

# Gender Critical Speech, misogyny, and social media: A human rights approach to hate

Michele Goodbody

Liverpool John Moores University – School of Law

## 1. Aims/Objectives

- a. Critical evaluation of gender critical speech in relation to Article 10 of the European Convention on Human Rights
  - i. Is the lack of legal definition of hate speech the driving factor behind gender-critical views being deemed offensive to an individual and/or wider society? And if so, how?
  - ii. What is the relationship between hate crime, gender and speech and how can these principles be reconciled to enable a greater freedom to express oneself?
  - iii. What impact is ‘expression’ having as a manifestation of a belief? Does there need to be greater clarity on the boundaries by which a belief becomes harmful?

## 2. Introduction

Gender critical is a belief that someone’s sex – whether they are male or female – is biological and immutable and cannot be conflated with someone’s gender identity, whether they identify as a man or a woman. (*Forstarter v CGD Europe*, 2022) This has been causing some issues legally because of the speech associated with the belief. Gender critical has been building traction since the 1970s via radical feminists but its only over the last 7 years or so in the UK that people are openly disagreeing with each other in various capacities and as such it is becoming ever more polarised, divisive and toxic because some who disagree with gender critical are deeming it as hateful. This is causing issues in some areas of law, most notably criminal and employment. Case law has seen people be arrested for expressing this view, (*R (on the application of Miller) v College of Policing*, 2021) it has also seen people being sacked from employment (*Higgs v Farmor’s school*, 2023) or being denied promotions, (*Forstarter v CGD Europe*, 2022) when a person has expressed this view via social media.

Not only is this belief causing problems in employment and criminal situations, the polarisation of the issue has resulted in people self-censoring and there are also situations in which, and this is particularly true of educational environments speakers have been asked to withdraw from speaking for holding this view. However, beyond these disagreements, at the centre of how people communicate is the right to freedom of expression, a right which has been established as accepting of views which shock and offend to keep in line with the demands of pluralism and democracy. (*Handyside v United Kingdom*, 1976). A right which further established words which are irritating, contentious, eccentric, heretical, unwelcome, and provocative, are acceptable providing of course there is no associated violence. (*Redmond-Bate v Director of Public Prosecutions*, 1999) This is where the conflict between gender critical speech and freedom of expression creates more tension because cases where gender critical is being examined, there is no violence or abuse, there is simply a difference of opinion.

## 3. Literature Review

The debate surrounding gender critical is a highly contemporary one. This is because a clash has occurred between two sets of rights, namely, women’s rights and trans rights, both are afforded protection under the Equality Act 2010 but the division over what they believe constitutes ‘sex’ and ‘gender’ means a conflict has occurred in the ways they perceive they are protected in law. Over the course of a few years more and more people are vocalising their concern or upset over changes in law based upon their beliefs. However, at the centre of the debate, is an acceptance that people speak based upon what they believe, it is part of what makes us human. (Harari, 2015). The right to freedom of expression (Article 10) is a long-established right which started gaining legal status from 1948 onwards (United Nations Declaration of Human Rights, 1948; European Convention on Human Rights, 1950).

Prior to this however it has been a well-known principle which has served communities and civilisations well for thousands of years. However, while this right is firmly cemented in domestic law (Human Rights Act, 1998), European law, (ECHR, 1950), and globally (UDHR, 1948 is one example), it is classed as a qualified right, meaning, it can be restricted legitimately to protect the rights of others, and this must be proportionate to the aim being pursued.

This is where the dilemma over gender critical speech becomes more complex and assists with the contemporary nature, because to consider the protection of others within the Article 10 right requires consideration of 'hate speech'. There is no universal definition of hate speech, simply broad guidance at national, European, and international levels. It includes protecting a person/group from the incitement of violence or hate based on an immutable characteristic (Council of Europe, 2014). However, the Universal Declaration of Human Rights includes gender as a 'characteristic' worthy of protection whereas Europe do not. Gender is argued as both an immutable characteristic and one that is not. The UK stance on gender is that there are no statutes which cover gender in terms of definition. (There is Gender Recognition Act 2004 which allows someone to legally change their gender.)

Within the UK are various statutes which cover the incitement of violence and hate but these are criminal and associated with an 'action'. (see, Public Order Act 1986, Communications Act 2003, and Malicious Communications Act 1988). All of these add to the frustration that people who agree or disagree with gender critical because for some this view is offensive, for others it is not. The right to expression establishes that offensive views are permissible however, it is based on acceptance that there is no harm to others. What constitutes harm however is varying, for some it is physical harm, for others it is harm to their reputation, or an attack towards their identity, financial harm could also be a consideration. The lack of clarity on how harm is defined specifically if someone vocalises a gender critical view (because this is subjective) means that legal challenges provide little clarity.

In cases where gender critical has been the topic of legal action there is no consistency in application, *Forstater v CGD Europe 2022* was hailed successful as after two appeals it was considered that 'gender critical' is a belief worthy of protection in democratic society. It has been considered as significant. Yet, since this decision, there are few cases which have successfully utilised the rationale determined within this decision to win a case where the circumstances are similar. Such as, words expressed on social media and employment tribunal. This adds yet another layer of confusion towards those who seek certainty in establishing the parameters of harm associated with expressing a gender critical view.

#### **4. Theory**

The origins of theories surrounding expression date to Ancient Greece with Socrates notable as one of the founding advocates of freedom of expression within civilised societies, his views towards the benefit upon mankind being able to speak their mind was such that when he was sentenced to death, he proclaimed he would rather die than be offered to live on the basis his speech is restricted. (Sorjahi, 2021). The focus of this research has been to adopt the stance of incorporating some of the more prominent theorists who engaged with understanding the connection between not only the benefit expression presents to societies but also the benefit to the person alongside the birth theories such as Socrates. This is because much of the toxicity which stems from gender critical rests on autonomy and identity as reasons to express who oneself is. This approach is taken with the view of attempting to build a framework for how better to assist in de-escalating tension in the area of freedom of expression within communities. Of the theorists being utilised, aside from Socrates, the use of J S Mill has been considered because Mill represents a liberal approach in the arena of hate and tolerance, noting the free flow of debate enables truth to emerge (Mill, 1859). This is useful when considering the debate which has ensued surrounding the biological and psychological elements of a female being determined in some instances as hateful. Finally, Thomas Emerson identified four core values which encapsulate the benefit freedom of expression has both to the individual and the wider community. These are individual self-fulfilment, advancement of knowledge, participation in decision making, achievement of a more adaptable and stable community. (Emerson, 1971) Broken down, Emerson is identifying four areas which bear relevance in the realm of gender critical. Namely, identity, debate/truth, democracy, censorship. These will prove useful throughout the research because Emersons work not only focusses on the community but the individual and this aligns well with the Article 10 right to expression.

## 5. Relevance

As of October 2024, in the UK, there are 31 cases in which the central component has been about ‘gender critical’, this has been over the course of 3 years. While this number is low, it is evident that this is a topic which is gaining more traction in the courts. In the past 10 months alone there have been 10 cases which have been decided. Current analysis demonstrates that the areas most likely to attract court proceedings are when words have been expressed via social media and in the arena of employment tribunal. It is also noteworthy that few claimants are successful in establishing they have been discriminated or victimised in employment. This proves useful because it assists the next stages of the project. For example, establishing why gender critical beliefs are harmful when expressed in employment settings; Why social media acts as a catalyst if views are expressed outside of employment hours; and if the belief is the central issue of a deeper issue of a clash between identity of a person and reputation of another entity (for example employer, or person.)

I believe my research is especially important because if society carries on this trajectory of allowing differences of opinion to become so polarised and divisive that an opinion can be criminalised, lead to discrimination or lead to censorship when there is no abuse attached then we are heading towards the decline of democratic processes and the essence of what it means to simply be a human in the way speaking our minds feeds into the notion of autonomous decision making. Furthermore, widespread media reporting and global recognition of issues such as violence against women and girls (UN, 2021), gender equality, LGBT rights, transgender rights, (Velasco, 2020) hate speech, and hate crime all rest on people’s beliefs; this starts with the expression, (Laud, 2019) whether that be a social media post, a conversation with a neighbour, a text message, a work email, expression filters through so much of our world. The more we know about how we communicate (particularly in a technology focussed world), if we can define certain practices within legislation (for example hate speech) the more we can assist in developing better futures for all and reduce harm and hate.

## 6. References

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