gendered expectations. This highlights that the premise underpinning transferable maternity leave, that simply making leave available to both parents will encourage fathers to take leave, is flawed. Such legislation will not lead to the workplace change required to achieve equal parenting.

Only Portugal has attempted to challenge this inherent problem with transferable maternity leave, by actively encouraging fathers to care. Maternity leave has been renamed “initial

¹⁴⁶ P. Foubert *The Legal Protection of the Pregnant Worker in the European Community* (Kluwer International Law, 2002) quoted in I. Robeyns ‘Should Maternity Leave be Expanded?’ (2012) 6 *Ethics and Social Welfare* 206, 208.

¹⁴⁷ H. Chung, H. Birkett, S. Forbes and H. Seo ‘Covid-19, Flexible Working, and Implications for Gender Equality in the United Kingdom’ (2021) 35 *Gender and Society* 218, 225.

parental leave” to challenge its association with mothers. Furthermore, a “sharing bonus” has been introduced; if fathers or co-parents take at least four weeks of initial parental leave on their own, an extra month of fully compensated leave is available to either parent.¹⁴⁸ Like non-transferable periods of leave, this incentivises take-up by providing more parental contact with very young children. This is particularly appealing in Portugal, as initial parental leave is relatively short; parents can choose to take five months at 100% pay, or six months at 80% pay. Whilst the onus remains on the mother to transfer leave, the bonus sends a clear signal that parents should share the entitlement and therefore does challenge the gendered constraints of transferable maternity leave. This had an instant impact, as the number of fathers taking leave rose from 0.6% to 20% in the first year.¹⁴⁹ This has continued to increase, reaching 40.91% in 2019, dropping to 38.02% in 2020.¹⁵⁰ Wall and Leitão recognise that this success is partly due to the high use of paternity leave, as well as parents’ changing attitudes towards childcare.¹⁵¹

Portugal’s experience shows that transferable leave can encourage fathers to take leave. By limiting the amount of leave that can be taken concurrently to 15 days and making the “sharing bonus” dependent on fathers or co-parents taking four weeks leave on their own, the legislation has attempted to ensure that fathers use this time to provide childcare. Therefore, this does help to challenge gender inequality and heteronormativity. As both mothers and fathers can take leave, employers have to recognise men as potential carers, not just women. Not only would this challenge discriminatory attitudes, it would also reduce the gender pay gap in the long-term. These changes are likely to further breakdown gendered stereotypes in the future, by changing children’s attitudes to gender roles and encouraging other fathers to take

¹⁴⁸ K. Wall and M. Leitão ‘Fathers on Leave Alone in Portugal: Lived Experiences and Impact of Forerunner Fathers’ in M. O’Brien and K. Wall *Comparative Perspectives on Work-Life Balance and Gender Equality: Fathers on Leave Alone* (New York: Springer, 2016) 46.

¹⁴⁹ Ibid. 46.

¹⁵⁰ R. Correia et al ‘Portugal’ (n 23) 486.

¹⁵¹ K. Wall and M. Leitão ‘Fathers on Leave Alone in Portugal’ (n 148) 47.

leave.¹⁵² However, progress in this regard is likely to be somewhat stifled by transferable maternity leave, as the peer effect will need to not only encourage fathers to take leave, but also give mothers the confidence to transfer leave. In contrast, with a non-transferable, individual right to leave, the peer effect only needs to impact fathers. I would therefore argue that it should be expected that peer effect would be more limited for transferable maternity leave than non-transferable leave.

This need to convince both parents that the father or co-parent should take the leave, may also explain why the introduction of the “sharing bonus” had a comparatively small initial impact on fathers uptake of leave. When comparing the uptake of leave in Portugal with the other countries with transferable maternity leave, the impact seems sizeable. However, the impact is much smaller than that created by a non-transferable, individual period of leave; the number of fathers in Norway taking some leave soared from 4% to 90% after such an entitlement was introduced.¹⁵³ Furthermore, in Portugal, the default remains that the mother takes the leave. Choosing an option other than this results in increased costs, be it financial, time or even psychological, as a decision would have to be made “in which there is already a choice being made as the default.”¹⁵⁴ Individual, non-transferable rights to leave change this, as the default is that the leave is shared.

Nonetheless, on first appearances, there may still seem to be some advantages to Portugal’s approach when compared to non-transferable leave. Under Portugal’s approach,

¹⁵² A. Hattery *Women, Work and Family: Balancing and Weaving* (Thousand Oaks, London and New Delhi: Sage, 2001) 28.

¹⁵³ B. Bungum and E. Kvande ‘Norway’ in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 456.

¹⁵⁴ A. Gheaus and I. Robeyns ‘Equality-Promoting Parental Leave’ (2011) 42 *Journal of Social Philosophy* 173, 184.

those who are entitled to the “sharing bonus” will have both provided care for the child, on their own, in the labour intensive first year of the child’s life. This would provide fathers with a genuine insight into the work which has traditionally been performed by mothers, breaking down heteronormative gendered expectations. This could make them not only more appreciative and better partners but is also likely to strengthen the parental bond. This would seem to be an improvement to the situation in countries with non-transferable leave such as Sweden, where most fathers do take leave on their own, but this tends to be later in the child’s life, when the demands are considerably different.¹⁵⁵ However, this is not a result of transferable maternity leave, but a benefit of shorter periods of leave. In both Portugal and Sweden, fathers tend to access the final periods of leave, whilst the mother takes the initial, longer period. Neither system has so far been able to combat this.

The experience in Portugal shows that some of the issues with transferable maternity leave can be overcome, albeit to a limited extent. Transferable leave can encourage fathers to care, but the snowball effect, of encouraging more fathers to do so, is likely to be a slower process when compared to non-transferable, individual rights to leave. This shows that there are no benefits to using this model, and that governments who are committed to encouraging fathers to care and challenging heteronormativity, should abandon it.

9. CONCLUSION

This article has outlined clear ways that shared parental leave could be improved, including making pay income related, increasing flexibility and accessibility. Adopting something similar to the “sharing bonus” in Portugal would also likely increase uptake of leave. Yet even

¹⁵⁵ A. Duvander and N. Löfgren ‘Sweden’ in A. Koslowski, S. Blum, I. Dobrotić, G. Kaufman and P. Moss *International Review of Leave Policies and Research 2021* (2021) Available at: http://www.leavenetwork.org/lp_and_r_reports/ 581.

with these improvements, the article has shown that transferable maternity leave remains flawed. It is not an effective tool to encourage fathers to take leave as it reinforces heteronormativity and gendered roles.

In this light, Spain's decision to repeal transferable maternity leave and instead equalise paternity leave with maternity leave, seems justified. The UK Women and Equalities Committee have recommended that the UK Government consider something similar and proposed that shared parental leave is replaced with a standalone entitlement of 12 weeks of paternal leave.¹⁵⁶ Such a standalone, non-transferable right to leave will better challenge gendered expectations by recognising that fathers can care and resisting the prioritisation of mothers' caring role. This will be bolstered if there are provisions to encourage fathers to take this leave on their own. The experiment with shared parental leave has been a relative failure, and tinkering with it, will not be enough to make it a success. Instead, fathers and co-parents need their own, individual entitlement to an extended period of leave.

¹⁵⁶ The Women and Equalities Committee *Fathers and the workplace First Report of Session 2017–19* (House of Commons, HSC 358, 2018) 26.