For Women Scotland Ltd v The Scottish Ministers: An Error of Judgment

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Introduction

In the late 19th and early 20th centuries, women in several common law jurisdictions fought a series of court battles to be allowed to engage in various aspects of public life. Scottish women were at the forefront of these cases, but in *Jex-Blake v Senatus of the University of Edinburgh* and *Nairn v University of St Andrews*, the courts held that when the relevant legislation said that certain 'persons' were entitled to take degrees or to vote, the word 'persons' did not include women. It was not until 1928 that the Privy Council held in *Edwards v Attorney-General for Canada* that the word 'persons' did include women and, in that case, women were therefore eligible for appointment to the Canadian Senate alongside men.

The Supreme Court's decision in *For Women Scotland Ltd v The Scottish Ministers* (FWS) is strongly reminiscent of the 'persons' cases over a century earlier. The Court decided that the word 'women' in the Equality Act 2010 (EA) does not include trans women. As in the 'persons' cases, the court's reasoning appeals to common sense, natural meanings, and the way things have always been. As in the 'persons' cases, the court's decision will eventually come to be seen as an outdated relic of an earlier era. For the losers at the time, however, it is not only deeply disappointing but has symbolic and material effects on their lives. For the 'winners', it preserves an exclusive space, but to what end? If the analogy with the 'persons' cases is correct, it simply postpones the moment when inclusion will be seen as obvious and inevitable, and its ramifications will have to be worked through including, where necessary, the creation of new facilities.

The (il)logic of consistency

This is not to suggest a teleological progression of increasing rights. Feminist, critical race and queer scholars have had too much experience of, and have had to account theoretically for, backlashes and reversals. The present era is one of widespread rights reversals, from the United States[1] to Afghanistan, from Central and Eastern Europe[2] to Africa and Turkey.[3] In this respect, the FWS decision is a product of

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[1] See, e.g. feminists@law Rapid Response to Dobbs v Jackson Women's Health Organisation (2022) 11(2) *feminists@law*.

[2] See, e.g. Vanessa Sauls Avolio, 'Rewriting Reproductive Rights: Applying Feminist Methodology to the European Court of Human Rights' Abortion Jurisprudence (2017) 6(2) *feminists@law*.

[3] See, e.g. Elif Ceylan Özsoy and Cavidan Soykan, '"We Are Not Leaving the Istanbul Convention": Disappearance of Istanbul Convention from Turkiye and Presence of Unlikely Feminist Spaces in International Law-making' (2025) 13(2) *feminists@law*.

its time. In deciding that the meaning of 'women' in the EA is confined to cisgendered women, and that 'sex' means biological sex, the Supreme Court reversed 20 years of trans rights under the Gender Recognition Act 2004 (GRA). The GRA itself was the product of a long series of efforts to achieve legal recognition of gender transitions.[4] Despite its contested criteria for recognition, the GRA did state (apparently) unequivocally that when a gender recognition certificate (GRC) was granted, a person's acquired gender became their legal gender 'for all purposes'. In reliance on this section, the Equality and Human Rights Commission (EHRC)'s then guidance stated that 'women' in the EA included trans women holding a GRC. This guidance, in turn, was relied on by the Scottish Government in its positive action scheme to increase the proportion of women on public boards, which became the subject of the FWS litigation.

The only stated exception to 'for all purposes' is where the GRA itself or another piece of legislation makes provision limiting or excluding the application of the Act. In the FWS decision, the Supreme Court radically expanded this exception by extending it not only to situations where the GRA or other legislation says it doesn't apply, but also to situations where the GRA might be implicitly taken to be excluded because applying it would lead to inconsistent or problematic results. According to the Supreme Court, interpreting 'women' in the EA to include trans women (and correspondingly, interpreting the concept of 'sex' to include a trans person's sex according to their GRC) would create various inconsistencies and problematic results, which would be avoided if 'women' and 'sex' were confined to their biological meanings.

One major difficulty with this reasoning is that trans existence inevitably produces inconsistencies and problems for binary categories. Any binary system will encounter difficulties accommodating something that is inherently non-binary. Counting trans women as 'women' may well be problematic in particular circumstances. But so too will counting trans men as 'women', which is what the Supreme Court's decision requires. Arbitrarily assigning trans people to one side of the gender binary rather than the other for the purposes of the EA does not establish a singular 'truth' of sex or eliminate inconsistencies or absurdities. Addressing this issue requires thinking in a much more careful and nuanced way about the purpose of particular provisions, what is at stake, and what is the most appropriate response in the circumstances. The fact that 'biological sex' is itself a construct which can be ambiguous or indeterminate[5] reinforces the false promise of consistency and universality.

Another major difficulty is that even if the Supreme Court's decision may have produced consistency and clarity in the interpretation of the EA (though this is arguable), it has at the same time produced fundamental uncertainty in the interpretation of the GRA. It is impossible to tell when the newly expanded exception to the application of the GRA will or will not apply, because it relies on judgement rather than fact. Who will decide whether the application of the GRA is straightforward or problematic in any given situation, and how will they do so? The net result is that the value and effect of a GRC has been thrown into significant doubt. Those holding GRCs will find themselves to be legally male in some circumstances and legally

[4] See, e.g. Flora Renz and Avi Boukli, 'Transgender Jurisprudence', in Chris Ashford and Alexander Maine (eds), *Gender, Sexuality and Law: A Textbook* (Edward Elgar 2024) ch.9.

[5] See, e.g. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990); Fae Garland and Mitchell Travis, 'Sex is Complicated', this issue.

female in others, with no ability to predict which is which. The judgment thus not only dispossesses them of legal rights but places them in a disorientating legal limbo.

The ramifications of the decision also extend beyond those trans people who have obtained a GRC. While the FWS judgment technically relates to the meaning of 'women' and 'sex' in the EA, the media quickly boiled down the court's decision into a simple take-home message: 'sex means biological sex'. Not only the EHRC but all other public sector bodies, employers and service providers started reviewing their guidelines, and in some instances have changed their policies in ways that are not actually required by the decision itself. FWS is not a licence to discriminate against trans women, nor a mandate to dismantle inclusionary practices that don't discriminate against anyone else. The EHRC's new draft code of practice recognises this, but in setting out the potential implications of the decision in relation to the prohibitions of discrimination on the basis of sex, perceived sex and gender reassignment, and the various exceptions to them, the draft code reveals the enormous complexity of the situation the decision has created. Nothing could be further from simple or straightforward. The draft code does not provide much practical guidance as to how services, public sector bodies and associations are supposed to navigate this new and confusing legal landscape, but it is not difficult to predict that trans and non-binary people will be harmed in the process.

Feminist decision-making

As well as paying careful attention to history and socio-legal realities, feminist legal scholars have long argued for courts to listen to women and to be more inclusive of women's lived experience in their decision-making. There is no doubt that the Supreme Court listened attentively to the perspectives and arguments of the women who brought the case and their supporters. These perspectives and arguments feature prominently in the judgment – to a much greater extent than in many previous cases where women's interests have been at stake.[6]

But the voices and lived experience of trans women and trans allies are strikingly absent from the Supreme Court's judgment. Only one side is given serious attention. Trans women as a group are figured as a minority source of confusion and potential danger, trans women with a GRC are treated as a minority within a minority whose interests can therefore be disregarded, and trans men (who, according to the Supreme Court, have to be counted as women for the purposes of the EA) are barely mentioned at all.

This majoritarian approach is antithetical to basic human rights decision-making, let alone a feminist approach. Feminist judgment projects have grappled directly with the situation where one group of women argues for a position that would, or potentially could, limit the options for or positively harm another group of women, and have formulated an ethical judicial response: be aware of potential conflicts and avoid as far as possible creating adverse consequences for other women, for example by framing the scope of the

[6] Cf e.g. *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; *In the matter of an application by Siobhan McLoughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48; *Reference by the Attorney-General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; although see also *Reference by the Court of Appeal in Northern Ireland pursuant to paragraph 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion)* [2018] UKSC 27.

decision narrowly, acknowledging that others would take a different position, or finding a way to accommodate and manage heterogeneity.[7] It could have been possible for the Supreme Court to hear the litigants on both sides equally, and to find a way to protect the interests of both the applicants and the trans community. But the way the court framed the question from the outset, as a rights conflict 'directly affect[ing] women and members of the trans community' (para 1), suggests that it did not even notice the fact that there were women on both sides and that the trans community also includes women.

Conclusion

As well as the 'persons' cases, FWS is reminiscent of another infamous transgender decision, *Corbett v Corbett*.[8] In that case, the marriage of a trans woman, April Ashley, was held to be invalid because, despite gender reassignment surgery, she remained legally male and therefore (at the time) unable to marry a man. Today, the GRA and the Marriage Act 1949 make it possible for a person to marry in their acquired gender. If a GRC can be 'good' for the purpose of marriage, its ineffectiveness for the purpose of the EA is baffling. Whether from an immanent or normative perspective, the Supreme Court's decision fails as an act of reasoning. This exposes the force underlying its authority – it relies on domination rather than persuasion. And that should be an uncomfortable conclusion for everyone.

[7] See, e.g. Rosemary Hunter, 'An Account of Feminist Judging', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010) 30, 41-42; Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) 20 *Feminist Legal Studies* 135, 140-41, 145; Wendy Aldred, 'Commentary on *Quilter v Attorney-General*: Same-Sex Marriage and the Marriage Act', in Elizabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds), *Feminist Judgments of Aotearoa New Zealand – Te Rino: A Two-Stranded Rope* (Hart Publishing 2017) 187, 191.
[8] *Corbett v Corbett* [1971] P 83.