

## Might makes right

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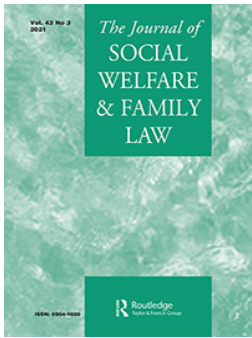
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## Might makes right: the 'two-child limit' and justifiable discrimination against women and children

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## Might makes right: the ‘two-child limit’ and justifiable discrimination against women and children

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In a decision which once again legitimates discriminatory welfare cuts, the UK Supreme Court has unanimously upheld the so-called ‘two-child limit’ for eligibility for child tax credit. The case concerned the government’s decision that only the first and second children in a family would be eligible for the individual element of the child tax credit: a non-contributory means tested benefit designed to assist carers in the bringing up of children. The limit was challenged by SC and her three children, together with CB and her five children, as a breach of Article 14 of the European Convention on Human Rights (taken with Article 8 (Right to Private Life) or Article 1 of the First Protocol (Right to the Peaceful Enjoyment of Possessions), which requires that all Convention rights be enjoyed without discrimination. In *SC and CB v Secretary of State for Work and Pensions* [2021] UKSC 26, the Court found that the two-child limit was a form of indirect discrimination against women and directly discriminatory against children in households with two or more children. However, it held that this discrimination is justified. The decision is worrying as it frames the right to equality as contingent on what Parliamentary majorities will allow. There is a repeated pattern of the Supreme Court failing to account for the reality of the inequalities resulting from welfare reforms or to meaningfully interrogate the government’s justifications (Campbell 2021). While the judgement raises a wide array of issues, this note focuses on the recurring tension points in using equality law to combat poverty.

The central claim in *SC and CB* is that the two-child limit is discriminatory. Although the judgement is lengthy, the concept of discrimination does little analytical work. In the interests of space, this section focuses on discrimination against women (O’Brien 2019). The Court recognises that the two-child limit is a form of indirect discrimination and defines it as: ‘a general measure or policy that has a disproportionately prejudicial effect on a particular group’ (para. 49). It then defers the assessment of these prejudicial effects against women to later in the judgement. However, the Court’s later assessment does not account for the discriminatory impacts, but instead focuses on the test for proportionality (paras. 188–199). – at no point does it consider the impacts of the two-child limit on women in poverty with multiple children. The paucity of the discrimination analysis is reflected in the Court’s explanation that

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*More women than men are affected because more women than men are bringing up children. That is an objective fact. There is no suggestion that that is itself the result of discrimination on the ground of sex* (para. 197).

This frames the discrimination against women as happenstance, with the Court characterising the discrimination as ‘inevitable’ or ‘inherent’ (paras. 195, 196, 198, 199). This ignores how the care of children is symptomatic of gendered disadvantage. Accepting the ‘naturalness’ of women’s caring role, makes it impossible for the Court to question whether failing to account for the gendered division of care means the two-child limit perpetuates women’s inequality. An indirect discrimination analysis should not accept the inevitability of a disproportionate negative impact on women and queries how the status quo can operate to both disguise and perpetuate inequalities. The Court’s approach reflects a blind spot to women’s disadvantage.

The Court’s failure to grasp the real-world impact of the two-child limit is stunning and there is a stark refusal to recognise the ways in which poverty is shaped by gender. Far from understanding what it means to live in poverty, the Court observes that CB’s children ‘were unable to emulate friends who held their birthday parties at commercial venues’ (para. 12). Elsewhere, there is acknowledgement that the two-child limit imposes income poverty on families (paras. 66, 207). Equating the impact of the two-child limit to a less extravagant birthday celebration or less economic resources woefully misunderstands the gender inequalities at stake. A robust discrimination analysis would reveal that the income poverty of the two-child limit is entwined with gendered prejudices. Women’s worthiness of support from the state is contingent on controlling their reproductive choices. The two-child limit taps into the demonisation of ‘welfare queens’ and the stigmas attached to welfare dependency (Campbell 2021). These stereotypes go uninterrogated by the Court.

Despite failing to fully investigate the discriminatory effects of the two-child limit, the Court concludes there is discrimination against women and children in households with two or more children. The bulk of the judgement is focused on whether this discrimination is justified. Prior to *SC*, the Supreme Court was fractured on the correct test to apply. In a series of cases, the majority adopted a highly deferential test, holding that measures would only be unjustified if they are ‘manifestly without reasonable foundation’ (MWRF) (see *R. (on the application of DA) v Secretary of State for Work and Pensions* [2019] UKSC 21 (para. 65)).

In *SC*, the Court advocates for a more nuanced approach to justification (*SC*, para. 158), holding that consideration must be given to a ‘range of factors which tend to heighten, or lower, the intensity of the review’ and recognises the different factors may pull in different directions. This is a salient insight as equality challenges to welfare benefits bring to the fore an under-theorised conundrum. Certain status grounds, such as race or gender, typically attract a high degree of scrutiny and ‘weighty reasons’ are need to justify discrimination. On the other hand, due to the separation of powers and concerns on institutional legitimacy, courts have exercised a high degree of deference in respect to social and economic policy. In resolving this dilemma, the Court holds that generally discrimination on ‘suspect grounds’ will require weighty reasons through a high intensity justification review, even in the context of welfare benefits (para. 99). MWRF should not automatically be applied. However, there is a degree of reluctance to

fully jettisoning MWRF, as the Court stresses that it can still be doctrinally relevant, such as with discrimination on non-suspect grounds or even in some undefined circumstances in the context of suspect grounds (paras. 157, 158).

On the surface, it is a positive development that the role of the MWRF has been curtailed and the recognition that certain status grounds attract a high intensity of review. This doctrinal shift, however, may prove to be hollow. The Court correctly recognises that proportionality is not a mathematical formula and there are varying intensities of review under this structured framework (para. 161). It then goes on to equate proportionality in the context of ‘sensitive moral or ethical issues’ like economic and social policy with MWRF, holding ‘that the ordinary approach to proportionality will accord the same margin to the decision-maker as the . . . [MWRF] formulation in circumstances where a particularly wide margin is appropriate’ (para 161). According to the Court therefore, proportionality or MWRF is – in some cases – a distinction without a difference.

Collapsing these two analytical frameworks into each other appears motivated to protect the separation of powers. The Court is concerned that a robust proportionality analysis will be used by equality seeking groups, who have failed in the political arena, to come to the courts and undo political choices (para. 162). This is a narrow understanding of the both the aims of human rights and the institutional role of the Court. Equality rights are designed, at least in part, to protect unpopular minority groups, like women and children who live in poverty, from hostile political majorities and courts have a role, through equality litigation, in furthering participatory democracy (Fredman 2008).

The application of proportionality in *SC* is perfunctory and demonstrates in practice it can have little meaningful difference from MRWF. The heart of the proportionality in this case is at the final balancing stage. This requires balancing the costs of the discrimination against the benefits of achieving the government’s aims. Has a fair balance been struck between the equality rights of women and children, the fiscal interests of the country and ‘the interests of the community as a whole in plac[ing] responsibility for the care of children upon their parents’ (para. 208)? To undertake this balancing assessment, it is vital to fully understand the discriminatory impacts. The Court’s inattention to the prejudicial effects of the two-child limit means the balancing exercise is skewed and it is impossible to weigh these competing rights and interests when one side of the scales remains obscured. Without anything on the other side of the scales, the Court abdicates the final stage of the proportionality analysis to Parliament. It holds that the ‘answer . . . can only be determined, in a Parliamentary democracy, through a political process . . . democratically elected institutions are in a far better position than court to reflect the collective sense of what is fair and affordable, or of where the balance of fairness lies’ (ibid). In essence, the Court holds that Parliament’s acceptance of discrimination is a weighty enough reason to justify discrimination against women and children.

Ultimately *SC* put across a particular vision of society that assumes women perform the bulk of care work, denies any community value in the provision of care and sees supporting women’s caring roles as coming at the expense of the country’s economic well-being and tax-payer fairness. Despite doctrinal shifts in the judgement, *SC* reflects the thinly veiled ideology of the Court that continues to dismiss the legal equality rights of individuals who live in poverty and instead consign them to political vicissitudes.

## Disclosure statement

No potential conflict of interest was reported by the author(s).

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