



Shakuntala Banaji

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## Biological essentialism cannot deliver safety or justice

*Shakuntala Banaji, Professor of Media, Culture and Social Change at the London School of Economics and Political Science reflects on the recent controversial UK Supreme Court judgment in For Women Scotland v The Scottish Ministers, arguing that gender itself is not essentially biological but arises from a complex mixture of historical, social, cultural and psychological factors that need to be considered to deliver safety or justice.*

If only all of us, the government, and the UK Supreme Court, put as much energy into upholding rights and stopping the ongoing harms of violent racism, sexism and misogyny — **genocide and starvation, sexist abuse, sexual harassment, pay gaps, lack of child support, online misogyny, gender based violence, FGM**, unequal burdens of care, **maternal mortality**, unsafe roads and public transport systems for starters — as is currently being spent on undermining the rights of an **already discriminated minority**.

**The judgment of the UK Supreme Court** on the appeal regarding the interpretation of “woman” and “sex” in the **2010 Equality Act**, states explicitly that the Court regards sex to be a biological binary that cannot change, so even if someone has a Gender Recognition Certificate they do not change sex for the purpose of the Equality Act 2010 and are not automatically protected under the category on their GRC.

Having read all 268 paragraphs (87 pages) of the judgment, it seems that the Court’s decision will result in the opposite of what the honourable judges hope. Namely, all spaces that *should be* safe for women will become less safe. **Inequalities** will be entrenched. Let me explain.

The judgment, while smattered with important and compassionate, but also patronising and limited assurances on everyone’s protection under the law and the aim of lessening inequality (paragraph 248, for example), is peppered with the **retrograde idea** that if we interpret trans women who have a Gender Recognition Certificate as women and act as if they are women then the collection of data

about groups and the enacting of legislation about groups and the setting of rules that apply to groups becomes too difficult, too complicated, too messy (paragraphs 153 and 154, for example).

In order to succeed in its own terms and to reduce both confusion and inequality, therefore, the judgement needs to make matters of public decision-making and data collection less complex, less stressful, less opaque and less harmful for ordinary people.

So, does it?

Spoiler: it does not.

For example, the judgement – paragraph 247, sub-paragraph 3 – mentions book clubs – stating that without taking a biological and binary definition of gender, under the 2010 equality act, groups like women’s book clubs would have to admit trans women with Gender Recognition Certificates. (Although the next sub-paragraphs 4-8 make it clear that the Court is equally – if not more – concerned about employment, prisons, sports, etc).

The judgment repeatedly suggests that all trans men who were born with female genitalia (and who therefore are women in the eyes of the Court) would get left out of data on women and out of some women’s groups/ clubs, which the Court considers unfair because they’re *essentially* women.

This invocation of unfairness ignores the choice of trans men not to be counted in the aforementioned demographics; and to move voluntarily from their birth group identity; it deliberately ignores the sociological work that could easily add data on trans men and non-binary persons to data on those currently counted in women’s stats to understand complex patterns; it ignores the fact that in most demographic surveys citizens voluntarily reveal demographic data and are not legally required to do so – so it’s a specious argument that the data is currently not being collected properly and disadvantageous to some women.

The notion of gender-as-a-binary-biological-essence that determines every aspect of one’s social life from birth to death is everywhere in the judgment. “Essence” and reduction to biology is the core of paragraph 265 and all its sub-paragraphs too. Remember that, as **Stuart Hall** and others have long argued, most forms of discrimination and inequality are premised on **essentialist thinking**, reductionism, binary oppositions, othering and stereotyping.

Therefore, a judgment that endorses the practice of thinking about gender-as-a-biological-essence will have detrimental consequences for everyone.

Let me again turn to the example of an all-women book club, this time after the judgment. We should really be asking the Supreme Court bench how, practically, the cis women in the group are going to set up criteria for allowing people in and excluding them: forget the fact that **most of us (cis or trans) won’t want much to do with discriminatory spaces**, and let’s imagine that everyone who is legally allowed to be in the book club joins. So in addition to Shamim and Linda and Louise and Amy and Karen who are cis women, Delroy who is a trans man with a **Gender Recognition**

**Certificate** (since we are reduced to thinking in stereotypes by the judgment) and Maria, a masculine-looking cis woman who has **facial hair**, opt to join. Delroy says “I’m a trans man”. Do the cis women in the group all sigh a sigh of relief (because they don’t accept that trans men are men) and go “Welcome to our women’s book group Delroy”? Louise and Shamim, both cis heterosexual women, think that Maria might be a trans woman masquerading as a biological (cis) woman, which makes them feel deeply unsafe.

The judgment suggests that everyone should use *proportionality* in such situations. But as we know, feelings are complicated, and sensitive; not necessarily conducive to proportionality when discrimination depends on discretion.

So, what do you think is going to happen? Will the cis women who look feminine in a way that is clearly recognisable demand to see Maria’s genitalia? Will they say Maria cannot attend the group? Will they **call the police to check**, if Maria refuses to show her genitalia or to leave? Will Maria, a cis woman, feel comfortable attending the group once the others have voiced their suspicions and humiliated her? Add to this: Amy has a history of trauma around men. Is she still within her rights to say that she doesn’t want Delroy in the group because Delroy looks and sounds like some of the men in her past? Or will she simply leave the group herself?

Has the judgment simplified anything? No, it hasn’t. It’s taken an **already complicated situation** that required further discussion, compassion, fairness and finesse and made it worse, evidenced by the detrimental **interim guidance** on toilets from the UK Equality and Human Rights Commission.

Now imagine **that we thought of gender inequality as intersecting other social structures of discrimination** that affect people’s lives from birth to death. Imagine we realised that racist and gender discrimination, gender-based violence, **murder, rape** and patriarchal ideologies and misogynist violence online were the things that need to change, urgently, legally and practically in order for women to feel safer everywhere, not just in spaces limited to women. Imagine we called for, worked towards and wrote judgments that made the world a better place for all women and girls, non-binary and gender-queer persons, boys and men who get **sexually assaulted** and harassed and/or find themselves in coercive relationships.

Our lives in contemporary societies are affected by overlapping cultural norms, educational influences, social prejudices, legal frameworks and judgments, resulting in custom and practice that sometimes aligns with justice and sometimes doesn’t (It might be illegal to hit **women** and **children** in domestic settings but many men still consider it their right to do so; it might be illegal to pay one group less than another group but employers find loopholes that allow them to do this in practice). Gender itself is not essentially biological but arises from a complex mixture of biological, historical, social, cultural and psychological factors.

Going forward, let’s put collective energy into achieving **gender justice**. That means trying to reduce and prevent harm and violence in all settings, to educate and legislate against gender-based

discrimination and violence (including homophobic and anti-trans violence) and to prevent and stamp out misogyny and transmisogyny, online and offline.

*This post gives the views of the author and not the position of the Media@LSE blog, nor of the London School of Economics and Political Science.*

## About the author

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