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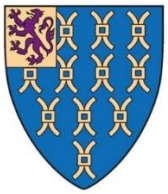

Student Law Journal

Volume V

March 2023

Forward

1. This is the fifth year of publication of the Lincoln's Inn Students' Law Journal. The breadth and diversity of the subject matter is once again notable. This has ranged from the law relating to Gender Equality in the House of Commons, Protecting the Integrity of Female Athletics from Discrimination, to Reproductive Technology in the context of Ectogenesis. Assessing this high quality for the purpose of choosing the best one for the prize has therefore been somewhat challenging.

2. The purpose of this exercise is to provide a platform for students to facilitate the publication and dissemination of outstanding legal articles written by them to a wider audience. This will also assist in the development of their future experience in both academic and professional roles.

3. After some deliberation I came to the conclusion that the outstanding contribution and top-scoring script was that submitted by Mr Zain Sheikh. This is therefore deemed to be the winning entry.

4. In my Foreword to the first edition of the Journal in 2019 I stated that it was perceived that it would have an optimistic future. This assessment has proved to be a correct analysis, and I have no doubt that there will be many future editions.

Edward Cousins
Editor
1st March 2023

Contents

Law of misuse of private information: Is the current balance struck between press freedom and a person's right to privacy appropriate?

Zain Sheikh

The revelations that emerged during the Leveson Inquiry highlighted the systemic invasion of privacy of celebrities and ordinary citizens, through a range of illegal practices. As is well documented, UK tabloids have revealed intimate details of the private lives of both public and ordinary figures, often with devastating consequences. The tort of misuse of private information (MPI) should be an action which protects individuals from the dangers posed by invasive media outlets. However, this essay will argue that the law of MPI has failed to establish an appropriate balance between press freedom and an individual's right to privacy. Firstly, it has been established in MPI jurisprudence that the disclosure of false information can be addressed through the tort. Consequently, privacy claims are increasingly used by claimants to avoid the stricter requirements in defamation actions for the issuance of interim injunction. Secondly, the broader conceptualisation of expression which could contribute to the public interest has led to idiosyncratic judgments as to the value of non-political speech. Finally, the courts have afforded excessive weight to Article 10 in the balancing act in cases regarding the Open Justice principle, often leading to the release of private information with superficial justification.

The MPI doctrine mandates a two-part test. In *Murray*,[1] it was established that the court must examine whether the claimant had a 'reasonable expectation of privacy', thereby engaging their right to a private and family life under Article 8 of the ECHR.[2] Where a reasonable expectation of privacy has been established, as stipulated in *ETK,* the court must then undertake a balancing exercise between the right to freedom of expression (Article 10) and the right to a private and family life (Article 8).[3] In *Campbell*, the court stipulated that both articles are of equal weight outlining that 'neither article has as such precedence over the other.'[4]

The balance between these rights will be considered inappropriate where the law of MPI has allowed claimants to avoid legal safeguards, fostered idiosyncratic or paternalistic judgments, or developed an unjustified bias towards an article in the balancing act.

[1] *Murray v Express Newspapers plc* [2008] EWCA Civ 446.

[2] European Convention on Human Rights 1950, Article 8 and Article 10.

[3] *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.

[4] *Campbell v MGN Ltd* [2004] AC 457 [138].

At the balancing stage, expression considered to be in the public interest has been given significant weight. In recent years, the courts have widened the forms of expression which are considered to contribute to the public interest. According to MPI jurisprudence, the most likely form of expression which can contribute to democratic debate is political speech. In *Campbell*, Baroness Hale stated that 'some [forms of expression] are more deserving of protection' in a democracy and political speech is 'top of the list.'[5] In *Von Hannover*, the court made a 'fundamental distinction' between the reporting of information which supported public discourse (for example, the statements of a politician), and by contrast, coverage of private citizens.[6]

Domestic and international courts have widened the conceptualisation of speech which could contribute to democratic discourse beyond traditionally political expression. In *Spelman v Express Newspapers*, the case did not have a political focus, however the court identified broader social matters relevant to the 'public debate' including the pressures on young people competing in elite sport.[7] Similarly, although *Von Hannover* did not involve distinctly political expression, it was viewed that the release of the applicant's holiday pictures when her father was unwell, supported a debate of public interest in examining how the royal family address such difficulties.[8] Thus, the courts are extending the legal conceptualisation of speech which contributes to democratic discourse beyond the explicitly political.

This broader categorisation of debate which is in the public interest, has led to idiosyncratic valuations of non-political speech. As Wragg highlights neither *Campbell* nor *Re S* provide parameters to analyse the strength of a freedom of expression claim.[9] Contrastingly, an extensive test has been cultivated in *Murray* allowing courts to use specific parameters to weigh a privacy claim.[10] Consequently, Wragg argues that judgments regarding the societal value of expression are contradictory.[11] An example of the inconsistency between judgments in similar MPI cases involving non-political speech is highlighted by the differing outcomes in *Goodwin* and *K*.

In *Goodwin*, a public interest was identified in the disclosure of the defendant's affair with the claimant. The court found that there should be a public discourse on circumstances where it is

[5] *Campbell* (n 4) [148].

[6] *Von Hannover (No 1)* [2004] EMLR 21 ECtHR [63].

[7] [2012] EWHC 355 [104] – [105].

[8] (2012) EMLR 16 [117].

[9] Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, unfulfilled' (2015) 7 Journal of Media Law 225, 230.

[10] Ibid 231.

[11] Wragg, (n 9) 230.

appropriate for an executive to have a sexual relationship with an employee.[12] Yet in *K*, where there was an affair between employees, the court found no public interest in simply stating the affair's existence.[13] Despite the similarities, distinct judgments were formed on whether such information contributed to the public interest.

Moreover, without parameters to weigh a freedom expression right, valuations are increasingly paternalistic. As cited earlier, in *Campbell,* Baroness Hale stated that different forms expression are 'more deserving of protection in a democratic society than others.'[14] Titillating narratives are viewed as being of a lower value to democratic deliberation. In *CTB*, where a footballer applied for an interim injunction to avoid information regarding an alleged affair being published, Eady J doubted whether there was any public interest, stating that the answer to the balancing stage was 'not far to seek.'[15] Similarly, as stated in *Mosley*, 'political speech' holds greater weight than 'gossip,' as 'titillation for its own sake' could 'never' be justified.[16] The absence of parameters as to how freedom of expression claims should be balanced, has encouraged the moralisation of certain press disclosures.

Where a publication is titillating, it may still contribute to public discourse. As stated in *Von Hannover*, 'mere entertainment' has a 'role in the formation of opinions,' that can 'spark a process of discussion.' [17] Publications regarding the promiscuity of footballers, could support debates examining their fitness to be public role models. Yet, the courts have dismissed the public interest that entertaining disclosures could contribute to democratic discourse more broadly. Thus, in accordance with our definition, given the increasingly paternalistic judgments, an inappropriate balance has been struck between the articles.

Another difficulty which has arisen in MPI case law is the blurring of boundaries between the tort of MPI and defamation. This is incentivising claimants to 'frame' their claims as privacy actions to circumvent stringent standards in how interim injunctions are issued under defamation.

As Busuttil and McCafferty highlight, the boundaries between these torts have blurred.[18] In *McKennit v Ash*, the court found that where some statements are false in a publication, it will not,

[12] *Goodwin v NGN Ltd* [2011] EWHC 1437 (QB) [133].

[13] *K v NGN Ltd* [2011] 1 WLR 1827.

[14] *Campbell* (n 4) [148].

[15] *CTB v News Group Newspapers Ltd* [2011] EWHC 1232(QB) [26].

[16] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 [132].

[17] *Von Hannover* (n 6) [25].

[18] Godwin Busuttil and Patrick McCafferty, 'Interim Injunctions and the Overlap between Privacy and Libel' (2010) 2 Journal of Media Law 1, 4.

alone, lead to the dismissal of MPI claims.'[19] Subsequently in *P v Quigley*, it was established that MPI claims will be permitted even where the claimant is arguing that *all* private information at issue is false. Eady J stated that the claimant's Article 8 rights were 'plainly engaged' by the disclosure of a fictitious novel regarding the claimant and the injunction was issued.[20]

Developments in MPI law now present two differing principles which a court may apply when considering to issue an interim injunction preventing the disclosure of a false statement.[21] Compared to MPI claims, the likelihood of succeeding in an interim injunction application within a defamation action is small.[22] As Hartshorne underlines, claimants are thus incentivised to portray their case as a MPI claim due to the lower threshold required to attain an interim injunction.[23] The risks posed by this incentive was highlighted in *Terry*. A footballer made an application for an interim superinjunction to prohibit information on his affairs being disseminated under MPI. However, Tughendhat T stated that this was an attempt to preserve Terry's reputation by claiming privacy.[24] He highlighted that although it was submitted as a MPI claim, there had been no comment on 'any personal distress.'[25] Terry's principal concern was, according to his Lordship, how such publicity would undermine his reputation and thereby adversely impact his income.[26] The court instead applied the *Bonnard* principle and dismissed the application.

Empirical evidence suggests this is part of a wider trend, as there has been a decline in claims made under defamation, and a simultaneous rise of MPI claims.[27] It appears that the blurring of the distinction between the torts, has incentivised claimants to frame their cases as privacy claims. This may be leading to more claims avoiding the legal safeguard implemented in *Bonnard*.

However, the courts have acknowledged this discrepancy and have expressed a vigilance to apply the *Bonnard* threshold appropriately. In *McKennit*, Longmore LJ stated that the court will not permit 'dress[ed] up' actions portrayed as MPI claims, when it is truly a defamatory claim seeking to protect reputation.[28] In *RST*, Tughendhat J emphasised, when determining whether to apply

[19] [2008] QB 73 [80].

[20] [2008] EWHC 1051 (QB).

[21] John Hartshorne, 'An Appropriate Remedy for the Publication of False Private Information' (2012) 4 Journal of Media Law 93, 101.

[22] Ibid.

[23] Ibid 103.

[24] *Terry v Persons Unknown* [2010] EMLR 16.

[25] Ibid [95].

[26] Ibid.

[27] Genn, Hazel, 'Civil Justice Reform and the Role of ADR' (Speech delivered by New Zealand Law Foundation Distinguished Visiting Fellow, Christchurch, 17 September 2009)

[28] Mckennit (n 19) [79].

the *Bonnard* principle, it is for the courts to examine what a claim's substance is, and should not be influenced by the action the claimant has selected. [29]

Judicial vigilance initially appears a promising way to prevent claimants circumventing the *Bonnard* principle. However, as Cheer argues the decision as to what the substance of the argument is, can rely on details which could be easily manipulated.[30] In *Terry*, Tughendhat explained the court's reasoning behind why the nub of the claim was for the protection of reputation. He cited the fact that the 'assembling of evidence has been put into the hands of business partners', showing that the claim is actually 'a business matter' not one regarding 'personal distress.'[31] Busuttil and McCaffetry argue this reasoning could be exploited by claimants who, through deceptive drafting and specialist knowledge, disguise the 'nub' of their claims as being for the protection of privacy not reputation.[32]

Given a claimants' motivation can be difficult to establish in privacy claims, this can lead to idiosyncratic judgements in the issuance of interim injunctions. As Stanganelli outlines, injunctions which are implemented at the interim stage are issued without the benefit of cross-examination and evidence available at trial.[33] In *Greene* the court stated that to prevent a disclosure of information 'merely by arguing on paper-based evidence,' would 'seriously weaken' the weight of Article 10.[34] These statements were in reference to the courts' ability to apply section 12(3) to defamation applications.[35] Yet, the same reasoning could also be applied to judgments regarding whether the 'nub' of a claim is in the protection of reputation or privacy. Given the breadth of information which is inaccessible at the interim stage, and the incentives for a claimant to distort their claim, it appears unlikely that courts could make an accurate and consistent identification as to what a claims' substance. Thus, the courts have struck an inappropriate balance between the articles, failing to introduce an effective means to prevent applicants from exploiting the blurring of the torts. This has allowed claimants to avoid the legal safeguard established in *Bonnard*.

Finally, developments in MPI law have been applied more broadly to cases regarding issues of open justice, impacting how courts balance the right to freedom of expression and privacy in these cases. In *Campbell*, the court stipulated that where a conflict arises between Article 8 and Article

[29] *RST v UVW* [2009] EWHC 2448 (QB).

[30] Ursula Cheer, 'Diving the Dignity Torts: a Possible Future for Defamation and Privacy' in Andrew Kenyon *Comparative Defamation and Privacy Law* (Cambridge University Press 2016).

[31] Terry (n 24) [95].

[32] Busuttil and McCafferty, (n 18) 8.

[33] Maryanne Stanganelli, 'Interim Injunctions and the case for Bonnard v Perryman' (2012) 17 Communications Law 91, 95.

[34] *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462 [74].

[35] Human Rights Act 1998, s12(3).

10 of the ECHR,[36] each right must be given equal weight in the balancing act. As Barendt underlines, although *Campbell* established an important development within MPI law, it was not a case regarding open justice.[37] Nevertheless, Lord Steyn in *Re S*, the authority on open justice, stated that the same approach must be taken in open justice, referring to the balancing act stipulated in *Campbell* as 'the ultimate balancing test.'[38] The principle of open justice was established in *Scott*, where the House of Lords stated that legal proceedings should be transparent to the public and the press. [39] However, it also established that exceptions should be made to the open justice principle where necessary, to protect the administration of justice. [40]

MPI jurisprudence stipulates that the articles should be given equal weight in the balancing act, which open justice authority *Re S* corroborates. Yet, the courts have consistently expressed that there is a presumptive superiority of the right to freedom of expression in open justice cases. The importance of the open justice principle has been underlined in the Practice Guidance provided by the Master of the Rolls. [41] It states that exceptions to the principle will be 'wholly exceptional' and should only be made where 'strictly necessary' to safeguard the administration of justice.'[42]

As Gligorevic argues, the courts have established a 'justificatory burden' in the balancing exercise for the right to a private and family life in open justice cases.[43] In *H v A*, the question arose as to whether the judgment from the case should be restored online in its entirety or redacted form. This followed concerns that the family involved could be identified through internet searches. Macdonald J permitted the judgment to be restored online in its original form, stating that only in 'exceptional circumstances' would the right to privacy 'prevail' over Article 10 where open justice was implicated.[44] Moreover, in *R (on the application of M) v Parole Board,* an applicant applied for an order requesting not to be named in any publication of the proceedings. The administrative court stated, due to the significance of the open justice principle in both the ECHR and common law, there is a 'weighty presumption' that proceedings will be 'publicly reported' in the balancing act.[45] These cases illustrate how the courts have effectively established presumptive priority for Article 10 in the balancing stage.

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[36] European Convention on Human Rights 1950, Article 8 and Article 10.

[37] Eric Barendt, 'Happy Centenary Birthday to Scott v Scott' (2013) 5 Journal of Media Law 297, 304.

[38] *Re S* (A Child) (Identification: Restrictions on Publication) [2005] 1 A.C. 593 [17].

[39] *Scott v Scott* [1913] AC 417.

[40] Ibid.

[41] Practice Guidance [2012] EMLR 5 [10].

[42] Ibid.

[43] Jelena Gligorijevic 'Publication Restrictions on Judgements and Judicial Proceedings: Problems with the Presumptive Equivalence of Rights' (2017) 9 Journal of Media Law 215, 221.

[44] *H v A* [2015] EWHC 2630 (Fam) [43].

[45] [2013] EWHC 1360 [47].

Due to the presumptive superiority afforded to Article 10 in case law,[46] the courts have adopted an overly deferential approach to the open justice principle. They often provide little justification as to why privacy rights have been overridden in a *specific* case. As Bohlander argues, the courts fail to provide sufficiently detailed explanations as to why the naming of suspects contribute to the 'public interest.'[47] Commenting on Lord Rodger's judgment in *Guardian News*, Bohlander argues that the debate presented by the judges fails to do 'justice' to the complexities of the balancing act. Dogmatic terminology such as 'necessary in a democratic society,' and 'in the general public interest' are deployed to justify the weighting of Article 10 without pertaining to the case's 'substance'. Similarly, in *H v A,* MacDonald J's explanation as to why the right to freedom of expression displaced the privacy right, did not focus on the facts of the case but on general concepts. The explanation highlighted the 'importance generally' of safeguarding freedom of expression and the broader public interest of ensuring the press is able to report on legal proceedings.[48] The judiciary's approach fails to undertake even a limited balancing exercise focused on the specific case. This has arguably led to a de facto elimination of the second stage. According to our definition, given the present bias towards Article 10 which is unjustified in case law, the current balance is inappropriate as it pertains to open justice cases.

In conclusion, the law of MPI has failed to establish an effective balance between press freedom and a person's right to privacy. The broad conceptualisation of non-political expression which can contribute to the public interest, has led to paternalistic and idiosyncratic judgements. If the courts were to establish clear parameters by which the value of freedom of expression claims could be examined, this could reduce the idiosyncrasy between judgments and discourage paternalism. Moreover, the distinction between the torts of MPI and defamation have blurred, and are being exploited to overcome stringent requirements for interim injunctions. Finally, due to the presumptive superiority of the open justice principle in case law, the courts are overly deferential to Article 10 in the balancing act, failing to weigh the rights in any sense.

[46] European Convention on Human Rights 1950, Article 10.

[47] Michael Bohlander, 'Open Justice or Open Season? Should the Media Report the Names of Suspects and Defendants?' (2010) 74 The Journal of Criminal Law 321, 327.

[48] *H v A* (n 42) [70].

Are Computer Programmes Patentable under UK Law?

Alexander Fairbairn

Introduction

In the UK, patents may only be granted to inventions.[49] The question of what an invention is therefore plays a critical part in shaping the contours of patent eligibility. Whatever represents its meaning influences the line between patentable and unpatentable subject matter, with important implications for innovation and economic growth. In this vein, Kane labels the invention requirement as serving a "*gate-keeping function*".[50]

The Patents Act 1977 governs UK patent law. However, it does not provide a positive definition of the term 'invention'. Instead, it contains a non-exhaustive series of excluded creations. S 1(2) states that the following are not inventions for the purpose of the Act, to the extent that a patent or application relates to it as such: (a) discoveries, scientific theories and mathematical methods; (b) aesthetic creations; (c) schemes, rules and methods for performing mental acts, playing games or doing business, or programs for computers; and (d) presentations of information.[51] Lacking a solid definition creates obscurity over the meaning of 'invention', and creates a problem of construction and application of s 1(2). In an attempt to resolve this, UK authorities have interpreted it as a requirement for subject matter to have technical character. This paper argues that conceiving 'invention' in in such a way has provided the courts with discretionary power to construe s 1(2) narrowly, representing a pro-patent policy. This move has led to an increased number of patentable subject matter, notably in cases with software technology.

This paper critically discusses the law on determining an invention and the extent to which computer programs are patentable in the UK. Section 1 investigates how the courts foster the requirement of technicality as a benchmark for patentability. Section 2 analyses how software technology benefits from the use of the technical requirement by way of the 'as such' proviso. Section 3 demonstrates the judicial pro-patent policy towards computer programmes through the Court of Appeal decision in *Symbian Ltd v Comptroller-General of Patents, Designs and Trademarks,*[52] while section 4 looks at subsequent litigation developments.

Technical Contribution

The lack of a legislative definition of 'invention', coupled with a judicial reluctance to create one, led to difficulty in determining patentable subject matter. Consequently, the UK has resolved to using technical as a proxy for 'invention'. Bently and Sherman describe this as a "*de facto and non-statutory*

[49] Patents Act 1977, s 1.

[50] See E Kane, 'Patent Ineligibility: Maintaining a Scientific Public Domain' (2006) 80 St John's L Rev 519, 524.

[51] Patents Act 1977, s 1(2)(a)-(d).

[52] [2008] EWCA Civ 1066; [2009] RPC 1.

requirement for patentability".[53] In its current jurisprudence, the UK applies the technical contribution test. The Court of Appeal in *Aerotel Ltd v Telco Holdings Ltd*[54] captured this in a four-stage test, which forms the basis of current UKIPO practice. The Court announced that the correct approach was to: (a) properly construe the claim; (b) identify the actual contribution; (c) ask whether the contribution falls within the excluded subject matter; and (d) check whether the contribution is actually technical.[55] In a nutshell, the Court ruled that an invention holds technical character if it makes a technical contribution to the prior art and is not within the excluded categories.

Determining the precise ambit of the computer program exclusion has aroused persistent difficulty since the enactment of the European Patent Convention. Computer programs include algorithms, functional aspects, and sequences of instructions that link to hardware. Mr Prescott QC explained in *CFPH LLC's Application*[56] that they are excluded because the EPC's drafters thought patents were not needed in the computer sector.[57] This owed to problems in locating prior art, the availability of copyright protection, and that they "*would do more harm than good*" to the software industry.[58] Yet, measuring subject matter by virtue of their technicality has considerably reduced the scope of this exclusion. Numerous cases demonstrate the ability of computer-related programs to gain patent protection despite s 1(2)'s objection. This is because, as the High Court has observed, they are "*self-evidently technical in nature*".[59] Here, a conflict emerges between the legislation and judicial culture of utilising technical contribution. On the one hand computer programs are expressly restricted from patentability, and on the other they are clearly technical. A relevant question concerns the sufficient level of technicality that subject matter must have to be eligible for patentability. And how does UK law respond to applications that involve a combination of excluded and non-excluded elements, like a computer-implemented method?

Computer Programs … As Such

The 'as such' qualification has proved controversial in the context of computer-related programs. That is, an application is not an invention only to the extent that it relates to an excluded category 'as such'.[60] This means s 1(2) does not restrict applications containing a combination of excluded and non-excluded material from patentability. The 'as such' caveat therefore plays a significant role as a barrier to a broad interpretation of s 1(2). This is very beneficial for hybrid inventions, which embody permitted features in addition to excluded content. A computer-implemented invention, for example, is a product that is carried out by a computer program. Examples include computer networks, software internal to a computer, and other processes. It could take the form of hardware such as a GPS system or software like compressing data. Initially, the courts only considered the non-

[53] L Bently, B Sherman, D Gangjee and P Johnson, *Intellectual Property Law* (5th edn, OUP 2018) 479.

[54] [2006] EWCA Civ 1371, [2007] RPC 7.

[55] Ibid [40].

[56] [2006] EWHC 1589 (Pat); [2006] RPC 5.

[57] Ibid [35].

[58] Ibid.

[59] *Halliburton Energy Services Inc's Patent Application* [2011] EWHC 2508 (Pat), [2012] RPC 12 [35] (HH Judge Birss QC).

[60] Patents Act 1977, s 1(2)(d).

excluded elements of applications in assessing technical character, disregarding any excluded aspects. This method was fatal for inventions that made a technical contribution in its excluded area. A change in approach occurred, as the courts now consider the whole contents of an application and it is unnecessary to separate the two. It matters not whether the claimed invention contains elements of excluded subject matter, as the entirety of its substance will be assessed for technicality.

The technical requirement combined with the 'as such' rule provides greater width for computer-related products to pass through s 1(2), since they are inherently technical and not entirely computer programs. The whole contents approach reflects the policy objective of preventing s 1(2) from becoming overinclusive and excluding more inventions than is necessary. Therefore, while computer programs 'as such' are excluded, computer-implemented apparatus or methods are not and can be conferred a patent. We can see the scope of s 1(2) reduced and the opportunity for a more diverse range of subject matter to gain patent eligibility. It makes sense in principle why pure software should not be allowed patentability. It is essentially a collection of mathematical instructions executed on a computer. But this should not have to apply to inventions implemented on a computer. However, it can be difficult to determine the correct technicality level required for an invention to be patentable. Too low a threshold would completely undermine the validity of s 1(2). Consequently, the standard effects of computer programs such as electrical currents or merely loading a program are not considered a sufficient technical innovation. There must be some further technical effect to be eligible. The EPO Guidelines describe this as "*going beyond the 'normal' physical interactions between the program (software) and the computer (hardware) on which it is run*".[61] This ensures that the scope of technical character does not extend too far or reflect an image of 'invention' that was not intended by the legislators.

Symbian v Comptroller-General

The Court of Appeal judgment in *Symbian* is a signature example of the judicial pro-patent attitude towards software technology. In this case, Symbian Ltd filed a patent application for an improved method of accessing data through a dynamic link library (DLL) on a computer. It claimed to overcome incompatibility issues when new functions were added to a DLL, leading to greater speed and reliability. The UKIPO rejected the application on the basis that it was a computer program as such. The High Court overturned that, and the Comptroller-General appealed to the Court of Appeal. The Comptroller submitted that s 1(2) excluded any computer program from patentability unless the contribution was made outside the computer. Additionally, the Comptroller referred to *Aerotel*, arguing that computer programs seldom went to the fourth stage of identifying technicality as the third stage of whether the subject matter fell within the excluded categories usually caught them. Symbian responded that s 1(2) had a more limited effect, only excluding programs that made no technical innovation.

The legal issue was ascertaining the exclusionary scope of s 1(2) on computer programs and the correct approach in determining that. Dismissing the appeal, the Court ruled that the application was

[61] EPO Guidelines for Examination.

patentable even though the technical contribution was made inside the computer. Lord Neuberger stated that "*the mere fact that what is sought to be registered is a computer program is plainly not determinative*".[62] To that end, the use of a computer program did not automatically render an application invalid. The Court followed *Aerotel* but conflated the third and fourth tests. It also acknowledged that there was no clear rule in determining the eligibility of a computer software, and each case had to be determined by reference to its facts and features. If an application made a relevant technical contribution to the known art, that would generally suffice to confer patentability regardless of whether it was internal or external. However, it remained the case that the mere presence of computer software would not in itself fulfil the technical requirement: a further effect was necessary. In the instant case, the application did make a sufficient technical contribution since it improved the functionality of computers by making them speedier and more efficient. It mattered not that the contribution was to software instead of hardware, but that "*it had the knock-on effect of the computer working better as a matter of practical reality*".[63] This verifies that there has been a transition from the conventional physical image of patentable inventions, as it proposes 'practicality' as the current standard for technical.

Symbian provides an opening for broader forms of computer software to gain patent protection, an outcome welcomed by the software industry. Consequently, UKIPO practice would have had to adapt to include a wider class of computer-related programs into the patent system, leading to more applications in that field. Inventions involving artificial intelligence would have particularly benefitted from this judicial direction, since they are usually implemented via computers. The Court also observed that the EPO and UK's divergent approaches were not so dissimilar since technicality was the key test in both and noted the capability for reconciliation.[64] This was reflective of the Court's enthusiasm for greater consistency between UK and EPO decisions and displayed a desire for a more unified conception of the invention requirement. De Mauny praises the *Symbian* outcome for showing a "*sensible restraint against giving too restrictive a definition that cannot cope with fresh technology*".[65] Indeed, it signified a subtle attitudinal adjustment towards defining patentable subject matter. Despite reconfirming technical character as the key question, the Court highlighted the conceptual difficulties surrounding its meaning, characterizing it as imprecise and elusive.[66] Lord Neuberger suggested that "*staged approaches … should not necessarily be followed blindly in every case*".[67] This suggests that the *Aerotel* four-stage test should not be strictly followed, portraying the preference for flexibility in determining what is an invention. Bently and Sherman share this view, commenting that "*the growing tendency for judges to reduce the law to a set of rules or guidelines*" has complicated this area of the law.[68] This links back to a previous point: adopting the notion of technical has led to a fluid understanding of 'invention'.

[62] *Symbian* (n 4) [48].
[63] Ibid [59].
[64] Ibid [11].
[65] C De Mauny, 'Court of Appeal Clarifies Patenting of Computer Programs' (2009) 31(3) EIPR 147, 150.
[66] *Symbian* (n 4) [50].
[67] Ibid [16].
[68] L Bently, B Sherman, D Gangjee and P Johnson (n 5) 476.

Subsequent Developments

Post-*Symbian* judgments have continued to develop the correct method for assessing technicality. In *AT&T Knowledge Ventures LP's Patent Application*,[69] Lewison J set out five signposts to indicate whether a computer-implemented invention makes a relevant technical contribution. The third step, for example, asks whether the effect makes the computer operate in a new way.[70] An application is likely to be regarded as an invention if it answers the signposts affirmatively. This interpretation was endorsed by the Court of Appeal in *HTC Europe Co Ltd v Apple Inc*.[71] Though, his Lordship clarified that they were not intended to be definitive and should not be considered an answer for every case. This characterises them more as guidelines, acting as a useful tool for determining an application's technical merit. This seems an effective method, striking a right balance between clarity and flexibility by allowing examiners and judges to decide cases on their facts with the aid of the signposts as guiding principles.

Arguably, UK practice regarding software patentability is moving in a direction more in line with the EPO's liberal approach. As a result, the exclusionary scope of s 1(2) on computer programs is eroding. In *HTC v Apple*, for example, the application in question enabled simultaneous touches on devices with touch-sensitive screens. The Court ruled that it was not excluded as it made a further technical effect by improving software's interface and making it easier for programmers to use. Kitchin LJ declared that "*an invention which is patentable in accordance with conventional patentable criteria does not become unpatentable because a computer program is used to implement it*".[72] This indicates that computer software is an illusory exception to patentability in practice. In contrast, however, the Court of Appeal in *Lantana Ltd v Comptroller-General of Patents, Designs and Trademarks*[73] dismissed a data retrieval application because it did not solve a technical contribution but merely circumvented it. This shows that there is still some reluctance towards awarding patents to software claims that occur inside a computer. It also reiterates how fact-specific the court's view of what is and is not patentable. Considering that the application in *HTC v Apple* was successful for enhancing the device's utility, whereas the application in *Lantana* was not, this conveys how subtle the analysis can be and why a rigid test is inappropriate in this area of the law. Nevertheless, the ambit of software patentability has proliferated in the UK as a result of s 1(2)'s restrictive interpretation. The unbated litigation also represents that the law is still in an ambivalent position despite the calls for harmonisation.

Are there grounds for reforming the computer program exception? As Lord Neuberger opined in *Symbian*, it is "*arbitrary and unfair to discriminate against people who invent programs which improve the*

[69] [2009] EWHC 343 (Pat), [2009] FSR 19.

[70] Ibid [40].

[71] *HTC v Apple* [2013] EWCA Civ 451, [2013] RPC 30.

[72] Ibid [57].

[73] [2014] EWCA Civ 1463, [2015] RPC 16.

performance of computers against those who invent the programs of other machines".[74] The software industry invests considerable amounts of time and money in creating new computer technology, and although copyright offers some protection, this is limited insofar that it does not proscribe the development of similar products by competitors. The Enlarged Board of Appeal suggested that "*judicial-driven legal development*" in the computer programs context had run its course and "*it is time for the legislator to take over*".[75] The European Commission previously proposed a directive aimed at codifying the EPO's practice of issuing patents for computer-implemented inventions,[76] which would have harmonised the UK and EPO's interpretative agendas. However, it was rejected by the European Parliament and will not be reintroduced. It is probably wise not to extend the bounds of computer program patentability too far. Without the exclusion, other excluded material like business methods or presentations of information could gain patentability merely through using a computer as a means of implementation.[77] Additionally, going back to Mr Prescott QC's concern in *CFPH*, there are difficulties in searching for prior art due to a lack of an identifiable body of literature on computer programs.[78] It is impractical to grant patents to them. The final chapter exemplifies that there are valid policy and practical reasons for maintaining the exclusion, albeit in a weaker form.

Concluding Remarks

The doctrinal question of what an invention is plays a central role in contemporary patent law. It controls the bounds of legally protected inventions, with far-reaching implications within and beyond the patent regime. S 1(2) provides an ill-defined catalogue of exclusions rather than firm definitions, leaving extensive interpretative powers to the courts. This paper discussed the extent to which computer programmes are patentable under UK law. Applying technical in determining patentable inventions has engendered a more permissible attitude towards software products, since they are inherently technical. Thus, although computer programs as such are excluded from patentability, the narrow interpretation by the courts means that computer-related inventions may be eligible. Ultimately, the traditional notion of 'invention' has extended beyond the physical conception of technology to "*(immaterial) information-based*" creations.[79] *Symbian* was a profound illustration of the increased ambit of software patentability, and subsequent decisions show that the excluded categories continue to tighten the more 'technical' is used. Possibilities of reforming the computer program exclusion were raised, considering its scope is now so slim. However, cogent grounds for maintaining it remain. The debate over patentable subject matter continues to present difficulties for UK courts. The imprecise statutory provisions mean more litigation will occur over what they do and do not exclude.

[74] *Symbian* (n 4) [22].

[75] G 003/08 *Computer program exclusion/PRESIDENT'S REFERENCE* [2010] EPOR 36 [7.2.7].

[76] Proposed Directive on the Patentability of Computer-Related inventions [2005] OJ C144/E9.

[77] *Symbian* (n 4) [25].

[78] *CFPH* (n 8) [35].

[79] L Bently, B Sherman, D Gangjee and P Johnson (n 5) 482.

Gender equality in the House of Commons

Kourosh Fallah

Introduction

This article evaluates the legal obstructions, weaknesses, and limitations of gender equality in the House of Commons and proposes solutions to overcome the barriers.
It will commence with the legal evolution background and continue through the relevant election laws and the importance of gender equality. Finally, legal solutions will be provided for having gender equality in the Commons. The means that the successful states have employed in implementing gender equality in their parliaments will also be considered.

Background

The evolution and impact of the laws as well as gender equality status in respect of elections from 1918 to 2019, will be illustrated in this background.

From 1916 to 1917, the House of Commons Speaker chaired a conference on electoral reform that recommended limited women's suffrage.[80]

In 1918, the Representation of the People Act ("the 1918 Act") was passed as a first step to allowing women to vote. The 1918 Act granted the vote to women over the age of 30 who met a property qualification. As a consequence, seventeen women were first able to stand for election into the House of Commons,[81] and out of the 707 MPs,[82] only one woman was elected.

The Electoral Administration Act 2006 reduced the age from 21 to 18, stating that "a person is disqualified for membership of the House of Commons if, on the day on which he is nominated as a candidate, he has not attained the age of 18."

Statistics illustrate that until the late 1980s, women had always made up below 5% of elected MPs and, until 1997, had never made up more than 10% of all MPs.[83] Following the 1997 general election, the proportion rose to 18.2%. In 2005, the proportion of female MPs reached 19.8%. Finally, in 2019, by adopting various positive strategies by all political parties to ameliorate gender disparity, the

[80] https://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/womenvote/overview/thevote/

[81] House of Commons Library ('HCL'), *Women in politics and public life* (4 March 2022).

[82] HCL, *UK Election Statistics: 1918-2021: A Century of Elections* (18 August 2021).

[83] HCL, *Women in politics and public life* (4 March 2022).

level of women MPs elected at general elections reached 33.8% (compared to 66.2% of men), which was the highest ever.[84]

The total number of female MPs who were elected at the 2019 general election was 220 out of 650. The Labour party had 104 female MPs, the Conservative 87, the Scottish National Party ("SNP") 6, the Liberal Democrat 7, and all other parties 6.[85]

Although the Labour party has had more female MPs than Conservatives, the only three women prime ministers in the UK were Conservatives.[86]

In total, from 1918 to 2019, 8,780 (14%) women and 54,841 (86%) men have been put forward as candidates.[87] During this period, out of all 17,856 elected MPs, 17,304 men and only 552 women have been elected to the House of Commons.[88]

It should be noted that women have had less important roles than men in the Commons. For instance, only once, between 1992 and 2000, a female, Betty Boothroyd, was a speaker in the House of Commons.[89]

To sum up, the progress of improving gender balance in the Commons has been too slow, and women have been vastly underrepresented, as the table below demonstrates. Furthermore, the current election law would not guarantee gender equality, and there is no clear vision of how to reach the gender balance anytime in the future. Based on the statistics as of 1 November 2022, the United Kingdom's global ranking for women serving in a national parliament is 45.[90]

[84] HCL, *UK Election Statistics: 1918-2021: A Century of Elections* (18 August 2021).

[85] HCL, *General Election 2019: results and analysis* (28 January 2020).

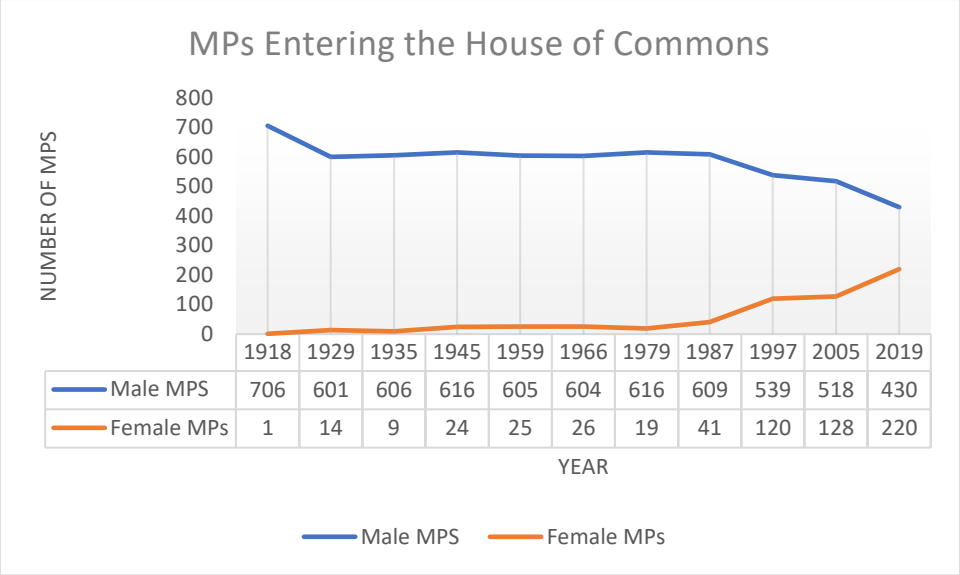
[86] https://www.gov.uk/government/history/past-prime-ministers

[87] https://commonslibrary.parliament.uk/house-of-commons-trends-how-many-women-candidates-become-mps/

[88] HCL, *Women in politics and public life* (4 March 2022).

[89] https://members.parliament.uk/member/679/career

[90] https://data.ipu.org/women-ranking?month=7&year=2022



The relevant election law

Sex Discrimination (Election Candidates) Act 2002 ("the 2002 Act") and the Equality Act 2010 ("the 2010 Act") are the relevant laws to facilitate all genders to be elected equally in the UK.

Prior to the 2002 Act, the Sex Discrimination Act 1975 ("the 1975 Act") was the law applicable to gender discrimination in elections. However, it did not address the issue of general equality for candidates. In this regard, in the authoritative case of *Jepson and Dyas-Elliot v Labour Party [1996] IRLR 116*,[91] the two men applicants had been prevented from standing on the Labour's shortlists of candidates. They asked the tribunal to say that the "women-only shortlists" arrangement for the 1997 general election, which had prevented them from being considered for selection as official Labour party candidates, constitutes direct sex discrimination against them. They argued that this was in contravention of section 13(1) of the 1975 Act and sought a declaration to that effect.
The tribunal held that "the complaints of both applicants that they have been unlawfully discriminated against on the grounds of their sex are well-founded, and the tribunal makes a declaration to that effect." As a result, the Labour party scheme was abandoned.

Although the tribunal's reasoning was never subjected to further judicial scrutiny by way of an appeal, there has since been considerable doubt surrounding the legality of positive discrimination measures under both the national and European legal order. It is argued that the tribunal applied a wide interpretation to s.13 and, in doing so, arguably strayed outside its jurisdiction by directly interpreting the provisions of the Equal Treatment Directive 76/207. Therefore, it gives currency to its reasoning, which both of these actions would have provided sufficient grounds for an appeal.[92]

[91] Lexis®Library (lexisnexis.com)

[92] Nicole Busby, *Sex Equality in Political Candidature: Supply and Demand Factors and the Role of the Law* (1 March 2003) 66(2) Modern Law Review 245–260.

Due to the 1975 Act limitation, the Labour party introduced the 2002 Act to exclude certain matters relating to the selection of candidates by political parties. The key objective of the 2002 Act is to enable political parties, should they wish to do so, to adopt measures that regulate the selection of candidates for certain elections to reduce inequality in the numbers of women and men elected as candidates of the party. The 2002 Act inserted an exemption in the 1975 Act for positive measures (designed to reduce inequality in the numbers of women and men elected to certain bodies) from the general prohibition against discrimination on the grounds of sex.

The 2002 Act enabled the political parties to use positive discrimination in the course of the selection process. They have applied various strategies to increase the number of women, including exhortation, incorporation of non-sexist selection criteria for the approved list, training of selectors in fair practices, All-Women Shortlists,[93] and "Zipper system". Nevertheless, as a result of not being prescriptive and no changes to the legal procedure, this Act does not guarantee gender parity.

Due to the failure of setting any specific goals and measures in the 2002 Act, it was obvious from the outset that it was unlikely that this Act would lead to any significant changes. Ultimately, the 1975 Act was repealed by the 2010 Act, which is against discrimination and inequality and promotes gender equality. This Act gives rights and more opportunities to all genders. It makes society fairer by facilitating to assist people who are underrepresented or suffer from inequality. It has provided a broad opportunity to all branches of the state to reduce and remove all aspects of inequality by obliging them not to discriminate against any protected characteristics, including sex, making it practically feasible to increase female MP representation.

Regarding the statistics, until now, only the Labour and the Liberal Democrat parties have implemented positive discrimination and were successful in securing gender equality. Strategies such as the persuasion of women to stand for the election alone, which was implemented without any guaranteed action by the other parties, were not successful. Therefore, owing to no comprehensive action from all parties, there have been no significant changes in the total number of female MPs.

To sum up, in reality, under the 2002 Act, only the threat of the 1975 Act was withdrawn; however, the issue of the underrepresentation of women remains. On the other hand, the comprehensive 2010 Act can be regarded as a principle to implement equality. However, the implementation of this Act in full is required that an equal number of women and men work together to complement each other's perspectives, decrease injustice, build a stronger economy, positively impact the environment, reduce discrimination and harassment, increase equal opportunities for all, and bring in higher levels of peace and stability. To reach this point, the 2002 Act is required to be appealed to make it possible to have gender equality in the Commons.

[93] Hansard Society Report, *women at the top*, section 1.

The importance of gender equality in the House of Commons

MPs' duty is to work on behalf of the people who voted for them in their constituencies. They should ensure that a wide range of opinions from across the United Kingdom is voiced.[94] Therefore, acts of omission of MPs must directly affect people and society.

Pursuant to the 2010 Act, "the Act is to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities."

Several sections of the 2010 Act are "to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics."

It is worth noting that any case of gender inequality, whether female predomination or male predomination, causes imbalanced decisions, negatively affecting socio-economic development. The statistics illustrate that the gender divide for caring for children, grandchildren, older people, or people with disabilities was 41% for women, compared to 25% for men. Additionally, daily cooking or housework was performed by 85% of women compared to 49% of men. However, the Full-Time Equivalent (FTE) employment rate for women was 45% compared to 61% for men.[95] The gender pay gap[96] is another current instance of discrimination. These cases exist despite the fact that women have much more family responsibilities than men. Thus, equal parliament may reduce these kinds of discrimination.

Section 149 of the 2010 Act is "to increase equality of opportunity." However, women may not be able to work full-time due to family responsibilities. Thus, they may not get job promotions and may lose further opportunities. In this patriarchal system, men have most of the power through money and job positions. Men also have more importance within society which may cause the oppression of women and, accordingly, children.

Consequently, since slightly more than half of the UK population are women, for the implementation of the 2010 Act and justice, it is essential that half of the MPs are represented by women. Female MPs would understand the women's feelings and concerns about their challenges of being a wife, mother/single mother, daughter, and carer. They would also be aware of the high number of female victims of violence.

Successful states in implementing gender parity in the parliament

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[94] The House of Commons: *The House of Commons at Work (booklet).*

[95] European Institute for Gender Equality (EIGE). *Gender Equality Index 2020* (28 October 2020).

[96] https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2021#the-gender-pay-gap

Rwanda with 61.3%, Cuba with 53.4%, Nicaragua with 51.7%, Mexico with 50%, the United Arab Emirates with 50%, and recently New Zealand with 50.4% are the six countries with 50% or more women in lower or single Houses. Most countries where women have more political participation have applied gender quotas.[97]

In Rwanda, there are reserved seats for women, youth, and persons with disabilities as well as quotas. There are not any voluntary quotas in Rwanda like in the UK. The weakness in this system is that the law determines the minimum number of female Deputies, but the maximum number of female Deputies is not defined, which has resulted in inequality.

Among the countries with more than 50% of female MPs, Cuba and New Zealand are the only countries that have not adopted any reserved seats or quotas in the constitution.[98] However, despite the official position in Cuba denying the existence of reserved seats and gender quotas in the parliament, it does implement measures of positive discrimination to strengthen women's presence in politics.[99]

Nicaragua and the UK have the same voluntary political party quotas.[100] However, regarding the Nicaragua Constitution, the participation rate of women in Nicaragua is much higher than in the UK.[101]

Pursuant to Article 131 of Nicaragua's Constitution, "… the list of candidates must contain 50% of male and 50% of female candidates, presented in a fair and alternating order; the same relation between the sexes must be maintained between the mandate holders and their alternates, where applicable." Under the 2000 Electoral Law of Nicaragua, "political parties or the coalition of political parties which participate in the National Assembly elections must include in their electoral lists 50% men and 50% women candidates."[102]

In Nicaragua, statutes secure effective democratic participation in the election procedures of authorities and candidates. This does not invalidate the academic, intellectual, and ethical requirements or the capacities and experience required to be candidates or applicants for these positions. As a consequence of implementing these laws, 47 of 91 current Nicaragua National

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[97] https://data.ipu.org/women-ranking?month=7&year=2022

[98] https://data.ipu.org/content/cuba?chamber_id=13375/
https://data.ipu.org/content/new-zealand?chamber_id=13478
https://www.constituteproject.org/constitution/Cuba_2019?lang=en

[99] Ilja A. Luciak, *Party and State in Cuba: Gender Equality in Political Decision Making* (Cambridge University Press: 13 December 2005).

[100] https://data.ipu.org/content/nicaragua?chamber_id=13475 cf. https://data.ipu.org/content/united-kingdom?chamber_id=13511

[101] https://data.ipu.org/women-ranking?month=7&year=2022

[102] http://legislacion.asamblea.gob.ni/SILEG/Gacetas.nsf/5eea6480fc3d3d90062576e300504635/e2ad62ab83ae684406257a08006aebbe/$FILE/Ley%20No.%20790.pdf

Assembly members are women.[103] This election system is practical due to enforcing political parties to actively represent female and male candidates, resulting in gender equality.
Although the legal framework and public awareness in the UK predated these countries, gender equality in the UK has not been fully implemented yet. The successful countries in increasing the number of MPs applied quotas with deadlines and enforcing guarantees, resulting in gender equality in a short time.

Proposed Solution

The UK's current law does not secure gender equality in the Commons, and as a result of "voluntary quotas," the number of women would be and has been variable in each general election and may result in more women than men, causing another imbalance. The political parties' strategies have also not reached a favourable outcome.

It is worth clarifying that the target of this paper is gender equality and also the key roles of women in the Commons. Roles are indicative of gender's influence and guarantee that outcomes advance gender equality in society.

The main proposal to achieve gender equality could be to adopt a quota requiring half of the women's representation in the Commons. In order to be practical, there is a need to appeal and amend the current laws to provide a deadline for implementing changes and sanctions for non-compliance.

The appealed provisions could be that:
"*The House of Commons is composed of 650 members. Members must be elected as follows: 50% of the member of the House of Commons must be women, and 50% must be men.*"
"Political parties which participate in the House of Commons elections must include 50% women and 50% men candidates in their electoral lists."
"Half of the roles in the Commons must be held by female and half by male MPs."
The proposed deadline for implementation could be by 2035.

The state should ensure that the new law secures effective democratic participation in the election procedures of the candidates. Political parties shall seek the equal participation of both women and men in decision-making positions and procedures.

The new legislation should also ensure that besides having experience, the candidates are academically, intellectually, and ethically qualified, persuading political parties to invest and participate in the education of citizens.

[103] https://www.idea.int/data-tools/data/gender-quotas/country-view/232/35

This proposal does not have the previous Acts' weaknesses, obstructions, or limitations. Moreover, the proposal also takes a further step that other states have not clarified, and that is to ensure that half of the female MPs hold the key roles in the Commons.

On the other hand, this solution could have massive disadvantages for the political parties in the short term. Due to not having sufficient qualified female candidates, they might lose seats, and indeed power, in the Commons. Moreover, finding and preparing suitable female candidates for posts puts pressure and additional costs on the political parties. They might also require to be more flexible in their principles and policies to convince and recruit more women. These complexities merit the proposed delayed date until 2035, by which the political parties must fully comply with the new legislation.

Furthermore, electors should understand the benefits of having gender equality in the Commons. Since being an MP has been seen mainly as a men's job, electors are also required to believe the women's capabilities to represent them.
All aspects of a woman's household responsibilities and motherhood duties, which may prevent her from joining a political party and becoming a candidate in the first place, could also be deemed. With the new law, facilities could also be provided for MPs, and the work environment could also be more family-friendly and gender-sensitive.

To sum up, it is required that in addition to appealing the law to secure gender equality in the Commons, regulations and policies accordingly be adopted, and infrastructure be provided to facilitate the presence of female MPs. Furthermore, the electors' awareness is crucial for implementing the new law and equality.

Conclusion

The UK's election law is a voluntary political party quota which does not guarantee gender equality in the Commons.

The proposed solution is to repeal the current law, adding a quota that mandates the House of Commons to have equal gender. The political parties are also required to have parity between women and men on candidate lists.

Discussing "gender equality" for a long time without taking effective steps would decrease the level of importance due to becoming a routine. It is proposed to take more serious and national steps in this regard.

Reproductive Technology and the Law: Does the Abortion Act 1967 Protect Women's Reproductive Autonomy in the Context of Ectogenesis?

Lee Xian Jie

Introduction

Robertson's theory of procreative liberty asserts that the freedom to and not-to reproduce, with whom, when and by what means constitutes full procreative freedom.[104] The exception being when the procreative decision-making will cause harm to the interests of 3rd parties – only then interference with this freedom is justifiable.[105] With the advancement of medical science, women are provided with more reproductive autonomy. Women suffering from Absolute Uterine Factor Infertility (AUFI), which was considered 'the only major type of female infertility still viewed as untreatable',[106] now have the option to opt for uterine transplantation (UTx) instead of just adoption, hence, regaining hope for having their own biological offspring.[107] Unfortunately, UTx is not yet ready to be used as a treatment in routine clinical practice as it is still in the clinical trial stage. This is due to it being the 'world's first ephemeral transplant',[108] where the procedure consists of assisted reproduction technology and organ transplantation. It requires a complex set of treatments that involves 3-4 major surgeries: retrieval surgery to remove the uterus from the donor, transplantation surgery to implant the uterus into the recipient, caesarean section to deliver pregnancy and hysterectomy to remove the uterus. However, there also exist the future possibility of ectogenesis, where the 'burdens placed exclusively on women in reproduction' could be alleviated, promoting reproductive autonomy and equality at the same time.[109]

Looking back at Robertson's theory, it implicitly frames reproductive rights as a negative right where the State is to adopt a permissive approach and refrain from interfering in reproductive choices – promoting full reproductive autonomy. However, it is arguably counterintuitive from a practical standpoint. As expressed by Nelson, restraining the State from interfering in our reproductive choices is insufficient because it 'fails to recognise the steps that might be necessary to create conditions in which reproductive autonomy can meaningfully be exercised'.[110] Hence, he

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[104] John Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69 Virginia Law Review 405, 406.

[105] John Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press 1996), 35.

[106] Mats Brännström et al, 'Livebirth after uterus transplantation' (2015) 385 The Lancet 607.

[107] Saaliha Vali, 'Uterine transplantation: legal and regulatory implications in England' (2021) BJOG <https://doi.org/10.1111/1471-0528.16927> accessed 9 September 2022.

[108] Laura O'Donovan et. al, 'Ethical and policy issues raised by uterus transplants' (2019) 131 British Medical Bulletin 19.

[109] Elizabeth Romanis, 'Artificial Womb Technology and the Choice to Gestate Ex Utero: Is Partial Ectogenesis the Business of the Criminal Law?' (2019) 28 Medical Law Review 2, 342.

[110] Erin Nelson, *Law, Policy and Reproductive Autonomy* (Hart 2013), 35.

argued that state intervention is 'necessary but also dangerous' as overregulation could cause destructive effects on individuals and the society.[111]

In what follows, I aim to critically analyse whether regulations introduced by the state protect reproductive autonomy in the context of ectogenesis as a form of reproductive technology. In Part 1, I introduce ectogenesis, the law on abortion and discuss how it promotes reproductive autonomy. I will then explore whether the exceptions in the **Abortion Act 1967 (AA 1967)** is inclusive of ectogenesis technology, followed by an argument against ectogenesis as a replacement for abortion.

PART 1: Ectogenesis and The Law

Artificial womb technology (AWT) is the 'common concept describing the technological components of the process called 'ectogenesis'.[112] This technology would provide for conception and fetal development to occur completely outside a human body (complete ectogenesis) or allow a fetus or partially developed embryo to be transferred from a woman's womb to an artificial womb for the remainder of its gestation (partial ectogenesis).[113] Partial ectogenesis can also have another interpretation; it could also refer to the 'routinely practiced techniques in neonatology via the use of incubators to sustain premature babies, as well as in reproductive medicine through in vitro fertilization (IVF).'[114] However, as mentioned by Seger, the latter interpretation has already become a 'limited reality',[115] hence this essay will focus solely on the initial interpretation.

Long before ectogenesis seemed remotely possible, it provided a contentious area of debate in the bioethical literature linking to abortion.[116] With the advancement of medical science, the possibility of ectogenesis detaches itself from the realm of science fiction. In 2017 and 2019, two teams of researchers created a prototype artificial womb and successfully tested it on animals, with hopes that it might soon be ready to be used on humans.[117] The advancement in this area of reproductive technology rekindled the abortion debates as scholars now argue how ectogenesis might affect the regulation of abortion.[118] In what follows, I will evaluate the abortion debate, emphasizing on the question of whether one could apply **AA 1967** to terminate or 'switch off' an ectogenesis incubator.

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[111] *Ibid.*

[112] Seppe Segers, 'The path toward ectogenesis: looking beyond the technical challenges' (2021) BMC Med Ethics 22, 59.

[113] Stephen Coleman, *The Ethics of Artificial Uteruses: Implications for Reproduction and Abortion* (2004); Joona Räsänen, Anna Smajdor, 'The ethics of ectogenesis' (2020) Bioethics 46, 93-8.

[114] N 6.

[115] *Ibid.*

[116] Joona Räsänen, 'Ectogenesis, abortion and a right to the death of the fetus' (2017) 31 Bioethics 697.

[117] Emily Partridge et al, 'An Extra-uterine System to Physiologically Support the Extreme Premature Lamb' (2017) 8 Nature Communications 1, 11; Haruo Usada et al, 'Successful Use of an Artificial Placenta to Support Extremely Preterm Ovine Fetuses at the Border of Viability' (2019) American Journal of Obstetrics and Gynaecology, <https://doi.org/10.1016/j.ajog.2019.03.001> accessed 9 September 2022.

[118] N 9.

Before delving deeper into the essay, it is essential to outline the law on abortion and how it promotes reproductive and bodily autonomy. Abortion is a criminal offence in England and Wales under the **Offences Against the Person Act 1861 (OAPA 1861)** and the **Infant Life (Preservation) Act 1929 (ILPA 1929)**. A person is guilty of unlawfully procuring miscarriage if they take any steps to procure miscarriage with the intention to do so under **OAPA 1861, s58**.[119] While **ILPA 1929, s1(1)** states that a person is guilty of 'child destruction' if that person has the intention of destroying the life of a 'child capable of being born alive' and wilfully act in a way which causes a 'child capable of being born alive' to die before it has been born.

The **AA 1967** promotes reproductive autonomy as it provides exceptions for abortion – making it legally permissible. **AA 1967, s1(1)(a)** provides for lawful abortion if the pregnancy does not exceed 24 weeks and that the 'continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman or any existing children or her family which is greater than if the pregnancy were terminated'. Any abortion after 24 weeks is governed by **AA 1967, s1(1)(b-d)**. However, it is also important to note that the law provides all decision-making powers concerning abortion to 'registered medical practitioner' as long as they are acting in 'good faith'.[120] Hence, a full reproductive autonomy is not granted by law as medical practitioners still have the final say.

PART 2: Ectogenesis and Termination

In the future when full ectogenesis becomes viable, the question of whether the exceptions in the **AA 1967** is inclusive of ectogenesis technology where one could terminate or 'switch off' an ectogenesis incubator arises. Consider the following hypothetical situation:

"George and Olivia are adamant about having a genetically related child. However, Olivia does not want to be physically pregnant as she wants to prioritise her career, and due to the nature of her career as a professional sportsperson, it would severely impact her performance. Therefore, they decided to go for IVF treatment and have one of their embryos placed into an ectogenesis incubator to be gestated for 9 months. 3 months into the gestation, George loses his job and Olivia was at a career stalemate due to a serious injury which eventually led to her depression. The couple decided that it is not a good time to have a baby and should wait. Hence, they request for the incubator machine to be switched off."

Looking at the hypothetical scenario, would ectogenesis technology be regulated under abortion laws? Currently, the legal framework does not provide for a definitive answer. If **AA 1967** was extended to ectogenesis it would mean that couples are able to request the incubator to be

[119] Elizabeth Chloe Romanis, 'Abortion & 'artificial wombs': would 'artificial womb' technology legally empower non-gestating genetic progenitors to participate in decisions about how to terminate pregnancy in England and Wales?' (2021) 8 Journal of Law and the Biosciences.

[120] Abortion Act 1967, s1(1).

switched off within the 24 weeks period, with the condition that the continuance of the ectogenesis gestation would involve risk of injury to the mental health of the progenitor or any existing child of their family.[121] This then begs the questions of (1) does progenitors mean now the father's mental health is to be taken into consideration as well as the mother's? And (2) is the wording of **AA 1967** liberal enough to include ectogenesis? If the former question is affirmative, the principle established in *Paton v British Pregnancy Advisory Service*[122] and *C v S (Foetus: Unmarried Father)*[123] that non-gestating genetic progenitors or as Romanis termed, 'putative fathers',[124] have no legal right in abortion decisions would have to be revisited. In both cases, the father sought an injunction to restrain the wife from having an abortion without his consent and the courts held that he father was unable to because **AA 1967** grants husbands 'no right to be consulted in respect of termination of pregnancy'.[125] It was clarified that a putative father does not have sufficient interest to seek an injunction just because they are a genetic progenitor – with development of full ectogenesis technology, this may change. To answer the latter question, case law would suggest the courts taking a literal approach when interpreting **AA 1967**. In the first instance judgement of *R (on the application of TT) v Registrar General for England and Wales (AIRE Centre intervening)*[126] the judge clarified that where a statute refers specifically to women, it need not necessarily mean that it can always be read to encompass men. However, scholars like Romanis argue for a more liberal statutory interpretation as she 'do[es] not believe that the fact **AA 1967** refers specifically to pregnant women would prevent a person of a different gender identity from obtaining an abortion',[127] hence, believing that the act is likely to regulate and apply to all pregnant people (and possibly different forms of pregnancy like ectogenesis). With the possibility of **AA 1967** encompassing ectogenesis, the reproductive autonomy of would be protected as women could not only choose alternative forms of reproduction but would not have to worry about their right to abortion being stripped away.

However, overregulation of ectogenesis by replacing it with abortion could have a destructive effect on individuals' reproductive autonomy and the society. In what follows, I will evaluate why regulations should not mandate ectogenesis to be a replacement for abortion.

PART 3: Ectogenesis as Replacement for Abortion

Prior to ectogenesis development, the question of whether women going through abortion have the intention of fetus severance or fetus extinction was not an issue as it constitutes the same

[121] Amel Alghrani, 'The Legal and Ethical Ramifications of Ectogenesis' (2007) 2 Asian Journal of WTO & International Health Law and Policy, 189.

[122] [1979] QB 276.

[123] [1988] 1 QB 135.

[124] Elizabeth Chloe Romanis, 'Abortion & 'artificial wombs': would 'artificial womb' technology legally empower non-gestating genetic progenitors to participate in decisions about how to terminate pregnancy in England and Wales?' (2021) 8 Journal of Law and the Biosciences.

[125] *Paton* (n 19) 281.

[126] [2019] EWHC 2384 (Fam).

[127] David N James, 'Ectogenesis: A Reply to Singer and Wells' (1987) 1 Bioethics 80.

thing.[128] As iterated by Coleman in 2004, 'At this point in time when we cannot remove the fetus from its mother's uterus without killing it, women seem to get what they want from abortion by default'.[129] However, the development of ectogenesis has raised the argument of whether ectogenesis is the viable alternative to abortion as fetus can be transferred from the womb to incubator.

Scholars in favour of abortion like Warren wrote, 'if and when a late-term abortion could be performed without killing the fetus, the mother would have no absolute right to insist on its death (e.g. if others wish to adopt it or pay for its care), for the same reason she does not have a right to insist a viable infant be killed'.[130] While Boonin argued in tandem that it is 'plainly unacceptable' to allow women the right to kill a baby who survived an attempted abortion.[131] These views were understood by Kaczor as viewing the right to abortion as a right of evacuation instead of a right of termination. He interpreted their view as in support of the use of ectogenesis technology as a replacement for abortion.[132] However, Kaczor overlooked an important factor: the mother's bodily and reproductive autonomy is engaged as fetus conceived via sexual reproduction would be located within the mother's womb. As noted by Alghrani, the difference between transferring a fetus from a mother's womb into an ectogenesis incubator and abortion is drastic because up until 14 weeks of gestation abortion is a relatively minor procedure.[133] David N James also noted the drastic difference and described 'fetus transplant' as a more invasive procedure due to the requirement for general anaesthesia and surgical incisions through the abdominal wall and uterus.[134] Hence, if regulation permits ectogenesis as a form of replacement for abortion and dictates women to transfer their unwanted fetuses into ectogenesis incubators, it would be a violation of women's fundamental right to privacy[135] – a breach in **Article 8 of The European Convention of Human Rights (ECHR)**. This point, however, was argued by Barbara Hewson that it would be difficult to justify abortion under Article 8 of the ECHR as we do not kill another to maintain ones right to privacy.[136] Though, a fetus is not considered a legal person until it is separated from the woman carrying it.[137]

Therefore, to protect reproductive autonomy, the argument that ectogenesis should replace abortion cannot be upheld because it essentially limits women's reproductive autonomy – women

[128] N 18.

[129] Coleman (N 10).

[130] Mary Anne Warren, 'The Personhood Argument in Favor of Abortion' in *Life and Death: A Reader in Moral Problems* (Wadsworth Publishing Company 2000), 267.

[131] David Boonin, *A Defence of Abortion* (Cambridge University Press 2003), 257.

[132] Christopher Kaczor, 'Could Artificial Wombs End the Abortion Debate?' (2005) 5 National Catholic Bioethics Quarterly 73.

[133] N 18.

[134] N 24.

[135] N 18.

[136] *Ibid*, footnote [37].

[137] Sara Fovargue, José Miola, 'The legal status of the fetus' (2010) 5 Clinical Ethics 122.

maintain the right to choose between different medical procedures, a point which was similarly contended by David James.[138] The failure to do so will result in a regressive society where back street abortions, infanticide and maternal deaths exist to avoid the mandate of women being subjected to ectogenesis as replacement for abortion.[139] Furthermore, in a hypothetical world where ectogenesis is the answer to abortion, who will be in charge of these babies and where will they go? With more than 210,000 reported abortions in England and Wales in 2021,[140] it would 'impose an overwhelming financial burden on society'[141] and we would be closer to a dystopian future where these babies will eventually become the children/product of the state.

Conclusion

In conclusion, state intervention is necessary to protect the rights and interests of women seeking to embrace ectogenesis as a form of reproductive technology. Despite the **AA 1967** not providing a definitive answer on whether it will be inclusive of ectogenesis technology, there exists the possibility of the Act doing so as long as a purposive approach is taken when interpreting it. However, overregulation by imposing women to transfer their unwanted fetuses into ectogenesis incubators would drastically curtail women's reproductive autonomy, along with their right to privacy, and is a step backwards in the fight for procreative liberty. At present ectogenesis is not yet ready to be used as a treatment in routine clinical practice, but once ready, the reproductive autonomy of women wishing to undergo reproductive technologies should be the priority of the State.

[138] N 24.

[139] N 18.

[140] Department of Health and Social Care, 'Abortion Statistics, England and Wales: 2021' (Department of Health & Social Care, 25 August 2022) <https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2021/abortion-statistics-england-and-wales-2021> accessed 9 September 2022.

[141] Jim Davin, Christopher Kaczor, 'Would Artificial Wombs Produce More Harm Than Good' (2005) 5 The National Catholic Bioethics Quarterly 657.

Consent and Risk Disclosure – Development of the law and the impact of Montgomery on healthcare practitioners.

Deborah Speight

The post *Montgomery v Lanarkshire Health Board* [142] position finds UK law in an era in which patient autonomy now claims to supersede the paternalistic approach once taken in medicine.[143] The outdated position that 'doctor knows best'[144] has since been replaced with the concept that patient autonomy is now the governing principle influencing judicial decisions around patient consent.[145] By considering these ethical principles the landmark case of *Montgomery* acted as a catalyst to consolidate some earlier established principles whilst rejecting others. The outcome: a two-part test developed to dictate the level of information the doctor must divulge to the patient to enable them to provide valid consent to treatment based on material risk and alternative available treatments.[146] It will first be considered how the law has developed around consent to medical treatment through analysis of the principles adopted in the *Montgomery* decision and the courts approach.

It is long established that prior to carrying out any medical treatment consent must be obtained directly from any patient with capacity; assumed unless otherwise established.[147] Failure to obtain consent will amount to a criminal liability of battery[148] or, where the patient has not been properly informed, a negligence claim may pursue for breach of duty of care, normally but not limited to circumstances in which the failure to warn was a cause of the damage suffered.[149] Until 2015 the main criterion for assessing reasonable care and risk disclosure in negligence cases was provided by *Bolam's*[150] 'accepted practice test.' *Bolam* provided that a clinician may negate claims of negligence by evidencing their logical[151] actions were supported by other medical professionals.[152]

[142] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

[143] Ibid [108].

[144] *Chatterton v Gerson* [1981] QB 432.

[145] n2.

[146] n1 [84].

[147] Mental Capacity Act 2005 s1(2).

[148] n2.

[149] Gemma Turton 'Informed Consent to Medical Treatment Post-Montgomery: Causation and Coincidence' 2019 Med Law Rev 27,1,108.

[150] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

[151] *Bolitho v City and Hackney Health Authority* [1992] 12 WLUK 224.

[152] Ibid.

Montgomery subsequently rejected this position for the purposes of consent, replacing it with a patient led approach,[153] arguably bringing the law up to date with existing medical guidance.[154]

Whilst practitioners retain their ability to exercise clinical judgement as to what treatment to recommend[155] and are not required to inform patients of all available treatments,[156] *Montgomery* asserted that the level of information to be provided is now patient led and reasonable care must be taken to inform patients of all 'material risks'.[157] Overruling *Sidaway*[158] which affirmed the paternalistic stance of *Bolam*, *Montgomery* establishes the test to inform risk is based on materiality of the risk; quantified by what the patient may attach significance to dependent on their individual circumstances.[159]

Though the primary concern in *Chester v Afshar*[160] was causation, the courts here demonstrated their earlier motivation to depart from the "normal rules"[161] when considering a failure to warn of risk, establishing that such failure may amount to negligence even where it was not the direct cause of injury.[162] The court demonstrated their rejection of paternalism in finding the patient has the right to be informed of even a small but well-established risk.[163] *Montgomery* went a step further in asserting that autonomy is the main principle the law of negligence is there to protect.[164] A significant shift of ethical principles affirming that 'in modern law paternalism no longer rules'.[165]

Prior to *Montgomery*, the courts were already developing the notion that a patient cannot exercise their bodily autonomy without being fully informed of what they are consenting to and requiring they are informed of the comparative risks of different available procedures.[166] When Nadine Montgomery brought her case to the Supreme Court[167] it was put before them to establish which risks the patient should have been made aware of. Montgomery's argument: that had she been informed of the risks involved in a vaginal birth as a diabetic of small stature and pregnant with

[153] n1 [93].
[154] https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/good-medical-practice.
[155] n1 [115].
[156] Ibid [90].
[157] Ibid [86].
[158] *Sidaway v Board of Governors of the Bethlem Royal Hospital* 1985 AC 871.
[159] n1 [89].
[160] *Chester v Afshar* [2004] UKHL 41.
[161] Ibid [24].
[162] Ibid.
[163] Ibid.
[164] n1 [108].
[165] n19 [16].
[166] *Birch v University College London Hospital NHS Foundation Trust* [2008] EWHC 2237 QB.
[167] n1.

a child already measuring in the 95th centile at 36 weeks' gestation, she would have opted for a caesarean section. Consequently, the failure to disclose risks resulted in her child being born with cerebral palsy. The Supreme Court held in her favour and in doing so established the two-part test for materiality of risk.[168]

The first part of the test assumes an objective position; the doctor is required to inform the patient of risks a reasonable person in the patient's position would be likely to attach significance to.[169] The first element of the test somewhat reflecting similarities to the 'hypothetical reasonable patient' approach[170] adopted in the United States in rejection of the 'prudent professional test' some forty years prior.[171] The North American case here enunciated that a risk is to be considered material: 'when a *reasonable person*, in what the physician knows or should know to be the patient's position, would … likely … attach significance to … in deciding whether or not to forego the proposed therapy.'[172]

The second part of the test includes a subjective element requiring doctors to disclose risks they should reasonably be aware the *particular* patient would be likely to attach significance to, based upon the patients' values, beliefs and lifestyle.[173] Following the approach taken by Lord Scarman in *Sidaway*[174] and Lord Wolf MR in *Pearce*[175] subject to the refinement of the 'particular patient' adopted from the Australian case of *Rogers v Whitaker*,[176] the courts demonstrated recognition that in order to meet the needs of the individual patient, which will be inherently subjective, an objective test would not suffice.[177] Whilst *Montgomery* appears to conclude a natural progression away from the paternalistic view that a patient should be provided with information the doctor believes they need to know[178] it is perhaps fair to suggest that *Montgomery* simply brought UK law up to date with already well recognised principles from overseas.[179]

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[168] n1 [87].

[169] n1 [87].

[170] *Canterbury v Spencer* 464 f 2d 772, 789 (DC, Ci) 1972).

[171] Emma Cave 'The ill-informed: Consent to medical treatment and the therapeutic exception' Common Law World Review 2017, 46 (2) 140-180.

[172] n30, 787.

[173] n1 [87] (emphasis added).

[174] n17.

[175] *Pearce v United Bristol Health Care NHS Trust* [1998] 5 WLUK 361.

[176] *Rogers v Whitaker* (1992) 175 CLR 479.

[177] n1 [83].

[178] n2.

[179] Malcolm K Smith & Tracey Carver 'Montgomery, Informed Consent & Causation of harm: lessons from Australia or a uniquely English Approach to Patient autonomy?' 2018 Jun: Journal of Medical Law and Ethics, 44,6: 384-388.

The enactment of Human Rights Act 1998 (HRA) also served to influence the Supreme Court's decision in establishing the *Montgomery* test.[180] Where a patient consents to treatment but has not been given sufficient information about said treatment they are not considered to be fully informed and the consent will not be valid.[181] Article 8[182] may be invoked where information about treatment is withheld from the patient.[183] The need for common law to reflect the fundamental values protected by the HRA including self-determination is therefore recognised in the Supreme Court's judgment.[184] Regardless of the journey in achieving the 'material risks test' the judiciary has made its position clear; to avoid a breach of duty around consent the level of information to be provided by doctor to patient must preserve patient autonomy and allow patients to make informed choices as to their treatment.[185]

Whilst a number of cases have followed in which the *Montgomery* test has been successfully applied and potentially extended to consider post operative risks,[186] the High Court recently demonstrated its reluctance to reach a decision around consent without reminding itself of what would be considered "common ground between experts."[187] Distinguishing between the tests to be applied when considering treatment and consent, the court made it clear that the issue of negligence will be a decision for the court.[188] To avoid negligence the treatment must be found to be logically acceptable to a responsible body of medical professionals on consideration of the comparative risks and benefits.[189] When considering consent, *Montgomery* is to be applied to establish whether a negligent failure to explain had occurred and to assess, based on the information provided, whether or not the patient would have opted to undergo surgery. The courts in applying *Montgomery* considered whether a reasonable person in the patient's position would be likely to attach significance to the risk, or whether the doctor was, or should reasonably have been aware the patient would be likely to attach significance to it. The courts distinguished between the information to be made available to the patient and information which would be considered "technical matters"[190] which per *Montgomery* most patients "could not reasonably grasp."[191] The High Court here refused to completely disregard *Bolam*[192] and concluded that whilst a limited duty arose to provide information falling under the 'material risks test' this did not

[180] n1 at [80].

[181] https://www.health-ni.gov.uk/articles/human-rights-act-1998 (accessed 27 December 2021).

[182] European Convention of Human Rights Article 8.

[183] https://www.health-ni.gov.uk/articles/human-rights-act-1998

[184] n1 [80].

[185] n1.

[186] *Spencer v Hillingdon Hospital NHS Trust* [2015] EWHC 1058 QB.

[187] *Negus v Guy's and St Thomas' NHS Foundation Trust* [2021] EWHC 643 (QB) [74].

[188] Ibid.

[189] Ibid.

[190] Ibid.

[191] n1[90].

[192] n8.

extend to providing the patient with all possible choices which might arise intra operation.[193] Instead, they concluded this should be left to the surgeon to exercise judgement based on their specialist level of understanding and experience in order to achieve the best possible outcome for the patient in response to evolving stages of the operation.[194] It would appear therefore by going full circle that some consideration was needed as to what a reasonable body of practitioners would consider acceptable when providing information and whilst a negligent failure may occur to warn the patient of risks as part of the consent process, no duty arose to go beyond that warning and provide a full explanation.[195] The courts are questionably allowing a somewhat paternalistic view to resurface and influence the findings of the appeal.

The Scottish Courts have since described *Montgomery* as a limited, albeit important, innovation on the *Bolam* rule when asked to consider consent to 'reasonable alternatives.'[196] Whilst acknowledging the *Montgomery test* as a 'significant development of law' it has been highlighted that 'care must be taken not to apply it to circumstances beyond the scope envisaged by the Supreme Court'.[197] In agreement with Lord Boyd's earlier interpretation[198] the court held that the intended use of *Montgomery* was about advising patients of risks associated with a *proposed* course of action. The court however stated that where the doctor does not discuss a particular treatment having rejected it as inappropriate to the patient's circumstances, it does not follow that a breach of duty to inform the patient of said treatment will occur.[199] What is considered as a 'reasonable alternative' should be left for the doctor to decide[200] based on their professional judgement[201] and not the patient. Where an error is made, this would revert to an assessment of negligence based on the standard of *Bolam*.[202] When considering 'alternative treatments' the test of *Montgomery* only appears therefore to be available for circumstances in which a doctor has failed to advise of risks involved in the alternative treatments *they* propose or where *they* have withheld optional alternative treatments due to their own personal values and reasoning.

Whilst *Montgomery* is asserted as a landmark case in the rejection of paternalism and presents a significant development in law bringing patient autonomy to the forefront when considering consent and negligence, the courts do appear to already be limiting its application to a narrow margin of cases. As demonstrated in several recent cases, the fallback position of *Bolam* has not

[193] n42 [78].
[194] Ibid.
[195] Ibid [80].
[196] *AH v Greater Glasgow Health Board* [2018] CSOH 57 [44].
[197] *McCulloch and Others v Forth Valley Health Board* [2021] CSIH 21 [36].
[198] n57 [40].
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Ibid.

been completely disregarded when considering consent and at the very least may have some influence over how the *Montgomery* test may be applied to future cases.

It has been claimed that the material risks test brought UK law in line with the longstanding ethical guidance of the General Medical Council,[203] suggesting doctors should have already been working to these standards.[204] Whilst clinical guidance states *what* is required as part of the consent process and *why*,[205] there appears to be little detail as to *how* these legal standards should be met, potentially leaving clinicians vulnerable to litigation.[206] As well as being skilled and experienced in their practice the practitioner is now expected to possess the ability to effectively engage in the appropriate dialogue to comply with the standards set out in guidance and the law.[207] A lack of skill or inclination for communication or imposed time restraints will not be a valid shortcoming in the process.[208]

As material risk will vary from patient to patient, the discussion must be tailored to the individual[209] and will therefore require time for the practitioner to engage in a "dialogue"[210] to ascertain the needs, concerns, and personal circumstances of the patient.[211] Guidance states this dialogue must take place as part of the consent process and within reasonable time in advance of the procedure.[212] Where possible, it should be undertaken by the practitioner who will carry out the procedure or at the least by one capable who holds the same skill set and knowledge of optional treatments; including their risks and benefits.[213] Patients must be granted 'adequate time and space' to enable them to make an informed choice around their treatment[214] which may include advanced notification of a change in surgeon as it is recognised that this may open further discussion around the implications of risk.[215] A considerable amount of time will potentially need to be allocated to the consent process, 'removing surgeons from the theatre' and negatively impacting the high workloads of an already strained NHS.[216]

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[203] https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/good-medical-practice/duties-of-a-doctor (accessed 5 December 2021)

[204] Sarah Daveney (and others) 'The far-reaching implications of Montgomery for risk disclosure in practice' Journal of Patient Safety and Risk Management 2019, 24(1) 25-29

[205] n65.

[206] n61.

[207] n65.

[208] n1 [93].

[209] n65.

[210] n1 [90].

[211] n63.

[212] n65.

[213] Ibid.

[214] Ibid.

[215] Ibid.

[216] n63 [139].

Practitioners must, without making assumptions around the information the patient may want or need, discuss any factors or outcomes the patient may consider significant.[217] It will not be sufficient to ask a patient what they want to know, as patients cannot be expected to know what they do not know about their treatment and therefore cannot ask about it.[218] The onerous task is one placed upon the doctor to identify what the patient wants to know; an issue which may lead to litigation but appears difficult in practice to achieve. Using their judgement, the correct amount of information is expected to be delivered[219] in a comprehensible manner without bombarding the patient with "technical information they cannot grasp."[220] The practitioner must therefore weigh up appropriate information to convey balanced against the patient's professional and personal background, considering any previous experience of treatments and their ability to comprehend the information.[221] How the practitioner strikes this balance is an arguably difficult task. The fear of delivering too little information may result in a defensive approach. Intended to be a 'work together' approach of doctor and patient the consent process could be at risk of becoming a tick box exercise including every possible risk so the doctor may safeguard themselves against litigation.[222] The patient subsequently receiving too much information will become overwhelmed, the process thus undermining patient autonomy rather than enhancing it. The consequence of either would deviate completely from what *Montgomery* was intended to achieve and fail the patient in enabling them to make an informed choice. Pressures and concern over litigation may subsequently impact morale within practice and potentially lead to lower staff retention rates impacting on the ability for the NHS to provide services and meet standards of patient care.[223]

Therapeutic privilege, an exception to the 'material risks' test, summarised by the Supreme Court to be used only in rare cases,[224] allows certain information to be withheld from the patient if deemed it will cause psychological harm outweighing the benefits.[225] Although possible in principle, in practice this exception can present significant legal difficulties for doctors and likely result in litigation,[226] creating fear and likely avoidance of its use.

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[217] https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/decision-making-and-consent/the-dialogue-leading-to-a-decision (accessed 1 December 2022).

[218] n1.

[219] https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/decision-making-and-consent/taking-a-proportionate-approach (accessed 1 December 2022).

[220] n1 [90].

[221] n44.

[222] n61.

[223] n63.

[224] n1 [88]-[94].

[225] Ibid.

[226] n65.

Whilst the expectation upon practitioners appears high and consequences of failure severe, the benefits need also be considered. Although time and resource are to be invested in the consent process it must be weighed against how it serves to protect patients' autonomous rights and prevent wasteful treatments which do not accord with patients' wishes, reinforcing the doctor / patient relationship as one of trust.[227]

In conclusion, acknowledging current medical practice time pressures make it difficult for practitioners to meet the standards set out by the Supreme Court though this does not change the legal requirements that must be adhered to.[228] The difficulties faced by practitioners in achieving this approach must be addressed through detailed guidance. Whilst the courts appear to demonstrate some control mechanisms, this only adds further ambiguity and uncertainty to those responsible for upkeeping patient autonomy without leaving themselves open to a claim of negligence. Practitioners arguably continue to face the added pressure that it will be for the courts to determine which risks constitute as 'material' and how with certainty they may protect themselves from claims of negligence in the future when obtaining valid consent.

[227] n63.

[228] n65.

Female athletes with Differences of Sex Development: Does the law need to 'protect' women's athletics?

Robert White

Introduction

In *Semenya v* IAAF, the Court of Arbitration for Sport (CAS) stated that the IAAF's Differences of Sex Development (DSD) Regulations are 'discriminatory'. Despite the admitted discriminatory nature of the regulations, CAS found this discrimination to be "necessary, reasonable, and proportionate" with the objective of "protecting the integrity of female athletics". This ruling has been widely criticised, not solely by impacted athletes, but by medical and legal communities alike. Such criticism leads the question of why women's athletics needs to be 'protected' from women who were born and compete as female.

Before the introduction of the DSD Regulations, the IAAF had introduced the Hyperandrogenism Regulations[229], which restricted the eligibility of female athletes with naturally high levels of testosterone. In women, the level of testosterone concentration is typically less than 3 nmol/L[230], whereas male concentrations normally range between 7 nmol/L to 30 nmol/L.

The DSD Regulations were introduced following the withdrawal of the Hyperandrogenism Regulations. The new regulations apply to female athletes who have one of several specified DSDs, which means they have XY chromosomes. Additionally, the regulations apply solely to middle-distance events and limit testosterone levels to 5 nmol/L.[231] This limit was a significant decrease from the 10 nmol/L permitted under the Hyperandrogenism Regulations.[232] Under the new regulations, affected athletes are required to lower their levels to under 5 nmol/L for a period of six months.[233]

The Justification for Discrimination

Sport undeniably rewards those with genetic differences, with longer legs and greater height providing advantages over athletes who lack such features. Therefore, it is questionable that the differences of DSD athletes are not permitted. In response to this, the IAAF stated, "the only

[229] IAAF Athletics, 'IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition' (May 2011).

[230] Valerie Grant and John France, 'Dominance and testosterone in women' (2001) (1/1) Biological Psychology

[231] IAAF Athletics, 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)' (May 2019).

[232] IAAF Athletics, 'IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition' (May 2011).

[233] IAAF Athletics, 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)' (May 2019).

genetic difference that elite sport does not celebrate is the genetic difference between men and women."[234] This is understandable, as men inherently have an advantage, however, the athletes impacted are not men, they are athletes who were born and identify as women.

The IAAF, now World Athletics (WA), has partly justified their decision using a study showing an advantage of 1.8% to 4.5% among those with the highest concentration of endogenous testosterone compared to those with the lowest level.[235] This has been described as a "flawed study"[236], with WA confirming that they were incorrect regarding such advantages.[237]

Even at the upper limit of the normal range, the regulations are still over double the normal concentration, this suggests that athletes with higher-than-normal testosterone concentrations, provided they are below 5nmol/L, would still gain an advantage. WA's limit being set at 5nmol/L has been criticised as arbitrary[238], and while some studies support the current level[239], this has been controversial, with the information available about normal testosterone ranges appearing not to justify the rule.[240] While the purpose of this paper is not the analysis of medical data, it is relevant to consider the disagreements surrounding what limit, if any, to impose. Such inconsistencies suggest that the regulations are founded on uncertain data.[241] These inconsistencies may be inappropriate when considering the impact on athletes.

It has been questioned why the regulations only cover events between 400m and the mile, with WA's justification being criticised.[242] WA considers that 46XY athletes have an advantage in all events, however, the specified distances are "where the most performance-enhancing benefits can be obtained".[243] However, heightened testosterone was shown to provide an advantage in events such as the hammer throw where female athletes with increased testosterone have a "significant

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[234] World Athletics, 'IAAF publishes briefing notes and Q&A on Female Eligibility Regulations' (*World Athletics*, 7 May 2019) https://worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg.

[235] David Handelsman, 'Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance' (2018) (39/5) Endocrine Reviews 803-829.

[236] George Mallett, 'Athletics DSD regulations are flawed, Christine Mboma is the next victim' (*Sports Gazette*, 26 October 2021) https://sportsgazette.co.uk/dsd-athletics/.

[237] Ibid.

[238] Kim McCauley, '9 reasons the Caster Semenya ruling is complete nonsense' (*SB Nation*, 1 May 2019) https://www.sbnation.com/2019/5/1/18525342/caster-semenya-ruling-testosterone-iaaf-cas.

[239] David Handelsman, 'Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance'(2018) (39/5) Endocrine Reviews.

[240] Sigmund Loland, 'Caster Semenya, athlete classifications, and fair equality of opportunity in sport' (2020) (46/5) Journal of Medical Ethics.

[241] Annette Brömdal, 'Eligibility regulations for the female classification: somatechnics, women's bodies, and elite sport' (2020) (14/2) International Journal of Sport Policy and Politics.

[242] Dennis Young, 'The Only Point of Track's Dumb New Testosterone Rules Is To Make It Illegal To Be Caster Semenya' (*Deadspin*, 26 April 2018) https://deadspin.com/the-only-point-of-track-s-dumb-new-testosterone-rules-i-1825546141.

[243] World Athletics, 'IAAF publishes briefing notes and Q&A on Female Eligibility Regulations' (*World Athletics*, 7 May 2019) https://worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg.

competitive advantage".[244] As with the prohibited testosterone levels, this inconsistency suggests that the regulations are unjustifiably discriminatory.

Previous Regulations

Before the DSD Regulations, the Hyperandrogenism Regulations placed restrictions on the eligibility of athletes with high levels of testosterone. The testosterone limit was 10 nmol/L, double the present regulations. These regulations were challenged by Dutee Chand, who had naturally high testosterone. In *Dutee Chand v AFI & IAAF*[245] it was stated that the burden of proving the regulations were necessary laid with the IAAF and that the IAAF "has not provided sufficient scientific evidence about … enhanced testosterone levels and improved athletic performance".[246] The Panel in *Chand* was unable to conclude that hyperandrogenic athletes enjoy "such a significant performance advantage that it is necessary to exclude them from competing".[247]

The ruling in *Chand* would suggest that discriminatorily regulating whether athletes with higher testosterone can compete is not necessary to 'protect' female athletics. This is because, even when the level was 10 nmol/L, there was insufficient evidence in favour of banning hyperandrogenic athletes.

The Medical perspective on the Regulations

DSD athletes are healthy individuals who have not taken any substance to increase their testosterone. Their increased testosterone stems from a mutation over which they had no control.[248] The regulations require athletes to artificially lower their testosterone, and WA provides various methods including a contraceptive pill, injections or removal of internal testes.[249] While these methods are not 'forced', with WA stating that it "does not insist on surgery"[250], athletes may feel forced to undergo treatment to continue competing.[251] This medical duress arises when faced by the choice of undergoing treatment or withdrawing from events that they have dedicated their lives to, meaning they may believe that treatment is their only option.

The requirement that athletes undergo treatment despite not suffering any health condition has received criticism from physicians. The World Medical Association (WMA) stated the regulations

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[244] Stéphane Bermon, 'Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes' (2017) British Journal of Sports Medicine.

[245] *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* CAS2014/A/3759.

[246] Ibid.

[247] Ibid.

[248] Berenice Mendonca, '46 XY disorders of sex development (DSD)' (2009) (70/2) Clinical Endocrinology

[249] IAAF Athletics, 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)' (May 2019).

[250] Ibid.

[251] Geneva Abdul, 'This Intersex Runner Had Surgery to Compete. It Has Not Gone Well.' (*The New York Times*, 16 December 2019) https://www.nytimes.com/2019/12/16/sports/intersex-runner-surgery-track-and-field.html.

"constitute a flagrant discrimination based on genetic variation … and are contrary to international medical ethics and human rights" and that "medical treatment for the sole purpose of altering performance in sport is not permissible".[252] As such, the WMA has called on physicians not to assist in implementing the regulations.

Further, the regulations do not cover women who have higher testosterone for other reasons. The occurrence of XX women who exceed the testosterone levels is more common than with XY. This is because XX women with polycystic ovary syndrome may produce levels of testosterone outside normal levels, yet they are not subject to the regulations. Therefore, by solely targeting DSD athletes, the regulations can be viewed as unfairly discriminatory.

The medical impact on athletes

While not required for athletes to undergo surgery, some have elected to have internal testes removed. As with chemical alteration of testosterone, surgery can damage a healthy athlete's performance and wellbeing. Annet Negesa, a middle-distance runner, underwent surgery to reduce her testosterone. Negesa believes that the purpose of surgery was misrepresented to her, with the surgery having both a physical and mental impact. This damage ended her career, with her running a 5:06.18 at the 2017 Ugandan Championships, far slower than her personal best 4:09.17.[253]

Negesa's case appears to support the WMA's view, by reflecting the belief that these unnecessary treatments can detriment health and performance, which should not be permissible. This is particularly relevant when considering Negesa was not dominant pre-surgery, as while she had set her 1500m national record at the 2011 African Junior Athletics Championships, she only finished 0.08 seconds ahead of Nancy Chepkwemoi, a non-DSD athlete.[254] This difference between Negesa and Chepkwemoi is not indicative of a dominant athlete from which women's athletics needs to be protected, let alone a difference that justifies surgical intervention. However, it is possible to view Negesa's case as supportive of the regulations, as her performance decrease could suggest that elevated testosterone provided an advantage. Despite such interpretations, it is questionable whether the reduction in testosterone or other effects of surgery caused Negesa's performance decrease, with such analysis being beyond the scope of this paper.

As per WA, these regulations can be interpreted as 'protecting' female athletics from women with genetic differences in their testosterone levels, however, the harm caused to athletes must be considered. 46XY women must undergo treatment which can potentially damage their health if

[252] World Medical Association, 'Physician leaders reaffirm opposition to IAAF Rules' (*World Medical Association*, 15 May 2019).

[253] World Athletics Athlete Profile, Annet Negesa, https://www.worldathletics.org/athletes/uganda/annet-negesa-14303395.

[254] World Athletics Athlete Profile, Nancy Chepkwemoi, https://www.worldathletics.org/athletes/kenya/nancy-chepkwemoi-14288890.

they wish to compete. Therefore, it could be viewed that these regulations damage the integrity of athletics, and public perception of it, by discriminating against women who have dedicated their lives to their sport, due to a mutation they cannot control.

The perspective of athletes

The view that discrimination is "necessary" to protect the integrity of female athletics has both support and opposition from athletes. The athlete most publicly critical has been Caster Semenya. Semenya was prevented from competing in her events, which led to her beginning treatment to reduce her testosterone. This treatment caused her to suffer unpleasant side effects, of which WA was dismissive, and she has commenced a legal challenge to the regulations.

Margaret Wambui, another affected athlete, has stated that "it would be good if a third category for athletes with high testosterone was introduced – because it is wrong to stop people from using their talents".[255] Wambui's suggestion was rejected by WA.[256]

This is not to suggest that all athletes are opposed to regulation. Following the 2016 Olympic 800m Final, podium positions were held by Semenya, Niyonsaba and Wambui, all of whom are 46XY athletes. Athletes finishing beyond the podium shared views in favour of regulations. One athlete was sixth-place finisher Lynsey Sharp, who stated that "if you take away the obvious ones it's actually really competitive".[257] Another athlete, fifth-placed Jóźwik stated, "I'm glad I'm the first European, and the second white" and "these colleagues have a very high testosterone level … which is why they look how they look".[258] These beliefs appear to align with WA's statement that it "does not want to risk discouraging … aspirations by having unfair competition conditions" and that regulating athletes with higher testosterone will "inspire new generations to join the sport and aspire to the same excellence".[259]

Former athlete, Madeleine Pape, who had competed against Semenya, held views in favour of preventing athletes with higher testosterone from competing.[260] Following commencement of an academic career, Pape's research led to her conclusion that "biological sex and athletic ability are

[255] Celestine Karoney, 'Margaret Wambui: Kenyan Olympic medallist calls for third category in athletics' (*BBC Sport*, 3 June 2021) https://www.bbc.co.uk/sport/africa/57239439.

[256] Ibid.

[257] Kathryn Snowdon, 'Lynsey Sharp defends Caster Semenya comments after coming sixth in Women's 800m Final in Rio' (*Huffpost*, 21 August 2016) https://www.huffingtonpost.co.uk/entry/lynsey-sharp-defends-caster-semenya-comments-after-coming-sixth-in-womens-800m-final-in-rio_uk_57b9ae1de4b0f78b2b4a53c1.

[258] Unnamed Author, 'Rio Olympics 2016: 'I'm Glad I'm the first European' – Olympian shocks with 'racist' remarks' (*NZ Herald*, 23 August 2016) https://www.nzherald.co.nz/sport/rio-olympics-2016-im-glad-im-the-first-european-olympian-shocks-with-racist-remarks/XBKZJAHTKN6INTDRZNYRHJFTFE/.

[259] IAAF Athletics, 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)' (May 2019).

[260] Madeleine Pape, 'I was sore about losing to Caster Semenya. But this decision against her is wrong' (*The Guardian*, 1 May 2019) https://tinyurl.com/mu2wfmz9.

far too complex for scientists to reduce to measures of testosterone"[261], indicating that athletes' opinions may change upon further understanding of the issue. Pape's research led to her testifying in support of Chand when she appealed against the Hyperandrogenism Regulations.[262]

When considering these views in the context of whether there is a need to 'protect' women's athletics, various non-DSD female athletes view the regulations as welcome. Their views, while controversial, stem from the belief that they cannot compete against those athletes, which is understandable alongside the statistic that the prevalence of 46XY females is only 6.4 per 100,000 females[263] and yet made up all three medal positions at the 2016 Olympics 800m. Therefore, the regulations could be viewed as necessary as they may cause athletes to become disillusioned with the sport if they believe they cannot compete at the highest level. However, it is uncertain whether there is a true need to 'protect' women's athletics and, if there is, whether it justifies the discriminatory nature of the regulations. This is because the performance difference is not as significant as is often represented, with the 800m record still being held by an XX woman. Though there have been suggestions that this was obtained by doping due to its prevalence in that period.

DSD Regulations and Human Rights

Following an unsuccessful challenge and subsequent appeal to the Swiss Federal Supreme Court (SFSC), Semenya applied to the European Court of Human Rights.[264] Semenya alleges breaches of various Convention Rights, which have highlighted inconsistencies between the regulations and an athlete's human rights.

Sex testing in sports has taken various forms, previously resulting in athletes undergoing unnecessary procedures such as sterilisation and FGM.[265] Testing can be interpreted as incompatible with Article 3, which protects from inhuman or degrading treatment, particularly where the results of sex verification are made public.[266] A case supporting this view is that of Pratima Gaonkar, who committed suicide following publication of her failed sex verification test.[267] This tragedy illustrates the damage testing can cause, particularly due to the public nature of decisions. Therefore, the regulations can be viewed as incompatible with Article 3 as they are degrading to athletes who may appear less 'feminine' and must be 'proven' to be female. Article 8, which provides a right to respect for a private and family life, can also be viewed as incompatible with the regulations, which publicly call an athlete's gender into question.

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[261] Ibid.

[262] Ibid.

[263] Agnethe Berglund, 'Incidence, Prevalance, Diagnostic Delay, and Clinical Presentation of Female 46,XY Disorders of Sex Development' (2016) (101/12) The Journal of Clinical Endocrinology & Metabolism.

[264] *Semenya v Switzerland* App no. 10934/21.

[265] United Nations Human Rights Council, *Report of the Special Rapporteur of everyone to the enjoyment of the highest attainable standard of physical and mental health* (Thirty-Second Session, A/HRC/32/33 2016).

[266] Myron Genel, 'The Olympic Games and Athletic Sex Assignment' (2016) 316(13) JAMA.

[267] Anna Posbergh, 'Same Tricks, New Name: The IAAF's New 2018 Testosterone Regulation Policy for Female Athletes' (2019) 3(3) The International Journal of Information, Diversity, and Inclusion.

In Semenya's appeal, a violation of prohibition of discrimination was alleged. The SFSC acknowledged the discrimination, however, it stated that "women with 46 XY DSD … have a testosterone level comparable to men" and "the CAS decision cannot be challenged".[268] It was also held that while medical clarifications and treatment surrounding testosterone "represent considerable interference with physical integrity", that the "core area of this right is not affected … [as] Examinations are carried out by qualified doctors and under no circumstances against the will of any female athletes."[269] Therefore, while it could be argued there is no real discrimination, as athletes can reduce their testosterone or withdraw from competition, this cannot honestly be held as compatible with an athlete's right to freedom from discrimination. This is because, while non-DSD female athletes should be able to compete in fair competition, it cannot be viewed as necessary to prohibit DSD athletes due to a trait beyond their control. This is particularly relevant when the performance gaps between non-DSD athletes and DSD athletes are often negligible.

Conclusion

To conclude, the CAS decision suggests that the DSD Regulations and similar rules such as the Hyperandrogenism Regulations are not necessary for "protecting the integrity of female athletics" and that the discrimination faced by affected athletes cannot be justified in its current form. Further, there is insufficient evidence to support the imposition of the regulations, as while studies discussed within this paper have supported the belief that increased testosterone provides athletes with an overwhelming advantage, this evidence is disputed, particularly regarding the regulations being applied, arguably inconsistently, to a handful of events. Alongside the inconsistent evidence on performance enhancement, the strong criticism from medical and medico-legal fields highlights the ethical issues which arise from requiring healthy athletes to use unnecessary medication or undergo surgery to continue competing in their events, which carries with it a risk of physical and mental harm. Finally, such regulations are capable of being viewed as incompatible with an athlete's human rights as it subjects athletes to public and possibly degrading sex testing, as well as placing their ability to compete at risk, with similar regulations previously having tragic consequences as demonstrated by the case of Gaonkar.

[268] Swiss Federal Supreme Court, 'Press Release of the Swiss Federal Supreme Court' (*Tribunal Fédéral*, 8 September 2020) https://tinyurl.com/45sc6bbw.

[269] Ibid.

The Judicial Review and Courts Act and the Rule of Law

Rory Wilson

The Judicial Review and Courts Act ('JRCA') received Royal Assent on the 28th April, 2022; touted by the government as 'restoring the UKs traditional political constitution', the legal world, while criticising its substantive content, nonetheless registered relief that the purported 'interpretive provisions' on remedial schemes had not been implemented.[270] While the hastily convened Independent Review of Administrative Law did not corroborate the governments' position regarding the shrinking boundaries between justiciability and politics, it nonetheless suggested an ouster of *Cart* judicial reviews and a variation of the remedial schemes available under judicial review.[271] These find reflection in the JRCA, and while space precludes a comprehensive analysis, we shall scrutinise the effects and implications of s.2(1)(2). This ousts the decision of the court as made in *Cart* by stipulating that the UTs permission-to-appeal decision 'is final, and not liable to be questioned or set aside in any other court'.[272]

The facts of *Cart* are well known but bear recapitulation. Under the Tribunal, Courts and Enforcement Act ('TCEA'), the UT was created a 'superior court of record', establishing for the first time an independent juridical structure isolated from the High Court.[273] The majority of the Supreme Court held that, despite the expertise of the tribunal systems, if the UT denied permission to an appeal of an FTT decision this could allow 'the fossilisation of bad law' within the larger judicature.[274] To avoid this the court created what Hayley J Hooper describes as a 'non-derogable baseline of judicial control' by which judicial review of UT decisions could be brought in the High Court, mediated by the imposition of the Second Appeals Criteria.[275] Introduced by s.13(6) TCEA, these criteria are reflected in CPR 52.7, which states that permission to review a decision of the UT will only be granted if there if it (i) 'raises an important point of principle of practice' and (ii) 'some other compelling reason for the court…to hear it'. There is a superabundance of academic literature discussing the merits of the decision in *Cart*, and as Joanna Bell argues, 'the complexities inherent in transposing a set of criteria, originating from a very particular decision-making context, over to an entirely new type of legal challenge', but they

[270] MoJ, https://www.gov.uk/government/news/new-bill-hands-additional-tools-to-judges (July, 2021); EHRC, *Judicial Review and Courts Bill: Commission Briefing* (October, 2021), pg. 2.

[271] Lord Faulks QC et al, *Independent Review of Administrative Law* (March, 2021), pg. 132.

[272] s.2(1)(2), Judicial Review and Courts Act (2022).

[273] S.3(5), Tribunal, Courts and Enforcement Act (2007).

[274] *R (Cart) v Upper Tribunal* [2010] UKSC 28, per Lord Dyson at [112].

[275] H.J. Hooper, 'Legality, Legitimacy, and Legislation: The Role of Exceptional Circumstances Review in Common Law Judicial Review', *Oxford Journal of Legal Studies* Vol.41(1) (2021), pg. 155.

appear to have functioned well as a filtering mechanism.[276] While the rates of successful *Cart* challenges are a contested figure – the IRAL's statistics have since been cast into doubt by empirical research by Joe Tomlinson, Alison Pickup, and more recently Mikolaj Barczentewicz – the paucity of reviews at the substantive stage demonstrates the high threshold of these criteria.[277] The Supreme Court was clear the *ratio* of *Cart* did not afford a forum for disappointed applicants to simply repeat judicial process. Indeed, the courts have developed an attenuated set of controls in regards to the Second Appeals criteria; per Dyson LJ, 'permission will only be given where there is an element of general interest, which justifies the use of the court's scarce resources' or a 'wholly exceptional collapse of fair procedure'.[278] This was confirmed in *PR* and *JD* where an even more restrictive gloss of a 'compelling reason' was suggested; 'a strongly arguable error of law on the part of the UT when coupled with truly drastic consequences for the individual "might" amount to a compelling reason for granting permission to appeal'.[279] More recently in *Singh*, Hickinbottom LJ suggested a 'high risk' of a applicants' article 8 HRA rights being infringed as a 'compelling reason'.[280]

But now this mechanism has been ousted, and in such terms that betray a consideration of previous judgements in its drafting. JRCA s.2(3)(a) reintroduces the distinction between jurisdictional and non-jurisdictional errors the court corrected in *Anisminic*.[281] Similarly, s.2(1)(7) extends the ouster to encompass 'purported determination[s]', clearly considered with the Supreme Courts' finding of a reviewable administrative 'nullity' in *Privacy International* in mind, restricting the potential for the 'conceptual gymnastics' that defined those judgement.[282] *Cart* judicial reviews are, for all intents and purposes, beyond the courts' jurisdiction.

The casual observer may be surprised by the opprobrium this ouster has drawn from the breadth of civil society, even taking Tomlinson and Pickup's higher success rates of 26.7%.[283] Why such a furore over such a specific judicial mechanism? However, as Frances Webber argues 'the incremental nature of the attacks on human and civil rights conceals their cumulative impact, as does the sheer volume and complexity of the law'; we must set the JRCA in context of the government's legislative program, specifically the Nationality and Borders Act ('NBA'), to fully

[276] J. Bell, 'The relationship between judicial review and the Upper Tribunal: what have the courts made of *Cart*?', *Public Law* (July, 2018), pg. 398.

[277] J. Tomlinson, A. Pickup, 'Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews' https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/ (20th March, 2021); M Barczentewicz, '*Cart* Judicial Reviews through the Lense of the Upper Tribunal', *Judicial Review* Vol.26(3) (2021).

[278] *Cart* (no.5) at [130].

[279] *PR (Sri Lanka) & Ors v SSHD* [2011] EWCA Civ 998 at [77], *JD (Congo) & Ors v SSHD* [2012] EWCA Civ 327 at [25].

[280] *Singh v SSHD* [2019] EWCA CIv 1504 at [25].

[281] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[282] *R (Privacy International v Investigatory Powers Tribunal & Ors* [2019] UKSC 22 at [111]; Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution', *Cambridge Law Journal*, Vol.71(2) (July, 2012), pg. 304.

[283] Tomlinson, Pickup (no.9).

understand its significance.[284] The changes brought to tribunal procedure of the Immigration and Asylum Chamber under the NBA are the most wide-ranging since its reorganisation in the TCEA. 'Improper', 'unlawful' and violating our obligations under international law, many of the more controversial reforms in the NBA are now insulated from the supervisory jurisdiction of the High Court by the complementary effects of the JRC.[285] Before situating this within a larger rule of law analysis, it is important to compare the reforms created by the NBA and *Cart* Second Appeals Criteria; how many of its changes would clear this threshold and be amenable to judicial review, and in this sense, what mischief is the government attempting to avoid?

Considering just two of the most controversial innovations of the NBA – Priority Removal Notices ('PRNs') and accelerated detained appeals ('ADAs') – through the lense of the Second Appeals criteria will substantiate Webber's claims of a coherent legislative agenda. By using recent *Cart* judgments and the published consultation paper by the Tribunal Procedure Committee ('TPC') – the statutorily created body that makes the rules 'that govern practice and procedure' in the IAC - as a heuristic lense, we can understand more fully the changes and challenges posed by the NBA and JRCA.[286]

S.20 of the NBA creates a new species of removal order called a PRN that significantly reduces the period in which a person may challenge a Home Office decision to deport them, creating a 'cut-off date' by which they must provide the evidence they seek to rely on for a human rights claim. S.22 creates prejudicial treatment regarding compliance with the PRN 'on or after the PRN cut-off'; s.22(4) demands that the deciding authority must take it 'as damaging to the PRN recipient's credibility' for appealing beyond the deadline, and s.26(2) mandates that judges and HO caseworkers give this evidence 'minimal weight'. PRNs also generate a new set of procedural rules, as s.23(4) calls for 'expedited appeals' on appeals after the cut-off date. Under these rules, any appeal must come 5 days after the relevant decision and any application for permission to appeal to the UT, within 20 days of the relevant decision. The HO, meanwhile, will have 14 days to respond to any appeal. The TPC consultation describes these timescales as 'too short to be practical' and is 'considering whether it is appropriate for an appellant to have less time in which to appeal a decision than the respondent has to respond to an appeal'.[287] This places an enormous burden on the claimants, which the governments' own equality and impact assessment acknowledges are commonly 'vulnerable people…[who] might find it more difficult than others to

[284] F.Webber, 'Impunity entrenched: the erosion of human rights in the UK', *Race & Class,* Vol.63(4) (2022), pg. 74; Nationality and Borders Act (2022).

[285] Amnesty International UK, 'Nationality & Borders Bill; the truth behind the claims' https://www.amnesty.org.uk/nationality-borders-bill-truth-behind-claims (26th September, 2022).

[286] TPC, *Consultation on Possible Changes to FTT (IAC) Rules and UT Rules arising from Nationality and Borders Act 2022* (October, 2022) at [1].

[287] Ibid. at [52].

disclose what happened to them; to participate in proceedings; and to understand the consequences of non-compliance with legal requirements'.[288]

This drastic acceleration of judicial process is reflected in the creation of ADAs for those in immigration detention under s.27. This in fact recapitulates the Asylum and Immigration (Procedure) Rules 2005; however, these measures were found unlawful in *R (Detention Action)* and upheld a year later.[289] In the latter case, Briggs MR described the 'detained fast track' rules as 'systematically unfair and unjust' and warned of the 'disastrous' impact mistakes might have on asylum seekers.[290] He urged the HO to recognise that 'justice and fairness should not be sacrificed on the altar of speed and efficiency'.[291] The ADA procedural scheme introduced under s.27 suffers from the same deficiencies, guaranteeing no provision of legal advice, and requires only the Secretary of State's belief that any appeal 'would likely be disposed of expeditiously' (s.27(2)) to be implemented. Intriguingly, the TPC simply reissues its response to an MoJ consultation regarding the original DTF rules. In this earlier report it had similarly concluded that, the 'rigorous procedural safeguards' required to ensure unsuitable cases didn't end up in the accelerated appeals structure required such a 'substantial amount of judicial and administrative resources' that it would generate more delays and errors of law than it could possibly correct. [292]

Would these reforms fulfil the *Cart* Second Appeals criteria that would allow the High Court to exercise its supervisory jurisdiction, pre-ouster? Dyson's original two limbs requires that a case must raise (i) an 'element of general interest' in principle or practice (the appeal will not succeed 'if the law is clear and well established') or be characterised by (ii) a different 'compelling reason' by which the cases 'cries out for consideration by the court'.[293] Through recent interpretations of these criteria we are able to set the NBA more accurately in context. For example, in *Chowdhury*, the High Court granted permission for review on the basis of ground (i); that there was 'a public interest in further guidance being given to the meaning of' a phrase in one of the immigration regulations.[294] In *R (HS)* this was held as a point that 'should not merely be important but should be one which calls for attention by the UT…and so potentially by the Court of Appeal'.[295] While the courts have traditionally accorded respect to the expertise of the 'dedicated cadre' of tribunal judges, they have similarly reserved competence for guidance in areas in which the law is not 'clear

[288] Home Office, 'The Nationality and Borders Bill: equality impact assessment', https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment/the-nationality-and-borders-bill-equality-impact-assessment-accessible-version at [19b].

[289] *R (Detention Action) v SSHD* [2015] EWHC 1689 (Admin); *Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

[290] Ibid. at [49].

[291] Ibid. at [49].

[292] TPC (no.18), at [67], [70].

[293] *Cart* (no.5) at [130-131].

[294] *Chowdhury (Extended Family Members: Dependency)* [2020] UKUT 00188 (IAC).

[295] *R (HS) v Upper Tribunal* [2015], at [20b].

and well established'.[296] There is a strongly arguable case that the reforms brought by the NBA – especially the creation of PRNs and reintroduction of ADAs – would have cleared this threshold.

Ground (ii) has similarly received a coherent treatment. Perhaps the clearest example of this is a case that represents, per Dyson, a 'wholly exceptional collapse of fair procedure'. Moreover, as demonstrated in *Singh*, and more recently in *Thrakar*, art.8 considerations can constitute a 'compelling reason'; especially if the implications of removal are 'so momentous' as to demand appeal.[297] In *PR* 'compelling' was however lent a more restrictive gloss as 'legally compelling, rather than compelling, perhaps, from a political or emotional point of view'; this is consistent with the caseload of the IAC, where removal is an inevitable aspect of proceedings. 29% of UT decisions in 2018-2020 explicitly discussed 'removal'.[298] However, considering the courts' previous striking down of a 'detained fast track' system on procedural grounds as 'systematically unfair and unjust' and the prejudicial weighting of evidence introduced under the PRN scheme, reforms introduced by the NBA would likely fulfil the second limb of the test.

The foregoing analysis is purely academic. As we have traced, the courts' supervision has been ousted, but by demonstrating that many of the NBAs reforms would be amenable to *Cart* reviews illuminates the true meaning and function of the JRCA. Webber's warning of a coherent legislative program seems less polemic and more perspicacious when set within this analysis. What is yet to be ascertained is the courts' reaction, which itself engages larger jurisprudential questions. The rationale of the JRCA is predicated in an orthodox interpretation of parliamentary sovereignty and its ability to oust the courts' jurisdiction using suitably clear words. And yet, since *Jackson*, the judiciary has posited its own 'hypothesis of constitutionalism'; per Lord Hope, 'it is no longer right to say that [Parliament's] freedom to legislate admits of no qualification whatever'.[299] Lord Steyn went further, suggesting this orthodoxy could be considered 'out of place in the modern United Kingdom'.[300] These *obiter dicta* have concretised over time. In *R (Unison),* Lord Reed went so far as to hold that 'even where primary legislation authorises the imposition of an intrusion on the right of access to justice, it is presumed to be subject to an implied limitation'.[301] Elliot and Thomas adroitly describe these scattered comments as a 'rich tapestry of dicta and extra-judicial remarks in which the constitutional fundamentality of judicial review is hinted at with increasing directness'.[302] These oblique references reached a climax in the more recent *Privacy International* , regarding, pertinently to our current discussion, an ouster of the courts' supervisory jurisdiction over determinations of the Investigatory Powers Tribunal. The majority held that the ouster did not exclude review on an error of law; 'consistently with the rule of law, binding effect

[296] Elliott, Thomas (no.14), pg.317.

[297] *Thrakar* [2018] UKUT 00336 at [38].

[298] Ibid. pg. 7.

[299] *Jackson v Attorney General* [2005] UKHL 56 per Lord Carnwath at [89]; Jeffrey Jowell, 'Parliamentary Sovereingty under the New Constitutional Hypothesis', *Public Law* (Aut., 2006) pg.562,572.

[300] Ibid. at [102].

[301] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 at [68].

[302] Elliot, Thomas (no.14), pg. 305.

cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court of tribunal'.[303] However, Lords Sumption and Wilson dissented, arguing that the ouster was clearly considered with *Anisminic* in mind and it was not beyond Parliament's powers to isolate a tribunal from scrutiny; in their lordships eyes, the Rule of Law had been 'sufficiently vindicated'.[304] The tensions in *Privacy International* are synecdochic of the tensions within administrative law generally; as Mark Elliot describes elsewhere, are these dissenting judgements merely 'contestable judicial claims about the limits of curial power' or a grave 'constitutional discourse the conduct of which involves the testing and determination of the respective boundaries of judicial and legislative power'?[305]

In a sense, *Privacy International* recapitulates the rationale of *Cart*, but demonstrates a much greater judicial radicalism. But is this the historical triumph of a new 'hypothesis of constitutionalism', or the courts' reaction to an increasingly hostile executive? In 2004, Lord Woolf could argue extrajudicially that the potential inclusion of an ouster in the Asylum and Immigration (Treatment of Claimants) Bill was 'so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution'.[306] After the speech, the clause, and its implications, were withdrawn. So much so that Lord Neuberger could articulate in a 2012 speech a conventional statement of parliament's 'absolute' sovereignty.[307] For Neuberger, criticising the courts' decision in *Jackson*, any effective attack on parliamentary sovereignty requires 'postulating a wholly different Parliament from that which we have ever known'.[308] But considering the intentions of the legislative instruments we have been tracing, can such a comfortable statement of orthodoxy be so easily reasserted today?

A watershed has been passed; the 'non-derogable baseline' has been vitiated by the clearest words possible. Moreover, it is unsure if this is an isolated act, or a smaller part of a larger scheme. In a press release accompanying the announcement of the JRCA, the government described it as part of a 'wider project' for other future ousters.[309] Leaked MoJ circulars, which the government refuses to comment on, suggests an ongoing consultation on creating new powers for ministers to 'address' named cases and strike down the findings of judicial reviews.[310] Judges have demonstrated a remarkable imagination in negotiating these strictures, but it is yet to be seen how this new 'hypothesis of constitutionalism' can negotiate clear, and considered, words.

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[303] *R (Privacy International) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22 at [144].

[304] Ibid. at [172].

[305] Mark Elliott, 'Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution', *Legal Studies Research Paper Series* No. 4 (Jan., 2018), pg. 19.

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