For Women Scotland and the CJEU's conceptualisation of sex discrimination

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Following Brexit, significant uncertainty about EU law's future within the UK existed. Much of it had been branded as 'red tape' and since leaving the block, successive governments have reformed legal areas that previously were governed or partially controlled by EU law. However, non-discrimination law was never considered to be at serious risk. While EU non-discrimination law has had significant influence on advancing the national legal framework in the UK, there were no serious suggestions to abolish or significantly amend the Equality Act 2010 as the UK seemed to have fully embraced the non-discrimination law paradigm across administrative and private law.

Indeed, worries about the future of non-discrimination law in the UK seemed to be calmed further as the decoupling of EU and UK law in the wake of the Retained EU Law (Revocation and Reform) Act 2023 led to changes in the Equality Act 2010 that aligned the UK legal framework more closely with EU approaches. For example, the Equality Act 2010 (Amendment) Regulation 2023 expanded the concept of indirect discrimination to include those that do not belong to the disadvantaged group but experience disadvantage alongside that group (s. 19A) as per the decision in *CHEZ* and the concept of a 'single body' was introduced in equal pay cases (s. 79) to implement the CJEU's concept of a single source within the context of Article 157 of the Treaty on the Functioning of the European Union (see e.g. *K and Others v Tesco Stores*).

What was left then was a diffuse concern about the diminished influence of the CJEU and its potential impact on legal developments in the UK. Having lost the EU as a 'happy hunting ground', it was suggested that there was not only the risk for UK and EU legal developments to stagnate, but also for the UK to return to formalism, which was prevalent in the early conception of the UK legal framework, and slowly regress.

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Considering the *For Women Scotland* judgment, we may now concede that the formal decoupling of EU and UK sex discrimination law may not only have halted future developments, but may potentially reduce protections litigated for over decades – suggesting that even long-accepted principles developed by the CJEU hold little sway. This criticism may come as a surprise given that the Supreme Court refers to the CJEU case law several times throughout the reasoning, including to the seminal *P v S and Cornwall County Council* judgment, which first recognised that disadvantages related to gender reassignment fall within the scope of sex discrimination. Indeed, the judgment in *FWS* by no means dismisses the importance of the CJEU's interpretation of EU non-discrimination law for the understanding of the Equality Act 2010. However, the cases are primarily treated as historical events that had an impact on the UK's legal development, not as fully reasoned judgments that contributed to a specific conceptualisation of sex discrimination, which is relevant beyond the specific issue at hand.

Referring to *P v S*, the UK Supreme Court notes in paras. 55-57 how the CJEU considered discrimination arising from gender reassignment as falling within the scope of sex discrimination given that it is a fundamental human right, and how this led to the modification of the Sex Discrimination Act 1975 to include gender reassignment discrimination (see The Sex Discrimination (Gender Reassignment) Regulations 1999). This is referring to situations where a person 'is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex' (as per the current definition in s. 7 of the Equality Act 2010).

Crucially, the Supreme Court draws a connection between fundamental human rights protection and discrimination based on gender reassignment, but neglects the most important point of the CJEU's judgment, namely that the scope of the Equal Treatment Directive 'cannot be confined simply to discrimination based on the fact that a person is of one or other sex' (para. 20) and that discrimination based on gender reassignment is based, 'essentially if not exclusively, on the sex of the person concerned' (para. 21). Sex discrimination in that understanding is not simply about comparative disadvantages, but catches asymmetrical adverse experiences related to sex. In the context of trans discrimination this then includes a right to gender expression and recognition of

gender identity. The CJEU rejects a strict formalistic approach that essentialises biological sex. Identifying disadvantages based on sex is thus contextual and cannot be confined to technical comparison that accepts an 'equal misery' defence simply because trans men and trans women are treated equally badly. Comparison is only needed to identify the disadvantage. Thus, in *P v S* the CJEU simply states that the claimant was 'treated unfavourably by comparison with persons of the sex to which she was deemed to belong, before undergoing gender reassignment' (para. 21). Yet, the Court could also have said that she was disadvantaged in comparison to women who did not undergo gender reassignment.

That it is indeed the right to gender recognition that was underpinning the case in *P v S* was confirmed in subsequent CJEU cases, all of which originated from the UK. In *KB v National Health Service Pensions Agency*, the claimant was entitled to a survivor pension for her unmarried partner who was a trans man, because the lack of recognition of her partner's gender identity prevented them from marrying, as marriage was only available for different-sex couples at the time. Even more pronounced, in *Richards v Secretary of State for Work and Pensions*, the CJEU recognised that a trans woman was suffering a disadvantage because she did not have access to a pension at the age of the female retirement age. Without the right to recognition that disadvantage would have been non-existent, since she was being treated as if she was male, and EU law does not ban different retirement ages based on sex. More recently, in *MB v Secretary of State for Work and Pensions* the Court recognised the claimant's gender identity irrespective of national conditions. Specifically, it held that 'persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender' (para. 35). The annulment of marriage requirement prior to the legal recognition of that gender identity then was considered a specific disadvantage suffered by those who undergo gender reassignment, and could not prevent access to the State retirement pension. In all three of these cases, EU non-discrimination law (which was applicable in the UK at the time that Parliament enacted the Equality Act 2010) required that, in at least some circumstances, Member States recognise trans people as having their lived, not their biological, sex for the purposes of equal access to employment or social security-related benefits. Indeed, if,

between 2010 and 2020, UK legislation had deviated from this requirement, the UK Supreme Court would have been obliged, as in the case of *MB*, to disapply national law.

The Supreme Court's judgment does not engage with any of this, despite these judgments being given effect within the UK legal framework. Instead, it drew sharp distinctions between sex and gender reassignment which enabled it to neglect the gendered dimensions of inequality that are rooted in misogyny and disadvantage women and trans people alike, although not always in the same manner. In the light of this, one may consider there to be a real risk in the Equality Act 2010's approach of explicitly recognising specific asymmetric characteristics such as 'gender reassignment', but also 'pregnancy', instead of subsuming these categories under the scope of 'sex'. Indeed, what was once celebrated as making rights visible may in the post-Brexit era encourage the development of overly technical definitions that are void of context, create blind spots, and significantly reduce the effectiveness of sex discrimination law.