The (non-)use of history and its significance in *For Women Scotland*

Caroline Derry*

The Equality Act 2010 was not the generous gift of a benevolent government. It was the outcome of many decades of campaigning in response to discrimination, exclusion, poverty, violence and death. Gains were hard-won from a state which was often not just indifferent but actively hostile. Piecemeal progress, often forced on the government by European institutions – particularly in relation to gender and transgender equality – was finally, importantly if imperfectly, consolidated in the 2010 statute.

Little of that history is found in the Supreme Court's decision in *For Women Scotland v The Scottish Ministers* [2025] UKSC 16. Instead, the legal past is omitted or flattened: reconstituted as an orderly legal progress in which common law and statute developed smoothly, needing nothing more than clarification to achieve consistency and correctness. That is not an accident or a matter of excluding irrelevant material. Rather, it is essential to maintaining the court's characterisation of the judgment as a neutral statutory interpretation of 'self-explanatory' terms. The struggle and pain are actively concealed, their traces glossed over with anodyne phrases: a process which does not serve the interests of any of those 'protected' by the legislation. Feminists have long demonstrated that apparent neutrality is in reality the perspective of privileged white men and serves their interests. Indeed, much of the law cited in the judgment was made by appellate courts composed entirely of privileged white men and by a parliament dominated by the same small section of the population. (The position, for the senior judiciary in particular, remains far from perfect.)

The absence of history is a persistent theme throughout the judgment; a single paragraph demonstrates this approach and its significance. Paragraph 54 makes three claims. It opens by stating, '[t]he common law of England & Wales did not recognise the possibility of a person becoming a different gender from their gender at birth.' This depiction of common law temporalities as a steady flow progressing smoothly through time has been used elsewhere to deny justice to disadvantaged people in favour of protecting hypothetical men 'with a family and a successful career.' In *For Women Scotland*, it is used to suggest a constant history of official non-recognition of trans people. It thus obscures their being able to change official documents, including their passport and national insurance record, without common law interference until the

* Professor of Feminism, Law and History, Law School, Open University, UK. Email caroline.derry@open.ac.uk.

decision in *Corbett v Corbett (otherwise Ashley)* [1971] P 83: a situation acknowledged in *Corbett* itself but carefully omitted here.

Second, and relatedly, paragraph 54 cites *Corbett* as simply confirming that sex could not legally change. (The judge in *Corbett* actually concluded this only after considering evidence from no less than six experts in areas including gynaecology, psychiatry, intersex conditions, and endocrinology). *For Women Scotland* does concede that *Corbett* was decided in relation to marriage:

> *... marriage was a relationship between a man and a woman and, in the context of marriage, even if not for other purposes, the person was still a biological male. ... Implicit in this is the special status of marriage as something more than a mutually agreed contract between parties.*

The precise nature of that special status is not explored; it certainly would have added troubling texture to the court's discussion. *Corbett* described marriage as 'the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element', indeed 'the essential role of a woman in marriage.' It was decided in a context where heterosexual marriage was actively protected as the foundational institution of patriarchy, supported by laws which entrenched male dominance and patrilineal descent of money and status. Notably, the marital rape exemption was still part of the criminal law. That exemption meant a husband could not be convicted of raping his wife because she was deemed to have given irrevocable consent to sex – at any time and place of his choosing – for the duration of the marriage. It had been maintained as a 'matter … of statutory interpretation' in *R v J (Rape: Marital Exemption)* [1991] 1 All ER 759, on the basis that 'unlawful sexual intercourse' (then part of the definition of rape) meant sex outside marriage. It was abolished just a year later when the House of Lords in *R v R* [1992] 1 AC 599 paid attention to social context and explicitly recognised changing social attitudes – following years of feminist campaigning and critique.

Finally, paragraph 54 cements its account of a smooth line of precedent with the statement, 'That conclusion that a person could not change sex was applied in the criminal law in *R v Tan* [1983] QB 1053.' That was indeed part of *Tan*'s ratio, but again historical context complicates the picture. In the early 1980s, many prostitution offences were gender-specific. G, a trans woman, appealed her conviction for living off the earnings of a prostitute, an offence which could be committed only by men; she and a co-defendant also appealed convictions for keeping a disorderly house. The appeals failed as the Court of Appeal stretched the definition of 'disorderly house', in the context of strong distaste for the BDSM services offered. They did not dispute that G 'had become philosophically or psychologically or socially female', but upheld her conviction for living off the earnings of a prostitute on the basis that the *Corbett* definition should be applied for consistency and 'common sense'. That point has to be seen within the court's moralistic enthusiasm to condemn 'services…of a particularly revolting and perverted kind' among which

'[s]traightforward sexual intercourse was not provided at all.' The Supreme Court's choice to cite *Tan* but not address its facts or moralism is a refusal to acknowledge a history that would trouble its bland story of legal neutrality and progress.

These omissions do not simply shorten and simplify an already long judgment. Nor are they an inevitable feature of the court's reasoning. The power of judicial histories, and the possibility of offering alternative accounts, has been demonstrated in the judgments of former President of the Supreme Court, Lady Hale. She knew the centrality of such contextual understandings to feminist legal reasoning: see for example how her judgment in *R v C* [2009] UKHL 42 used a historical grounding to better recognise the nuances of disability; or the counter-history given as the basis of her dissent in *R v J* [2004] UKHL 42.

For Women Scotland shows that the loss of such feminist historical consciousness is a real loss to the court, and to those subject to its decisions. Erasing histories hides context and consequences, burying them under myths of common law continuity and of the neutrality of statutory interpretation and 'common sense'. Such erasures allow the court to disavow the real-world consequences of a judgment which undermines the rights not only of trans people but of anyone who does not conform to their 'common-sense' norms.