For Women? Sex in the Supreme Court

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Introduction

> I do earnestly wish to see the distinction of sex confounded in society unless where love animates the behaviour. For this distinction is, I am firmly persuaded, the foundation of the weakness of character ascribed to women. (Mary Wollstonecraft, A *Vindication of the Rights of Woman*, 1792. p.76)

The Supreme Court judgment in *For Women Scotland* is widely perceived to have resolved a long-running conflict of rights by clarifying that those of women trump those of trans people when it comes to the regulation and policing of single-sex spaces. Inevitably, this has provoked controversy with much of the critical commentary focusing, unsurprisingly, on the problematic implications of the decision for trans people. In this blog, we take a different tack, focusing on the implications of the decision for women in general. We challenge the mainstream media presentation that, by confirming a biological concept of sex for purposes of UK equality legislation, *For Women Scotland* is an unequivocal victory for women's rights.

Biology is (not) destiny

An examination of law's patriarchal past quickly reveals that biology has rarely, if ever, favoured women. Historically, sex functioned as a key category of common law, yielding a status-based landscape of legal rights and obligations founded on women's 'natural' inferiority to men. Not only did women's inherent weakness provide a legal justification for limiting their access to education and the professions, as well as the right to vote, it supported a legal framework in which, upon marriage, a wife's legal personhood was wholly absorbed in her husband's. This, in turn, justified a legal regime in which women's interests were viewed to be derivative of or subordinate to men's. Incredibly, it was not until the late twentieth century that women were fully recognized as 'persons' in the eyes of the law. A series of judgments and statutes from the late nineteenth century onwards addressed the social death that marriage entailed for women, leading to the slow

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erosion of coverture and its multiple deleterious effects, culminating in the early 1990s, in the recognition of marital rape as a legal offence.

Unsurprisingly, then, the thrust of feminist rhetoric from Wollstonecraft onwards was to downplay the significance of biological sex in relation to legal and social arrangements and to strive for a world in which - 'unless love animates the behaviour' - sex was of no significance. This was also the primary aim of the Sex Discrimination Act 1975: its purpose was to *undo* the patriarchal legacy of sex-based status distinctions by removing sex from the realm of legitimate reasons justifying social arrangements and practices. This explains the symmetrical nature of the Act: it applied to men and women equally. Moreover, while limited exceptions were made to accommodate situations in which single sex arrangements were thought to be necessary, the broad thrust of the Act was to enable people to challenge those situations in which sex continued to feature in social and economic decision-making.

Rules and exceptions

Equality law has evolved exponentially since the 1975 Act, but the idea that certain kinds of reasons, based on perceived personal characteristics, should *not* influence access to social and economic opportunities remains at the heart of the legislation. What is particularly perplexing about the recent Supreme Court decision is that it has turned this sensibility on its head: the core of the legislation, prohibiting sex-based decisions, has been displaced, and the legislative exceptions making provisions for single-sex spaces have been repurposed to provide a central justification for the legislative framework as a whole.

This is a striking example of a particular judicial technique identified by Duncan Kennedy in *A Left Phenomenological Alternative.* HLA Hart famously distinguished between the core, settled meaning, and the penumbra, or the uncertainty, of a legal rule. Kennedy challenged this account as a neutral description of legal rules, highlighting how it masks the exercise of judicial discretion in determining what is core and what is penumbral. Crucially, and within the scope of legitimate legal reasoning techniques, it allows the judicial redesignation of the core as the penumbra and vice versa – so that the exception is deemed to function as the rule and the rule the exception. This sleight of judicial hand in *For Women Scotlan*d paves the way for a retrospective reading of the history and development of equality law so that concerns exercising a tenacious grip upon the present – single sex arrangements and the meaning of sex for these purposes - appear to be the legislative animus all along.

Sex in context

For those who have followed the development of UK equality law from its inception, the Supreme Court's take on this now well-honed regulatory field seems, at times, unrecognizable. Consider, for example, the repeated insistence that 'sex' in equality law has retained a fixed and stable meaning over time. It is true that when the SDA 1975 was enacted, the categories 'man' 'woman'

and 'sex' were broadly thought of in biological terms (insofar as they were thought of at all, which was not really). However, early case law revealed that the concept of sex required a more complex interpretation.

In several cases, defendants argued that the reasons for less favourable treatment were not, strictly speaking, based on the biological sex of the claimant, thus prompting the question whether cultural assumptions about the nature, roles, and relations of men and women were captured within the legislative concept of sex. Early decisions, such as *Horsey v Dyfed* [1982] IRLR 395 (assumptions about married women) and *Hurley v Mustoe* (assumptions about working mothers) [1981] IRLR 208, held that it did, so that gradually the concept of sex under the SDA was extended *beyond* biology to encompass socially constructed differences between the sexes. The 1990s European Court of Justice decision in *P v S and Cornwall CC* (Case C-13/94) took this expansionist approach a step further, holding that discrimination on grounds of gender reassignment fell within the concept of sex discrimination for purposes of the European Equal Treatment Directive. Later, as we know, this decision led the UK government to create an independent protected characteristic of gender reassignment and there can be no doubt that similar, albeit unsuccessful, efforts to stretch sex to include discrimination on grounds of sexual orientation (*Grant v South-West Trains Limited* C-249/96) paved the way for the eventual creation of a new protected ground of sexual orientation in the early 2000s.

Our point here is not to insist that 'sex' for purposes of UK equality law did not at one point – indeed, may not currently - be viewed as biologically based; rather it is to contest the Supreme Court's position in *For Women Scotland* that sex retains a fixed meaning throughout its legislative history or cannot properly be apprehended differently in different contexts, depending upon the work it is called upon to do – which is a lot. At least five of the current nine protected characteristics of UK equality legislation are, to varying extents, sex-referential, the legacy of law's patriarchal past extending well beyond the oppression of women to encompass any deviation from the hetero-normative order. The interchangeability of sex and gender in legislative texts and judgments likewise evidences a much more fluid and adaptable concept, called to do different work at different times and for different purposes.

How many sexes?

In truth, the gender critical preoccupation with biological sex runs against the current of feminist theory as it has evolved over the last 50 years.

The cultivation of difference is an inegalitarian impulse to support social hierarchy, with differences attributed to 'nature' historically providing the most powerful anchoring for oppressive social arrangements. Of course, what passes for nature – and biology – varies over time and place. Our apprehension of sex is no exception to this. Pre-modern conceptualizations posited the female body either as a part of the male body (as in the Biblical account of Eve's creation from Adam's

rib) or as a defective version thereof (as in Aristotle's dismissal of the female body as a 'mutilated male'). In this sense, there was only one sex – men – in relation to which women were either derivative or defective. In *Making Sex: Body and Gender from the Greeks to Freud* (Harvard UP, 1992), Thomas Lacquer argues that a conception of male and female bodies as fundamentally distinct from one another, a 'two-sex' rather than 'one-sex' model, did not really become dominant until the eighteenth century, as anatomical and medical knowledge of human bodies advanced. Similarly, contemporary scientific knowledge problematises the two-sex model. Feminist biologists point out that where the relevant biological markers are reproductive organs and chromosomes, there are more than two sexes (intersex, for example). And if we view biological sex more broadly to include secondary sex characteristics (such as bone density, body hair, height, and voice pitch), the categories of male and female pretty much cease to be useful. It turns out that the so-called 'certainties' of biology are always provisional and far more inflected by social and cultural norms than is commonly recognized.

These provisos are absent from the judicial reasoning in *For Women Scotland,* which is unequivocal in its commitment to the two-sex model of late Enlightenment thinking. Philosophers such as Rousseau embraced the two-sex approach, viewing women as possessing a distinct biologically based nature that rendered them emotional, passive, and family-oriented. The social contractarians performed mental gymnastics to justify both the natural freedom of all persons and women's relegation to the family and lack of rights. All are free in the 'state of nature,' said Locke, Hobbes, and Rousseau, but women's sexual and social nature as a mother and wife necessitated exclusion from the public sphere, political power, property ownership, and, in short, personhood. Biology then dictated the civil, social, political, *and legal* death of women.

The gender critical preoccupation with biological sex thus seems a regression of feminist knowledge. From a sexual equality perspective, it is also a strategic misstep.

For women?

All of which brings us to question the strategic value, for those concerned with advancing women's rights, of a judgment which insists on defining sex narrowly and tightly tied to biology. Will such a concept be flexible enough to deal with sex-based discriminatory conduct in which the biological dimension is deeply buried beneath the layers of social and cultural normativity? And will it even deliver what the litigants in *For Women Scotland* seek to 'protect', that is, women-only spaces such as toilets and changing rooms? The logic of separate accommodation for trans people – people whose identity and sense of self is inextricably entangled in sex designations and their consequences – is surely to increase the pressure to create more gender-neutral spaces, heralding the decline rather than the preservation of 'women's rooms'.

The two-sex vision of sex has frequently placed women in an unenviable position when it comes to strategically engaging with law as a tool for women's advancement. Either women's 'nature' is a difference that should be afforded special legal protection, or there are no differences between

the sexes to which law should attend. The problem can be illustrated by considering women's participation in the paid workforce during the Industrial Revolution. The nineteenth-century Factory Acts restricted women's working hours and their return to work after pregnancy under the guise of their different, delicate nature. Late nineteenth-century feminists argued that the Acts were paternalistic and restricted women's ability to freely contract their labour. They were sceptical of gender distinctions in legislation and the use of women's nature to deny access to the public sphere, including paid work.

Lost within this debate about women workers' difference and sameness vis-à-vis male workers are the material transformations of patriarchal and capitalist domination that occurred during the Industrial Revolution, and which produced the two-sex role model and women's reduction to nature, mothering, and the family. Massive upheavals in the social and economic reordering of society at this time resulted in a gendered separation of production (paid work) and reproduction (unpaid work). Women were relegated to the latter and admitted to the former on terms inferior to those of men. Both capitalists and male workers benefited from women's reduced earning capacity and round-the-clock responsibility for the needs of the family. It is within this economic and social context that the two-sex model came to prominence and was invoked as the rationale for protective legislation. It is this sexual and economic ordering, which continues into the present, that should be the primary concern of feminists.

We are witnessing the all too familiar retreat from progress toward equality and justice for socially disadvantaged groups. Strategically speaking, the two-sex model endorsed by *For Women Scotland* and by gender critical feminists may erode protection for women. At the very least, it naturalises as biology what is, in the main, a culturally, socially, and economically produced distinction between the sexes that is rarely beneficially invoked *for* women. As others have argued, it also dovetails with current reactionary forces. We would go further. For the reasons discussed in this blog, the gender critical obsession with grounding sexual difference in biology, and its deployment in policy debate and legal strategizing, is itself reactionary.