

On Reading the April 2023 UK EHRC Advice on B-sex as a Version of Formal Gender Theory

V1.0, comments are appreciated

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Abstract

The April 2023 advice by the UK EHRC on the role of the concept of biological sex is commented from the perspective of formal gender theory (FGT). The need to adapt FGT so as to incorporate key aspects of said advice in FGT is discussed. FGT is extended/adapted as to accommodate these key aspects.

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1 The April 2023 EHRC advice on the role of the concept of biological sex

Recently, on 3 April 2023, a highly remarkable letter written by the UK EHRC to the UK government has been sent to the UK government. The letter contains an advice to the UK Government concerning the concept of (human) biological sex including the potential role and use of that content.¹ We will refer to the EHRC advices as EHRC-on-b-sex.

At first sight the suggestions given in EHRC-on-b-sex are quite distant from the views that have been promoted in our series of papers on formal gender theory (FGT).

1.1 FGT as a framework for versions of gender theory

With FGT we refer to the Formal Gender Theory that has been designed and documented in a series of reports and messages (sort reports) starting with [1]. These texts can be found on the site `gender-theory.org`, and in particular we refer to reports AGTRT 2023:1-11 and messages AGTRT-message 2023:1-5 as collected on that site. The idea is that FGT serves as a conceptual framework which can be equipped with additional detail and made more precise in various ways thus giving rise to a family of versions of FGT. Admittedly the design of FGT is still work in progress and there are some discrepancies among the claims on the various texts just mentioned.

¹https://www.equalityhumanrights.com/sites/default/files/letter-to-mfwe-definition-of-sex-in-ea-210-3-april-2023_0.pdf

1.2 EHRC-on-b-sex as a seed of a version of FGT

We made an effort to compare EHRC-on-b-sex as a version of FGT so that both can be compared. In doing so we have taken the liberty to ascribe to EHRC-on-b-sex positions and views which cannot be literally be found in the text of the advice but which, so we feel, are very plausibly (if not necessarily, at least from our point of view) held by the collective of authors of EHRC-on-b-sex. If we are mistaken on such matters of additional detail that is evidently our fault.

1.3 What separates FGT and EHRC-on-b-sex?

The distance between FGT and EHRC-on-b-sex may be summarized as follows:

1. FGT has been designed under the assumption that gender (in particular 3G gender) takes priority over b-sex (biological sex) as a mechanism (legal as well as informal) for the classification for adult humans.

EHRC-on-b-sex seems to reverse these priorities: biological sex may become a legal attribute which (perhaps more often than not) may take priority over biological sex.

2. In FGT the notion of biological sex (b-sex) is considered both problematic and ambiguous. A range of such notions exists and making a distinction between (sex) transition permissive notions of b-sex and transition non-permissive notions of b-sex is considered of critical importance. For those who adopt a transition permissive notion of b-sex the concept of gender need not come into play in order to explain the phenomenon of transsexing (which then may be labeled as transgendering). For those who adopt a transition non-permissive notion of b-sex the very phenomenon of transgendering depends on accepting a concept of gender which deviates from their notion of b-sex.

The EHRC, however, uses biological sex as a primitive attribute without further detail or analysis. It is left unclear whether or not a sexual transition is considered possible by the EHRC. It is also unclear to what extent the notion of b-sex serves as a parameter of the EHRC-on-b-sex proposals.

3. In FGT we claim/hope/intend to work towards an MotR (middle of the road) version of gender theory where a concept of gender is used that strikes an adequate balance between gender essentialism (gender is exclusively determined by b-sex) and gender co-essentialism (gender is exclusively determined by gender identity, which in terms comes about exclusively from self determination).

ENRC-on-b-sex on the other hand seems to avoid any search for a compromise between essentialism and co-essentialism. The notions of gender (and of man, woman, and nonbinary) are understood from a co-essentialist perspective, while the notion of b-sex has an essentialist background. A clash between essentialism and co-essentialism is avoided by having these ideas applied to different concepts: gender resp. b-sex.²

4. FGT has been designed on basis of the idea that the concept of gender came about as result of gender studies where both the classical gender division in two b-sex based genders and the social consequences of that division are criticized. Moreover the concept of gender serves as an indispensable conceptual tool for analysing and resolving issues regarding gender dysphoria in its many forms. Moreover FGT has been designed from the idea that, preferably, one avoids the introduction of b-sex as a legal category, working with gender as a legal categorization mechanism only.

Instead the EHRC (in EHRC-on-b-sex) seems to confine gender to a limited role mainly serving the purposes of (i) the medical and psychological professions, (ii) (to a lesser extent) of religions, and (iii) the cultural sector.

1.4 Updates needed for FGT in order to accomodate EHRC-on-b-sex

As FGT stands at the time of writing several modifications are needed in order to bring about the state of affairs that EHRC-on-b-sex can be read as a (simplified introduction to) a version of FGT. We think that EHRC-on-b-sex represents a credible approach to gender theory so that it is a requirement on FGT to be sufficiently general to admit EHRC-on-b-sex as a version of it. Achieving that situation requires the following amendments (updates) for FGT:

1. It is an option that besides gender also a concept of b-sex has a legal status. Some of the “legal work” may be done via the chosen notion of b-sex. (For FGT it is a requirement that gender has legal status.)
2. The chosen notion of b-sex (if any is available in a certain version of FGT) may or may not be transition permissive (FGT merely imposes that such a distinction can be made).

²Perhaps one must admit that EHRC-on-b-gender is taking Bogardus [6] to its ultimate conclusion: conceptual engineering of a notion of gender will not lead to a satisfactory result for the simple reason that such a result (a transinclusive notion of gender) is nonexistent. In [1] it was outlined why the argument of Bogardus may yet be inconclusive.

3. Striving towards an MotR notion of gender is merely one option among several possible ways forward.
4. Co-essentialism on gender may be acceptable in the presence of a notion of b-sex.
5. Gender erosion is not a very relevant worry in the presence of a legal notion of b-sex (which does much of the legal work).
6. The gender neo-binary (gender is either fully determined by biological factors, or it is fully determined by psychological factors) is unremarkable in the presence of a legal notion of b-sex.

From now on we will use FGT with these updates made.

2 Correspondence of EHRC-on-b-sex with FGT

Having amended FGT so as to be able to accommodate EHRC-on-b-sex as a version of it we may find a remarkable number of aspects of correspondence between both.

2.1 Similarities between FGT and EHRC-on-b-sex I

The following technical issues represent points of agreement between EHRC-on-b-sex and FGT.

1. Both FGT and EHRC-on-b-sex adopt the following assertions:
 - AHM_g: “A man is an adult human with male gender.”
 - AHF_g: “A woman is an adult human with female gender.”
2. Both FGT and EHRC-on-b-sex reject the following assertions (in the notation of [7]):³
 - AHM: “A man is an adult human male.”
 - AHF: “A woman is an adult human female.”
3. Both FGT and EHRC-on-b-sex dis agree with UK PM Rishi Sunak as well as with UK opposition leader Keir Starmer on the question “What is a woman?” (Both Sunak and Starmer have confirmed AHF in their own wording.)

³The observation that EHRC-on-b-sex is in disagreement with Byrne’s claim in [7] that AHF is valid, suggests a large gap. In fact EHRC-on-b-sex and Byrne [7] seem to agree on matters of substance only to differ on the tactics of naming. The disagreement of EHRC-on-b-sex with AHF is rather an accidental side-effect of its design than that it represents a commitment to the fundamental criticism of AFH as voiced e.g. in [8].

4. Both FGT and EHRC-on-b-sex are undecided on which (if any) conditional versions of AHF and AHM are valid.⁴
5. Both FGT and EHRC-on-b-sex agree that b-sex and gender are different though related concepts.
6. Both FGT and EHRC-on-b-sex agree that the concept of gender is essential for explaining the phenomenon of transgendering.
7. Both FGT and EHRC-on-b-sex agree that recent policies on participation in sports events are based on a conceptual framework in which (in practice) the notion of gender plays a secondary role only to various conglomerates of bodily features of individuals seeking participation. B-sex is merely one of such conglomerates. Both FGT and EHRC-on-b-sex are consistent with the idea that b-sex plays a minor role only in policies for admission to sports events.
8. Both FGT and EHRC-on-b-sex accept a difference between gender identity and gender categorization.⁵

2.2 Similarities of FGT and EHRC-on-b-sex II

The following non-technical issues represent points of agreement between EHRC-on-b-sex and FGT.

1. In FGT we suggest that gender erosion (understood as the slow but steady removal of bodily/biological aspects from the notion of gender) is problematic.
In EHRC-on-b-sex the problem of gender erosion is recognized as well (but rather than expecting to find a remedy in concept engineering for the notion of gender, the conclusion is drawn that b-sex needs to be reinstated as a first class concept with legal status).
2. FGT proposes to use a gender (qua)ternary.
For EHRC (given EHRC-on-b-sex) the gender identity (qua)ternary is one of many conceivable options. (Because the role of gender is reduced, by having part of that role played by b-sex instead, the degrees of freedom for gender categorization increase.)

⁴FGT suggests that under sufficiently strong but still meaningful conditions AHF and AHM may become valid, while for EHRC-on-b-sex it is plausible to leave such matters open for subsequent conceptual engineering and political design.

⁵For FGT differentiating between gender identity and gender categorization is much more critical than for EHRC-on-b-sex because in the latter the role of gender is significantly more restricted.

3. Both FGT and EHRC-on-b-sex are mute on the question how the rights for neutral (i.e. nonbinary) person may be derived from rights for man and for women in various jurisdictions.
4. Both FGT and EHRC-on-b-sex agree that the concept of androgyny may to some extent replace the notion of gender (though not the notion of b-sex).
5. Both FGT and EHRC-on-b-sex assume that concepts of gender and b-sex are made precise within a given jurisdiction and that different jurisdictions may differ on which version of gender theory to embrace.
6. Both FGT and EHRC-on-b-sex may be qualified as gender-critical views about gender theory.⁶
7. Both FGT and EHRC-on-b-sex are consistent with rejecting both gender essentialism and gender co-essentialism.⁷
8. Both FGT and EHRC-on-b-sex acknowledge the notions of responsible transgenering and capricious transgenering with a preference for the first.⁸
9. Both FGT and EHRC-on-b-sex do not give rise to any accusation in the direction of other versions of FGT. For accusations in general we refer to [4, 5] and for accusations in the context of gender we refer to [1].⁹

3 Modifying the EHRC-on-b-sex based version of FGT: towards an MotR version of FGT

A symmetric option for adapting policies on gender is as follows:

⁶FGT is gender critical by intentionally not excluding gender-critical views, while EHRC-on-b-sex is gender-critical actually by adopting gender critical positions.

⁷However, EHRC-on-b-sex adopts the idea that whatever the fate on the debate about gender essentials versus gender co-essentialism, a suitable notion of b-sex will be needed and may be assumed for that reason. FGT is as yet undecided on such matters.

⁸However, for FGT it is more important too design obstacles against capricious transgenering than for EHR-on-b-sex because in the latter there is less room for misuse of transgenering.

⁹Accusations seem to be a driving force for the public debate on gender theory. Accusations of being transexclusionary, transphobe, gender-critical, transundfriendly, homophobe, stand in opposition to the accusation of promoting gender ideology. Such accusations may emanate from various origins including academic research. Perhaps we may suggest that opponents of EHRC-on-b-sex may be accused of being 'biophobe'.

(i) to incorporate gender identity as a legal notion. Gender identity (i.e. 3G gender identity) is self-identified although confirmation is needed. Confirmation of gender identity looks into the following issues: is the person free to self-identify and to disclose and expose the outcome of their self-identification? Are no unreasonable external pressures being applied? Is the person cognitively able to develop or update their gender identity. Is the person not manifestly harming their own interests by adopting the (self-intended) gender identity?

(ii) to distinguish gender from b-sex as well as from gender identity. Now gender can be understood legally as gender categorization. And moreover, if gender categorization is sufficiently restrictive gender can replace b-sex in the EHRC-on-b-sex based version of FGT. Gender categorization may be restrictive (though enabling transgending) once (confirmed) gender identity has obtained legal status.

(iii) B-sex plays a role in defining the notions of a prototypical man and a prototypical woman, as described and used, in our analysis of participation policies for international sports events in [3]. So B-sex remains a vital concept which plays a role in the underpinning of gender categorization.

(iv) Now rights to inclusion and rights to exclusion can be linked with gender in ways similar to how that has been done in times that gender was in close correspondence with b-sex. Such rights may be preserved even if due to transgending said correspondence becomes less dominant. For (confirmed) gender identity the legal situation is different: rights to inclusion and rights to exclusion may be both legally constrained and guaranteed and may differ significantly from the package of rights that comes with a corresponding gender categorization.

We believe that along the above lines progress can be made towards development of an MotR (middle of the road) version of FGT.

4 Concluding remarks

EHRC-on-b-sex can be seen as a seed from which a fairly complete version of FGT can be grown. In order to make such a move we had to upgrade FGT by making it somewhat less constrained. The core element of the upgrade is to have as an option that besides gender also a suitable notion of b-sex can play a legal role and that a significant fraction of the legal work related to gender can be done on the basis of b-sex.

We conclude that EHRC-on-b-sex constitutes a novel version of FGT which significantly differs from the following known versions: (i) the RCC/ROC version (as specified in [9]), (ii) the version as supported by the Anglican Church (accepting transsexing), (iii) the co-essentialist version (though without any legal role for some notion of b-sex), (iv) the

version of FGT that underlies traditional laws on transgendering (understood as medically, performed, monitored and validated transsexing), (vi) the version of FGT as practiced in Iran, (vii) the version of FGT that underlies [2], (viii) more liberal (towards transgendering) forms of the latter where behavioural criteria (i.e. living as a person of gender $g \in 3G$, for the duration of timespan at least t) are taken in to account as well.

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