

## **Edinburgh**

Thank you to Shereen for organising this event, and for inviting me to speak. And to the University of Edinburgh for providing a platform for respectful, evidence-based discussion of a difficult societal challenge. This is at the heart of the purpose of universities, and it is heartening that more universities and more academics feel able to hold these types of events in the current climate.

The subject of my talk is to frame the discussions with a background on international human rights law and why we have women's rights.

I am a professor of law, and I specialise in international human rights law and the United Nations. Much of my work focuses on protecting vulnerable groups from abuses. I work on projects like how to tackle sexual exploitation and abuse by peacekeepers and humanitarian workers in conflict and crisis zones. Or on the impact of religious lobby groups on women's rights and LGBT rights around the world. Or on how to protect the human rights of irregular migrants. So when I became involved in this issue area, I did so from the lens of international human rights law and the rights of vulnerable groups.

So, in this talk I will cover some of the background on international human rights law and why we have rights for vulnerable groups, what the law is in this country on protecting women as a vulnerable group and on protecting transgender individuals, and what solutions we can propose to uphold the rights of all concerned.

International human rights law sprang from the ashes of Nazi Germany. Up until then under international law a government could treat its own citizens any way that it liked. The Universal Declaration of Human Rights in 1948 was designed to address that gap. To give all individuals protections of their fundamental rights. To

require all governments to uphold those rights for all individuals within their jurisdiction.

When the Universal Declaration was being drafted, there was a discussion about whether to have specific protections for women. But they decided not to do so, because the whole point was that every individual has every right by virtue of being born human. And it was felt that having specific protections for particular groups would undermine the universality of the human rights project.

Ultimately, trying to mainstream women's rights into human rights left significant and deeply problematic gaps in terms of women's rights. At that time, one third of UN member states did not grant political rights to women, and women remained subjugated in a myriad of ways often in the name of 'religion' or 'culture'.

In 1967 the UN Commission on the Status of Women took the ground-breaking step of adopting the Declaration on the Elimination of Discrimination against Women. That was followed in 1979 by the Convention on the Elimination of All Forms of Discrimination against Women. And an accountability mechanism was created – CEDAW -- to review and implement that Convention in States that signed up to it.

The advancement of women's rights has continued with further ground-breaking moments. At the same time, despite much focus on ending discrimination and advancing women's equality, and the increasing focus on violence against women and girls, we remain in a world where women are subjugated in many parts of the world, and denied their fundamental rights both in law and in practice.

The fight for women to have specific protections has paved the way for other vulnerable groups to do the same, with specific mechanisms now for children, persons with disabilities, racial minorities, migrant workers, and others.

In international human rights law the word 'women' has been defined as referring to biological sex. This was the definition in various international human rights treaties and discussions, including recently in 1998 in the Rome Statute creating the International Criminal Court where it makes it explicit that the word 'gender' refers to the two biological sex classes of male and female.

Gender has been defined as social constructs based on the different ways that the two sexes are viewed and treated in societies, including laws and practices. Some forms of discrimination against women might be based on their sex – for example denying access to reproductive rights, or child brides. Others may be based on gendered constructs, such as denying girls the right to education based on society viewing the two sexes differently, or violence against women against girls.

The international human rights law framework and mechanisms focusing on women provide specific protections for women to access their fundamental rights based on the long history of violence and discrimination against women.

Separately, in international human rights law there have been some attempts to protect LGBT persons. Almost all of those attempts are done separately to the protection of women's rights. LGBT minorities are a separate vulnerable group, as are children, persons with disabilities, racial minorities, and so on.

Those attempts are frequently blocked at the UN level by the 77 countries that still criminalise, discriminate against, or oppress LGBT persons. And many efforts to protect the fundamental rights of those people have failed as a result.

Of course, all individuals have fundamental rights by virtue of being born human. And those rights include non-discrimination and dignity. The denial of fundamental rights to LGBT persons around the world is deeply concerning, and it is clear that there is a long fight ahead to get there.

At the UK level there is a somewhat chequered history in terms of transgender individuals and the law. On the one hand, transgender individuals have lived free from state violence and discrimination for many decades, on the other hand they have only been recognised in law since 2004.

The starting point is the *Corbett v Corbett* case from the 1970s. This is also known as the April Ashley case, and was one that remained in the headlines at that time. April Ashley was a famous transsexual model. She had been a sailor as a young man, before embarking on a course of hormone treatment and surgery to her genitals, and living as a woman. She married into high society by marrying a Baron, Arthur Corbett. They went to court to have their marriage annulled. She said it should be annulled on the basis that it had not been consummated. He said it should be annulled on the basis that April Ashley remained a man despite being transsexual.

The court looked in great detail at what sex is for the purposes of law. The judge, who was a medical man, ruled that sex is about chromosomes, gonads, and genitalia. And while he was deeply sympathetic to those who experience gender dysphoria, who think that they are a man trapped in a woman's body or vice versa, he made clear that sex is about biology.

And that remains good law today. And remains in line with international law that being a woman is about sex and biology, not about gender identity.

But what about transgender individuals? In 1998 the UK passed the Human Rights Act, which brought into law the European Convention on Human Rights. Part of that Act included the right to a private and family life.

A case was soon taken through the courts and to the European Court of Human Rights about whether a transsexual named Christine Goodwin had her right to a

private and family life violated by the law not recognising her as a transsexual woman. She argued that she had lived as a woman, but by not being able to change her birth certificate her employer knew of her transsexual status, and she was not able to marry a man because same-sex marriage was not allowed at that time.

The result of that case was that the UK brought in the Gender Recognition Act in 2004. The Act sets out that for a person to change their legal sex they must have a medical diagnosis and have lived meaningfully in the other sex for two consecutive years. And while that does not change the fact of someone's sex – which is chromosomes, gonads, and genitalia – it does change how the law treats a person in terms of their sex. It is what we call a legal fiction. And those legal fictions exist in other areas, for example when we treat a company as though it is a person when we take it to court.

Where a person qualifies they receive a Gender Recognition certificate that allows them to change their birth certificate and be treated in law as a person of their preferred sex.

The second important piece of law in this area is the Equality Act 2010. That act brought together equalities legislation on race, religion, sex and so on, into one piece of law. And in the Equality Act it is made clear that no-one can be discriminated against on the basis of protected characteristics, which includes sex and gender reassignment.

The relationship between these two pieces of legislation is not clear cut. There is a long history of having sex-segregated services in this country in order to protect women, to provide safety, and to provide mechanisms for redressing the balance of power and the long history of women being subjugated and oppressed. Those

spaces might be separate sleeping facilities in youth hostels, or separate women's sports, or all-women shortlists for political parties or for prizes in business.

But over recent years the organisations that lobby for transgender rights have told the NHS, schools, Girl Guides, prisons, sports teams, and so on, that they cannot maintain sex-segregated spaces, and that they must include any person who says that they identify as a woman, whether or not they have a Gender Recognition Certificate.

This is not true. It is legally incorrect. But because those organisations have been told that they will be discriminating against a vulnerable group, and because this was being done through advisory work and not the courts, little was known about what was happening. However, when the consultations opened about whether anyone who identifies as a woman should be able to get a Gender Recognition Certificate without a medical diagnosis or meaningful transition, whistleblowers started coming forward. And the more that people spoke out, the more that the media paid attention.

Transgender individuals clearly require protection from violations of their human rights. We ought all to be concerned with the many countries where people who do not conform to gender expectations or norms are tortured, imprisoned, forcibly sterilised, or discriminated against. But those are fundamental rights that all people have by virtue of being born human. Protecting a person's right to 'gender identity' goes beyond fundamental rights, and therefore needs to be defined if that group of individuals are to receive specific additional protections. And currently there are no definitions of gender identity that could be applied in law.

The 2018 report by the UN independent expert on violence and discrimination against SOGI minorities, in which he examines violence and discrimination against gender identity minorities, defines gender identity by referring to a version of

Stonewall's list of who might fall under this broad umbrella. Listing who might be a gender identity minority – including transsexuals, transvestites, cross dressers, and non-binary people, amongst others– is not a definition for the purpose of law.

The European Court of Human Rights has stated that the right to a private and family life includes something called the right to self-determine one's gender, although there is little explanation of what that means.

Some laws have been passed on gender identity, none of which provide definitions my favourite of which is from Massachusetts which defines gender identity as the gender in which a person identifies.

In the UK case of *Elan-Cane* last year gender was described as "a matter of self-perception" when talking about how difficult it is to pin down a definition.

It is pretty clear, then, why people seeking to protect transgender individuals' fundamental rights are seeking to conflate sex and gender. Without a definition of gender identity, and in a world where transgender individuals face significant human rights violations, linking gender and sex would provide a mechanisms to protect their rights more robustly. The problem is that doing so would be in direct conflict with women's rights already established and protected in law.

Individuals who are members of vulnerable groups have specific rights afforded to them based on their characteristics. Members of racial minorities, persons with disabilities, women, children, and others are afforded those protections based on their membership of a group. Expanding the definition of a group to include others undermines those protections. For example, women have specific protections based on the history of discrimination, disempowerment, and of male privilege being afforded to members of the other sex class. Expanding the

definition of who is a woman would undermine the object and purpose of those protections.

That is not to say that transgender individuals do not face discrimination or abuses, but their experiences are not the same as those of women, or those of racial minorities, or persons with disabilities, and the experiences stem from different reasons and spaces, even if there are similarities across the board. This is why it is key to have specific protections for each group, not to conflate the groups.

What is clear from international human rights law is that women's rights must be protected, and that the UK has legal obligations to do so.

In the UK the relationship between the Gender Recognition Act and the Equality Act is such that it is unclear how sex-segregated exemptions might be retained. Indeed, we already know that many of those exemptions are being ignored in practice despite this violating human rights of women.

What we need is clarity. Clarity in terms of the law. Clarity in terms of definitions. We need proposals for solutions that will uphold the rights of all individuals, including the specific protections afforded in human rights law to women based on their sex. And we need the UK to remember that it is party to international human rights treaties that require it to protect our sex-based rights.