

Bad Law, Worse History and the Role of the Court: Re-reading *For Women Scotland Ltd v The Scottish Ministers*

Exceptions

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Abstract

The narrative study of law has offered important insights through which to consider the enumeration of law, its grounding and in particular its interpretation by the Courts. In this article, I situate all of this with relation to the recent judgement of the UK Supreme Court in *For Women Scotland Ltd v The Scottish Ministers*. I utilise a narrative understanding of law to deconstruct and problematise many of the premises adopted by the Supreme Court that enabled their conclusions, and, in particular, the way in which the Court leverages anachronistic precedent in order to construct a veil of legitimacy. It is from this basis that I recontextualise the judgement. In doing so, I address those perspectives which were neglected by the Supreme Court, notably any meaningful consideration of the European Convention on Human Rights (ECHR) and the combined discrimination provision of the Equality Act 2010.

Keywords: legal narrative, non-discrimination Law, European Convention on Human Rights, transmisogyny

1. INTRODUCTION

The prominent British constitutional historian Sir David Keir wrote, in the context of disputes between the Crown and Parliament in the 17th century, that, ‘there was much bad law and worse history in the appeals which each side made to the constitutional practise of the past’.¹ Sir David speaks to the way in which appeals to law, and in particular to the historical context in which laws originated, often constituted a partisan endeavour: one undertaken without intellect or character.² The versatility of this quote is evident in the historical study of the common law; where dubious precedents are often advanced devoid of the original context. While doctrinal legal scholarship often tries to present the law as being free from contradiction, neither the legislature, nor the executive, nor even the courts are capable of embodying rationality itself.³ The possibility for error always remains, and it is this possibility that must be interrogated.

This is particularly relevant when one considers the ruling of the Supreme Court in the matter of *For Women Scotland Ltd v The Scottish Ministers*: an exceptionally flawed judgment demanding an extraordinary response.⁴ The case arose as a challenge to statutory guidance, adopted under the Gender Representation on Public Board (Scotland) Act 2018, which interpreted the use of the word ‘woman’ under the Equality Act 2010 to include trans women with a Gender Recognition Certificate

¹ David Lindsay Keir, *The Constitutional History of Modern Britain* (9th edn, Black 1969) 160.

² *Ibid.*; see also: Costas Douzinas, Peter Goodrich, and Yifat Hachamovitch (eds) *Politics, Postmodernity and Critical Legal Studies* (Routledge 1994) 45.

³ See, among others: Costas Douzinas, Ronnie Warrington, and Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Text of Law* (Routledge 1991) 106; Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press 2001) 71; Anna Piekarska, ‘Challenging the Rule of Law Universalism: Why Marxist Legal Thought Still Matters’ (2023) 34 *Law & Critique* 269, 278.

⁴ Unless the context provides evidence to the contrary, my references to ‘the Court’ should be presumed to refer to the Supreme Court in their adjudication of *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 (*For Women Scotland*).

(GRC).⁵ The central question before the Supreme Court pertained to the definition of a single word. At this point, it is worth stressing that both the Outer House of the Court of Session (herein after referred to as the Lord Ordinary) and the Inner House of the Court of Session (herein after the Inner House), on appeal, found for the Scottish Government.⁶

The Supreme Court, in their adjudication, fixated on the possibility that to interpret the law in such a way – so as to include those with a Gender Recognition Certificate within the definition – would result in an outcome that was ‘unworkable, inconsistent and incoherent’.⁷ However, in reaching this conclusion, the Court took little concern in how their own decision was all of those three and worse. In this regard, the Court afforded little concern for the European Convention on Human

⁵ This case was, therefore, a product of devolved legislation adopted by the Scottish Parliament that, for all relevant purposes, imported provisions from legislation of the UK Parliament. The UK is composed of several distinct legal jurisdictions (of which Scotland is one). Scotland has maintained its own historic common law; although, this has also been and continues to be influenced by the interpretation of English common law.

Since 1999, there has also been a devolved Parliament which has been empowered to adopt legislation in a range of areas. Some matters – detailed under the Scotland Act 1998, as amended – are reserved and (subject to specific exceptions) remain the sole competence of the UK Parliament. Consequently, in each piece of UK legislation provisions must define the Act’s particular territorial scope.

Despite this, the principle that the King-in-Parliament is sovereign means that the UK parliament is theoretically able to renegotiate this settlement at its own volition. However, the political reality, with successive developments in the last decade, have profoundly changed the viability of such a position. It is this conceptualisation of sovereignty that has also acted as a basis for refuting, or at least limiting, the competence of Court’s through their adjudication to secure effective protections of fundamental rights. See: Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81 MLR 989.

Equally of interest at this point, and as is set out in greater detail below, Section 9 of the Gender Recognition Act enumerates the procedure for issuing a Gender Recognition Certificate, and thereby providing for the recognition of one’s sex in law. One could, and many trans people do, live without a Gender Recognition Certificate: it is not a prerequisite to obtain most documentation; it is a prerequisite to obtaining a modified Birth Certificate and for certain legal rights that ensue from recognition.

⁶ For context, the Outer House of the Court of Session acts as the court of first instance for *inter alia* matters of judicial review, with a single judge (known as the Lord Ordinary) presiding. The Inner House, constituted by a panel of three judges, is the highest civil court in Scotland, and exercised appellate jurisdiction in this matter. From there appeal lay to the Supreme Court of the United Kingdom.

⁷ *For Women Scotland* [2025] UKSC 16 [197].

Rights (ECHR), reaching a position which markedly departs from *Goodwin v the United Kingdom*.⁸ Beyond the incredibly problematic and often explicitly trans-exclusionary nature of the judgment, the position that the Supreme Court assumed was also most impractical. The judgment's structure conceals numerous erroneous premises which, when compounded by the construction of an infallible legislature, results in a most abhorrent and illogical conclusion. My central thesis, in light of all of this, is that if one were to reconstruct the narrative deployed by the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* a different ruling would follow.

In drawing attention to the various points where the Court either neglected significant perspectives or drew erroneous conclusions with no basis in either law or fact, I also reflect on the very structure of UK law, or more appropriately, the lack thereof. Charles Townshend argued that, 'the characteristic English device of studied indefinición ... was integral to the common law tradition. A mountain of individual case law suffocated general principles'.⁹ The Supreme Court's judgment relied heavily on *creating* this studied indefinición: utilising anachronistic case law and fixating on what can only be conceived as peripheral issues in a manner that defies reason or principle.

I begin by reflecting on the role of narrative in the construction of law: this provides the frame through which I am able to situate the judgment. I then turn to consider the specific point of departure used by the Court which enabled many of the judgment's issues. Following on from this I begin the process of deconstructing the judgment: in doing so I illustrate how many of the problematic aspects in the Supreme Court's decision can be understood either as result of their preconceived definitions or from their failure to consider the

⁸ As will be considered in greater detail later, *Goodwin v the United Kingdom* App no 28957/95 (Grand Chamber, ECtHR, 11 July 2002) (*Goodwin*) detailed the obligation to provide a mechanism through which one could change their sex in law. It is this judgment that necessitated the passage of the Gender Recognition Act 2004. See also: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art. 8.

⁹ Charles Townshend, *Making the Peace: Public Order and Public Security in Modern Britain* (Oxford University Press 1993) 4–5.

broader legal and practical implications of their decisions. It is only as a consequence of deconstructing the judgment that one can initiate a process of reconstructing the narrative of the judgment. In doing so, the aspiration is to recentre considerations that were unduly dismissed and to recontextualise and challenge positions that are both harmful, because of the trans-exclusionary rhetoric adopted, and plainly wrong.

At this point, I think it is important to make a brief remark on terminology. My own understanding of the division between sex and gender is heavily influenced by my study of international human rights law. In this context sex (which corresponds to male/female/intersex) generally refers to the biological difference, whereas gender (corresponding to a range of identities, of which man and woman are but two) refers to the way in which we socially construct our identities.¹⁰ It must also be recognised that 'biological' difference is not free from its socio-cultural context.¹¹ On the basis of this distinction, law has very little to do with the former, existing almost entirely within the scope of the latter. In this vein, it is important to recognise that law is by definition a component of the socio-cultural construction of gender. However, law often adopts the language of the former and more problematically attempts to construct, within itself, a belief of biological rationality. It is important to recognise that my own understanding of these terms does not reflect their general usage in UK law: this is particularly important when one is forced to consider their ordinary usage.

¹⁰ See, in particular: CEDAW, 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (47th session, 16 December 2010) UN Doc CEDAW/C/GC/28, para 5.

¹¹ The utilisation of specific biological differences in the construction of sex is informed by socio-cultural contexts: while the differences, as such, are not, the emphasis placed on one difference over another is. See: Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (Seal Press 2007) 17; see also: Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (2nd edn, Routledge 1999); M. Dru Levasseur, 'Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights' (2015) 39 *Vermont LR* 943, 1004; Sally Hines, 'Sex Wars and (Trans) Gender Panics: Identity and Body Politics in Contemporary UK Feminism' (2020) 68 *Soc Rev* 699.

2. THE NARRATIVE OF LAW

In *For Women Scotland*, the Supreme Court constructed a narrative that could be employed to uphold their preconceived understanding of sex. Even within this, there is much which is unconvincing. However, to properly understand the way in which the narrative structure of the judgment facilitated the Court in asserting their position and to be able to critically engage with the political role that the Court assumes for itself in this judgment, it is – in my opinion – important to explicitly situate this within the narrative structure of law. In doing so, one must consider the extensive theoretical scholarship that exists at the intersection of narratology and law, which has been fundamental in articulating law as a form of narrative practice.¹²

The process of narrating – of drawing together discrete elements into a coherent rendering – is of considerable significance to the structuring of law and in particular to the process of adjudication. Central to this is the way in which these elements are given expression within the rendering and the relationship that is created between each element in time, in space and in significance. This process is manifested, within the common law, most concretely through the use of precedent. In examining the narrative quality of law, it therefore becomes necessary to critically examine and contextualise the relationship of common law courts to precedent.

A narrative text can be considered to be composed of three constituent layers: the text, the story and the fabula – ‘understood as material or content that is worked into a story’.¹³ Mieke Bal goes on to write that, ‘most fabulas can be said to be constructed according to the demands of human logic of events, provided that this concept is not too narrowly understood’.¹⁴ Narrative, understood as such, is complemented and

¹² See: Stephen Paskey, ‘Reframing Law’s Domain: Narrative, Rhetoric, and the Forms of Legal Rules’ (2021) 29 *Narrative* 178; Greta Olson, *From Law and Literature to Legality and Affect* (Oxford University Press 2022) 37–41.

¹³ Mieke Bal, *Narratology: Introduction to the Theory of Narrative* (4th edn, University of Toronto Press 2017) 7; see also: Peter Brooks and Paul Gewirtz (eds) *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996) 17; Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence*, *supra* 3, 96–99.

¹⁴ Bal, *Narratology*, *supra* 13, 154.

reinforced by logic and reason. The mechanism by which a narrative is constructed within and of law, and in particular when done so by the Court, is grounded explicitly within and by law; one is able to construct the perception of legitimacy by asserting that only one narrative could be fabricated.¹⁵

It is this mechanism of construction that allows for law's deconstruction. In Jacques Derrida's words, 'Law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable and transformable textual strata ... or because its ultimate foundation is by definition unfounded'.¹⁶ He goes on to write that, 'deconstruction takes place in the interval that separates the undeconstructability of justice from the deconstructibility of *droit* (authority, legitimacy, and so on)'.¹⁷ In essence, to understand law as grounded in narrative is to foreground its deconstructibility: it is to interrogate the mechanisms by which the law has been constructed and its relationship to justice.¹⁸ This process through which one deconstructs law necessarily causes one to reflect on those who constructed law as such and the decisions that contributed to it.

It is through the process of narrating that the Court is required to assert the law and to determine the facts of a given case.¹⁹ The construction of a narrative is, in this regard, a process of choosing.²⁰ This process challenges the explicit role afforded to the Court in many jurisdictions, including in the UK. In many contexts the Court is required to position itself above the fray: as an external narrator.²¹ However,

¹⁵ Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence*, *supra* 3, 96–99.

¹⁶ Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld, and David G. Carlson (eds) *Deconstruction and the Possibility of Justice* (Routledge 1992) 14.

¹⁷ *Ibid.* 15.

¹⁸ See, also: Walter Benjamin, 'Critique of Violence' in Marcus Bullock and Michael Jennings (eds) *Walter Benjamin: Selected Writings* (Harvard University Press 2004).

¹⁹ Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence*, *supra* 3, 97; Flora Di Donato, *The Analysis of Legal Cases: A Narrative Approach* (Routledge 2020), 168–172.

²⁰ Bal, *Narratology*, *supra* 13, 156; see also: Roland Barthes, 'An Introduction to the Structural Analysis of Narrative' (1975) 6 *New Literary History* 237; Di Donato, *The Analysis*, *supra* 19, 168–176.

²¹ Bal, *Narratology*, *supra* 13, 13.

the extent to which the Court is able to abstract itself from the fabula, which in ruling, it must write itself into, is debatable.²² The process of constructing the narrative, and of concealing or at least understating the role that narrative plays in reaching the decision, is heavily influenced by decisions the Court takes: decisions the Court asserts it was forced to make.²³

The utilisation of precedent, within the common law tradition, is one way in which Courts convey this: by invoking precedent, a meta-narrative is constructed whereby it was not this Court's decision to take, for it had already been taken for them.²⁴ It is through precedent, that judges instrumentalise the past: to fashion a 'narrative coherence that it often lacked in its material transmission'.²⁵ Judges, thereby, enter into a discourse and simultaneously attempt to conceal their position within it. This process of concealing the judge is necessary to obscure 'the accidents of history, the selectivity and omissions that characterize all narrative acts, the dubious causal logic between the succession of mere events'²⁶ that precedent – and specifically the process of selecting precedent – depends on.

One sees this, for instance, in manner that precedent is invoked to assert rules of statutory interpretation. Previous decisions explicitly structure the way in which future decisions can be made: on the manner in which some material is considered necessary as a means of interpretation in one instance, but insufficient in another.²⁷ Precedent is invoked in determining the process by which meaning is afforded to statutory provisions. This, as will be discussed momentarily, is given

²² Brooks and Gewirtz (eds) *Law's Stories*, *supra* 13, 16; see also: Robert M. Cover, 'Violence and the Word' (1986) 95 *Yale LJ* 1601, 1627.

²³ Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence*, *supra* 3, 96–99; Di Donato, *The Analysis*, *supra* 19, 172–173.

²⁴ See: Brooks and Gewirtz (eds) *Law's Stories*, *supra* 13, 10–11; Andrew Benjamin Bricker, 'Is Narrative Essential to the Law? Precedent, Case Law and Judicial Emplotment' (2016) 15 *L Cult Humanit* 319, 324; Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence*, *supra* 3, 65.

²⁵ Bricker, 'Is Narrative Essential', *supra* 24, 324.

²⁶ *Ibid.* 331.

²⁷ See, among others: *R (on the application of O (a minor)) v Secretary of State for the Home Department* [2021] UKSC 3, [2023] AC 255.

concrete effect in the diverging consideration of *Imperial Tobacco* by the Inner House and Supreme Court respectively.²⁸ In *Imperial Tobacco*, Lord Hope established that, ‘the best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable’.²⁹ While this rule generally constricts the role of the Court in enumerating the meaning of a provision, it is also explicitly and implicitly laden with presumptions: some of which can, when it is appropriate, be rebutted. In navigating this, the Court, at least to a degree, can apply or disapply rules of statutory interpretation depending on the extend to which it empowers their conclusions; however, as they do so they assert the legitimacy and command of precedent.

In a similar fashion, the Court can enable interveners to speak on its behalf. This has the effect of creating a situation where once again the Court is able to conceal its own views; instead, the Court defers to the views of others, those whom it has bestowed standing upon. In this process the Court elevates perspectives that it, at the very least, implicitly endorses. By deferring to an intervener, and in doing so explicitly, in their judgment, the Court obscures its own role in enabling that conclusion.

Throughout the process of adjudication, the Court is empowered to internalise certain facts within the law and to exclude others. The law requires material reality to be retold; it must be reconstructed as a set of facts that are intelligible to the law.³⁰ The Court’s narrative is constructed from the facts that the Court, in their application of procedural law, deems admissible. In constructing their own narrative, the Court must privilege one narrative over others: it is required to resolve conflicting narratives.³¹ In this way, the Court ‘inescapably shapes those facts to create an official account – definitive at least until an appellate court reshapes the facts once again’.³²

²⁸ *Imperial Tobacco Limited v Lord Advocate* [2012] UKSC 61 (*Imperial Tobacco*).

²⁹ *Imperial Tobacco* [14].

³⁰ See: Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence*, *supra* 3, 45; Di Donato, *The Analysis*, *supra* 19, 168.

³¹ Di Donato, *The Analysis*, *supra* 19, 168–169.

³² Brooks and Gewirtz (eds) *Law’s Stories*, *supra* 13, 10.

One is therefore left to observe that, ‘the fiction of the common law’s coherence, like all fictions of continuity, is predicated on the smoothing out of omissions’.³³ The Court achieves this by emphasising particular precedents over others; allowing some to speak as opposed to others; and, internalising certain facts at the expense of others. All of this contributes to the creation of what appears to be a coherent whole. This attempt at constructing ‘a coherent unity may create the need to refer back or point ahead’.³⁴ In this vein, one must turn to consider the role that temporality assumes in the construction of the narrative form.

Time, and one’s relationship to it, is central to the construction of a narrative.³⁵ The process of narrating, is a process of arrangement and of selection; one which is not required to follow the chronology of the fabula: it allows for chronological deviation, for anachrony.³⁶ Expanding upon this, Bal writes that, ‘an event presented in anachrony is separated by an interval, long or short, from the present; that is, from the moment in the development of the fabula with which the story is concerned at the time the anachrony interrupts it’.³⁷ This conceptualisation of anachrony is particularly interesting for understanding the temporality of law, in that, ‘at any given moment the law appears as the sum total of all that has been done and not yet undone’.³⁸

Anachrony, therefore, takes on a pronounced role in understanding the narrative of law, especially that which is grounded in legal history: for as Legrand and Samuel write, ‘in *common law*, there is no truth without history’.³⁹ However, the distinct *temporal rhythm* of law means

³³ Bricker, ‘Is Narrative Essential’, *supra* 24, 328.

³⁴ Bal, *Narratology*, *supra* 13, 70.

³⁵ See, among others: Brooks and Gewirtz (eds) *Law’s Stories*, *supra* 13, 14; Renisa Mawani, ‘Law’s Archive’ (2012) 8 *Ann Rev L Soc Sci* 337, 350; Di Donato, *The Analysis*, *supra* 19, 25–26.

³⁶ Bal, *Narratology*, *supra* 13, 70.

³⁷ *Ibid.* 76.

³⁸ Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press 1999) 43.

³⁹ Pierre Legrand and Geoffrey Samuel, ‘Brèves épistémologiques sur le droit anglais tel qu’en lui-même’ (2005) 54 *Revue interdisciplinaire d’études juridiques* 1, 26.

that not all of law's historical capacity is strictly anachronistic.⁴⁰ Law has the ability, and is even required, to draw the past into the present: while law remains in force, its history is suspended in the present.⁴¹ It is only once one is required to disrupt this rhythm, to construct a narrative from that which has been repealed, or to exclude that which has since come into force, that one must rely on anachrony in the strictest of senses.⁴² While one could argue that law's historical capacity ought to be conceived as anachrony *lato sensu*, it is anachrony *stricto sensu* that asserts a far more problematic position: in that, within the narrative of law, its presence signifies an attempt to revive that which has been repealed.⁴³ It is this narrow construction that must therefore assume the predominant focus.

It is through understanding the law, and in particular the process of adjudication, as a product of narrative, that one can begin to interrogate how the act of interpretation depends on the narrative form. This must be contextualised within the privileged position that the Court's narrative must assume; judicial narrative is hegemonic, providing little opportunity for a plurality of narratives that could exist prior.⁴⁴ As such, it becomes necessary to situate any challenge to the Court's narrative within this practice: whereby the Court legitimates its own action with reference to its prior action.⁴⁵ It is from this position that one can begin to deconstruct a given interpretation, to problematise

⁴⁰ Dan Edelstein, Stefanos Geroulanos, and Natasha Wheatley (eds) *Power and Time: Temporalities in Conflict and the Making of History* (University of Chicago Press 2020) 20; see also: Kahn, *The Cultural Study*, *supra* 38, 52.

⁴¹ Edelstein, Geroulanos and Wheatley, *supra* 40, 20; Tim Murphy, 'As if: *camera juridica*' in Costas Douzinas, Peter Goodrich, and Yifat Hachamovitch (eds) *Politics, Postmodernity and Critical Legal Studies* (Routledge 1994) 85.

⁴² See: Brooks and Gewirtz (eds) *Law's Stories*, *supra* 13, 33.

⁴³ Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence*, *supra* 3, 46.

⁴⁴ See, with respect to the 'need' for Law's Archive to exclude: Mawani, 'Law's Archive', *supra* 35, 355; see additionally, with regard to *inter alia* the inability of State Archives (and thus the Archive of Law as a principle component) to capture the authenticity of the trans experience, enacting a form of necropolitics: Eliza Steinbock, 'Affective Justice: Raising the Dead in Trans* Archival Media' in Todd W. Reeser (ed) *The Routledge Companion to Gender and Affect* (Routledge 2023).

⁴⁵ See: Patricia Ewick and Susan S. Silbey, 'Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative' (1995) 29 *L & Soc Rev* 197.

the narrative structure and to challenge that which has been centred or neglected in the process of constructing a given narrative.

3. THE POINT OF DEPARTURE

One ought to begin by considering the broader narrative structure of the Supreme Court's judgment and how they constructed it. To this end, the Court, in para 165, stated that, 'as a self-contained reforming statute, it [namely the Equality Act] should be interpreted, if reasonably possible, without recourse to the predecessor provisions'.⁴⁶ It would have therefore seemed logical to first consider the Equality Act, at least in abstract, so as to justify any recourse to the legislation that had inspired it. However, other than some cursory remarks on the nature of statutory interpretation and on the history of the claim, the Court initiated its consideration with the Sex Discrimination Act 1975: in doing so the Court erred.⁴⁷

One could assert that the narrative structure of the judgment is defined more by the generic narrative structure of the Court's judgments than anything specific to this ruling. There would be some merit to this claim: in that judgments, especially those by the same court, do have similarities in their structure.⁴⁸ It is therefore of particular importance to draw one's attention to para 265, where the Court summarised their own reasoning: it is this process, more than the preceding 80 pages, although those 80 pages often mirror this summary, that the Court illustrated the narrative structure of their judgment; it is this summary which most acutely exposed the flaws; and, it is in this summary where the centrality of their interpretation of the Sex Discrimination Act 1975 came to the fore.

⁴⁶ The act of consolidation must also lend credibility to the assertion of the Inner House that the term may be employed differently, depending on the context in which it is used. This will be addressed in greater detail in due course.

⁴⁷ See: *For Women Scotland* [2025] UKSC 16 [36]–[53].

⁴⁸ See, for example: Di Donato, *The Analysis*, *supra* 19, 169–172.

The decision to depart with a consideration of the Sex Discrimination Act, by their own reasoning, was a peculiar one. Especially as, despite this very reasoning, their consideration of the Sex Discrimination Act was central to framing the entire analysis of the Equality Act.⁴⁹ This was compounded by the manner in which the Supreme Court conducted their analysis; under the heading of *The legal background: the Sex Discrimination Act 1975*.⁵⁰ The Court was already framing their conclusion. Before determining whether the terms of the Equality Act, when read in light of other extant legislation, were sufficient to answer the question, the Court reached into the past, to present the law in anachrony, instead.⁵¹

At this point, it must be stressed that the Court never provided a satisfactory answer as to the degree to which the Equality Act consolidated, and therefore maintained, or amended existing non-discrimination provisions at the point of adoption.⁵² To do so would undermine their narrative: one constructed out of the Sex Discrimination Act 1975. In order to arrive at the conclusions that the Court did, they were required to reach beyond the Equality Act; in reaching beyond, however, the Court could not meaningfully interrogate the extent to which it would actually be necessary, while maintaining the narrative structure of their judgment. One therefore arrives at a position where the Court's own logic demands a deeper interrogation of the nature of the Equality Act, especially in the relationship to the Sex Discrimination Act 1975. To do so, however, would undermine the very reason it was necessary in the first place.

The Court, in moving to consider the case law on the matter, opined that, 'the common law of England and Wales did not recognise the possibility of a person becoming a different gender from their gender at birth'.⁵³ The decision to frame this through the perspective of gender as opposed to sex is particularly revealing: almost as if it is necessary to

⁴⁹ See, among other instances: *For Women Scotland* [2025] UKSC 16 [80], [164], [265].

⁵⁰ *Ibid.* [36]–[53].

⁵¹ *Ibid.* [50]–[53].

⁵² *Ibid.* [113].

⁵³ *Ibid.* [54].

allow for the construction of ‘biological’ sex.⁵⁴ To this end, the Supreme Court relied *inter alia* on the decision of the High Court judgment, given by Ormrod J, in *Corbett v Corbett*.⁵⁵ This, however, does not support the assertion of the Supreme Court. Justice Ormrod, in his ruling, was precise in his use of language: he distinguished between sex and gender, though admittedly did not provide a definition for the latter.⁵⁶

In *obiter dicta*, Justice Ormrod recognised the quagmire that would arise where there was no congruence between the biological characteristics of sex, as in the case of an intersex individual.⁵⁷ In this regard, he emphasised that, ‘these criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination’.⁵⁸ Despite the law having been fundamentally modified in this area in the half a century since, this must be a central feature of *Corbett*: even when the law recognises biological indicators of sex, it is a principally legal determination.⁵⁹ In any case, by the time that the Supreme Court considered this, they had already negligently concluded that sex under the Sex Discrimination Act 1975 should be interpreted as ‘biological’ sex.⁶⁰

⁵⁴ The focus on gender at this point in the judgment acts to legitimate the Supreme Court’s interpretation, by minimising the implications that the Gender Recognition Act had. The Court could thereby articulate the Gender Recognition Act as a mechanism to modify gender not sex. This neglects the conflation of the two concepts across UK law.

⁵⁵ The case – if not for the prior medical training of Ormrod J, which enabled a more technical assessment of the facts – would be an almost inconsequential case in English legal history. Instead, Ormrod J, in adjudicating on the validity of a marriage between a man and a post-operative trans woman considered that sex for the purpose of marriage was determined on the basis of congruence between gonadal, chromosomal and genital sex. In doing so, it must be stressed, Ormrod J gave little credence to the submissions of doctors that asserted that sex was also grounded in psychological and hormonal bases. Ormrod’s judgment was consequently given considerable weight in the adjudication of similar matters across a variety of legal fields. *Corbett v Corbett (otherwise Ashley)* [1970] 2 W.L.R. 1306, [1971] P 83 (*Corbett*).

⁵⁶ *Ibid.* 107.

⁵⁷ *Ibid.* 106; see also: Christopher Hutton, ‘Legal Sex, Self-Classification and Gender Self-Determination’ (2017) 11 *L & Hum* 64.

⁵⁸ *Corbett* 100.

⁵⁹ See: *For Women Scotland Ltd v The Scottish Ministers* [2023] CSIH 37 (*For Women Scotland*) [44]; *Corbett* 100; see also: Hines, ‘Sex Wars’, *supra* 11, 710; Ralph Sandland, ‘Feminism and the Gender Recognition Act 2004’ (2005) 13 *Fem Leg Stud* (2005) 43, 61–62.

⁶⁰ *For Women Scotland* [2025] UKSC 16 [51].

Moreover, *Corbett v Corbett* was decided in 1970. It would be foolish to attempt to interpret such a judgment outside of the societal changes that have taken place in the ensuing decades: the attempt to do so is a thinly veiled attempt to construct narrative continuity.⁶¹ In *Bellinger v Bellinger*, Lord Justice Thorp, dissenting from the Court of Appeal, asserted that, especially within the field of family law, attention must be given to interpreting the law in a way that reacts to and reflects social change.⁶² In doing so, he asserted, even before the Gender Recognition Act, that *Corbett* was, in principle, a matter of anachrony.⁶³

The way in which sex is understood in law cannot be principally a matter of biology: the law may try to construct its own meaning of biology; however it must be understood as distinct from being biological.⁶⁴ The incapacity of law to truly internalise biological sex is – as was addressed above – identified by the Court in *Corbett*. As such, to conclude that the Sex Discrimination Act necessarily depends on ‘biological’ sex is without basis: it, at best, constructs a conceptualisation of sex in law. To this extent, the Inner House asserted that, since the passage of the Gender Recognition Act, the rule in *Corbett* is marginal: it must be understood within the context of its anachrony.⁶⁵

The extent to which *Corbett*, in particular, can continue to be invoked, as has already been alluded to, is dubious at best. In 2002 the Grand Chamber of the European Court of Human Rights (ECtHR) held in *Goodwin v the United Kingdom* that the inability of trans individuals to *inter alia* have their birth certificates amended constituted a violation

⁶¹ Kahn, *The Cultural Study*, *supra* 38, 46; Fitzpatrick, *Modernism*, *supra* 3, 85–90.

⁶² The two other justices of appeal, however, concluded that *Corbett* reflected the law as it stood. On appeal to the House of Lords, the Lords of Appeal in Ordinary found with the majority of the Court of Appeal; however, the House of Lords, also, issued a declaration of incompatibility under s 4 of the Human Rights Act. This was rectified by the passage of the Gender Recognition Act, at which point these cases fell into anachrony. What is pertinent about the dissent is, therefore, the fact that some believed – albeit not many – *Corbett* to be anachronous already prior to this. *Bellinger v Bellinger* [2001] EWCA Civ 1140, [2002] Fam 150 [160] (Thorpe LJ).

⁶³ *Bellinger v Bellinger* [155], [160] (Thorpe LJ); see also *Goodwin* para 53.

⁶⁴ Laura Grenfel, ‘Making Sex: Law’s Narratives of Sex, Gender and Identity’ (2003) 23 *Leg Stud* 66, 94; see also: Di Donato, *The Analysis*, *supra* 19, 33–34.

⁶⁵ *For Women Scotland* [2023] CSIH 37 [38].

of Art. 8 of the ECHR.⁶⁶ It was in direct response to this that Parliament passed the Gender Recognition Act 2004. This provided a framework, under Section 9, for an individual to change their sex in law and to consequently be issued with a Gender Recognition Certificate. In doing so, it set out that:

- (1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).
- (2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).
- (3) Subsection (1) is subject to provision made by this Act or any other enactment or any subordinate legislation.⁶⁷

The Supreme Court asserted, in *For Women Scotland*, that – at the passage of the Gender Recognition Act – the exception contained in Section 9(3) was applicable to the Sex Discrimination Act.⁶⁸ This was grounded in the fact that the Gender Recognition Act did not explicitly amend the definitions of ‘man’ or ‘woman’ within the terms of the Sex Discrimination Act.⁶⁹ In reaching this conclusion, the Court erred. It would have made little sense if the Gender Recognition Act had amended the definitions contained within the Sex Discrimination Act because the purpose of the 2004 Act was to materially change – or at the very least provide a mechanism to change – the composition of the groups

⁶⁶ *Goodwin* para 93; see also: Maciej Rzewuski, ‘One Person, Two Identities: The Problem of Legal Gender Recognition of a Transgender Person in Europe’ (2025) 43 *Behavioral Sci & L* 149.

⁶⁷ Gender Recognition Act 2004 s 9.

⁶⁸ *For Women Scotland* [2025] UKSC 16 [103]–[104].

⁶⁹ *Ibid.* [80]–[82].

as they were already defined. The language in Section 9(1) closely mirrors the definitions contained within the Sex Discrimination Act 1975 for this very reason.

Equally, Section 9(1) is defined in explicitly broad terms: it would, therefore, appear reasonable to require considerable evidence to rebut the presumption in favour of Section 9(1).⁷⁰ The Supreme Court appears to have had no evidence to support this, asserting that little evidence existed in favour of applying Section 9(1) to the Sex Discrimination Act.⁷¹ This, however, neglects the consideration that was afforded to the matter by the Joint Committee on Human Rights in their report of the Bill as it was passing through Parliament.⁷² The parentheses found in Section 9(1) were included on the recommendations of the Committee, so as to ensure trans people could benefit from the protections afforded by *inter alia* the Sex Discrimination Act.⁷³ It would appear disingenuous to reach a conclusion other than that the material composition of ‘men’ and ‘women’ under the Sex Discrimination Act 1975 was, as a matter of fact, modified by the passage of the Gender Recognition Act 2004, and that it was done so knowingly.⁷⁴

By comparison, the language to define ‘gender reassignment’ as a protected characteristic, within the scope of the Equality Act 2010, differs quite notably from the provisions of the Gender Recognition Act 2004, in that it extends to a far larger group of people. Individuals benefit from protection under the Equality Act from the moment they express a desire to transition.⁷⁵ In doing so, one would reasonably

⁷⁰ This was noted by the Inner House: *For Women Scotland* [2023] CSIH 37 [40]–[42]; it is also a broader principle for interpreting human rights law: *Halsbury’s Laws* (4th edn, 1995) vol 44(1) para 1379; Brice Dickson and Conor McCormick, ‘Northern Ireland Dimensions to the First Decade of the United Kingdom Supreme Court’ (2020) 83 *MLR* 1133, 1141; Lewis Graham, ‘Has the UK Supreme Court Become More Restrained in Public Law Cases?’ (2024) 87 *MLR* 1073, 1082.

⁷¹ *For Women Scotland* [2025] UKSC 16 [80]–[82].

⁷² See: Joint Committee on Human Rights, *Draft Gender Recognition Bill* (2002–2003, HL 188-I, HC 1276-I) para 93–95.

⁷³ Sandland, ‘Feminism’, *supra* 59, 45; for the Court’s own consideration of the parentheses, see: *For Women Scotland* [2025] UKSC 16 [97].

⁷⁴ See also: *For Women Scotland* [2023] CSIH 37 [42].

⁷⁵ Equality Act s 7; *For Women Scotland* [2025] UKSC 16 [200].

conclude that Parliament knowingly introduced a protection that was to apply to all trans people, not only those who had obtained a Gender Recognition Certificate.⁷⁶ In this regard, it is important to consider the specific function of obtaining a Gender Recognition Certificate: namely, to obtain recognition of a person's sex in law. This must include an entitlement to protection from discrimination on the basis of one's legal sex.

The Supreme Court, in first considering the terms of the Sex Discrimination Act, framed the rest of their judgment through their dubious interpretation of the Sex Discrimination Act. Anachrony, while central to the way in which the law is understood, must be used responsibly: to contextualise the law as it persists. The Court did not manage this. By their own logic, the Court should have attempted to interpret the Equality Act independently of the provisions it repealed. In any case, the Court should have first situated their interpretation, where possible, within extant law. Instead, they employed anachrony to mould the law to their will. While departing from a consideration of the Equality Act would not rid the judgment of its flaws, it would expose many of them.

4. 'UNWORKABLE, INCONSISTENT AND INCOHERENT':⁷⁷ THE CASE FOR RECONSTRUCTING THE NARRATIVE

The Supreme Court grounded their decision on the basis that it would be impossible to interpret the Equality Act in any other manner, stating that the 'provisions would be unworkable, inconsistent and incoherent if they bore a certified sex meaning'.⁷⁸ Such an accusation is fatal. Peter Fitzpatrick, considering the role of law more broadly, writes that, 'if [the law] were not coherent but contradictory, something else

⁷⁶ See: *For Women Scotland* [2023] CSIH 37 [47]; *For Women Scotland* [2025] UKSC 16 [199]–[201].

⁷⁷ *For Women Scotland* [2025] UKSC 16 [197].

⁷⁸ *Ibid.*

could be called on to resolve the contradiction'.⁷⁹ The consequence of this would be to deprive the law of its hegemonic grasp.⁸⁰ However, in reaching this conclusion, the Court afforded limited consideration to how unworkable the provisions become as a result of their own interpretation. The disregard shown by the Court to the implications of their own position is untenable. It results in a situation where the Equality Act itself is almost devoid of meaning.

The Court's conclusions are largely a result of either: (a) their pre-conceived definition of sex; or, (b) their failure to give due attention to the broader legal and practical implications of their conclusion. The convergence of these two points results in a conclusion that seems devoid of any serious basis, riddled with logical fallacies and at times simply wrong. As a result, much of the decision, and in particular its narrative structure, is employed in concealing missing premises and parroting trans-exclusionary rhetoric.

In framing the judgment, the Court went to great lengths to qualify their own role in interpreting the way in which language is used within law. In para 2, they stated that, 'it is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word "woman" other than when it is used in the provisions of the EA 2010'.⁸¹ Such a qualification of the Court's role would be expected, and one could therefore quite easily come to the conclusion that it is reasonable.⁸² One should note, however, that the Court was already providing a basis for a distinct definition under the Equality Act: given the particular scope of the case this is peculiar to say the least.

⁷⁹ Fitzpatrick, *Modernism*, *supra* 3, 71.

⁸⁰ See: Maureen Cain, 'Gramsci, the State and the Place of Law' in David Sugarman (ed) *Legality, Ideology and the State* (Academic Press 1983) 101–104; Butler, *Gender Trouble*, *supra* 11, 5.

⁸¹ *For Women Scotland* [2025] UKSC 16 [2].

⁸² In this the Court is situating their interpretive role firmly within the domain of law, as opposed to the broader consideration of the topic within the press and in politics. This is no doubt influenced by the attacks that the judiciary in the UK has been subjected in the past decade. See, for a more detailed consideration of the role of politics in the process of interpretation: Lewis Graham, 'Judges and Politics in UK Courts' in Robert M. Howard, Kirk A. Randazzo, and Rebecca A. Reid, *Research Handbook on Law and Political Systems* (Edward Elgar 2023).

However, despite their recognition of the contentious nature of the public discourse, and the centrality of the definition of sex to the question before the Court, they provided limited consideration to the method for defining a word. Instead, they declared, in para 171, that:

The definition of sex in the EA 2010 makes clear that the concept of sex is binary, a person is either a woman or a man. Persons who share that protected characteristic for the purposes of the group-based rights and protections are persons of the same sex and provisions that refer to protection for women necessarily exclude men. Although the word ‘biological’ does not appear in this definition, the ordinary meaning of those plain and unambiguous words corresponds with the biological characteristics that make an individual a man or a woman. These are assumed to be self-explanatory and to require no further explanation. Men and women are on the face of the definition only differentiated as a grouping by the biology they share with their group.⁸³

To borrow the words of the court, this is a ‘plain and unambiguous’ abdication of their own responsibility. One must also note the delusion of declaring that the definition of the word, central to deciding a matter that required a judgment running to nearly 90 pages, and in which both the Inner and Outer Houses of the Court of Session ruled to the contrary, to have a plain and unambiguous meaning.⁸⁴ The Inner House concluded that both in law more broadly, and specifically within the context of the Equality Act ‘sex’ and ‘gender’ are used interchangeably.⁸⁵ To adopt a definition based on the common usage of ‘sex’ without first contesting this point is nothing short of a dereliction of the Court’s function.⁸⁶

⁸³ *For Women Scotland* [2025] UKSC 16 [171].

⁸⁴ See: James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community* (University of Chicago Press 1984) 259–260.

⁸⁵ *For Women Scotland* [2023] CSIH 37 [52].

⁸⁶ Yon Maley, ‘The Language of the Law’ in John Gibbons (ed) *Language and the Law* (Longman 1994); Christopher Hutton, ‘Hiding in Plain Sight: The Category of Ordinary Language and the Case Law Domain of Transgender Marriage’ in Janny H.C. Leung and Alan

It is also fundamentally wrong. The premise that binary sex is evidence of a biological grounding is both preposterous and rooted in a long and harmful discourse.⁸⁷ In fact, it is evidence that within law there is greater concern for enforcing a socio-political definition (i.e. gender), than any fidelity to biology.⁸⁸ The law cannot stop the birth of intersex individuals; it can, however, disgracefully attempt, at least in law, to erase those who refuse to live within a binary conception of gender.⁸⁹ To this end, Butler writes that, ‘the law is not simply a cultural imposition on an otherwise natural heterogeneity; the law requires conformity to its own notion of “nature” and gains its legitimacy through the binary and asymmetrical naturalization of bodies’.⁹⁰ The Supreme Court in their zealous pursuit of their conclusions, and despite their claim to a biologic justification for their conclusions, displayed a profound lack of fidelity to any scientific basis.

The Court’s approach to equality law, and in many respects the law itself, was two-dimensional: incapable of capturing the lived identities of individuals. Instead, the Court attempted to reduce these complex identities, which the Equality Act sets out to protect, to the individual characteristics which the Equality Act uses as a means to protect, and to further reduce these protected characteristics to a caricature beyond serious recognition. It is this reductionist approach, alone, which enabled the Court, in an attempt to justify their position, to assert that:

Durant (eds) *Meaning and Power in the Language of Law* (Cambridge University Press 2018); *Halsbury’s Laws* vol 44(1) para 1389.

⁸⁷ Hines, ‘Sex Wars’, *supra* 11, 709; see also: Veronica Sanz, ‘No Way Out of the Binary: A Critical History of the Scientific Production of Sex’ (2017) 43 *Signs* 1; Sonja Erikainen, *Gender Verification and the Making of the Female Body in Sport: A History of the Present* (Routledge 2019).

⁸⁸ Kathryn J. Perkins, ‘To Run Like a Girl: State Transmisogyny and the Legal Construction of Gender in *Hecox v. Little* (2020)’ in Mary Caputi and Patricia Moynagh (eds) *Research Handbook on Feminist Political Thought* (Edward Elgar 2024); see also: Butler, *Gender Trouble*, *supra* 11, 186–188; Kate Malleson, ‘Equality Law and the Protected Characteristics’ (2018) 81 *MLR* 598, 605–606.

⁸⁹ See, among others: Sandland, ‘Feminism’, *supra* 59, 50; Hines, ‘Sex Wars’, *supra* 11, 704–705.

⁹⁰ Butler, *Gender Trouble*, *supra* 11, 135.

A certificated sex interpretation would cut across the definition of the protected characteristic of sex in an incoherent way ... We can identify no good reason why the legislature should have intended that sex-based rights and protections under the EA 2010 *should apply to these complex, heterogenous groupings, rather than to the distinct group*.⁹¹ (emphasis added)

In this one paragraph, the inconsistent and incoherent position adopted by the Court comes to the fore. As will be considered in much greater detail below, the Court made only a passing reference to the provisions relating to combined discrimination within the Equality Act and, in doing so, they neglected the diversity of individuals who should be entitled to protection. Moreover, the Court, in adopting this position, implied that a 'biological' determination would create a group of cis women and trans men and a group of cis men and trans women, which by some contrived logic would be *more* homogeneous: this seems an untenable position.⁹² The Court's desire for homogenous groups, which maintain static and uniform identities, is, if one is to be generous, delusional, and, if one feels less so, authoritarian.

Moreover, while the Court went to considerable lengths, in para 2, to qualify their role in defining many terms, the Court appeared to have no such qualm in defining the sexual identity of lesbians.⁹³ The Court employed interventions by trans exclusionist organisations to justify the rigidity with which they approached queer identities. Sexual identities are complex and individual, the fact that the Court felt competent to define queerness is as shallow as their attempt to define womanhood.⁹⁴ Sexual identity, like gender, is a product of continual negotiation and renegotiation.⁹⁵ This is compounded by the manner in which

⁹¹ *For Women Scotland* [2025] UKSC 16 [172].

⁹² See: Hines, 'Sex Wars', *supra* 11, 710.

⁹³ See: *For Women Scotland* [2025] UKSC 16 [206].

⁹⁴ M. Paz Galupo, 'Bisexuality: Complicating and Conceptualizing Sexual Identity' (2011) 11 *J Bisexuality* 545; see also: Sandland, 'Feminism', *supra* 59, 54.

⁹⁵ Volker Woltersdorff, 'Paradoxes of Precarious Sexualities' (2011) 25 *Cult Stud* 164, 171–173; see also: Judith Butler, 'Imitation and Gender Insubordination' in Diana Fuss (ed) *Inside/Out: Lesbian Theories, Gay Theories* (Routledge 1991); Judith Butler, *Who's Afraid of Gender* (Allen Lane 2024).

the renegotiation of sexual identity and gender occurs: influencing and mutually shaping the other.⁹⁶ All of this is to say that the position that the Court adopted, in advancing their conclusions, disregards the complexity with which queerness is understood by many queer people.⁹⁷

In many instances, the Court's conclusion that sex must refer necessarily to 'biological' sex depends, in fact, on their presumptions in favour of a 'biological' interpretation, which form a substantial part of the premise. For instance, in para 231, the Court stated that:

A certified sex meaning applied to these exceptions would make it impossible for any women's association or charity – including, for example, a mutual support association for women who are victims of male sexual violence, a lesbian association, a breast-feeding support charity – to be set up or to pursue a dedicated purpose which is directed at the needs of biological females.⁹⁸

It must be stated clearly: it would not. All it would do is to change the beneficiaries of such an organisation. The Supreme Court, in adopting this position, refused to recognise the vulnerability and humanity of trans people, and trans women in particular.⁹⁹ The Court, in a similar vein, posited the question that, 'if sex means certified sex, how can an organisation consider the needs of, or disadvantage to, women separately from men?'¹⁰⁰ In asking this question, the Supreme Court lays bare its own view: that trans women are not women and that trans men are not men. If they were to answer the question of the case in good faith, it would become apparent that this subsidiary question was devoid of

⁹⁶ See, among others: M. Paz Galupo, Shane B. Henise, and Nicholas L. Mercer, "The Labels Don't Work Very Well": Transgender Individuals' Conceptualizations of Sexual Orientation and Sexual Identity' (2016) 17 *Int J Transgenderism* 93.

⁹⁷ Butler, *Gender Trouble*, *supra* 11, 26–30; Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (Routledge 1993) 226–230; Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Duke University Press 2006); Katharina Kehl, *Boundaries of Queerness: Homonationalism and Racial Politics in Sweden* (Cambridge University Press 2024).

⁹⁸ *For Women Scotland* [2025] UKSC 16 [231].

⁹⁹ See: Serano, *Whipping Girl*, *supra* 11, 192; Perkins, 'To Run Like a Girl', *supra* 88, 97.

¹⁰⁰ *For Women Scotland* [2025] UKSC 16 [240].

meaning – the usage of ‘certified’ sex in this instance can only pose an issue if one holds a predetermined definition of ‘woman’ and ‘man’ respectively. The provisions of the Equality Act do not require *prima facie* such an interpretation; the Court’s reductionist understanding of gender, however, does.

All of this is compounded, through the course of the judgment, by the increasingly trans-exclusionary language used by the Supreme Court: for instance, when they opined that a, ‘competition organiser could refuse to admit all men, including trans women regardless of the GRC status’.¹⁰¹ The Court in formulating their conclusions, as such, showed a lack of fidelity in trans identity and in particular a disregard for the purpose of the Gender Recognition Act 2004. While the language available to the law presents a noted issue, the Supreme Court showed, when it is to the benefit of their own conclusions, the capacity to differentiate with a degree of precision.¹⁰² In those instances, where they chose not to, it is apparent.

The Court was, to a large extent, able to adopt the position it took because of the comparisons they chose to make, and the ones that they neglected. The Court extensively considered the material distinction between a trans individual with a Gender Recognition Certificate to one without.¹⁰³ In doing so, the Court often neglected the intended legal consequences of obtaining one: namely to modify the way in which law recognises one’s gender.¹⁰⁴ This will be returned to. However, the Court rarely, if ever, seriously considered the distinction between a cisgender and transgender man or between a cisgender and transgender woman.¹⁰⁵ The Court’s simplistic and reductionist approach to addressing inequality required this to be disregarded: the judgment can only appear coherent, and one can doubt whether it ever does, if only half the story is told.

In doing this, the Court neglected that this reductionist approach demands that gender is performed in a uniform way.¹⁰⁶ To this end,

¹⁰¹ *Ibid.* [236].

¹⁰² See, for example: *ibid.* [54]; see also, with regard to the interchangeable use of language in law: *For Women Scotland* [2023] CSIH 37 [37].

¹⁰³ See, among other instances: *For Women Scotland* [2025] UKSC 16 [184], [213], [228].

¹⁰⁴ See, among other instances: *ibid.* [184], [202].

¹⁰⁵ See, for example: *ibid.* [134].

¹⁰⁶ In this regard, see: Serano, *Whipping Girl*, *supra* 11, 181.

the Court is fixated on those individuals that may possess a Gender Recognition Certificate, however, do not present in a manner the Court deems appropriate or in the words of the Court, ‘whose biological sex is likely to be readily identifiable’.¹⁰⁷ This line of reasoning is riddled with numerous issues. The most practical one is that those whose performance of gender is satisfactory to the Courts, will by definition be without apparent distinction from cisgender individuals. Therefore, in suggesting that sex should be interpreted in the way the Court does, they do not offer a practicable solution. They simply ensure that those who perform gender in a way which does not conform with the expectations of others will become liable to harassment. The Court appeared to be aware of this result. They assert that the decision will not have an impact on the rights of trans people because they will continue to enjoy protection from discrimination as a result of having a perceived characteristic.¹⁰⁸ This will only ever cover those who can satisfy courts that they can conform: those who are capable of performing gender within the rigid confines that the courts would be required to validate as authentic. In fact, the reasoning of the Court, if not for the extensive trans-exclusionary rhetoric, would logically have resulted in the conclusion that, within reason, self-identification must be the principal basis for determining identity.¹⁰⁹

All of this is to say, that the Court’s conclusions, despite asserting a desire to avoid incoherence and inconsistency, and to ensure that the provisions are workable, left a position that is fundamentally worse than that of the of the Inner House of the Court of Session. In that, where the Court of Session found compromise in the utilisation of a variable

¹⁰⁷ *For Women Scotland* [2025] UKSC 16 [228].

¹⁰⁸ *Ibid.* [249].

¹⁰⁹ The Court’s utilisation of comparison – primarily between a trans person with and one without a Gender Recognition Certificate – neglects that there will be no clarity with which to distinguish between a trans individual with a GRC, from one without, nor from a cis individual of the same gender identity. To attempt to do so would likely give rise to a breach of the provisions prohibiting harassment. This, in turn, provides a clear conclusion: outside of a limited number of particular instances, one must rely on the self-identification of individuals. See: Butler, *Who’s Afraid of Gender*, *supra* 95, 164.

definition, something which the Supreme Court found unacceptable; the Supreme Court – in pursuit of this alleged coherence – failed to account for the consequences of their own conclusions. Consequences which render much of equality law incomprehensible. The Supreme Court attempted to construct a façade of consistency and coherence: this was only possible through the negligent abdication of their responsibility, in favour of parroting trans-exclusionary rhetoric. The Court was required to conceal the inherent inconsistencies in their own position to even afford it a modicum of plausibility. Put simply, at least to a certain degree, the Equality Act is inconsistent and is only workable when one accepts that in different contexts the same word may have been used to refer to different groups of people, and any attempt to read it in isolation from its explicit aim or from human rights and equalities legislation, more broadly, will inevitably result in a situation which is unworkable, inconsistent and incoherent, in a manner that is both unpredictable and unresolvable.

5. RECONSTRUCTING THE NARRATIVE IN *FOR WOMEN SCOTLAND LTD V THE SCOTTISH MINISTERS*

It is apparent that the judgment of the Court was inadequate, to say the least. Having detailed the broader reasons for this, it is now imperative to address some of the most egregious omissions from the Court's narrative. In doing so, to the extent that it is possible, the aim is to abstract that which is sound from that which is erroneous. One may wish to imagine law as coherent and consistent, however, it rarely is.¹¹⁰ In the case of the Equality Act, it will become apparent that there is no way to achieve coherence within its provisions. Instead, this process of reconstruction will be focused on giving meaning to the language of the law, in light of its stated aspiration and the broader legal framework that exists.

¹¹⁰ See: Douzinas, Warrington, and McVeigh, *Postmodern Jurisprudence*, *supra* 3, 106; Fitzpatrick, *Modernism*, *supra* 3, 71.

In reconstructing the Court's narrative, it is important to consider the interrelation between different protected characteristics. Firstly, one must consider the neglect by the Court to devote any attention, beyond a passing reference to the provisions on combined discrimination especially by considering the relationship between 'sex' and 'gender reassignment' through the framing of and informed by transmisogyny. Secondly, it is important to consider the way in which the Court treated 'pregnancy and maternity' – a protected characteristic in its own right, distinct from 'sex' – in its judgment. After this, one will reflect on the absence – other than for a few limited references – of the Human Rights Act 1998 from the Court's judgment.

a. Combined Discrimination and Transmisogyny

The Court only made a passing reference to the combined discrimination provisions within the Equality Act. Given the extent to which the claim for judicial review must be understood through the lens of transmisogyny, this is most peculiar. This is compounded by the claimant's assertion that to recognise the intersection of 'sex' and 'gender reassignment' is to conflate them, something which the Supreme Court appeared to parrot.¹¹¹ To properly draw attention to deficiencies within the judgment of the Supreme Court, one must address what they chose to neglect.

The ability of the law to recognise and respond to discrimination that arises from the intersection of multiple protected characteristics has, historically, been found wanting, to say the least. Kimberlé Crenshaw, through her theorisation of intersectionality, detailed the barriers that the predominant view of equality created for those who were left unable to articulate the discrimination they faced as a consequence of a singular protected characteristic.¹¹² Crenshaw goes on to concretely illustrate how this is the product of anti-discrimination

¹¹¹ See: *For Women Scotland* [2023] CSIH 37 [19]; *For Women Scotland* [2025] UKSC 16 [198].

¹¹² Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 139.

frameworks that operate on a singular axis, thereby protecting those most privileged, those most able to articulate discrimination as the sole consequence of one characteristic.¹¹³ Intersectionality thereby provides a lens through which to fundamentally reimagine non-discrimination protections, and in doing so provides a language through which to articulate transmisogyny.¹¹⁴

The broader equalities framework established under the Equality Act 2010, in part brought about by consolidating disparate protections, went some way to ensuring protections against discrimination that arose from the intersection of multiple protected characteristics.¹¹⁵ Section 14 sets out that:

- 1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.
- 2) The relevant protected characteristics are:
 - a) age;
 - b) disability;
 - c) gender reassignment;
 - d) race;
 - e) religion or belief;
 - f) sex;
 - g) sexual orientation.
- 3) For the purposes of establishing a contravention of this Act by virtue of subsection (1), B need not show that A's treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).
- 4) 4–7 *Omitted by Author*.¹¹⁶

¹¹³ *Ibid.* 151–152.

¹¹⁴ *Ibid.* 151–152; Serano, *Whipping Girl*, *supra* 11; see also, for example: Hines, 'Sex Wars', *supra* 11; Sean Arayasirikul and Erin C. Wilson, 'Spilling the T on Trans-Misogyny and Microaggressions: An Intersectional Oppression and Social Process Among Trans Women' (2018) 66 *J Homosexuality* 1415.

¹¹⁵ See: Alex Sharpe, 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?' (2020) 83 *MLR* 539; Malleon, 'Equality Law', *supra* 88, 615–620.

¹¹⁶ Equality Act 2010 s 14.

In this manner, the Equality Act directly responds to the important critique that Crenshaw levelled against many non-discrimination provisions. It provides a basis for those who experience discrimination grounded in multiple intersecting characteristics that cannot be articulated simply. One ought to note that only one of the protected characteristics established under the Equality Act 2010 is not listed: pregnancy and maternity. This fact will be returned to later.

The failure of the Court to properly situate the case within the scope of the combined discrimination faced by trans women – on account of both their ‘gender reassignment’ and their ‘sex’ – fundamentally undermines the broader protections included within the Equality Act. The Court instead asserted that:

A certificated sex interpretation would cut across the definition of the protected characteristic of sex in an incoherent way. References to a ‘woman’ and ‘women’ as a group sharing the protected characteristic of sex would include all females of any age (irrespective of any other protected characteristic) and those trans women (biological men) who have the protected characteristic of gender reassignment and a GRC (and who are therefore female as a matter of law). The same references would necessarily exclude men of any age, but they would also exclude some (biological) women living in the male gender with a GRC (trans men who are legally male). The converse position would apply to references to ‘man’ and ‘men’ as a group sharing the same protected characteristic. We can identify no good reason why the legislature should have intended that sex-based rights and protections under the EA 2010 *should apply to these complex, heterogenous groupings, rather than to the distinct group* of (biological) women and girls (or men and boys) with their shared biology leading to shared disadvantage and discrimination faced by them as a distinct group.¹¹⁷ (emphasis added)

However – as an aside from the inconsistency and incoherency of this position, which was addressed above – this position fundamentally

¹¹⁷ *For Women Scotland* [2025] UKSC 16 [172].

neglects the structure of the Equality Act. The Court in their interpretation drew a direct relationship between each of the protected characteristics and a defined and homogeneous group. This does not appear consistent with the provisions of the Equality Act. Many of the protected characteristics under the Equality Act are possessed by all people and, as such, the ‘groups’ are inherently heterogeneous and intersecting.¹¹⁸ The Court’s interpretation, by comparison, risked reducing these complex groups to a single perspective; something which parliament explicitly legislated against. This would inevitably, as is already being displayed, deprive the most vulnerable of protection, as, in the words of Crenshaw, ‘the focus on the most privileged group members [namely: those who can best assert a claim to homogeneity] marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination’.¹¹⁹ Such a situation, as the Supreme Court has now created, risks leaving the combined discrimination provisions devoid of any meaning.

This is exemplified in the Court’s proposition that, ‘where gender reassignment is the protected characteristic, in the case of a male person proposing to or undergoing gender reassignment to the opposite sex, the correct comparator is likely to be a man without the protected characteristic of gender reassignment and similarly for a woman’.¹²⁰ This statement neglects the complexity of the discrimination faced by trans people and, in particular, neglects the distinction between those individuals in possession of a Gender Recognition Certificate and those without. At various points in their judgment, the Court dedicated considerable attention to this distinction, although here it is obscured in the omission of those who have ‘undergone’ gender reassignment from the Court’s assessment. In many instances, attempting to compare trans men with cis women or trans women with cis men would be nonsensical. This is not least because, in the words of Julia Serano, ‘much of the anti-trans

¹¹⁸ See: Butler, *Gender Trouble*, *supra* 11, 6; Butler, *Who’s Afraid of Gender*, *supra* 95, 149.

¹¹⁹ Crenshaw, ‘Demarginalizing’, *supra* 112, 140; see also: Serano, *Whipping Girl*, *supra* 11, 2.

¹²⁰ *For Women Scotland* [2025] UKSC 16 [134].

discrimination that trans women come across is clearly rooted in traditional sexism'.¹²¹

It must be stressed that unpacking the effects of gender discrimination faced by trans individuals is complex: trans women face discrimination as a result of navigating the world as women; trans men relinquish some of this, however their lives continue, at least partially, to bear witness to the effects of gender discrimination.¹²² This complexity is compounded by a legal system that fails to provide adequate mechanisms to recognise those that identify outside of this binary distinction. Despite this, the centrality of comparison to the current structure of equality law demands a level of understanding which equality law at present is unable to internalise.¹²³ Similarly, whether an individual possesses a Gender Recognition Certificate, in practice, has little effect on the discrimination that they face; however, within the current legal framework, it is – or at least if it were not for the Supreme Court, would be – the *conditio sine qua non*. This is the purpose of a Gender Recognition Certificate: to enjoy the recognition and protection of one's sex in law.

It is therefore worth noting the conclusion of the Inner House, that 'A person with a GRC will necessarily have the protected characteristic of gender reassignment; and they will have a separate protected characteristic of sex, which will be that of their acquired sex. This does not involve in any way the conflation of two separate protected characteristics'.¹²⁴ In doing so, the Inner House recognised the ways in which trans women, in particular, face discrimination on the basis of their gender reassignment and of their sex. The assertion that to do so would conflate protected characteristics, as put forward by For Women Scotland and adopted by the Supreme Court, poses a considerable

¹²¹ Serano, *Whipping Girl*, *supra* 11, 187.

¹²² See, among others: Sharpe, 'Will Gender', *supra* 115, 553; Kristen Schilt, *Just One of the Guys? Transgender Men and the Persistence of Gender Inequality* (The University of Chicago Press 2010).

¹²³ Hugh Collins, 'Discrimination, Equality and Social Exclusion' (2003) 66 *MLR* 16, 32; see also: Malleon, 'Equality Law', *supra* 88, 615–620; Sharpe, 'Will Gender', *supra* 115, 553–554.

¹²⁴ *For Women Scotland* [2023] *CSIH* 37 [52].

threat to the broader structure of UK equality law.¹²⁵ If one was to accept this reasoning then to consider the intersection of two or more protected characteristics would be to conflate them.¹²⁶

Throughout the judgment, there was a profound neglect by the Court in their understanding of the way in which people face discrimination on the basis of multiple intersecting grounds. Instead, the Court endorsed the argument that to properly understand the intersection of multiple protected characteristics – as is required by section 14 – would, in fact, be to conflate protected characteristics. This position poses a considerable threat to the protections afforded under the Equality Act to those who do not present in a manner that fits the narrow homogeneity pursued by the Supreme Court.

b. Pregnancy and Maternity: A Distinct Protected Characteristic

One feature of the Supreme Court's ruling that justifies the need for a 'biological' interpretation of sex was their treatment of provisions on pregnancy and maternity. The provisions on pregnancy and maternity within the Equality Act and the language that those provisions use do give rise to pause. However, the Court gave inadequate consideration to the distinction that exists between 'sex' as a protected characteristic on the one hand and 'pregnancy and maternity' on the other. In this section, one must reflect on the implications that the protection of 'sex' and 'pregnancy and maternity' – as distinct characteristics protected under the Equality Act – has for the broader interpretation of the Equality Act. In doing so, it is necessary to reconsider the use of gendered language in the two distinct protected characteristics and the role this had for the interpretation of 'woman' within the related provisions. In attempting to make sense of this, and the rule contained in *Imperial Tobacco*, the Inner House offered the possibility of a variable definition of the term 'woman' under the Equality Act; while the Supreme Court did not preclude the possibility of variable definitions, as

¹²⁵ See: *ibid.* [19]; *For Women Scotland* [2025] UKSC 16 [198].

¹²⁶ *For Women Scotland* [2025] UKSC 16 [199].

such, the Court concluded there was no justification for such a definition within the context of the case. This ought to be revisited.

In many instances, the Supreme Court provided insufficient consideration to the meaning afforded to each protected characteristic and the interrelation between them. This is best illustrated in the language used to address ‘pregnancy and maternity’ as opposed to ‘gender reassignment’: the former is ‘special’¹²⁷ while the latter is ‘distinct and separate’.¹²⁸ The Court attempted to diminish the distance between ‘sex’ and ‘pregnancy and maternity’ as protected characteristics, while in the instance of ‘gender reassignment’ attempting to emphasise it. The conflation of ‘pregnancy and maternity’ with ‘sex’ by the Supreme Court is particularly interesting – aside from the blatant hypocrisy of such a position – given that Parliament excluded ‘pregnancy and maternity’ from the combined discrimination provisions: thereby conferring on it a degree of autonomy from the other protected characteristics. This autonomy provides a basis on which to reasonably articulate the existence of a variable definition.

Turning to the specific provisions in question, Sections 17 and 18 of the Equality Act are most pertinent in defining discrimination on the basis of ‘pregnancy and maternity’: to this effect, Section 17(2) asserts that, ‘a person (A) discriminates against a woman if A treats her unfavourably because of a pregnancy of hers’.¹²⁹ In considering, these provisions the Supreme Court asserted that it would have been illogical for Parliament to exclude trans men, with a Gender Recognition Certificate, from the protections offered by these provisions.¹³⁰ Such a position would seem reasonable, however, it disregards the extent to which Parliament could have foreseen such an occurrence in 2010.¹³¹

¹²⁷ *Ibid.* [135].

¹²⁸ *Ibid.* [199].

¹²⁹ Equality Act 2010 s 17(2).

¹³⁰ *For Women Scotland* [2025] UKSC 16 [196].

¹³¹ At the time the Equality Act was passed, there had only been a handful of trans men who had given birth globally. By all accounts the first trans man (with a GRC) to give birth in the UK was Freddy McConnell, which became the basis of *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 (*McConnell*). See: Simon Hattenstone, ‘The Dad Who Gave Birth: “Being Pregnant Doesn’t Change Me Being a Trans Man”’ *The*

This inconsistency is compounded, if not explained, by the historically gendered nature of UK law and the particular way in which law has been drafted.¹³² To this extent, it is important to consider the manner in which drafting conventions pervaded over what could have otherwise been gender neutral. In instances pertaining to discrimination of the basis of sex the use of gendered language is of considerable importance to the way in which one could understand the provisions: one would rarely be able to assert it was intended to be gender neutral. In instances pertaining to pregnancy and maternity – where, unlike in determining discrimination under another protected characteristic, no comparison is undertaken – there is no reason to believe gendered language is necessary to the protections advanced.¹³³ The Supreme Court, in ruling, identifies a considerable issue. However, instead of using the tools available to them – to interpret the provision in a manner that would enable the Equality Act to be read in compliance with the ECHR, as will be considered momentarily – the Court instead employed it as a basis to deny trans people the protections of sex discrimination law.

This conclusion was largely facilitated by the Supreme Court’s interpretation of the rules of statutory interpretation (at least in regard to the Equality Act). As such, it becomes necessary to revisit the rules of statutory interpretation. The Inner House, in their reading of the rules of interpretation, as set out in *Imperial Tobacco*, concluded the pertinent issue was such that, ‘whenever the phrase or word occurs, its meaning within the particular context where it appears is clear and predictable’.¹³⁴ From this position, the Inner House was able to assert

Guardian (London, 20 April 2019) <www.theguardian.com/society/2019/apr/20/the-dad-who-gave-birth-pregnant-trans-freddy-mcconnell> (accessed 15 October 2025).

¹³² See: *Halsbury’s Laws* vol 44(1) para 1388; Thomas G. Watkin, ‘Gender Neutrality: Description and Prescription*’ (2022) 10 *TP Leg* 292, 296; see also, by analogy: Marguerite E. Ritchie, ‘Alice through the Statutes’ (1975) 21 *McGill LJ* 685; Wendy Martyna, ‘Beyond the “He/Man” Approach: The Case for Nonsexist Language’ (1980) 5 *Signs* 482; Giulia A. Pennisi, ‘Legislative Drafting and Gender: Some Linguistic Insights into English and Italian’ (2022) 10 *TP Leg* 305, 313.

¹³³ This is especially given the autonomous nature of the protection under the Equality Act 2010.

¹³⁴ *For Women Scotland* [2023] CSIH 37 [62].

that in precise circumstances a variable definition – the current case included – would be necessary. By contrast, the Supreme Court concluded that, ‘by its nature a variable definition is neither clear, constant nor predictable’.¹³⁵ However, despite this claim, the Supreme Court concede, a few paragraphs later, that a variable definition may not be precluded by the rules of statutory interpretation: this ‘falls far short of providing any compelling basis’¹³⁶ for using a variable definition of ‘woman’ under the equality act. This neglects that the Human Rights Act can provide this basis.

Moreover, *Halsbury’s Law* illustrates, in passing, the possibility for a variable definition of terms, citing another consolidating act which explicitly provides for a variable definition.¹³⁷ The failure of the Supreme Court to properly distinguish between the nature of the Equality Act as both consolidating prior legislation and reforming it, again presents a serious issue for the credibility of their own position. On the one hand, if the Equality Act simply consolidated various individual acts into a single legislative instrument, the need for a variable definition would seem reasonable; on the other, if the Act was meant to fully reform equalities legislation into a coherent body of law, such a variable definition may be less defensible. The fact that the Supreme Court left this matter unresolved gives rise to an untenable position.

In light of the foregoing, greater consideration should be dedicated to situating the possibility of a variable definition within the rules of statutory interpretation as set out in *Imperial Tobacco*, the broader rules of interpretation and the specific context that arises in *For Women Scotland*. It therefore becomes necessary to turn to the judgment in *Imperial Tobacco*, where the Supreme Court had ruled that:

The system that those rules laid down must, of course, be taken to have been intended to create a system for the exercise of legislative power by the Scottish Parliament that was coherent, stable and workable. ... The best way of ensuring that a coherent, stable and workable outcome is achieved

¹³⁵ *For Women Scotland* [2025] UKSC 16 [191].

¹³⁶ *Ibid.* [195].

¹³⁷ *Halsbury’s Laws* vol 44(1) para 1389.

is to adopt an approach to the meaning of a statute that is constant and predictable. This will be achieved if the legislation is construed according to the ordinary meaning of the words used.¹³⁸

Neither the Inner House nor the Supreme Court situated their interpretation of the rule contained within *Imperial Tobacco* in the context in which it was enumerated: namely the interpretation of the Scotland Act 1998 and the validity of Scottish laws adopted under it.¹³⁹ Within the context of the Scotland Act this presumption has merit; although it is at best a presumption capable of being rebutted.¹⁴⁰ By comparison, the Equality Act 2010 exists as a constituent part of a complex legislative framework; one cannot seriously interpret it outside of the scope of the Human Rights Act or the broader bricolage that constitutes UK human rights and equalities law.¹⁴¹ In this vein, within the specific context of consolidating legislation and in light of the interrelation that must be maintained between the Equality Act and broader human rights law, it must be recognised that a constant definition within a single Act is not necessarily a predictable one. The legal context at issue in *For Women Scotland* is therefore distinguishable from the issue in *Imperial Tobacco*.

Moreover, within the Supreme Court's reasoning in *Imperial Tobacco*, there is a presumption that the predictable interpretation of a word is the same as affording it a constant meaning, and that such an interpretation can give rise to coherence and stability within the legal system as a whole.¹⁴² The interpretation of the Equality Act – prior to the Supreme Court's judgment in *For Women Scotland* – appears to rebut this. To this extent, it should be noted that it was the variable definition that had been the prevailing one. Even the Equalities and Human Rights

¹³⁸ *Imperial Tobacco* [14].

¹³⁹ *Ibid.* [1].

¹⁴⁰ See: *ibid.* [15].

¹⁴¹ See, among others: Christopher Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998' (2014) 25 *King's LJ* 34; Conall Mallory and Hélène Tyrrell, 'Discretionary Space and Declarations of Incompatibility' (2021) 32 *King's LJ* 466, 477; Dickson and McCormick, 'Northern Ireland Dimensions', *supra* 70, 1150–1155; Graham, 'Has the UK', *supra* 70.

¹⁴² *Imperial Tobacco* [14]; see also: *For Women Scotland* [2023] CSIH 37 [62].

Commission, which has been weaponised in recent years to advocate for trans-exclusionary policies, held the view that a statutory amendment would be required to deviate from the position whereby ‘woman’ did not, under the Equality Act, include a trans woman with a GRC.¹⁴³ The view that it was not predictable, therefore, appears disingenuous.

While the Supreme Court dismissed, in their judgment, any possibility that a variable definition was required to interpret the Equality Act 2010, the complex legislative framework in which the Equality Act is situated, the existence of ‘pregnancy and maternity’ as a distinct protected characteristic – which is neglected by the Supreme Court as they, at least to some degree, conflated it with ‘sex’ – and, as will be considered momentarily, the need to guarantee ECHR rights when taken together articulate the necessity of and justify, at the very least, a variable definition, or maybe more appropriately a variable usage: in some instances it confers a gendered meaning in others not.

c. In Light of the Human Rights Act

Thus far, much of the consideration has been specifically concerned with the interpretation of the Equality Act in isolation. However, within this field of law, there are considerable implications for human rights that should have been considered within the scope of the judgment. The Supreme Court instead provided little more than a cursory consideration of the Human Rights Act 1998 or the compatibility of their interpretation with the ECHR. The Court, as has already been detailed above, dedicated considerable attention to the Sex Discrimination Act 1975. It is therefore important to dedicate appropriate attention to the broader human rights context in which the judgment exists.

Section 3(1) of the Human Rights Act 1998 requires that, ‘so far as it is possible to do so, primary legislation and subordinate legislation

¹⁴³ Cal Horton, ‘Towards a Theory of Cis-Supremacy: Conceptualising Ongoing Barriers to Trans Equality’ (2025) 59 *Sociology* 485, 493–494; see: Sharon Cowan, ‘Trans Rights, Queer Times: In Search of a New Hope’ (2025) 47 *JSWFL* 108, 117; *For Women Scotland* [2025] UKSC 16 [247].

must be read and given effect in a way which is compatible with the Convention rights'.¹⁴⁴ This provision has previously been interpreted to confer such powers on the Court to allow and even require the Court to supplement the language of statutory provisions, to the extent it is allowed by the purpose and fundamental features of the Act, in realising a position that is compliant with the Convention.¹⁴⁵ This expands a broader rule of interpretation that UK law should, to the extent it is possible, be interpreted in light of international legal obligations.¹⁴⁶ As such, compliance with the ECHR ought to be considered before relying on anachrony. As such, even if for no other reason than it was the ECtHR's ruling in *Goodwin* which led to Parliament adopting the Gender Recognition Act, it would be reasonable to conclude the Supreme Court should have dedicated attention to the compatibility of their interpretation of the Equality Act with the convention rights.¹⁴⁷

One, therefore, ought to begin by considering the scope of the ruling in *Goodwin*. The claimants, For Women Scotland, asserted that *Goodwin* was concerned by a narrow matter that had since been rendered mute by other legal developments.¹⁴⁸ This neglects the broad implications that the ECtHR foresaw, when they recognised, 'the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance'.¹⁴⁹ As such, the obligation to provide for legal recognition would necessitate a thorough

¹⁴⁴ Human Rights Act 1998 s 3(1).

¹⁴⁵ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [30]–[31] (Lord Nicholls), [67] (Lord Millet); *Gilham v Ministry of Justice* [2019] UKSC 44 [39].

¹⁴⁶ *Halsbury's Laws* vol 44(1) para 1439 and 1455; Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *ICLQ* 57; see also: Odile Ammann, 'How Do and Should Domestic Courts Interpret International Law? Insights from the Jurisprudence of HLA Hart and Duncan Kennedy' (2019) 10 *TLT* 385, 415–416.

¹⁴⁷ See, for example: Crawford, 'Dialogue', *supra* 141; Mallory and Tyrrell, 'Discretionary Space', *supra* 141, 468–470; see also: HL Deb 3 November 1997 vol 582 cols 1240; as a point of comparison, see: *For Women Scotland* [2023] CSIH 37 [64].

¹⁴⁸ *For Women Scotland* [2023] CSIH 37 [20].

¹⁴⁹ *Goodwin* para 91.

reconsideration of the consequences that would arise, in light of the Convention rights. To this end, the ECtHR concluded that, ‘the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant’.¹⁵⁰ It remained with the United Kingdom to determine how best to guarantee the convention rights and to balance it against other considerations, although the recognition of the scope of application to such a broad range of topics should ensure that trans people enjoy the same protections afforded those of the same gender identity.¹⁵¹ From this it would follow that they are entitled to protections on the basis of their legal sex under equality legislation: the interpretation of the Equality Act by the Supreme Court in *For Women Scotland* precludes this.

To illustrate the deficiencies in the Supreme Court’s reasoning it is important to consider their treatment of Section 195 of the Equality Act, pertaining to participation in sport.¹⁵² As an initial point, it must be stressed that section 195 introduces the notion of a ‘gender-affected’ activity, the Court offered no rationale as to the use of gender instead of sex.¹⁵³ One is forced to question the legal authority of the Gender Recognition Act in the eyes of the Supreme Court, if both gender and sex are afforded a uniform meaning by the Court.¹⁵⁴

¹⁵⁰ *Ibid.* para 93.

¹⁵¹ *Ibid.*; *TH v the Czech Republic* App no 33037/22 (ECtHR, 12 June 2025) para 52–53; see also: Amrei Müller, ‘Domestic Authorities’ Obligations to Co-Develop the Rights of the European Convention on Human Rights’ (2016) 20 *IJHR* 1058; Maciej Szydłowski, ‘Gender Recognition and the Rights to Health and Health Care: Applying the Principle of Self-Determination to Transgender People’ (2016) 17 *IJ Transgenderism* 199, 204–205.

¹⁵² See: *For Women Scotland* [2025] UKSC 16 [232]–[236].

¹⁵³ This is peculiar given that the Supreme Court gave particular weight to the predominant focus on ‘gender’ within the context of the Gender Recognition Act 2004: in doing so the Court dismissed the assertion that the parentheses were consequential. The Court state that, ‘to reflect the fact that the words “gender” and “sex” were used interchangeably in legislation at the time the GRA 2004 was introduced’ (emphasis added by author). This in turn articulates a rational whereby from that point ‘gender’ and ‘sex’ were, or at least at some point since have become, distinct. The Court appears as though it is attempting to interpret extant legislation into anachrony; this, as was addressed above, disregarded the rational for the explicit inclusion of the parentheses. See: *For Women Scotland* [2025] UKSC 16 [97].

¹⁵⁴ The apparent differentiation of ‘sex’ and ‘gender’ by the Court is of particular intrigue in large part because the Court provides insufficient clarity between the treatment of both terms in law. If one accepts that the terms did and continue to have the same or,

The consideration of the Court focuses on sub-sections (1) and (2). These provide for the exclusion of an individual on the basis of their sex – and thus establishes ‘gender-affected’ activities – and on the basis of their gender reassignment, respectively. The latter requires it to be necessary for the safety of others or in pursuit of fairness. As such a ‘certified’ sex interpretation would require the exclusion of an individual trans person to be proportional.¹⁵⁵ The Supreme Court asserted that this is too great a burden for a competition organiser to assume.¹⁵⁶

It must be stressed that Section 195 is of such a scope – in that it applies to all sport, including grassroots sport – that the interpretation offered by the Supreme Court would consequently risk excluding trans people from ‘gender-affected’ sports. The Court, elsewhere in its judgment, distinguished between the extent to which trans individuals may choose to pursue medical interventions which, when compounded by the physiology of each individual, would legitimate an approach that is grounded in an individualised assessment.¹⁵⁷ The generalised exclusion, pursued by the Court, would constitute a disproportionate restriction on the private lives of many trans individuals: the centrality of proportionality to the interpretation of the ECHR ought to be noted when considering the language of Section 195.¹⁵⁸

The Supreme Court also asserts that, if trans people with a Gender Recognition Certificate contributed to the average used to determine whether a sport was ‘gender-affected’, ‘the differences ... between the two groups may begin to fade’.¹⁵⁹ This neglects, however,

at the very least, a conflated definition in law then the arguments advanced vis-à-vis the non-application of the Gender Recognition Act, as has been demonstrated above, appear disingenuous. If as the Court seems to imply the terms are at present distinct in law, it is most peculiar that no serious effort was dedicated to defining them, in opposition to one another, within the judgement.

¹⁵⁵ Sharpe, ‘Will Gender’, *supra* 115, 541–542; *For Women Scotland* [2025] UKSC 16 [234].

¹⁵⁶ *For Women Scotland* [2025] UKSC 16 [235].

¹⁵⁷ See, for instance: *ibid.* [200], [217], [228].

¹⁵⁸ ECHR Art 8; see also: *Goodwin* para 91; Francesca Romana Ammaturo, ‘The Council of Europe and the Creation of LGBT Identities Through Language and Discourse: A Critical Analysis of Case Law and Institutional Practices’ (2019) 23 *IJHR* 575.

¹⁵⁹ *For Women Scotland* [2025] UKSC 16 [235].

that for such a shift there would need to be an unforeseen increase of such considerable magnitude in the number of trans people, who had gone through the process of obtaining a Gender Recognition Certificate, that any argument the Court offered in defence of its possibility is unreasonable.

All of this is to say that the Gender Recognition Act was adopted in response to a particular deficiency within UK law. Despite this, and the broad scope with which it was conceived, the Supreme Court in their judgment did not meaningfully address the Convention rights which are of considerable relevance to the interpretation of the Equality Act. In doing so the Court undermined the ability of trans people to participate in the life of the community and encroached on their human rights. The Court did all of this while disregarding the clear obligation under Section 3(1) of the Human Rights Act to interpret statutory provisions in a manner consistent with the Convention rights.

6. CONCLUSION

One can have little doubt that the judgment of the British Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* was erroneous, an unacceptable departure from the rights enshrined in the ECHR and a dangerous precedent, capable of rendering the Equality Act devoid of meaning. This ruling has already had profound implications for the rights of trans people: this alone must concern all of us.¹⁶⁰ However, we must be acutely aware of what this means for the integrity of UK law more broadly. The Supreme Court, without basis in fact or law, and in direct contravention of the ECtHR case law, constructed a narrative that at least *prima facie* enabled them to rule as they wished. In doing so, the Court has shown its hand.

¹⁶⁰ Alongside the exceedingly problematic interim guidance by the Equalities and Human Rights Commission, sports governing bodies and police forces have revised policies seriously diminishing the rights of trans people with considerable material consequences, in particular their access to and enjoyment of public space and cultural life.

It is through understanding the law as grounded in rhetoric, as a product of narrative, that one is able to deconstruct the judgment, an example of law's preeminent narrative text, and to effectively interrogate the premises from which the Court departs. The pre-eminent assumption being the position that binary sex within law necessarily refers to 'biological' sex. I have addressed at length how this is without basis in scientific fact and in opposition to a substantial body of law, both domestic and ECtHR. In asserting this position, the Supreme Court went to great lengths to construct a narrative that concealed some of the more egregious points and necessitated their conclusion, even if many of the premises collapse under the most limited of critical reflection.

The Supreme Court's rhetoric neglected or concealed important perspectives from consideration. This is most apparent in the Court's point of departure. The Court's unequivocally asserted that the Equality Act ought to be interpreted without recourse to the legislation it consolidated, to the extent it is possible. The Court, however, failed to provide any serious justification for their recourse to the Sex Discrimination Act 1975. Moreover, the Court neglected provisions on combined discrimination, instead presenting the two protected characteristics as incompatible. This was only compounded by the Court's disregard for the ECtHR and their failure to situate their interpretation within its scope.

Despite all of this, one cannot lay all of the blame for this on the Court. Much of the blame must rest, instead, with Parliament. The premise that the King-in-Parliament is sovereign affords limited room for the Court to explicitly criticise the quality of legislation. Instead, the Court is required to presume the existence of a near infallible legislature. The Inner House of the Court of Session offered an interpretation which enabled for a dual interpretation within the Equality Act: the consequence would have allowed for a pragmatic interpretation of the law. There is no perfect solution: in ruling as the Inner House did, they sought to preserve legislative intent while recognising that a degree of incoherence exists within the Equality Act. While the Equality Act aspires to the most noble of aims, its execution is wanting. At any point, Parliament could have corrected this; they chose not to.

One must question, at least to some extent, what the Court was meant to do. It would always be in a position which either required it

to criticise the legislation that was incoherent or to ignore it. In adopting the latter approach, it becomes increasingly easy to disregard provisions in pursuit of some imagined coherence. The result being incoherence at large, and legislation that has been devoid of all meaning.

There is a part of me that wants to believe that the Court reached this conclusion in good faith: as a jurist, I want to be able to afford them the benefit of doubt. However, that good faith is meaningless to the thousands of trans people whose rights have been diminished, and despite the Court's protestations, that is what has happened. It is equally meaningless to the countless cisgender people who will be harassed and deprived of protections because they do not perform their gender to the satisfaction of others: because they do not conform. One is left only to conclude that this judgment offends against all which law ought to defend, and worst of all it does so while claiming that to do otherwise would be unconscionable.

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