

Incompatibility of “Group Identity” with the “Rule of Law”: A Socio-legal Analysis

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Abstract

This paper argues that Group Identity is inherently incompatible with the Rule of Law. The depth of this incompatibility is equal to the depth of both these concepts. By examining the Gender Recognition Act 2004 (GRA) and its 2022 reform, as well as the UK’s Online Safety Act 2023 (OSA), this paper shows that this incompatibility has increasing relevance and impact in our society. It considers two controversial issues - the treatment of transgender and censorship - where group identity based legal policies apparently clash with the rule of law. While these two issues may seem distinct from each other, they are similar in their connections with Group-Identities and their incompatibility with the Rule of Law.

In addressing these sensitive issues, I have tried to be respectful in tone whilst maintaining rigour in the requirement of reform. I have also made efforts to position this paper away from political science, despite the political connectedness of the topics. This is done to enhance legal credibility and avoid speculation. I address and often rebut the limitations to my argument throughout, and present solutions that may engender better compatibility between the two concepts.

Key Words

Group Identity, Rule of Law, Censorship, Online Safety, Gender Recognition

1. Introduction

The central questions that will be examined and analysed throughout this paper are - What are the ideas of Rule of Law and Group Identity? Why is Group-Identity incompatible with the Rule of Law? How is Group-Identity incompatible with the Rule of Law? What is the impact of this incompatibility? How we achieve compatibility between these two concepts?

Next part of the paper (section 2) will define Group-Identity and the Rule of Law, laying the foundations for the legal analysis ahead. The subsequent two parts refer to two pieces of legislation or social principle, bringing them as representative areas of the incompatible relationship between Group-Identity and the Rule of Law. They will combine a loose blackletter law analysis approach with a social impact analysis of the legislations. The two legislations that I will be critiquing are the Online Safety Act 2023 and the 2022 Reform of the Gender Recognition Act 2004. The fifth and final section will attempt to draw an informed conclusion.

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2. Group-Identity and The Rule of Law

2.1. The Rule of Law

The rule of law is a tree with many branches, serving as a fundamental mechanism to gauge the functionality and cohesion of society. However, these branches are hard to responsibly confine into purposes and characteristics that fully capture its indeterminable scope and pivotal role in shaping the fabric of society. These purposes must be wise enough to “enlighten our society,”¹ and the characteristics firm enough for the “welfare of a country to depend on.”² Moreover, it is because of these standards that extensive disrespect and dissonance for the rule of law have always led to collapses of society.³ Hence it is of palpable importance that all ideologies remain compatible with it.

Purposes of Rule of Law

The purposes of the rule of law can be broken down into “constraint, consistency and certainty.”⁴ Constraint refers to the separation of powers that “deters governments from making laws that do not follow the legislative process.”⁵ Consistency is simply the stability of socio-legal cohesion. Next, “certainty” can be expanded into being “certain, foreseeable and easy to understand,”⁶ making it focused on legislative transparency. In order for a concept to be compatible with the rule of law, it must encompass all 3 of these purposes in its legislative practice.

Characteristics of Rule of Law

There are three essential characteristics of rule of law – equality, transparency and civil liberties under the law. The first defining characteristic of the rule of law is equality under the law.⁷ This can be summarised as the fair treatment of all individuals under the law,⁸ no matter their identity. Secondly, transparency under the law, can be condensed to the “clarity honesty and comprehensiveness of the law.”⁹ Finally, civil liberties under the law should be synopsised as “personal rights and freedoms afforded to citizens,¹⁰ irrespective of their identity. It is all three of these aspects of the rule of law that I believe to be incompatible with Group-Identity ideology. These aspects will be individually examined for their incompatibility and will act as sub-headings for the subsequent sections as they are the centrepiece of this dissertation.

2.2. Group Identity

Group-Identity ideology is a tree with many branches. In psychology, it is “social identity theory,”¹¹ In history, “tribalism,”¹² and in politics, “identity politics.”¹³ Yet in law it can be

¹Lord Bingham, ‘*The Rule of Law*’, The Cambridge Law Journal, Volume 67, March 2007, p 79.

²Zilis, M, *how identity politics polarises rule of law opinions*, May 2020, Political Behaviour, 179.

³Hayek, F., *The Decline of the Rule of Law*, Mises Institute, April 1953, <<https://mises.org/library/decline-rule-law>>

⁴Endicott, T, *The impossibility of the rule of law*, 1999, Oxford Journal of Legal Studies, p. 3.

⁵ Burgess, P, *Why we need to abandon the rule of law*, Monash University (Online blog), Why We Need to Abandon ‘The Rule of Law’ — IACL-IADC Blog (blog-iacl-aidc.org) Accessed 3 Jan. 2024.

⁶Council of Europe, Rule of law, 2011, Venice Commission, Available at, [Rule_of_law\(coe.int\)](http://Rule_of_law(coe.int))

⁷Lexis Nexis., ‘*The Rule of law-The Equation*,’ <<https://www.lexisnexis.co.uk/about-us/rule-of-law>> Accessed 10 Jan. 2024.

⁸The Universal Declaration of Human Rights Article 1 - *All human beings are born free and equal in dignity and human rights*, 1948

⁹Harris, K., ‘*Florida's Role as Part of the Americas*’ Florida Journal of International Law, Volume 13, Issue 1, Article 1, 2000.

¹⁰Smith, D., *British Civil Liberties and the Law*, Political Science Quarterly, Volume 101, Issue 4, 2018, pp. 637–660.

¹¹Tajfel, H., *An integrative theory of intergroup conflict*. Psychology, Volume 14, Number 12, December 2023, pp. 33-37,

¹²Chua, A., ‘*Tribal World: Group Identity Is All*’ Foreign Affairs Volume 97 Issue 25 August 2018

¹³Fukuyama, F., ‘*Against Identity Politics: The New Tribalism and the Crisis of Democracy*’ Volume 97 Issue 5, October 2018. pp. 19-23 DOI: <http://www.jstor.org/stable/44823914>

expressed as legal progression or regression. I believe these fields all slightly differ in their interpretations because ideology is ingrained in our progressive nature as a species.¹⁴ This is due to its central tenant of improving the lives of a specific Group-Identity. This tenant is interdisciplinary in scope, and often displayed as a tool for the betterment of society, explicitly in the socio-legal sphere. An example of this betterment is the civil rights movement in America, catalysed by the emancipation of slaves that proceeded to the Jim Crow Laws and *Brown v Board of Education*.¹⁵ These events were purposed on improving the lives of a distinctively identifiable group and can thus be credited to this ideology of Identity politics. Societal norms have also been advanced through this ideology's motivation of social justice. This is shown by The Marriage Act 2013, enabling same-sex marriages in the UK, exhibiting the range of past achievements accredited to this ideology, to be the pinnacle of moral progression. I believe the three interdisciplinary characteristics of Compassion,¹⁶ Acceptance¹⁷ and Virtue¹⁸ are what empower this theory and makes it so popular and successful in its overarching aim of improving the lives of identities.

Three Problematic Traits of Group-Identity

However, in recent years, this ideology has started to encompass and promote socio-legal phenomena that cause controversy and incompatibility. This seems contradictory at first as these characteristics – Compassion, Acceptance and Virtue - are inherently noble traits, much like the spirit of the ideology. However, the nuances of these traits are that they tread a fine line between order and chaos,¹⁹ and when popularised and worshipped, more extreme interpretations of these traits are made, constructing the chaos.²⁰ These traits can also be hijacked by both political and legal proponents as a method of justification and controlling opposition,²¹ thus weaponizing them. This has led to this ideology portraying itself to now judge people, not on the content of their character, (as it once did) but on their adherence and compliance with the inflated interpretations of these three traits. Thus, illustrating this ideology's slippery slope into the socio-legal chaos, I advocate for reform.

Compassion

In further exploration of how these characteristics have transformed from order to chaos, I take the idea of compassion first. Compassion has led to rights devoid of responsibility. Through the amplification of compassion, there is a risk of misconstruing legal rights as a gift that alleviates oppression. This can lead to the neglect of responsibilities intertwined with those rights. This distortion is influenced by the emotional context surrounding rights and legal privileges, as these often alleviate significant suffering. However, it is crucial to recognise that rights and privileges cannot be bestowed out of mere “compassion” but must come out of necessity for the establishment of a morally just and functional society. Compassion is often the reactive by-product to this but not the main goal. For instance, the granting of women's

¹⁴ Clark, C., 'Tribalism Is Human Nature.' Sage Journals, Volume 28 Issue 6, August 2019 pp. 587-592. <https://doi.org/10.1177/0963721419862289>

¹⁵ *Brown v Board of Education* 347 U.S. 483 (1954)

¹⁶ Blackstone, A. (2009). Doing Good, Being Good, and the Social Construction of Compassion. *Journal of Contemporary Ethnography*, 38(1), 85-116.

¹⁷ Transue, J., *Identity Salience, Identity Acceptance, and Racial Policy Attitudes: American National Identity as a Uniting Force*, *American Journal of Political Science*, Volume 57, Issue 1, January 2007, pp. 78-91,

¹⁸ Levy, N., *Virtue signalling is virtuous*, *Synthese*, Volume 198, pp 9545–9562, April 2020.

¹⁹ Peterson, J., *12 Rules for Life: An Antidote to Chaos*, Rule 2, 2018

²⁰ Dressler, M., *The social construction of reality*, Volume 31, Issue 2, 2019, DOI: <https://www.jstor.org/stable/26642789> pp 123

²¹ Foran, M., *The Scottish Gender Recognition Reform Bill: The case for a Section 35 Order*, 2021 <<https://policyexchange.org.uk/wp-content/uploads/2023/01/The-Scottish-Gender-Recognition-Reform-Bill.pdf>> Accessed 31 Dec. 2023.

right to vote in 1919²² was not an act of compassion but a strategic move to accommodate the needs of women in the workforce and political sphere. While this did alleviate oppressive suffering, its purpose was to enable half of the population to provide to society, by equalising their opportunity. It was thus not compassionate in purpose but in consequence. Furthermore, although many women desired this right, it was implemented against the wishes of some,²³ as it also brought the responsibility of the draft, which gave this right meaning.²⁴ In today’s mainstream narrative, this reduction of rights to mere reparations for oppression detaches all meaning from them and is visible in the Gender Recognition Act (GRA) reform especially.

Acceptance

Following on, the trait of acceptance has also witnessed transformation into its extreme half.²⁵ Initially conceived to promote a morally just narrative and facilitate collective endorsement of common values, Acceptance takes a “perilous turn”²⁶ when it is pushed to extremes and evolve into censorship. This shift occurs because of a misunderstanding of the diversity of human experiences, which can be contextualised as the idea that no two individuals can agree on everything.²⁷ Therefore the only way to achieve total acceptance of a value is through tyrannical enforcement by censoring what is ‘unacceptable.’ This gradual progression towards censorship, through the exaggeration of acceptance, is often overlooked due to its simplicity when applied. For instance, while racism is universally acknowledged as morally reprehensible, dissenting opinions still persist. The easiest response to this is the censorship of these dissenting voices to ensure total acceptance. However, a more effective, but albeit challenging, approach is to encourage open discussion and thus condemnation, fostering genuine acceptance. However, this methodology of acceptance has been overshadowed in the pursuit of an unrealistic objective: The insistence that everyone must agree on everything, even at the expense of personal freedoms. This notion is prevalent in the Online Safety Act (OSA).

Virtue

Finally, the deformation of virtue into virtue signalling is also noteworthy. Initially, rooted in the selfless pursuit of good without the expectation of reward,²⁸ this has undergone significant distortion, catalysed by the admiration and glorification of achievements tied to Group-Identity. These have become so pronounced that many are now compelled to publicly endorse their support for such progress.²⁹ While the celebration of such advancements is inherently positive, this has reached a point where failure to overtly glorify these achievements is deemed regressive and bigoted.³⁰ This shift infringes on various aspects of life, and has far-reaching consequences for law, as policymakers overlook critical issues with law in their pursuit of

²² The Representation of the People Act 1918

²³ Sargeant, M., *It's Complicated: Age, Gender, and Lifetime Discrimination against Working Women - the United States and the U.K. as Examples*, Volume 22, Issue 1, July 2014, DOI: <http://dx.doi.org/10.2139/ssrn.2367859> Accessed 31 Dec. 2023.

²⁴ Ngesson, T., *Conscription, Citizenship, and Democracy*, Oxford Research Encyclopedia of Politics, October 2020, DOI: <https://doi.org/10.1093/acrefore/9780190228637.013.1909>

²⁵ Hogg, M., *Going to extremes for one's group: the role of prototypicality and group acceptance*, Journal of Applied Social Psychology, Volume 46, Issue 9, May 2016, pp. 544-553.

²⁶ Nova Scotia University., *‘Changing the culture of acceptance,’* 2015-2019, <<https://novascotia.ca/lae/pubs/docs/changing-the-culture-of-acceptance.pdf>> accessed 27 Dec. 2023

²⁷ Huvenes, T., *Individuation by agreement and disagreement*, March 2022, DOI: <https://doi.org/10.1080/0020174X.2022.2051203>

²⁸ Turillo, C., *Is Virtue Its Own Reward? Self-Sacrificial Decisions for the Sake of Fairness*, Organizational Behavior and Human Decision Processes, Volume 92, Issue 2, July 2003, pp 839–865.

²⁹ White House Office of the Press Secretary., *Obama Administration’s Record and the LGBT Community*, June 2016 Available at <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community> Accessed 10 Jan. 2024

³⁰ Walton, B., *‘Opinion: If you’re anti-gay, you’re a bigot,’* Kentwired.com, April 2018, <<https://kentwired.com/43869/opinion/opinion-if-youre-anti-gay-youre-a-bigot/>> Accessed 10 Jan 2024

reward via virtue signalling. This leads to an erosion of factual analysis and diverges from the essence of virtue. This overemphasis on glorification, has led to the undermining of both concepts and is accordingly present in the GRA and OSA retrospectively.

These inherently regressive and restrictive traits can be described as the negative counterparts of Group-Identity characteristics. All of which turn Group-Identity into “exacerbated tribalism.”³¹

3. The Online Safety Act 2023

The primary legislation for this section is the Online Safety Act 2023 (OSA).³² I will discuss this legislation's incompatibility with two aspects of the rule of law, as the act presents inconsistencies with both the transparency aspect and civil liberties aspect. This Act, although not directly related, appears heavily influenced by group identity ideology in its air-tight provisions of censorship and surveillance. Here, I argue that the government, as a public service, can have no business in the lives of private citizens in a democracy in keeping with the rule of law. As private citizens it is our responsibility to govern matters that we can govern ourselves,³³ and it is for governments to establish the borders of such governance and assist only when asked. This bill clearly transfers our responsibilities as private citizens to government bodies.

The OSA is the first comprehensive piece of legislation that aims to formalise the relationship between the state and online-intermediaries. This Act imposes legal duties of care on “user to user services,”³⁴ to prevent harmful content, and reduce disinformation. The overarching aim of which is to improve internet safety, for minorities and children in particular. On the surface this bill seems sober and rational, prescribing tighter laws around revenge porn³⁵ and criminalising messages that encourage people to commit “suicide or an act of serious self-harm.”³⁶ However the criminalisation of civil liberties appears to be the unnecessary cost of this, as group identities are used as justification for, at best poor legislative practice, and at worst, ideological censorship. Incompatibility with the rule of law is achieved not only via infringements on freedoms but also via the lack of transparency in the nature of the act.

Some Contexts

Safety and the right to feel safe is a notion that is an established concern within Group-Identity ideology. This comes from different identities arguing they do not feel safe, with 65% of young people seeing a lack of justice when online abuse are reported.³⁷ However, this right to feel safe in society without subjection to hate-speech often is confused with physical acts of violence.³⁸ This is not to say that hate-speech is harmless or acceptable, but that it does not warrant the same legal intervention that physical violence does. Yet despite this, hate speech is frequently categorised as a legal issue and not a social one, with legal penalties for hate speech gradually materialising more cohesively. This was shown historically in this country with the

³¹Hummel, T., *the Dangers Of Tribalism*, Leaders.com, April 2023 Available at <https://leaders.com/news/social-issues/jordan-peterson-the-dangers-of-tribalism/> Accessed 10 Jan. 2023

³² The Online Safety Act 2023

³³Feldman. M., ‘*To Manage Is to Govern*’ University of Michigan, Volume 62, 2002, pp. 529-541

³⁴ The Online Safety Act 2023, Section 3

³⁵ *ibid* sec 187 (66)(a)(5)

³⁶ *ibid* sec 184 (3)

³⁷ ‘Stonewall - Staying Safe Online’ (*Internet Matters*, 28 September 2020) pp. 45 <https://www.internetmatters.org/hub/resource/stonewall-staying-safe-online/> accessed 27 December 2023

³⁸ ‘Hate Speech and Violence - European Commission against Racism and Intolerance (ECRI) - Wwww.Coe.Int’ (*European Commission against Racism and Intolerance (ECRI)*) <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/hate-speech-and-violence> accessed 27 December 2023

Malicious Communications Act³⁹ and Investigatory Powers Act⁴⁰ acknowledging and validating this confusion in the executive. Consequentially leading to many respected institutions, such as Oxford University, advocating for legislation with increasingly broader scopes to govern this.⁴¹

I believe this confusion occurs for two reasons. Firstly, from the conflicting domains of social and legal. As bigotry of any sort is societal in nature, and thus very difficult to litigate without risking necessary freedoms.⁴² Secondly from the more rooted ideological issue of discussing rights without prior discussion of responsibility, as this ideology is very quick to legislate nuanced issues that require more careful, and objective thought. I believe this issue of verbal safety’ (to even call it that) to be no different, and the prescription of rights without responsibility to be an extension of that. This conjoins relevance to the rule of law as governing and regulating speech, albeit harmful or not, opens a slippery slope to controlling it.

I believe these aspects of incompatibility with the rule of law to be perfectly demonstrated within the OSA, where the establishment of rights without mention of responsibility is rife. And the protection of group identities from hate-speech that is confused with violence is used to the justify this.

Freedom of Expression

The first issue with the OSA can be illustrated by its excessive restriction on free speech making it “unfit for law in a liberal democracy.”⁴³ Free speech is the free exchange of values principles and ideas “without interference from public authority,”⁴⁴ and an extension of freedom of expression, making it a “cornerstone of democracy,”⁴⁵ due to its intertwinement with thought and consequentially free-thinking. However, Section 121 and Section 17 conjunctively, threaten to overthrow this cornerstone in their sanctioning of “accredited technology,”⁴⁶ to remove content that OFCOM⁴⁷ deem “legal but harmful”⁴⁸. This demonstrates a degree of censorship that protrudes over an individual’s ability to view and judge legal content for themselves. Additionally, Section 66 states that the “dissemination of illegal content”⁴⁹ must also be reported to the National Crime Agency⁵⁰ who have the power to enforce a penalty of “a term not exceeding 2 years imprisonment”⁵¹ for anyone in breach of this act. This is in direct violation of Articles 8,⁵² and 10⁵³ of the European Convention on Human Rights where it states that infringements of the rights of freedom of expression can

³⁹ Malicious Communications Act 1988

⁴⁰ Investigatory Powers Act 2016

⁴¹ McConnachie et al. *Comparative hate speech law*; University of Oxford, March 2012 <https://www.law.ox.ac.uk/sites/default/files/migrated/1a._comparative_hate_speech_annex.pdf> accessed 27 December 2023

⁴² Butler, O (2022) The regulation of hate speech online and its enforcement - a comparative outlook, *Journal of Media Law*, 14:1, 20-24.

⁴³ Big Brother Watch *Briefing on the online safety bill for House of Lords Second Reading*, February 2023. pp. 4 <<https://bigbrotherwatch.org.uk/wp-content/uploads/2023/02/BBW-briefing-Online-Safety-Bill-HoL-Second-Reading.pdf>> accessed 27 December 2023

⁴⁴ The European Union Charter on Fundamental Rights. 2007. Article 11 - freedom of expression and information

⁴⁵ Gorenc, N., *Hate speech or free speech: an ethical dilemma?*, *International Review of Sociology*, Volume 32, Issue 3, October 2022, pp, 413-425.

⁴⁶ The Online Safety Act 2023 Section 121.

⁴⁷ The Office of Communications, 2003, <<https://www.ofcom.org.uk/>> Accessed 10 Jan. 2024

⁴⁸ The Online Safety Act 2023 Section 17 (2).

⁴⁹ *ibid* sec 9 (e).

⁵⁰ *ibid* sec 66.

⁵¹ *ibid* sec 69 (d).

⁵² European Convention on Human Rights., *Article 8: Right to respect for private and family life*, August 2022

⁵³ *ibid Article 10: Freedom of Expression*, June 2021

only be lawful if “necessary and proportionate.”⁵⁴ Yet this act does not adhere to this. The case of *Delf AS V Estonia* (2015)⁵⁵ demonstrates why. Unlike the OSA, the ECHR’s authority was made clear in this case as it clarified the secondary position online intermediaries should take when it comes to Article 8 and 10. This reaffirmed the importance of free speech in the online community and emphasised the necessary and proportionate principles that this act neglects.

It is important to note that although the judgements of the ECHR do not directly apply to the domestic laws of the UK, the police force are bound to ECHR laws under the human rights act.⁵⁶

Duties of Care

More broadly, the framework that allows for freedom of expression to be compromised, is the ill-thought concept of duties of care for companies, in regulating illegal content on their platforms. This provides the framework under which freedom of expression is nullified.

These duties are codified in Section 3 and 4 but were first established by the Carnegie Trust in 2019⁵⁷ where it was proposed there should be a singular duty of care placed upon online intermediaries to tackle internet harm, and that OFCOM should oversee this.⁵⁸ However, this was supposed to be confined to the health and safety of employees at work. The OSA takes these duties of care further by enforcing them indiscriminately to the population, to all services “likely to be accessed by children.”⁵⁹ Yet with 62% of 11–13-year-olds having seen pornography,⁶⁰ we can confer this does mean services that target children, but rather every site, due to the freeness of the internet.

Moreover, ‘Illegal content’ is an undefined term that is up to OFCOM to define under the parameters of whatever causes ‘harm,’ demonstrating a “predictive policing element,”⁶¹ and absence of transparency. This ultimately exports the responsibilities of parents to protect their children and adults from having sovereignty over their online activities over to the state.

These powers cannot easily be subverted as if a platform is found to be in breach of their duties to take down and ban users, OFCOM is entitled to a fine of “£18 million or 10% annual turnover,”⁶² whichever comes first. This places a harsh standard for companies, indicating the seriousness of this surveillance.

However, the criticisms of this duty of care model are vast, with Non-Governmental-Organisations' such as Article 19 arguing this is capable of being weaponised as a method of, censoring opinions to control socio-political opposition.⁶³ Additionally, the Index on

⁵⁴ Ibid.

⁵⁵ *Delf AS V Estonia*, App no 64569/09, European Court of Human Rights, June 2015

⁵⁶ Big Brother Watch *Briefing on the online safety bill for House of Lords Second Reading*, February 2023. pp. 11 <<https://bigbrotherwatch.org.uk/wp-content/uploads/2023/02/BBW-briefing-Online-Safety-Bill-HoL-Second-Reading.pdf>> accessed 27 December 2023

⁵⁷ Woods, L., *Draft Online Harm Reduction Bill*, The Carnegie UK Trust, 2019, <https://d1ssu070pg2v9i.cloudfront.net/pex/pex_carnegie2021/2019/12/05125320/Carnegie-UK-Trust-draft-ONLINE-HARMS-BILL.pdf> accessed 31 Dec. 2023.

⁵⁸ *ibid.*

⁵⁹ The Online Safety Act 2023 Section 37.

⁶⁰ BBFC. *New research commissioned by the BBFC into the impact of pornography on children demonstrates significant support for age-verification*. 2019. Accessed 31 Dec. 2023. pp. 3 accessed 27 December 2023.

⁶¹ Smith, G. Mapping the Online Safety Bill, Cyberleagle blog 27 March 2022 <https://www.cyberleagle.com>

⁶² The Online Safety Act 2023 Section 143 (4)(b)

⁶³ Article 19., *UK: Online Safety Bill is a serious threat to human rights online*, April 2022, Available at, <https://www.article19.org/resources/uk-online-safety-bill-serious-threat-to-human-rights-online/>

Censorship has argued these duties to put freedom of expression in “peril.”⁶⁴ Moreover the very nature of these duties and their infringement on civil liberties was deemed by Big Brother Watch to “undermine the rule of law.”⁶⁵

Ultimately illustrating these duties to “lay waste to several hundreds of years of fundamental procedural protections for speech,”⁶⁶ through the exportation of responsibilities from parent to corporation, and the harsh sanctions imposed on corporations, forcing compliance. This supports my position that the current model of duties of care is poorly conceived and deviates from the rule of law, as it conflicts with fundamental rights.

Right to Privacy

Moving on to the issue of “accredited technology.”⁶⁷ I believe the nature of this technology and the powers this technology holds are what breach the right to privacy. The right to privacy can be defined as the “right to live without monitoring or surveillance,”⁶⁸ a presumption that is increasingly diminished in our society. Section 121 reduces this concept further when outlining the accredited technology that online-intermediaries will use to censor what the government deems harmful. This specific technology is Client-Side Scanning (CSS). CSS is the software the OSA intends to employ to monitor the content of online messages, files and posts. CSS intercepts these online communications and scans them against a database of illegal and legal but harmful content, to judge whether they should be removed.⁶⁹ All of this is done after a message is sent but before it is received by the recipient, installing a third party to every message on every user-to-user service. However, CSS is achieved by breaking end-to-end encryption, which is what protects online communications from being intercepted by anyone other than the intended recipient.⁷⁰ This allows OFCOM the overreaching power to read private messages after they have been sent but before they are received, infringing on civil liberties. This means every device would be equipped with software that scans and analyses every message we send, irrespective of whether this message was “communicated publicly or privately,”⁷¹ acting as a tool of surveillance.

This precedent not only dismantles individual privacy but also threatens the security of communication. It is likely to be most harmful to those who rely on their ability to communicate privately. For example, homosexuals in countries like Uganda and journalists in countries like North Korea. Ultimately illustrating this technology to not be sufficient in offsetting the cost of right infringements.⁷²

⁶⁴The House of Lords Communications and Digital Committee., *Free for all? Freedom of expression in the digital age*, July 2021, Available at, <https://committees.parliament.uk/publications/6878/documents/72529/default/> Accessed 8 January 2024

⁶⁵Big Brother Watch *Briefing on the online safety bill for House of Lords Second Reading*, February 2023. pp. 3 <https://bigbrotherwatch.org.uk/wp-content/uploads/2023/02/BBW-briefing-Online-Safety-Bill-HoL-Second-Reading.pdf> accessed 27 December 2023

⁶⁶ Smith, G. Mapping the Online Safety Bill, Cyberleagle blog 27 March 2022 <https://www.cyberleagle.com>

⁶⁷ The Online Safety Act 2023 Section 121

⁶⁸ Citizens Advice, *Your right to respect for private and family life*, <<https://www.citizensadvice.org.uk/law-and-courts/civil-rights/human-rights/what-rights-are-protected-under-the-human-rights-act/your-right-to-respect-for-private-and-family-life/>> accessed 10 Jan. 2024

⁶⁹ Anderson, R., *Policy Brief-The Online Safety Bill*, University of Cambridge, Bennett Institute for Public Policy, October 2022, <<https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2022/09/Policy-Brief-Online-Safety-Bill.pdf>> accessed 31 Dec. 2023.

⁷⁰ IBM., *What is end-to-end encryption*, Available at, <https://www.ibm.com/topics/end-to-end-encryption> Accessed 10 Jan. 2024

⁷¹ The Online Safety Act 2023 Section 232

⁷² Trengrove, M., *‘A critical review of the Online Safety Bill,’* August 2022, p 6 <[https://www.cell.com/patterns/pdf/S2666-3899\(22\)00147-7.pdf](https://www.cell.com/patterns/pdf/S2666-3899(22)00147-7.pdf)> accessed 31 Dec. 2023

Contradictory Laws

Another issue with this Act is its contradiction with other laws. The method in which the act broadens its scope with any service “with links to the UK”⁷³ also bring into question whether online-intermediaries are even capable of complying, due to the “international free flow of information and conversation online.”⁷⁴ This is especially pertinent when considering constitutional law. For example, the Brazilian Constitution cites a civil rights framework throughout Article 5 of their constitution.⁷⁵ Additionally, the Indian Constitution codifies a right to expression through Article 19 of their constitution,⁷⁶ ultimately demonstrating this act to be inconsistent with a variety of constitutions that it intends to impose on, leading them to clash and contradict each other. Ultimately proving this act to be completely incompatible, not just with the rule of law but basic legal principles and logic associated with free and transparent society.

Limitations & Solutions

However, it is important to mention that there are limitations and justifications to the censorship imposed. A legal limitation is codified in Section 104 and 122. This states that the rights of expression and privacy are protected via the “skilled persons report.”⁷⁷ This report serves as a checkpoint for OFCOM who must obtain this report before issuing a technology notice that would permit them to use the invasive CSS. This is to prevent misuse of power and individualise the most invasive aspects of this bill. This is done as the “skilled person”⁷⁸ would be impartial and could demonstrate to OFCOM the impact their technology notice would have, through independent assessment. This would also protect those who rely on their ability to communicate privately, as the report must specifically detail how the technology notice would impact civil liberties.⁷⁹ This skilled person report is also mandatory,⁸⁰ ensuring consistency and proportionality.

However, according to Section 104 OFCOM have the power to appoint this person themselves and instruct them to discuss what they see as “relevant matters.”⁸¹ OFCOM would also have the power to ignore this report entirely.⁸² Thus impeding any attempts of the skilled persons report in protecting civil liberties and reducing the entire report to be meaningless.

A social limitation offers more intelligent rebuttal, however. This being that infringements upon individual rights can be construed as necessary and proportionate when faced with a greater threat.⁸³ After all, the overarching purpose of the bill is to prevent hate-speech that could lead to suicide and child exploitation. Slight infringements on a person’s freedom of expression and privacy are minimal in comparison to the lives and wellbeing of children.

However, when the government wishes to put in place new measures to reduce illegal content and protect the public, they must simultaneously demonstrate that they are thinking about the

⁷³ The Online Safety Act 2023 Schedule 2 Section 1 (b)

⁷⁴ Big Brother Watch *Briefing on the online safety bill for House of Lords Second Reading*, February 2023. pp. 6 <<https://bigbrotherwatch.org.uk/wp-content/uploads/2023/02/BBW-briefing-Online-Safety-Bill-HoL-Second-Reading.pdf>> accessed 27 December 2023

⁷⁵ The Constitution of the Federal Republic of Brazil, Article 5 - *Individual and Collective Rights and Duties*, 2010

⁷⁶ The Constitution of India. 1949, Article 19 - *Freedom of Speech and Expression*.

⁷⁷ The Online Safety Act 2023 Section 104

⁷⁸ *ibid* sec 104 (1)(b)(ii).

⁷⁹ *ibid* sec156.

⁸⁰ *ibid* sec 122 (1).

⁸¹ *ibid* sec 104(4).

⁸² *ibid* sec 124 (2)(h).

⁸³ The Home Office, *Government Response to the Report of the Joint Committee on the Draft Online Safety Bill*, CP-640, March 2022, p 33.

freedoms they will be restricting by these new measures.⁸⁴ Yet this act lacks a significant degree of transparency and appears to use Group-Identity as a justification for its lack of consideration. So due to the elusive nature and the ideological drive behind the OSA, this is not sufficiently displayed, and remains unconvincing.

If the bill had taken any meaningful restrictions to go alongside the powers in the bill, this cost may be balanced. However, a higher standard of competent policing online, is not mentioned in the bill, when this is capable of doing much more than new laws in reducing illegal content, especially in preventing child abuse. If the police had the capacity to act, then much progress could be made. However, this clear solution goes unnoticed by government, despite its broadcast by the CPS⁸⁵ and the NSPCC.⁸⁶ Thus pointing further to the incompatibility of this bill.

Group Identity

Lastly, the contribution of Group-Identity to this cannot go without mentioning. As a result of the censorship culture often manifested within this ideology due to its requirements of compassion and acceptance. Group-Identity, although distinct from this piece of legislation, can be seen to be in alignment with its goals of censorship and surveillance.

The main correlation is that both the act and Group Identity ideology are intensely similar in their aims. This is illustrated by Cancel Culture, often described as “the outcome of intolerance for other opinions,”⁸⁷ which carries the aim of censorship in creating acceptance. The OSA in contrast infringes on the same rights but does so legislatively, adding legitimacy and credence to the foolish narrative that everyone should be judged on identity and not the content of their character.

To Sum Up

Whether narratives or opinions are right or wrong, the censoring of them will only be bad. As bad ideas must be talked about to establish them as bad. That is why historic atrocities such as the holocaust and 9/11 and the ideologies that manifested them are not shielded from classrooms. If they were, the ideologies that led to these events would be forgotten and then risk being repeated. This is what I believe Group-Identity ideology forgets when insisting that hate speech should be censored, and not exposed for public discussion and condemnation. The repercussions of this are emphasised in the OSA’s achievement of this ideological goal, setting destructive precedents for this decreasingly free society. Hence its inherent incompatibility with the rule of law.

4. The 2022 Reform of the Gender Recognition Act 2004

The Gender Recognition Reform Bill 2022⁸⁸ is directly related to Group-Identity ideology in its prevalence of compassion and the responsibility this lacks. Virtue signalling is also a common method of justification by proponents of this bill, only adding to the lack of

⁸⁴Big Brother Watch and Others v, The United Kingdom., App no. 58170/13, 62322/14 and 24960/15, European Court of Human Rights, September 2018.

⁸⁵Crown Prosecution Service., *CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses*, June 2006, <https://www.cps.gov.uk/sites/default/files/documents/victims_witnesses/children_policy.pdf>

⁸⁶ National Society for the Prevention of Cruelty to Children, *Child protection system in England*, December 2023, <<https://learning.nspcc.org.uk/child-protection-system/england/>> accessed 10 Jan 2024.

⁸⁷ Nicholson. L., *Identity After Identity Politics.* Volume 33, January 2010, Washington University Journal of Law and Politics.

⁸⁸ SP Bill 13B, The Gender Recognition Reform (Scotland) Bill [as passed] Session 6 <<https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/stage-3/bill-as-passed.pdf>> 10 September 2024.

responsibility this bill permits. Furthermore, this bill's faulty treatment of transgenders only contributes to greater societal epidemics. All of which stem from a broad incompatibility.

This bill is contrary to the OSA as it gives too much power to the individual when this power is easily misused and requires the responsibility of authoritative bodies. However, the intervention of governing bodies and laws is only needed due to the lack of responsibility this bill promotes in its prescription of rights. The wider impacts of which will be vigorously analysed.

On Equality

Before I address the socio-legal issues of this section I want to first clarify the definition of equality and the context it falls under. I will also discuss the central theme of my argument and address the limitations of my argument throughout. Equality under the law is an ideal that has been subject to much controversy and debate as of late. This is odd to me as, in this country, this fight is won on a legal level, with every identity apart from children (due to their inability to consent and reason) being equal under the law. Yet the narrative that the fight for equality continues, is still persistent. I argue this is not because we are unequal, but because we are confused about what equality means.⁸⁹

Equality, in its most literal sense, is the arithmetical split of equal amounts, or 50/50,⁹⁰ otherwise known as equality of outcome. However, when it comes to giving everyone an equal chance in all aspects of life, which is what the rule of law aims to do, equality of outcome cannot attain this. This was first demonstrated by the Nordic Equality Paradox.⁹¹ Which concluded that when two identities are given fair opportunity the outcomes of this fair treatment are unequal, due to the differences between both collective identities and individuals.⁹² Showing that the fairer a society in opportunity, the less equal they are in outcome. Hence equality of opportunity is what I will refer to when discussing equality under the law, and equality of outcome, or the aim of it, as the issue of incompatibility with the rule of law. This is because we now know that equality of outcome can only be achieved through inequality. Thus, illustrating the "complicated reality" of equality.⁹³

Regarding legislation, the reform bill appears to prioritise equality of outcome, contributing to the special treatment for those with gender dysphoria. This is counterproductive for all parties involved.

Contexts of the Gender Recognition Law

I believe that a brief context behind the GRA is paramount to properly encapsulate the criticisms I will make. This will involve frequent diversions between law and medical literature, as an understanding of this is fundamental in comprehending the legal incompatibilities. This is because the contradictions between science and law are rife.

Gender dysphoria is a condition with many names. Some define it as transgenderism while others coin new terms such as 'non-binary' in attempts at extending its scope. However, all these varying definitions bear the same characteristic of personal confusion and distress around what gender you are. Gender dysphoria is what describes this process clinically and is regarded

⁸⁹ Sen. A, *Equality of what?* Stanford University, May 1979 <https://ophi.org.uk/wp-content/uploads/Sen-1979_Equality-of-What.pdf> accessed 29 December 2023

⁹⁰ Shula. K, *Gender Equality in Zambia: Equivalence of Outcome or Opportunity*, Working Papers, July 2023, pp 5.

⁹¹ Sanandaji. N, *The Nordic Gender Equality Paradox: How Nordic Welfare States are Not Only Empowering Women, But Also (un)intentionally Holding Them Back*, 2016.

⁹² Stoet, G., (2018), *The Gender-Equality Paradox in Science, Technology, Engineering, and Mathematics Education*, Psychological Science, Sage Journals 581.

⁹³ Lady Hale, Equality and Human Rights Lecture, October 2018, University of Oxford <<https://www.supremecourt.uk/docs/speech-181029.pdf>> Accessed 31 Dec. 2023.

by the ICD-11 as a mental disorder under code F64.⁹⁴ This is a condition that has recently caught a lot of controversy, primarily due to the belief that those suffering from gender dysphoria are unequal under the law. This is because adults cannot self-identify, and children are unable to surgically transition. However, the American Psychiatric Association acknowledge that treatments for this condition are “highly personal and individual decisions,”⁹⁵ and therefore a one law fits all approach is inappropriate. Despite this, increasingly broad legislation is constructed to resolve this understandable perception of inequality. Leading not only infringements on the equality of opportunity of others but the equality of outcome of this identity. As although transgenders are treated unfairly in individuals’ cases of bigotry, these individual cases do not reflect their inequality under the law as an identity.

This is not to say that those with gender dysphoria are unworthy of dignity, respect and equal opportunity, but that their emancipation cannot come at the cost of another identity's equality or the erosion of factual analysis.

The Limitations of Legal History

A limitation to my position would be the progress made, towards opportunity in this area of law and the contribution of the GRA to this. As this could demonstrate consistency, constraint and certainty between the rule of law and this strand of Group-Identity ideology.

Moreover, there are many examples to show that despite equality for transgenders being codified in The Equality Act 1975,⁹⁶ they have not been treated equally in practice, thus supporting an oppressive notion and the legal incentive for change. This was alluded to in the Stonewall study, that concluded 41% of transsexuals had been a victim of hate crime in the last 50 years.⁹⁷ Historically the solution to this issue of hate and ignorance was to educate the population, and visibly demonstrate better legal consistency of equal treatment under the law. I believe this was done best by the EU who offered significant aid and established a multitude of admirable precedents to better accommodate those who suffer with gender dysphoria. For example, the case of X, Y and Z v UK 1997⁹⁸ where the “existence of a family life between a transsexual and his partners child”⁹⁹ was established as legitimate. Therefore, displaying a progress that had no repercussions with the rule of law, potentially undermining my argument of imbalance and inequality.

This notion continues when the GRA 2004 was passed. This was initially done to follow on from the immense progress by the EU. This is reflected in the Impact Assessment for the GRA¹⁰⁰ which is of great similarity to the EU’s anti-discrimination law.¹⁰¹

⁹⁴International Statistical Classification of Diseases and Related Health Problems 11th Edition, *F64-Gender Dysphoria*, January 2022.

⁹⁵ Drescher J, ‘*Gender Dysphoria*,’ American Psychiatric Association, Psychiatry.org, <<https://www.psychiatry.org/patients-families/gender-dysphoria>> accessed 31 Dec. 2023

⁹⁶ The Equality Act 1975

⁹⁷ Government Equalities Office, 2018, *Facts and figures*, (ISBN: 978-1-78655-673-8), <<https://assets.publishing.service.gov.uk/media/5b3a478240f0b64603fc181b/GEO-LGBT-factsheet.pdf>> accessed 31 December 2022.

⁹⁸ X, Y and Z v UK, App no 21830/93, European Court of Human Rights, April 1997

⁹⁹ European Court of Human Rights, Factsheet-Gender Identity issues, (January 2023) pp. 2 <https://www.echr.coe.int/documents/d/echr/FS_Gender_identity_ENG> accessed 31 December 2022.

¹⁰⁰ The Government Equalities Office, *Pre-Consultation Equality Impact Assessment for the Gender Recognition Act 2004*, July 2018, <<https://assets.publishing.service.gov.uk/media/5b3a6218ed915d33b8405b33/GRA-PSIED-Assessment.pdf>> Accessed 8 January 2024

¹⁰¹ Council Directive 2004/113/EC of 13th December 2004., implementing the principle of equal treatment between men and women in the access to and supply of goods and services, L 373/37

This act demonstrated equality under the law by equalising the opportunity for transgenders to get married,¹⁰² in response to *Goodwin v UK*¹⁰³. Another positive aspect was its initial introduction of Gender Recognition Certificates or (GRC), allowing transgenders to obtain legal recognition. Hence supporting the notion that this act, in its original format, does not breach the rule of law.

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However, these efforts were all that was required to emancipate this identity at the collective level. Anymore could cause an imbalance and potentially jeopardise other identities. This imbalance is shown today with the politicisation of this area of law. These regressions are shown in the reform for the GRA in 2022, where the Scottish government endangers the sanctity of equality under the law.

The most famous example is the infringements on women's rights through the inclusion of trans women in women's sports.¹⁰⁴ This is now suggested by section 15A and 15B of the Gender Reform Bill as "equality,"¹⁰⁵ and has boosted the precedent that has led to less than 0.03% of the population¹⁰⁶ winning 18% of all sporting events they compete in.¹⁰⁷ Illustrating severe inequality under the law that has now been accepted. Moreover the "mildest critique"¹⁰⁸ of these infringements or discussion of indisputable biological advantages¹⁰⁹ in sports is ironically labelled misogynistic.¹¹⁰ Illustrating the medical-legal contradictions and the outcome of rights devoid of responsibility.

This also relates to the "culture of glorification"¹¹¹ that these regressions have contributed to. As I believe it was this inclination that allowed the Tavistock controversy to occur,¹¹² where it was revealed that there was omitted and contradictory statements, concerning the safety of surgeries in children's patient information sheets.¹¹³ I would argue that this example illustrates the virtue signalling aspect of Group-Identity, whilst depicting an impact these combinations of incompatible contradictions can lead to.

However, the official purpose of the Gender Recognition Reform 2022 was argued by Scottish Parliament "to change the process of obtaining a GRC."¹¹⁴ To make it easier for transgenders

¹⁰² The Gender Recognition Act, 2004, Section 11

¹⁰³ *Christine Goodwin v, The United Kingdom* App no. 28957/95, European Court of Human Rights, July 2002

¹⁰⁴ UK Parliament, *Performance, Inclusion and Elite Sports - Transgender Athletes*, No. 683, October 2002, Available at <https://researchbriefings.files.parliament.uk/documents/POST-PN-0683/POST-PN-0683.pdf>

¹⁰⁵ SP Bill 13B (n 88) sec 15b (2)(ca)(ii).

¹⁰⁶ Hughto. JM, Reisner. SL, Pachankis. JE, *Transgender stigma and health: A critical review of stigma determinants, mechanisms, and interventions*, December 2015, Journal of Social Science and Medicine.

¹⁰⁷ Zeigler, C., 'These 23 trans women have won national or international competitions or championships,' *Outsports*, May 2023 <<https://www.outsports.com/trans/2022/3/1/22948400/transgender-trans-athlete-championship-national-world-title>> accessed 31 Dec. 2023.

¹⁰⁸ Brown. O, 'The terror of being labelled transphobic now tops any inclination to protect women's sport,' *The Telegraph*, March 2022, <<https://www.telegraph.co.uk/swimming/2022/03/21/terror-labelled-transphobic-now-tops-inclination-protect-womens/>> accessed 31 December 2022)

¹⁰⁹ Heather AK, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, July 2022, *International Journal of Environmental Research and Public Health*.

¹¹⁰ Powell M, 'What Lia Thomas Could Mean for Elite Womens Sports,' *the New York Times* (29 May 2022) <<https://www.nytimes.com/2022/05/29/us/lia-thomas-women-sports.html>> accessed 31 Dec. 2022.

¹¹¹ Yarhouse. A. M, 'Understanding Gender Dysphoria: Navigating Transgender Issues in a Changing Culture,' (IVP academic 2015) pp. 313.

¹¹² *Bell v Tavistock* [2021] EWCA Civ 1363

¹¹³ Biggs, M., *The Tavistock's Experiment with Puberty Blockers*, University of Oxford, July 2019 <https://users.ox.ac.uk/~sfos0060/Biggs_ExperimentPubertyBlockers.pdf> accessed 31 Dec. 2023.

¹¹⁴ SP Bill 13B (n 88) sec 6.

to gain legal recognition in their “acquired gender.”¹¹⁵ The GRA consultation document¹¹⁶ cites this change was made for 2 primary reasons. Firstly, because the current process is intrusive and unfair.¹¹⁷ Secondly because the process is overly medical.¹¹⁸ These reasons are not without merit. However, when properly analysed the risks of reforming for these reasons severely outweigh the benefit sought from them. This is what I believe the Secretary of State saw when he blocked the bill from receiving royal assent under Section 35 of the Scotland Act.¹¹⁹

Gender Recognition Certificates & Female Safety

To comprehend why GRC’s may be intrusive and unfair, we must first critically assess the GRC procedure, in the GRA. To grasp the full effect of the self-identification proposed.

The current process to obtain a GRC is via a Gender Recognition Panel (GRP) who must be satisfied the “applicant has lived in the acquired gender for 2 years,”¹²⁰ has diagnosed gender dysphoria¹²¹ and “intends to live in the acquired gender until death.”¹²² This is seemingly “standard procedure.”¹²³ However proof the applicant is “undergoing treatment for modifying sexual characteristics,”¹²⁴ “reports by medical practitioners”¹²⁵ and evidence that treatment “has been prescribed or planned,”¹²⁶ are also required by the panel. I believe that the latter half of this procedure is intrusive as these are intensely personal requirements, for a “personal choice.”¹²⁷ However this is currently necessary to protect identities, from the “corrosive impact”¹²⁸ self-identification of gender dysphoria could have, which has not just lead to female inequality but also female endangerment as now, many claim to be dysphoric, when they are not.¹²⁹ This endangerment is exemplified in prisons globally as around half of transwomen prisoners in Canada are convicted sex offenders, residing in female prisons,¹³⁰ and with male prisoners in the UK being twice as likely to identify as transgender,¹³¹ this illustrates the requirement for GRC’s to distinguish genuine dysphoric and sexual predators is a necessity,

¹¹⁵ *ibid*, sec 4(3).

¹¹⁶ Ministry of Justice, July 2018, *Reform of the Gender Recognition Act – Government Consultation*, 23 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf> accessed 10 September 2024.

¹¹⁷ *ibid*, 22.

¹¹⁸ *ibid*, 21.

¹¹⁹ The Scotland Act, 1998, Section 35

¹²⁰ The Gender Recognition Act, 2004, Section 2 (1)(b)

¹²¹ *ibid* sec 2 (1)(a)

¹²² *ibid* sec 2 (1)(c)

¹²³ Home Office, *Guidance for His Majesty’s Passport Office on Gender Recognition*, September 2022., p 17 <https://assets.publishing.service.gov.uk/media/634ea3aad3bf7f61877597a0/Gender_recognition__V17_For_GOV.UK_publication_.pdf> accessed 31 Dec. 2023.

¹²⁴ Gender Recognition Act 2004 Section 3 (3)(a)

¹²⁵ *ibid* sec 3 (1)(b)

¹²⁶ *ibid* sec 3 (3)(b)

¹²⁷ Fairbairn, C., *Gender Recognition Act reform: Consultation and outcome*, House of Common Library, February 2022, Available at, <https://researchbriefings.files.parliament.uk/documents/CBP-9079/CBP-9079.pdf> (Accessed 31 December 2022)

¹²⁸ Williams, J, *The Corrosive Impact of Transgender ideology*, June 2020, Civitas Institute for the Study of Civil Society, Available at: <https://www.civitas.org.uk/content/files/2454-A-The-Corrosive-Impact-of-TI-ppi-110-WEB.pdf> (Accessed 31 December 2022)

¹²⁹ Jones, A, ‘*Gender identity, analogy and virtue: a response to Newton and Watt*’, November 2019, New Blackfrairs: A review, pp. 10 <<https://research.stmarys.ac.uk/id/eprint/3582/1/gender%20analogy%20virtue%20as%20accepted.pdf>>

¹³⁰ Phoenix, J, *Gender diverse prisoners and sex-based patterns of offending*, September 2023 Available at, https://macdonaldlaurier.ca/wp-content/uploads/2023/09/20230922_We-were-right-Phoenix-COMMENTARY-v5.pdf pp, 3 Accessed 31 Dec. 2023.

¹³¹ Frith, S, *An exploration into the lived experience of prisoners with sexual convictions transitioning gender*, European Congress of Psychology, June 2023, Available at,

and can amount to discriminatory if not amended.¹³² This was the main line of argument in an enquiry to parliament submitted by Non-Governmental-Organisation 'Fair Play for Women'.¹³³ Yet despite this, the Gender Reform Bill failed to see the urgency in addressing this issue, deciding that a report to be made "no later than 2 years"¹³⁴ after the review period, was sufficient in addressing the impact biological men can have had in female prisons.

Until these complex issues are resolved I believe these procedures for a GRC must remain in place for the equal treatment of others.

Socio-Legal Contradictions & Children

Another limb of this bill argued the age of consent for surgery should be lowered, to be more accommodating, and less medical. However, this reform is estranged with science.

Although it is true that the psychological distress that leads to this disorder often occurs between the ages 10-13,¹³⁵ and that this distress is a national concern, with 3585 children of this demographic being referred to 'GIDS'¹³⁶ in the year of 2022 alone.¹³⁷ This does not warrant legal intervention for surgical transition, as when children are left completely untreated, 80% of them appear to grow out of their dysphoria.¹³⁸ In addition to this, 95.6%¹³⁹ of gender-confused children actually identify as non-heterosexual, once puberty occurs.¹⁴⁰ I believe these facts to demonstrate that legislation of any kind that encompasses children are ultimately futile and unnecessary. Thus, children should be entirely excluded from the discussion of medical transitions, not only due to the risks associated with them, and their inability to consent (first shown in *The New Atlantis*¹⁴¹) but also the high probability these feelings will "recede,"¹⁴² as illustrated by the current medical literature.

These facts eliminate the arguments that section 13B, (which attempts to lower consenting age from 18 to 16)¹⁴³ is based in fact that has been preserved of any influence of virtue signalling.

Diagnostic Reports & Social Contagions

Diagnostic reports are a fundamental element of diagnosis and transition as they are the medical/legal evidence that qualify surgical entitlement. But these are viewed by proponents

¹³² Shah and Kaur v Ealing BC [2008] EWHC 2026

¹³³ Fair Play Women, 'Written submission from Fair Play For Women to the Women and Equalities Call for Evidence for the Inquiry into the reform of the Gender Recognition Act', November 2022, <<https://committees.parliament.uk/writtenevidence/16877/pdf/> (Accessed 31 December 2022)

¹³⁴ SP Bill 13B (n 88) sec 15 (b)(3).

¹³⁵ Steensma TD, Biemond R, de Boer F, Cohen-Kettenis PT. *Desisting and persisting gender dysphoria after childhood: a qualitative follow-up study*. Clin Child Psychol Psychiatry, October 2011 Volume 16 Issue 4 pp 499-516.

¹³⁶ The Gender Identity Development Service., 'Referral to GIDS' <<https://gids.nhs.uk/about-us/number-of-referrals>> accessed 31 Dec 2023.

¹³⁷ *ibid*.

¹³⁸ Ristori J, Steensma TD, Gender dysphoria in childhood. Int Rev Psychiatry, 2016 Volume 28 Issue 1 pp 13-20

¹³⁹ Singh D., *A Follow-up Study of Boys with Gender Identity Disorder*, University of Toronto; 2012. <https://tspace.library.utoronto.ca/bitstream/1807/34926/1/Singh_Devita_201211_PhD_Thesis.pdf> Accessed 31 Dec. 2023.

¹⁴⁰ Kaltiala-Heino R, Bergman H, Työlajärvi M, Frisén L, *Gender dysphoria in adolescence: current perspectives*. Adolesc Health Med Ther. 2018 Mar 2;9:31-41. doi: 10.2147/AHMT.S135432.

¹⁴¹ Hruz, Paul W., et al. "Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria." *The New Atlantis*, no. 52, 2017, pp. 3–36. JSTOR, <http://www.jstor.org/stable/44252647> Accessed 31 Dec. 2023.

¹⁴² Kaltiala-Heino R, Bergman H, Työlajärvi M, Frisén L, *Gender dysphoria in adolescence: current perspectives*. Adolesc Health Med Ther. March 2018 Volume 2 Issue 9, pp 31-41. doi: 10.2147/AHMT.S135432 Accessed 31 Dec. 2023.

¹⁴³ SP Bill 13B (n 88) sec 15 (4)(iii).

as overly medical also. In symmetry with the GRA consultation document the BMA¹⁴⁴ advocated to forgo diagnostic reports in the bill, potentially normalising gender dysphoria, and degrading its medical classification. It is important to note there is a fine line between confusion about sexuality and body image, and confusion about gender, especially for teenage girls. As this could lead to some being mistaken to have gender dysphoria when they are instead non-heterosexual or simply unhappy with their bodies (to which 77.6% of teenage girls are)¹⁴⁵ Illustrating that confusions that are natural for children could be misconstrued as gender dysphoria, when diagnostic reports are irrelevant. This could lead to a psychological epidemic, that the bill fails to account for.

The evidence to suggest that a significant spike in gender dysphoria correlates to a psychological epidemic is convincing but not absolute. Although, the evidence is particularly notable in teenage girls with a 4000% rise in girls seeking gender affirming treatment in the last 8 years.¹⁴⁶ In light of the psychological element of this problem and the failings of Tavistock this can only lead to overdiagnosis and a rapid increase in gender dysphoria already seen in epidemiological studies.¹⁴⁷ These impacts further detach this bill from the rule of law and the virtue it strives for.

However, a limitation to this would be the reputable bodies the reputable journals and studies arguing these increases are natural.¹⁴⁸ This provides a potent rebuttal. However, I would argue that if this were overwhelmingly true we would see this not just across demographics but across identities as well, naturally. Yet the gay population has only risen 7% in the last 6 years¹⁴⁹ and the number of transgenders over 40 only makes up 5% of the transgender population.¹⁵⁰ Although this does not refute the vast body of evidence contrasting this, this does illustrate these spikes cannot be naturally occurring. This also does not diminish the relevance of diagnostic reports, as with 1 in 10 post-surgery transgenders dying of somatic morbidity,¹⁵¹ diagnostic reports are fundamental in ensuring surgeries contest a net positive also. Hence the requirement for proper diagnostic reports that will identify, track and regulate those who may have been influenced more by ideology than dysphoria and to protect the standards for dangerous surgery.

To Sum Up

This bill seems rushed, perhaps as the legislators have been provoked into virtue signalling. Nevertheless, the goal of facilitating greater compassion for those suffering from gender dysphoria is still a righteous and noble one. But in attempting this social justice the executive has only contributed to the growing issues I have alluded too. This is seen through the exploitable loopholes throughout the bill demonstrating a lack of responsibility and equality

¹⁴⁴ British Medical Association., ‘BMA Submission: Women and Equalities Committee inquiry on Reform of the Gender Recognition Act,’ September 2020, <<https://www.bma.org.uk/media/3584/bma-submission-reform-of-the-gender-recognition-act.pdf>> accessed 31 Dec. 2023.

¹⁴⁵ Ganesan S, Ravishankar SL, Ramalingam S, *Are Body Image Issues Affecting Our Adolescents? A Cross-sectional Study among College Going Adolescent Girls*, December 2018, Indian Journal of Community Medicine, 43, doi: 10.4103/ijcm.IJCM_62_18 Accessed 31 Dec. 2023.

¹⁴⁶ Transgender Trend., *Written evidence submitted by Transgender Trend*, June 2020, <<https://committees.parliament.uk/writtenevidence/7947/pdf/>> accessed 27 Dec. 2023

¹⁴⁷ Zucker KJ, *Epidemiology of gender dysphoria and transgender identity*, October 2017, Journal of Sexual Health, 404.

¹⁴⁸ Turban, J., ‘Sex Assigned at Birth Ratio Among Transgender and Gender Diverse Adolescents in the United States’, Paediatrics, August 2022; Volume 150 Issue 3.

¹⁴⁹ Hu, Y., ‘Sexual Orientation Identity Mobility in the United Kingdom’ June 2023; Volume 60 Issue 3 pp. 659–673.

¹⁵⁰ McKechnie, J., ‘Transgender identity in young people and adults recorded in UK primary care electronic patient records: retrospective, dynamic, cohort study’, BMJ Journal, November 2023 Volume 2 Issue 1.

¹⁵¹ Simonsen. RK, Hald. GM, Kristensen. E, Giraldi ‘A, Long-Term Follow-Up of Individuals Undergoing Sex-Reassignment Surgery: Somatic Morbidity and Cause of Death’, Journal of Sexual Medicine March 2016

for all. This is also done by the reduction in standards to apply for GRCS, one of them being the removal of diagnostic reports to obtain them. These ill-thought recommendations are particularly dangerous when considering the recent Tavistock controversy and the climate this has created. The efforts of section 15A and 15B¹⁵² in the form of reviews,¹⁵³ to limit ideological effects and establish balance with the Equality Act 2010, are simply not radical enough when assessing the gravity of this situation. All these dangers are magnified by this legislation in compliance with the tenants of the rule of law, namely the equality aspect.

My solution to these inequalities would be to retain some of the practices displayed by the EU, who were able to focus on equality of opportunity and balance the dignity of the minority with the rights and freedoms of the majority. Additionally, to reinforce proper procedures and standards in all aspects of legal recognition, fostering responsibility that is paired with rights. This can be done through the marriage of science and law, in place of ideology and law, a replacement that is neglected. I believe if these two things are achieved, then the theoretical purposes of compassion and acceptance that Group-Identity promotes will align with their practices. This can be done without jeopardising the rule of law.

5. Conclusion

In order for Group-Identity to be compatible with the rule of law, it must be constrained, consistent and certain in its traits, methodology and legal input. Throughout this dissertation I have exhibited the intricate reasons for why this ideology has fallen short, by way of 5 questions. These questions were answered socio-legally in a respectful, but firm manner.

It appears that group identity is incompatible with the rule of law because of the inflated interpretations it is beholden to. This incompatibility is created by the festering of extremism consequentially, that has spilled into extreme policies in the OSA and GRA reform. The impacts of this, range from overarching governmental powers of censorship and surveillance to the endangerment of females and vulnerability of children, via a catastrophic erosion of science and law. All of which, in breach of the rule of law.

However, avenues for compatibility have been displayed, some of them viewed as limitations. These can be achieved ultimately by examining history, as through looking at successes of a recent past and failures of the distant past, we can shape and predict the future of this ideology and its positioning with the rule of law. Additionally, by utilising all limbs of enforcement, we can properly perform social justice. The examples of the GRA reform and the OSA were elected to best illustrate the viability of these evident but omitted solutions, as despite the incompatibility these legislations cause, reform for them is achievable.

Only if these solutions are implemented can these two great concepts foster genuine compatibility and reunite in socio-legal grandeur and re-nourish the law with the equality, transparency and civil liberties it is owed.

¹⁵² SP Bill 13B (n 88) sec. 15.

¹⁵³ *ibid*, sec. 15B