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HUMAN RIGHTS

Compelled speech: gaslighting in the courtroom

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Introduction

In 2017 Maria MacLachlan was assaulted while she was waiting to attend a public meeting in London about proposed reforms to the Gender Recognition Act 2004. One of her attackers, Tara Wolf, who self-defines as a 'trans woman', was convicted of assault by beating in April 2018. While McLachlan was giving evidence at Wolf's trial for the assault in the Magistrates Court, the presiding District Judge instructed her to call Wolf ''she'' or ''the defendant'', as a matter of ''courtesy''. MacLachlan has said that she tried to do this, but that because she was nervous while giving her evidence, she kept reverting to calling Wolf ''he''. The judge is reported to have described this as ''bad grace'' on MacLachlan's part, and to have given this as one of the reasons for his decision not to award her financial compensation for the assault. MacLachlan has stated:

> ''My experience of court was much worse than the assault…I was asked ''as a matter of courtesy'' to refer to my assailant as either ''she'' or the ''defendant''. I have never been able to think of any of my assailants as women because, at the time of the assault, they all looked and behaved very much like men and I had no idea any of them identified as women… I tried to refer to him as the ''the defendant'' but using a noun instead of a pronoun is an unnatural way to speak. It was while I was having to relive the assault and answer questions about it while watching it on video that I skipped back to using ''he'' and earned a rebuke from the judge. I responded that I thought of the defendant ''who is male, as a male''. The judge never explained why I was expected to be courteous to the person who had assaulted me or why I wasn't allowed to narrate what had happened from my own perspective, given that I was under oath.'' [1]

The guidance which is the source of the judge's attempts in this case to prevent a witness in a criminal trial from describing events in her own words, and to compel her to describe the defendant using language which belied her own perceptions, raises serious questions about the fair treatment of witnesses at trials involving defendants who identify as transgender, particularly where the witness is a complainant. The compelled speech to which this guidance effectively gives rise is arguably a breach of witnesses' rights under Articles 9 and 10 of the European Convention on Human Rights, which respectively protect the rights to freedom of

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1 Julie Moss, 'INTERVIEW: Maria MacLachlan on the GRA and the aftermath of her assault at Speaker's Corner' (*Feminist Current*, 21 June 2018) < www.feministcurrent.com/2018/06/21/interview-maria-maclauchlan-gra-aftermath-assault-speakers-corner/ > accessed 30 June 2018.
In a blog written a year after the trial, Maria MacLachlan stated, ''I resolve, if I ever find myself in that situation again, to vociferously resist any such demand…'' (https://www.peaktrans.org/district-judge-kenneth-grant/, accessed 18 June 2019)

thought, conscience and religion, and to freedom of expression. In order to explore the implications of this policy, it is necessary to explain the context in which it has developed, and to examine current debates in England and Wales about the law relating to gender re-assignment.

Definitions of sex and gender

The law in this area is ambiguous in some ways because of the use of language which confuses or conflates sex and gender. The difference between the two was succinctly expressed by a group of doctors writing to *The Lancet* in 2018, who stated: ‘‘Sex has a biological basis, whereas gender is fundamentally a social expression.’’ [2]

A similar distinction is made in the UN Women’s Gender Equality Glossary, which defines sex as ‘‘the physical and biological characteristics that distinguish males from females.’’ It defines gender as the:

> ‘‘… roles, behaviors, activities, and attributes that a given society at a given time considers appropriate for men and women…These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities.’’ [3]

This definition recognises that gender is a socially constructed hierarchy which helps to maintain and reinforce social and economic inequalities between women and men.

The Convention on the Elimination of all Forms of Discrimination against Women 1979 (CEDAW) recognises that the socially constructed roles and norms which constitute gender are part of the fabric of structural inequality between the sexes, and seeks to challenge them.

Article 5 of the CEDAW states:

> “States Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’’

In contrast to human rights instruments which aim to promote women’s equality, and recognise gender as an aspect of structural inequality between women and men, the Yogyakarta Principles define ‘‘gender identity’’ in terms of individual subjective feelings. These Principles make recommendations about the application of human rights standards to issues of sexual orientation and gender identity, but have no formal status as a human rights instrument. They define ‘‘gender identity’’ as follows:

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[2] Richard Byng, Susan Bewley, Damian Clifford, Margaret McCartney, ‘Gender-questioning children deserve better science’, (2018) *The Lancet*, Vol. 392, Issue 10163 <www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)32223-2/fulltext?rss=yes > accessed 18 June 2019

[3] UN Women Training Centre, ‘Gender Equality Glossary’, <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=S&sortkey=&sortorder=asc > accessed 10 June 2019

> ‘‘Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.’’ [4]

This concept divorces gender, a socially constructed hierarchy, from the material realities of sex-based oppression which give rise to it, and turns it into an individual, subjective identity based on an idea. It reinforces the ‘’social and cultural patterns of conduct of men and women’’ which Article 5 of the CEDAW seeks to modify or eliminate, by framing them as innate, personal identities. Many feminists argue that this undermines women’s sex-based rights.

Women’s rights in international human rights instruments such as CEDAW, and the United Nations Declaration on the Elimination of Violence against Women 1993, are based on women’s common experiences as a sex, and not on individuals’ subjective sense of ‘‘gender identity.’’ [5] For example, Article 1 of the CEDAW defines discrimination against women to mean:

> “any distinction, exclusion or restriction *made on the basis of sex* which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’’ (Emphasis added)

Feminists who view the concept of ‘‘gender identity’’ as undermining women’s rights often describe themselves as ‘‘gender critical’’. This term is used here. When discussing the political beliefs which underpin the concept of ‘‘gender identity’’, the term ‘‘gender ideology’’ is used.

The Gender Recognition Act 2004

The Gender Recognition Act 2004 (GRA) in its current form, requires an application to change legal gender to be supported by a diagnosis of gender dysphoria, with a report from a registered medical practitioner or psychologist practising in the field of gender dysphoria, and an additional report from a medical practitioner who may or may not practice in that field. It also requires the applicant to have lived as the other ‘‘gender’’ for a minimum of two years. The application must be accepted by a Gender Recognition Panel, which is made up of members who have legal and medical qualifications.

Byng et al state,

> ‘‘…sex is not assigned – chromosomal sex is determined at conception and immutable. A newborn’s phenotypic sex, established in utero, merely becomes apparent after birth, with intersex being a rare exception.’’ [6]

Thus, while it is possible for people to adopt styles of dress which are customarily worn by the other sex within a particular culture, and to undergo medical procedures which may make them look more like people of the other sex, it is not possible to actually change sex. The Equality

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[4] The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007

[5] The Declaration on Women’s Sex-Based Rights, launched in March 2019, seeks to re-affirm the sex-based rights of women and girls as set out in CEDAW and other human rights documents. It can be found at https://www.womensdeclaration.com/

[6] *Op. cit.* (2)

Act 2010 recognises this in distinguishing between the protected characteristics of sex and gender reassignment. The GRA is essentially a legal fiction.

The GRA came about in large part as a result of the European Court of Human Rights' decision in the case of *Goodwin v UK* [7] which specifically focussed on the status of post-operative transsexuals. The Court found that the UK was in breach of the applicant's right to respect for private and family life under Article 8 of the Convention, and of the right to marry under Article 12, because it did not have a mechanism whereby post-operative transsexuals could change their gender in law. The Court acknowledged that introducing a mechanism for legally changing gender would cause difficulties and have important repercussions in areas such as ''access to records, family law, and criminal justice'' (amongst others), but stated that these difficulties would be ''manageable and acceptable if confined to the case of fully achieved or post-operative transsexuals''. [8]

The GRA does not require any specific bodily changes, and therefore applies to a wider group than post-operative transsexuals. However, it is clear from the debates during its passage through Parliament that the legislation was aimed primarily at this group, and that it was envisaged that it would apply to a very small proportion of the population. [9] In 2016 the House of Commons Women and Equalities Committee's Report on ''Transgender Equality'' [10] recommended that the GRA be reformed to remove all of the current assessment processes, and enable people to change their legal gender by a process of self-declaration. This would involve completing a statutory declaration. The Committee also stated that it had ''heard from various quarters'' [11] the view that the UK government should adopt the overarching principles on ''trans equality'' embodied in two international declarations, the Yogyakarta Principles and the Council of Europe's Resolution 2048.

Principle 31(A) of The Yogyakarta Principles plus 10 [12] calls on States to ''…end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality''. In other words, the ultimate aim of the Yogyakarta Principles is the complete elimination of all sex and gender markers from the law. Principle 31(C iii) states that while sex or gender continue to be registered, States shall ''Ensure that no eligibility criteria...shall be a prerequisite to change one's name, legal sex or gender''. This specifically includes such prerequisites as a minimum age. Principle 31 (C iv) states that a person's criminal records should not be used to prevent a change of legal sex or gender.

The Women and Equalities Committee's recommendations, if implemented, would put almost all of Principle 31(C) into effect. The only explicit exception is that the Committee recommended a minimum age of 16 for self-declaration of gender identity. The Committee even goes some way to recommending a future approach which would remove all sex and gender markers, in stating that:

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[7] (2002) 35 EHRR 447
[8] *Ibid*, para. 91
[9] HC Deb 23 February 2004, vol 418, cols 48-108
[10] House of Commons Women and Equalities Committee, 'Transgender Equality First Report of Session 2015–16', HC 390, 14 January 2016 <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> accessed 10 March 2016
[11] *Ibid*, 9
[12] The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 10 November 2017

> ‘‘…there is scope for the Government to develop a coherent overall approach to the emerging issue of the position of non-binary and non-gendered people. One aspect of this might be a general ‘‘non-gendered’’ approach to the official recording of information on individuals.’’ [13]

The proportion of the population who now identify as transgender, who are a larger group than those who see themselves as transsexual, means that any change in gender recognition law, especially if it takes the form of self-declaration without any assessment process or prerequisites, will have much wider social repercussions than the GRA has had in its current form. The law relating to gender reassignment has implications for society as a whole, and particularly for women and girls, many of whose existing rights under the Equality Act 2010 are based on the protected characteristic of sex. This includes rights to single sex spaces and services, including those designed to protect the safety, privacy and dignity of women and girls who have experienced sex-based violence, such as rape crisis services and refuges for women and children escaping domestic abuse. If self-declaration is introduced without exceptions, any man will be able to declare himself to be a woman, and be treated as a woman in law, at least for most purposes. How far this would extend would depend on whether the single-sex exceptions in the Equality Act 2010 would be maintained, and whether or not they would be strengthened.

It is a basic principle of human rights law that it should balance the rights and interests of different groups. However, while written evidence was provided to the Women and Equalities Committee’s Transgender Equality Inquiry by a range of organisations, including women’s organisations, the Committee sought oral evidence only from groups advocating on behalf of transgender people. In their submissions to the Inquiry both the British Association of Gender Identity Specialists and the British Psychological Society stated that some male sex offenders who claim to be transgender are doing so as a means of seeking access to women and children by presenting in an apparently female way, in order to make subsequent sexual offending easier. The British Association of Gender Identity Specialists noted an ‘‘ever increasing tide of referrals of patients in prison serving long or indeterminate sentences for sexual offences’’, who ‘‘vastly outnumber’’ prisoners referred to them who have committed non-sexual offences.[14] The British Psychological Society stated that, ‘‘psychologists working with forensic patients are aware of a number of cases where men convicted of sex crimes have falsely claimed to be transgender females’’, and they warned the Inquiry of the need to be ‘‘extremely cautious of setting law and policy such that some of the most dangerous people in society have greater latitude to offend’’. [15] The Committee did not seek oral evidence from either of these organisations, and the Committee’s report made no reference to their concerns.

Following the Committee’s report, there was a period of public consultation about its recommendations, which ended in October 2018. During the consultation period a number of women’s groups started to organise public meetings to discuss the implications of the self-declaration proposals for women. When these meetings were publicised, activists organised to

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[13] *Op. cit.* (10) 9

[14] British Association of Gender Identity Specialists, ‘ Written evidence submitted by British Association of Gender Identity Specialists to the Transgender Equality Inquiry’, 20 August 2015, 4 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19532.html>, accessed 18 January 2016

[15] British Psychological Society, ‘Written evidence submitted by British Psychological Society to the Transgender Equality Inquiry’, 20 August 2015, 6 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19471.html> accessed 18 January 2016

try to close them down. This was the context in which Wolf's attack on Maria MacLachlan took place. *The Times* journalist Janice Turner, who witnessed the attack, described what happened:

> ''I was at Speakers' Corner waiting, along with about 80 others, to learn the secret location of a meeting entitled, ''What is gender? The Gender Recognition Act [GRA] and beyond.'' It was all very cloak and dagger because the original venue…had cancelled the previous day on health and safety grounds. Which is one way of saying ''trans rights activists harangued our staff and threatened, via various Facebook groups, to cause havoc if it went ahead.'' Then, hearing of the Hyde Park rendezvous, they rang every single venue within a mile radius to promise mayhem. Having failed to find it, about 15 of them arrived at Speakers Corner…Maria was taking photographs when an opponent grappled with her, snatched her camera and smashed it to the ground. Then a tall, male-bodied, hooded figure wearing make-up rushed over, hit her several times and as police arrived, ran away.'' [16]

Turner commented that, ''Changes to the very definition of ''man'' and ''woman'' are being proposed, yet it is almost impossible to hold a public meeting to discuss them.'' [17] However, public meetings organised by un-funded grass-roots feminist groups have continued all around the country, despite ongoing attempts to prevent them taking place. [18]

The new speech control

The attacks on freedom of expression which are directed at grass roots women's groups who question self-declaration of ''gender identity'' are mirrored at a policy level in some large organisations in the public sector.

Attempts to control speech which is gender critical can be seen as taking two separate but sometimes over-lapping forms. One is the suppression of gender critical speech, and the other is compelled speech, which involves the imposition of forms of speech which acquiesce in an acceptance of gender ideology.

One field in which the control of gender critical speech is prevalent is higher education. In June this year, a group of academics wrote a letter to the *Sunday Times* in which they expressed concerns about the effects on academic freedom of ''the inappropriately close relationship between LGBT charity Stonewall and UK Universities, via the Education Section of the ''Stonewall Diversity Champion Programme''. The letter stated that the Programme's requirements effectively leave ''academics unable to confidently question the contested notion of ''gender identity'' without fear of sanction.''[19]

In May this year Maya Forstater was fired from her job as a senior researcher at the Centre for Global Development (CGD), a think tank based in London and Washington, for sharing gender critical opinions on Twitter. Complaints about the tweets had been made to the organisation's Human Resources Department. Forstater had shared campaign material about the potential impacts of the proposals for gender self-declaration on women and girls, and had sent tweets

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[16] Janice Turner, 'The battle over gender has turned bloody' (*The Times*, 16 September 2017) <https://www.thetimes.co.uk/article/the-battle-over-gender-has-turned-bloody-2wpkmnqhh> accessed 17 September 2017

[17] *Ibid*

[18] Some of the history of these public meeting and the attempts to prevent them from taking place can be found at https://womansplaceuk.org/

[19] Letters to the Editor, *The Times*, 16 June 2019

which essentially stated that men could not actually become women. [20] *The Times* reported that Forstater was told by her managers that she had used "offensive and exclusionary" language, and that she was accused of "fear-mongering" for tweeting her concerns about the self-declaration proposals. At the time of writing, Forstater has begun employment tribunal proceedings against CGD.[21]

De facto self-declaration and policy capture

Groups who promote gender ideology appear to have been very successful in effecting policy capture in recent years. The Organisation for Economic Co-operation and Development (OECD) has defined policy capture as,

> ''…the process of consistently or repeatedly directing public policy decisions away from the public interest towards the interest of a specific interest group or person. Capture is the opposite of inclusive and fair policy-making, and always undermines core democratic values. The capture of public decisions can be achieved through a wide variety of illegal instruments, such as bribery, but also through legal channels, such as lobbying and financial support to political parties and political campaigns. Undue influence can also be exercised without the direct involvement of public decision-makers, by manipulating the information provided to them, or establishing close social or emotional ties with them.'' [22]

Horrocks has described the ways in which ''experts'' who provide consultancy can use their influence to capture policy. His work relates to the relationship between e-government and the IT consultancy industry, but his analysis of the process of policy capture by perceived ''experts'' potentially has wider application. [23]

An article in the *Sunday Times* published in June this year reported that UK universities have spent nearly one million pounds on training run by LGBT campaigning groups over the past five years. [24] While the nature of what might broadly be described as the ''equalities'' industry is very different to the IT industry, both are perceived by the organisations who commission them as possessing very specialised forms of expertise which are not shared by staff within the commissioning organisations. Arguably this creates a power imbalance which facilitates policy capture by those perceived as experts, particularly where those experts can confer awards on their client organisations.

Whatever the explanations for it may be (and they are probably multi-faceted), the extent to which *de facto* self-declaration has already been introduced without public consultation or debate in many public sector organisations indicates widespread policy capture. Organisations currently operating forms of self-declaration include criminal justice agencies. The Prison Service has housed a number of transgender sex offenders in female prisons in recent years,

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[20] Maya Forstater, 'I lost my job for speaking up about women's rights', 5 May 2019 <https://medium.com/@MForstater/i-lost-my-job-for-speaking-up-about-womens-rights-2af2186ae84> accessed 10 May 2019

[21] Andrew Gilligan, 'Tax expert Maya Forstater fired for saying trans women aren't women', *The Times*, 5 May 2019

[22] OECD, 'Preventing Policy Capture: Integrity in Public Decision-making', (2017), 9 <https://read.oecd-ilibrary.org/governance/preventing-policy-capture_9789264065239-en#page9> accessed 3 June 2019

[23] Ivan Horrocks, 'Experts' and E-Government: Power, influence and the capture of a policy domain in the UK', *Information, Communication & Society* (2009) 12 (1) 110-127

[24] Ewan Somerville and Sian Griffiths, 'Stonewall is using its power to stifle trans debate, say top academics' (*The Times*, 16 June 2019) <www.thetimes.co.uk/article/stonewall-is-using-its-power-to-stifle-trans-debate-say-top-academics-dtswlcl0n> accessed 17 June 2019

many of whom do not have a Gender Recognition Certificate and are therefore male in law. One example is Karen White, who identifies as a woman but is biologically and legally male. In 2018 White was convicted of sexually assaulting two women while on remand at HMP New Hall awaiting trial for rape and other sexual offences. White was placed in New Hall despite already having convictions for indecent exposure, indecent assault (now sexual assault), and gross indecency involving children. [25] Arguably, the UK acted in breach of its obligations under Article 3 of the European Convention on Human Rights in placing White in a women's prison, as the women White assaulted were subjected to degrading treatment to which the Prison Service's actions made them vulnerable, and which were reasonably foreseeable in view of White's criminal record.

The Equal Treatment Bench Book

Another criminal justice service in which *de facto* self-declaration is operating is the courts. The source of the judge's approach at Tara Wolf's trial is the *Equal Treatment Bench Book* published by the Judicial College. The *Bench Book* is not aligned with current law. Its definition of ''transgender'' includes a much wider group of people than those who come within the provisions of either the GRA or the Equality Act 2010. It states that ''Transgender is an umbrella term used to describe many different people who cross the conventional boundaries of gender.'' [26]

The extent of policy capture in this area is illustrated by the language and concepts used in the *Bench Book,* which closely resemble those used by some campaigning groups. [27] The *Bench Book* states:

> ''The term 'transgender' is commonly associated with those people whose gender identity does not correspond to the gender assigned to them at birth, and who identify with the opposite gender. They may have a strong and persistent desire to permanently reassign their gender ('transition') and to live in accordance with their gender identity. Some may seek medical treatment, e.g. hormone therapy and gender reassignment surgeries, others may not. The Gender Recognition Act 2004 and Equality Act 2010 refer to this narrower group of transgender people as 'transsexual' people.
>
> Despite its use in current legislation, the term 'transsexual' is dated and some people find it stigmatising. It is preferable to use the term transgender – if it is necessary to the legal proceedings to refer to a person as being transgender at all.
>
> The gender landscape is rapidly changing. Increasing numbers of people identify, for example, as non-binary, a-gender and gender fluid. They are also transgender within the broader meaning of the term. UK law has not yet caught up with these social changes.'' [28]

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[25] Jon Sharman, 'Karen White: Transgender prisoner jailed for life for sexually assaulting female inmates and raping two other women' (*The Independent*, 11 October 2018) <www.independent.co.uk/news/uk/crime/karen-white-transgender-prisoner-jailed-life-sexual-assault-rape-a8579146.html > accessed 12 October 2018

[26] Judicial College, *Equal Treatment Bench Book*, (February 2018, amended March 2019) 12 - 2, <www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2019.pdf> accessed 7 May 2019

[27] See, for example, Stonewall, 'Glossary of Terms', < https://www.stonewall.org.uk/help-advice/glossary-terms>, and Gender Identity Research & Education Society (GIRES), 'LEAFLET-Transgender-Experience' <www.gires.org.uk/wp-content/uploads/2019/03/LEAFLET-Feb-2019-Transgender-Experiences2.pdf>

[28] *Op. cit*. (26)

It is difficult to imagine how, in operational terms, the law could catch up with these changes, given that they exist entirely in the realm of ideas and have no basis in material reality. It is even more difficult to imagine how witnesses at criminal trials are to be expected to deal with them. Unsurprisingly, the *Bench Book* provides no guidance about this. It goes on to state:

> ''The Gender Recognition Act 2004 enables some transgender people to apply for legal recognition of their gender identity. For a variety of reasons, not all transgender people apply. Everyone is entitled to respect for their gender identity regardless of their legal gender status…It is important to respect a person's gender identity by using appropriate terms of address, names and pronouns.'' [29]

This is not elaborated on, and no guidance is given about how this requirement should be carried out in practice in relation to witnesses other than those who identify as transgender. No guidance is given about how judges should treat witnesses who perceive defendants in terms of their sex rather than their ''gender identity''. The guidance is written as if the use of a defendant's preferred pronouns is simply an emotionally neutral administrative matter which will have no detrimental effects on witnesses, or on the trial process.

No thought seems to have been given to the inter-action between the *Bench Book* guidance and the *Achieving Best Evidence in Criminal Proceedings* guidance (*ABE*). *ABE* states that judges have a responsibility to ensure that all witnesses are enabled to give their best evidence, and that judges and magistrates must strike a balance under Article 6 of the European Convention on Human Rights between protecting the defendant's right to a fair trial, and ensuring that witnesses are enabled to give evidence to the best of their ability. It requires judges to ''…have regard to the reasonable interests of witnesses, particularly those who are in court to give distressing evidence, as they are entitled to be protected from avoidable distress in doing so.'' [30]

ABE includes detailed guidance on the treatment of witnesses defined as vulnerable or intimidated under the Youth Justice and Criminal Evidence Act 1999. Section 16 of the 1999 Act defines vulnerable witnesses as child witnesses under the age of 17, and adults who suffer from a mental disorder within the meaning of the Mental Health Act 1983, or have learning or physical disabilities which may affect their ability to give evidence. Section 17 defines intimidated witnesses as those whose evidence is likely to be affected by fear or distress in connection with testifying in the proceedings. The *Bench Book* guidance takes no account of the particular vulnerabilities of these groups of witnesses. This guidance seems to have been written without consideration of the potential impact on any witnesses of being required to describe a defendant in ways which amount to a denial of their own perceptions of reality, or of the particular stress this will cause to witnesses who are giving evidence about being subjected to traumatising events such as physical and sexual violence.

In trials for sexual offences the majority of complainants are women and children and the overwhelming majority of defendants are male. [31] There appear to be a significant proportion of offenders who identify as transgender who have committed sexual offences. Ministry of

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[29] *Ibid*

[30] Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures,* March 2011, 134,

[31] The most recent detailed figures are available from: Office for National Statistics (GB), 'Sexual Offences: Appendix Tables, Year ending March 2017', <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/sexualoffencesappendixtables> accessed 8 January 2019

For detailed analysis of current patterns of child sexual abuse in the UK see <www.csacentre.org.uk/research-publications/scale-and-nature-of-child-sexual-abuse-and-exploitation/ > accessed 1 March 2019

Justice figures released in response to a BBC Freedom of Information request in 2018 estimated that long-term prisoners in the prison estate in England and Wales included 125 offenders who claimed a transgender identity, of whom 60 were sex offenders. Of these 60, 29 had convictions for sexual offences relating to children. [32]

The logic of the *Bench Book* guidance is that a complainant in a rape trial can be required to call a defendant who has raped her ''she''. By extension, it could also require her to use female possessive pronouns to refer to the defendant's body parts, to which she would have to refer when giving her evidence. This could also apply to child witnesses and vulnerable adult witnesses. The *Bench Book* guidance gives no thought to how a child or an adult with learning disabilities might experience an instruction from an authority figure like a judge to refer to a biological male as ''she''. This type of compelled speech undermines access to justice, particularly for women and children. The right to accurately describe the sex of those who have assaulted them is crucially important to the ability of women and children, and men, to report violence and give evidence against their abusers.

Gaslighting in the courtroom

For a court to require a witness to call a biologically male defendant ''she'' is a form of gaslighting, particularly when that defendant has subjected her to violence. The Oxford English Dictionary's definition of the verb ''gaslight'' is ''to manipulate a person by psychological means into questioning his or her own sanity'', but it is commonly used to refer to the deliberate undermining of a person's sense of reality.

The gaslighting of witnesses is not a new feature of criminal trials. The central purpose of adversarial cross-examination is to undermine the credibility of opposing witnesses, and research studies have identified strategies for doing this which are frequently used by advocates across different common law jurisdictions. [33] Ellison states that, ''Victimological study of criminal trial proceedings has…revealed the extent to which cross-examination is used as a tool to humiliate, intimidate and confuse opposing witnesses.'' [34]

These practices have been gradually modified since the enactment of the Youth Justice and Criminal Evidence Act 1999 and the *ABE* guidance which was written to accompany it, and because of initiatives such as the Advocates' Gateway, [35] particularly in relation to child witnesses, and to adult witnesses who are entitled to special measures at court. However, they persist, as the following quotation from a QC, whose language evokes sexual stereotypes while he criticises their exploitation in rape trials, shows:

> ''But there are barristers still who defend who simply want to destroy a complainant. And I mean that. They know that if they can turn her into a snivelling wreck, or make her look a complete tart, they will win their case, and it's wrong. And section 41[36] has gone a long way to stopping that, but people still try and do it, because that's the way.''[37]

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[32] BBC News, 'How many transgender inmates are there? 13 August 2018, <www.bbc.co.uk/news/uk-42221629 > accessed 16 August 2018

[33] Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (OUP 2001), Andrew E Taslitz, *Rape and the Culture of the Courtroom* (New York University Press 1999)

[34] Louise Ellison, 'The mosaic art?: cross-examination and the vulnerable witness', [2001] LS 353

[35] The Advocates Gateway provides evidence-based guidance on vulnerable witnesses and defendants. < www.theadvocatesgateway.org > accessed 30 May 2019

[36] Section 41 Youth Justice and Criminal Evidence Act 1999

[37] Cited in Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008) 129

The common feature of cross-examination strategies is the attempt to control what the witness says as far as possible, so as to prevent her from saying anything which may be detrimental to the advocate's client's case. When advocates take witnesses through their evidence during examination-in-chief, they encourage them to provide an account of events in their own words, and are not permitted to ask leading questions (questions which are worded so as to try to elicit a particular answer). In cross-examination, leading questions are the norm.

In addition to the use of leading questions, cross-examination strategies for maintaining control of the witness' account of events include the use of ''questions'' which are really statements or accusations, rapid jumps from topic to topic which are designed to disorient the witness, and pre-emptive interruption of answers which the advocate sees as detrimental to his or her client's case. At trials for rape and other sexual offences defence advocates draw on sexual stereotypes and victim-blaming rape myths in their control strategies, as the quotation above illustrates. The advocate's control may be exercised through dominant body language as well as through the forms of questioning used. Ellison summarises the most common control techniques as follows:

> ''Tone of voice, speech rate, emphasis, physical proximity, eye contact, physical gesture and facial expression are all devices which can be used to unsettle or unnerve a witness…Commonly observed trial tactics include repeating the same question many times, asking questions in rapid succession and continuing a line of questioning despite its rejection by a witness…Other...devices include pre-emptive interruption, the juxtaposing of unrelated topics…and the tendency…to latch on to trivial inconsistencies and present them as indicators of unreliability and untruthfulness.'' [38]

Maria MacLachlan has said that the judge's rebuke of her for referring to Wolf as ''he'' and ''the defence counsel's haranguing of me for the same reason just made me more nervous.''[39] That was likely to have been the defence counsel's intention. Trying to unnerve witnesses is a common defence strategy, and the *Bench Book's* guidance on pronoun use gives defence advocates an additional tactic for doing this, which can be used in combination with other control strategies. For example, correcting a witness' pronoun use could be used very effectively as a method of pre-emptive interruption when an advocate is not happy about the direction a witness' answer is taking. Because it is supported by *Bench Book* guidance it can be presented as benevolent concern for the defendant, rather than a tactic for undermining the complainant.

Compelled speech and human rights law

The use of pronouns and forms of address which reflect a person's ''gender identity'' rather than their sex is not simply a matter of social courtesy. For many people it is an expression of a political belief with which they profoundly disagree, and which they consider to be harmful to the rights of women and to society as a whole. For others, it may be an expression of a belief which is contrary to their religious beliefs; or may be an unacceptable expression of a belief because it involves colluding with denial of material reality. The *Bench Book* guidance is effectively imposing a form of compelled speech, and is an infringement of witnesses' rights to freedom of thought, conscience and religion, and freedom of expression, under articles 9 and 10 of the European Convention on Human Rights respectively. Both these articles protect the right not to be obliged to manifest beliefs that one does not hold, as stated in the case of *Lee v*

[38] *Op. cit.* (34) 360-361
[39] *Op. cit.* (1)

Ashers Baking Co. [40] The right not to be compelled to express a political belief is well established in the case law of the European Court of Human Rights and in domestic case law.

The concept of 'compelled speech' was developed in the United States (US) in cases relating to the First Amendment of the US constitution. The rights protected by the First Amendment include freedom of religion, freedom of speech, freedom of the press, and the right to peaceful assembly. An early significant case relating to compelled speech was *West Virginia State Board of Education v Barnette* [41] in which the Supreme Court held that the Board of Education could not require public school students to salute the American flag or recite the Pledge of Allegiance if doing so was contrary to their religious beliefs. The majority of the Court found that the First Amendment did not permit attempts to enforce unanimity of opinion on any topic. *Barnette* was cited in the case of *Wooley v Maynard*,[42] in which the applicants had been prosecuted under a New Hampshire statute requiring non-commercial vehicles to carry licence plates embossed with the state motto ''Live Free or Die''. The Supreme Court found that the state's interests in requiring the motto did not outweigh the First Amendment's free speech principles, which included the right of individuals to refuse to foster an idea which they found morally objectionable.

In *Lee v Ashers Baking Co.* the respondent suggested that the principles relating to compelled speech established by the US Supreme Court had not been adopted in the law of the United Kingdom. However, the UK Supreme Court disagreed. Referring to *Wooley* and *Barnette*, the Court stated:

> ''There is indeed longstanding Supreme Court authority for the proposition that ''the right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all''….in the light of *Laramore* and *RT (Zimbabwe)* and the Strasbourg case law on which they are based, it cannot seriously be suggested that the same principles do not apply in the context of articles 9 and 10 of the Convention.'' [43]

The Strasbourg cases to which the Supreme Court was referring here are *Kokkinakis v Greece* [44] and *Buscarini v San Marino*. [45] In *Kokkinakis* the applicant was a Jehovah's Witness who was arrested and fined for proselytising after discussing his religious beliefs with Orthodox Christians. The Strasbourg Court found that freedom of religion included the right to try and convince others, and that his Article 9 rights had been violated. It emphasised that freedom of thought, conscience and religion is one of the foundations of a ''democratic society'' within the meaning of the Convention. In *Buscarini* the applicants complained that the requirement to take an oath on the Christian Gospels in order to take up their parliamentary seats infringed the right to freedom of religion and conscience under Article 9. The Court found that the applicants' Article 9 rights had been violated, and reiterated that freedom of thought, conscience and religion entails the freedom to hold and not to hold religious beliefs.

The right not to participate in religious practices was upheld under Article 9 in the Privy Council case of *Commodore of the Royal Bahamas Defence Force v Laramore*. [46] All of these cases concerned the right to express, or not express, religious belief. However, in *Kokkinakis*

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[40] *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) (Northern Ireland*) [2018] UKSC 49
[41] 319 US 624 (1943)
[42] 430 US 705 (1977)
[43] *Op. cit.* (40) [53]
[44] *Kokkinakis v Greece* (1994) 17 EHRR 297
[45] *Buscarini v San Marino* (2000) 30 EHRR 208
[46] [2017] 1 WLR 2752

and *Buscarini* the European Court of Human Rights emphasised that Article 9 also protected other forms of belief.

The UK case of *RT (Zimbabwe) v Secretary of state for the Home Department* [47] was specifically concerned with political beliefs. It related to four Zimbabwean nationals who had claimed asylum in the UK. They feared persecution if they were sent back to Zimbabwe because of their lack of support for its ruling political regime. It was accepted that there was a real risk that someone who did not express active support for the regime would be perceived to be a supporter of the opposition party, and persecuted as a result. The Secretary of State essentially argued that, since the political neutrality of the four (one appellant and three respondents) was not a deeply held belief, they could avoid persecution if they were returned to Zimbabwe by pretending to support the regime. The Supreme Court disagreed. Lord Dyson stated:

> ''… the right *not* to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and… the Convention too…. Nobody should be forced to a have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution.'' [48] (Emphasis in the original)

RT (Zimbabwe) was cited by the Supreme Court in *Lee v Ashers Baking Company*, in which the appellant baking company had refused to supply the respondent, Mr Lee, with a cake iced with the slogan ''Support Gay Marriage'', due to their religious beliefs. Mr Lee brought a claim for direct and indirect discrimination on grounds of sexual orientation, religious belief or political opinion. The presiding District Judge accepted the baking company's submission that they would have supplied the cake to Mr Lee without the slogan, and that they would have refused to supply a cake iced with this slogan to any customer, whatever their sexual orientation. Nevertheless she held that the refusal to supply the cake was direct discrimination on all three grounds. The Court of Appeal dismissed the baking company's appeal, and held that there had been associative direct discrimination on the ground of sexual orientation.

However, the Supreme Court made a distinction between a refusal to supply a cake because of a customer's sexual orientation, which they found had not occurred in this case, and the appellants' refusal to ice a cake with a political slogan with which they disagreed. They found that there had been no discrimination on grounds of sexual orientation, because the baking company's objection had been to the message they were asked to put on the cake, and not to any particular person or persons.

Citing Articles 9 and 10 of the European Convention, Lady Hale stated:

> ''…the baker could not refuse to provide a cake – or any other products – to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different – obliging them to supply a cake with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake…'' [49]

The question of whether the law should be changed to allow a person to change their ''gender identity'' by means of self-declaration has recently been the subject of a public consultation. A number of campaigning groups promote such self-declaration. The belief that a person may have a ''gender identity'' which is separate from that person's biological sex, and is an identity

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[47] *RT (Zimbabwe) and others v Secretary of State for the Home Department* [2012] UKSC 38
[48] *Ibid* [42]
[49] *Op. cit.* (40) [55]

which should be recognised in law, clearly constitutes a political opinion. It is also a political opinion with which many people disagree. Requiring a witness in court proceedings to refer to a defendant on the basis of ‘‘gender identity’’ rather than biological sex is essentially no different to requiring a person to participate in the religious practices of a faith they do not share, or to communicate a political slogan with which they disagree. This practice clearly constitutes compelled speech, and is an infringement of the witness' rights under Articles 9 and 10 of the European Convention.

Conclusion

Articles 9 and 10 are qualified rights, and may be limited where this is prescribed by law, and is necessary in a democratic society in pursuit of a legitimate aim, provided that the limitation is proportionate. It is questionable whether the guidance set out in the *Bench Book* is prescribed by law, in view of the fact that its definition of ‘‘transgender’’ is not aligned with the provisions of the GRA or the Equality Act 2010. It also includes ‘‘non-binary’’ forms of ‘‘gender identity’’ which are not recognised in law, as the *Bench Book* itself acknowledges.

The *Bench Book* states that, ‘‘Everyone is entitled to respect for their gender identity, private life and personal dignity.’’ [50] It might be argued that encouraging respectful treatment at court for a defendant's sense of personal identity and dignity is a legitimate aim. However, compelling other witnesses at court to dissemble and express a political opinion with which they disagree is not a proportionate means of achieving this aim, particularly when doing so requires them to effectively deny their own perceptions of the events about which they are giving evidence. The ability of children or vulnerable adult witnesses to give evidence may be completely undermined by an attempt to compel their speech in this way.

Transgender defendants may be distressed by being referred to by the pronouns associated with their biological sex rather than their ‘‘gender identity’’. However, a complainant may be profoundly distressed by being asked to refer to a biological male as a woman, particularly if she is giving evidence about a sexual offence, or a physical attack. The courts have an obligation to balance the rights of defendants and witnesses. However, the *Bench Book* guidance prioritises the wishes and feelings of transgender defendants at the expense of complainants, and other witnesses. Its approach to the conduct of criminal trials undermines not only the witnesses whose speech the courts may attempt to compel, but justice itself. Justice is not served when the courts actively impede witnesses' ability to give their best evidence, and doing so cannot reasonably be said to be a proportionate means of achieving the *Bench Book'*s stated aims.

[50] *Op. cit*. (26) 12-2