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For Women Scotland Ltd v The Scottish Ministers

By Alfie Boxall

For Women Scotland Ltd v The Scottish Ministers marked a watershed moment in the United Kingdom's discourse on gender identity. However, as this paper argues, it sets a regrettable precedent for rights-based activism across the UK. It highlights how, due to the functioning of the Supreme Court, rulings on rights issues originating from devolved matters can negatively affect minority groups throughout the UK—even in nations beyond the one from which the devolved issue originally arose.

This paper outlines how the Scottish National Party's proactive yet disjointed approach to gender identity stemming from the initial provisions of the Gender Representation on Public Boards (Scotland) Act 2018—particularly in relation to the rest of the UK—adversely impacted the rights of minorities outside the Scottish Government's remit. These consequences stemmed initially from the statutory guidance that gave rise to the case and extended through the progression of appeals to the Supreme Court. It will be argued that the case's evolution—from advice issued by a devolved government to a ruling with nationwide precedent—reiterates longstanding concerns about the legal interplay between devolved and national jurisdictions, reminiscent of the West Lothian Question (WLQ). Activists, therefore, must consider how the actions of devolved governments may have far-reaching implications for rights across the entire country.

For Women Scotland Ltd v The Scottish Ministers means that rights activism in the UK is fundamentally limited in its scope under the current system of devolution in Scotland. Because the precedent set by the case raises an issue similar to the West Lothian Question, legislation intended to advance rights in one devolved administration may further restrict the rights of others throughout the UK through arbitrary rulings.

The West Lothian Question was a defining instance of a lack of constitutional clarity for the UK. Similarly, the relationship between lawmaking by the Scottish Parliament and by the sovereign Parliament at Westminster has been considered unfair since the inception of devolution.²⁰⁷ But that sense of unfairness has so far only been studied in terms of the legislative competences of the Scottish and Westminster Parliaments and votes on legislation at Westminster itself. This was the original concern of the West Lothian Question.²⁰⁸ The implications of such a situation, a constitutional anomaly between a devolved and central government organ, in the form of a legal ruling, have not yet been studied. This is the area of concern where *For Women Scotland Ltd v The Scottish Ministers* sits. This paper will explore the origins of the legal and constitutional situation this case creates and its implications. It will also explore the implications for rights-based activism, and how in this context the issue generates a similar form of constitutional unfairness or inequality to that articulated in the West Lothian Question. We will first outline why the ruling developed and how the existing mechanisms of the Scottish Parliament, Supreme Court and Westminster Parliament facilitated how it unfolded. Then, we will examine how this sets a

²⁰⁷ HC Deb 14 November 1977, vol 939, col 123.

²⁰⁸ Paul Bowers, "The West Lothian Question," Research Briefing SN02586 (House of Commons Library, January 18, 2012).

similar precedent to the West Lothian Question, but also how this precedent is unique in and of itself. We will then outline how this is also unique because it concerns the role of the Supreme Court in setting such precedents. Lastly, we will explore how this sets a troubling precedent for rights-based activism, what this might mean for rights-based movements and how these movements can learn from the ruling. This article will also examine how this case fits into the existing scholarship surrounding gender identity and recognition, as well as the existing scholarship on legal-to-national devolved functions.

Rights-based claims have long been brought before the UK courts, which have been a primary vehicle for legal change, especially under so-called judicial activism, for which there is established precedent. Indeed, the constitutional instruments necessary for it have long been in place.²⁰⁹ In terms of trans and queer rights, the implementation of laws and various rulings has also been the device by which questions about rights have been raised and activism has been pursued in the first instance, especially in response to instances of moral panic.²¹⁰ And it could be argued that this context of moral panic was similar to that in which *For Women Scotland Ltd v The Scottish Ministers* originated. FWS Ltd launched the case after the Scottish Government's Gender Representation on Public Boards (Scotland) Act 2018.²¹¹ This Act was passed by the Scottish Parliament²¹² in response to the relevant statutory guidance issued under the Equality Act 2010.²¹³ The Scottish Parliament is not an independently sovereign Parliament but a devolved body under the supreme Westminster Parliament which maintains some reserved powers.²¹⁴ So in this case, it was a devolved update to existing legislation from the supreme legislative body via a devolved assembly. The Supreme Court is the final court of appeal in the UK and hears cases from all of the devolved nations.²¹⁵ The case was taken there and the ruling was determined.²¹⁶

Now, while all three bodies are working in tandem as intended, the nature of the ruling nonetheless bends legislative norms. One only needs to look at Dicey at his most basic to know that Parliament is sovereign, and that deviation from that is out of the norm. That was the worry behind the West Lothian Question, that despite being a creation of the sovereign Westminster Parliament,²¹⁷ the Scottish Parliament would override the authority of MPs sitting in Westminster and thus undermine parliamentary sovereignty. The issue in the case of *For Women Scotland Ltd v The Scottish Ministers* is that the disproportionate impact on parliamentary sovereignty arose through the courts, by way of an established ruling, rather than merely as a by-product of the devolution arrangements. It shows that a deliberate legal effort in one devolved nation has the potential to alter the impact and meaning of laws from the supreme legislature which have a deep impact on rights. Such a perspective had not previously been included in the academic literature because no such ruling had been made. In addition, it is worth

²⁰⁹ Anwar Baig, "Activism Under Certain Circumstances Be a Legitimate and Protect the Human Rights Effectively," *Wah Academia Journal of Social Sciences* 3, no. 2 (2024), pp. 775–98.

²¹⁰ Sandra A. Duffy, "Moral Panics and Legal Projects: Echoes of Section 28 in United Kingdom Transgender Discourse and Law Reform," *Gender and Justice* 1, no. 1 (2025), pp. 78–99.

²¹¹ Isabel Kagoo, "Defining Woman—The Contentious Legal Battle over the Definition of 'Woman' in Scotland," *St Andrews Law Review*, March 12, 2024.

²¹² Gender Representation on Public Boards (Scotland) Act 2018 (asp 4).

²¹³ *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, [2025] 2 WLR 879 [15]–[20].

²¹⁴ Scottish Parliament, "Difference between Parliament and Government."

²¹⁵ Robert Reed, Lord Reed of Allermuir, "Why Does the UK Supreme Court Matter for Scotland?," speech delivered at the University of Strathclyde, October 28, 2024.

²¹⁶ *For Women Scotland* (n 213) [264]–[268].

²¹⁷ Scotland Act 1998, s 28.

mentioning that this contribution also includes wider scholarship regarding issues of biological sex and gender identity. Much of the scholarship has thus far been centred around the introduction of legislation such as the Gender Recognition Act 2004. This scholarship has examined, through a contemporary lens, the initial changes that the legislation made to the status of trans people in the UK and how efforts by devolved nations to improve the status of trans people may, on a wider scale, imperil similar efforts across the UK.

The response to the ruling was one of general negativity and it was acknowledged as perhaps the most significant backstep on trans rights in British history.²¹⁸ The role of the Scottish Government was largely ignored, except for observations that it was a devolved administration and that the governing SNP had adopted a more active approach to trans rights than the Westminster government. This reflects a longstanding tendency among sections of the British left to portray successive Westminster Governments, including the Labour Government, as inactive on trans rights as the issue has become increasingly prominent.²¹⁹ Although there has been little academic or media attention directed towards the mechanics of the ruling, discussion of it has largely been political. The advantage of adding the perspective that this article takes is identifying the underlying functional and constitutional issues which truly exacerbate the negative experience of minorities in the UK and even elsewhere with similar constitutional arrangements, including in countries with uncoded constitutions or Westminster parliamentary systems. There needs to be a comprehensive account of how and why such dynamics exist and what their implications may be if rights activism in the UK is not to remain constrained by such challenges. Regarding the existing scholarship on devolved-to-national legal functions and relationships, there is little on the specific relationship between the UK Supreme Court and the Scottish Government. Scholarship on general devolved-to-national legal functions has focused on the limited role that the courts ultimately play and how this is unlikely to change.²²⁰ This ruling suggests the opposite, because there is now a concrete example of the courts becoming involved in such functions, and the Supreme Court no less. This article aims to prove that the courts do in fact play a role in devolved-to-national legal functions and that there is the potential for such cases to arise in the future.

The precedent set by the ruling is similar to the West Lothian Question in that it is an instance of the devolved rulings producing an unfair balance legally speaking. But it has never been explored whether the Supreme Court was able to produce such a balance. The role of the Supreme Court encompasses the outcomes of rulings in the devolved administrations. But it has never been considered whether such devolved rulings would harm the rights of those protected by supreme legislation. The Equality Act 2010 had remained unchanged in terms of precedents until the ruling.²²¹ And it can be argued that the impact the ruling had on the guidance laid out in said Act was seismic. In addition to the cultural disquiet it produced among the trans community and its allies, architects of the 2010 Act acknowledged that its impact was disproportionate with regard to the original scope of the Act.²²² This suggests that part of the scope of the impact of the ruling lies in a degree of unfairness

²¹⁸ Rosemary Hunter, "For Women Scotland Ltd v The Scottish Ministers': An Error of Judgment," *feminists@law* 14, no. 2 (2025).

²¹⁹ Andrew McDonald, "Why Scotland and Westminster Are Going to War over Trans Rights," *Politico*, September 19, 2023.

²²⁰ Alan Trench, "The Courts and Devolution in the UK," *British Journal of Politics and International Relations* 14, no. 2 (2012), p. 303.

²²¹ Sophie Lewis, "The UK's Anti-Trans Ruling Is a Defeat for All Women," *The Nation*, April 23, 2025.

²²² Sana Noor Haq, "UK Supreme Court Says Legal Definition of 'Woman' Excludes Trans Women, in Landmark Ruling," CNN, April 16, 2025.

outside of the remit of the passage of the Equality Act 2010. And based on the mechanics outlined in the first section, we can ascribe this unfairness to the fact that the nature of the ruling originated from a matter taken to a devolved government. Much like the WLQ, this was unintentional in that such unfairness was the result of the inherent functioning of the bodies involved (in the case of the WLQ, the Westminster Parliament and the Scottish Parliament; in the case of the ruling, the Supreme Court and the Scottish Parliament). The difference with *For Women Scotland Ltd v The Scottish Ministers* is that it, in legislative terms, implicates the Supreme Court as well as the devolved Scottish Parliament and the Westminster Parliament. The case was against the Scottish Parliament, was brought to the Supreme Court, and resulted in a fundamental reinterpretation of the legislation passed by Westminster. Such a tripartite result is commonly understood to be possible, as the Supreme Court is the final court of appeal for cases arising from the devolved jurisdictions. But a ruling which has had such a fundamental impact in terms of confusing the status of a minority group's rights is not comparable to any other in the UK so far. Most common law revisions of this sort have come from lower courts, especially regarding rights activism.²²³ What, then, does this mean overall for rights activism in Britain? Rights activism depends on legislative clarity. Indeed, that was what many advocates for issues regarding minority groups like trans rights in the UK had asked for. The ruling establishes the possibility that legislation enacted at Westminster may be altered through rulings arising from devolved jurisdictions. And what that means for rights activism, especially regarding small minorities, is that a similarly significant impact on rights governed by the Gender Recognition Act 2004 is likely to recur.

But in order to create a more comprehensive assessment of the implications of the ruling for rights activism, it would be wise to consider what the dynamic outlined above means for the constitutional organs involved, and how the institutional effects of the ruling, if unchanged, set an ingrained challenge for rights activism. The case was initially taken to the top of the Scottish legal system in the Court of Session,²²⁴ demonstrating the potency of trans rights as an area of rights activism which can permeate the UK legal system. It reached the top of a devolved nation's legal structure and had to be taken to the final court of appeal. It is worth investigating briefly whether this was a unique deficiency of the Scottish legal system that the matter could not be resolved within the Scottish courts. By doing this, we can ascertain the extent to which this issue could recur in other devolved jurisdictions, namely, Wales or Northern Ireland. In the case of Northern Ireland, it seems that rights activism has been latently related to cases related to the Troubles, and arbitration has been linked to the ECHR and supranational legal organs rather than the UK Supreme Court:

*"In an accompanying legal memorandum, the UK government acknowledges that the ECtHR of Human Rights 'has articulated a general opposition' to amnesties but goes on to suggest that the Court has countenanced the possibility of an amnesty being ECHR compatible, 'including where a reconciliation process is in existence.'"*²²⁵

²²³ Brice Dickson, "Activism and Restraint within the UK Supreme Court," *European Journal of Current Legal Issues* 21, no. 1 (2015).

²²⁴ *For Women Scotland* (n 213) [15]–[30].

²²⁵ Anna Bryson and Kieran McEvoy, "Human Rights Activism and Transitional Justice Advocacy in Northern Ireland," *International Journal of Transitional Justice* 17, no. 3 (2023), p. 460.

And in the case of Wales, there is no equivalent to the Court of Session, and the legal jurisdiction forms part of the single legal jurisdiction of England and Wales.²²⁶ Nor have cases involving comparably prominent rights issues originated in Wales and subsequently reached the Supreme Court. What this suggests is that the Scottish case does have a degree of uniqueness when it comes to rights activism. Northern Ireland is a polarised jurisdiction for a number of reasons and rights activism centres around sectarian identity and the history of the Troubles and extrajudicial management outside of the UK. In Wales, most rights-based cases seem tied to England. However, this should not defeat the precedent which the Scottish case sets. It proves that it is possible for such a case to happen. Just because it is more likely in Scotland does not mean it is impossible for it to ever happen in Northern Ireland or Wales. Regardless, we will next look at the role of the Scottish legal system in managing the case to the point at which it became a non-devolved matter at the Supreme Court, and became a matter involving the reinterpretation of national legislation. The Inner House of the Court of Session overturned the ruling in favour of the Gender Representation on Public Boards (Scotland) Act 2018 in early 2022.²²⁷ This led to the case subsequently becoming entangled in the Scottish legal system with FWS filing numerous appeals and the appellate judges in the Court of Session striking them down.²²⁸ What this shows is that the lead-up to the ruling was extremely prolonged, and that this was determined by the intense conviction and efforts of FWS to force the ruling in the Scottish courts and subsequently their efforts to force the case *out* of the Scottish courts. And it was only when the case came under the remit of the Scottish legal system that it became a harmful instance of rights activism backfiring. Existing scholarship has admitted that such a problem has the potential to happen but has not acknowledged that it would be inherently problematic. As Chalmers explains: ‘The possibility of disparate interpretation already exists in relation to UK statutes dealing with matters of criminal law, but does not appear to have proved unduly problematic.’²²⁹ This judgment is unsurprising given that it was written before the creation of the Supreme Court, when it was uncertain whether such a case would come before the new court. But Chalmers, despite this, does actually propose the available solution to the ruling in a political sense by suggesting that such matters can be resolved by Parliament: ‘Parliament can, of course, always intervene to impose uniformity by way of legislation if disparate interpretations are seen as problematic.’²³⁰ The effective political solution for rights activists who are for trans rights and against the ruling is for gender identity and care to be clarified in legislation. In terms of the law, however, his perspective suggests that the impact of the ruling does in fact lie within the functioning of the Supreme Court itself. Chalmers suggests that the possibility of disparate interpretation may be inherent in the functioning of the Supreme Court, or may at least prove to be a problem in appeals directed to the court from the Scottish courts. This begs the question of whether the role of the Supreme Court is inherently biased towards any group with a persistent enough effort to change legislation, and whether the issue was the adequacy of the existing legislation. The Gender Recognition Act 2004 was ultimately the target of FWS. But I would argue

²²⁶ Law Society of England and Wales, *England and Wales: A World Jurisdiction of Choice* (Law Society of England and Wales, 2019), p. 12.

²²⁷ *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4, 2022 SC 150 (IH) [40].

²²⁸ *For Women Scotland Ltd v Scottish Ministers* [2023] CSIH 37, 2024 SC 117 (IH).

²²⁹ James Chalmers, “Scottish Appeals and the Proposed Supreme Court,” *Edinburgh Law Review* 8, no. 1 (2004), p. 21.

²³⁰ Chalmers, “Scottish Appeals,” p. 21.

that it was indeed the functioning of the Supreme Court which is to blame. The court operated under the assumption that the case needed resolving because FWS kept pushing for its progression and had made several unsuccessful appeals. This sets a precedent suggesting to rights activists that any movement with significant effort behind it would be able to use the Supreme Court to amend legislation in a way that harms minorities, where legislation such as the Gender Recognition Act leaves room for reinterpretation. And the fact that this came through the appeals process from another devolved jurisdiction is the key to this effort which could undermine rights activism. All it would take is any concerned group to make a case in a devolved jurisdiction and forward the case to the Supreme Court for the entire country to feel the impact. It would be wise for rights activists to, in addition to asking for legislative clarity, have the courage to question the constitutional loopholes which allow for malicious actors to harm the rights of minorities by amending existing legislation. The state should consider establishing panels or bodies to assess such changes and determine whether they would cause excessive harm.

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