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## Gender critical litigation: reconciling *Fair Play for Women* and *For Women Scotland*

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Crowdfunded litigation has emerged as a key campaign strategy for “gender critical” activists across the United Kingdom, supporting a diverse range of civil cases from employment tribunal actions<sup>1</sup> to petitions in judicial review.<sup>2</sup> Its influence has been felt in Scottish courts too, as reflected in two recent judicial review cases – *Fair Play for Women Ltd*<sup>3</sup> and *For Women Scotland Ltd*<sup>4</sup> – which were supported by crowdfunding to the tune of at least £235,000.<sup>5</sup> The Court of Session handed down judgments in these cases just days apart in February 2022. These opinions generated considerable social media comment – and not a little confusion – as their outcomes seemed at odds with one another. While both cases concerned legal definitions of “women” and “sex,” in *For Women Scotland*, the Inner House concluded the Scottish Parliament had “conflated and confused” different protected characteristics by including transwomen in one legal definition of “women.”<sup>6</sup> In *Fair Play for Women*, by contrast, the court held “there is no universal legal definition of the word sex” in law – and that the concept of “sex” does not always or necessarily mean biological sex.<sup>7</sup>

This article argues that, despite appearances, the Court of Session’s decisions in these cases can be reconciled in straightforward legal terms. While shared ideological commitments explain why these cases were pursued by activist groups, I show the legal issues raised by these actions are only superficially similar. Having more fully introduced the “gender critical” beliefs underpinning the two petitions, I show that *For Women Scotland* is best understood as a case about the technical limits of devolution and the complex interaction between reservations and exceptions in Schedule 5 of the Scotland Act 1998. *Fair Play for Women*, by contrast, represents an – ultimately unsuccessful –

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<sup>1</sup> For example, *Forstater v CGD Europe* [2021] UKEAT/0105/20/JOJ. £123,865 was raised to support the case via crowdfunding online from 4,617 contributors <https://www.crowdjustice.com/case/lost-job-speaking-out/>

<sup>2</sup> See, for example, *Bell v Tavistock* [2021] EWCA Civ 1363. £ 118,810 was raised in support of the case from 3,811 people. <https://www.crowdjustice.com/case/protect-gd-children/>

<sup>3</sup> *Petition, Fair Play for Women Ltd* [2022] CSOH 20; *Fair Play for Women v Registrar General for Scotland* [2022] CSIH 7. In subsequent references, these judgments will be identified as *Fair Play for Women* (Outer House) and *Fair Play for Women* (Inner House).

<sup>4</sup> *Petition, For Women Scotland Ltd* [2021] CSOH; *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4. In subsequent references, these judgments will be identified as *For Women Scotland* (Outer House) and *For Women Scotland* (Inner House).

<sup>5</sup> *Fair Play for Women*, “Reclaim the definition of “sex” in Scotland” (2022)

<https://www.crowdfunder.co.uk/p/reclaim-sex-in-scotland> and *For Women Scotland*, “Stop the Scottish Government redefining “woman” to include men” (2021) <https://www.crowdjustice.com/case/stop-scottish-government-redefining-woman/>.

<sup>6</sup> *For Women Scotland* (Inner House), para 40.

<sup>7</sup> *Fair Play for Women* (Inner House), para 20.

attempt to persuade the Scottish courts to adopt a single biological definition of the concept of the “sex” for all legal purposes. Read together, these cases illustrate the opportunities and risks of strategic litigation by political interest groups. While *For Women Scotland* represents a significant victory for gender critical activists, *Fair Play for Women* can be seen as a more fundamental setback. In conclusion, I suggest these cases represent a good opportunity for public lawyers to reappraise our understandings of “public interest litigation,” more consistently to recognise the contested character of legal actions which command the interest – and increasingly, the financial support – of organised sections of the public.

### **A. What is “gender critical” litigation?**

“Gender critical” ideas can be understood as “the belief that sex is biologically determined, binary and immutable,” while gender is socially constructed.<sup>8</sup> While critiques of the social construction of gender identities and roles have been a longstanding feature of different canons of feminist analysis, modern “gender critical” activism contends that sex – and *not* gender – should represent the primary category of social and legal analysis. This view has resulted in a range of policy preoccupations and campaigning efforts across the UK. These have included resisting reforms to the Gender Recognition Act 2004 – and implicitly and explicitly opposing the gender recognition for transgender people the 2004 Act enables – contesting the legality of NHS Trusts prescribing puberty blockers to transgender teenagers diagnosed with gender dysphoria,<sup>9</sup> pursuing employment tribunal cases seeking to establish that gender critical beliefs are protected under the Equality Act 2010 for the purposes of discrimination, victimisation and harassment,<sup>10</sup> opposition to other administrative and legal changes which do not accord particular legal status or bureaucratic significance to recorded sex at birth, putting pressure on parliamentarians to use the language of “sex” rather than “gender” in new legislation,<sup>11</sup> and promoting the idea that the concept of “sex” should be understood in policy, legislation and society in exclusively biological terms. #SexNotGender is the basic shibboleth of this active, agitated and international social media subculture.

### **B. *For Women Scotland Ltd***

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<sup>8</sup> S Cowan and S Morris, “Should ‘Gender Critical’ Views about Trans People Be Protected as Philosophical Beliefs in the Workplace? Lessons for the Future from Forstater, Mackereth and Higgs” (2020) *Industrial Law Journal* 51(1) 1 – 37, 1.

<sup>9</sup> *Bell v Tavistock* [2021] EWCA Civ 1363.

<sup>10</sup> *Forstater v CGD Europe* [2021] UKEAT/0105/20/JOJ.

<sup>11</sup> Demands of this kind helped shape the final text of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021, for example, eliminating a reference in an earlier statute to the “gender” of medical examiners to their “sex” in section 5 of the Act. They also informed the inclusion of “sex” in section 12 of the Hate Crime and Public Order (Scotland) Act 2021.

For Women Scotland characterise themselves as a “group of women from all over Scotland working to protect and strengthen women and children's rights.”<sup>12</sup> In October 2020, the company launched a crowdfunding campaign to challenge the legislative competence of certain provisions of the Gender Representation on Public Boards (Scotland) Act 2018, raising £196,815 from 5,278 contributors. This represents one of the highest value litigation crowdfunding campaigns in Scotland in the last seven years.<sup>13</sup>

Section 1(1) of the 2018 Act established a “gender representation objective” for public boards with devolved and mixed functions. The objective was for “50% of non-executive members who are women” – a goal the Scottish Government sought to facilitate by incorporating different positive action measures into the Act, including new rules on recruitment and appointment of board members.<sup>14</sup> The 2018 Act defines a “woman” for these purposes as “including a person who has the protected characteristic of gender reassignment” under the Equality Act 2010 “if, and only if, the person 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.”<sup>15</sup> The Scottish Parliament was able to pass this proposal as a result of the Scotland Act 2016, which partially reformed the reservation of “equal opportunities” to Westminster. Since 1998, “equal opportunities” has been a reserved matter under Schedule 5 of the Scotland Act, with some limited exceptions for the encouragement “other than by prohibition or regulation” of equal opportunities through legislation. The 2016 Act added new exceptions to this reservation, giving Holyrood competence to introduce legislation promoting the inclusion of people with “protected characteristics” in non-executive posts “on boards of Scottish public authorities with mixed functions or no reserved functions.”<sup>16</sup> The 2016 Act provided that the “protected characteristics have the same meaning as the Equality Act 2010” for the purposes of this exception.<sup>17</sup>

In *For Women Scotland*, the key dispute was whether the 2018 Act’s definition of “women” fell within this exception to the reservation of equal opportunities – and so the Parliament’s legislative competence – or whether its approach was *ultra vires*. For Women Scotland argued that section 2 departed from the conceptual scheme of sex<sup>18</sup> and gender-reassignment in the Equality Act 2010,<sup>19</sup>

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<sup>12</sup> For Women Scotland, accessible at: <https://forwomen.scot/>.

<sup>13</sup> See generally, A Tickell, “The Continuation of Politics by Other Means: Crowdfunded Litigation in Scotland (2015-2021)” (2022) *Edinburgh Law Review* 26(1) 100 – 106.

<sup>14</sup> 2018 Act, s 3 – 6.

<sup>15</sup> 2018 Act, s 2.

<sup>16</sup> Scotland Act 2016, s 37.

<sup>17</sup> Scotland Act 1998, Schedule 5, L2.

<sup>18</sup> Equality Act 2010, s 11.

<sup>19</sup> Equality Act 2010, s 7.

and therefore exceeded devolved powers. The crowdfunder in support of the case expressed the social analysis behind the case more directly, arguing that the Scottish Government were essentially “redefining “woman” to include men” in law.<sup>20</sup> The Equality Network – which describes itself as “the leading national charity working for lesbian, gay, bisexual, transgender and intersex equality and human rights in Scotland”<sup>21</sup> – was granted permission to intervene with written submissions, addressing “some of the equal opportunities arguments from the perspective of transgender people.”<sup>22</sup>

For Women Scotland lost their case at first instance but persuaded the Inner House of the Court of Session that these provisions are outside legislative competence on appeal. In the Outer House, Lady Wise concluded For Women Scotland’s case was “misconceived” on the basis the contested provisions did not:

purport to redefine woman in the sense of excluding those who have that biological sex, nor does it seek to redefine the protected characteristic of gender reassignment which definition is governed by UK wide legislation and not part of the exception. The key definition has the effect only of including as women, for the purpose of a piece of legislation designed to improve gender representation on public boards, those who can meet the aforementioned stringent criteria. If they do, they are deemed to be representative of the female gender in this limited context; they are included as women for that single purpose.<sup>23</sup>

On appeal, Lady Dorrian did not agree, holding that these provisions of the 2018 Act exceeded Holyrood’s legislative competence. “By incorporating those transsexuals living as women into the definition of woman,” the Inner House found, the 2018 Act “conflates and confuses two separate and distinct protected characteristics, and in one case qualifies the nature of the characteristic which is to be given protection.”<sup>24</sup> The Lord Justice Clerk elaborated that:

it would have been open to the Scottish Parliament to include an equal opportunities objective on public boards aimed at encouraging representation of women. It would have been open to them separately to do so for any other protected characteristic, including that of gender reassignment. That is not what they have done. They have chosen to make a representation

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<sup>20</sup> For Women Scotland, “Stop the Scottish Government redefining “woman” to include men” (2021) <https://www.crowdjustice.com/case/stop-scottish-government-redefining-woman/>.

<sup>21</sup> Accessible at: <https://www.equality-network.org/>.

<sup>22</sup> *For Women Scotland* (Outer House), para 42.

<sup>23</sup> *For Women Scotland* (Outer House), para 53.

<sup>24</sup> *For Women Scotland* (Inner House), para 40.

objective in relation to women but expanded the definition of women to include only some of those possessing another protected characteristic.<sup>25</sup>

On this basis, the court held the definition of “woman” adopted in the 2018 Act “impinges on the nature of protected characteristics which is a reserved matter under Schedule 5,” fell outside the limited exception to the reservation of equal opportunities – and was accordingly *ultra vires*.<sup>26</sup>

The court’s approach to interpreting Schedule 5 is also significant from the point of view of intersectional understandings of discrimination. While the reception of this decision focused on its implications for gender critical activism and transgender rights, the judgment has wider resonances for other protected characteristics which should not be overlooked. One significant feature of the Court’s approach to legislative competence is that it effectively excludes recognition of intersectionality in this small corner of devolved equality law. The American legal scholar Kimberlé Crenshaw is widely credited with coining the concept of “intersectionality” in her analysis of prejudice and discrimination.<sup>27</sup> Rooted in critical race studies and black feminism, Crenshaw’s key insight was that “black women’s experiences are much broader than the general categories that discrimination discourse provides” – particularly in the context of legal articulations of the nature of discrimination. Crenshaw’s critique had two key targets. Firstly, “colour blind” feminist literature which did not reckon with the dynamics of race, and secondly, legal frameworks for the evaluation of discrimination were – and arguably remain – rooted in what she described as a “single-issue framework” within which sex and race were understood as distinct and separate lines of discrimination, rather than intersecting axes, which need to be understood together to be adequately understood at all. If the Scottish Parliament wished to incentivise greater inclusion of ethnic minority women on public boards in future, for example, *For Women Scotland* suggests this would be an impermissible objective to incorporate into legislation, as the intersectional outlook advocated by Crenshaw would constitute another “confusion and conflation” of the protected characteristics of race<sup>28</sup> and sex.<sup>29</sup> In this context, it is significant that the recognition of “dual discrimination” in section 14 of the Equality Act 2010 has still not been brought into force by UK ministers. For the limited purposes of the Scottish Parliament’s

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<sup>25</sup> *For Women Scotland* (Inner House), para 40.

<sup>26</sup> *For Women Scotland* (Inner House), para 40.

<sup>27</sup> K Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) *University of Chicago Legal Forum* 1(8); 139 – 167, further elaborated in K Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) *Stanford Law Review* 43(6) 1241 – 1299.

<sup>28</sup> Equality Act 2010, s 9.

<sup>29</sup> Equality Act 2010, s 11.

competence over equal opportunities, *For Women Scotland* locks Scots law into exactly the kind of single-issue equality framework Crenshaw criticises.

### **C. *Fair Play for Women Ltd***

*For Women Scotland* was easily misunderstood as a judgment mandating a general distinction between concepts of “sex” and “gender” in law. That the Inner House’s judgment it did not do so is neatly reflected by the *Fair Play for Women* case, decided in the same court by a similar bench just days later. Fair Play for Women Ltd describes itself as “a campaigning and consultancy group which raises awareness, provides evidence and analysis, and works to protect the rights of women and girls in the UK.”<sup>30</sup> In March 2021, the group raised £101,000 from 3,259 supporters to raise judicial review proceedings in the High Court in London, challenging the lawfulness of the Office For National Statistics’ guidance on how the public should answer the question “what is your sex?” in the 2021 census.<sup>31</sup> This was followed by separate proceedings in the Court of Session, arguing that the guidance given by the Registrar General for Scotland on completion of the Scottish census was also unlawful. The guidance stated:

If you are transgender the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate (GRC). If you are non-binary or you are not sure how to answer, you could use the sex registered on your official documents, such as your passport. A voluntary question about trans status or history will follow if you are aged 16 or over. You can respond as non-binary in that question.<sup>32</sup>

In March 2022, the group raised a further £38,428 from 1,332 contributors to meet the costs of this litigation, having channelled excess funds from its initial crowdfund to support the Court of Session case. As Lord Sandison explained, the legal key question raised by the petition was:

whether, absent possession of a [gender recognition certificate], a transgender person, non-binary person or any other person not sure how to answer the sex question would be acting lawfully by answering the question other than by reference to the sex recorded on that person’s birth certificate.<sup>33</sup>

Under the Census Act 1920, questions about sex have been designated as core questions for over 100 years, meaning that respondents must answer this question, truthfully, on pain of criminal

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<sup>30</sup> Accessible at: <https://fairplayforwomen.com/>.

<sup>31</sup> *R (Fair Play for Women Ltd) v UK Statistics Authority* [2021] EWHC 940 (Admin).

<sup>32</sup> *Fair Play for Women* (Outer House), para 1.

<sup>33</sup> *Fair Play for Women* (Outer House), para 38.

prosecution.<sup>34</sup> There is, by contrast, no compulsion to complete census questions concerning your religion, sexual orientation, or gender identity.<sup>35</sup> With the exception of those with a certificate under the Gender Recognition Act 2004, Fair Play for Women argued that a “person’s sex is determined for all legal purposes (including, crucially for present purposes, the obligation to answer correctly the census sex question) as being that with which that person was registered at birth.”<sup>36</sup> On this basis, they argued the Registrar General’s guidance was unlawful, in the sense that it was informing census respondents that they could give a “false” answer to the census question, and so fell to be reduced.<sup>37</sup> Their *esto* position was that although concept of “sex” in the 1920 Act was not defined, “the meaning was readily and naturally comprehended as a binary term admitting of no understanding but a biological one,” which they submitted also required respondents to answer in terms of recorded sex at birth.<sup>38</sup>

These arguments were not without precedent. In criminal courts, for example, people have been convicted of common law fraud and sexual offences, based on the conclusion that they had secured sex by deception by failing to disclose their underlying sex to their partners.<sup>39</sup> The respondents, by contrast, suggested the 1920 Act should be construed as legislation which is “always speaking.”<sup>40</sup> In essence, they argued that times change, concepts like “sex” change with the times, and statutory interpretation should track this evolving social understanding. The Equality Network was again permitted to intervene, arguing “there was no single legal definition of “sex” which applied in every context, and certainly not in the context of the 1920 Act and its subordinate legislation.”<sup>41</sup>

At first instance, Lord Sandison rejected Fair Play for Women’s core submission, holding that “there is no general rule or principle of law that a question as to a person’s sex may only properly be answered by reference to the sex stated on that person’s birth certificate or [gender recognition certificate].”<sup>42</sup> He elaborated that:

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<sup>34</sup> Census Act 1920, s 8(1) and Schedule.

<sup>35</sup> Census Act 1920, s 8(1A).

<sup>36</sup> *Fair Play for Women* (Outer House), para 39.

<sup>37</sup> *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 at para 38.

<sup>38</sup> *Fair Play for Women* (Inner House), para 13.

<sup>39</sup> In England and Wales, this has been treated as vitiating consent under the Sexual Offences Act 2003 in *R v McNally* [2013] EWCA Crim 1051. In Scotland, prosecutions have been brought on the basis of common law fraud charges. See, for example, *HM Advocate v Wilson* (Unreported) BBC Scotland (2013) “Sex fraud woman put on probation” 19<sup>th</sup> April 2013 <https://www.bbc.com/news/uk-scotland-north-east-orkney-shetland-22078298>. These judgments have been criticised. See A Sharpe, “Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent” (2014) *Criminal Law Review* 207 – 223.

<sup>40</sup> *Fair Play for Women* (Inner House), para 23.

<sup>41</sup> *Fair Play for Women* (Outer House), para 34.

<sup>42</sup> *Fair Play for Women* (Outer House), para 40.



any determined attempt to construct a cohesive picture out of the isolated incidences in which the words in question have been used in diverse statutory provisions appears to be more of a legal Rorschach test than anything else, in that it risks being much more a reflection of the mindset of the observer than a recognition of objective features of the field surveyed.<sup>43</sup>

This conclusion was supported by the Inner House in a fast-tracked appeal seven days later. While Lady Dorrian accepted “there are some contexts in which a rigid definition based on biological sex must be adopted”<sup>44</sup> – following *Bellinger v Bellinger*<sup>45</sup> – she held “there is no universal legal definition of the word sex,”<sup>46</sup> and there are many circumstances in which the words “sex” and “gender” have been used synonymously and interchangeably” by policy-makers and courts,<sup>47</sup> reflecting the “popular and common usage of the terms synonymously.”<sup>48</sup> In reaching this conclusion, both courts laid emphasis on the social context in which the language of “sex” is being used here – a census questionnaire being sent to every household in Scotland. Understood in this context, Lady Dorrian concluded:

It is to be expected that the language used, and the meaning to be attributed to the words used, are to be interpreted according to their popular and common meaning, not according to a specialist, restricted definition which may be adopted where matters of status and rights may be in issue.<sup>49</sup>

Fair Play for Women’s petition was accordingly dismissed, and no further appeal was pursued.

#### **D. Analysis**

In Harlow and Rawlings’ terms, both of these cases can be understood as strategic litigation by political groups bringing “pressure through law,” using “the law and legal techniques as an instrument for obtaining wider collective objectives.”<sup>50</sup> As Ramsden and Gledhill point out, “strategic litigation is oriented towards advancing a variety of causes that transcend the individual litigation” – and the impact sought by pursuing such cases “is not focused solely on legal outcomes, but on producing broader social effects, including the building blocks to change social attitudes and effectuate political reform.”<sup>51</sup> In most cases, judges do not feel the need to speak about the political

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<sup>43</sup> *Fair Play for Women* (Outer House), para 47.

<sup>44</sup> *Fair Play for Women* (Inner House), para 12

<sup>45</sup> [2003] 2 AC 467.

<sup>46</sup> *Fair Play for Women* (Inner House), para 20.

<sup>47</sup> *Fair Play for Women* (Inner House), para 22.

<sup>48</sup> *Fair Play for Women* (Inner House), para 22

<sup>49</sup> *Fair Play for Women* (Inner House), para 22

<sup>50</sup> C Harlow and R Rawlings, *Pressure Through Law* (1992), 1.

<sup>51</sup> M Ramsden and K Gledhill, “Defining Strategic Litigation” (2019) *Civil Justice Quarterly* 38(4) 407 – 426, 425.

context within which their decisions might resonate. It is significant that Lady Wise – and subsequently the appeal court – felt the need to emphasise that their judgments in *For Women Scotland* do not:

form part of the policy debate about transgender rights, a highly contentious policy issue to which this decision cannot properly contribute. At its core, this litigation is concerned with whether certain statutory provisions were beyond the legislative competence of the Scottish Parliament.<sup>52</sup>

Lady Wise stressed that:

While I record certain statements that were made about Scottish Ministers’ policy or position on transgender rights, that matter was at best tangential to the central dispute and has had no bearing on the decision.<sup>53</sup>

While you can understand the court’s anxiety for its decisions not to be (mis)interpreted as political interventions in a contentious debate, these decisions inevitably “form part of the policy debate about transgender rights” in the UK. This is, after all, why these judicial review petitions were lodged, and supported, and crowdfunded, and resisted, and intervened in. While the court’s decision in *For Women Scotland* may, as Lady Dorrian held, not hinge on the “debate about the rights and wrongs of policy decisions in this area, but on the proper interpretation” of the Scotland Act,<sup>54</sup> the political constituency for litigation enforcing the technical constraints of the Scotland Act is vanishingly small. Judges can decide how to reason their decisions. They cannot limit the social resonance of their opinions – or save their judgments from selective quotation in the press, cherry-picking on social media, or dumb confusion in both.

Elsewhere, I have suggested that the sometimes couthy language of “public interest litigation” can fail to reflect the extent to which crowdfunded litigation is a raw manifestation of politics – which is to say, it is politically motivated and the subject of legitimate disagreement.<sup>55</sup> While both groups have a right of access to the court’s supervisory jurisdiction, whether cases like *Fair Play for Women* and *For Women Scotland* are in the public interest is rightly contested.<sup>56</sup> An interest which prompts litigation can be “widely shared” by some sections of the public without necessarily being progressive or consistent with the rights of others.<sup>57</sup> Litigation is tool which can be used for different and

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<sup>52</sup> *For Women Scotland* (Outer House), para 1.

<sup>53</sup> *For Women Scotland* (Outer House), para 1.

<sup>54</sup> *For Women Scotland* (Inner House), para 27.

<sup>55</sup> A Tickell, “The Continuation of Politics by Other Means: Crowdfunded Litigation in Scotland (2015-2021)” (2022) *Edinburgh Law Review* 26(1) 100 – 106, 106.

<sup>56</sup> A K Chen and S Cummings, *Public Interest Lawyering: A Contemporary Perspective* (2013)

<sup>57</sup> T Mullen, “Public interest litigation in Scotland” *Juridical Review* (2015) 4 363 – 383, 363,

incompatible ideological purposes. Public lawyers interested in the diverse ways diverse groups apply public and private pressure through law should reflect on the implications of our critical vocabulary. Alternative conceptual frameworks to describe this kind of legal activism are available – from “strategic litigation” and “cause lawyering”<sup>58</sup> to “impact” and “test-case litigation.”<sup>59</sup>

Recognising the contested character of supposedly “public interest litigation” also creates more critical space to recognise the phenomenon of *unstrategic* litigation involving a degree of public participation – where the legal interventions of political actors miscarry or produce adverse or unforeseen consequences.<sup>60</sup> As Duffy explains, “in practice, litigation will often be inherently risky in diverse ways,”<sup>61</sup> and “the positive nature and impact of litigation can certainly not be taken for granted” – either in terms of the public interest, or the particular collective interest the strategic litigant(s) hoped to vindicate.<sup>62</sup> We can see this dynamic in these two cases. While For Women Scotland achieved their goal of having the contested provisions of the 2018 Act declared outside of legislative competence, Fair Play for Women secured the precise opposite of their strategic goals, securing unwanted judicial confirmation that “there is currently no single definition of sex, or gender, in law.”<sup>63</sup>

Approaching litigation funded by public participation in this more critical way is ultimately more illuminating than rehearsing tired and familiar David and Goliath stories and makes it more likely we recognise and reckon with the diverse social, cultural and economic capital which can be mobilised through litigation campaigns, problematising questions of who the powerful and strategic political actors really are in these complex – and reliably costly – courtroom dramas.

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<sup>58</sup> A Sarat and S A Scheingold, *Cause Lawyers and Social Movements* (2006).

<sup>59</sup> M Ramsden and K Gledhill, “Defining Strategic Litigation” (2019) 4 *Civil Justice Quarterly* 407.

<sup>60</sup> C McCorkindale and A McHarg, “Litigating Brexit” in (2021) *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure*, 260 – 291.

<sup>61</sup> H Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (2018), 238.

<sup>62</sup> Duffy (2018), 5.

<sup>63</sup> S Cowan, H J Giles, R Hower, B Kaufmann, M Kenny, S Morris and Katie Nicoll Baines, “Sex and gender equality law and policy: a response to Murray, Hunter Blackburn” (2021) *Scottish Affairs* 30(1) 74 – 95, 76.