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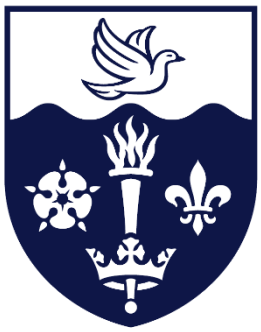

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Editorial Board (2023-24)

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Foreword

I was delighted to be asked to write the foreword to the inaugural Hull Law Review. In these challenging times, it is important to recognise that our students as well as seasoned academic staff have views, values, perspectives and opinions based on well considered research which need to be heard. Our law students set out their thinking not only on existing law, but also on what might/should/could happen next. In doing so they challenge with confidence and compassion, the way in which Law, whether International or otherwise works and how the world might be better served in the future.

To mention some of the papers in this volume, Farid examines the principles of distinction and proportionality in International Humanitarian Law (IHL) and explores the complex relationship between them. Her approach demonstrates a considered and measured response to how current thinking, might be developed to ensure that these principles steadfast upholding humanitarian values.

Kumar takes a long look at the relevance of the Montevideo Convention and carries out a robust critique of its value in the 21st Century and the challenges of international law. In doing so their article asserts that the convention is no longer relevant to understanding the nature of statehood.

Yuhang Xing, in their article which explores the nature and extent of Anticipatory Self-Defence in Taiwan. In doing so they reflect on the increasing nature of international conflict and the complexity of its application across different jurisdictions and the difficult of garnering a consensus drive approach to the law. Emphasising that the changes in which warfare is carried out, cannot mean that we ignore rigorous legal and ethical standards.

Onojobi challenges us to understand the relevance and applicability of legal frameworks which relate to the relatively recent developments in marine geoengineering. In doing so, Onojobi explores the relevance of existing legal instruments and frameworks which seek to govern existing regulatory oversight and identifies that there are gaps which existing approaches fail to address. His proposal for new and targeted legal frameworks is well considered and lends itself to careful reflection.

Falade takes an interesting look at an everyday activity within law courts, the administering and making of an oath. He explores this supposedly well understood activity, with critical attention and detail which challenges the traditional underpinnings of the oath process and draws careful conclusions about its continued value to judicial proceedings.

Singh, in the final submission, tackles in an ever-changing world how, if at all, Group identity can be compatible with the Rule of Law, in his thought-provoking article he challenges current thinking in a novel approach.

I am immensely grateful to Dr Jashim Chowdhury, who has worked tirelessly with the students, across all year groups creating the space, opportunity and understanding of the process of publication, not to mention the inevitable final push to complete the Review. I am confident that this will be the first of many Hull Law Reviews, reflecting the diversity of the research community within Hull Law school and in doing so will demonstrate how staff and students can work together to create a publication of High- quality research and scholarly work.

To the extensive team of students who gave up valuable time to learn and understand more about the publication and writing process, I thank you all. I hope that this will be the stepping stones for you and your future careers.

I look forward to what happens next, to the creativity, innovation and imaginative thinking that the next generation of scholars will bring to the Hull Law Review in the future.

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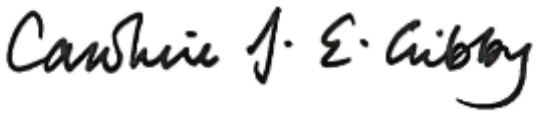

Dr Caroline Gibby

Head, Law School.

Editorial

The Editorial Board (2023/24) is excited to present the inaugural volume of the Hull Law Review. This volume showcases an outstanding quality of diverse legal content selected from student research at the Law School throughout the year. The aim and purpose of the Editorial Board was to build on an ethos of collaboration, creating a culture of pride and value in exceptional undergraduate research, and encouraging the engagement of students as co-producers and facilitators of their work. We strived to create a forum of intellectual discussion on the contemporary developments in law, encourage student participation in their research, and provide critical, lively feedback contributing to the legal discourse more actively.

In this volume, we have selected, peer-reviewed and published six student papers covering diverse issues ranging from administration of justice, administrative law, international law, human rights law and international humanitarian law.

First among those is Farah Farid's paper on the *Principles of Distinction and Proportionality in IHL*. It is based on an important purpose of protecting the civilians, a disproportionate target of wars and fighting. *How can we alleviate the suffering of these people?* She argues that the solution lies in the proper and effective application of the principles of "Distinction and Proportionality" which are foundations of international humanitarian law under Articles 48 and 51 of the Additional Protocol I to the Geneva Convention. Failure to adhere to the principle of discrimination in World War II led to massacres, ethnic cleansing campaigns against civilians, and genocide. Such as happened in Yugoslavia 1991-1995, Rwanda in 1994 and as recently as in Gaza. The bottom line of Farah's argument is that the two principles influence each other, and when applied effectively, the principle of distinction facilitates the proportionate use of force. We understand that the balance of military necessity is crucial to the principle of proportionality.

Next, Archana Bijay Kumar's piece critiquing the *Montevideo Convention of 1933 in the Context of the 21st Century* argues that Article 1 of the 1933 Convention on the Recognition of States by the International Community has become flawed and needs radical amendments. Art 1 of the Convention defines the elements of a state (permanent population, defined territory, independent and effective government, and legal capacity to enter relations with other states). She shows that Article 1 fails to specify the requirements for immigration and dual citizenship to form a permanent population. It also does not commit to defining a specific territory characterized by borders with its neighbours. Also, number of international recognitions of independent countries without an effective government has muddied the criterion of an independent government. While such practices are consistent with the Constitutive Theory, disagreement lies over the question when a state should be admitted to the UN as well. Art 1 also fails to specify the elements of the legal capacity as an expression of the state's sovereignty. *Do international restrictions imposed on a state affect its independence and therefore its legal capacity?* Kumar concludes by arguing that the requirements of Art 1 are unclear and ineffective in addressing the state's challenges and require flexibility from major countries.

In the third paper, Yuhang Xing examines whether *Anticipatory Self-Defence Doctrine* might have been deployed by the Chinese government in relation to the Taiwan Strait. The doctrines of pre-emptive and anticipatory self-defences argue for the use of unilateral military force even in the absence of an imminent threat. Dubious application of the doctrine in the 2003 US war on Iraq undoubtedly undermined the principle. Xing asks, *Could the PRC mimetic the United States and justify its action by undertaking Preemptive actions against Taiwan because of its policy or destructive weapons and terrorism and invoking stronger reasons depending on the proximity of the distance?* The paper

emphasises the principle of necessity and proportionality as a fundamental element of customary international law governing self-defence and argues that its effects must not extend to creating justifications to serve the interests of major powers. Moreover, advanced weapons may lead to the development of a new rhetoric that challenges international law. Xing concludes that disagreement and tensions remain prevalent between the theory of preventive defence and the Chinese elites, who consider it an unnecessary aggressive warfare, consolidating American hegemony.

Fourth, Oluwagbenga Onojobi critically analyses the *legal and governance challenges associated with Marine Geoengineering (MG)* and its existing legal and administrative frameworks and renders some recommendations. The experimental studies aim to modify oceanic and atmospheric processes to counteract climate change inherent of the marine environment. The legal framework for geoengineering consists of customary international law, the 1982 UNCLOS, the 1972 London Convention LC, the LP 1996 and its amendment 2013 (Ocean fertilization), and the Convention on Biodiversity. They collectively aim to promote sustainability in utilization of its components and ensure the fair and equitable sharing of genetic resources. However, they have significant limitations in effectively governing these new technologies due to lacks specific regulations for geoengineering. Onojobi argues that despite the indirect IMO's regulatory and enforcement role, in the absence of a dedicated international treaty enforcing compliance and ensuring responsible geoengineering practices will be limited. He recommends that adaptive governance mechanisms should be adopted, and international cooperation be strengthened to achieve a balance between scientific research and developing climate solutions.

In the fifth paper, Olugbenga Falade examines the nuances of *the Witness Oaths and its impact on the English judicial system*. While religious beliefs greatly influence oaths and the consequences of perjury, the development of the common law and statute laws, such as UK Oaths Act 1978 and Rules of Criminal Procedure Rules 2020, has formalised Oath as a procedural requirement in judicial proceedings. However, some criticise the practice as a non-binding formality, and challenge its seriousness and authenticity in a virtual or digital environment. Although witnesses are protected, they may be exposed to lying due to fear, emotions, external pressures, or personal gain. Hence, Falade asks, *can it be argued that an oath should not be a strict rule? Is* there *the possibility of discrimination against defendants who are not willing to swear by God*? He concludes that religious beliefs, integrity, and moral standards combinedly motivate one's conscience to commit internally to honesty. Therefore, better education on cultural values and public awareness should reinforce the seriousness and importance of the oath.

Lastly, Arjan Singh's intriguing paper on Group Identity and Rule which argues that the idea of Group Identity has an inherent and unavoidable contradiction with the concept of the Rule of Law. Therefore, successful legal reforms must strive to strike a delicate balance between the two concepts. Singh forcefully stands for granting rights and freedoms to citizens irrespective of any identity politics that may be affecting the social psyche of a given time. Singh took the UK's Online Safety Act 2023 (OSA) and the Gender Recognition Act 2004 (GRA) and its 2022 reform as interesting case studies to develop the argument.

We would like to express our deep gratitude to our Patron, Dr. Caroline Gibby, the pool of Peer Reviewers, Authors and our Faculty Coordinator Dr. Jashim Chowdhury for their continuous support and invaluable advice throughout the Journal process. We would also like to thank and congratulate all the members of the Editorial Board 2023/24 who worked tirelessly and devoted significant part of their time scrutinising, reviewing and proofreading the Journal. We wish you find this volume of the journal intellectually intriguing. From the Editorial Board (2023-24)'s part, that was the standard of success we set for us.

The Principles of Distinction and Proportionality in International Humanitarian Law

Farah Sophie Farid*

Abstract

This paper examines the principles of distinction and proportionality in International Humanitarian Law (IHL) and explores the complex relationship between them. Drawing on key legal instruments, case studies, and scholarly analysis, it argues that while these principles are foundational to IHL, and crucial for protecting civilians during armed conflict, their practical application faces significant challenges in modern warfare scenarios. The study critically analyses how the principles have been interpreted and applied in various conflicts, from World War II to contemporary asymmetrical warfare. It highlights the ongoing tensions between military necessity and humanitarian concerns, particularly in the context of technological advancements and the involvement of non-state actors.

The paper concludes that while distinction and proportionality remain vital for upholding humanitarian values in conflict, there is a pressing need for continuous refinement and adaptation of these principles to ensure their effectiveness in minimizing civilian harm in evolving conflict situations.

Keywords

Distinction, Proportionality, Legitimate Military Target, International Humanitarian Law

1. Introduction

The principles of distinction and proportionality are foundations for 'International Humanitarian Law'(IHL) and are aimed at protecting civilians and minimising any possible harm that can occur to them within armed conflicts. The proper application of both principles is essential for upholding the humanitarian objectives of International Humanitarian Law and ensuring the legitimacy of military actions. However, the complexities of modern warfare present challenges in effectively implementing these principles, highlighting the ongoing need for critical assessment and adaptation in response to evolving conflict scenarios.[1]

2. Principle of Distinction

The principle of distinction is a fundamental principle of International Humanitarian Law that requires parties of an armed conflict to distinguish between civilian (civilian objects) and military targets, as civilians are not considered legitimate targets but instead require protection

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[1] Françoise Bouchet-Saulnier, Camille Michel and Laura Brav, *The Practical Guide to Humanitarian Law* (Rowman & Littlefield Publishers 2014).

from any direct attack. The principle of distinction can be understood in more depth as it is codified within Article 48 of Additional Protocol 1 of the Geneva Conventions: 'The Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.'[2]

The International Court of Justice (ICJ) has further refined the principles of distinction in the Legality of the Threat or Use of Nuclear Weapons (1996), stating that the parties of a conflict must put forth paramount efforts to ensure that there is a minimum number of civilian casualties during the conflict.[3] The International Court of Justice therefore concluded that the use of nuclear weapons is considered illegal. However, they could not determine whether there would be an instance where an exception could occur in the extreme circumstances of self-defence, where the survival of a state was threatened.[4] Limiting the use of nuclear weapons exemplifies the principle of distinction, as it acknowledges their indiscriminate nature and the potential impact on civilian populations.

Furthermore, the principle of distinction is a fundamental aspect of customary international humanitarian law (customary international law is formed by the general and consistent practice of states, accompanied by a belief that such practice is legally required- 'opinio juris'). Even in the absence of explicit treaty obligations, the principle of distinction has become a customary norm binding on all armed conflict parties, whether they have ratified specific treaties addressing the matter. By examining state practice and opinio juris, the International Committee of the Red Cross (ICRC) and other legal academics frequently play a critical role in discovering and codifying customary international humanitarian law. Certain standards, such as the principle of distinction, are universal and applicable to all governments, independent of their treaty obligations.[5] This is highlighted by the adoption and acknowledgement of these principles through customary international law. The three key cases I will be focusing on, where devastating consequences and atrocities occurred due to the disregard of the principle of distinction in International Humanitarian Law include the bombing of civilian areas in World War II, the ethnic cleansing within the Yugoslav War, and the deliberate targeting of civilians in the Rwandan Genocide.

Initially, the bombing campaigns during World War II (1939) had resulted in the widespread destruction of cities and civilian infrastructure (notable examples include the bombings of Dresden, Tokyo, and London). These actions had caused immense civilian casualties and suffering, highlighting the need for clear principles to protect non-combats during a time of conflict. In addition, the conflicts in former Yugoslavia (1991– 1995), witnessed extensive violations of International Humanitarian Law, including ethnic cleansing and indiscriminate attacks on civilian populations. This provides evidence that the principle of distinction was often ignored, leading to civilian casualties, displacement, and severe humanitarian crises. The final case of the Rwandan Genocide (1994) saw the deliberate targeting of ethnic groups, resulting in mass killings and atrocities. The principle of distinction was not upheld in this case, leading to civilians becoming direct targets of violence. The international community's failure to intervene promptly further highlighted the importance of enforcing humanitarian norms. These historical events underscore the vital need to follow and acknowledge the principle of distinction to alleviate the impact of armed conflicts on civilian populations. The development

[2] Geneva Conventions 1949, Additional Protocol I 1977.
[3] 'Legality of the Threat or Use of nuclear weapons' <https://www.icj-cij.org/case/95> accessed 9 September 2024.
[4] Lord Iain Bonomy, *Principles of Distinction and Protection at the ICTY* (Torkel Opsahl Academic EPublisher 2013).
[5] Jérémie Labbé and Pascal Daudin, 'Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross' (2015) 97 International Review of the Red Cross 183.

and reinforcement of International Humanitarian Law through the International Court of Justice (ICJ), aims to hold individuals accountable for war crimes, crimes against humanity, and genocide, further emphasising the importance of respecting the principle of distinction in modern conflicts. [6]

On the other hand, an example where the principle of distinction was acknowledged and applied was during Operation Inherent Resolve in Mosul Iraq (2016 to 2017).[7] The Iraqi security forces, with support from the United States-led coalition, demonstrated a commitment to minimising harm to civilians and distinguishing between military targets and civilian areas. The efforts included precision airstrikes, intelligence coordination to identify specific ISIS positions, and measures to protect the local population. This provides evidence that the principle of distinction was recognised, and ultimately reduced civilian casualties and damage to infrastructure during the challenging urban warfare against ISIS in Mosul. On the other hand, the conflict between Israel and Palestine has raised significant challenges to the principle of distinction, as the conflict has witnessed many military operations, including airstrikes, which have resulted in significant civilian casualties (particularly in highly populated Palestinian territories like Gaza). Critics argue that Israel's military actions have caused challenges to this principle such as the impact on civilian infrastructure. The targeting of infrastructure in densely populated areas can have severe consequences for civilians, as this could affect multiple aspects of lives such as food and health needs. Critics further argue that the destruction of vital facilities, such as hospitals and schools, is not proportional to the military objectives being pursued.[8]

However, the key issue associated with the implementation of the theory of distinction is that it faces unique challenges and criticisms in scenarios involving asymmetrical warfare or non-state actors. For example, in asymmetrical conflicts involving non-state actors, distinguishing between combatants and civilians becomes challenging. The absence of uniforms among non-state actors makes it difficult to distinguish between military targets and civilians. This ambiguity can lead to civilians being mistakenly targeted, thus violating the principle of distinction.

Furthermore, non-state actors may deliberately operate from civilian areas, using the presence of civilians as a form of protection. This could therefore complicate efforts to target combatants without causing harm to civilians, as attacking military targets near civilians becomes a significant challenge. Additionally, global public opinion can be considered significant in influencing the conduct of military operations. When asymmetrical conflicts result in civilian casualties, there may be widespread condemnation, leading to increased scrutiny and pressure on involved parties to adhere to the principle of distinction.[9]

3. Principle of Proportionality

The principle of proportionality explains that the use of force must never exceed what is deemed necessary to achieve the legitimate military objective. This principle is articulated within Article 51 of Additional Protocol 1 to the Geneva Conventions, where it is stated that: 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians,

[6] Christine D Gray, *International Law, and the Use of Force* (Oxford University Press 2018).
[7] 'Special Report: Operation Inherent Resolve' (*U.S. Department of Defense*2017) <https://dod.defense.gov/OIR/
[8] 'Amnesty International, Breach of the Principle of Distinction | How Does Law Protect in War? - Online Casebook' (*casebook.icrc.org*) <https://casebook.icrc.org/case-study/amnesty-international-breach-principle-distinction> accessed 11 September 2024.
[9] Orly Maya Stern, *Gender, Conflict, and International Humanitarian Law. A Critique of the Principle of 'Distinction'* (Routledge 2018).

damage to civilian objects, or a combination thereof, would be excessive in relation to the concrete and direct military advantage anticipated.'[10] This article clearly sets out the principle of proportionality, as it emphasises that attacks resulting in accidental harm to civilians or civilian objects must not be excessive compared to the direct military advantage that would be anticipated.

An example of when this principle brought legal consequences occurred in 2004 when the International Court of Justice (ICJ) upheld the customary character of the proportionality criteria in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.[11] As the court determined that the barrier that violated international law, it was deemed that it should be torn down with immediate effect. This scenario underscores the need for a delicate balancing act to ensure that the anticipated collateral damage to any civilian is not seen as excessive and instead is proportionate.[12]

Within armed conflicts, this principle is crucial as it aids in preventing unnecessary harm to civilians, and therefore aids in maintaining a balance between humanitarian considerations and military necessity. Failing to adhere to this principle would constitute violations of International Humanitarian Law, resulting in substantial harm to civilians, which would undermine both the moral and legal legitimacy of the conflict in question. By analysing these specific passages from Article 51(5)(b), we establish a foundation for the customary nature of the proportionality principle.[13] The acknowledgement of such principles in Additional Protocol I signifies their importance and contributes to their status as binding norms in customary international law, as affirmed by the ICJ. However, a fundamental problem to the theory is determining a proportionate response in the context of a specific military operation, leaving this up to constant debate and controversy.[14]

Assessing adherence to the principle of proportionality in armed conflict is a complex task that entails legal and ethical considerations. In the Gulf War (1990-1991), the coalition forces, led by the U.S., demonstrated efforts to adhere to the principle by employing precision-guided weaponry to target military installations while minimising harm to civilians. This approach aimed to achieve military objectives without causing excessive harm to non-combatants. On the other hand, the ongoing Syrian civil war serves as an example of the principle of proportionality being violated. Aerial bombardments and the use of barrel bombs in densely populated areas have resulted in significant civilian casualties, prompting concerns about the proportionality of military actions by various parties involved in the conflict. Both examples illustrate the challenges and complexities in applying the principle of proportionality during armed conflicts. The assessment often involves considering the specific circumstances of each case, including the nature of the conflict, the available military technologies, and the intent behind military actions. The international community, human rights organisations, and legal institutions play crucial roles in holding parties accountable for violations of the principle of proportionality.[15]

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[10] Geneva Conventions 1949, Additional Protocol I 1977, Article 51(5)(b)

[11] Roger O'Keefe, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary' [2004] SSRN Electronic Journal <https://www.tjsl.edu/slomansonb/PalWallAdv.pdf> accessed 11 September 2024.

[12] ibid.

[13] Additional Protocol I 1977, Article 51(5)(b)

[14] Christine D Gray, *International Law, and the Use of Force* (Oxford University Press 2018).

[15] 'Proportionality | How Does Law Protect in War? - Online Casebook' (*casebook.icrc.org*) <https://casebook.icrc.org/a_to_z/glossary/proportionality#:~:text=The%20principle%20of%20proportionality%20prohibits> accessed 11 September 2024.

However, the principle of proportionality is subject to various criticisms and challenges, which reflect the complex nature of its practical application and interpretation, such as technological challenges. Technological advancements in military weaponry have yielded highly precise tools. However, these advances do not necessarily alleviate the challenge of the principle of distinction, as civilian casualties may still occur despite precise targeting. This raises questions about the adequacy of current technologies meeting the requirements of proportionality.[16] Additionally, balancing military necessity with proportionality is a persistent challenge. In some cases, military commanders may argue that the strategic importance of a target justifies potential civilian harm. However, there is an ongoing debate about where to draw the line here, leading critics to argue that the principle of proportionality should take precedence to prevent excessive harm.[17]

4. Relationship between the Two Principles

The principles of distinction and proportionality are closely interconnected within International Humanitarian Law, constantly influencing each other within armed conflicts.

The principle of distinction requires parties to an armed conflict to distinguish between combatants and civilians whilst distinguishing between military objectives and civilian objects. When this principle of distinction is effectively applied, it facilitates the proportionate use of force. By accurately identifying and targeting military objectives, parties to the conflict can minimise the possible collateral damage to civilians, allowing for more precise and more targeted military actions. Since the principle of distinction is closely tied to the prohibition of in-discriminatory attacks, it could possibly limit the result of excessive harm in conflicts and therefore acknowledge the principle of proportionality.[18]

Furthermore, when discussing the impact of proportionality on the principle of distinction, we understand that a balance of military necessity is crucial to the principle of proportionality. This balance inherently involves considerations of distinction, as it ensures that the targeting of military objectives is not broad or discriminatory. Since this requires an assessment of potential collateral damage, it is intimately tied to the accuracy of distinguishing between military and civilian entities. This provides evidence that a failure to adhere to the principle of distinction throughout the principle of proportionality can lead to an underestimation of collateral damages, resulting in a direct violation of proportionality.[19] To expand on this, in situations of asymmetrical warfare, where non-state actors may operate within civilian populations, proportionality requires careful consideration of the potential harm to civilians. This makes adherence to the principle of distinction crucial in accurately identifying combatants and civilian populations.

In conclusion, respect for the concept of distinction has a big impact on how proportionate military operations are. Parties to a conflict can reduce collateral damage and acknowledge the concept of proportionality by precisely differentiating between combatants and civilians as well as between military objectives and civilian objects. On the other hand, disregarding the concept of difference may jeopardise a military operations' proportionality, resulting in undue harm to civilians and transgressions of international humanitarian law. To guarantee that military operations are carried out with appropriate consideration for the protection of civilians in

[16] Jack M Beard, 'The Principle of Proportionality in an Era of High Technology' [2018] SSRN Electronic Journal.
[17] Craig Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts' (2007) 37(2) California Western International Law Journal <https://core.ac.uk/download/pdf/232620737.pdf> accessed 11 September 2024.
[18] Christine D Gray, *International Law, and the Use of Force* (Oxford University Press 2018).
[19] Amichai Cohen and David Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures* (Oxford University Press 2020).

armed situations, the concepts of distinction and proportionality must cooperate and be balanced.

5. Conclusion

It is shown that the principles of distinction and proportionality are vital elements of International Humanitarian Law, which reflect the international community's commitment to humanising and cultivating the conduct of armed conflicts. The principles' customary nature and inclusion in legal instruments provide evidence of their significance. Even though both principles face challenges within contemporary warfare, the principles of distinction and proportionality, remain crucial for upholding humanitarian values amidst the complexities of conflict. A continued commitment to refining and adapting these principles is essential to minimise civilian harm, and to ensure their effectiveness in safeguarding civilian lives and minimising the human cost of war, which has not historically been the case.

Challenges Facing the Montevideo Convention on the Rights and Duties of States

Archana Vijai Kumar*

Abstract

The main objective of this research paper is to dissect the requirements for statehood provided under Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, and challenge their effectiveness in the 21st century, based on state practice and customary international law. It critically analyses the requirements under Article 1 (a permanent population, a defined territory, an independent and effective government and the legal capacity to enter into relations with other states) by highlighting their rigidity and the effects of the right of self-determination on statehood, while considering the controversial but equally vital role the international community plays. Further, it ventures into the different theories of recognition and underscores the issues within each theory, inter alia, the effects of non-recognition by powerful states, admission of states into the United Nations, and the lack of a central authority to govern the recognition of member states. The growing threat of climate change further exposes the inadequacy of Article 1's criteria and its failure to address issues such as the displacement of populations and shifts in territorial boundaries. It emphasizes Article 1's inadequacy in determining statehood by examining its flaws while providing cogent evidence and academic literature to support these arguments. [Ultimately], this research paper concludes that the requirements under Article 1 are not only inadequate but irrelevant in determining statehood in the 21st century, especially in light of climate change.

Keywords

Montevideo Convention on the Rights and Duties of States 1933, Permanent Population, Defined Territory, Independent and Effective Government, Constitutive Theory, Declaratory Theory, Right to Self-determination, State Recognition.

1. Introduction

Article 1 of the Montevideo Convention on the Rights and Duties of States 1933 has been recognised by numerous scholars as the universally accepted criteria for statehood. Article 1 provides elements for statehood which are a permanent population, a defined territory, an independent government and the legal capacity to enter into relations with other states. This research paper analyses each of the elements under Article 1, challenges its effectiveness on state practice while recognizing other considerations of statehood and its relevance in determining statehood in light of climate change in the 21st century. In the end, this paper concludes that despite its relevance, the Montevideo Convention does not provide an adequate explanation for the criteria of statehood, other than merely stating elements, and is undeniably flawed in addressing current issues under international law.

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2. Permanent Population

The first criterion for statehood under Article 1 is the need for a permanent population.[1] However, Article 1 fails to explain this. Oppenheim argues that a population can be viewed as an 'aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be of different colour.'[2] Dixon is of a differing opinion, that there must be a 'population linked to a specific piece of territory on a more or less permanent basis.'[3] Oppenheim's argument suggests that a population is a community of residents that reside together but does not mention the notion of permanence. In this sense, the latter view is preferred.

For a state to have a 'permanent population', there must be an intention to establish permanent residency within the state and to be recognised as its inhabitants thereof. Such an attribute can be derived from the nature of livelihood in that state. For instance, Sealand is not recognised as a state as all its citizens have dual citizenship and permanently reside in their home countries. Similarly, the Free Republic of Liberland does not have any permanent population since its formation in 2015, and as such, has not been recognised as a state.[4] Hence, it does seem that there is a strict need for permanency of population within states. However, as seen in *The Western Sahara case*, the ICJ has recognised nomadic tribes as 'population' if they have rights to the land.[5]

Article 1 also does not specify if the population must be considered indigenous in its origin. However, states are recognised despite not having indigenous people as the majority of its population. For instance, the Falkland Islands is recognised by the United Nations as a Non-Self-Governing Territory despite having a population of descendants of UK nationals. Article 1 also fails to lay out the minimum number of populations required. However, inference can be made that there is no minimum population as large states like China (with 1.4 billion people) and small states like Vatican City (with 1,000 people) are equally recognised.

From the above, it seems highly probable that the need for a permanent population is essential as it provides for an organized community to form the basis for the birth of a state. Despite its relevance, Article 1 has failed to explain and provide guidance on the requirements considering migration and dual citizenship.

3. Defined Territory

The second criterion is the need for a defined territory.[6] Article 1 fails to explain this requirement and in an ironic sense, define the elements of a defined territory. It is silent in its application to disputed territories of states, especially emerging states post-decolonization. The key element is that this requirement sits upon the need for a particular territorial base upon which states can operate.[7] To fulfil this requirement, some defined physical existence must be

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[1] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 263, Art 1.
[2] Lassa Oppenheim, *International Law* (8th edn, Oxford University Press 1955), 118.
[3] Martin Dixon, *International Law* (6th edn, Oxford University Press 2007), 119.
[4] Gabriel Rossman, 'Extremely Loud and Incredibly Close (but Still So Far): Assessing Liberland's Claim of Statehood' (2016) 17(1) CJIL 306, 309.
[5] Advisory *Opinion of Western Sahara* (1975) ICJ Reports of Judgments, Advisory Opinions and Orders, 102.
[6] *Montevideo Convention* (n 1).
[7] Malcolm N. Shaw, *International Law* (9th edn, Cambridge University Press 2021), 183.

present to mark it out clearly from its neighbours.[8] However, this requirement is not adhered to strictly by member states.
After World War I, many states were recognised for its territorial consistency even when their boundaries had not been accurately delimited.[9] For instance, Albania was recognised as a state by many countries, although its borders were not defined for a long period.[10] Despite having multiple claims over Palestinian territory, Israel has been accepted by the United Nations as a valid state; because despite the conflicts regarding its borders, there is a clearly marked territory that is solely recognised as 'Israel'. In fact, the UK itself has recognised many states that have disputes over their borders with their neighbours. However, the states mentioned here came into existence after being 'recognised' by other states. Hence, recognition plays a huge role in the circumstances of a state having a disputed territory. In the event there is a void in recognition from other states, this requirement would need to be strictly adhered to. This is explained in detail in Part 6.

Crawford argues that there is a need for the establishment of an effective political community for this criterion to be fulfilled.[11] This argument is humbly disagreed with, as the word 'political' reflects a subjective interpretation and is dependent on the government of the day. The preferred view is that of the importance placed on the presence of a stable community within a certain area.[12] This view places this criterion's fulfilment on stability within a certain area and does not dwell upon the territorial disputes which often occur during decolonization. This requirement, although relevant, is not a strict requirement followed by member states. As argued above, there are instances where recognition plays an important role in recognizing statehood when there is uncertainty of a state in fulfilling this requirement. In this regard, Article 1 has failed to consider the impact recognition plays.

4. An Independent and Effective Government

The next criterion is an independent and effective government.[13] In this regard, Crawford's view of a stable 'political community' is accepted[14] as there is a necessity for an effective government, with central administrative and legislative organs. Although necessary, it is not a condition for the recognition of an independent country but acts as proof of a political structure of independence. For instance, Congo was recognised by other states as having formal independence despite not having an effective government.[15] In this sense, there seems to be a flexible approach to this requirement.

The government would require a sufficient level of control for it to be independent. For instance, Transkei is not recognised by the United Nations since the majority of its budget was controlled by South Africa.[16] However, Shaw believes that the lack of effective central control may be compensated by significant international recognition, leading to the membership of

[8] *Dixon* (n 3).
[9] *Duestche Continental Gas-Gessellschaft v Polish State* (1929), Annual Digest of Public International Law Cases (Cambridge University Press 2021).
[10] *North Sea Continental Shelf Case* (1969) ICJ Reports of Judgments, Advisory Opinions and Orders, 32.
[11] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2012), 128.
[12] *Shaw* (n 7), 183.
[13] *Montevideo Convention* (n 1).
[14] *Crawford* (n 11), 128.
[15] James Crawford, *The Creation of States in International Law* (Oxford University Press 1979), 42-43.
[16] Geoffrey E. Norman, 'The Transkei: South Africa's Illegitimate Child' (1977) 12 New England Law Review, 585, 588.

the United Nations.[17] Such a view is accepted, although any lack of effective control will need to be substituted with recognition that must be 'significant.' It is not known for sure what would amount to 'significant' recognition. However, it is implied that a large number of states would need to confer that recognition. For instance, states like Croatia, Bosnia and Herzegovina were recognised by other states despite facing uncertainty in fulfilling this requirement.[18] Although it does not have an effective government and is not a member of the United Nations, Kosovo is still recognised by states like the U.S., Germany, France and more.

It is argued that such recognition is only valid because it comes from powerful nations as the aforementioned. However, this is not absolute. For instance, Somaliland, a separate state with an effective government was not recognized as a state by the United Kingdom[19] and as such, remains as an unrecognised state. Although external recognition is vital, there are instances where a state possesses a sovereign government due to the internal recognition of it being the highest authority. For instance, Transnistria is a state with internal recognition of its sovereignty despite not having the same kind of external recognition.[20]

Despite the above, membership of the United Nations is not equivalent to statehood as there are states that are recognised without being part of the United Nations (for instance, Vatican City). It is equally incorrect to state that membership of the United Nations is a sign of the existence of the state, as there are entities that are not recognised as an independent state despite being members. For instance, Ukraine and Byelorussia have been members of the United Nations since 1945. Hence, although recognition of the state is important and often results in its membership of the United Nations, it is controversial to conclude that membership of the United Nations automatically gives rise to statehood. Additionally, loss of control by the central government does not lead to the termination of statehood.[21] For instance, Lebanon and Sudan were still recognised as states despite there being an invalid government because of civil wars in those states.

This requirement is crucial as it shows the legal capacity of governments to enter into relations with other states. Equally important is the impact that recognition from other states have. It is necessary for governments to possess effective control over their states and to be viewed as sovereign, since sovereignty signifies independence.[22] However, in the event of diminishing sovereignty, significant recognition can grant states the notion of statehood. Nevertheless, caution must be exercised in this regard, as a significant lack of effective control may not be compensated by international recognition. For instance, in a belligerent occupation, the occupied state is prevented from exercising effective control during the said occupation. In such circumstances, although the existence of the state's sovereignty is not challenged, its governmental and administrative functions are heavily impacted. Here, recognition from other states will not negate the state's lack of effective control and this requirement for statehood will be left unfulfilled.

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[17] *Shaw* (n 7), 185.
[18] Robert M. Hayden, 'The 1995 Agreements on Bosnia and Herzegovina and the Dayton Constitution: The Political Utility of a Constitution Illusion' (1995) 4 Euro Const Rev 59, 61.
[19] Michael Schoiswohl, 'Status and (Human Rights) Obligations of Non-Recognised De Facto Regimes in International Law: The Case of Somaliland' (Martinus Nijhoff, 2004).
[20] Michael Bobick, 'Sovereignty and the Vicissitudes of Recognition: Peoplehood and Performance in a De Facto State' (2017) 40(1) Polar 158, 159.
[21] *Dixon* (n 3), 116.
[22] *Island of Palmas case* (*Netherlands, USA*) (1928), UN Reports of International Arbitral Awards, 829.

5. Legal Capacity to Enter Into Relations with Other States

The next criterion is the legal capacity of the state to enter into relations with other States.[23] In this regard, Article 1 has failed to lay out the elements of legal capacity for states to enter into relations with others. Although relevant, it is not specific to states but applies to other entities such as international organizations, including non-governmental agencies, the United Nations and regional bodies like the European Union. However, the key difference here is that states are capable of having full legal capacity, unlike other entities that may have partial legal capacity.[24] Thus, the question is not about the extent of legal capacity but its presence or absence.

It must be emphasized that this is the most important criterion since it goes into the core aspect of the existence of member states, as well as an indication of the importance attached to its recognition by other member states.[25] The most crucial element is the presence of a sovereign state that is not in the direct or indirect control of another.[26] Although this criterion is vital, we must readily acknowledge that no state is entirely independent. States often rely on one another for resources, financial aid, political support and more. For instance, the Czech Republic and Slovakia are heavily dependent on each other for trade despite having achieved individual sovereignty.

Restrictions upon a state's liberty do not affect its independence if such restrictions do not place the state under the legal authority of another.[27] For instance, Austria was recognised as an independent state despite having various restrictions on its economic and military freedom. The ability of another state to control the economic or legislative elements of another would dampen a state's independence. This is seen in *The North Atlantic Coast Fisheries case* wherein allowing the U.S. to have a right in the preparation of fishing legislation would give it a right in the legislative affairs of Great Britain and cause it to be dependent.[28]

A state is independent despite having an external body overseeing its government functions.[29] This is seen in the recognition of Bosnia and Herzegovina, despite having a High Representative appointed to implement the peace settlement, following the end of the Bosnian War.[30] A similar approach was taken in Kosovo where it was seen to have 'independence with international supervision' in the form of an International Civilian Representative.

However, this approach differed when it came to the independence of Lithuania, where it is termed as not truly 'independent' as the Soviets possessed substantive control over it. Although this criterion is essential as it dives deep into the sovereignty of a state, there are certain elements regarding 'independence' which ought to be considered. Drawing from the idea that 'no man is an island', this concept can be critically applied to states as well; no state can be fully independent or self-sufficient, as there is always some degree of dependency on other states for resources, as previously mentioned.

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[23] *Montevideo Convention* (n 1).
[24] Cecily Rose, *An Introduction to Public International Law* (Cambridge University Press 2022), 35.
[25] *Shaw* (n 7), 185.
[26] *Dixon* (n 3), 120.
[27] *Austro-German Customs Union Case* (1931), PCIJ Rep Series A/B, No 41.
[28] *The North Atlantic Coast Fisheries Case (Great Britain, United States)* (1910), XI UN RIAA 167, 186.
[29] *Shaw* (n 7), 186.
[30] The General Framework Agreement for Peace in Bosnia and Herzegovina (adopted 21 November 1995, entered into force 14 December 1995) UN Doc S/1995/999, Annex 10.

A state need not have full control nor eliminate all forms of dependency on other states to be recognised, but would need to ensure that no other state or entity has effective control over it and that it, in every sense of the term, is truly 'independent.'

6. The Right of Self Determination

One of the considerations for statehood, aside from Article 1, is the people's right to self-determination under the UN Charter 1945.[31] The right of self-determination is recognised as a rule of *jus cogens* giving rise to '*erga omnes*' obligations.[32] The right comprises two aspects: internal self-determination which pertains to a people's rights to political, economic, social and cultural development[33] and external self-determination, which encompasses the right to unilateral secession.[34]

The emergence of the right to self-determination has affected the criteria for an independent government in member states undergoing decolonization. In such cases, a lower standard of effectiveness in situations of decolonization has been accepted.[35] As argued above, the requirement of an independent and effective government is a crucial criterion for statehood. However, in instances of decolonisation, the standard for fulfilling the criterion of an effective government is significantly lowered allowing for the self-government of the state and its people, as per Article 73(b) of the UN Charter.

As a result, academics argue that it is now necessary for international law to allow democracies to validate the governance of their states.[36] For instance, Katanga's secession from Congo was recognised by several states and was admitted to the United Nations despite a breakdown of its government. However, the approach differed for the Portuguese colony of Guinea-Bissau. The United Nations recognised the independence of the Republic of Guinea-Bissau through a resolution passed by the General Assembly, which passed with over 93 votes in favour from member states.[37]

Although some Western states including Portugal denied that the criteria for statehood had been complied with, the admission of Guinea-Bissau as a member of the United Nations was in accordance with the decision of the General Assembly under the UN Charter 1945.[38]

Therefore, it can be viewed that the right of self-determination is an additional criterion for statehood. However, it is crucial that there is sufficient recognition from other states regarding the independence of the state based on self-determination. However, the question of how much recognition is required poses a range of complexities. For instance, in the case of Rhodesia, a resolution was passed by the United Nations General Assembly condemning the actions of Rhodesian authorities for independence through illegal methods and called upon

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[31] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), Art 55.
[32] *Case Concerning East Timor (Portugal v. Australia)* (Judgment) (1995) ICJ Rep 90, 102.
[33] United Nations General Assembly Resolution 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (14 December 1960) UN Doc A/RES/1514(XV).
[34] *Re Secession of Quebec* (1998) 2 SCR 217.
[35] Crawford (n 11).
[36] Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86(46) AJIL 47.
[37] United Nations General Assembly 'Illegal Occupation By Portugese Military Forces Of Certain Sectors Of The Republic Of Guinea-Bissau And Acts Of Aggression Committed By Them Against The People Of The Republic' (2 November 1973) UN Doc A/RES/3061 (XXVIII).
[38] *Charter of the United Nations* (n 31), Art 4.

other member states to not recognise Rhodesia.[39] It was eventually recognised as Zimbabwe after a civil war. Although Rhodesia had fulfilled the necessary factual requirements of statehood and had a strong movement of self-determination, the absence of total recognition from other states led to it not being recognised.

7. Recognition from Other States

In recent years, we have noticed how recognition from other states can give rise to statehood despite the state in question's failure to fulfil the requirements for statehood (for instance, Congo). However, to what extent does recognition 'fill in the void' for states that do not fulfil the requirements? In this regard, there are two theories in place.

7.1. The Constitutive Theory

The constitutive theory asserts that a state gains statehood solely upon recognition. This means that an entity becomes a state, subject to the will of member states. The Montevideo Convention, however, only guides us that recognition allows a state to be a personality with all the rights under international law.[40] However, caution must be exercised since recognition plays a far bigger role than what is maintained in the Montevideo Convention. In this theory, the recognition of a state by another could be more political rather than factual[41]. The decision to recognise a state often depends on the political relationships between states, and more powerful states typically have a greater influence on the recognition of less powerful states. An instance of such a political tug-war is when the U.S. refused to recognise China due to concerns over legal and economic implications, while simultaneously asserting its own sovereignty and influence on the international stage. This demonstrates how recognition can be driven by strategic and political interests, rather than just the fulfilment of statehood criteria.

In the previous paragraphs, we have established that the requirements under Article 1 are not necessarily clear and concise. In situations of uncertainty, the constitutive theory provides that recognition from member states offers clarity in assessing the entity's status internationally. Recognition by other states is crucial for establishing statehood, and the lack of recognition by a majority of states can indicate that the entity has not fulfilled the requirements for statehood. For instance, when states were obligated not to recognise South Africa's presence in Namibia.[42]

However, confusion arises if a member state's admission to the UN signifies recognition of statehood. Dixon argues that votes from member states in favour of a state's admission to the United Nations could imply recognition of statehood.[43] This perspective is illustrated in *The Yugoslav Republic of Macedonia case*, which, following United Nations Security Council Resolution 817, was recognised as a state and admitted as a member of the United Nations.[44] In this regard, it suggests that one can imply statehood recognition when a state is voted into membership of the United Nations.

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[39] United Nations General Assembly Resolution 'Question of Southern Rhodesia' (11 November 1965) Un Doc A/RES/2024 (XX).
[40] *Montevideo Convention* (n 1), Art 6.
[41] *Shaw* (n 7), 376.
[42] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1970], ICJ Reports of Judgments, Advisory Opinions and Orders.
[43] *Dixon* (n 3), 131.
[44] United Nations Security Council Resolution 817 (7 April 1993) UN Doc S/RES/817 (1993).

However, Lauterpacht argues (and it is agreed) that even without admission to the United Nations, a state has the legal duty to recognise another state if the requirements under Article 1 are met.[45] Here, recognition plays no important role.

This theory raises several unresolved doubts. Firstly, in the event the requirements under Article 1 are not met, is there a minimum number of state recognitions needed for one to obtain the status of statehood? Secondly, are there political consequences if a state is not recognised by powerful states including permanent members of the United Nations Security Council? Thirdly, if there is a divide in opinion on recognition between member states, does that give rise to a partial legal personality of an entity? This was observed in Kosovo, wherein the international community was heavily divided in its recognition and resulted in a conundrum of Kosovo's legal personality. Since Kosovo is not a member of the United Nations, it seems that it is only entitled to diplomatic immunities offered by the member states that recognise it. This merely further complicates the problem. The constitutive theory does not provide clarity in instances of recognition (or lack of thereof) of self-proclaimed states; including Nagorno-Karabakh Republic and the Turkish Republic of Northern Cyprus, which remain unrecognised despite fulfilling the requirements under Article 1.[46] Although the constitutive theory provides brief guidance on the influence recognition may have on statehood, I maintain that it sparks confusion amongst international law thinkers since it fails to clarify the doubts raised above.

7.2. The Declaratory Theory

In contrast, the declaratory theory of statehood provides that when an entity fulfils the requirements under Article 1, recognition simply acknowledges the state's pre-existing legal capacity [47] and admits a factual situation.[48] This theory is more favourable as it is based on the fulfilment of the requirements of Article 1. The Montevideo Convention does consider this theory in recognizing that the political existence of a state is independent of its recognition by other states.[49] A state's refusal to recognise another state does not bear legal effects on its existence.[50]

However, I insist that there are still important questions and ambiguities surrounding the criteria under Article 1. To what extent must these criteria be fulfilled before recognition from other states can be invoked? I agree with Shaw's argument that recognition here is merely an admission of a 'factual situation.' But can a state ever be a fact? A state cannot be a fact without having any legal status attached to it due to the rules and practices that define the entity of that state.[51] This is because a state is an ever-changing entity with various elements at play.

Even if the requirements for statehood are met, there can be uncertainty in the state's fulfilment of the criteria (for instance, the criteria of a defined territory which is currently unclear in the Israel-Palestine conflict). There is also a lack of a central authority that can decide on whether recognition should be afforded to states or not. In circumstances like this, the

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[45] Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53(3) YLJ 385.
[46] Sascha Dov Bachmann and Martinas Prazauskas, 'The Status of Unrecognized Quasi-States and Their Responsibilities Under the Montevideo Convention' (2019) 52(3) TIL 393, 394.
[47] *Dixon* (n 3), 132.
[48] *Shaw* (n 7), 382.
[49] *Montevideo Convention* (n 1), Art 3.
[50] Institut De Droit International, 'Resolutions Concerning the Recognition of New States and New Governments' (2017) 30(4) AJIL 185.
[51] *Crawford* (n 11).

obligation would probably fall on member states.[52] Here, the arguments on political influence put forth under the constitutive theory (as mentioned above) apply.

8. Challenges facing the Montevideo Convention: Climate Change in Perspective

It has been extensively argued that the criteria under Article 1 is not effective in addressing the challenges of statehood. Nevertheless, how is one of the requirements, namely the requirement for a defined territory, relevant in respect of extinction and re-emergence of states because of climate change? It is argued and strongly echoed that climate change may render a state both factually and legally extinct.[53] As a result, there will be displacement of permanent populations, ambiguity as to the effectiveness of governments and their capacity to enter into legal relations and inevitably, the lack of a defined physical territory. With a lack of precedence regarding this matter, it is obvious we need to redefine the requirements for statehood under Article 1 considering climate change.

Since we have established that a strict approach to the requirements in Article 1 is not required, there is room for flexibility when it comes to climate-threatened states. For a state to maintain its statehood and (as much as possible) adhere to the requirements of Article 1, a submerging state may remain sovereign by purchasing new territories. For instance, Indonesia agreeing to rent out its island to The Maldives.[54]

There could also be a possibility for the construction of man-made islands that would permanently be above the sea level, for the resettlement of citizens of submerging states. However, the challenge is the inadequacy of the United Nations Convention on the Law of the Sea in addressing these concerns.[55] Since recognition from member states play a critical role for statehood, states could still be recognised as legally independent (as compared to factually independent) if they satisfy certain elements in Article 1.

For instance, a state can be recognised as independent while having a largely decreasing number of populations or in the event of full submersion, a state could be independent with the presence of a functioning government situated in another state.[56] It is evident that the Montevideo Convention has significantly failed to consider the relevance of its requirements under Article 1 in light of one of the biggest threats in the 21st century, which is climate change.

9. Conclusion

The criteria for statehood as stipulated in Article 1 is vital but there is no clear approach taken in fulfilling such requirements. Article 1 fails to address the concerns attached to each requirement; which begs the need for an academic exploration into the tenets of international law. Although certain requirements simply cannot be ignored (like the requirement for a permanent population), Article 1 is silent on the importance of the right of self-determination and the substantial role played by recognition from other states. Branching from the arguments put forth above, it cannot be denied that recognition amplifies a state's claim to statehood; the

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[52] *Lauterpacht* (n 42).
[53] Seokwoo Lee and Lowell Bautista, 'Climate Change and Sea Level Rise: Nature of the State and of State Extinction' in Richard Barnes and Ronan Long (eds), Frontiers in International Environmental Law: Oceans and Climate Challenges (Koninklijke Brill, 2021) 209.
[54] Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 122.
[55] United Nations Convention on the Law of the Sea (adopted 16 November 1982, entered into force 16 November 1994) 1833 UNTS 3.
[56] *Crawford* (n 11), 678.

more the recognition, the less the need for adherence to the requirements,[57] but it cannot completely replace it. With an increase in climate change and the possible submersion of smaller states, there is an obvious lacuna in the Montevideo Convention in addressing such issues and providing guidance on the statehood of re-emerging states. Therefore, the Montevideo Convention requires an urgent revamp to ensure its relevancy in a post-colonial and ever-changing world like ours.

[57] *Shaw* (n 7).

Potentials of "Anticipatory Self-Defence" in Taiwan

Yuhang Xing*

Abstract

This article examines the concepts of pre-emptive and anticipatory self-defence, with a focus on its application in international conflicts, notably following the Iraq War, and its potential implications for the People's Republic of China's (PRC) approach to Taiwan. Building on previous research critiquing the Iraq War as a case of disputed pre-emptive action, the study investigates how such precedents might influence the PRC's strategic decisions regarding Taiwan. The analysis also considers the PRC's response to the U.S. doctrine of pre-emption, as well as the impact of emerging technologies like autonomous weapons and outer space capabilities on the evolving concept of self-defence. The findings underscore the need for a balanced approach, emphasizing that while modern threats might sometimes justify pre-emptive actions, they must be weighed against rigorous legal and ethical standards.

Key Words

Pre-emptive self-defence; Iraq War precedent; Taiwan Strait; international law; autonomous weapons

1. Introduction

Pre-emptive self-defence is a contentious concept in international law that allows a state to act militarily against a perceived threat before it fully materialises, which is different from traditional self-defence. Pre-emptive actions, often justified under the concept of anticipatory self-defence as articulated in the 'Caroline Doctrine', have been endorsed by customary international law under the principle that the necessity of self-defence must be 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.[1] While Article 51 of the UN Charter does not explicitly reference the Caroline case, the customary law principles established by the case—beyond the principle of imminence, including the principles of necessity and proportionality—are widely recognised as informing and complementing the interpretation and application of the right to self-defence within the UN Charter framework.[2] The UN High-Level Panel on Threats, Challenges and Change appears to have adopted a somewhat more flexible stance on anticipatory self-defence. The panel stated that 'a threatened State, according to long-established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.'[3] This implies that the UN implicitly endorses anticipatory self-defence.

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[1] Louis-Philippe Rouillard, 'The Caroline Case: Anticipatory Self-Defence in Contemporary International Law' (2004) 1MJOIL 104.

[2] T. D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-Emption, Prevention, and Immediacy' (2006) 11 J Conflict & Sec L 361.

[3] United Nations High-Level Panel on Threats, Challenges and Change 'A More Secure World: Our Shared Responsibility' (2004) UN Doc A/59/565.

However, the concept of anticipatory self-defence has evolved into what is now known as pre-emptive self-defence, which is not recognised by the United Nations.[4] The Bush Doctrine emphasised that the United States (U.S.) would act pre-emptively to address threats, even if those threats were not imminent, marking a departure from the traditional requirement of immediacy in the Caroline Doctrine.[5] This approach allowed for action based on perceived future threats rather than waiting for an immediate or impending attack.[6]

Proponents argue that Pre-emptive self-defence allows a state to use unilateral military force to prevent a potential future attack, even in the absence of an imminent threat. This is justified by the evolution of more rapid and destructive weapons that can be initiated without warning.[7] Apart from the U.S., some states like France and Australia have expressed a right to strike pre-emptively against states in the face of a risk that terrorists will acquire weapons of mass destruction from a 'rogue state'.[8]

Opponents argue that pre-emptive self-defence differs from anticipatory self-defence as it relies on the mere possibility of a future attack rather than an imminent threat, making the burden of proof less defined and often speculative.[9] An act of pre-emptive self-defence by one state may be seen as 'serious or hysterical misjudgement' or 'cynical or self-deluded and unjustified aggression' by others, due to the radically different cultures, values, and strategic assessments between international actors.[10] Franck stresses that pre-emptive self-defence is not grounded in law and reciprocity, but rather in the unilateral power of the super power to subordinate the rights of everyone else.[11] More seriously, the widespread adoption of pre-emptive defence by other states carries potentially destabilising consequences for the global order.[12]

The Taiwan Strait has been a region of tension for more than 70 years. With Lai Ching-te officially advocating for Taiwan's independence during his inauguration[13] and the increasing economic decoupling from the People's Republic of China (PRC), the U.S., and other Western

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[4] Secretary-General Kofi Annan and Special Representative for Iraq, Sergio Vieira de Mello, 'Transcript of Press Conference by Secretary-General Kofi Annan and Special Representative for Iraq, Sergio Vieira de Mello' (2003) <https://press.un.org/en/2003/sgsm8720.doc.htm> accessed 21 August 2024.

[5] National Security Archive, 'George W. Bush, State of the Union address' (2002) <https://nsarchive.gwu.edu/document/28048-document-08-george-w-bush-state-union-address-january-20-2002 > accessed 21 August 2024.

[6] The New York Times 'Text of Bush's Speech at West Point' (2002) <https://www.nytimes.com/2002/06/01/international/text-of-bushs-speech-at-west-point.html> accessed August 21 2024.

[7] Abraham D. Sofaer, 'On the Necessity of Pre-emption' (2003) 14 EJIL 209, 214<www.ejil.org/journal/Voll4/No2/artl.pdf> accessed 8 Aug 2024; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edh, OUP 1996) 420; Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP 2002) 101.

[8] Michael Byers, 'Policing the High Seas: The Proliferation Security Initiative' (2004) 98 Am J Int'l L 526, 541.

[9] Chris O'Meara, 'Reconceptualizing the Right of Self-Defence Against 'Imminent' Armed Attacks' (2022) 71(3) Int'l & Comp LQ 278.

[10] Thomas M. Franck, 'Pre-emption, Prevention and Anticipatory Self-Defence: New Law regarding Recourse to Force' (2004) 27 Hastings Int'l & Comp L Rev 425.

[11] Ibid.

[12] W. Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Pre-emptive Self-Defence' (2006) 100 AJIL 525.

[13] Liu, Cheng, 'Lai Ching-te: Taiwan's New President' The Guardian (Guardian, 2024) <https://www.theguardian.com/world/article/2024/may/20/lai-ching-te-taiwan-new-president> accessed 19 August 2024.

countries,[14] the risk of conflict in the Taiwan Strait has escalated.[15] Therefore, it is crucial to explore whether the PRC might adopt pre-emptive self-defence against Taiwan and whether there is a legal basis for such action.

This article will firstly explore whether the PRC could invoke traditional anticipatory self-defence. In light of some current literature advocating a more lenient approach to anticipatory self-defence, especially in the context of pre-emptive actions against devastating weapons and terrorism, this article will examine whether such an approach could justify actions against Taiwan. Thirdly, this article will analyse the Iraq war in 2003 in detail, which is a highly debatable case of pre-emptive self-defence, to explore the implications to the Taiwan Strait. Owing to the current literature primarily focusing on critiquing the subjective interpretation of pre-emptive self-defence, this article will discuss how new rhetoric surrounding a broader concept of pre-emptive self-defence may affect and potentially apply to the Taiwan issue. Fifthly, this article will also combine the emerging threats in the future to discuss the effect on the Taiwan issue. This research will employ doctrinal analysis, case studies, and interdisciplinary methods, relying on historical context, policy documents, and existing literature and legal frameworks to thoroughly examine the topic. Finally, the applicability of pre-emptive self-defence in Taiwan issue would be concluded.

2. Anticipatory Self-Defence for China?

The threshold for the PRC to invoke the Caroline doctrine to justify anticipatory self-defence is exceptionally high. Historically, Taiwan conducted limited operations against the PRC, such as reconnaissance missions, psychological warfare, and small-scale raids.[16] However, by the 1970s, these activities had largely ceased as Taiwan shifted its focus to maintaining the status quo following the normalisation of Sino-American relations.[17] While both sides may be opposed, they are not formally at war, unlike the situation in the Caroline case, which involved insurrections or rebellions.[18] In the Taiwan Strait, there has been a prolonged period of tension lasting almost half a century, yet the situation remains peaceful despite the underlying conflict.[19] Assessing imminent threats in such contexts is challenging. While the ongoing tension in the Taiwan Strait underscores the complex and enduring nature of regional conflicts, it's essential to distinguish between tension and actual threats.

Although some Taiwanese officials advocate for independence, their statements or actions do not constitute a direct threat to the PRC. In the current context, the primary risk might arise from missile tests[20], which could potentially be conducted over long distances and with suddenness.[21] However, Taiwan's missile tests do not directly invade Chinese territory or

[14] Li W, 'Towards Economic Decoupling? Mapping Chinese Discourse on the China–US Trade War' (2019) 12(4) Chinese J Intl Pol 519.
[15] Woo-tae Lee, 'After the Taiwan Election: Potential Taiwan Strait Crisis and South Korea's Response' [2024] Korea Institute for Unification online series.
[16] Gary D Rawnsley, 'Taiwan's Propaganda Cold War: The Offshore Islands Crises of 1954 and 1958' (1999) 14(4) Intelligence & Nat'l Sec 82.
[17] ibid.
[18] Louis-Philippe Rouillard (n 1).
[19] Rawnsley (n 16).
[20] Fabian Hamacher and Ann Wang, 'Taiwan Shows Off Missile Firepower in Rare Trip to Sensitive Test Site' (Reuters, 20 August 2024) <https://www.reuters.com/world/asia-pacific/taiwan-shows-off-missile-firepower-rare-trip-sensitive-test-site-2024-08-20/> accessed 25 August 2024.
[21] United States House of Representatives Committee on Oversight and Government Reform, 'The Declining Ballistic Missile Threat' (March 2008) <https://corpora.tika.apache.org/base/docs/govdocs1/306/306888.pdf> accessed 25 August 2024.

waters and cannot be deemed an immediate threat.[22] Furthermore, despite North Korea's frequent missile tests, its neighbours—South Korea and Japan—have not responded with military force in retaliation.[23] Similarly, during the Cuban Missile Crisis, the U.S. implemented a naval blockade and prepared for potential military action but refrained from initiating substantive military operations.[24] These precedents suggest that missile tests alone are insufficient grounds for anticipatory self-defence under the Caroline doctrine. Hence, the PRC could not invoke anticipatory self-defence in the current situation.

2.1. "Weapons of Mass Destruction" Argument

Supporting pre-emptive self-defence mainly comes from the devastating blows, exactly, modern high-tech weapons could inflict overwhelming attacks that the victim state Self-defence might no longer be applicable. These advanced weapons are capable of inflicting overwhelming damage, to the extent that the victim state might be unable to mount an effective defence in response. For instance, during the Six-Day War in 1967, Israel launched a devastating strike against Egypt, destroying the majority of the Egyptian Air Force on the ground.[25] This overwhelming attack severely crippled Egypt's ability to defend itself, demonstrating how a swift and devastating strike can effectively neutralise a state's defensive capabilities before it has the chance to respond.[26] In the Taiwan Strait, although Taiwan is a smaller and militarily weaker entity compared to the PRC, it possesses advanced weaponry such as the Yun Feng missile and F-16V 'Viper' fighter jets, among others.[27] If these missiles or strategically placed bombs were to target critical infrastructure, such as the Three Gorges Dam, it could potentially result in catastrophic flooding, submerging vast areas and affecting multiple provinces in the PRC, ultimately leading to a mass disaster.[28] Hence, the PRC might use this rhetoric to justify the demilitarization of Taiwan, arguing that the presence of advanced weaponry poses an existential threat.

However, many states possess long-range attack capabilities and critical infrastructure, some of which are even more significant than the Three Gorges Dam, such as nuclear power plants. If the PRC could legally invoke pre-emptive self-defence on these grounds, it could set a dangerous precedent where any state might justify a pre-emptive strike under similar reasoning. Moriarty emphasises that many nations have reinforced, protected, and dispersed their Weapons of Mass Destruction (WMD) facilities, complicating efforts to destroy them through pre-emptive strikes.[29] For example, effectively neutralizing or inflicting significant damage on Iran's WMD program would require attacks on multiple sites across the country.[30] However, the likelihood of fully destroying these targets while minimizing collateral damage remains uncertain.[31] This underscores the need for more stringent limitations and criteria to prevent the misuse of pre-emptive self-defence in relation to WMD. On the other hand, Taiwan and

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[22] Fabian Hamacher and Ann Wang (n20); United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS) art2.
[23] Dean Cheng, 'The North Korean Nuclear Development Program and Japan' (MPhil thesis, Massachusetts Institute of Technology 1994).
[24] Thomas M. Franck (n10).
[25] Kurtulus EN, 'The Notion of a Pre-Emptive War: The Six Day War Revisited' (2007) 61(2) Middle East J 220.
[26] ibid.
[27] Shirley A. Kan, 'Major U.S. Arms Sales Since 1990' (Congressional Research Service 2014).
[28] Murray SW, 'Revisiting Taiwan's Defence Strategy' (2008) 61(3) Naval War College Rev 12.
[29] Tom Moriarty, 'Entering the Valley of Uncertainty: The Future of Preemptive Attack' (2004) 167 World Affairs 71.
[30] Michael Knights, 'Target: Nuclear Iran' (Policy Watch, 28 May 2003) <https://www.washingtoninstitute.org/policy-analysis/iranian-nuclear-weapons-part-ii-operational-challenges> accessed 25 August 2024.
[31] ibid.

the U.S. should focus on diplomatic and political solutions rather than introducing WMD, which could increase hostility and escalate tensions in the region.[32] This approach is reminiscent of how the U.S. responded to the Soviet Union's attempt to place missiles in Cuba, where the U.S. did not permit missiles near its borders.[33]

2.1.1. Case Study: The Invasion of Iraq in 2003

In 2003, the U.S. justified the invasion by claiming that Iraq possessed WMDs and posed an imminent threat, thus invoking the concept of pre-emptive self-defence.[34] Despite significant skepticism from the international community and a lack of concrete evidence, the U.S. garnered support from many countries, including the United Kingdom, Denmark, the Netherlands, South Korea, and several Eastern European nations, which provided varying levels of military, logistical, and political backing.[35] The support of the willing coalition provided a measure of legitimacy to U.S. actions, despite the ongoing controversy regarding the legality of the invasion.[36] However, this interpretation does not hold up under international law.

Principle of Necessity

The necessity principle is a fundamental component of the customary international law governing self-defence.[37] Even if Iraq had been found to possess WMD, the fact that Iraq was geographically distant from the U.S. means it could not effectively threaten U.S. territory by lacking long-range missiles. Israel's pre-emptive actions against the Osirak nuclear facility in 1981 remain a subject of debate, but at least two neighboring states were concerned.[38] Thus, it appears that lessons from the past have had little impact on the U.S. Ironically, it turned out that these weapons did not actually exist.[39] In this scenario, the U.S., by recognising and justifying a pre-emptive strike based on perceived threats, could further blur the clarity of the concept of pre-emptive self-defence."

The potential consequences include a more lenient interpretation of what constitutes an imminent threat, even an illusory threat, thereby expanding the scope of pre-emptive actions.

Confuse Collective Self-Defence and Collective Security

Moreover, the concept of 'weapons being used against the U.S. or its allies,' as suggested in the Bush administration's rationale, implies a focus on collective self-defence rather than individual self-defence.[40] However, considering the previously discussed lack of necessity, it is essential to distinguish between collective security and collective self-defence. The concept of collective self-defence, Lee argues, cannot cover scenarios where one state recruits or solicits

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[32] Pastor, 'The Paradox of the Double Triangle' (2000) 17(1) World Policy J 19.
[33] Barlow, *The Cuban Missile Crisis in Naval Blockades and Seapower* (1st Routledge 2007) 157.
[34] Miriam Sapiro, 'Iraq: The Shifting Sands of Pre-emptive Self-Defence' (2003) 97 AJIL 599.
[35] Edgars Svarenieks, Eastern Europe and the 2002-2003 Iraq Crisis (MA thesis, Naval Postgraduate School 2003); Peter Viggo Jakobsen and Jens Ringsmose, 'Size and Reputation—Why the USA Has Valued Its "Special Relationships" with Denmark and the UK Differently Since 9/11' (2015) 13(2) J Transatlantic Stud 135.
[36] Geoffrey Corn and Dennis Gyllensporre, 'International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defence, the Initiation of Hostilities, and the Impact of the Choice between Two Evils on the Perception of International Legitimacy' (2010) 30 Pace L Rev 484.
[37] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14; Thomas Cottier, 'The Principle of Proportionality in International Law: Foundations and Variations' (2017) 18(4) JWIT 628.
[38] Tamar Meisels, 'Pre-emptive Strikes—Israel and Iran' [2012] Can J Law & Jurisprudence 447.
[39] ibid.
[40] NSA (n 5).

another to achieve policy objectives such as sharing military burdens.[41] This principle lacks the core 'come to the rescue' element inherent in collective self-defence.[42] Hence, the military action in Iraq resembles a measure of collective security. According to the United Nations Charter, collective security measures require authorization from the United Nations Security Council (UNSC).[43] Since the action in question did not receive such authorization[44], it lacks the necessary legal backing under the Charter for collective security operations. Consequently, the unilateral military action in Iraq taken by the U.S. and its coalition against Iraq lacks a solid legal basis.

Principle of Proportionality

Even if 'The Invasion of Iraq' was de facto executed as a unilateral military action, it should have been focused solely on neutralising the perceived threat rather than pursuing extensive military actions aimed at regime change or territorial occupation.[45] The collapse of the Iraqi state and the failure of the U.S. occupation to effectively rebuild it led to a prolonged period of instability, violence, and insecurity that had severe consequences for the Iraqi population.[46] This approach clearly violated the principle of proportionality.[47]

International Criticism

Pre-emptive action in Iraq under the guise of self-defence is widely regarded as unjustified aggression and has been condemned by the international community.[48] For instance, the Spanish Prime Minister, using Iraq as an example of failure, declared, 'pre-emptive wars, never again; violations of international law, never again.'[49] Additionally, the Islamic Conference of Foreign Ministers denounced 'the principle of pre-emptive military strikes against any country under any pretext whatsoever'.[50]

In response, the National Security Strategy of the U.S. clarified that 'the U.S. will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression.'[51] The U.S. appears to euphemistically acknowledge the limitations of pre-emptive self-defence. However, it also views this as an absolute right to determine who can exercise this right and when it expires. As Brooks and Wohlforth observe, during a time when there are notably few external constraints on its actions within the international system, the U.S. finds itself in a historically privileged position.[52] This perspective enables the U.S. to use its hegemonic power to reshape standards of legitimacy and institutionalize its preferred solutions

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[41] Jaemin Lee, 'Collective Self-Defence or Collective Security? Japan's Reinterpretation of Article 9 of the Constitution' (2015) 8 J E Asia & Int'l L 373.
[42] ibid.
[43] United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) art 49, art42.
[44] UNSC Res 1441 (2002), UN Doc. S/RES/1441.
[45] Toby Dodge, 'Iraqi Transitions: From Regime Change to State Collapse', *Reconstructing Post-Saddam Iraq* (1st Routledge 2007) 153.
[46] ibid.
[47] Nicaragua v US [1986] ICJ Rep 14; Cottier (n37).
[48] Sapiro (n 34).
[49] Irish Independent, 'Pre-emptive wars not on, say Spanish' (2004) <https://www.independent.ie/world-news/europe/pre-emptive-wars-not-on-say-spanish/25912722.html> accessed 29 Aug 2024.
[50] Report of the Secretary-General, 'Final Communiqué of the Thirty-First Session of the Islamic Conference of Foreign Ministers' (2004) UN Doc A/58/856-S/2004/582, 6.
[51] White House, 'National Security Strategy of the United States' (September 2002) <https://georgewbush-whitehouse.archives.gov/nsc/nssall.html> accessed 29 Aug 2024.
[52] Stephen G Brooks and William C Wohlforth, *World Out of Balance: International Relations and the Challenge of American Primacy* (PUP 2008) 208, 216.

to global challenges.[53] As a rising superpower, the PRC also has the capability to follow the precedent set by the U.S.

Implications for Taiwan Conflict

Similarly, in the context of the Taiwan Strait, the PRC might claim that perceived WMDs justify unilateral pre-emptive action against Taiwan. Given the proximity of the Taiwan Strait, unlike the vast distance between the U.S. and Iraq, the PRC might argue it has even stronger grounds to claim pre-emptive self-defence against Taiwan. Following the precedent set by Iraq, the PRC could potentially disregard proportionality, opting to occupy Taiwan or establish a puppet government to achieve its strategic objectives. Moreover, the PRC could mimic the U.S. by advocating for stricter regulations on pre-emptive self-defence once pre-emptive actions have been carried out.

The precedent set by the Iraq War allows the PRC to undertake pre-emptive actions against Taiwan with minimal constraints and regardless of proportionality. This precedent extends beyond the concept of pre-emptive self-defence and blatantly violates fundamental principles of self-defence. While such actions are illegal under international law, the U.S.' impunity in this regard could provide other states with a pretext for similar behavior. As the 2004 UN High-Level Panel on Threats, Challenges, and Change warned, 'if one state is permitted to act in this way, it opens the door for all to do so'.[54] Consequently, this situation could lead to a downward spiral, as states adapt the concept of pre-emption to suit their interests and maintain their security.

2.2. Counter-Terrorism Argument

As discussed in the introduction, in the context of pre-emptive self-defence, anti-terrorism strategies were more strongly supported by the Reagan administration and other states, not just the Bush administration.[55] Nonetheless, this raises two important questions: the definition of terrorism and the threshold for pre-emptive actions.

Definition of Terrorism

International law has traditionally defined terrorism through specific actions like hijacking and hostage-taking, avoiding broader definitions to sidestep political sensitivities.[56] However, there is growing debate over the need for a general definition, as evidenced by the United Nations' ongoing efforts to draft a comprehensive international convention.[57] Despite these efforts, a

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[53] ibid.

[54] The Secretary-General's High-Level Panel on Security Threats, 'Maximizing Prospects for Success' (35th United Nations Issues Conference, January 13-15, 2004).

[55] National Security Decision Directive, 'Combating terrorism' (3 April 1984) <https://irp.fas.org/offdocs/nsdd/nsdd-138.pdf> accessed 22 August 2024; Jacques Chirac, 'Speech to Strategic Analysts'(20September2003)<http://www.jacqueschirac-asso.fr/archives-elysee.fr/elysee/elysee.fr/anglais/speeches_and_documents/2006/speech_by_jacques_chirac_president_of_the_french_republic_during_his_visit_to_the_stategic_forces.38447.html> accessed 22 August 2024; Australia, Ministry of Defence, National Security: A Defence Update 2003 (2003) 16 <http://www.defence.gov.au/ans2003/Report.pdf> accessed 22 August 2024; Full Text of Newly Passed Anti-Secession Law' China Daily (15 March 2005) <https://www.chinadaily.com.cn/english/doc/2005-03/14/content_424643.htm>; W. Michael Reisman and Andrea Armstrong (n 12).

[55] ibid.

[56] Krzystof Skubiszewski, 'Definition of Terrorism', *Israel Yearbook on Human Rights* (Brill Nijhoff 1989)39.

[57] Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight against its Financing' (2003) 14 European Journal of International Law 365, 368; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature 14 December 1973,

global consensus on a universal definition of terrorism has yet to be reached, and states continue to rely on their own definitions and often broader definitions.[58] For instance, the U.S. includes 'an act dangerous to human life, property or infrastructure'[59], the United Kingdom even encompasses lawful forms of protest that impact the government.[60] In practice, the U.S. justified the targeted killing of Qasem Soleimani as a pre-emptive measure to prevent imminent attacks on American personnel and interests.[61] In contrast, Iran condemned the designation of Soleimani's official role as a foreign terrorist organisation, noting that he was engaged in diplomatic activities on the day of the assassination.[62]

In a similar vein, the PRC could assert that the President or other high-ranking officials of Taiwan, who seek independence through collusion with Tibetan separatists[63], are engaging in activities that constitute terrorism. According to the PRC's Counter-Terrorism Law, 'terrorism as used in this Law coerce national organs…so as to achieve their political, ideological, or other objectives'[64]. This definition encompasses actions that disrupt social order and threaten national security, potentially categorizing separatist efforts, including those involving Taiwan, Tibet, and Xinjiang, as terrorist activities. This perspective is supported by General Xu's statements, which highlight the PRC's view that terrorism is often linked to separatist movements across these regions.[65]

The Qasem Soleimani Incident

The assassination of Soleimani has been condemned for violating the principle of sovereignty in extraterritorial regions[66] and failing to demonstrate an imminent threat, thus undermining the principle of necessity for unilateral force under pre-emptive anti-terrorism guidelines.[67] Additionally, members of Congress in the U.S. have voiced strong concerns about the executive branch's unconstrained use of force against Iran.[68] Hence, although pre-emptive measures have changed the application environment, the threshold for invoking such actions

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1035 UNTS 167 (entered into force 20 February 1977); International Convention against the Taking of Hostages, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983); International Convention for the Suppression of Terrorist Bombings, opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).

[58] Ben Golder & Williams George, 'What Is 'Terrorism'? Problems of Legal Definition' (2004) 27 UNSWLJ 270.

[59] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 18 USC (USA).

[60] Sir David Williams, 'Terrorism and the Law in the United Kingdom' (2003) 26 University of New South Wales Law Journal 179, 179.

[61] White House, 'Notice on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (2020) <https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf> accessed 29 August 2024.

[62] UNSC 'Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General and the President of the Security Council' (3 January 2020) UN Doc S/2020/13.

[63] Kristina Kironska, 'The Dalai Lama's Visits to Taiwan and Their Intertwined Effects on Cross-Strait Relations' (Reset Dialogues on Civilizations, 2023) <https://www.resetdoc.org/story/dalai-lamas-visits-taiwan-intertwined-cross-strait-relations/> accessed 22 August 2024.

[64] PRC Counter-Terrorism Law (adopted 27 December 2015, entered into force 1 January 2016) art 3.

[65] Pianpian Tang, 'Xu Guangyu: Terrorism in China stems from separatist forces' (*Phoenix TV*, 30 November 2015) <http://phtv.ifeng.com/a/20151130/41515085_0.shtml> accessed 29 August 2024.

[66] UNSC 'Identical Letters Dated 6 January 2020 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council' (6 January 2020) UN Doc S/2020/15.

[67] Thomas Clayton *Killing of Qasem Soleimani: Frequently Asked Questions* (Congressional Research Service, 2020) 2; Mostafa Fazaeli, 'The Assassination of General Soleimani from the Perspective of International Law on the Use of Force' (2021) 7(2) Q J Comp Res Islam & West Law 170.

[68] S.J. Res. 68, 116th Cong (2020) <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/68/text> accessed 29 August 2024.

still aligns with the anticipatory doctrine. While the PRC may classify Taiwanese separatists as terrorists, the criteria for such classification remain consistent with anticipatory theory.

2.3. Proliferation of other Rhetoric

In 2022, Russia justified its military invasion of Ukraine by claiming that it was acting to prevent NATO's expansion and to protect Russian-speaking populations in Ukraine, framing its actions as necessary to defend against an imminent threat from the West.[69] In 2019, India launched airstrikes on what it claimed were terrorist camps in Pakistan, following a terrorist attack in Indian-administered Kashmir that was blamed on a Pakistan-based militant group.[70] Rather than framing its actions as directly offensive, North Korea portrayed its nuclear weapons development and the potential for pre-emptive use as defensive measures essential for ensuring its survival, despite widespread international criticism and sanctions aimed at curbing its nuclear ambition.[71] These precedents might lead more states to unilaterally resort to force. While they do not make the use of force by the PRC against Taiwan legally justified, they may make such actions seem less abrupt. The once-promising system, based on mutual respect for the law to prevent mutual destruction, has been undermined by realpolitik, leading to a grim outlook for international relations.[72]

China's New Rhetoric

Furthermore, implications for the international community may extend beyond the different rhetoric of pre-emptive self-defence. Powerful states may argue that they can create justifications innovatively to serve their interests. Chinese elites overwhelmingly reject the American concept of the 'pre-emption doctrine', viewing it as neither a legitimate nor useful strategy for China's security.[73] They see pre-emptive self-defence as a form of aggressive warfare and a tool to entrench American hegemony, rather than a necessary adjustment to address actual security challenges.[74] For the PRC, the notion of sovereignty is a 'central aspect of its identity', and pre-emptive self-defence is perceived as fundamentally undermining 'the sovereign equality of all and freedom from the threat of war'.[75]

However, the disagreement with the theory of pre-emptive defence does not mean that the PRC fully adheres to the traditional definition of self-defence or the prohibition on the use of force. The PRC has never concealed its determination or intention to use force to retake Taiwan. Officially, it has introduced the Anti-Secession Law and white papers that consistently threaten the use of force against Taiwan,[76] albeit under different rhetoric. The PRC prefers to

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[69] Louis René Beres, *Russia's War Against Ukraine—Impacts on Israeli Nuclear Doctrine and Strategy* (Begin-Sadat Center for Strategic Studies, 2022).

[70] Imdad Ullah, 'India's Pre-Emptive Strike in Pakistan: The Legal Perspective' (2020) XX (1) IPRI Journal 45.

[71] Josh Smith, 'North Korea Passes Law Authorizing Pre-emptive Nuclear Strikes' (Reuters, 2022) <https://www.reuters.com/world/asia-pacific/nkorea-passes-law-declaring-itself-nuclear-weapons-state-kcna-2022-09-08/> accessed 29 August 2024.

[72] W. Michael Reisman and Andrea Armstrong (n 12).

[73] Phillip C Saunders, 'China's America Watchers: Changing Attitudes Towards the United States' [2000] The China Quarterly 41; David Shambaugh, 'China's Military Views the World' (2000) 24(3) International Security 52; Thomas J Christensen, 'Chinese Realpolitik' [1996] Foreign Affairs 37; Biwu Zhang, 'Chinese Perceptions of American Power, 1991-2004' (2005) 45(5) Asian Survey 667.

[74] ibid.

[75] Scott A Silverstone, 'Chinese Attitudes on Preventive War and the "Pre-emption Doctrine', (US Air Force Academy, 2009) 24; 'Six Paradoxes of the Iraq War' Southern Weekend Renmin Wang (shanghai, 4 April 2003).

[76] National People's Congress, Anti-Secession Law (14 March 2005) <http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383917.htm> accessed 23 August 2024; State Council Information Office of the People's Republic of China, White Paper on Taiwan (2022) <http://www.scio.gov.cn/32618/Document/1681510/1681510.htm> accessed 23 August 2024.

invoke historical claims and the assumed 'sovereignty over Taiwan' under the One China Policy to justify the use of force for unification, a strategy that not only legitimizes military action but also stirs nationalism to garner support from populist sentiments.[77] Sovereignty, which pre-emptive self-defence may encroach, is crucial to the PRC's stance because it is a foundation of the One China Policy.[78] Moreover, pre-emptive self-defence violates China's cultural preference for a 'harmonious society' and peaceful rise. Hence, the PRC may adopt new rhetoric to better serve its interests, rather than using or refining the theory of pre-emptive self-defence.

In this scenario, the anti-secession law is highly controversial because it challenges the principle that 'sovereign power of a state ceases at its borders', a concept rooted in the theory of the territorial state, which refutes the application of domestic law extraterritorial.[79] Furthermore, effective control is a prerequisite for the exercise of sovereignty.[80] However, an originally controversial issue may become ambiguous under the innovative sovereignty theory, which parallels the U.S.' Bush theory.

The PRC's ambition to emulate U.S. rhetoric can be inferred from its promotion of 'human rights with Chinese characteristics.' Xi Jinping explicitly referenced this concept in his speech at the United Nations Palais des Nations, signaling a new approach to global human rights governance.[81] Regarding the Taiwan issue, Xi Jinping, on the 40th anniversary of a key cross-strait policy statement, declared that 'reunification is the historical trend and the right path,' and emphasised that China 'makes no promise to renounce the use of force and reserves the option of taking all necessary means.'[82] These statements indicate China's intention to enhance its discourse power in the world. On Taiwan, although the PRC has not taken unilateral action, tensions remain high. The PRC's rejection of the International Tribunal's ruling on the South China Sea and its ongoing pressure on neighboring states contribute to regional instability.[83] These developments suggest an increased risk of conflict in the Taiwan Strait.

3. Autonomous and Outer Space Weapons: New Era of Anticipatory Self-defence?

Autonomous weapons (AWs), such as drones and robotic systems, offer enhanced speed and precision in identifying and engaging targets. As high-tech weapons become increasingly popular among various states, AWs may present two significant challenges. First, they could make judgments about 'imminent threats' more precarious. Second, they may mistakenly identify threats or engage in excessive counterattacks, thereby escalating tensions. This is because the nature of AWs—characterized by its speed, unpredictability, decentralized operation, and attribution—could complicate decision-making during crises, potentially

[77] Zhang Jian, 'Chinese Nationalism and Its Foreign Policy Implications' *Asia-Pacific Security: Policy Challenges* (ANU Press 2003) 108.
[78] Silverstone (n 75).
[79] United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) art 2(4); Ying-jeou Ma, 'State, Sovereignty, and Taiwan' (2000) 23 Fordham Int'l LJ 959.
[80] Minquiers and Ecrehos Case (France/United Kingdom) [1953] ICJ Rep 14; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) [1992] ICJ Rep 351.
[81] Andrea Worden, 'China Pushes Human Rights with Chinese Characteristics at the UN' (China Change, 9 October 2017) <https://chinachange.org/2017/10/09/china-pushes-human-rights-with-chinese-characteristics-at-the-un/> accessed 24 Aug 2024.
[82] Lily Kio, 'All Necessary Means: Xi Jinping Reserves Right to Use Force Against Taiwan' (Guardian, 2 January 2019) <https://www.theguardian.com/world/2019/jan/02/all-necessary-means-xi-jinping-reserves-right-to-use-force-against-taiwan> accessed 24 Aug 2024.
[83] Rabbani A, 'China's Hegemony in the South China Sea' (2019) 23 World Affairs 66.

leading to miscalculations and unintended escalation.[84] After a miscarriage, the question of responsibility is significant: should it lie with the developers who create autonomous weapons or with the civilian and military officials who establish their operational conditions?[85] Whether the weapons themselves should also be held accountable remains a matter of debate.[86] Hence, the PRC may use AWs as a scapegoat to evade its responsibility.

Satellites play an irreplaceable role in modern military operations, and attacks on these assets can significantly impact a country's military capabilities and strategic decisions. When satellites are compromised, countries may fight ineffectively without the support of critical satellites.[87] The concept of pre-emptive self-defence may be re-emphasised, potentially leading to renewed ambiguities surrounding its invocation. Additionally, the evolving characteristics of satellites introduce further complexities. For instance, it is debatable whether facing a threat from 'space stalkers'—satellites positioned too close to another country's satellites—justifies pre-emptive self-defence. While Russia and the PRC argue that outer space development necessitates further elaboration and clarification, the U.S. and its allies permit anticipatory or pre-emptive self-defence under certain conditions.[88] Another point of contention is whether the right to self-defence in outer space extends to actions on Earth.[89] The increasing divergences introduce greater uncertainties in the Taiwan Strait, yet they also provide the more powerful side with greater latitude to employ pre-emptive self-defence as a strategic tool.

4. Conclusion

The possibility of the PRC employing pre-emptive self-defence against Taiwan can be assessed through various scenarios. According to the anticipatory self-defence doctrine, the PRC cannot currently justify such a measure due to the absence of a substantive threat, rendering the issue of imminence irrelevant. However, it is crucial for Taiwan and the U.S. to avoid deploying WMDs, as this could heighten the risk of the PRC invoking anticipatory self-defence.

While pre-emptive actions against terrorism might gain some endorsement from the international community—especially when contrasted with pre-emptive strikes against states under the Bush Doctrine—the threshold for such actions still hinges heavily on the concept of 'imminence', similar to anticipatory self-defence.

The precedents set by the Iraq War have not only lowered the threshold for what constitutes an "imminent" threat but have also eroded fundamental principles of self-defence, such as necessity and proportionality. The unilateral use of force without accountability may encourage other states to misuse pre-emptive self-defence. More significantly, powerful states like the

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[84] Schmitt, Michael N, *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations* (2nd edn, CUP, 2017) 350; Nathan Leys, 'Autonomous Weapon Systems, International Crises, and Anticipatory Self-Defence' (2020) 45 Yale J Int'l L 377.

[85] Marcus Schulzke, 'Autonomous Weapons and Distributed Responsibility,' Philosophy & Technology 26 (2013) 203-219.

[86] Ibid.

[87] Fabio Tronchetti, 'The Right of Self-Defence in Outer Space: An Appraisal' (2014) 63 ZLW 92.

[88] United Nations Office for Disarmament Affairs 'Follow-Up Comments by the Russian Federation and China on the Analysis Submitted by the United States of America of the Updated China Draft PPWT' (14 September 2015) CD/2042 <https://documents.un.org/doc/undoc/gen/g15/208/38/pdf/g1520838.pdf?OpenElement> accessed 28 August 2024; Secretary of Defence and Director of National Intelligence, 'National Security Space Strategy : Unclassified Summary <http://archive.defence.gov/home/features/2011/0111_nsss/docs/NationalSecuritySpaceStrategyUnclassifiedSummary_Jan2011.pdf> accessed 28 August 2024.

[89] Brian G Chow, 'Space Arms Control: A Hybrid Approach' (2018) 12 *Strategic Stud. Q.* 2.

PRC might emulate the U.S. in crafting narratives or justifying their reasons for using force, potentially targeting Taiwan. Moreover, the development of AWs and outer space weaponry presents new challenges to the international community, including Taiwan. Modern weaponry further complicates the necessity for pre-emptive actions. Addressing these challenges requires collective efforts and peaceful means to resolve differences, rather than relying on subjective judgments or rhetoric backed by power. This approach should be applied universally to decrease conflicts and promote peace in the Taiwan Strait.

Marine Geoengineering: Legal and Administrative Challenges

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Abstract

The Ocean, covering over 70% of the earth's surface is a crucial component of our planet's ecosystem, playing a vital role in climate regulation, biodiversity, and human livelihoods. The provisions of UNCLOS, which has frequently been hailed as the Constitution for the Oceans, may not sufficiently address contemporary technological advancements in Marine Geoengineering. This present study analyses the legal and governance challenges associated with MG. It critically examines the ecological and long-term implications of these technologies, assesses the sufficiency of existing legal frameworks and international legal instruments, and recommends the development of comprehensive and unified legislation to address governance gaps and regulatory challenges inherent in the marine geoengineering landscape.

Key Words

Marine Geoengineering, International Seabed Authority, UNCLOS, International Maritime Organisation, Regulatory Challenges

1. Introduction

Marine Geoengineering (MG) refers to technological interventions designed to modify oceanic and atmospheric processes to counteract climate change. These techniques, which include ocean fertilization, carbon capture and storage (CCS), ocean albedo enhancement, ocean alkalinity enhancement, and artificial upwelling, aim to enhance the ocean's natural capacity to absorb carbon dioxide (CO_2) or modify the Earth's radiative balance. While promising, these technologies are experimental and raise concerns about their ecological impacts and long-term efficacy, necessitating careful regulatory oversight and thorough understanding before large-scale implementation.

This paper is divided into 4 parts. It explores the complex legal landscape surrounding MG, focusing on the governance structures and regulatory bodies responsible for overseeing these emerging technologies. Part 1 examines some of the unique challenges of Marine Geoengineering such as scientific and technical uncertainties, governance issues, environmental and ecological risks, social and political challenges, and economic and regulatory considerations. Part 2 discusses the Legal framework for marine geoengineering. It further examines existing international legal instruments, such as the UNCLOS, CBD, London Convention and Protocol, as well as Customary International Law. Part 3 considers the Governance Gaps and Regulatory Challenges in the MG Framework while Part 4, analyses the Institutional Framework of Marine Geoengineering.

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Flowing from the above, my findings indicate that MG governance encounters significant challenges due to the absence of a dedicated international treaty, fragmented regulations, and rapidly evolving technologies. This situation calls for adaptive governance mechanisms and additional legal instruments to ensure comprehensive oversight.

2. Unique Challenges of Marine Geoengineering

MG presents a unique set of challenges distinguishing it from other environmental and technological interventions. These challenges arise from the inherent complexities of the marine environment, the global scale of potential impacts, the ethical and legal uncertainties, and the nascent stage of many geoengineering technologies. They include but are not limited to the following:

Scientific and Technical Uncertainties

MG technologies are still in their early stages of development. As a result, significant scientific uncertainty surrounds their effectiveness, environmental impacts, and long-term consequences to marine biodiversity and ecosystems.[1] The interconnectedness of ocean processes makes it difficult to predict the outcomes of geoengineering, with even small-scale interventions potentially causing widespread and unintended effects.

Governance Issues

MG raises significant ethical concerns, particularly regarding environmental justice, intergenerational equity, governance, and the moral hazard of relying on technological fixes for climate change. [2] These interventions could disproportionately impact vulnerable communities, especially in coastal and island regions, exacerbating global inequalities as the benefits may not be evenly distributed.[3] Developing countries, which contribute the least to greenhouse gas emissions, could suffer the most from the negative consequences of geoengineering led by more developed nations, raising issues of fairness and equity.[4]

Environmental and Ecological Risks

Geoengineering activities that alter ocean chemistry, such as ocean alkalinity enhancement, could have unpredictable effects on marine biodiversity and ecosystem services.[5] Furthermore, the long-term environmental impacts of geoengineering interventions are difficult to predict. Some geoengineering techniques, such as deep-sea carbon storage, involve the permanent alteration of marine habitats, which could have irreversible consequences for deep-sea ecosystems.[6] The potential for unintended consequences, such as the exacerbation of ocean

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[1] Jeffrey McGee, Kerryn Brent, and Wil Burns, 'Geoengineering the oceans: an emerging frontier in international climate change governance' (2018) 10 **Australian Journal of Maritime & Ocean Affairs** 67.
[2] Joshua Wells, 'Geoengineering Governance: Addressing the Problems of Moral Corruption, Moral Hazard, and Intergenerational Inclusion' (PhD diss, University of Reading 2020).
[3] Albert Lin, 'Geoengineering: imperfect yet perhaps important options for addressing climate change' in David M Konisky (ed), *Handbook of US Environmental Policy* (Edward Elgar Publishing 2020) 373.
[4] Ibid
[5] Ibid
[6] Charles H Greene and others, 'Geoengineering, marine microalgae, and climate stabilization in the 21st century' (2017) 5 *Earth's Future* 278.

acidification or the disruption of nutrient cycles, further highlights the need for a precautionary approach in the deployment of MG technologies.[7]
(iv). MG also presents significant social and political challenges, particularly in terms of public perception, stakeholder engagement, and the legitimacy of decision-making processes.[8]

Economic Considerations

The economic aspects of MG are also challenging. The costs associated with research, development, deployment, and long-term monitoring of geoengineering technologies are substantial, and it remains unclear who would bear these costs.[9] Moreover, the potential economic benefits of geoengineering, such as the mitigation of climate change impacts, must be weighed against the risks and costs of potential environmental damage.[10]

Regulatory Considerations

The evolving nature of geoengineering technologies requires adaptive regulatory mechanisms capable of responding to new scientific knowledge and technological developments.[11] However, the absence of clear regulatory pathways and the potential for regulatory fragmentation across jurisdictions pose risks to the effective governance of MG.[12]

3. Legal Framework of Marine Geoengineering (MG)

The Legal framework for MG comprises of customary international law, the UNCLOS, the London Convention (LC) of 1972, LP 1996, the Convention on Biological Diversity.

Customary International Law

State practices have established several customary legal principles, with the "no harm" principle being particularly significant.[13] This principle requires states to prevent, reduce, and manage pollution and substantial transboundary environmental harm resulting from activities within their territory or under their control.[14] This principle is widely accepted in non-binding declarations, backed by the UN General Assembly, the International Law Commission (ILC), international environmental agreements, and court rulings. The ICJ confirmed it in the Pulp Mills case, highlighting a state's responsibility to prevent significant harm to another state's environment, especially when shared resources and risky activities are involved.[15]

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[7] Sikina Jinnah, Simon Nicholson, and Jane Flegal, 'Toward legitimate governance of solar geoengineering research: a role for sub-state actors' in Toby Svoboda (ed), *The Ethics of "Geoengineering" the Global Climate* (Routledge 2020) 233.
[8] Sean Low and others, 'Public perceptions on solar geoengineering from focus groups in 22 countries' (2024) 5 *Communications Earth & Environment* 1.
[9] ibid.
[10] Elnaz Roshan, Mohammad M Khabbazan, and Hermann Held, 'Cost-risk trade-off of mitigation and solar geoengineering: Considering regional disparities under probabilistic climate sensitivity' (2019) 72 *Environmental and Resource Economics* 263.
[11] Olaf Corry, 'The international politics of geoengineering: The feasibility of Plan B for tackling climate change' (2017) 48 *Security Dialogue* 297.
[12] ibid.
[13] Sandrine Maljean-Dubois, 'The No-Harm Principle as the Foundation of International Climate Law' (2021) *Debating Climate Law* 35.
[14] Benoit Mayer, 'Climate change mitigation as an obligation under customary international law' (2023) 48 *Yale Journal of International Law* 105.
[15] *Case Concerning Pulp Mills on the River Uruguay, Argentina v Uruguay* (Judgment on the merits) [2010] ICJ Rep 14, ICGJ 425 (ICJ 20 April 2010).

However, the characterization of shared resources, including the legal status of the atmosphere and the classification of specific geoengineering activities as hazardous, remains debated in international law.[16] Despite these uncertainties, the "no harm" principle emphasizes preventing significant harm rather than classifying activities as hazardous.[17]

The United Nations Convention on Laws of the Sea (UNCLOS)

The UNCLOS established in 1982, incorporates various customary international law principles related to the maritime domain.[18] Part XII of UNCLOS, titled "Protection and Preservation of the Marine Environment," sets out key environmental obligations for maritime activities. States must regulate and monitor activities under their jurisdiction, as outlined in Article 94, which includes enforcing international safety, pollution prevention, and labour standards for vessels. Article 192 requires states to protect and conserve the marine environment, applying these duties to maritime activities within a state's territory, in international waters, or where cross-border impacts are involved. [19]

The effectiveness of MG regulations relies on how marine pollution is defined under UNCLOS. This includes the introduction of substances or energy into the ocean that harms marine life, poses risks to human health, disrupts marine activities, degrades water quality, and depletes marine resources.[20] It is concerned with activities that introduce substances likely to cause harm.[21] This broad definition covers impacts from MG activities like OIF and AOA, which involve introducing substances into the marine environment and are likely considered pollution due to their potential adverse effects.[22] However, other MG techniques like MCB or ocean upwelling, which involve moving water and nutrients within the ocean, may use pipes that are better classified as equipment rather than substances. These techniques might not qualify as marine pollution since they don't introduce harmful substances.[23] The classification of MG activities as pollution depends on whether they pose a risk of harmful effects.

During the research phase, such activities fall under the regulations outlined in Articles 258–262 of UNCLOS. Therefore, it's unclear if the marine pollution obligations apply to all MG proposals, depending on whether these activities meet the definition of marine pollution. UNCLOS sets specific procedural obligations for MG activities, requiring states to cooperate in protecting the marine environment, notify relevant parties of potential threats, and conduct EIAs for activities likely to cause significant pollution or environmental harm.[24]

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[16] Anthony E Chavez, 'Using legal principles to guide geoengineering deployment' (2016) 24 *NYU Environmental Law Journal* 59.
[17] Stephen M Gardiner, 'Ethics and geoengineering: An overview' in *Global Changes: Ethics, Politics and Environment in the Contemporary Technological World* (2020) 67.
[18] Nilmini Silva-Send, 'Deep Sea Mining in the Area Beyond National Jurisdiction–A Lost Opportunity or Yet Another Reason for the United States to Join UNCLOS?' (2024) San Diego Legal Studies Paper 24.
[19] Kerryn Brent, 'Marine Geoengineering Governance and the Importance of Compatibility with the Law of the Sea' in *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar Publishing 2020) 442.
[20] Article 1(4) UNCLOS
[21] Anita Dian Eka Kusuma and Akbar Kurnia Putra, 'The Role of UNCLOS 1982 in Maintaining and Protecting the International Marine Environment' (2024) 6 *Lampung Journal of International Law* 23.
[22] Karen N Scott, 'Mind the Gap: Marine geoengineering and the Law of the Sea' in *High Seas Governance* (Brill Nijhoff 2018) 34.
[23] Simon Harding, 'Marine Debris: Understanding, Preventing and Mitigating the Significant Adverse Impacts on Marine and Coastal Biodiversity' (2016) Secretariat of the Convention on Biological Diversity 20.
[24] Article 197 UNCLOS, Article 198 UNCLOS

Convention on Biological Diversity (CBD)

The CBD imposes responsibilities on nations to preserve biological diversity, promote sustainability in utilization of its components, and ensure the fair and equitable sharing of genetic resources in Article 1. The CBD defines "biological diversity" to include ecosystems on land, in the sea, and in other aquatic environments.[25] Consequently, MG activities that could impact marine biodiversity and ecosystems fall under the purview of this agreement.

The CBD applies to MG research and activities within both territorial waters and areas beyond national jurisdiction.[26] Despite its broad relevance, the CBD imposes limited specific obligations regarding MG, primarily requiring states to prevent cross-border harm under Article 3 CBD and requires states to identify activities that could significantly adversely affect the conservation and sustainable use of biological diversity,[27] cooperate internationally,[28] and make national laws detailing EIA procedures. However, the CBD doesn't define the content or criteria for an EIA for MG activities, providing little guidance on what's appropriate. As a result, the obligations in the CBD are vaguely defined, and their effectiveness in governing MG is limited by the frequent use of qualifying language.[29]

The London Convention and London Protocol

The "Convention on the Prevention of Marine Pollution by Dumping of Wastes or Other Matter, 1972" (LC) and the London Protocol 1996 (LP) are international treaties that regulate ocean waste disposal, building on the UNCLOS principles in Article 210. The LC, adopted in 1972, focuses on preventing marine pollution from waste dumping.[30] The LP, adopted in 1996, aims to replace the LC with stricter measures, employing a precautionary approach to eliminate pollution from dumping.[31] Both agreements apply to territorial seas, EEZs, and the high seas, making them relevant to MG activities like OIF and AOA.[32] In 2013, a proposed LP amendment sought to regulate MG specifically, but it has not yet come into effect and is not legally binding.

Apart from this pending amendment, the LC and LP pertain to MG activities classified as "dumping." Dumping, as defined by both agreements, refers to the intentional disposal of waste or other substances into the sea from various structures at sea, including vessels, aircraft, and platforms.[33] It also covers deliberate disposal at sea of such structures themselves.[34] Activities that involve introducing substances into the ocean for purposes other than disposal are not considered dumping unless they conflict with the goals of the Convention/Protocol.[35] This definition covers a wide range of MG activities carried out from different structures near or within the ocean, provided that they involve the deliberate introduction of materials into the sea.

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[25] CBD, article 2
[26] ibid, article 4
[27] ibid, article 7
[28] ibid, article 5
[29] Kerryn Brent, 'Marine Geoengineering Governance and the Importance of Compatibility with the Law of the Sea' in *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar Publishing 2020) 442.
[30] Article 11 LC
[31] Article 2 LP
[32] Article 3(3) LC and Article 1(7) LP
[33] Article 3(1)(a) LC and Article 1(4)(1)(1) LP
[34] ibid
[35] Article 1(4)(2) LP

The LC and LP face challenges in regulating certain MG activities, similar to the issues in defining pollution under UNCLOS, as adopted by Article 1(10) of the LP. Specifically, OIF and AOA are covered by these agreements because they involve deliberately adding substances like iron or calcium carbonate to the ocean.[36] Conversely, other MG methods, such as MCB, ocean upwelling/downwelling, and certain microbubble techniques, which do not entail the intentional addition of substances to the ocean, are likely outside the regulatory purview of these agreements.[37] Consequently, the LC and LP do not extend oversight or governance to these activities.

4. Governance Gaps and Regulatory Challenges in the MG Framework

MG poses significant governance challenges that are not fully addressed by existing legal frameworks. While some principles and instruments apply, substantial gaps remain due to the global, transboundary nature of marine environments and the novelty of these technologies.[38] The current legal framework is fragmented, with rules spread across various instruments primarily focused on pollution and environmental protection, rather than specifically regulating MG. [39]

Key frameworks like UNCLOS and the LP provide some foundational regulations but were not originally designed with MG in mind.[40] As a result, they have significant limitations in effectively governing these new technologies. For instance, UNCLOS offers broad principles for marine environmental protection but lacks specific regulations for geoengineering. [41] Similarly, while the LP has been amended to address ocean fertilization, it does not cover other MG techniques like ocean alkalinity enhancement or marine cloud brightening. This gap in coverage raises concerns about the adequacy of existing legal frameworks to ensure comprehensive governance and compliance across different jurisdictions.

The lack of a specific legal framework for MG creates varying obligations for countries, complicating governance. States may need to follow different legal frameworks like the London Convention (LC), London Protocol (LP), or UNCLOS, depending on their commitments. For example, obligations for ocean fertilization (OIF) and AOA depend on whether a state is a party to the LP, LC, or just UNCLOS.

Countries that are not parties to the LC or LP but are signatories to UNCLOS must enact laws to prevent marine pollution from dumping, as outlined in Article 210 of UNCLOS.[42] This overlapping framework complicates the regulation of MG activities, as different sets of regulations may apply to the same activity. The vague and broad nature of international legal obligations, such as preventing harm to other states' territories and the marine environment,

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[36] Kerryn Brent, William Burns, and Jeffrey McGee, 'Governance of marine geoengineering' in *Governance of Marine Geoengineering* (Centre for International Governance Innovation 2019) 34.
[37] Stefan Partelow, Maria Hadjimichael, and Anna-Katharina Hornidge, 'Ocean governance for sustainability transformation' in *Ocean Governance: Knowledge Systems, Policy Foundations and Thematic Analyses* (Springer International Publishing 2023) 1.
[38] Karen N Scott, 'Transboundary environmental governance and emerging environmental threats: Geo-engineering in the marine environment' in *Transboundary Environmental Governance* (Routledge 2016) 246.
[39] Kerryn Brent, William Burns, and Jeffrey McGee, 'Governance of marine geoengineering' in *Governance of Marine Geoengineering* (Centre for International Governance Innovation 2019) 34.
[40] Harald Ginzky, 'Marine geo-engineering' in *Handbook on Marine Environment Protection: Science, Impacts and Sustainable Management* (2018) 997.
[41] Kerryn Brent, 'Marine Geoengineering Governance and the Importance of Compatibility with the Law of the Sea' in *Research Handbook on Climate Change, Oceans and Coasts* (Edward Elgar Publishing 2020) 442.
[42] Laisa Branco Almeida, 'The Role of International Law of the Seas on the Global Governance of Marine Climate Geoengineering Techniques' (2018) Available at SSRN 318.

presents challenges in applying these rules to specific MG projects. This complexity undermines trust and confidence in MG initiatives, making effective governance difficult for researchers and policymakers.

The overlapping international legal frameworks create complexities for researchers and policymakers by applying different regulations to the same MG activities, complicating governance.[43] International law obliges states to prevent or reduce harm to other states' territories and the marine environment, but the obligations differ depending on the impact of MG activities. These duties are often vague and broad, offering limited guidance for specific MG projects.

A significant governance gap is the absence of a dedicated international treaty that comprehensively addresses geoengineering, including MG. [44] Existing frameworks like UNCLOS and the LP provide some oversight but were not designed with geoengineering in mind and do not cover all aspects, such as marine cloud brightening or ocean alkalinity enhancement.[45] This lack of a specific treaty creates a regulatory vacuum, leaving significant MG activities unregulated and posing risks of environmental harm due to insufficient oversight. Additionally, without a binding international agreement, the global community's ability to enforce compliance and ensure responsible geoengineering practices is limited.

The evolving nature of MG technologies presents significant regulatory challenges, particularly the need for adaptive governance mechanisms that can respond to unforeseen risks and ethical dilemmas.[46] Since these technologies are still experimental, their full environmental and social impacts are not yet fully understood. This uncertainty calls for regulatory frameworks that are both robust and flexible, capable of adapting to new information and emerging risks. [47]
Traditional regulatory approaches, which rely on fixed rules and standards, may not be adequate for managing the dynamic nature of geoengineering technologies.[48] Instead, adaptive governance mechanisms are needed, including iterative risk assessments, adaptive management practices, and the ability to revise regulations based on new evidence. Strengthening the precautionary approach, as outlined in the London Protocol (LP), could involve continuous monitoring, provisional regulations, and rapid response mechanisms for unforeseen environmental impacts.

However, even the yet-to-be-adopted 2013 amendments to the existing framework have limitations, such as not covering the governance of all MG activities. This underscores the need for a more comprehensive and adaptive regulatory approach. In its definition, the 2013 LP amendment defines marine geoengineering as:

> "a deliberate intervention in the marine environment to manipulate natural processes, including to counteract anthropogenic climate change and/or its impacts, and that has the

[43] Harald Ginzky and Robyn Frost, 'Marine geo-engineering: legally binding regulation under the London Protocol' (2014) 8 *Carbon & Climate Law Review* 82.
[44] Ralph Bodle, 'Geoengineering and international law: The search for common legal ground' (2018) 46 *Tulsa Law Review* 305.
[45] Philip Boyd and Chris Vivian, 'High level review of a wide range of proposed marine geoengineering techniques' (2019) *International Maritime Law* 56.
[46] Karen N Scott, 'From ocean dumping to marine geoengineering: The evolution of the London Regime' in *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing 2023) 240.
[47] Grant Wilson, 'Murky Waters: Ambiguous International Law for Ocean Fertilization and Other Geoengineering' (2014) 49 *Texas International Law Journal* 507.
[48] Alexander Proelss, 'Law of the sea and geoengineering' in *The Law of the Sea* (Routledge 2022) 93.

> potential to result in deleterious effects, especially where those effects may be widespread, long-lasting or severe"[49]

These activities are characterized by their potential to cause harmful effects, especially if these effects are extensive, prolonged, or severe.[50] To be added to Annex 4 and regulated by the amendment, an activity must meet a specific definition. This definition covers activities aimed at addressing climate change, boosting marine productivity, or combating ocean acidification, but excludes those that unintentionally alter natural processes, like laying submarine cables or building artificial reefs. The activities must pose a potential risk to the marine environment, aligning with the LP's goal of protecting marine ecosystems. Importantly, the threshold for showing harm is low, requiring only the possibility of harm, not proof of actual damage.[51]

The amendment, specifically Article 6b, limits its regulatory scope to MG activities involving "the placement of matter into the sea from vessels, aircraft, platforms or other man- made structures at sea for MG activities listed in annex 4" such as AOA) or blue carbon initiatives that introduce substances like calcium carbonate or nutrients into the ocean.[52] This means that activities that do not involve the introduction of materials, like seawater extraction for cloud seeding or energy introduction into the ocean, are excluded from its oversight. For example, techniques like microbubble applications that involve depositing materials into the ocean would be regulated, but methods generating microbubbles without introducing matter, or ocean upwelling/downwelling that only move water or nutrients, are not covered.[53] This indicates that the governance framework does not comprehensively address all MG activities. The 2013 LP amendment faces several challenges in regulating MG activities. Developed before the Paris Agreement, the amendment does not align with global climate change goals, particularly the need for large-scale negative emissions to limit temperature rise to 2 degrees Celsius.[54] While it emphasizes protecting the marine environment, it fails to integrate geoengineering into broader climate change mitigation strategies or address the risks that climate change poses to marine ecosystems. The amendment also fails to consider the risks that climate change poses to marine ecosystems or align with the United Nations Framework Convention on Climate Change (UNFCCC) goals, stated in Article 2 UNFCC, for reducing greenhouse gas emissions.[55]

Furthermore, it lacks mechanisms to balance the marine pollution risks of geoengineering against the risks of inaction on climate change. According to paragraph 28 of Annex 5 of the 2013 LP, permits for MG activities are required to minimize environmental impacts while maximizing benefits. This means the amendment focuses solely on the risks of MG activities, without a broader view of climate change or geoengineering governance, limiting its effectiveness. Its impact is also reduced by the slow adoption rate—by 2024, only 10 out of 87

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[49] Sherry P Broder, 'International Governance of Ocean Fertilization and other Marine Geoengineering Activities' in *Ocean Law and Policy* (Brill Nijhoff 2017) 305.
[50] Article 1(5) bis
[51] Anita Talberg, Peter Christoff, Sebastian Thomas, and David Karoly, 'Geoengineering governance-by-default: an earth system governance perspective' (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 229.
[52] Alexander Proelss and Robert C Steenkamp, 'Geoengineering: Methods, Associated Risks and International Liability' in Peter Gailhofer, Dorte Krebs, Alexander Proelss, Klaus Schmalenbach, and Roda Verheyen (eds), *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective* (Springer, Cham 2023) 419.
[53] Ibid
[54] Sophie Gambardella, 'The stormy emergence of geoengineering in the international law of the sea' (2019) 13 *Carbon & Climate Law Review* 122.
[55] James Harrison, 'C. Ocean dumping' (2021) 32 *Yearbook of International Environmental Law* 72.

LC member nations had ratified the amendment[56] far short of the required 2/3 majority needed for it to become legally binding.[57] This slow acceptance reflects the difficulties in achieving international consensus on MG regulation. Additionally, the amendment's scope is restricted to LP parties, excluding major countries like the U.S., Russia, India, and Indonesia, which could hinder its ability to effectively oversee MG activities.[58] Overall, despite its potential adaptability, the 2013 LP amendment may be insufficient for the comprehensive governance of MG technologies, given its narrow focus and limited global acceptance.

5. Institutional Framework of Marine Geoengineering

The International Maritime Organization (IMO)

The IMO is crucial in managing MG, helping the Contracting Parties, especially through its regulatory role under the London Convention (LC) and London Protocol (LP). These international agreements were originally created to prevent marine pollution from waste dumping but have since been expanded to cover new MG activities, adapting to the changing challenges in ocean governance.[59] Article 3(7) of the LC empowers the Contracting Parties to designate an organisation to carry out the mandate of the LC which was done in the LP in Article 1(2) when they appointed the IMO as the organisation to carry out the mandates of the Convention and Protocol.

Duties and Responsibilities of the IMO

The IMO assists contracting parties in fulfilling their obligations to prohibit geoengineering activities, including marine geoengineering (MG), that pose significant risks to the marine environment unless permitted.[60] The 2013 Amendments to the Protocol, via Resolution LP.4(8), specifically regulate ocean fertilization, banning it unless classified as legitimate scientific research.[61] The IMO has established guidelines for assessing and permitting MG activities, including criteria for legitimate scientific research and procedures for conducting Environmental Impact Assessments (EIAs) as required by Article 6bis of the Protocol.

The IMO also monitors compliance with the London Convention and Protocol through various committees, reviewing reports from member states and addressing non-compliance through diplomatic channels or dispute resolution mechanisms.[62] Additionally, the IMO regularly updates its regulations and guidelines in response to new scientific knowledge and technological advances.[63] An example is the adoption of the "Assessment Framework for Scientific Research Involving Ocean Fertilization" to address environmental concerns. This adaptability ensures that regulations remain effective in managing the challenges posed by new MG technologies.

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[56] International Maritime Organisation, '45th Consultative Meeting of Contracting Parties to the London Convention and the 18th Meeting of Contracting Parties to the London Protocol (LC 45/LP 18)' (2023) <https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/LC-45-LP-18.aspx> accessed 1 August 2024.

[57] The United Kingdom, the Netherlands, Finland, Norway, Iran, Estonia, Sweden, Belgium, Denmark, and the Republic of Korea.

[58] Lucy Elizabeth Strapp, 'Tempting fates: The relevance and applicability of existing international environmental law in the context of global geoengineering governance' (2022) 29 *Australian International Law Journal* 45.

[59] Chiara Armeni and Catherine Redgwell, 'International legal and regulatory issues of climate geoengineering governance: rethinking the approach' (2015) 21 *Climate Geoengineering Governance Working Paper Series* 6.

[60] Article 4 LP

[61] Article 19(2(2) LP

[62] **Article 16** LP

[63] Article 14(4)(a) LC, Article 19(3)(1)

The IMO promotes sustainable marine geoengineering (MG) practices by developing guidelines that emphasize a precautionary approach, urging caution in the absence of full scientific certainty to prevent environmental degradation.[64] These guidelines aim to minimize risks and encourage responsible innovation in MG. The IMO also serves as a platform for international cooperation, facilitating discussions and negotiations among member states to ensure the safe and sustainable use of marine environments. [65] This includes promoting collaboration with regional and international organizations, which is crucial for harmonizing regulations and addressing transboundary environmental impacts.[66]

Additionally, the IMO supports its member states, particularly developing countries, by building capacity to implement the London Protocol's provisions.[67] This support includes technical assistance, training, consultations, and resources to help states conduct environmental assessments, enforce regulations, and develop national policies that align with international standards.[68]

Challenges of the IMO

The International Maritime Organization (IMO) faces several challenges that limit its effectiveness in MG.

The current regulatory framework under the London Protocol has major gaps and uncertainties, especially when it comes to new geoengineering methods beyond ocean fertilization. Although the Protocol was amended in 2013 to regulate ocean fertilization, it doesn't fully cover newer, more complex techniques like marine cloud brightening or artificial upwelling, which carry significant environmental risks. One major issue is the broad and sometimes unclear definitions in the Protocol, particularly regarding what counts as "dumping," which might not cover all relevant activities in Article 1(4)(1) of the LP.[69] While Article **3 of the LP** establishes the general obligation to prevent pollution of the marine environment. However, these provisions were not initially designed with the complexity of geoengineering in mind.[70] For instance, while ocean fertilization is covered, other techniques may not be seen as "dumping" in the traditional sense, thus escaping regulation. This lack of specificity can lead to differing interpretations by states of what is permissible or prohibited, creating inconsistencies in regulation.

Additionally, the binary categorization of activities as either "legitimate scientific research" or "industrial" is increasingly problematic as geoengineering technologies evolve. [71] These emerging techniques often blur the lines between research and commercial application, complicating regulatory oversight and raising questions about how to appropriately govern

[64] Article 3 LP
[65] Article 14(3) LC, Article 19(2)(1)
[66] Article 13 LP
[67] Article 9 LC, Article 13(1) LP
[68] Article 14(3) LP
[69] Marcel van Marion and Marcel van Marion, 'Methodology of Dumping' in *International Trade Policy and European Industry: The Case of the Electronics Business* (2014) *Journal of Business Law* 407.
[70] Charlotte Clarke and others, 'Cumulative effect assessment in the marine environment: A focus on the London protocol/London convention' (2022) 136 *Environmental Science & Policy* 428.
[71] David L Vander Zwaag, 'The international control of ocean dumping: navigating from permissive to precautionary shores' in *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing 2015) 132.

these activities.[72] The current rules under the London Protocol have significant gaps and uncertainties, especially for new geoengineering methods beyond ocean fertilization. While the Protocol was updated in 2013 to regulate ocean fertilization, it doesn't fully address more complex techniques like marine cloud brightening or artificial upwelling, which pose serious environmental risks. A key problem is the broad and sometimes unclear definitions in the Protocol, particularly regarding what qualifies as "dumping," which may not cover all the relevant activities mentioned in Article 1(4)(1) of the LP.

A key limitation of the IMO's regulatory framework is its reliance on member states for enforcement, leading to inconsistent global implementation. Article 6 of the London Protocol mandates that parties prevent and control pollution from dumping activities, but practical enforcement varies widely. Some countries, like Norway and Canada, have the capacity and commitment to enforce IMO regulations on ocean fertilization, while others may lack the necessary resources or prioritize economic development over environmental protection. This creates regulatory loopholes and risks uneven enforcement, potentially allowing harmful geoengineering activities to go unregulated in certain regions.

The IMO itself lacks direct enforcement powers, relying on member states to report violations and act, which is problematic given the transboundary impacts of geoengineering. This situation can lead to "forum shopping," where entities seek jurisdictions with weaker enforcement to carry out activities that would be more strictly regulated elsewhere. Additionally, countries with limited environmental governance may become safe havens for potentially harmful activities, posing significant risks to global marine ecosystems and undermining the uniform application of international regulations.

The IMO faces a challenging task in balancing the promotion of scientific innovation with the precautionary principle, especially regarding marine geoengineering (MG) technologies. The precautionary approach, as outlined in Principle 15 of the Rio Declaration io Declaration on Environment and Development,[73] mandates that the lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[74] However, this principle is difficult to apply to MG, where new and untested technologies pose unknown risks to marine ecosystems.

The IMO must balance promoting legitimate scientific research, vital for understanding marine environments and developing climate solutions, while ensuring these activities don't harm marine ecosystems. This tension is clear in MG, where the risks of technologies like ocean fertilization, artificial upwelling, or marine cloud brightening are still uncertain. The London Protocol addresses this by permitting only activities deemed legitimate scientific research, as outlined in the 2013 Amendment.[75] This amendment aligns with the precautionary approach but also demonstrates the IMO's recognition of the importance of research in this field. However, as noted in *Article 3 of the London Protocol*, there remains a broad scope for interpretation, which can lead to inconsistencies in how precaution is applied, particularly when new geoengineering techniques are considered.

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[72] Karen N Scott, 'From ocean dumping to marine geoengineering: The evolution of the London Regime' in *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing 2023) 240.

[73] *A/CONF.151/26 (Vol. I) Report of the United Nations Conference on Environment and Development* (1992).

[74] Tony George Puthucherril, 'Protecting the marine environment: Understanding the role of international environmental law and policy' (2015) *Journal of the Indian Law Institute* 48.

[75] Article 16bis LP 2013

The rapid pace of technological advancement in MG compounds the challenge. Techniques that were once theoretical are now being tested, often outpacing the regulatory frameworks designed to manage them. This creates a scenario where the IMO must constantly adapt its guidelines and regulations to keep pace with innovation, a task that is both resource-intensive and politically complex. Moreover, the absence of comprehensive environmental impact assessments for many emerging technologies makes it difficult for the IMO to apply the precautionary principle effectively.

The global nature and potential cross-border impacts of marine geoengineering (MG) highlight limitations in the IMO's traditional state-centered structure, which may not fully address the complexities of these activities.[76] MG, particularly on the high seas, can affect marine environments across multiple nations, necessitating a governance framework beyond the IMO's current scope.

To address these challenges, the IMO must adopt a more integrated and collaborative approach involving not just member states but also international organizations, scientific bodies, and non-state actors. This broader involvement is essential for understanding the long-term impacts of MG and for developing more effective and scientifically grounded regulations. The IMO has made some efforts to collaborate with bodies like the UNFCCC and CBD, but these collaborations need to be deepened.[77]

Moreover, the participation of NGOs, industry stakeholders, and the scientific community is critical for creating a governance framework that is both scientifically sound and socially acceptable.[78] NGOs, in particular, play a vital role in raising awareness of MG risks and advocating for stronger precautionary measures.[79] Article 14 of the London Protocol encourages such cooperation, but its effectiveness depends on the meaningful engagement of all stakeholders and the creation of mechanisms to facilitate this collaboration.

Regional Cooperation Mechanisms and Organisations in MG

Regional cooperation mechanisms play a pivotal role in the governance of MG activities. Article VIII of the LC encourages Contracting Parties to promote bilateral and multilateral agreements, including regional agreements, to prevent marine pollution by dumping, while Article 13 of the LP specifically encourages Contracting Parties to cooperate regionally to promote the effective implementation of the Protocol with respect to MG activities.

Article 123 of the United Nations Convention on the Law of the Sea (UNCLOS) further underscores the significance of regional cooperation among states bordering enclosed or semi-enclosed seas for managing marine resources, protecting the environment, and conducting scientific research.[80] States are encouraged to establish regional centres for marine technology research and information dissemination to foster cooperation in these areas.[81]

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[76] Harald Ginzky, 'Marine geo-engineering' in *Handbook on Marine Environment Protection: Science, Impacts and Sustainable Management* (2018) 997.

[77] Karen N Scott, 'Geoengineering and the marine environment' in *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing 2015) 451.

[78] Harriet Harden Davies, 'The Regulation of Marine Scientific Research: Addressing Challenges, Advancing Knowledge' in *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2015) 212.

[79] Ibid

[80] Article 197 UNCLOS

[81] Article 276 UNCLOS

Regional cooperation is vital for managing marine ecosystems that cross multiple jurisdictions. It ensures the harmonization of policies, the sharing of best practices, and the creation of unified environmental standards, particularly in DSM and MG, where actions in one area can affect neighboring regions.[82] A key example is the United Nations Environment Programme's (UNEP's) Regional Seas Programme, which helps countries sharing common seas to collaborate on environmental protection.[83] This program has led to Action Plans and Protocols in various regions such as the Mediterranean, Caribbean, and West and Central African regions, addressing specific environmental challenges.

In MG, regional cooperation is crucial to prevent unintended consequences that could harm entire marine ecosystems. Agreements like the Barcelona Convention[84] provide a legal framework for regulating activities, including MG, and establish guidelines, such as the Protocol on Integrated Coastal Zone Management (ICZM)[85], for the sustainable management of coastal and marine resources.

Regional organizations play a crucial role in governing deep-sea mining DSM and MG activities by providing the institutional framework for regional cooperation and ensuring the implementation of international and regional agreements at the national level. Here, organizations like the Association of Southeast Asian Nations (ASEAN) through its Agreement on the Conservation of Nature and Natural Resources facilitates regional cooperation on environmental issues, essential for managing geoengineering activities.[86]

6. Conclusion

MG technologies offer potential for climate change mitigation but come with significant risks and uncertainties. These technologies present distinct environmental, social, and legal challenges that require thorough assessment before deployment. Despite existing international environmental law providing some regulatory starting points, there are substantial governance gaps, especially due to the absence of specific provisions or treaties addressing these emerging technologies. The evolving nature of geoengineering complicates governance, necessitating adaptive regulatory frameworks that address risks, incorporate ethical considerations, and ensure public participation. Key legal principles like the "no harm" rule from customary international law obligate states to prevent transboundary environmental damage and conduct thorough Environmental Impact Assessments, including in international waters. UNCLOS incorporates customary international law to regulate maritime activities, including MG, with a focus on environmental protection. It mandates states to prevent and control marine pollution, including harmful substances from geoengineering, though some activities remain ambiguously regulated. UNCLOS requires cooperation, environmental assessments, and continuous monitoring, but its guidelines lack specificity, particularly for geoengineering

[82] Alexandrya Herman, 'Assessing the Ocean Governance Frameworks Underpinning Deep Sea Minerals Development in the Cook Islands' (2019) *Marine Law Journal* 122.

[83] Maria Adelaide Ferreira and others, 'A role for UNEP's Regional Seas Programme under the post-2020 global biodiversity framework' (2022) 136 *Marine Policy* 104.

[84] *Convention for the Protection of the Mediterranean Sea Against Pollution* 1976, available at <https://www.unep.org/unepmap/who-we-are/contracting-parties/barcelona-convention-and-amendment> accessed 11 September 2024.

[85] *Protocol on Integrated Coastal Zone Management* 1992, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:034:0019:0028:EN:PDF> accessed 11 September 2024.

[86] Sarah Yen Ling Tan and Hanim Kamaruddin, 'Environmental challenges within ASEAN: Contemporary legal issues and future considerations' in *ASEAN Post-50: Emerging Issues and Challenges* (2019) 155.

impacts. The CBD emphasizes biodiversity protection but offers vague guidance on EIAs for geoengineering. The LC (LC) and LP (LP) regulate marine pollution, with the LP adopting a precautionary approach. However, their scope is limited, particularly for unregulated geoengineering methods. The governance of MG faces significant challenges due to the lack of a specific international treaty, fragmented regulations, and evolving technologies, necessitating adaptive governance mechanisms and further legal instruments to ensure comprehensive oversight.

International organizations such as the IMO play central roles in shaping the legal and regulatory landscape in MG. These bodies are tasked not only with facilitating the exploration and exploitation of marine resources but also with ensuring the protection of the marine environment from the potentially harmful effects of these activities. The IMO's role in regulating MG highlights the evolving nature of ocean governance in response to emerging technological challenges. The IMO contends with regulatory gaps and ambiguities, particularly in addressing emerging geoengineering techniques. The organization's reliance on member states for enforcement leads to inconsistent global implementation of its regulations, which can undermine the effectiveness of its governance framework. Moreover, the IMO faces the delicate task of balancing innovation in MG technologies with the precautionary principle, a challenge compounded by the rapid pace of technological advancements and the need for broader international collaboration.

Regional cooperation mechanisms and organizations complement these international efforts by fostering collaboration among neighboring states, harmonizing policies, and ensuring the implementation of international agreements at the national level. These regional frameworks are essential for managing the transboundary nature of marine ecosystems and for addressing the unique environmental challenges posed by MG activities. The governance of MG requires continuous adaptation and collaboration at both the international and regional levels. The effectiveness of this governance framework depends on the ability of international organizations such as the IMO to address existing challenges, close regulatory gaps, and enforce environmental protections while fostering scientific innovation.

The Effect of Oaths on the Administration of Justice in England

Dr Olugbenga Damola Falade*

Abstract

The administration of justice in England relies heavily on the integrity and truthfulness of witness testimonies, with oaths playing a crucial role in ensuring these values. Oaths are designed to underscore the seriousness of providing truthful testimony, supported by legal statutes such as the Oaths Act 1978, which allows for both religious oaths and secular affirmations. While traditionally seen as a vital mechanism for ensuring honesty, the effectiveness of oaths is increasingly questioned. Critics argue their impact is limited due to psychological, cultural, and practical factors. This work examines the effect of oaths in the English judicial system, exploring their significance, limitations, and implications. Moral theory was adopted, and doctrinal methodology was used. The study found that despite challenges, oaths remain accepted and essential in maintaining public confidence in the justice system and the perceived legitimacy of judicial outcomes in England. The study made several recommendations, including stricter enforcement of perjury laws, and increased public legal education.

Keywords

Oath, Administration of justice, Oaths Act, and Religion

1. Introduction

'I swear by God Almighty that the evidence I shall give shall be the truth, the whole truth and nothing but the truth'. In an alternative, 'I, do solemnly, sincerely and truly declare and affirm' that the evidence I shall give shall be truth, the whole truth and nothing but the truth.'[1] This phrase is being recited by the witness in England's Courts whenever they are called to give evidence.[2] This is an oath that has long been a fundamental component in the administration of justice, serving as a solemn promise or affirmation, to speak the truth, or perform a duty faithfully. An oath can generally be defined as 'a promise of a heavy moral weight to abide by certain principles, made orally and publicly along with certain symbolic gestures, whereby the oath-taker puts his/her integrity on the line and expresses a willingness to undergo a penalty if he/she breaks his/her words.'[3]

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[1] Oath Act 1978, section 1(1) and 6(1).

[2] Ryan T McKay, Will Gervais and Colin J Davis, 'So Help Me God'? Does Oath Swearing in Courtroom Scenarios Impact Trial Outcomes? (2023) 114 (4) *British Journal of Psychology* 991.

[3] Thaddeus Metz, 'The Ethics of Swearing: The Implications of Moral Theories for Oath-Breaking in Economic Contexts' (2013) 71(2) *Review of Social Economy* 228.

The concept of oaths dates back to ancient times, with origins in religious and cultural practices where invoking a deity was believed to ensure truthfulness.[4] Its uses in legal and judicial proceedings have deep historical roots and have continued to play a significant role in ensuring the integrity and reliability of testimonies, as well as the accountability of officials. It shows people's belief in their magical abilities, and within that belief system, it served as a sensible social control mechanism.[5] Certain legal systems, including those of China, Slavidom, and numerous Swiss states, have either never had an oath or have had it completely or largely abandoned.[6] In England, the use of oaths in legal proceedings can be traced back to the early medieval period, where they were employed to settle disputes and ensure the credibility of testimonies.[7] During this time, religious beliefs heavily influenced oaths, with individuals swearing by God or on sacred relics to tell the truth.[8] This practice was rooted in the belief that divine retribution would follow perjury.[9] As the common law system developed, oaths became formalised as a procedural requirement in judicial proceedings. The introduction of jury trials in the 12th century further entrenched the use of oaths, as jurors, witnesses, and officials were required to swear to their duties.[10]

Over the centuries, legal reforms have shaped the application of oaths in the justice system of England. The Oaths Act of 1888 standardised the form and administration of oaths, allowing for affirmations as an alternative for those who objected to swearing on religious grounds. The Oath Act 1978 adapts the use of oaths to accommodate diverse beliefs and ensure inclusivity within the judicial system.[11] Section 7 of the Oaths Act 1978 nullified Section 8 of the Administration of Justice Act of 1977 and previous Oaths Acts. There were calls for the abolishment of oaths in the English legal system, but they failed.[12]

Various types of oaths are administered depending on the context and role of the individual in the current English legal system. In addition to witness oaths, Jurors swear an oath to faithfully try the case and deliver a true verdict according to the evidence presented, while public officials, including judges and law enforcement officers, take oaths of office to perform their duties with integrity and impartiality. As this work explores the current application and impact of oaths on the administration of justice in England, it limits itself to witness oaths. The context of the witness oath is examined in the next section.

2. Oaths of the Witnesses

Witness oaths are the cornerstone of judicial proceedings, ensuring that testimonies provided in court are truthful and reliable.[13] The oath serves as a solemn reminder to the witness of their social duty to be truthful. Under the penalty of a perjury accusation, social commitment becomes a legal requirement; if the oath is religious and beyond an affirmation, it becomes a

[4] Britannica, The Editors of Encyclopaedia, "oath" *Encyclopedia Britannica*, (2023) <https://www.britannica.com/topic/oath-religious-and-secular-promise> accessed 1 August 2024.
[5] Paul Cavill, 'Perjury in Early Tudor England' (2020) 56 *Studies in Church History* 182.
[6] Helen Silving, 'The Oath' (1959) 68(7) The Yale Law Journal 1376.
[7] Paul Cavill, 'Perjury in Early Tudor England' (2020) 56 *Studies in Church History* 182.
[8] Ibid, 185.
[9] Ibid, 184.
[10] Mike Macnair, 'Vicinage and the Antecedents of the Jury' (1999) 17(3) *Law and History Review* 537.
[11] Oath Act 1978.
[12] Robert Pigott, 'Motion to End Bible Oaths in Court Defeated' (19 October 2013. BBC News) <https://www.bbc.co.uk/news/uk-24588854> accessed 2 August 2024; Royal Holloway University of London, 'Jurors Could View Defendants Who Don't Swear By God in Court as more Likely to be Guilty' (2023) <https://www.royalholloway.ac.uk/about-us/news/jurors-could-view-defendants-who-don-t-swear-by-god-in-court-as-more-likely-to-be-guilty> accessed 2 August 2024.
[13] Helen Silving, 'The Oath' (1959) 68(7) *The Yale Law Journal* 1376.

religious obligation.[14] Before providing testimony, witnesses in court must swear an oath or make an affirmation that they will speak the truth. Every witness's written or oral testimony is generally required to be sworn in, both in criminal and civil proceedings.[15] The UK Criminal Procedure Rules 2020 states that the witness must take an oath or affirm.[16]

To respect the diverse beliefs of witnesses, courts provide various options such that witnesses can choose to swear on a religious text that aligns with their faith and affirmations.[17] The administration of witness oaths involves a standardised procedure designed to ensure solemnity and clarity. Typically, a court official or the judge administers the oath, asking the witness to raise their right hand and repeat the oath while the witnesses may swear on a religious text such as the Bible, Quran, or another sacred book in their hands, depending on their faith. For individuals who do not wish to take a religious oath, a secular affirmation is offered as an alternative, carrying the same legal weight. The primary purpose of witness oaths is to uphold the integrity of the judicial process. Witnesses affirm their commitment to providing truthful information, with the understanding that false testimony can lead to legal consequences. Oaths serve as a formal mechanism to hold witnesses accountable for their statements, deterring dishonesty and perjury. In addition, it imposes both a legal and moral obligation on the witness to tell the truth, reinforcing the importance of honesty in judicial proceedings. Taking an oath has significant legal implications. If a witness knowingly provides false testimony under oath, they can be charged with perjury, a serious offence since the early development of English law.

The UK Perjury Act 1911 is the primary statute governing perjury in England, outlining the legal definition and penalties for providing false testimony under oath. The Perjury Act 1911 states that any person lawfully sworn as a witness who wilfully makes a false statement on a material matter is guilty of perjury and liable to imprisonment for up to seven years.[18] Punishment for perjury will serve as a deterrent, encouraging witnesses to provide truthful testimonies. Also, the testimonies given under oath are generally deemed more credible by courts and juries. It has been found that the party who does not swear by God Almighty runs losing their case in the hands of the jurors who swear before handling their case.[19] Statements made under oath are admissible as evidence, whereas unsworn statements may be subject to stricter scrutiny or exclusion. A conviction or judgement based on non-sworn evidence is liable to be declared null and void.[20]

There are lot of criticism against oath-taking. One of which is that in contemporary times, a witness oath may be perceived as a mere formality rather than a binding commitment, potentially diminishing its impact. The next section will discuss the criticisms and challenges of Oath-taking in the court.

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[14] Dennis Kurzon, 'Telling the Truth: The Oath as a Test of Witness Competency,' (1989) 2(1) *International Journal for the Semiotics of Law,* 49.
[15] Practice Direction 32-Evidence; Criminal Justice Act 1967, section 9.
[16] ibid, sec 24.4 (3)
[17] For the atheists, agnostics, and those who prefer a non-religious option.
[18] The UK Perjury Act 1911, section 1(1).
[19] Ryan McKay et al, 'So Help Me God'? Does Oath Swearing in Courtroom Scenarios Impact Trial Outcomes? (2023) 114 (4) *The British Journal of Psychology* 991.
[20] *R v Marsham, ex parte Pethick Lawrence* (1912) 2 KB 362.

3. Criticisms and Challenges

Despite their importance, the use of oaths in the administration of justice faces several criticisms and challenges. Some critics argue that the effectiveness of oaths in ensuring truthfulness and integrity is limited.[21] While oaths have traditionally been seen as a vital mechanism for ensuring the truthfulness and integrity of witness testimony in judicial proceedings, human behaviour is complex and often influenced by situational factors rather than moral absolutes. It can be argued that witnesses may lie under oath due to external pressures, fear or personal gain, despite the formal commitment to tell the truth. For instance, if a child is a strong support in his parent's life, the parent may find it difficult to give truthful evidence under oath. Likewise, a loving husband may want to use his evidence to save his loving wife from being sentenced to prison, and a witness may lie under oath due to fear of reprisal. Is it not morally right to abstain from taking such an oath? Even if a witness wishes to abstain, the evidence will not be acceptable without taking an oath. Can it be argued that an oath should not be a strict rule before evidence will be acceptable in court? If yes, where will the credibility of the witness evidence lie? This has caused the administration of oaths to become a requirement rather than a matter of personal conviction.

Also, it can be argued that there is no adequate protection for a witness who is not a child or vulnerable. This situation will affect the witness testimony when the witness thinks of the aftermath of the given testimony. For instance, if there is a criminal matter, the accused or his family may attack the witness for giving truthful evidence under oath. There is no special provision of law for the protection of such people although there is a standard of care for witnesses to a crime or incident in England.[22] As a child under 17 in England is protected as a witness in certain cases,[23] The protection can be extended to certain people who are afraid of reprisal if they give truthful evidence under oath.

In England, credible and reliable witnesses are expected to be called to give evidence in courts,[24] and taking an oath is seen as a sign of credibility. Professor Ryan McKay states that 'If taking the oath is seen as a sign of credibility, this could lead to discrimination against defendants who are not willing to swear by God. There are a lot of faithless people. Research states that 45% of British described themselves as either atheists or non-religious.[25] The call for what one does not believe in will not make a change in his readiness to speak the truth in the court. An earlier proposal to abolish the oath in England and Wales was defeated when opponents argued that the oath strengthens the value of witnesses' evidence. This is ironic, as it seems to acknowledge that swearing an oath may give an advantage in court.'[26]

Another source of criticism of the oath is the widespread decline in religious belief, which frequently reduces the swear based on the Bible and other holy religious books to a farce. The witness's belief is at the centre of the debate over the requirements for a successful oath-taking performance. As a religious act, the oath seems to have little significance these days. As a result,

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[21] James Bowman and Jonathan P West, 'Pointless or Powerful: The Case for Oaths of Office (2020) 52(8) Administration and Society 1147.
[22] UK Government, *The Witness Charter: Standard of Care for Witnesses in the Criminal Justice System* (2013, Ministry of Justice).
[23] UK Youth Justice and Criminal Evidence Act 1999, section 21.
[24] Regina v Camberwell Green Youth Court (2015) UKHL 4.
[25] Anna Fleck, 'The UK's Faithless' (2022) Statista <https://www.statista.com/chart/5457/the-uks-atheist-strongholds/> accessed 18 August 2024.
[26] Humanists UK, 'Calls for Ends to Oaths in Court as Study Finds Jurors Biased Against The Non-Religious' (2023) <https://humanists.uk/2023/04/04/call-for-end-to-oaths-in-court-as-study-finds-jurors-biased-against-the-non-religious/> accessed 11 August 2023.

opinions regarding the oath may be seen as 'a sign of the times.'[27] Also, in a multicultural society, the traditional religious connotations of oaths may not resonate with all individuals, potentially undermining their significance. The psychological impact of taking an oath may vary among individuals, with some viewing it as a mere formality rather than a solemn commitment. For instance, it can be contended that a Muslim witness who was supposed to swear on the Holy Quran was sworn on the Holy Bible in the UK court,[28] holds oath as a mere formality rather than solemn commitment. The administration of oaths can also give rise to legal and ethical dilemmas. While oaths are intended to deter perjury, prosecuting individuals for false testimony can be complex and challenging, requiring substantial evidence of intentional deceit.[29] It can be argued that perjury ought not to be punished as God is supposed to be in charge. It was stated that 'very ancient law seems to be not quite certain whether it ought to punish perjury at all. Will it not be interfering with the business of the gods?'[30]

Balancing the requirement for oaths with respect for freedom of belief and expression can be delicate, particularly when accommodating secular affirmations. For individuals who do not hold strong religious or moral convictions about oath-taking, the act may lack personal significance, thereby reducing its impact. In addition, in a secular and diverse society, the traditional religious connotations of oaths may not resonate with everyone, leading to a perception that the oath is an outdated formality. It can be deduced that the Oath taken is based on the personal conviction and perspective of individual witnesses. The question is what are the factors that determine the perspective of individual witnesses?

4. Factors Influencing the way Witness uphold Oaths

The witness's perception of oaths as either solemn commitments or mere formalities can significantly impact the integrity and effectiveness of judicial proceedings. Various factors influence how witnesses perceive oaths, ranging from individual beliefs and attitudes to societal norms and judicial practices. This section explores these factors in detail, examining their implications for the justice system and suggesting ways to address potential issues.

4.1. Religious Convictions

According to Shuman and Hamilton, the religious context of an oath can significantly impact its seriousness.[31] For deeply religious individuals, swearing an oath on a sacred text invokes a higher moral authority, reinforcing the commitment to truth-telling. Secular individuals may view oaths differently, perceiving affirmations as equally binding or viewing both as formalities. In the UK case of R v. Registrar General, ex parte Segerdal,[32] the court considered the religious context of oaths, highlighting the importance of accommodating different belief systems to ensure the oath's solemnity and significance. Since knowledge, opinion, and evidence-based

[27] Dennis Kurzon, 'Telling the Truth: The Oath as a Test of Witness Competency,' (1989) 2(1) *International Journal for the Semiotics of Law,* 49.
[28] Christopher Howse, 'The Trouble with Swearing an Oath on A Holy Book' (2015, the Telegraph Newpaper) <https://www.telegraph.co.uk/comment/11455853/The-trouble-with-swearing-an-oath-on-a-holy-book.html> accessed 18 August 2024; Neil Docking, 'Robbery Trial Collapses after Muslim Witness Swore Oath on the Bible instead of the Koran' (2015, Mirror Newspaper) < https://www.mirror.co.uk/news/uk-news/robbery-trial-collapses-after-muslim-5239165> accessed 18 August 2024.
[29] R v Dunn (2011) EWCA Crim 3183.
[30] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward 1* (Cambridge University Press, vol 2 1952) 541.
[31] Daniel W Shuman and Jean A Hamilton, 'Jury Service- It may Change Your Mind: Perception of Fairness of Jurors and Nonjurors' (1992) 46 *SMU Law Review* 449.
[32] [1970] 2 QB 697.

decision-making are shaped by the era of communications, religion is losing ground in the UK.[33] Secularism is taking hold faster than it should be because young people are becoming more and more unwilling to accept traditional beliefs.[34] According to a Kings College London study, fewer than half (49%) of British people indicated they believed in God in 2022, compared to 75% in 1981.[35] The continued decline in religious belief will make the oath taken mean nothing to most witnesses.

4.2. Personal Integrity and Ethical Standards

Individuals with high personal integrity are more likely to take oaths seriously, regardless of their religious or secular nature, as their commitment to honesty is internally driven.[36] One could argue that honest witnesses are those who have a clear conscience. A person's moral sense of right and evil, perceived as a guide to their behaviour, is called conscience.[37] Therefore, it is possible to conceptualise conscience as only a metaphysical compass that exercises judicial authority over an individual's behaviour. A person's opinions or convictions regarding whether behaviours are ethically proper or wrong are intimately linked to their conscience in day-to-day living.[38] For instance, it can be contended that most government workers give truthful evidence under oath for fear of penalty. On the other hand, persons who have no recognised position in society may give false statements under oath for fear of repercussions and personal gains. The Perjury Act 1911 (UK) underscores the legal obligation to truthfulness under oath, providing a framework for holding individuals accountable irrespective of their personal beliefs.

4.3. Judicial and Procedural Context

The attitude of the court when an oath is being taken speaks volumes to the importance the witness will take into it. Tyler argues that the formal administration of legal procedures, including oaths, can enhance their legitimacy and perceived seriousness among participants.[39] A courtroom witness takes an assertory oath. An assertory oath is a serious declaration that a statement is true. If the witness on oath makes a false statement, they risk perjury. It can be contended that merely reading the usual '…promise to speak the truth, the whole truth, nothing but the truth...' is not enough to bring solemnity to the administration of the oath. The way judges and court officials emphasise the importance of oaths can significantly influence how seriously they are taken by witnesses.[40] The Equal Treatment Bench Book advises judges to clearly explain the significance of the oath to ensure that all witnesses understand its importance and the consequences of perjury.[41]

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[33] Burt Flannery, 'Why Religion is in Decline' <https://humanists.uk/humanistlife/why-religion-is-in-decline/> accessed 18 August 2024.
[34] Ibid.
[35] King's College London, 'God, Heaven and Hell, and Life after Death: Data Reveals UK's Low Religious Belief Compared with Other Nations (2023) < https://www.kcl.ac.uk/news/god-heaven-and-hell-and-life-after-death-data-reveals-uks-low-religious-belief-compared-with-other-nations> accessed 18 August 2024.
[36] Aldert Vrij, *Detecting lies and Deceit: Pitfalls and Opportunities* (2nd Edn, 2008 Wiley series in the Psychology of Crime, Policing and law)488.
[37] Oxford Dictionary, 'Conscience' (2013, Oxford University Press).
<http://oxforddictionaries.com/definition/english/conscience?q=conscience.>
[38] Sulmasy Daniel P, 'What is conscience and Why is Respect for It So Important?' (2008) 29(3) *Theoretical Medicine and Bioethics* 135.
[39] Tom R Tyler, *Why People Obey the Law* (1990, Yale University Press) 7.
[40] Stanley Milgram, *Obedience to Authority: An experimental View (*1974, Haper and Row.)
[41] <https://www.judiciary.uk/wp-content/uploads/2023/06/Equal-Treatment-Bench-Book-July-2024.pdf> accessed 2 August 2024.

4.4. Cultural Norms and Values

Cultural norms and values significantly influence how legal procedures, including oaths, are perceived and respected within different societies.[42] The value given to oath taken in a society will determine the truthfulness of a witness during trial. The British core values are 'democracy, the rule of law, individual liberty, and mutual respect and tolerance of those with different faiths and beliefs.'[43] This value is diminishing and the Government has called on schools to promote British values.[44] It can be argued that the oath is recognised as part of the value system of England but the value attached to it by the British residents is diminishing as the number of believers is reducing. People take oaths as it is mandatory and because of the consequences attached to it. The fear of God's punishment for giving false evidence under oath in court is fading away as there is an increase in the number of Britons who do not believe in God's existence.

4.5. Public Awareness and Education

Public education about legal procedures enhances the witness's legitimacy and effectiveness.[45] Public understanding of the consequences of perjury can reinforce the seriousness of oaths. In examining the extent of religious belief in the UK as discussed above, it was found that there is a reduction in the number of people that believe in religion. Although their disbelief may lead to more false testimony under oath, the public's awareness of the consequences of providing false testimony under oath will lead to a rise in the number of true testimonies. Public awareness of contempt of court and perjury will prevent many people from giving false evidence on oath. The moral and legal importance of oath-taking needs to be taught in schools to instil in the students' reasons why truth must be spoken during trial in court not minding the consequences for the public or personal gains they may bring. UK residents should be informed that making a false statement under oath in court is a criminal offence and should be aware of the consequences. [46] The public awareness of the legal consequences of false testimony under oath is a significant factor in the court's deliberation on the reliability of witness statements.

4.6. Institutional and Structural Factors

Consistency in legal procedures is critical for maintaining perceived legitimacy.[47] Standardised administration of oaths ensures that all witnesses are treated equally and understand the importance of their commitment. The Civil Procedure Rules 1998 (UK) Part 32 provides guidelines for the administration of oaths, ensuring consistency and formality across judicial proceedings. The case of Regina v. Hughes [48] highlighted the importance of consistent procedures in administering oaths to maintain their credibility and the integrity of the judicial process. It can be argued that most oaths do not have the force of religion in court again. It is just a process that the law is required to follow before evidence can be credible and accepted

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[42] Geert Hofstede, 'Cultural Dimensions in management and Planning' (1984) 1 *Asia Pacific Journal of Management* 81.

[43] Buckinghamshire New University, 'Example of British Values' <https://www.bucks.ac.uk/study/apprenticeships/safeguarding-student-welfare/examples-british-values> accessed 18 August 2024.

[44] UK, 'Guidance on promoting British values in School Published' (2014) <https://www.gov.uk/government/news/guidance-on-promoting-british-values-in-schools-published> accessed 18 August 2024; Michael Gove, 'All Schools Must promote 'British Values', says Michael Gove' (2014, The Guardian) < https://www.theguardian.com/politics/2014/jun/09/michael-gove-says-all-schools-must-promote-british-values-after-trojan-horse-reports> accessed 18 August 2024.

[45] Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (2002, Russell Saga Foundation) 264.

[46] Halsbury, *Laws of England*, Fourth Edition, Vol 11(1) para 299.

[47] Cass R Sunstein, 'Social Norms and Social Roles' (1996) 96 Columbia Law Review 903.

[48] [1985] AC 379.

by the court. The perceived likelihood of enforcement and punishment for perjury significantly influences the seriousness with which witnesses take their oaths.[49] The Perjury Act 1911 (UK) provides stringent penalties for false testimony, reinforcing the seriousness of oaths.

The government institutions especially the courts have the responsibility to ensure that the mind or conscience of the witness is spoken into before the administration of oaths. And the oath ought not to have a specific or stereotyped statement, '….all that I will say shall be the truth nothing but the truth, so help me God. This makes it more casual and everyday talk which one may say has lost its significance. There should be a statement that will bring the fear of consequences if the truth is not spoken.

4.7. Technological and Modernization Challenges

Modern developments present new challenges for the administration of oaths. The rise of remote testimonies via video conferencing complicates the administration of oaths, raising questions about how to ensure solemnity in a virtual setting. It can be argued that maintaining the solemnity of oaths in virtual environments requires careful adaptation of traditional practices. The Federal Rules of Civil Procedure allows for testimony by remote means but emphasises that the same formalities, including oaths, must be observed to ensure the integrity of the process.[50] The person taking the oath is not required to be physically present with the person giving the oath under the Commissioner for Oaths Act 1889 or the Oaths Act 1978. Nonetheless, an affidavit must conclude with the person giving the oath signing it and stating that it was made "before me." The Statutory Declarations Act 1835 stipulates that a statutory statement must be made "before" the person in charge of administering it. This implies that when the oath is taken, the deponent and the person giving it must be present in the same location. Particularly during the COVID pandemic, the question of whether an oath can be taken remotely via a well-known video conferencing platform (such as Zoom, Skype, or Google Meet) has been raised. Similar to this, the UK First-tier Tribunal determined in its preliminary ruling that there is a substantial chance of success for the contention that a deed seen by an attorney via videoconference was not duly performed.[51] There is no clear law on this issue but one can argue that oaths can be made through video conferencing platforms as the witness and the commissioner of oaths are on the same platform. The commissioner can see the witness and the documents being signed by the witness while the commissioner of oath can sign the documents also online. The UK Government guidance on video hearing urges the witness to 'be ready at least 20 minutes before the hearing and make sure you have your preferred holy book or scripture to swear an oath on (if applicable).'[52] This can be held on to as a government directive on the issue of oath, but law or clear regulation must be put in place to avoid any ambiguity.

Also, the challenges of ensuring authenticity and formality in digital processes, including the administration of oaths.[53] The Electronic Communications Act 2000 (UK) provides a framework for the use of electronic signatures and digital authentication in legal processes.

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[49] Paul H Robinson and John M Darley, 'Does Criminal law Deter? A Behavioural Science Investigation' (2004) 24(2) Oxford Journal of Legal Studies 173.
[50] Rule 43(a).
[51] Man Ching Yeun v Landy Chet Kin Wong [2019] UKFTT 2016/1089.
[52] UK Government, Guidance: What to Expect When Joining a Telephone or Video Hearing' (2020) < https://www.gov.uk/guidance/what-to-expect-when-joining-a-telephone-or-video-hearing> accessed 18 August 2024.
[53] James Katz and Ronald E Rice, *Social Consequences of Internet Use. Access, Involvement, and Interaction* (2002, The MIT Press).

The oath is a thing of mind and conscience. The perception of witness oaths as mere formalities can have significant implications for the justice system, if the mind and the conscience of the witness have been filled with any of the reasons stated above, the perception of the witness towards oath will be formal and not solemn. Such an oath may not be effective as it is not from the sincere mind. If oaths are widely perceived as ineffective, this can erode public confidence in the judicial process and the reliability of witness testimonies. It can also undermine the credibility of witnesses, potentially affecting the outcomes of cases. The effectiveness of perjury laws depends on the perceived seriousness of oaths. If oaths are not taken seriously, the deterrent effect of perjury laws may be weakened. The overall integrity of judicial proceedings relies on the truthfulness of testimonies. Perceptions of oaths as formalities can compromise this integrity.

5. Recommendations

Administration of oath is an important aspect of adjudication, and its removal may not do any good to the administration of justice in England. There are better ways to reform the administration of oaths to achieve the truthfulness of evidence. Firstly, enhancing the administration of Oaths can bring credibility to the evidence of the witness. Ensuring that oaths are administered in a formal, solemn manner can reinforce their seriousness. Judges and court officials should emphasise the importance and legal implications of taking an oath. The consequences of false evidence, 'perjury/contempt of court' should be emphasised more than God's name during the administration of oath in court.

Also, there should be a way to resuscitate British values, although the UK Government is calling for schools to teach these values, it should be part of the curriculum from nursery school to higher education. This will imbibe in the minds of the students the culture of tolerance and truthfulness in court and everywhere. In addition, public education campaigns can help raise awareness about this value, the significance of oaths, and the legal consequences of perjury. Providing clear explanations to witnesses about the importance of their oath can enhance its perceived weight. Everyone should be aware that an injustice to an innocent soul is an injustice to the entire society. Understanding and offering a range of religious texts and secular affirmations can ensure that oaths are meaningful for all witnesses. Training court officials in cultural sensitivity can help accommodate the diverse beliefs and attitudes of witnesses.

In addition, modernising the administration of oaths to leverage technology can help address contemporary challenges. Developing protocols for administering oaths in virtual settings, including video conferencing, can ensure that the solemnity and legal significance of oaths are maintained in remote testimonies. Also, the implementation of digital authentication methods for oaths, such as electronic signatures and secure digital platforms, can help ensure the legitimacy and enforcement of oaths in a digital legal environment.

Also, enforcing perjury laws is essential to preventing false testimony, preserving the fairness of legal procedures, and preserving public trust in the legal system. The seriousness of perjury can be reinforced by strong enforcement procedures and well-publicised cases, even in the face of obstacles like limited resources and complicated evidence. The legal system can safeguard the credibility of witness testimony and the general integrity of judicial procedures by addressing these issues and ensuring consistent enforcement.

6. Conclusion

England's justice system is known for its long-standing traditions, rigorous procedures, and robust legal framework, which ensure fairness and the rule of law. A key component of this system is the administration of oaths, a critical element that upholds the integrity, fairness, and seriousness of legal proceedings. Whether in court or public office, the act of taking an oath serves as a powerful reminder of the responsibilities and ethical standards expected of individuals within the legal framework. This tradition continues to be an essential part of ensuring justice is delivered effectively and impartially. While the administration of oaths faces several criticisms and challenges, removing it from the justice system will not add any value. However, addressing issues relating to oaths taken through educational initiatives, inclusive practices, standardised procedures, and technological advancements can enhance their effectiveness and credibility. By doing so, the justice system can uphold the importance of truthfulness and accountability, maintaining public trust in the judicial process.

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

Arjan Singh*

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

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[1]Lord Bingham, '*The Rule of Law,*', The Cambridge Law Journal, Volume 67, March 2007, p 79.
[2]Zilis. M, *how identity politics polarises rule of law opinions,* May 2020, Political Behaviour, 179.
[3]Hayek, F., *The Decline of the Rule of Law,* Mises Institute, April 1953, <https://mises.org/library/decline-rule-law>
[4]Endicott. 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.
[6]Council of Europe, Rule of law, 2011, Venice Commission, Available at, Rule_of_law (coe.int)
[7]Lexis Nexis., *'The Rule of law-The Equation,'* <https://www.lexisnexis.co.uk/about-us/rule-of-law> Accessed 10 Jan. 2024.
[8]The Universal Declaration of Human Rights Article 1 - *All human beings are born free and equal in dignity and human rights*, 1948
[9]Harris, K., *'Florida's Role as Part of the Americas'* Florida Journal of International Law, Volume 13, Issue 1, Article 1, 2000.
[10]Smith, D., *British Civil Liberties and the Law*, Political Science Quarterly, Volume *101,* Issue 4, 2018, pp. 637–660.
[11] Tajfel, H., *An integrative theory of intergroup conflict*. Psychology, Volume 14, Number 12, December 2023, pp. 33-37,
[12] Chua, A., '*Tribal World: Group Identity Is All*' Foreign Affairs Volume 97 Issue 25 August 2018
[13] Fukuyama, 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] Acceptance[17] and Virtue[18] 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

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[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 1919[22] 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

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[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 legislations 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 porn [35] 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

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[31]Hummel, 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

[33]Feldman. 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) - Www.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 Act [39] and Investigatory Powers Act [40] 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 OFCOM [47] 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 Agency[50] 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 10[53] 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 Carneige Trust in 2019[57] 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

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[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. 202 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]

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[64]The 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

[65]Big 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> 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

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[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 CPS[85] 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 2022[88] 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

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

[85] Crown 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 bills 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

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[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 1997[98] 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 GRA[100] which is of great similarity to the EU's anti-discrimination law.[101]

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[94] International 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-PSED-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.

Gender Recognition Reform Bill 2022

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 population[106] 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 advantages[109] 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

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[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 document[116] 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 dysphoria[121] 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,

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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)
127Fairbairn. 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 Psycology, 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

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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, Työläjärvi 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, Työläjärvi 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 BMA [144] 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 years[149] 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

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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.

145Ganesan 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 15B[152] 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 incompliance 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