# Are trans rights human rights? The case of gender self-ID

## Introduction

In 1771 De Lolme proposed that Britain's sovereign Parliament could do anything except turn men into women and women into men.[1] In fact this was incorrect: as Jennings observed "if Parliament enacted that all men should be women, they would be women so far as the law is concerned. In speaking of the power of Parliament, we are dealing with legal principles, not with facts".[2] Two and a half centuries later the emergence of gender identity theory has made legislation of this kind a political possibility. Yet the Conservative government has announced that, for England and Wales, it will not proceed with controversial reform to introduce a system of gender self-identification ("self-ID") whereby a person simply completes a form changing their gender.[3] Should courts step in and declare self-ID a human right? This analysis argues that if Parliament declines to introduce self-ID then the courts ought not to try to compel it to do so.

Attempts to judicialise gender controversies may readily be discerned in the volume of legal actions being brought before courts. Moreover a number of groups and politicians including Amnesty, Human Rights Watch, Liberty and Sir Keir Starmer have recently deployed the slogan "trans rights are human rights". As well as begging the question of which rights constitute "trans rights", invocation of "human rights" is ambiguous. "Human rights" are oftentimes deployed rhetorically to plead that society *ought* to regard certain rights as fundamental. This sense would echo the "Women's Rights Are Human Rights" movement of the 1990s which emphasised how existing human rights laws and mechanisms failed to protect women.[4] The assumption now may be that the human rights system excludes transgender persons and needs reform. Alternatively "trans rights are human rights" may constitute a claim that specific rights in the European Convention on Human Rights *already* guarantee transgender rights and that courts should prompt their implementation. To label rights as "human rights" connotes a heightened judicial role, with courts empowered to assert themselves, to a greater or lesser extent, against legislatures. Yet these two possible meanings of "trans rights are human rights" are not so far apart, since the ECHR is a "living instrument" and normative argument works to determine its evolution. When courts update the meaning of Convention rights in line with changing social conditions they have been persuaded by political argument that law should be reinterpreted to embrace such-and-such a new right. This process subordinates black-letter literalism and precedent to a more natural-law orientated judicial creativity.

The question of which organ of state, judiciary or legislature, should determine the issue of self-ID therefore merits pressing concern. It is good that there has been some normative debate between legal scholars on self-ID's substantive merits and

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[1] J. de Lolme, *The constitution of England: or An Account of the English Government* (Indianapolis: Liberty Fund, 2007), p.55.
[2] I. Jennings, *The Law and the Constitution* (London: University of London Press, 1947), p.149.
[3] https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation September 22, 2020.
[4] G. Fester, "Women's Rights Are Human Rights", Agenda: Empowering Women For Gender Equity. No. 20, 1994, pp76-79. JSTOR, www.jstor.org/stable/4065874. Last accessed 8 December 2020.

demerits.[5] Yet the logically-prior question is which institution of state should take the decision. The relevant Convention right is Article 8 ECHR, the right to respect for private and family life. This is a *qualified* right: states may lawfully interfere with the enjoyment of that right where necessary in a democratic society to protect the rights and freedoms of others. Where rights collide, the Strasbourg Court typically requires the striking of a fair balance, permitting national authorities a wide or very wide margin of appreciation.[6] As Gavin Phillipson observes, this deference builds in a high degree of compromise with majoritarian or democratic communitarianism, on top of the way in which the Human Rights Act 1998 embodies deference to the legislature.[7] In light of this, this analysis argues that self-ID falls to be resolved by Parliament, since self-ID involves conflict between competing human rights claims, within which the balance Parliament strikes is unlikely to be held unlawful.

**Gender Recognition Act 2004, Equality Act 2010 and self-ID**

Under the Gender Recognition Act 2004 ("GRA") an applicant may obtain a gender recognition certificate on the basis of "living in the other gender" if a Panel accepts that s/he (a) has gender dysphoria (defined as "the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism");[8] (b) has lived in the acquired gender for two years; and (c) intends to continue to live in that gender until death.[9] At least one of the two medical reports attesting to the applicant's gender dysphoria must detail any past, present or planned treatment for modifying the applicant's sexual characteristics.[10] Where a full gender recognition certificate is issued, the person's gender becomes for almost all purposes the acquired gender.

In its 2018 consultation paper *Reform of the Gender Recognition Act – Government Consultation*, the Conservative government canvassed replacing the GRA's requirements by a "non-assessment based" model. [11] This essentially allows a transgender person to complete a form themselves which changes their legal gender. The person would then be recognised on that basis. The government's proposal generated controversy over the relationship between self-ID and women's right to single-sex spaces under the Equality Act 2010. There is concern that self-ID would open up women's sports, prisons, hospital wards, domestic violence refuges, rape crisis centres, changing rooms and toilets to males. Under Schedule 3 of the Equality Act it is lawful to provide a single-sex service to one sex alone, provided that doing so constitutes a proportionate means of achieving a legitimate aim.[12] Here, "sex" means

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[5] A. Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?" (2020) 83(3) M.L.R. 539, A. Asteriti and R. Bull, "Gender Self-Declaration and Women's Rights: How Self Identification Undermines Women's Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?'" The M.L.R. Forum. https://www.modernlawreview.co.uk/asteriti-bull-sharpe/ (last accessed 25 September 2020).

[6] H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006) pp.691-693.

[7] G. Phillipson, "Deference, Discretion and Democracy in the Human Rights Act Era" (2007) 60 C.L.P 40.

[8] A less circular definition might be the sense of unease due to a mismatch between biological sex and gender identity.

[9] s.2 GRA.

[10] s.3(3) GRA.

[11] Presented to Parliament by the Minister for Women and Equalities, July 2018, p.17.

[12] Sch.3, s.27 Equality Act 2010.

sex in the biological sense, acquisition of a gender recognition certificate being irrelevant.[13]

The GRA followed the European Court of Human Rights judgment in *Goodwin v. United Kingdom* in which the Court fashioned a positive obligation to ensure that legal recognition is given to a gender reassignment:

> 93. …the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention… Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender reassignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant.[14]

The effects of the judgment were restricted to "fully achieved and post-operative transsexuals", envisaging use of the "increasingly sophisticated surgery and types of hormonal treatments" available, with only chromosomal differences remaining.[15] Subsequent case law eroded the need for surgery. In *Garcon and Nicot v France* the Court held that making recognition of gender identity conditional on undergoing an operation involving high risk of sterility violated Article 8. Conversely, requiring a medical examination to demonstrate the irreversible nature of change of appearance along with proof of gender identity disorder was compatible with Article 8.[16] Similarly in *SV v Italy* the male-bodied applicant's appearance and social identity had long since been female, but gender reassignment surgery had not been completed. Deprivation of recognition of gender identity for an unreasonably period on such grounds breached Article 8. Yet the Court emphasised that the state, to safeguard legal certainty, could legitimately retain stringent procedures to verify the underlying motivations for requests to change legal identity.[17] Likewise in *X and Y v Romania* female-to-male transgender persons had undergone hormonal therapy and mastectomies but were denied legal recognition of their new gender since they had not had genital surgery. The Court indicated that genital surgery cannot be an absolute prerequisite since national courts need to undertake a balancing exercise, specifying the precise nature of the general interest which weighs against allowing legal recognition of gender-change.[18] These cases bring ECHR jurisprudence into line with the GRA which also does not require surgery; moreover they show the Court accepting restrictions based on states balancing competing public interests.

**The argument that self-ID involves rights-conflict: single-sex spaces**

Assuming that Article 8 is engaged, the state may lawfully restrict its exercise in pursuit of the rights of others. If a court were asked whether society has changed so decisively that the ECHR now tilts in favour of gender self-ID, then arguments around

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[13] Sch.3, s.28 Equality Act 2010.

[14] *Goodwin v. United Kingdom* [2002] 35 E.H.R.R. 447. *Goodwin* has been criticised for judicial overreach: Conor Gearty accuses the Court of "judicial mimicry of the legislative branch".[14] It too easily abandoned precedent, leading to analytical incoherence in the law and placing a public spotlight on the judiciary. C. Gearty *Principles of Human Rights Adjudication* (Oxford OUP 2004), pp.196-202.

[15] *Goodwin v. United Kingdom* [2002] 35 E.H.R.R. 447 [91].

[16] Applications nos. 79885/12, 52471/13 and 52596/13, judgement of 6 April 2017.

[17] Application no.55216/08, judgment of 11 October 2018.

[18] Applications nos. 2145/16 and 20607/16, judgment of 19 January 2021.

competing rights would come to the fore, particularly the argument that self-ID would cause harm to girls and women by eroding women-only single-sex spaces.

On the one hand some commentators deny conflict between self-ID and women's rights. Alex Sharpe contends that the issues of self-ID and access to women's single-sex spaces are unconnected, and that self-ID would "de-pathologise" and destigmatise legal recognition.[19] Sharpe argues that transwomen are largely already entitled lawfully to access single-sex spaces under the proportionality test, though there is self-exclusion owing to the Equality Act's chilling effect.[20] Concern that men would exploit a relaxation of single-sex spaces to harm women is dismissed as a "bogeyman" argument.[21]

Others fear that expanding gender recognition creates particular problems for the retention of women-only single-sex spaces, since to permit any male to claim a transgender identity with no biological requirements opens the door for sexual predators of various types to play the system by reinventing themselves as women. Imposters with no commitment to adopting a female identity could thereby exploit self-ID to perpetrate sex-crimes. Alessandro Asteriti and Rebecca Bull raise an issue unconsidered by Sharpe:

> As single sex spaces are normally not policed, we rely upon mutual respect between the sexes, coupled with the power for women to object to and challenge male presence. We assert that self-ID further decouples legal gender reassignment from any significant physical change…and we hypothesise that this renders the enforcement of single sex spaces problematic. Opening spaces to those who self-declare their sex and who are perceived as males undermines women's empowerment to challenge all male-bodied entrants and, we posit, will embolden male opportunists to enter single sex spaces, reducing their risk-mitigation role. …. Bodily integrity and autonomy necessarily require that a woman may choose to exclude a male (regardless of gender identity) from female-only spaces, including communal changing rooms, rape refuges, prisons, gynaecological care, nursing and medical care. …. The threat of male sexual assault is not a bogeyman but a reality.[22]

Additionally, the onus surely rests on those advocating a law reform to prove that it will result in no harm: the burden cannot lie on those opposing it.

On this reading what is at stake is not merely a competing public interest to set against self-ID but *competing fundamental human rights* which self-ID may erode. There are several ECHR rights applicable to girls and women to weigh against the claim of a right to self-ID for transgender persons: the right to life (Article 2 ECHR), freedom from inhuman and degrading treatment (Article 3 ECHR), the right to respect for

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[19] A. Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?" (2020) 83(3) M.L.R. 539, p.541.
[20] A. Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?" (2020) 83(3) M.L.R. 539, p.542.
[21] A. Sharpe, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?" (2020) 83(3) M.L.R. 539, p.552.
[22] A. Asteriti and R. Bull, "Gender Self-Declaration and Women's Rights: How Self Identification Undermines Women's Rights and Will Lead to an Increase in Harms: A Reply to Alex Sharpe, 'Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?" The M.L.R. Forum. https://www.modernlawreview.co.uk/asteriti-bull-sharpe/ (last accessed 25 September 2020). pp.9-10.

private life (Article 8 ECHR) and the right of non-discrimination in respect of enjoyment of ECHR rights (Article 14 ECHR).

Violence against women, the Court has categorically emphasised, falls squarely within the scope of Articles 2 and 3.[23] Where such violence is perpetrated by non-state actors, the state must take positive action to ensure that the protection of rights is practical and effective not merely theoretical and illusory.[24] Preserving female-only single-sex spaces would seem an important component of such practical protection. Crucially, too, Article 14 may be invoked on grounds that women are disproportionately victims of violent and sexual crime carried out by male-bodied persons. For their part transgender people could of course make the same claim under Articles 2, 3 and 14. However, arguments that transwomen are the most at-risk and marginalised in society would have to be evidenced and weighed against the evidence in relation to women in any proportionality analysis, alongside the argument that states should not oblige women to serve as "human shields" for transwomen.

The right not to be sexually assaulted involves issues of bodily integrity and autonomy guaranteed by Articles 3 and 8. Furthermore, unlike Article 8, Article 3 is an absolute right. As Shazia Choudhry and Jonathan Herring observe, it requires the state to take reasonable measures to protect one citizen from torture or inhuman and degrading treatment at the hands of another. There is also a particular obligation to protect the Article 3 rights of vulnerable people such as girls. Whereas the state may lawfully fail to respect privacy rights under Article 8(1) if paragraph 2 is satisfied, Article 3 being unqualified in a sense prevails over Article 8.[25]

We are confronted therefore not with weighing a human rights claim against a public interest but rather with a claim of colliding human rights. When Convention rights conflict, this understandably erodes judicial preparedness to intervene in parliamentary decision-making.

**Self-ID and the margin of appreciation**

The European Court of Human Rights, not being strictly bound by its previous decisions, could in theory discard its existing case law in favour of self-ID by further narrowing the margin of appreciation available to states. The Court will generally accord a wide margin if the state is required to strike a balance between competing Convention rights. [26] In any case on self-ID, competing rights (Articles 2, 3, 8 and 14) would take centre-stage.

It is true that the Court is less likely to accept broad state discretion where a particularly important aspect of an individual's existence or identity is at issue under Article 8. Here, however, self-ID arguably cuts both ways. It pits against each other crucial aspects of both transgender people's *and* women's existence and identity. The quest of transgender people for less onerous, non-stigmatic means to change their official status is set against the concern of women to preserve women-only single-sex

[23] See e.g. *Talpis v Italy* no. 41237/14 judgement of 2 March 2017.
[24] *X and Y v. the Netherlands*, 26 March 1985, ss 23, Aeries A no. 91
[25] S. Choudhry and J. Herring, "Righting Domestic Violence" (2006) 20 International Journal of Law, Policy and Family 95, 97-8.
[26] *Dickson v. United Kingdom* (2008) 46 E.H.R.R. 41 [78].

spaces. Not wanting natal males in women's spaces is about desiring privacy and dignity, which is important to the psychological well-being of women, especially those who are survivors of male violence and abuse. Arguments that *Goodwin* has been overtaken by changing social *mores* cut both ways too: stronger support for self-ID has lately gone hand-in-hand with fiercer resistance to it.

The margin of appreciation is also affected by the presence or absence of a European consensus. Contracting states which have introduced self-ID are Denmark, Greece, Ireland, Malta, Norway and Portugal. These various self-ID systems are diverse and not necessarily considered satisfactory by transgender persons.[27] Certainly there is no European consensus. Finally, any such case would involve the imposition of a positive obligation in a context where the UK has already legislated to meet a Strasbourg judgement. There seems no compelling reason therefore for the Strasbourg Court to try to enforce self-ID.

**Self-ID, precedent, deference and *McConnell***

The Human Rights Act 1998 ("HRA") was intended to "bring rights home" thereby obviating a trip to Strasbourg. Under s.4 higher courts may make a declaration of incompatibility that statutory provisions contravene Convention rights. Assuming self-ID is not brought in by legislation, and absent a Strasbourg volte-face, could our courts reasonably hold the GRA incompatible with Article 8? This seems unlikely. Such a holding would rely on British courts going beyond Strasbourg jurisprudence. As Roger Masterman has observed, our courts, under s.2(1) HRA, have shown comparative hesitancy to develop the meaning of the Convention rights. British courts tend to see attempts to extend the Convention rights as being at the very fringes of judicial creativity.[28] As Lord Bingham held in *Ullah*, "the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time; *no more*, but certainly no less".[29] More recently, indeed, as Lewis Graham shows in this present issue of *Public Law*, the UK courts have turned more assertively against judicial activism by resisting Strasbourg case law where they deem it incorrect, and where adopting a Strasbourg stance would lead to negative consequences nationally.[30]

British courts' reluctance to extend Strasbourg authority is reinforced by their creation of a doctrine of deference, whereby courts will in appropriate circumstances defer on rights matters to the democratically-elected government and Parliament. In *R v Director of Public Prosecutions, Ex p Kebilene* Lord Hope of Craighead stated:

> It will be easier for such [a discretionary] area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or

[27] For example the Danish version makes scant provision to ensure that the self-declared gender status will be respected. C. Dietz, "Self-declaration of legal gender status in Denmark", Briefing Paper, 31 October 2018, School of Law, University of Leeds.
[28] R. Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: CUP, 2011), p.203.
[29] *R. (On the application of Ullah) v. Special Adjudicator; Do v. Immigration Appeal Tribunal* [2004] UKHL 15; [2004] 2 AC 323, [20] (emphasis added).
[30] L. Graham, "The Modern Mirror Principle" [2021] P.L.

> are of a kind where the courts are especially well placed to assess the need for protection. [31]

In *Belmarsh* Lord Bingham, with whom most of the nine-member panel agreed, accepted Lord Hope's dictum, arguing that any decision made by a representative democratic body must command respect, and that the degree of respect will be conditioned by the nature of the decision. Cases involving the rights to liberty and to a fair trial were particularly appropriate for judicial intervention.[32] Laws LJ in *International Transport Roth GmbH v. Secretary of State for the Home Department* posited four factors to assess appropriate deference: (a) an Act of Parliament merits more deference than an executive action; (b) more scope should be accorded where a Convention right requires a balance to be struck; (c) greater deference to the democratic powers is appropriate where the subject-matter lies within their particular constitutional responsibility; (d) consider the actual or potential expertise of the courts and Parliament.[33]

Scholarly support for the doctrine of deference underlines its likely relevance to self-ID. Academics have emphasised three interrelated aspects: first, the importance of democracy: judges assign varying degrees of weight to the judgment of the elected branches, out of respect for inter alia democratic legitimacy.[34] Arguably there is a particular need for democracy on the issue of self-ID since it constitutes major social change with wide consequences. Secondly, importance is accorded to whether the challenged measure is embodied in an Act of Parliament, as here with the GRA. Courts will accord presumptive weight to upholding primary legislation and will not interfere with statute merely because they disagree with it, but only if it violates Convention rights to a substantial degree.[35] Thirdly, contestability increases deference. The more contestable the issue, the more appropriate to throw the ball into Parliament's court.[36] Striking balances between different interests or groups is considered more a "political judgment".[37] Article 8 requires a particularly controversial balance to be struck when it comes to self-ID: indeed, the issue is *party*-political, with Labour supporting self-ID, Conservatives opposing it.[38]

These considerations were reflected in *R. (on the application of McConnell and Anor) v The Registrar General of England and Wales*.[39] The GRA expressly provides that "the fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child" (s.12). Asked to make a declaration of incompatibility that this violated Article 8 because a female-to-

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[31] [2000] 2 AC 326, 381.
[32] *A and others v. Secretary of State for the Home Department; X and another v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68 [39].
[33] [2002] EWCA Civ 158. (2002) 3 W.L.R. 344, [83]-[87].
[34] A. Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge: CUP, 2009) p.169; A. Young *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2009) p.117.

[35] A. Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge: CUP, 2009) p.171.
[36] A. Young *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2009) p.140.
[37] M. Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in N. Bamforth and P. Leyland (eds) *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003) p.353.
[38] https://twitter.com/UKLabour/status/1309070203377127427, September 24, 2020.
[39] [2020] EWCA Civ 559.

male transsexual would be registered as mother, not father, of a child, the Court of Appeal held that, to assess the extent of Parliament's margin of judgment, it had to consider the relative institutional competence of courts compared to Parliament. It concluded that the political process allows legislators to acquire information from the widest range of opinions, particularly valuable in a complicated and inter-linked field of legislation. Furthermore, Parliament enjoys democratic legitimacy and the courts do not; this legitimises Parliament's interventions in areas of difficult or controversial social policies.[40] Holding that the British legislation upheld the rights of the child and did not violate Article 8, the Court declined to make a declaration of incompatibility.

**Prospects of parliamentary non-compliance**

Our sovereign Parliament's power to "make or unmake any law" runs deep in British political culture. Important social decisions are usually determined by Parliament not by courts *Roe v Wade* style.[41] If under s.4 HRA the courts declared the GRA to be incompatible with Article 8, then the GRA remains in force and Parliament decides whether to change the legislation. Parliament may simply disagree with the courts over human rights. For example after *Hirst v. United Kingdom* on prisoners' voting rights, Parliament decided on minimalist compliance.[42] This prompted Robert Wintemute to argue that compliance with the judgments of the European Court of Human Rights is now effectively voluntary.[43] Conversely the parliamentary debates responding to *Hirst* arguably saw MPs protecting Britain's constitutional fundamentals: parliamentary sovereignty, the separation of powers and the rule of law.[44] Given the tense nature of debate on self-ID, a Strasbourg judgment or domestic law declaration of incompatibility in favour of self-ID may suffer the same fate as prisoner voting. Legislators may again discern judicial overreach and the pursuit of politics by other means. By contrast, parliamentary decision-making has more legitimacy here. As Maleiha Malik observes, the ability of representative institutions to secure identification with their decisions by both majorities and minorities is a significant advantage; it is because citizens are more likely to identify with the decisions of legislatures that they are an ideal forum for policies which go beyond toleration of minorities and impact the interests of majorities.[45]

**Conclusion**

Article 8 ECHR is a qualified right which can be justifiably interfered with to protect the rights of others. For this reason, whilst some rights relating to transgender concerns are likely to be accorded fundamental status by the courts where conflicting rights are not readily apparent, such as the right not to be discriminated against or harassed for having had a gender reassignment, demands for self-ID are more legitimately treated as contestable. Self-ID falls within the category of rights properly determined by Parliament since it involves *conflict* between human rights. Where

[40] [80]-[82].
[41] *Roe v. Wade* 410 U.S. 113 (1973).
[42] *Hirst v United Kingdom (no.2)* (2006) 42 E.H.R.R. 41.
[43] R. Wintermute, "Same-sex Marriage in National and Internationational Courts: 'Apply Principle Now' or 'Wait for Consensus'?" [2020] P.L. 134, 154.
[44] D. Nicol, "Legitimacy of the Commons Debate on Prisoner Voting" [2011] P.L. 681.
[45] M. Malik "Minority Protection and Human Rights" in T. Campbell, K. Ewing and A. Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford: OUP, 2001).

fundamental rights clash, the case for parliamentary rather than judicial decision-making becomes particularly compelling. A court, acting reasonably, cannot entirely dismiss concerns for women's safety: the prospects of opportunists exploiting self-ID cannot be discounted. Against this backdrop of rights-conflict, courts are likely to recognise that the fierce controversy over self-ID is not best resolved by the judicial arm of the state. This would leave the question of reform to the democratic institutions. This may well be for the best, since resolving the controversy over self-ID likely depends on thrashing out detailed compromises and concessions, making legislation, not jurisprudence, the better way to negotiate these differences in an increasingly complex society.