

Balancing Sex-Based Rights and Trans Inclusion: Biological Determinism in For Women Scotland – A Feminist and Queer Legal Analysis

Xinyue Wang*

University of Birmingham, Edgbaston, Birmingham, B15 2TT, United Kingdom

**Author to whom correspondence should be addressed.*

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Abstract: This essay examines the UK Supreme Court's decision in *For Women Scotland Ltd v The Scottish Ministers* and considers whether it strikes a legitimate balance between sex-based rights and transgender inclusion. It argues that, although the Court presented its reasoning as necessary for legal clarity and coherence, the judgment ultimately prioritized a biological understanding of sex. Drawing on feminist and queer legal theory, the essay demonstrates that biological sex may justify distinctions in certain contexts, but should not operate as a universal principle across equality law. It concludes that a context-based and purpose-oriented approach provides a more convincing framework for balancing sex-based protections and transgender inclusion.

Keywords: For women in Scotland; Equality law; Sex-based rights; Transgender inclusion; Feminist legal theory; Queer theory; Biological determinism

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1. Core jurisprudential tension between sex and gender identity in UK equality law

The relationship between sex-based rights and gender identity has become a very debated issue in UK equality law. While the Equality Act 2010 recognizes both sex and gender reassignment as protected characteristics, it does not clearly explain how conflicts between them should be solved in practice. This situation shows a deeper problem inside equality law, which is whether legal protection should be based on stable categories or focus more on the real experiences of disadvantage. As Atrey argues, equality law is not mainly about keeping categories clear and stable, but about responding to inequality and disadvantage in society^[1]. Because of this, the debate about the meaning of “sex” is not only a question of definition, but also about how equality law works in reality and what it tries to achieve.

2. “For Women Scotland Ltd v The Scottish Ministers”: The return of the biological sex standard and scholarly controversies

It is in this context that *For Women Scotland Ltd v The Scottish Ministers* becomes very important. The case is not only

about statutory interpretation, but also shows an important change in equality law, because it brings back a biological understanding of sex. In this case, the Supreme Court said that the terms “man”, “woman”, and “sex” in the Equality Act should mean biological sex, and this limits how people with a Gender Recognition Certificate (GRC) can be treated as their acquired gender in sex-based rights. As Brown observes, the Court describes the GRC as a “paper certificate”, which shows that its legal value is reduced, and biological status becomes more important in deciding legal identity. This way of reasoning has caused a lot of academic debate, because it changes how legal recognition and anti-discrimination protection are connected.

The Court explains its reasoning by saying it needs legal clarity and coherence, and it presents its interpretation as necessary for the law to work properly. However, many people do not agree with this view. Some critics say the judgment is not only explaining the law, but also making a normative choice about which idea of sex should be more important. As Cowan and others suggest, the relationship between sex and gender identity in equality law is more complex than a simple separation, and if it is reduced to a binary opposition, it can hide the real problems of disadvantage that the law tries to deal with. Similarly, Mulder points out that there are other, more context-based ways to understand sex discrimination in European law, which means the Court’s interpretation is not the only possible one and not always the most reasonable. These critiques show that the idea of clarity may actually hide a deeper preference for one way of understanding identity instead of others.

This essay argues that the judgment in *For Women Scotland* does not make a proper balance between sex-based rights and transgender inclusion, but instead it gives more importance to a biological understanding of sex. Although concerns about protecting sex-based spaces and services can justify clearer distinctions in some limited situations, it does not mean that biological sex should become a general legal rule for all equality law. If we look at it more carefully, the judgment is not simply a neutral explanation of the law, but a debatable choice which gives priority to biological sex instead of a more flexible and context-based way of recognizing transgender people.

3. Inherent tensions of two gender recognition regimes in UK legislation

The legal problem in *For Women Scotland* cannot be understood alone from the wider statutory framework from which it comes. It is not only a simple problem of unclear law drafting, but it also shows a deeper tension inside UK equality law. This tension comes from two different ways to understand sex and gender, which are not fully consistent with each other. One is based on legal recognition of gender identity, and the other is based on sex as a protected category in anti-discrimination law. The relationship between these two frameworks is not accidental, but it is also not fully clear or harmonized. Because of this, the meaning of “sex” becomes more complex and difficult to deal with in law.

3.1. Gender Recognition Act 2004: Restricted and institutionalized legal recognition of transgender people

The Gender Recognition Act 2004 is an important step in the legal recognition of transgender people. It provides a way for a person to get a Gender Recognition Certificate (GRC) and then be legally recognized in their acquired gender. As Hines explains, this Act was an important development because it helped to give transgender people a kind of legal citizenship and allowed their gender identity to be recognized in law ^[1]. However, this recognition is not fully free or decided by the person themselves. As Gray shows, the GRA works within a medical and institutional system, where people need to meet certain requirements, such as having a diagnosis of gender dysphoria and being assessed by a Gender Recognition Panel, before they can be legally recognized ^[2]. This shows that rules and experts control legal recognition, and it is not only based on what a person says about their identity.

Moreover, as Rodgers argues, the recognition given by the GRA is selective, which means it accepts some types of transgender identity but not others, especially those that fit a binary and medical model. In this way, the Act does not remove the tension between legal and social understanding of gender, but instead it manages this tension through a system

that both allows and limits recognition. This situation is not only in the UK. As Theilen observes in the European context, legal gender recognition has developed in a complex and incomplete way over time, and it involves continuous negotiation between different ideas of identity and legal status. Taken together, these views show that even before *For Women Scotland*, legal recognition of gender identity was already limited and controlled by institutions.

3.2. Legislative intention and academic divisions over the dual protection framework of the Equality Act 2010

This complexity becomes more serious because of the Equality Act 2010, which uses a different but partly similar framework. The Act recognises both sex and gender reassignment as protected characteristics, and this shows that discrimination can happen in different and intersecting ways. This dual recognition must suggest Parliament did not want to reduce gender identity to biological sex, or treat one as less important than the other. Instead, the law tries to deal with different but related forms of disadvantage. As Cowan and others argue, equality law is not mainly about keeping clear and fixed categories, but about responding to inequality and people's real experiences, which do not always fit into simple classifications. From this view, having both sex and gender reassignment in the Act is not a problem, but a way to deal with complexity instead of simplifying it too much.

At the same time, this approach is not accepted by everyone. Murray and Hunter Blackburn argue that equality law can only work effectively if there is a relatively stable and biological understanding of sex, especially in areas like single-sex spaces. Without this kind of stability, they believe the boundaries of legal protection may become unclear and harder to apply in practice. This view shows a real concern about how the law works in institutions, and it also explains why the definition of "sex" is still highly debated. However, as Atrey emphasizes, the purpose of equality law is not only to keep categories clear, but to deal with structural disadvantage and achieve real equality. When there is a conflict between clear categories and this purpose, categorical stability should not always be treated as the most important factor.

4. Defects in the Supreme Court's reasoning centered on legal clarity and coherence

Accordingly, the legal problem in *For Women Scotland* does not come from a simple gap in interpretation, but from the existence of two partly competing ways to understand sex and gender in UK law. One is about legal recognition of gender identity, and the other focuses on sex as a more stable category in anti-discrimination law. Because of this, the Court was not only explaining unclear statutory language, but also intervening in an already debated and complex legal issue. It is this deeper tension, rather than a simple lack of clarity, which provides the main background for understanding both the judgment and the criticisms that follow.

The reasoning of the UK Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* is presented as a normal way of statutory interpretation, based on the need for coherence and legal certainty in the Equality Act. At the center of the judgment is the idea that the terms "man", "woman", and "sex" should mean biological sex. The Court says that using a consistent biological definition is necessary to make the law work properly, especially in areas like single-sex spaces and legal exceptions. As Brown explains, the Court presents its reasoning as a way to avoid inconsistency in the law and keep the system stable^[2]. A similar focus on coherence can also be seen in how the judgment is written, which treats clear definitions as very important for legal regulation. However, as Hunter argues, this reasoning is still debated and is based on a specific view about how equality law should work. In addition, as Mulder suggests, the Court's approach is not the only possible way to interpret the law, and there are other, more context-based understandings of sex discrimination in wider legal frameworks.

The problem with the Court's reliance on clarity and coherence is that it gives too much importance to these ideas. Although clear concepts may be useful for administration, they do not necessarily decide what equality really means in

law. By treating clarity as the most important factor, the Court risks mixing up ease of use with proper legal justification. As Atrey argues, equality law is not mainly about keeping categories stable, but about dealing with disadvantage and structural inequality. From this view, protected characteristics should not be fixed without considering the real social context where discrimination happens. Cowan and others also suggest that equality law should respond to people's lived experiences, instead of relying on strict and separate categories. By focusing too much on a biological definition of sex, the Court makes legal reasoning simpler, but it also reduces the ability of the law to deal with more complex forms of disadvantage. As Mulder points out, a more flexible and context-based understanding of sex discrimination is not only possible, but already exists in other areas of law. This shows that the Court's reasoning is more a choice to prefer formal clarity, rather than something required by the law itself.

This prioritization can be clearly seen in how the Court deals with the Gender Recognition Certificate. As Brown observes, the judgment reduces the legal importance of the GRC by treating it as only a "paper certificate", which limits its ability to change a person's legal status in sex-based rights. This description is not completely neutral, but it also creates a kind of hierarchy between different types of recognition, where biological sex is placed above legal gender identity. In doing this, the Court makes the GRC look less like a real legal change and more like an administrative document. As Derry argues, this kind of reasoning is connected to deeper historical and conceptual ideas about sex, which the Court treats as obvious instead of something that can be questioned. As a result, the judgment makes one understanding of sex seem natural, while other possible views are pushed aside in both legal and academic discussions. Hunter also points out that this result was not the only possible one, and the Court could choose a different way to interpret the law without losing coherence. Instead, it decides to deal with the tension between sex and gender identity by giving more importance to biological sex.

The main weakness of the Court's reasoning is not only that it chose one definition of sex over another, but that it treats conceptual certainty as if it is enough to decide what equality law requires. In doing this, the Court turns a question of interpretation into a question of classification, and this may move attention away from the real purpose of anti-discrimination law.

5. Dual theoretical reflection: Feminist perspective and queer theory critique

5.1. Feminist analysis: Limited rationality of sex-based distinctions

Feminist discussion of *For Women Scotland* does not show one clear view, but instead it shows a tension between the importance of sex as a real category and the idea that legal categories are not fixed or neutral. Some feminist arguments support having clearer sex-based distinctions in certain situations. Murray and Hunter Blackburn argue that equality law, especially in relation to women's rights, depends on keeping a stable and workable definition of sex. This idea is more convincing in contexts like single-sex spaces, where rules are based on privacy, safety, and gender-based harm. In these situations, more stable categories may help to build trust and provide better support, as shown in studies about gender-based violence and women-only spaces. These arguments show that sex-based distinctions can have useful protective functions, but mainly in limited contexts.

However, these arguments are mainly limited to specific situations. The fact that sex-based distinctions can be justified in some areas does not mean that biological sex should define all equality law. The main problem in the Court's reasoning is that it does not keep this difference. By treating the strongest case for sex-based distinction as something that applies in all situations, the judgment turns a context-based argument into a general legal rule. From a feminist view, this is not only unconvincing but also methodologically problematic. As Fineman argues, legal categories are shaped by institutional power and not simply based on natural facts, while Daly shows that feminist theory includes different and competing ideas about sex and gender. Because of this, the Court's use of one biological definition ignores this diversity and presents it as if it is obvious and not debated. This is made stronger by the fact that the Court does not fully consider the historical development of sex as a legal category. In addition, as Atrey emphasizes, equality law is mainly about dealing

with disadvantage, not just keeping categories clear. When a strict definition of sex limit this function, it cannot be justified only by saying it makes the law more clear.

A feminist analysis does not fully support the judgment. At most, it supports limited and context-based sex distinctions. It does not support making biological sex a general rule for all equality laws. The main problem of the Court is overextension, because it takes an argument that only works in some situations and turns it into a rule for all cases. By doing this, the Court replaces a purpose-based approach to equality with a more rigid way of classification, which may exclude some forms of disadvantage that do not fit into this system.

5.2. Queer theory critique: Reproduction of binary gender structure in judicial logic

A queer analysis of *For Women Scotland* moves the focus away from legal interpretation and looks more at how law creates and stabilizes legal subjects. Queer theory does not accept that sex and gender are fixed or natural categories, but instead sees them as shaped by social and institutional factors. As Otto argues, legal systems do not only regulate gender, but also actively reproduce binary ideas, where “male” and “female” are treated as complete and obvious categories. From this view, the Court’s idea that “sex” must mean biological sex is not a neutral explanation, but it reinforces a binary system that limits what kinds of identity can be recognized in law.

This idea can be clearly seen in legal recognition. As Easterbrook-Smith shows, legal documents not only record identity but also help to shape it inside administrative systems, and Rodgers also argues that systems of recognition often prefer some types of transgender identity that fit institutional expectations. Because of this, the Court’s reasoning can be seen as limiting what identities can be recognized in law. Its treatment of the Gender Recognition Certificate is very important here. By reducing its legal effect, the judgment put legal gender recognition in a weaker position compared to biological classification, and this creates a hierarchy where some identities are easier to recognize than others. As Rodgers further suggests, recognition is already selective, and the Court makes this even stronger. From a wider European view, this also shows a bigger tension between formal recognition and real equality, because legal status does not always lead to real protection against discrimination. As a result, the idea of “sex” becomes more separated from people’s real experiences of gender disadvantage.

However, queer critique also has some limits. Although it gives a strong explanation of how law reproduces binary structures, it does not fully provide a practical framework for legal decision-making. Anti-discrimination law still needs categories that are stable enough to guide institutions and decide who can be protected. If everything becomes too fluid, it may weaken this function. As Leng argues, sex and gender identity are better seen as different but sometimes overlapping areas^[1], which allow distinction without creating a strict hierarchy. Cowan and others also point out that legal complexity does not mean it cannot be managed, but instead it needs more careful attention to people’s real experiences [2], while Mulder supports a more context-based way to understand sex discrimination^[3].

Queer theory gives a very strong critique of the judgment’s binary logic, but it is less convincing if it is used as a complete legal framework, especially if it suggests that categories should not be stable at all. The main problem with the Court’s reasoning is not that it uses categories, but that it fixes them in a very rigid and exclusive way, which limits more flexible and context-based alternatives.

6. A Balanced alternative: Contextual and purpose-oriented interpretation model

The analysis before shows that neither the Court’s biological approach nor a fully anti-categorical queer view gives a satisfactory way to solve the tension between sex-based rights and transgender inclusion. Although the Court’s reasoning creates a high level of clarity, it does this by fixing the meaning of sex in a way that is not fully justified and not very responsive to the purpose of equality law. On the other hand, queer theory gives a strong critique of binary classification, but it does not provide a clear and workable basis for legal decisions if it suggests that categories should not be stable. So, the main task is not to choose between being too rigid or too unclear, but to find a framework that can balance legal

certainty and real equality.

A more convincing approach is a context-based model, which focuses on the purpose of the law. As Leng argues, sex and gender identity are better understood as different but sometimes overlapping parts of legal recognition. This idea gives a reason to reject the Court's view that one biological definition of sex should apply to the whole law. Instead, the meaning of sex should depend on the purpose of each legal rule. In some situations, like privacy, bodily safety, or dealing with sex-based harm, using biological differences may be more reasonable. However, in other areas, such as employment, services, or general anti-discrimination protection, a more inclusive approach that considers gender identity may better match the purpose of the law. As Atrey emphasizes, equality law mainly focuses on dealing with disadvantage, rather than keeping categories the same, so legal interpretation needs to respond to real inequality in society^[4].

This purpose-based approach also needs a more careful test of necessity. The Court assumes that a biological definition of sex is needed to keep the law clear, but it does not fully explain why other, less strict options would not work. A context-based approach instead asks whether excluding transgender people is really necessary to achieve the legal aim, not just easier to apply in practice. As Cowan and others argue, having complexity in equality law does not mean it cannot work, but it requires more careful attention to people's real experiences. Mulder also shows that the meaning of sex discrimination can change depending on context, and it does not need to follow one fixed definition. The Court's failure to consider these options shows that it prefers simple administration over stronger legal justification.

Finally, a context-based approach also needs to consider if there are less exclusionary ways to interpret the law. Even when making distinctions is justified, it does not mean that it must follow the same rigid form used by the Court. A more balanced framework would try to keep sex-based protections effective, while reducing unnecessary exclusion. This may include recognizing that different parts of the same law can use different meanings of sex, depending on their purpose and situation. This kind of approach keeps the advantages of using categories, but avoids making the law too general in the way the Court did.

Therefore, the most convincing approach is not the Court's biological model or a fully anti-category queer view, but a context-based framework that recognizes sex and gender identity as different but sometimes overlapping parts. This model is better because it connects legal interpretation with the purpose of equality law, instead of making these purposes depend too much on fixed categories.

7. Conclusion

The decision in *For Women Scotland Ltd v The Scottish Ministers* does not achieve a proper balance between sex-based rights and transgender inclusion. Although it is presented as a neutral way of statutory interpretation, it actually depends on a debatable and not fully justified focus on biological sex. As Brown shows, the judgment reduces the importance of legal gender recognition by placing it below biological status, and this changes the structure of equality law by giving more importance to clear categories instead of real protection.

The main problem is that the Court extends context-based concerns into a general rule for the whole law. Feminist arguments may support some limited sex-based distinctions, especially in areas like single-sex spaces and gender-based harm, but they do not support making biological sex a universal principle. By treating these concerns as applying to all situations, the Court moves away from the main purpose of equality law, which, as Atrey argues, is to deal with structural disadvantage rather than keep categories clear. From a wider theoretical view, the judgment also shows what Otto describes, that legal systems often reproduce binary ideas while appearing neutral, and this can strengthen existing patterns of exclusion instead of questioning them.

A more convincing approach is a context-based and purpose-focused framework. As Leng argues, sex and gender identity should be seen as different but sometimes overlapping parts, which allow courts to interpret legal rules based on their specific aims, instead of using one single definition for the whole law. This kind of approach better matches the structure and function of equality law, and it helps to keep both protection and the ability to deal with more complex forms

of disadvantage.

For Women Scotland is important not because it solves the problem between sex-based rights and transgender inclusion, but because it shows the limits of trying to deal with complex identity conflicts by using rigid categories.

Disclosure statement

The author declares no conflict of interest.

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