On Defining Sex in Law

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Any word or phrase used in law to ground distinct legal rights, duties, privileges, or immunities must have legal meaning. Whether it requires a precisely articulated legal definition is another question.[1] Definition may cause more confusion that it alleviates. Roman jurists expressed this concern in the maxim *Omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset; "*All definition in law is dangerous, for one can rarely be found that cannot be overthrown."[2] This is reflected in HLA Hart's warning when discussing legal interpretation, and the options an interpreter has open to them when dealing with contested terms, using his classic example of a rule banning vehicles from parks:

> He either takes the meaning that the word most obviously suggests in its ordinary nonlegal context … or one which the word has been given in some other legal context, or, still worse, he thinks of a standard case and then arbitrarily identifies certain features in it – for example, in the case of a vehicle, (1) normally used on land, (2) capable of carrying a human person, (3) capable of being self-propelled – and treats these three as always necessary and always sufficient conditions for the use in al contexts of the word "vehicle," … This choice, not "logic," would force the judge to include a toy motor car … and to exclude bicycles … In all this there is possibly great stupidity but no more "logic".[3]

Dangerous though definition may be, it is sometimes necessary and often useful. Knowing when a definition is needed in law is a work of practical art; it is rare that a term will be defined unless its ordinary meaning has become contested or its legal meaning diverges in important ways from its ordinary meaning. Definition becomes particularly important when the law begins to use both an ordinary meaning and a technical meaning of a term in different contexts.

Sex once had a settled ordinary meaning. Now it is contested at the level of both ordinary meaning and technical legal meaning. But if sex is to ground distinct legal rights and duties, which it does, there must be a way for legal actors to know who bears those rights and duties. There was little ambiguity over the meaning of sex when the norm was not equal treatment between men and woman. The law had a conception of women and men, unarticulated because uncontested, when it denied women the vote or prevented them

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[1] Huntington Cairns, 'A Note on Legal Definitions' (1936) 36 Columbia Law Review 1099.

[2] D. 50.17.

[3] HLA Hart, 'Positivism and the Separation of Law and Morality' (1958) 71 Harvard Law Review 593, 611.

from standing to be an MP. The history of the law relating to sex is marked by the gradual dismantling of legal frameworks designed to create and maintain a hierarchy of legal rights, followed by the protection and retention of sex-based rights where sex matters.

Developments in the law to prohibit sex discrimination show just how relevant sex once was for one's legal standing. Throughout all of this, sex took on its ordinary meaning. Earlier legislation provided no definition for 'women' and 'men'. Nobody involved in drafting, enacting, or interpreting these statutes was unsure of the groups affected by laws that distinguished on the basis of sex. By 1975 we did have something approximating a definition. Under the Sex Discrimination Act, "woman" includes a female of any age and "man" includes a male of any age. One might think that this reference to male and female was designed specifically to signify that sex is tied to biology, but this unlikely. In fact, the inclusion of minors within the scope of protections offered by the Act was not intended to be an exhaustive definition. Drafters merely took the ordinary meaning of the terms and clarified that for the purposes of sex discrimination provisions, references to men and women include boys and girls. This is common in legislative drafting to save the law having to add in "and a girl/boy" every time it references women or men. Legal references to sex at this time were understood to track ordinary usage and not to refer to a special or technical meaning. The law has developed since then, and it is important to establish precisely how it has done so before any existing ambiguities can be adequately resolved.

Indeterminate Sex

We have distinguished on the basis of sex for as long as they have existed. Where the law draws distinctions, particularly those that involve significant differences in rights and entitlements, there will be times when the boundary is tested. Where someone's sex is contested, the law needs to have an answer. And it did. In Roman law,[4] canon law[5] and later common law,[6] an individual's sex was always one of three possibilities: male, female or hermaphrodite, sometimes also known as intersex but now more accurately described as conditions of differences in sex development (DSDs).[7] DSDs are a group of rare conditions where the reproductive organs and genitals don't develop as expected. In Roman and Canon

[4] Lynn Roller, 'The Ideology of the Eunuch Priest' (1997) 9 Gender & History 542.

[5] Decretum Gratiani, C. 4, q. 2 et 3, c. 3 § 22, "Whether an hermaphrodite may witness a testament, depends on which sex prevails"; Summa Parisiensis 2.4, q. 2/3 s.v. hermaphroditus, "Hermaphrodite: In hot regions, many are born double-sexed; if they are closer to men, they give testimony like men"; Huguccio, C. 27, q. 1, c.23 ad v. ordinary, "if [the hermaphrodite] is more female than male, he is not to be ordained; in the opposite case, he is able to receive holy orders … what if he/she equally tends to both sexes? Then he/she does not receive holy orders"; Huguccio, C. 4 q. 2 et 3 c. § 22 ad v. sexus incalescentis, "If [a hermaphrodite] has a beard, prefers doing manly tasks to doing female ones, and always prefers to keep company with men, not women, this is a sign that the male sex prevails in him and that he thus can give testimony in cases where women are excluded … if however, [the hermaphrodite] lacks a beard, always wants to be with women and to do female tasks, this is a sign that the female sex prevails in her, that she is not allowed to witness, where women are excluded".

[6] E Coke, The First Part of the Institutes of the Laws of England, Institutes 8.a.

[7] See; Martine Cools and others, 'Caring for Individuals with a Difference of Sex Development (DSD): A Consensus Statement' (2018) 14 Nature Reviews Endocrinology 415.

law, there was recognition of differences in sex development, but people were then classed as either male or female, depending on which characteristics appeared most dominant.

Unsurprisingly, the context in which this attracted the most attention was inheritance. When men can inherit titles, wealth, and entire estates ahead of their elder sisters, it really matters which sex every sibling is. Sir Edward Coke addressed this in his discussion of succession where he noted that "Every heire is either a male, a female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heire, either as male or female, according to that kind of sexe which doth prevaile."[8] Male and female took on their ordinary meaning here, tied to biological categories. For those with DSDs, classed as hermaphrodites, technical legal rules were developed to classify an individual as either male or female. As such, technical meaning arose only where biological sex was indeterminate. Where it was not indeterminate, no special or technical rules applied.

In Scotland, a similar approach had been adopted and was central to the dispute between Sir Ewan Forbes and his cousin in the 1960s.[9] Ewan was born in 1912, christened Elizabeth Forbes-Sempill, and officially registered as female. As the youngest daughter of John Forbes-Sempill, the 18th Lord Sempill, Elizabeth was born into a noble family but had no prospect of inheriting. She grew up to be an established doctor and for decades presented as and was perceived to be a woman, even winning international acclaim as a female Scottish country dancer. This changed in 1952 when, after several years of taking exogenous testosterone, she formally re-registered her birth as male and changed her name to Ewan. Re-registration of a birth certificate is not something that can be done by self-declaration. It's only possible when the relevant legal authority, in this case a Sheriff, is satisfied that there was an error in the initial registration.[10] It's likely that Forbes-Sempill was therefore able to convince the initial sheriff that he was intersex. In obtaining this re-registration, Ewan had jumped from having no prospect of inheritance to being next in line after his elder brother William.

For a time, the issue of Ewan's sex remained quite private, his re-registration passing without much public comment. Then in 1965, thirteen years after the re-registration, William died. He was survived by daughters but no sons and so the baronetcy, along with a significant portion of land, was to pass to the first male heir. *The Times* reported that this heir was Ewan, "once a woman".[11] But this was contested by John Forbes-Sempill, Ewan's cousin, who would have been the heir had Ewan remained registered as female. John, not wanting to lose out on the title and considerable estate, argued that the 1952 re-registration

[8] Coke, *The First Part of the Institutes of the Laws of England*, Institutes 8.a.

[9] *Forbes-Sempill*, 29 Dec 1967, Court of Session Outer House, available National Archives of Scotland, CS258/1991/P892.

[10] Registration of Births, Deaths and Marriages (Scotland) Act 1854, s. 63. Section 63 allowed a sheriff "satisfied" of any error to "direct a corrected entry of the birth". A similar provision exists in the current Registration of Births, Deaths and Marriages (Scotland) Act 1965, s. 42.

[11] "Baronetcy Heir Once a Woman", The Times, 31 December 1965, p. 10.

was invalid. Ewan was biologically female and there had been no error in the initial birth registration. The case was heard by Lord Hunter, a judge in the Outer House of the Court of Session via summary trial, a procedure akin to arbitration.[12] To challenge the re-registration, John would need to establish that Ewan's sex was not actually indeterminate at birth, as that is the legal requirement to permit the Sheriff to re-register due to initial error.

Medical experts examined Ewan's chromosomal, gonadal, phenotypic and sex characteristics as well as his psychological state. From this, Lord Hunter concluded that Ewan was "a true hermaphrodite in whom the male sexual characteristics predominate, and that this has been the position throughout his life".[13] While some have argued that Ewan was biologically female and not someone with a DSD condition,[14] this was never established in court and was in fact explicitly rejected after detailed medical examination. At least from the perspective of the court, Ewan had a rare condition affecting sex development. It was not concerned with how the law deals with people who are unequivocally of one biological sex from birth but who have medically altered their body.

Forbes-Sempill was covered by rules relating to indeterminate sex, not changed sex. It's important not to conflate these concepts. The history of legal regulation of hermaphroditism is distinct from questions of gender identity or the ability to change legal sex at will. People with differences in sex development – historically classified as hermaphrodites – faced their own legal struggles, unique to them. For example, in early Scots law, people with sex development conditions could not enter into a legally valid marriage. Viscount Stair noted that "the consent of persons naturally impotent or of dubious kind, as hermaphrodites, where the one sex doth not eminently predomine, doth not make a marriage".[15] As late as 1979 an English court annulled a marriage of twelve years on the grounds that the petitioner "did not marry a male but a combination of male and female".[16]

In law there is an important distinction between sex change and sex indeterminacy. Where sex is indeterminate, law will look to medical science for resolution. This is because indeterminacy is here tied to a question of fact. As medical science advances, it becomes easier for differences in sex development to be categorised appropriately as developmental

[12] Administration of Justice (Scotland) Act 1933, s. 10.

[13] *Forbes-Sempill*, 29 Dec 1967, Court of Session Outer House, available National Archives of Scotland, CS258/1991/P892. See also; Lesley-Anne Barnes, 'Gender Identity and Scottish Law: The Legal Response to Transsexuality' (2007) 11 Edinburgh Law Review 162.

[14] Zoe Playdon, *The Hidden Case of Ewan Forbes: The Transgender Trial That Threatened to Upend the British Establishment* (Bloomsbury 2021). Note that this book has been heavily critiqued for legal and factual inaccuracies. The central claim of the book, that this case permitted a transsexual person to change their birth certificate at will, is entirely false. See; Dave Hewitt, 'The Curious Case of Ewan Forbes' (*Void if removed*, 11 December 2021) <https://www.voidifremoved.co.uk/p/the-curious-case-of-ewan-forbes>.

[15] Stair 1.4.6. See also W Forbes, The Institutes of the Law of Scotland vol 1 (1722) 18 (1.1.1.): "The Sex is Male or Female, or an Hermaphrodite, which is esteemed to be of that Sex, which is most prevailing in the Person."

[16] C & D (1979) 6 Family Law Reports 636 at 639 per Bell J.

conditions affecting individuals who are either male or female.[17] There is no third sex either in reality or in law.[18]

Sex at Common Law

Differences in sex development are a naturally occurring aspect of human development. People born with such conditions have been legally recognised, even if not treated particularly well, since at least the time of Ancient Rome.[19] Transsexuality, transgenderism, or the more modern "trans" status, are something else entirely. "Transsexual" was the original term and is the descriptor most frequently found in case law and legislation. The concept came to into being in the early twentieth century, as medical science began to encounter what became known as "the transsexual phenomenon".[20] Magnus Hirschfeld, the renowned physician and sexologist, initially spoke of a "gender passage". This term was eventually replaced by *psychopathia transsexualis*, or a "pathologic-morbid" desire to become a member of the opposite sex.[21]

Gender non-conformity, manifest in changes to dress, presentation, and behaviour, has a long history. Indeed in twentieth century Germany, up to and including under the Nazi regime, people could be granted a permit that allowed them to cross-dress in public and could even be issued formal documentation reflecting a name change to one of the opposite sex.[22] There was even an example of a woman, Erna K, who was taken into 'protective custody' in 1938 for 'endangering public security and order' by wearing men's clothing in public 'despite the fact that the permit previously issued to her had been withdrawn in the year 1933".[23] Erna was sent to a women's concentration camp in Lichtenburg where she was subject to medical and psychological examination and then released with temporary permission from the camp's Political Department to wear men's clothing until an official permit could be issued by the Gestapo.[24] A month later the Interior Ministry granted permission for Erna to substitute the name 'Gerd' on all official records. There are several recorded instances of this for both woman and men.[25] Even Nazi Germany had a degree of tolerance for gender non-conformity. What it was fundamentally opposed to was homosexuality, especially male homosexuality. Where you could distinguish cross-

[17] See;
[18] See the comments of Lady Hale in *A*
[19] Roller (n 4).
[20] See; D Cauldwell, "Psychopathia transexualis" (1949) 16 Sexology 274; Lesley-Anne Barnes, 'Gender Identity and Scottish Law: The Legal Response to Transsexuality' (2007) 11 Edinburgh Law Review 162, 167.
[21] Ibid.
[22] Jane Caplan, The Administration of Gender Identity in Nazi Germany, (2011) 72 History Workshop Journal 171-180.
[23] Ibid, 172.
[24] Ibid.
[25] Ibid, 172-175. 3 See also; Magnus Hirschfeld, Der erotische Verkleidungstrieb (Die Transvestiten), Illustrierter Teil, Berlin, 1912, Fig. XVIII and caption, showing that Joseph Meissauer had been issued with such a permit by the Berlin and Munich police authorities.

dressing from deviance, such that it was not "for indecent motives", authorities were more forgiving.

By the 1940s, after Hirschfeld had died in exile, a new theory of transsexualism began to emerge across the West. What was initially taken to be an aspect of sexual deviance linked to homosexuality began to be recast as a mental disorder. Transsexualism, as distinct from transvestitism, was now, in some circles, a condition that warranted careful study and compassionate medical treatment to alleviate acute distress with one's sexed body. In law, this resulted in a shift to regulation via civil rather than criminal law.

What was new about "the transsexual phenomenon" was the inclusion of medical intervention in the form of cross-sex hormones and cosmetic surgery. Someone who was intensely uncomfortable in their sexed body now had the option, although at great risk of complication and sometimes death, to physically alter their outward appearance to appear more like the opposite sex. This would have important implications for the law. Until the mid-twentieth century, the law would determine sex, where it was ambiguous, primarily by reference to physical appearance. In cases involving differences in sex development, this involved a crude assessment of physiology and sex-stereotyped behaviour to determine whether an individual appeared more male or female and to categorise them on that basis. But as the twentieth century advanced, it became clear that sufficient medical intervention could allow an individual who is unequivocally of one sex to appear to be a "true hermaphrodite" in whom the opposite sex was more dominant. As these interventions were becoming more popular, the law was faced with a problem of distinguishing between ambiguous sex and changed sex. Understandably, it did not treat these as synonymous.

For example, in 1957, a fifty-year-old male who had displayed "markedly feminine" interests and attitudes since childhood petitioned Tayside Sheriff Court to correct what he regarded as an error in his birth certificate, re-registering him as female.[26] Unlike the case of Forbes-Sempill, the court did not conclude that this was a case involving an undiagnosed DSD condition. Because of this the petition was refused. Although the court recognised that the petitioner displayed clear feminine traits, having undergone surgical intervention, this was not sufficient to establish that he was a member of the female sex. As such, Sheriff-Substitute Prain concluded that

> "the doctors are careful to stress that this is not a case of hermaphroditism, but is a genuine case of the very rare condition of transsexualism … it is however stated that skin and blood tests still show X's basic sex to be male".[27]

We can see clearly that the law did not, at this point, treat sex as having a technical legal meaning. Rather, references to sex were to biological sex. Where that was unclear or

[26] *X Ptr*, 1957 SLT (Sh Ct) 61.
[27] Ibid, 62.

contested, courts would rely on expert medical and scientific evidence to identify the biological sex of the individual in question as best as they could. This was so, even when significant medical interventions had altered the physical body to appear more like the opposite sex. Where sex was genuinely indeterminate, a special rule was used to place individuals into one category or another.

This general approach continued even as surgical interventions advanced and became less lethal. In 1971, the English High Court considered whether someone could change sex in law by virtue of radical cosmetic surgery.[28] The case, *Corbett v Corbett*, concerned the validity of the marriage between Arthur Corbett, 3rd Baron Rowallan, and April Ashley, a model and actress who was born male but had undergone medical intervention to appear female. The pair had married in Gibraltar on 10 September 1963. Arthur had sought marriage with April specifically because of April's history. Due to his obsessive behaviour, relations quickly broke down, and when, in 1966, April's lawyers wrote to Arthur demanding maintenance payments, he responded by applying to have the marriage annulled on grounds that April was male and alternatively that the marriage had not been consummated. In response, April argued that she was of the female sex at the time of the marriage and denied that she was incapable of or had wilfully refused to consummate the marriage. She admitted that for many years she had presented and had been regarded as male, but had then sought medical intervention to appear female. This included taking oestrogen and undergoing surgery involving the removal of the testicles and the construction of an artificial vagina by creating a cavity in front of the anus and inverting the skin of the penis after removing the muscle from inside it. Parts of the scrotum were then used to create an approximation in appearance of female external genitalia.

The question before the court was whether this intervention meant that April was now female. If she was, her marriage to Arthur was valid. If she was not, it was void and could be nullified by Arthur via decree from the court. The judge concluded that the validity of this marriage depended on April's "true sex". To determine this, recourse had to be made to the expert testimony of medical professionals. Both sides called several experts, demonstrating a significant amount of agreement amongst them. It was not suggested at any time that there was any error as to the initial registration of April as male at birth.

April had been christened George and brought up as a boy. At the age of 16 he joined the Merchant Navy, where he served as a merchant seaman. During his second voyage, he had taken an overdose of tablets and was put ashore in San Francisco and admitted to hospital. When he returned to Britain, he was referred to the psychiatric department of the Walton Hospital in Liverpool as an out-patient and later, for a short time, as an in-patient. Hospital records show that George had expressed an intense desire to be a woman, which he had experienced since childhood. He also gave several accounts of homosexual experiences

[28] *Corbett v Corbett* [1971] P. 83, [1970] 2 All E.R. 33.

he had on board ship. After six months of treatment, the doctor treating George reported his conclusions in a letter to his general practitioner dated 5 June 1953, which stated that:

> "This boy is a constitutional homosexual who says he wants to become a woman. He has had numerous homosexual experiences and his homosexuality is at the root of his depression. On examination, apart from his womanish appearance, there is no abnormal finding."[29]

From here, George moved to London to work in the hotel trade until 1956 when he emigrated to the south of France. There he met members of a well-known troupe of female impersonators – biological males who performed in nightclub acts as female characters. After some time he joined the troupe. By then he was regularly taking oestrogen and going by either Toni or April. In 1960, four years after joining Le Carrousel, he went to Casablanca to undergo the surgeries mentioned above. Following this, George returned to London, now using the name April Ashley and presenting as a woman.

In November 1960, six months after the operation, April and Arthur met. At this time Arthur was aged 40, married with four children and sexually dissatisfied. He was routinely unfaithful to his first wife and cross-dressed erotically. He was unhappy with this because, in his words, "I didn't like what I saw; you want the fantasy to appear right. It utterly failed to appear right in my eyes."[30] Arthur had been cross-dressing from a relatively early age and this had led him to make contact with other men who shared his interest. He frequently engaged in sexual conduct with these men and gradually became more and more involved in their community. Eventually he heard of April and managed to make contact with her via an American acquaintance. The two agreed to meet for lunch and Arthur was instantly infatuated. He was aware that April was born male and had undergone surgery to appear female, but upon meeting he couldn't believe it. He said:

> "This was so much more than I could ever hope to be. The reality was far greater than my fantasy … it far outstripped any fantasy for myself. I could never have contemplated it for myself."[31]

This sudden reality of what had previously been pure erotic fantasy defined the character of this relationship from then on. Arthur had initially sought out April for erotic crossdressing purposes, but this soon transformed into a deeper desire for a relationship and eventually marriage. His feelings "had become those of a full man in love with a girl, not those of a transvestite in love with a transsexual".[32] Yet, while these feelings had deepened, they had not matured. By all accounts, the pair had not engaged in any sexual activity by the time of the marriage nearly three years later. Correspondence between them revealed an

[29] Ibid, 90.
[30] Ibid, 92.
[31] Ibid.
[32] Ibid.

affectionate relationship devoid of passion, except where Arthur flew into a jealous rage, infuriated at April's success at adopting the female role that he wished for himself. By September 1961, the relationship between Arthur and his first wife had broken down completely. He had frequently brought April to their home and had taken her on outings with his family. His obsession with her made it impossible to maintain his existing marriage and eventually a separation was arranged.

During 1961, April had worked successfully as a model until her story was widely publicised in the press and she decided to move to Spain. Here Arthur would frequently visit, although they never slept together and in fact they would not sleep in the same building. Around this time, with the assistance of Arthur, April had changed her name from George to April Ashley by deed poll and obtained a passport with that name. They attempted to get a new birth certificate, but this was refused. They did however succeed in persuading the Ministry of National Insurance to issue April with a woman's insurance card, treating April as a woman for national insurance purposes. This is important and we will return to it later.

In the end, after a tumultuous courtship, characterised by obsessiveness and indifference respectively, Arthur and April married in September 1963. Fourteen days later, April packed up and left without warning for London. This was the end of their relationship. Eventually, April sought maintenance support form Arthur and in response, he filed for an annulment, declaring the marriage void partially on account of April's sex being male.

In resolving this issue, the court relied on expert medical and psychiatric evidence. It was agreed by all experts that claimed anomalies of sex categorisation fall into two broad categories: psychological and developmental.. Among the psychological aspects recognised were transvestism and transsexualism. A transvestite is "an individual (nearly, if not always a man), who has an intense desire to dress up in clothes of the opposite sex. This is intermittent in character and is not accompanied by a corresponding urge to live as or pass as a member of the opposite sex at all times."[33] Experts noted that male transvestites were usually heterosexual and often married. They therefore usually had no wish to depart from the "male role" in sexual activity.

A transsexual, on the other hand, "has an extremely powerful urge to become a member of the opposite sex to the fullest extent which is possible".[34] They typically have a long history, stretching back to childhood, of identifying with the opposite sex, which persists into adulthood and is accompanied by intense distress when thinking of their sexed bodies. This is particularly acute when thinking of genitals, which remind them of their biological sex. At the time that this case was decided, the cohort of people seeking medical

[33] Ibid, 98.
[34] Ibid.

assistance exhibited very similar and specific symptoms. Experts suggested that for this cohort psychological treatment was largely ineffective, and surgical intervention was seen as one way to alleviate distress. In assessing the medical evidence, the court was clear that "the purpose of these operations is, of course, to help to relieve the patients' symptoms … not to change their sex".[35] Indeed, the doctors who gave evidence in this case required their patients to sign a form prior to operation in the following terms:

> "I …….. of …… do consent to undergo the removal of the male genital organs and fashioning of an artificial vagina as explained to me by …….. (surgeon). I understand it will not alter my male sex and that it is being done to prevent deterioration in my mental health."[36]

Opinion was divided among the medical professionals who gave evidence as to the therapeutic efficacy of these procedures. That was, however, irrelevant for the question that had to be decided in this case, namely whether April was male or female for the purposes of entering into a valid marriage.

The first point that the court addressed was whether April was transsexual or had been born with a DSD. Based on the medical evidence provided, the court concluded that she was a "a male homosexual transsexualist".[37] In finding as such, the judge addressed "the anatomical and physiological anomalies of the sex organs", making it clear that this part of the evidence was of marginal significance in this case, but might be of central importance for others, such as the case of Ewan Forbes-Sempill.[38] All medical experts agreed that there are at least four criteria for assessing the sex of an individual:

1. Chromosomal factors
2. Gonadal factors (the presence or absence of testes or ovaries)
3. Genital factors (including internal sex organs)
4. Psychological factors.

Some of the witnesses would have added:

5. Hormonal factors or secondary sexual characteristics (such as the distribution of hair, breast development, physique etc., which are thought to reflect the balance between the male and female sex hormones in the body).

It is important to stress that the court recognised that these criteria had been evolved by doctors "for the purposes of systematising medical knowledge and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either

[35] Ibid.
[36] Ibid.
[37] Ibid, 99.
[38] Ibid, 100.

physically or psychologically, from sexual abnormalities".[39] The court cited with approval Professor Dewhurst, who gave evidence in this case and observed that "we do not determine sex – in medicine we determine the sex in which it is best for the individual to live".[40] Because of this, the court was clear that "these criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination".[41]

Taking all the evidence together, the judge concluded that April had XY chromosomes and therefore was of male chromosomal sex; had testicles prior to the operation and therefore was of male gonadal sex; had male external genitalia without evidence of female sex organs and therefore was of male genital sex; and was psychologically a transsexual. In distinguishing between those with intersex conditions (DSDs) and those who are post-operative transsexuals, the court was clear that hormonal changes as a result of medical intervention, including the removal of sex organs, cannot render someone intersex. April was biologically male.

Socially, things were more complex. The court found that April was living in the community as and passing as a woman, more or less successfully: "Her outward appearance at first sight was convincingly feminine but on closer and longer examination in the witness box it was much less so."[42] The medical experts who examined April concluded that "the body in its post-operative condition looks more like a female than a male as a result of very skilful surgery", leading Professor Dewhurst to frame things in the now infamous summary; "the pastiche of femininity was convincing".[43] The court concluded that this was an accurate description of April, noting that "it is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed … [April's] operation, therefore, cannot affect her true sex.".[44]

All of this was to say that in law there is a distinction between an individual's sex, determined biologically, and their gender – determined at this time socially based on how an individual lived and presented themselves in day-to-day life. The court warned that it is misleading to speak of "assignment" in this context, because doctors dealing with patients do not "assign" a sex; they decide on the gender in which an individual is best placed to live, and advise accordingly. How that advice interacts with legal and social frameworks is a separate question.

This case was the first time a court in England was called upon to decide the sex of an individual who did not have a DSD. The main reason for this was the development of surgical techniques for vaginoplasty and their application to the treatment of male

[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid, 104.
[43] Ibid.
[44] Ibid.

transsexuals. Because this was the first time such a case had arisen, the court needed to approach this question as a matter of principle. In so doing, the court summarised the general approach of law to the regulation of sex, noting that "legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship".[45]

A vast area of the law is indifferent to sex. As we have seen above, that was not always the case, but by this point and certainly in our modern context, the law almost never differentiates on the basis of sex. When it does, it is usually for reasons relating to the needs and rights of everyone involved. In some areas of policy, such as in pension schemes, life assurance, or state run schemes such as national insurance, sex is relevant but not an essential determinant. This is because "there is nothing to prevent the parties … agreeing that the person concerned should be *treated as* a man or as a woman, as the case may be".[46] Effectively, the parties involved are free to create a legal fiction for the purposes of their private agreement, even if one of the parties is a government body, but this does not tell us anything about how an individual's sex will be determined as a matter of general legal status.

In other areas, the law recognises that sex is "an essential determinant", meaning that (biological) sex is so important, so integral to the purpose of the law in that area, that it cannot be ignored. Into this category Ormrod J placed marriage as it was then understood. The law has since developed and, with the introduction of same-sex marriage in Great Britain in 2014[47] and Northern Ireland in 2020, the law no longer considers marriage to be an area where biological sex is an essential determinant.

The court was clear that it was not concerned with determining the "legal sex" of April Ashley at large. The task before it was to determine sex for the purposes of marriage. Because what matters here is biological sex, fixed no later than birth, the law should adopt the first three criteria mentioned above, i.e., the chromosomal, gonadal and genital tests, collectively identifying biological sex as male or female. Where there is disparity or uncertainty here, the case would be one of indeterminate sex. Psychological, hormonal, or surgical factors were not relevant here. They do not indicate indeterminate sex, but rather a psychological condition (since labelled gender dysphoria) and medical interventions used to alleviate it. As such, the court concluded that April was a biological male and so the marriage between April and Arthur was void by virtue of its homosexual character.

This approach was affirmed and clarified in both *Bellinger v Bellinger*[48] and *A v Chief Constable of West Yorkshire Police.*[49] Following *Corbett,* it was not clear whether private

[45] Ibid, 105.
[46] Ibid, emphasis added.
[47] In Scotland, this was via the Marriage and Civil Partnership (Scotland) Act 2014. In England and Wales, this was via the Marriage (Same Sex Couples) Act 2013 but the first same-sex marriages took place from 29 March 2014.
[48] [2003] UKHL 21

agreements *treating someone as if* they were of a different sex meant that from the perspective of the law an individual could have one sex for one purpose and another for others. In *A*, Lord Bingham addressed this question directly and, referencing *Corbett*, concluded:

> "That case, it is true concerned the capacity of a male-to-female transsexual to marry. But the Court of Appeal (Criminal Division) applied the same rule to gender-specific criminal offences in *R v Tan* [1983] QB 1053 … there was nothing in English domestic law to suggest that a person could be male for one purpose and female for another and there was no rule other than that laid down in *Corbett* and *R v Tan*."[50]

Similarly, Lord Rodger noted that the correct statement of the domestic law of the United Kingdom on this question is that even a male-to-female transsexual who has undergone gender reassignment surgery remains male.[51] Lady Hale conforms this position, noting that from the perspective of the common law "is has been assumed that a person's gender is fixed at birth for the purpose of all legal provisions which make a distinction between men and women".[52]*A* is therefore unequivocal authority for the proposition that in domestic law, subject to legislative change, an individual's sex is fixed at birth and tied to whether they are male or female. This position was affirmed again in *Forstater v CGD Europe & Ors*, where the Employment Appeal Tribunal noted that "the position under the common law as to the immutability of sex remains the same; and it would be a matter for Parliament … to declare otherwise".[53]

Sex in European Law

Under common law, 'sex' corresponds with its ordinary meaning, tied to the categorisation into male and female, divided on the basis of evolutionary reproductive pathways, and immutable in humans. Until relatively recently, no definition was needed because the ordinary meaning was not significantly contested and there was no technical meaning accepted in law that diverged from ordinary meaning. Over the course of the last half century, however, that position has changed. Developments in European law, at both the EU level and from the European Court of Human Rights, gave rise to a new technical meaning of 'sex', one which diverged from the ordinary meaning embraced by the common law. We have also seen an increase in contestation over the ordinary meaning of sex, resulting in divergence between settled common law doctrine and a new social and political definitional

[49] [2004] UKHL 21.
[50] Ibid at [3].
[51] Ibid, at [19].
[52] Ibid, at [30]. It is worth nothing that here, Lady Hale clearly means to use sex and gender interchangeably.
[53] [2021] UKEAT 0105_20_1006, at [115]

battleground. It remains unclear even today in what context the law adopts the technical or the ordinary meaning of sex.[54]

Section 2(1) of the European Communities Act 1972 placed a duty upon British courts to give legal effect to all rights, liabilities, obligations and restriction from time to time arising by or under the Treaty of Rome. This would take precedence over any provision in domestic law that was inconsistent with European Community law. Article 2(1) of Council Directive 76/207/EEC (the Equal Treatment Directive) prohibits any "discrimination whatsoever on grounds of sex either directly or indirectly". This prohibition was subject to several exceptions and qualifications but nevertheless laid the groundwork for the development of gender reassignment discrimination protection in *P v S and Cornwall County Council*.[55] This case is important, not just because it extended protection from wrongful discrimination to many trans people, but also because in so doing, it linked the legal meaning of sex to the tests involved in determining direct sex discrimination. That link has informed much of the background thinking relating to contemporary debates over the meaning of sex within the Equality Act as a whole.

The facts of the case concerned the dismissal of a male-to-female transsexual who, at the time, had embarked on but not completed a course of gender reassignment surgery. At this time, the law relating to sex discrimination was covered by the Sex Discrimination Act, which did not yet contain provision for gender reassignment discrimination. This posed a difficulty for P because the test for sex discrimination involves assessment of how a suitable comparator would have been treated. For sex discrimination this requires you to look at how a member of the opposite sex who is in all relevant respects in a similar situation would have been treated. The difficulty for P was that the comparator here would then be a female-to-male transsexual who had proposed to undergo gender reassignment surgery. That person would also have been dismissed, and so the Industrial Tribunal held that this was not sex discrimination. It was, however, uncertain whether this situation fell within the scope of the Equal Treatment Directive and so the tribunal decided to stay proceedings and refer that question to the European Court of Justice.

The Court ruled that "the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex".[56] This is because the Equal Treatment Directive "is simply the expression, in the relevant field, of the principle of equality".[57] Thus, the scope of the directive extended to include protection from discrimination on the grounds of gender reassignment. As such, gender reassignment

[54] There have been several recent conflicting first instance decisions on this point with both academic and practitioner commentary indicating that this is an area of considerable uncertainty. See; Robin Moira White and Nicola Newbegin, *A Practical Guide to Transgender Law* (Law Brief Publishing 2021) 15, 52, 55; Michael Foran, 'The Scottish Gender Recognition Reform Bill: The Case for a Section 35 Order' (2023) Policy Exchange, 24–32.
[55] (Case C-13/94) [1996] ICR 795.
[56] Ibid, [20].
[57] Ibid, [18].

discrimination was "based on" sex and its prohibition manifested a principle which the court distinguished from the rule prohibiting discrimination based on the fact that a person is of one or another sex. This meant that the appropriate comparator here was not a female-to-male transsexual, but rather a male who had not proposed to undergo gender reassignment.[58]

There are two ways to interpret this ruling. The first is to say that what the Court did in *P* was identify an overarching principle of equality within the Equal Treatment Directive that is directed towards ensuring respect for "the dignity and freedom to which [an individual] is entitled, and which the Court has a duty to safeguard".[59] From this principle, the court drew two non-discrimination principles: one prohibiting discrimination based on the fact that a person is of one sex or another and the other on the basis of gender reassignment. While both of these could be classed as examples of sex-based discrimination, on this view, the court did not indicate that the meaning of sex had changed to anything other than what domestic English common law had long established. In effect, this would mirror an approach which viewed sexual orientation discrimination or pregnancy discrimination as instances of sex discrimination (because both are based on sex), one which equally does not indicate that sex means anything other than its ordinary meaning.[60] Nor did this judgment place an obligation on the United Kingdom to interpret its domestic law to reflect any such change. Instead, the Court established at the European level a right of those who intend to undergo, are in the process of undergoing or who have undergone gender reassignment to be free from discrimination on that basis. From here, it is up to individual states to determine how such a right is to be implemented within domestic law.

An alternative view is that the Court in *P* did not establish a new ground of non-discrimination, indeed did not even extend the scope of sex discrimination to include discrimination on the basis of gender reassignment, but instead introduced a new rule into EU law that sex must be interpreted to mean something different from biological sex. If this interpretation is correct, it means that references to 'sex' within anti-discrimination law must take on a technical meaning rather than their ordinary meaning. There are three reasons to conclude that this is not the correct interpretation and one reason to think that it is.

Firstly, following *P v S*, the EAT in *Chessington World of Adventures v Reed* held that the prohibition on sex discrimination in the Sex Discrimination Act 1975 must be understood, pursuant to the interpretative obligation in section 2(1) of the European Communities Act 1972, to also prohibit discrimination on the basis of gender reassignment.[61] However, because of the structure of the relevant provisions, it would be difficult to

[58] Ibid, [21].
[59] Ibid' [22].
[60] See; Robert Wintermute, 'Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in Mossop, Egan and Layland' (1994) 39 McGill Law Journal 429.
[61] [1998] ICR 97.

establish this by virtue of a comparator test unless those protected under gender reassignment changed sex from the moment that they could be included under the scope of its protection, i.e. from the moment they proposed to undergo gender reassignment. That is not how the court resolved this case. Instead, the EAT drew upon the reasoning in *P v S* where the Court expressly distinguished gender reassignment discrimination from discrimination based on the fact that someone is one sex or another, coupled with the reasoning in *Webb v EMO*,[62] which applied jurisprudence of the European Court of Justice establishing that pregnancy discrimination was an instance of sex discrimination.[63] This was so despite there being no appropriate male comparator for a pregnant woman, because pregnancy discrimination was 'based on' sex. In *Chessington*, the court held that gender reassignment discrimination operates in the same manner. Because gender reassignment discrimination does not require a male/female comparison, it instead requires comparison between someone who is proposing to undergo reassignment with someone who is similarly situated but is not proposing to undergo reassignment. That similarly situated person will have the same sex as the claimant: "by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment".[64]

The consequence of *P v* S was that the court in *Chessington* was required to interpret sex discrimination as including gender reassignment discrimination without the need to use a comparator test between men and women because it could do so between males who are not covered under gender reassignment and those who are.

It is important to note that it may no longer be the case that this need be classed as sex discrimination, as both pregnancy discrimination and gender reassignment discrimination are now covered under their own provisions in the Equality Act 2010. As such, the interpretative obligations arising from the European Communities Act and the Human Rights Act no longer require sex discrimination to be interpreted to include these forms of discrimination, because such rights are now expressly and separately protected. The interpretative obligations require the kind of reinterpretation of text that occurred in *Chessington* only when the relevant rights are not protected elsewhere in domestic law.

Secondly, the decision in *P v S* led to the Sex Discrimination (Gender Reassignment) Regulations 1999,[65] which amended the 1975 Sex Discrimination Act by inserting a new section 2A to establish a prohibition on the grounds of gender reassignment. It did not amend the definition of sex discrimination, nor did it do anything to indicate that the meaning of sex within the Act had changed. This would indicate that establishing a new ground of discrimination was sufficient to meet the obligation to respect the rights enshrined in the Equal Treatment directive. Additionally, as mentioned above, these

[62] [1995] IRLR 645.
[63] [33].
[64] (Case C-13/94) [1996] ICR 795, [21].
[65] SI 1999/1102.

regulations altered the interpretative obligations operative on the court in *Chessington* and so likely confined the decision to its time. There is now no obligation for courts to read sex discrimination provisions to include gender reassignment discrimination because there are now gender reassignment discrimination provisions in their own right. If this did meet the obligation to respect rights established by the ECJ, then it did so without introducing a technical meaning of sex into domestic law.

Thirdly, the protection afforded against gender reassignment discrimination unequivocally extends to include a time period before an individual has undergone or completed a process of gender reassignment. It would be bordering upon absurd to think that *P v S* establishes that someone has changed sex from the moment that they propose to undergo gender reassignment. As White and Newbegin note:

> "There are others who are of the view that a person who has undertaken no steps to transition, but who identifies in the opposite gender to their assigned gender, should be treated in the gender in which they identify for all purposes, including under the Equality Act 2010 … in the view of the authors, this cannot be correct".[66]

It is clear that gender reassignment protection is intended to cover even those who have not begun to do anything in the way of gender reassignment beyond proposing to start it at some unspecified point in the future. It cannot be the case that being protected from gender reassignment discrimination means that one should be treated in law as if one is a member of the opposite sex.

Having said all of this, there is one strong reason to think that *P v S* did, as a matter of EU law, establish new rules relating to the meaning of sex: the House of Lords in *A v Chief Constable of West Yorkshire Police* held that it did. While the court was unequivocal that, according to domestic law, sex means immutable biological sex, it was equally clear that, in its view, the law of the ECJ required some form of recognition of post-operative transexuals as belonging to their acquired gender. In the absence of domestic legislation, the court was therefore under interpretative obligations to read existing law to include gender reassignment recognition. Thus, Lord Bingham concludes that

> "effect can be given to the clear thrust of Community law only by reading "the same sex" in section 54(9) of the 1984 Act, and "woman", "man" and "men" in sections 1, 2, 6 and 7 of the 1975 Act, as referring to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender".[67]

[66] White and Newbegin (n 55) 19.
[67] [2004] UKHL 21, [11].

Similarly, Lady Hale interpreted *P v S* as establishing not simply a principle of non-discrimination on the basis of gender reassignment, but also a "right to a sexual identity".[68] This right appears nowhere in the decision of the ECJ but is instead referenced in the opinion of Advocate General Tesauro. Lady Hale took this right to be "clearly the right to the identity of a man or a woman rather than some third sex".[69] She then extrapolated from the ECJ's conclusion that gender reassignment discrimination must require comparison with persons of the sex to which an individual was deemed to belong before undergoing reassignment to imply that their sex must therefore change in EU law once they have undergone such assignment: "for the purposes of discrimination between men and women in the fields covered by the directive, a trans person is to be regarded as having the sexual identity of the gender to which her or she has been reassigned".[70]

There are several problems with this approach as a matter of doctrinal law. The first and most glaring is that this interpretation has little foundation within the actual judgment in *P v S*. An inference is drawn from the fact that the Court identified the comparator for gender reassignment discrimination as "persons of the sex to which he or she was deemed to belong before undergoing gender reassignment" to conclude that therefore once that person has done through a process of gender reassignment they must, as a matter of EU law obligation on Member States, be deemed to have changed sex. This is a non-sequitur. It simply does not follow from the fact that gender reassignment discrimination compares treatment with those of the same biological sex who have not proposed to undergo a process of gender reassignment that there is therefore an obligation on Member States to do anything regarding the meaning of sex in other areas of law, even if this is confined to those who have completed a process of gender reassignment, something which is in any case not defined by the Court.

Additionally, because the completion of a process of gender reassignment is not a prerequisite for protection from gender reassignment discrimination, the court in *P v S* did not need to provide any guidance on what kind of procedures or processed needed to be completed before one changed sex as a matter of EU law. This is most likely because such a change was not actually envisaged by the Court. The result is that Lord Bingham was left to fill in this gap himself, concluding that only those post-operative transsexuals who were visually and for all practicable purposes indistinguishable from members of the opposite biological sex could be classed in law as members of the opposite sex. This qualification does not appear within *P v S* and leaves open the question of the status of those who are not visually and for all practicable purposes indistinguishable. Presumably they would remain classed as their natal sex, even if they had completed gender reassignment to the best of their ability.

[68] Ibid, [56].
[69] Ibid.
[70] Ibid.

The practicability of implementing a rule such as this in the context of single-sex services or intimate care is not addressed by the House of Lords. Lord Bingham does, however, conclude that nobody who is intimately searched by a member of the opposite biological sex could reasonably object if the person searching them was visually and for all practicable purposes indistinguishable from members of their sex.[71] This displays, at best, a remarkable ignorance and, at worst, a shocking indifference to the needs and rights of women who may not consent to being intimately searched by males, regardless of how much surgery they have had. In particular, it fails to account for the reasonable objection that may come from women who have been victims of male violence, including sexual violence, or women who for religious or other reasons simply cannot be in a state of intimate undress with males who are not in their immediate family. Were this rule to be implemented extensively, it would undoubtedly give rise to human-rights infringements.[72]

Nevertheless, whether the House of Lords was correct in its interpretation of *P v S* is in some sense irrelevant. This is for two reasons. Firstly, regardless of whether an obligation to recognise reassigned gender as changed sex in law arose as a matter of EU law, it most certainly arose as a matter of ECHR law.[73] Secondly, this interpretation is superseded by primary legislation. There is some confusion over what exactly the legal effect of the decision in *A* is. Some have argued that "The House of Lords rules that a male-to-female transitioner who was 'for all practical purposes' of the acquired gender should be so treated".[74] This claim misstates the *ratio* in *A* and fails to adequately distinguish between the domestic legal context and the European legal context.

There are two important points to make about both the ECJ and ECHR strands of legal development. The first is that recognition in one's acquired gender was, at that time, tied to surgery. The decision of the House of Lords in *A* was that, as far as domestic law is concerned, sex means biological sex; as far as European law was concerned, post-operative transsexuals are entitled to be recognised in their acquired gender in certain circumstances. The full statement of Lord Bingham refers to "the acquired gender of a *post-operative transsexual* who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender".[75] The reference to indistinguishability was a qualifier, applying the principle of recognition only to those post-operative trans people who were also for all practical purposes indistinguishable from a non-trans person. The law at this time did not have anything to say about trans people who have not undergone surgery except to note that they were protected from gender reassignment discrimination and that

[71] Ibid, [11].
[72] This will be discussed below.
[73] Goodwin v United Kingdom [90].
[74] Robin White, "The Equality Act and sex – an alternative view" (*Scottish Legal News*, 16 June 2023) https://www.scottishlegal.com/articles/robin-white-the-equality-act-and-sex-an-alternative-view.
[75] Note that here gender is being used as a synonym of sex.

the comparator in such cases was a member of the same sex who was not covered by gender reassignment.

The second point to make here is that in the absence of domestic legislation, courts were under an interpretative obligation to read in those specific rules as they relate to post-operative trans people. The European obligations are not a statement of domestic law. They place duties upon the United Kingdom as a whole to, however it so chooses, incorporate these principles into domestic law. The House of Lords in *A* and Parliament in the Gender Recognition Act 2004 chose different mechanisms to implement the European requirement that post-operative transsexuals should be recognised in law in at least some circumstances. The House of Lords chose an extremely high standard – post-operative indistinguishability – as the gateway to extremely far-reaching legal consequences. Parliament via the Gender Recognition Act 2004 chose a much less demanding standard for issuing a gender recognition certificate, but also placed limits on the legal effect of obtaining one. In so doing, Parliament met the European obligations for recognition such that the interpretative obligations on courts to alter the meaning of other legislation fell away. When the Gender Recognition Act was passed, it constituted definitive domestic incorporation of these principles, reflecting legislative choices to meet these obligations in a way that balances the rights of others.

The Gender Recognition Act 2004

The landmark case of *Goodwin v United Kingdom* recognised a right of post-operative transsexuals to be recognised legally in their reassigned gender.[76] For those people who had gone through a "long and difficult process of transformation" including surgical intervention, full recognition in law "might be regarded as the final and culminating step" in changing sex.[77] As such the court concluded that "the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable".[78]

This then placed an obligation on the United Kingdom to provide some form of legal recognition for the gender reassignment of those who have undergone extensive surgery to present as the opposite sex. In the absence of primary legislation, this obligation would have placed on courts sweeping interpretative obligations to modify the meaning of existing legislation and common law rules so as to ensure proper respect for this right. This is what we began to see both as a result of *Goodwin* and as a result of *P v S*.[79] Once the Gender

[76] *Goodwin v United Kingdom* Application no. 28957/95.
[77] Ibid [78].
[78] Ibid, [90].
[79] Indeed, the Court appeal and the House of Lords in *A* were in disagreement over whether the obligation to recognise reassigned gender arise primarily from *Goodwin* or *P v S*, in the context of anti-discrimination law. See; *A v Chief Constable of West Yorkshire* [2004] UKHL 21, [13], [50], [53]-[54], [63].

Recognition Act 2004 was passed, however, that judicial development was shut down, replaced by the legislative scheme envisaged by Parliament.[80] Section 9(1) of the Act provides:

> 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).

We can see from this provision that the terms 'sex' and 'gender' are used interchangeably such that gender recognition amounts to a change of legally recognised sex. As such, under certain circumstances, the law uses a modified, technical meaning when it references sex. Under s. 2 of the Gender Recognition Act, in order to change one's legal sex one must first

a. Be diagnosed with gender dysphoria
b. Have lived in the acquired gender for two years, and
c. Intend to continue to live in the acquired gender until death.

The result is the removal of any requirement to undergo invasive medical or surgical alteration to one's body as a precondition for gender recognition. Nevertheless, the understanding of lawmakers and judges at the time was that medical intervention would be an important step for the vast majority of cases. The target beneficiaries of this Act were those who suffered from gender dysphoria, manifesting in acute psychological distress that could be alleviated only by changes to social and physical aspects of one's presentation with the aim of resembling the opposite sex. As such the House of Lords in *Bellinger v Bellinger* described the process of gender reassignment as typically involving four stages of treatment: "psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the 'real life experience'), and in suitable cases, gender reassignment surgery".[81]

Thus, while the Gender Recognition Act moved beyond the strict requirements set down in European law to provide recognition for post-operative transsexuals, it did so with the understanding that recognition was provided on the basis that individuals would take extensive steps to reassign gender. The UK government recognised that "not all are able to have surgery, for medical and other reasons" but did not seem to consider the possibility that some people may wish to be afforded the legal status (and any entailed rights) without undergoing any medical intervention. Lord Filkin, speaking in the House of Lords, stressed that:

[80] Indeed, in *A,* the court was clear that much of the job of concretising the European obligations would be done by Parliament and it was only until Parliament had done this that courts were left to make judgement in borderline cases. See; Ibid, [60].
[81] [2003] UKHL 21, [9].

> Such people who do not have surgery are few. There are usually good reasons for them not having done so. If the panel is not convinced that those persons are committed to living in a permanent state it will not grant them a gender certificate. However, to turn it the other way, for the state almost to say that unless people go through a process of bodily mutilation they will not have a legal recognition is wrong.[82]

Parliament, cognisant of these concerns over locking civil rights behind invasive surgery, therefore decided to rely on a much less stringent standard for legal sex change than the House of Lords had proposed in *A*. But in so doing, it also proposed a more limited regulatory regime, one which abandoned requirements of indistinguishability but also curtailed the sweeping entitlements envisaged by the House of Lords in *A* by carving out several exceptions, including an open-ended clause for further exceptions.

While s9(1) of the Gender Recognition Act states that a GRC changes one's legal sex "for all purposes", this is immediately qualified by s.9(3), which states that s.9(1) "is subject to provision made by this Act or any other enactment or any subordinate legislation". Within the Act itself, these provisions included exceptions such that a GRC does not affect, among others, one's status as the father or mother of a child,[83] succession,[84] peerages,[85] gender-specific criminal offences,[86] or one's sporting category where biological sex may need to be recognised to ensure fair competition or safety.[87]

What this reveals is that the drafters of the Gender Recognition Act knew that there would be times, even for those who have undergone extensive surgery, where biological sex would be relevant in law. Indeed, it is telling that the exceptions established here and later in the Equality Act cover most areas of law where a distinction in treatment is drawn and justified on the basis of sex. Returning to the analysis of Ormrod J in *Corbett v Corbett,* sex will either be irrelevant in law, relevant but not essentially determinative, or essentially determinative.[88] The vast majority of our law makes no distinctions between men and women. A GRC has nothing to say in those areas. In many other areas, sex is referenced as a marker of information but does not carry with it a corresponding rule permitting or demanding differentiation in treatment. Here, sex is relevant – because the information is relevant – but is not determinative of any legal rules. In these areas, a GRC is operative but can, for the most part, be seen as a minor administrative change that permits an individual to have the sex marker they identify with on formal documentation that rarely, if ever, corresponds with specific legal entitlements differentiated on the basis of sex. All that a

[82] HL Deb, 29 Jan 2004, vol 657, col 375-6.
[83] Gender Recognition Act 2004, s.12.
[84] Ibid, s.15.
[85] Ibid, s.16.
[86] Ibis, s.20.
[87] Ibid, s.19.
[88] [1971] P. 83, 105.

GRC does in this context is permit the alteration of documents which record sex as data about the individual concerned. Where things get more complicated is the legal effect of a GRC in areas where provision is made for different treatment on the basis of sex.

From at least 2004 onwards, our law had a technical meaning of sex in addition to the ordinary common law meaning. The difficulty which arose, given the wording of s9(3), is how one is to determine when provisions refer to the ordinary meaning of sex and when they refer to the technical meaning crafted by the Gender Recognition Act? It would be unlikely, given the specific wording of s.9(3), if all references to sex were automatically and without question taken to mean sex as modified by a Gender Recognition Certificate. So the difficult task before any interpreter is to determine whether the meaning of sex in the Equality Act should be taken to be covered by s.9(1) or s.9(3).

One way to resolve this is to draw upon existing common law principles and precedents, assuming as we often do that legislation is a contribution to an existing body of law rather than a stand-alone enactment.[89] With this in mind, one could assume that, unless expressly stated to the contrary, in areas where sex is relevant but does not correspond with a concrete rule permitting or demanding differentiation on the basis of sex, s.9(1) should apply. This will mean that any formal documentation recording sex, such as birth or death certificates, would refer to sex as modified by a GRC. Conversely, enactments or subordinate legislation which make provision for rules where sex is an essential determinant would be covered by s.9(3). All the exceptions set out in the Gender Recognition Act make provision for sex where biological sex is essential to the legal rules they cover. Any analogous enactment or subordinate legislation which similarity makes provision for sex where biological sex is an essential determinant would naturally be interpreted to constitute 'provisions' for the purposes of the rule in s.9(3) that the "for all purposes" clause in s.9(1) "is subject to provision made by this Act or any other enactment or any subordinate legislation".

The alternative is to assume that s.9(3) envisages "provision made" to be done in the form of express wording rather than implied by background principles. This is possible, and would significantly extend the consequences of being issued a Gender Recognition Certificate. It would also mean that, as far as legal interpretation was concerned, it is to be presumed that, unless otherwise stated, any and all references to sex in law are intended to track the technical meaning of sex rather than the ordinary meaning of sex. The default would be that sex means sex as modified by a Gender Recognition Certificate in the absence of an express carveout. There are several reasons to think that this approach may cause unintended consequences, not least for the operation of the Equality Act 2010.

[89] See; John Laws, *The Common Law Constitution* (Cambridge University Press 2014); TRS Allan, 'Interpretation, Injustice, and Integrity' (2016) 36 Oxford Journal of Legal Studies 58.

Sex in the Equality Act 2010

The interaction between the Gender Recognition Act and the Equality Act is far from certain.[90] There are however, only two possible interactions: either references to sex in the Equality Act take their ordinary common law meaning or they take a technical meaning whereby sex means biological sex unless modified by a Gender Recognition Certificate. There is no plausible argument that being protected under the characteristic of gender reassignment entitles one to be treated as if one's legal sex has changed.[91] This argument was addressed and dismissed in *Green v Secretary of State for Justice,* where a male-to-female trans prisoner, convicted of the spousal murder of Rachel Hudson, claimed direct gender reassignment discrimination on account of being denied access to, among other things, wigs, tights, prosthetic simulacra of female genitalia, separate changing facilities and privacy screens.[92] The reason for this denial was grounded in the security risk that such items would pose in a men's prison.

Green did not have a Gender Recognition Certificate and so could not conceivably be classed as a woman in law. As such, following *P v S* and the subsequent case of *Croft v Royal Mail Group*,[93] the correct comparator for gender reassignment discrimination was another male who did not have the protected characteristic of gender reassignment:

> Frankly, it is almost beyond argument that the only comparator is a male Category B prisoner at HMP Frankland … I find it impossible to see how a female prisoner can be regarded as the appropriate comparator. The claimant is a man seeking to become a woman but he is still of the male gender and a male prisoner.[94]

Similarly, Lady Dorrian in *For Women Scotland v The Lord Advocate (FWS1)* [95] noted that

> PvS was decided at a time when protection against discrimination on the basis of gender reassignment was not included in the UK legislation … While it recognised that discrimination on the basis of gender reassignment was most likely to be sex discrimination, neither it nor Chief Constable, West Yorkshire Police v A, which anticipated the Gender Recognition Act 2004, is authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present. These cases do not vouch the proposition that sex and gender reassignment are to be conflated or combined, particularly in light of subsequent legislation on the

[90] See; White and Newbegin (n 55) 15, 52, 55; Julius Komorowski, 'Sex and the Equality Act' (2020) 65 The Journal of the Law Society of Scotland <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act/>; Gwyneth King, 'Equality Act Provisions Regarding Gender Reassignment Discrimination' (*Scottish Legal News*, 13 February 2023) <https://www.scottishlegal.com/articles/gwyneth-king-equality-act-provisions-regarding-gender-reassignment-discrimination>; Michael Foran, 'Getting the Equality Act Right' (*Scottish Legal News*, 14 February 2023) <https://www.scottishlegal.com/articles/michael-foran-getting-the-equality-act-right>.

[91] See; White and Newbegin (n 55) 19.

[92] [2013] EWHC 3491 (Admin).

[93] [2003] EWCA (Civ) 1045.

[94] [2013] EWHC 3491 (Admin), [68].

[95] [2022] CSIH 4.

> matter in the form of the 2010 Act which maintained the distinct categories of protected characteristics, and did so in the knowledge that the circumstances in which a person might acquire a gender recognition certificate under the 2004 Act were limited.[96]

This much is settled law. Without a Gender Recognition Certificate, a male-to-female trans person is legally male for the purposes of the Equality Act. Conversely, a female-to-male trans person is legally female. Where things become more complicated is whether sex in the Equality Act is modified by s.9(1) of the Gender Recognition Act or covered by the s.9(3) exception; does sex in the Equality Act track the ordinary meaning or a technical meaning?

There is very little precedent on this question and what we do have is contradictory. *A v Chief Constable of West Yorkshire* is a decision of the House of Lords that indicates completion of a process of gender reassignment to the extent that one is visually and for all practical purposes indistinguishable will constitute a changed sex for the purposes of the Sex Discrimination Act 1975. But this is superseded by both the Gender Recognition Act 2004 and the Equality Act 2010 and so is of minimal, if any, assistance, especially given the textual differences between the definition of sex in the Equality Act and the Sex Discrimination Act.

Green v Secretary of State for Justice is a decision of the High Court of England and Wales which includes obiter comments that Green "is in a male prison and until there is a Gender Recognition Certificate, he remains male … Male to female transsexuals are not automatically entitled to the same treatment as women until they become women".[97] This implies that sex in the Equality Act is modified by s.9(1) of the Gender Recognition Act. But this is an obiter comment and so does not constitute binding precedent.

In contrast, the Inner House of the Court of Session – equivalent to the court of Appeal – did address this question directly in *For Women Scotland v The Lord Advocate (FWS1)*.[98] This case concerned a judicial review of the Scottish Government's decision, via the Gender Representation on Public Boards (Scotland) Act 2018, to introduce positive measures designed to increase representation of women on company boards. Here, a "woman" was considered to be "a person [who] is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female". That would include those male-to-female trans people who do not have a GRC in the category of women. Lady Dorrian held that this was outwith the competence of the Scottish Parliament because it alters the meaning of the protected characteristic of sex in the Equality Act, which is reserved.[99] In so holding, she concluded that

[96] Ibid, [38].
[97] [2013] EWHC 3491 (Admin), [68].
[98]. [2022] CSIH 4.
[99] Ibid, [39]-[40].

> an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a "female of any age". Provisions in favour of women, in this context, by definition exclude those who are biologically male.[100]

The Inner House of the Court of Session is the highest court to address this question directly since the passage of the Gender Recognition Act and the Equality Act. This reasoning also arguably forms part of the *ratio* of the decision as it is it from this finding that Lady Dorrian draws out the conclusion that the proposed definition of "woman" is outwith competence.[101]

To complicate matters further, the Outer House in the subsequent *For Women Scotland v The Scottish Ministers (FWS2)* attempted to distinguish *FWS1* on the basis that Lady Dorrian's decision cannot be seen as authority for the proposition that sex in the Equality Act means biological sex.[102] Lady Haldane then concluded that because the Equality Act was drafted in full awareness of the 2004 Act, the fact that the word 'biological' is not included in the definition of 'woman' suggests that the intention of Parliament was for sex to mean sex as modified by a Gender Recognition Certificate.[103] This argument will be addressed in detail below.

Drawing all of this together, it is clear that the precise interaction between the Gender Recognition Act and the Equality Act is uncertain. There is no obvious default position here, given the complex textual framework. When interpreting the nature and extent of the interaction, several considerations must be accounted for. In the remainder of this paper, I wish to sketch – admittedly with a rough hand – some of the considerations that should be taken into account when interpreting the meaning of 'sex' within the Equality Act.

Textual Considerations

There are four separate provisions which are relevant for any interpretation of the meaning of sex within the Equality Act, all of which must have meaning within our law. They are replicated below with emphasis added:

- **S.9(1) of the Gender Recognition Act 2004:** "When a full gender recognition certificate is issued to a person, the person's gender becomes *for all purposes* the

[100] Ibid, [36].
[101] It should be noted that Lady Haldane in *FWS2* contends, at [43] that this comment is obiter. It seems to me that this comment sets out Lady Dorrian's understanding of the meaning of the protected characteristic of sex as it relates to the specific context of positive measures and the Public Sector Equality Duty and is therefore a necessary aspect of the decision in a way that the obiter comments in *Green* are not. *Green* could have been decided without commenting on GRC holders because Green did not have a GRC. Here, the correct interpretation of the protected characteristic of sex is the core issue to be resolved by the court and this includes commenting on both GRC holders and those who are protected under gender reassignment but who do not have a GRC. The conclusion that these provisions seeking to advance the position of women, by definition, exclude biological males is an essential part of the chain of reasoning that drives the final judgment.
[102] [2022] CSOH 90, [44].
[103] Ibid, [49]-[50]

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)

- **S.9(3) of the Gender Recognition Act 2004:** "Subsection (1) is *subject to* provision made by this Act or any other enactment or any subordinate legislation"
- **S.5(2) of the Sex Discrimination Act 1975:** "In this Act – 'woman' *includes* a female of any age, and 'man' *includes* a male of any age"
- **S.212(1) of the Equality Act:** "In this Act – 'man' *means* a male of any age; 'woman' *means* a female of any age"

The conventional approach to statutory interpretation is summarised by Lord Hope in *Imperial Tobacco Ltd v Lord Advocate:*

> 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 consistent and predictable. That will be achieved if the legislation is construed according to the ordinary meaning of the words used.[104]

With that in mind, one might assume that s.212(1) of the Equality Act, interpreted according to the ordinary meaning of the words used, would have to mean that 'sex' also corresponds to its ordinary meaning. Of course it is not as simple as that, because s.9(1) of the Gender Recognition Act is a deeming provision: it states how other legal rules, principles and concepts ought to be interpreted. Here the provision deems that for all other legal rules, principles and concepts, sex must take on the technical meaning of ordinary sex unless modified by a Gender Recognition Certificate.

If this were all that ought to be considered, it would settle the issue neatly. Ordinary meaning has been supplanted with technical meaning for all purposes. Indeed, it appears as though Lady Haldane adopted such a view when, referencing the "for all purposes" provisions, she notes that "the language of the statute could scarcely be clearer".[105] Yet, the language of the statute absolutely could be clearer. The "for all purposes" provision must be read in light of s.9(3) of the Act, which conditions its scope by reference to "provision made by this Act or any other enactment or any subordinate legislation". As Sharpe notes:

> placing emphasis on section 9(1) of the GRA, which recognises trans women with a GRC as women for 'all purposes', fails to acknowledge how recognition is circumscribed by the GRA in significant ways. Thus the scope of legal gender recognition is delimited in relation to competitive sport, parental status in the context of existing children, succession, peerages, and particular gender-specific offences. However, more significant than any of these particular limiting provisions, is section

[104] [2012] UKSC 61, [14].
[105] [2022] CSOH 90, [45].

> 9(3) of the GRA which makes clear legal gender recognition is subject to '*any other enactment* or any subordinate legislation'. In other words, and by virtue of this provision, legal recognition under the GRA is subject to subsequent and qualifying legislation. That is, if there is conflict between the GRA and the EA, the EA trumps the GRA to the extent of conflict.[106]

This is the central question here: not when is s.9(1) applicable but when is s.9(3) applicable? If s.9(3) applies, it negates the deeming provision in s.9(1) and reverts the meaning of sex back to its ordinary common law meaning. If it does not apply, then s.9(1) does and the ordinary meaning is replaced by the technical meaning. Far more attention should therefore be paid to what constitutes "provision made" for the purposes of s.9(3). There is no obvious or default interpretation here. Nevertheless, there are two broad approaches that could be adopted. Either s.9(3) applies only where there is express textual foundation, or it applies in circumstances where the interpretation of a provision referencing sex can only be coherent, stable, and workable if it is understood to carry the ordinary meaning of sex. Arguably, in the context of the Equality Act 2010, *both* of these approaches have been satisfied.

As far as express textual foundation is concerned, Lady Haldane is entirely correct when she notes that "well-established principles of statutory interpretation include the presumption that the drafters of legislation, highly skilled individuals, do not insert or omit words or use language carelessly".[107] From here, she observes that

> the 2010 Act was drafted in full awareness of the 2004 Act, and its ambit. It is worth reiterating that the explanatory notes to the 2004 Act state, amongst other things, that upon the issuing of a GRC,
>
> > "the person's gender becomes for all purposes the acquired gender, so that an applicant who was born a male would, in law, become a woman for all purposes. She would, for example, be entitled to protection as a woman under the Sex Discrimination Act 1975."
>
> Thus when consolidating anti-discrimination legislation, including the Sex Discrimination Act 1975 and providing a definition of terms such as "sex" and "woman", the drafters of the 2010 Act did so with the benefit of that knowledge.[108]

Lady Haldane is of course correct here. What she has failed to account for is the fact that in consolidating the Sex Discrimination Act into the Equality Act, the drafters did in fact make an important textual amendment which must be given meaning, especially given the presumption that drafters do not use language carelessly. In the Sex Discrimination Act 1975, woman is defined as *including* a female of any age; in the Equality Act 2010, woman is

[106] Alex Sharpe, 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?' (2020) 83 Modern Law Review 539, 551.
[107] [2022] CSOH 90, [49].
[108] Ibid, [50].

defined as *meaning* a female of any age. The difference here is important and must have legal effect. The 1975 definition is open-ended; the reference to inclusion does not foreclose the possibility that there may be other meanings of "woman" which do not correspond with "a female of any age". By 2010, that definition is changed and we must presume that this was not done randomly or arbitrarily. Its consequence is to narrow the definition from the 1975 Act by confining the meaning of woman to mean a female of any age. We must also presume that the drafters did this in full knowledge of the Gender Recognition Act 2004, including knowledge of s.9(3) and the limitation of the "for all purposes" rule by reference to "provision made" by other enactments.

Thus, while it is true that "the word 'biological' does not appear in the definition", this does not mean that there was nothing in the way of textual change from the 1975 Act to the 2010 Act that could support the idea that provision has been made in this enactment to limit the applicability of the "for all purposes" clause here. On this point, the question is how explicit the "provision made" must be in order for it to engage s.9(3). On a narrow reading, there would need to be some reference to biology or the possession of a GRC to constitute provision made. Yet this would render the choice to change the definition of woman between the two Acts meaningless. As Haldane rightly notes, the presumption is that statutory language is not chosen carelessly or without full knowledge of the background legislative context.

Even if this did not provide the textual foundation to support the applicability of s.9(3), it may still nevertheless apply if provisions within the Equality Act would be coherent, stable, and workable only if they are understood to carry the ordinary meaning of sex. This is clearly what Lady Haldane had in mind when she noted that the Gender Recognition Act will not modify the meaning of legislation "where it is clear that 'sex' means biological sex".[109] The example that she uses here is revelatory: the Forensic Medical Services (victims of Sexual Offences) (Scotland) Act 2021, "where references to the sex of the forensic medical examiner can only mean, read fairly, that a victim should have access to an examiner of the same biological sex as themselves".[110] Notice that here the lack of an explicit reference to biological sex is no impediment to interpreting sex to mean biological sex for this Act. Nor is there a requirement to expressly invoke s.9(3) of the GRA or to mention GRC status. The reason is that, read fairly, these provisions can make sense only if sex means biological sex. The difference between the Equality Act and the Forensic Medical Services Act cannot then be based on whether the term "biological" is used. Rather, it is, on Lady Haldane's view, because for one Act, taking into account both purpose and background principles, sex could not fairly be read to mean anything other than biological sex. The mistake that Haldane has made, in my view, is to assume that the Equality Act, read fairly, would not require the same interpretation.

[109] Ibid, [53].
[110] Ibid.

To reiterate, the applicability of s.9(3) depends on whether there has been "provision made" which indicates that the "for all purposes" clause does not apply. Lady Haldane initially appears to think that this requires express textual foundation. Yet she does not address the change in drafting of the definition of sex between the Sex Discrimination Act and the Equality Act and indicates that the only way to make it clear that sex means biological sex is to insert the term "biological" into the statute itself. But she then contradicts this position by concluding that the Forensic Medical Services Act, read fairly, can only be interpreted as referring to biological sex when it mentions sex, even though it doesn't use the term "biological" either. Charitably, this means that what Lady Haldane really means here is not that sex in the Equality Act must be modified by a GRC unless the term "biological" is used, but rather that the interpretation of sex within the Equality Act depends upon an examination of the statute as a whole, taking into account whether a fair reading would adopt the ordinary meaning of sex or the technical meaning.

On this view, determining whether there has been "provision made" requires one to examine the enactment or subordinate legislation as a whole, rather than searching for express textual foundation. If, properly understood, references to sex within an enactment would be incoherent, unstable, or unworkable if they meant the technical meaning of sex as modified by a GRC, then the proper interpretation would have to be that sex takes on its ordinary meaning such that it would therefore constitute provision made for the purpose of s.9(3), thereby negating the deeming provision in s.9(1). The remainder of this paper explores considerations that will be relevant for determining if this is the case for the Equality Act 2010.

Considerations of Purpose

One of the most important considerations here is the purpose of the Equality Act, in particular whether that purpose will be frustrated if sex takes on a technical meaning throughout the Act. Considered in the abstract, the purpose of the Equality Act is to make provision for the prohibition of wrongful discrimination on the basis of a list of protected characteristics; to anticipate and pre-emptively resolve conflicts in interest between certain protected groups; and to make provision for the advancement of group-based interests in the form of permissive positive measures and the public sector equality duty.

In the context of specific protected characteristics, it must be asked whether one of the purposes of the Act is to include biological females as a distinct vulnerable group who suffer from distinct forms of sex-based discrimination and who have distinct group-based interests that positive measures or the public sector equality duty ought to account for.

Similarly, it must be asked whether the purpose of the Act is to include trans people – what the act defines as transsexuals – within the ambit of anti-discrimination protection and group-based equality consideration. Crucially, it must be asked whether in doing so, the

purpose of the Equality Act is to set up a system whereby those trans people who have GRCs are treated substantially differently from those who do not.

These considerations and questions will be addressed throughout the following discussion. It is important to identify them at the outset, however, because they will usefully frame discussion of whether the Equality Act would be coherent, stable, and workable if it is taken to have adopted one definition of sex or another.

Groups as well as Individuals

I mentioned earlier in this paper that one of the consequences of *P v S* was in the linking of the legal meaning of sex to the tests involved in determining direct sex discrimination. The result has been a focus within most of the discussions on the interpretation of sex within the Equality Act on the position of an individual claimant. Thus, White and Newbegin note that "there is substantial uncertainty as to whether following … the possession of a Gender Recognition Certificate, an individual should be considered male or female in the context of a sex discrimination claim".[111] When framed from this perspective, it might seem as though what matters here is the status of individual claimants and not much else. But the vast majority of references to sex within the Equality Act are group-based. Accounting for this is vital for any fair reading of the statute as a whole.

Arguments concerning the definition of a protected characteristic are never simply manifestations of individual claims. They are always group-oriented. The claim that one is a woman is a claim to be included within a particular category of persons and to be excluded from another. It is also a claim to include some persons and to exclude other persons within the group that one is a part of. This matters especially for aspects of the Equality Act which require duty-bearers to be cognisant of how their conduct might affect those who share a protected characteristic or where there is an obligation to account for the distinct needs and interests of those who share a particular characteristic.

This is particularly important when interpreting the s.149 public sector equality duty, which establishes positive obligations to advance equal opportunities by taking into account the need to close advantage gaps which exist between various social groups. Section 149 imposes upon public authorities in the exercise of their functions the requirement to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Act; to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it. These are group-based provisions, not individual ones.

[111] White and Newbegin (n 55) 15.

A central question, therefore, is whether the Equality Act, properly understood, takes biological females to be a distinct group covered by its protection. In this context we can see a tension between sex-based interests and gender-identity-based interests. If the purpose of the Equality Act includes the idea that biological women as a group should be afforded this attention and consideration, then sex as a protected characteristic must relate to biological sex. If it does not, then biological females are not expressly included within the Equality Act and all protections afforded to them are as a result of their indirect relationship with the category of legal sex envisaged by the GRA. That would mean that any provision within the Equality Act addressed to women as a group would in fact be addressed to those biological females without GRCs but not those biological females with GRCs stating they are male, and those biological males with GRCs stating they are female but not those biological males without them.

The Equality Act can be concerned with advancing the interests of biological women compared to biological men, and the interests of trans persons compared to non-trans persons, with no contradiction. But it cannot advance both the interests of biological women compared to biological men and "legal" women compared to "legal" men at the same time because here each category necessarily excludes the other. Sex as modified by a GRC would not mean that women as a category consists of all biological females and those biological males who have GRCs. This is because it would necessarily exclude those female-to-male trans people who have GRCs stating that they are men. The result is that the Equality Act would have no mechanism for accounting for the distinct issued faced by biological females because they would not be considered a group that shared the protected characteristic of sex.

You can interpret representation of women to mean either representation of legal women or biological women, but it cannot mean both. The wider category of legal women in this context cuts against the conceptual purpose of equal opportunity, which is to focus not on the general category but on the narrower cognate group. The same is true for the issue of a comparator for claims in indirect sex discrimination and equal pay cases. Indeed, the issue of equal pay is more complicated because in these cases the comparator must be a real, actual person. In direct and indirect discrimination cases, a hypothetical comparator is sufficient. In equal pay cases, there must be a real comparator who is of the opposite legal sex. If the purpose of the Equality Act as it pertains to the protected characteristic of sex focuses on addressing advantage gaps between legal women and legal men, it cannot focus on advancing the interests of biological women as compared to biological men.

There is already a duty to advance equality of opportunity between those who have the gender reassignment characteristic and those who do not. If sex in the Equality Act does not mean biological sex, then there is no duty to take into account the needs of biological females as a distinct group. Indeed, it is clear that in the first *For Women Scotland* case, Lady Dorrian was convinced that provisions designed to advance the position of women as a

group relative to men as a group can only, read fairly, be understood as pertaining to biological women: "provisions in favour of women, in this context, by definition exclude those who are biologically male".[112] The distinction between Lady Dorrian and Lady Haldane therefore is that Lady Dorrian, focusing on the group-based aspects of the Equality Act, concluded that they must be referring to biological sex, and Lady Haldane concluded that the Equality Act was not a statute wherein a fair reading would require sex to mean biological sex.

The Single Sex Exceptions

It is quite interesting that Lady Haldane concluded that the Forensic Medical Services Act can only be read fairly to have meant biological sex when it used the term sex. This is because the amendment introduced by the 2021 Act was to the Victims and Witnesses (Scotland) Act 2014, ensuring that s.9(2) be read as follows:

> Before a medical examination of the person is carried out by a registered medical practitioner, the person must be given an opportunity to request that any such medical examination be carried out by a registered medical practitioner of a sex specified by the person.

Lady Haldane does not consider there to be any need for this provision to specify that the sex in question is biological sex because, read in context, it is clear that the intention is to respect the right of a victim of sexual crime to request single-sex care should she so desire. Contrary to Lord Bingham in *A*, it is now understood that in the context of intimate examination involving exposure of genitals, someone can in fact reasonably object to this being done by a member of the opposite sex.

What is interesting here is that virtually identical provisions are contained within Schedule 3 of the Equality Act, which outline the exceptions to the general rule against direct discrimination. Paragraph 27(1) states that a person does not contravene the rule against discrimination in the provision of services by providing a service only to persons of one sex if any of a list of conditions is satisfied. Among that list is:

> (6) The condition is that—
>
> (a) the service is provided for, or is likely to be used by, two or more persons at the same time, and
>
> (b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.
>
> (7) The condition is that—

[112] [2022] CSIH 4, [36].

(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and

(b) B might reasonably object if A were not of the same sex as B.

It is hard to see how references to sex in s.9(2) of the Victims and Witnesses (Scotland) Act 2014 can only be fairly read to mean biological sex while these sections of the Equality Act can only be fairly read to mean sex as modified by a Gender Recognition Certificate. They stand or fall together. If, as Lady Haldane acknowledges the victim of sexual crime has the right to request single-sex care, that right may manifest in contexts outside of a medical examination directly related to the investigation of crime. To establish that right, it must be lawful under the Equality Act for service providers to set up and maintain single sex services which discriminate on the basis of biological sex. Those provisions do exist, but only if the protected characteristic of sex means biological sex.

Additionally, if the conditions set out above are interpreted as referring to sex as modified by a GRC, it renders their applicability practically non-existent. Take the physical contact condition. For this to be met there must be a service where there is likely to be physical contact and where B might reasonable object if A were not of the same legal sex as B. In the example of a female victim of sexual violence without a GRC, the reasonable objection would need to be to B not falling into the category of those biological females without GRCs and those biological males with GRCs. So B would need to be comfortable with a biological male who has a GRC engaging in physical contact but then reasonably objecting if that same person did not have a GRC stating they were a woman. Conversely, B would need to be comfortable with a biological female engaging in physical contact but then reasonably object if that same person had a GRC stating they were a man. It is hard to see how a private document would make the difference here, bearing in mind that there is no requirement for surgery or medical intervention of any kind. The objection that B might reasonably have here can only fairly be interpreted as being to the biological sex of the person engaging in potentially intimate physical touching.

Similarly, the objection that persons of one sex might reasonably make to the presence of a person of the opposite sex simply cannot be grounded in the possession or lack of a GRC. A woman in a female only changing room might reasonably object to the presence of biological males, particularly if she has been the victim of male violence or has religious reasons for being unable to undress in their presence. But she cannot be said to be thinking rationally, let alone reasonably, if she would have no objection to biological females without GRCs and biological males with GRCs but would object to biological females with GRCs and biological males without them. Again it must be remembered that this distinction does not track trans status, physical appearance, presentation, identity, or surgery. It would track biological sex unless modified by a GRC and nothing else. There is no way to read these

provisions fairly and in their proper context and come to anything other than the conclusion that provisions relating to single-sex services can only be referencing biological sex. Given that those provisions set out exceptions to rules relating to discrimination on the basis of the protected characteristic of sex, it must follow that the protected characteristic of sex is also referring to biological sex.

A similar analysis can be done of the examples used in the explanatory notes, where examples include "a cervical cancer screening service to be provided to women only, as only women need the service"; "separate male and female wards to be provided in a hospital"; "separate male and female changing rooms to be provided in a department store"; and "a massage service to be provided to women only by a female massage therapist with her own business operating in her client's homes because she would feel uncomfortable massaging men in that environment". None of these examples would make sense if they intended to refer to GRC status rather than biological sex. Female-to-make trans people with GRCs stating that they are men may still need a cervical cancer screening service and may be at an increased risk of cancer generally as a result of the administration of cross-sex hormones, delivered in high doses and over a period of decades.[113] If sex means sex as modified by a GRC in this context, then it is simply false that only women need the service, because some men would need it.

Additionally, in the context of exceptions to gender reassignment discrimination set out in Schedule 3, paragraph 28, references to sex here must also be to biological sex. Gender reassignment discrimination can be permitted, if proportionate, in the context of anything done in relation to the provision of separate services to persons of each sex, the provision of separate services differently for persons of each se; or the provision of a service only to persons of one sex. Once again, these provisions would be inoperable if provision of service only to persons of one sex means provision of services only to biological females without GRCs and to biological males with GRCs but not biological females with GRC and biological males without them. Even if the policy was one that wished to provide service to women and male-to-female trans people, only some of the latter group could be included as only some male-to-female trans people will have GRCs.

The example used in the explanatory notes is the exclusion of transsexual people from a group counselling session for female victims of sexual assault because the organisers judge that the clients who attend are unlikely to do so if a male-to-female transsexual person was also there. This example poses some difficulty because it indicates that the exclusion of a male-to-female trans person from such a service would be covered under gender reassignment discrimination. If sex meant biological sex it would be covered under sex

[113] See; Hayley Braun and others, 'Cancer in Transgender People: Evidence and Methodological Considerations' (2017) 39 Epidemiologic Reviews 93. See also;

discrimination. Yet if sex meant sex as modified by a GRC, this example would be incoherent because the exclusion of male-to-female trans people without GRCs would also be sex discrimination, not gender reassignment discrimination. This would only be gender reassignment discrimination in relation to the exclusion of female-to-male trans people who don't have GRCs stating that they are men and male-to-female trans people who do have GRCs stating that they are women.

Additionally, if the goal was to exclude only male-to-female transsexual persons, it is unclear why the policy would be to prohibit all transexual people from attending, including female-to-male trans people. This would seem disproportionate. Equally, a policy not allowing transsexual people would, according to the terms of the Act, include those who are proposing to undergo but have not actually undergone any process of changing attributes of their sex. All in all, this example must be treated with some scepticism because it does not appear to have fully grasped the relevant law, regardless of whether sex is modified by a GRC. Explanatory notes can be useful, but they cannot take precedence over legislation in cases of conflict.

If sex meant biological sex then things become more simple in this example. The female only nature of the service would, if proportionate, permit the exclusion of all males, including male-to-female trans people, regardless of GRC status. This would be covered under the paragraph 27 sex discrimination exceptions. But if the service providers were concerned that there may be reasonable objection to some female-to-male trans people, particularly those who have taken testosterone to give them a more masculine appearance and a much deeper voice, potentially triggering a trauma response in some women, then their exclusion would amount to gender reassignment discrimination, not sex discrimination. It is here where the gender reassignment exceptions make most sense: in cases where there is a single sex service which seeks to exclude those of the same sex in circumstances where their having undergone a process of gender reassignment might cause an issue such that it would be proportionate to exclude them. Other examples might be a male only spa faced with a post-operative male-to-female trans person who has undergone surgical or hormonal interventions but has now de-transitioned to live as a gay man. In this context, a request that this man maintain a towel at all times could constitutes something done in the provision of a single sex service which amounts to gender reassignment discrimination. It could therefore be covered under the exception set out in paragraph 28, if it amounts to a proportionate means of achieving a legitimate aim.

Other Protected Characteristics

The Equality Act makes provision for the prohibition of discrimination on grounds that relate to sex. In these areas, it will matter whether sex takes on its ordinary meaning or the technical meaning resulting from the GRA.

Pregnancy Discrimination

Beginning with pregnancy discrimination, the Equality Act makes provision for circumstances when "a person (A) discriminates against a woman if A treats her unfavourably because of a pregnancy of hers".[114] Sections 13(6), 17 and 18 outlaw discrimination against women on the basis of pregnancy and maternity. There are repeated references to a woman who has become pregnant and no references to a man who has become pregnant. Woman is defined in s.212 as meaning a female of any age. If female and woman are interpreted to mean sex as modified by a GRC, then any female-to-male trans person who has a GRC and becomes pregnant will fall outside of the scope of protection because they are not women for the purposes of the Equality Act.[115] If sex takes on its ordinary meaning, these females will retain protection.

Sexual Orientation Discrimination

The protected characteristic of sexual orientation is defined in s.12 as "a person's sexual orientation towards – (a) persons of the same sex, (b0 persons of the opposite sex, or (c) persons of either sex". If sex in this context is taken to be modified by GRC possession then there will be two important implications.

The first is that biological males or females who are oriented towards members of the same sex will not be covered under this provision. To be oriented towards members of the same sex one would instead need to be for example legally female, either because one is biologically female without a GRC or because one is biologically male with a GRC, and attracted only to other legal females. Orientation does not imply that one is attracted to every member of a group but it does imply that one is only attracted to members of a group. It is hard to imagine anyone who is only attracted to those of one biological sex who don't have a formal document couples with those of the opposite biological sex who do have this document but who is attracted to nobody in the reverse group.

The second implication is that trans people who obtain a GRC will as a consequence usually change sexual orientation as they will have changed sex. This will have an impact

[114] Equality Act 2010, s.17(2).

[115] See; Equality and Human Rights Commission, 'Letter to Minister for Woman and Equalities on the Definition of Sex in the Equality Act 2010' (3 April 2023) app A <https://www.equalityhumanrights.com/sites/default/files/letter-to-mfwe-definition-of-sex-in-ea-210-3-april-2023_0.pdf>; Cf. Alice Margaria, 'Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?' (2020) 34 International Journal of Law, Policy and the Family 225.

upon the operation of provisions designed to respect freedom of association rights of lesbians and gay men by requiring for example a lesbian association to include a male-to-female trans person who is attracted to women (however this is defined).

Section 101 of the Equality Act sets out provisions for membership within associations. Section 101(1) prohibits discrimination in the admission or terms of admission of members. Schedule 16 sets out certain exceptions to this prohibition of discrimination. Most notably, sch.16 para.1(1) states that: An association does not contravene section 101(1) by restricting membership to persons who share a protected characteristic. It matters for all of this how sex is defined because that will affect how sexual orientation is defined and what constitutes a lesbian association, who its members can be, and whether the association can exclude someone who is biologically male.

Inequality of Status within Gender Reassignment

One important consequence of sex being interpreted to mean sex as modified by a GRC is that this would lead to an inequality of status between those who share the protected characteristic of gender reassignment. If possession of a GRC changed one's sex for the purpose of the Equality Act, this would create an asymmetry in the legal status of trans people, with GRC holders being treated differently than non-GRC holders, as has been set out above. This would mean that in some contexts, possession of a GRC would correspond with additional rights and in others it would involve the removal of rights. There is doubt as to whether this was intended by the drafters of the Equality Act. As Sharpe notes;

> "The GRA does not, nor was it ever intended to, have consequences for equality law. Rather, it deals exclusively with the issue of legal recognition … the argument sex-based exceptions cannot be invoked against transwomen GRC-holders because of their female status under the GRA needs to be treated with caution. Ultimately, it is a question of statutory interpretation. If Parliament had intended for the exceptions to be confined to non-GRC holders, that is, to remove GRC holders from the ambit of permitted discrimination, it could have drafted the EA accordingly and in clear terms. Yet, there is nothing in the EA, its explanatory notes or in the parliamentary debates pre-ceding its enactment to suggest the exceptions cannot be invoked against GRC holders. Rather, trans people, covered by the protected characteristic of 'gender reassignment' enjoy a set of benefits and detriments under the EA. There appears to be no good reason to think GRC holders were intended to bear an asymmetrical relationship to this balancing of rights. While trans women GRC-holders are

considered women for most legal purposes, it is clear they are not considered women for all legal purposes."[116]

In addition to this, the inequality of status within the protected characteristic of gender reassignment, if it is tied to possession of a certificate, complicates all rules relating to sex within the Equality Act. What is more, the fact that it is a criminal offence to disclose knowledge of should one come across it in an official capacity, makes the enforcement already complex rules almost impossible.[117] It was for this reason that the Equality and Human Rights Committee notes that "Notwithstanding the existence of statutory exceptions permitting different treatment of trans people where justified, and our guidance to explain the law, it has not been straightforward for service providers and employers to apply the law, including in areas such as sport and health services".[118]

An interpretation of statute which is practicably unworkable or which would make it impossible for duty-bearers to follow ought to be disregarded in favour of one which is coherent, stable, and workable. All of the issues set out above militate in favour of the proposition that the Equality Act is similar to the Forensic Medical Services (victims of Sexual Offences) (Scotland) Act 2021 in that references to sex can only be fairly read to mean biological sex.

Human Rights Concerns

In addition to the textual and contextual considerations that must be accounted for when interpreting the meaning of 'sex' within the Equality Act, there may also be human rights arguments. It is beyond the scope of this paper to explore these arguments in detail. What should be considered by any interpreter however is the s.3 obligation in the Human Rights Act to, as far as possible, interpret statute to be compatible with the human rights of all those affected. This will include the human rights of trans people to recognition and to be free from discrimination as well as the human rights of others who may be affected by a definition of sex which departs from the ordinary meaning.

As far as rights arising from gender reassignment are concerned, it should be noted that a definition of sex as biological sex within then Equality Act does not, at least of the face of it, appear to be in conflict. The Equality Act maintains protection from gender reassignment discrimination and the Gender Recognition Act, even if it does not apply to the Equality Act, provides a legal mechanism for someone to change their legal sex on their birth, death, and marriage certificates.

[116] Sharpe (n 109) 551.
[117] See; Gender Recognition Act 2004, s.22.
[118] Equality and Human Rights Commission (n 118).

Yet, if sex does not mean biological sex, that could give rise to human rights infringements for women, religious minorities, and sexual minorities. These rights include rights to freedom of religion, freedom of association, protection from sexual orientation discrimination and, in the context of intimate searches or medical treatment for vulnerable or traumatised women, rights to freedom from cruel and degrading treatment. Should any of these rights militate in favour of the definition of sex in the Equality Act meaning biological sex, the s.3 Human Rights Act obligation will obtain.

Conclusion

Finding precise legal meaning for commonly used concepts is surprisingly difficult. It is often advantageous to leave some room for ambiguity such that exceptional cases can be accounted for within an otherwise coherent, workable legislative framework. Where things become particularly difficult however is when the exception is expected to set the terms for the norm. Rather than finding ways to accommodate the distinct needs and rights of an anomalous group of individuals *within* an existing framework, the presumption now seems to be that the framework itself must be radically reconfigured. There does not appear to be must legal foundation for this. The Gender Recognition Act made specific provision to subject the effect of a GRC to the provisions of other enactments. The Equality Act, on any fair reading which takes into account the needs and rights of all protected groups, was intended to protect both gender reassignment and biological sex. When thinking about the needs of the exceptional case, it is often forgotten why the general framework exists in the first place. But this framework, where biological sex and gender reassignment are each recognised as distinct vectors for discrimination and inequality, is necessary to protect the rights of all. So long as biology remains an important factor in discrimination and inequality, it must remain an important aspect of ani-discrimination and equality law.