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Dear Readers and Authors,

I am pleased to present the 3rd volume of the Bristol Law Review (BLR). This publication is the culmination of a yearlong undertaking by the editorial team. It has been my privilege to serve as Editor-in-Chief for the 2016 edition.

Each year, the BLR receives submissions from both undergraduate and postgraduate law students and strives to showcase exemplary work from law students at various stages of their academic career. As a publication, the BLR is committed to publish a law review that is representative of the many views and interests held by today’s aspiring legal scholars. I am grateful to the authors who have allowed us to share their work with our readers. Their contributions to the BLR have resulted in an insightful and engaging edition. It is my hope that the BLR will continue to grow as a forum for the discussion and exploration of diverse legal perspectives.

This year, the BLR has benefited immensely from the support we have received from the Law School. In particular I would like to thank Dr Jennifer Collins, our academic adviser, for her guidance. I would also like to take this opportunity to thank Professor Joanne Conaghan, our Head of School, for her support of this edition of the BLR.

Finally, I would like to express my gratitude to the editorial team whose hard work and dedication made this edition possible. I must also thank Giles Thompson, our Managing Editor, whose commitment to the BLR was instrumental to this edition’s success.

Sofia Brondino Zavalla
Editor-in-Chief, Bristol Law Review 2016
There is nothing more exciting than the study of law. How could it not be so? Law permeates every aspect of social life; there are few areas of human experience nowadays where law is not to some degree implicated. Is this a good thing? Perhaps not. However, the more complex our world becomes, the more pressing the challenges that confront us, the more we call upon law, rightly or wrongly, to assist. There are of course limits to law’s competencies in this respect and increasingly we are required to consider law, not by itself, but as part of a wider network of regulatory responses to social, economic and political problems. The days in which law was studied in splendid isolation from other disciplines are long over. This is not to say that there is nothing distinct about law as a body of knowledge or mode of study. To study law is to adopt a perspective, to cast a lens, which is recognisably grounded in the finest traditions of legal education: it is to be rigorous but flexible; imaginative but focused; attuned to theory but always with an eye to the practical. It is these kinds of intellectual attributes which legal study aims to develop and which law students strive to acquire, not in order to pass exams or to score high marks but because the academic study of law is of value in and of itself.

This is why initiatives such as the Bristol Law Review are to be nurtured and encouraged, providing a forum for students to explore law beyond the formal confines of the curriculum and to aspire to the highest standards of intellectual enquiry. In this issue can be found a number of engaging articles, selected both for their academic excellence and their appeal to a wide-ranging readership. Encompassing the public and the private, the local and the global, they do not shrink from tackling difficult issues which continue to attract controversy and defy easy resolution. And that is as it should be: enjoy!

Joanne Conaghan FAcSS
Professor of Law and Head of School, University of Bristol
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SOCIAL MEDIA AND FREEDOM OF EXPRESSION IN THE WORKPLACE: IS THE LAW AND PRACTICE IN THE UK FIT FOR PURPOSE?

Dorcas Seah

Social media has become an integral part of many of our lives and its use often extends into the workplace. Issues however arise when employers’ rights to safeguard their reputation and other business interests conflict with workers’ rights to freedom of expression. The focus of this essay is on “work-related” expression an area most likely to engender employer concern and be subject to control and sanction. Firstly I examine the value of freedom of expression, building a case for its protection using both normative and pragmatic arguments. In light of this, I critically examine the adequacy of the law and practice in the UK in safeguarding workers’ Article 10 rights to freedom of expression on social media, arguing that it lacks sensitivity to the inequalities of the employment dynamic, unduly prioritises business interests and crucially, in failing to adopt an enabling approach does not account for the positive nature of the right; it is thus unfit for purpose.

Keywords: social media, freedom of expression, Article 10, human rights, workers’ rights, employment, workplace, unfair dismissal, Employment Rights Act, Human Rights Act, proportionality

1. INTRODUCTION

Given massive developments in info-communication technology such as the availability of smartphones and widespread Internet access\(^1\), social media has gained incredible prominence and reach in the twenty-first century: Facebook, Twitter and Google+ collectively have 1.5 billion active users across the globe\(^2\), and Britons spend 62 million hours each day on social media platforms\(^3\). In the workplace, social media has arguably become the new “water-cooler” or “cigarette break” where workers banter, exchange ideas and network\(^4\). Companies also increasingly harness the potentials of social media for marketing and advertorial purposes\(^5\) making social media an inevitable element of working

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\(^5\) Unum (n 2).
life today. Against this backdrop, this essay seeks to examine the impact of social media on workers’ freedom of expression in the workplace and critically assess the current law and practice governing its use.

My discussion is organised into three sections. Firstly, I define “social media”, “workplace” and “freedom of expression”, providing justifications for my research focus and situating it in the wider literature. In the second section, I present the case for freedom of expression in the workplace, addressing both normative and pragmatic arguments to safeguard this right. I explore also employers’ competing interests in limiting workers’ freedom of expression notably to avoid reputational damage or vicarious liability. This examination of the tension between worker and employer interests bridges into the third section where I examine the adequacy of the current legal and regulatory framework in balancing these competing claims, arguing that it lacks sensitivity to the inequalities in the employment dynamic, unduly prioritises managerial prerogative and business interests over convention rights and crucially, fails to enhance worker voice; it is thus unfit for purpose.

2. DEFINITIONS AND JUSTIFICATION

A) Research Focus: defining key terms

Social media is defined as platforms where users can connect by creating and sharing content. It includes social-networking sites such as Facebook, LinkedIn and MySpace, blogs like the micro-blogging site Twitter, as well as video hosting sites such as YouTube. Given that material shared through these platforms is necessarily wide consisting of text, images and videos spanning diverse topics, I limit my discussion to expression in the “workplace”. While primarily referring to the physical work venue and activities taking place during working hours, my definition of the “workplace” extends beyond the spatial and includes off-work conduct with work-related content. This encompasses inter alia material about the company, employers, co-workers and employment conditions. Significantly, social media transcends physical boundaries being readily accessible both inside and outside the work venue thus rendering the physical workplace of limited importance. Case law also demonstrates that the consequences of social media expression are not determined by the physical location of the act. In Teggart v TeleTech UK Ltd, an employee was dismissed for an obscene Facebook post about a colleague made while at home, and it was emphasised (albeit obiter) in Otomewo v Carphone Warehouse Ltd that vicarious liability can arise despite conduct not strictly occurring at work. It is thus persuasive that content and not merely the venue of expression is significant; indeed “talking about [one’s] employer” even while away from work can hardly be considered “off-the-job”. As such, the “workplace” is

9 LD Lieber, ‘Social Media in the Workplace—Proactive Protections for Employers’ (Wiley Online Library 2011) <wileyonlinelibrary.com> 94.
10 [2012] NIIT 00704_11IT (Industrial Tribunal).
11 ET/2330554/2011.
defined here to encompass both the physical work venue and work-related content; these will hereafter be referred to collectively as “work-related” expression.

B) Justification for research focus: work-related expression on social media

Issues of freedom of expression play out in numerous contexts. However, it is in the area of work-related expression on social media where the conflict between employers’ and workers’ interests is most pronounced. Professor Bruce Barry identifies three key determinants of employer interest in workers’ behaviour namely “publicness” (potential reach of the material), “venue” (whether it arises within or outside the workplace) and “topic” (whether material concerns work and the company); expression in public settings, on work-related topics and occurring inside the workplace naturally engenders the most employer interest13. Drawing from this framework, I firstly submit that with social media, the “public” element is satisfied since Facebook alone boasts 1.35 billion active users14, and despite the presence of “privacy settings”, its content can easily be “copied and passed on” to a much wider audience (see Crisp v Apple Retail UK Ltd15 on Facebook; see Game Retail Ltd v Laws16 for a similar stand on Twitter). Indeed, employers are often notified of contentious online posts through workers’ social media “friends” (Crisp17 and Whitham v Ventura18) highlighting the extensive reach of and one’s lack of control over such material. Apart from “publicness”, my definition of work-related expression also encompasses Professor Barry’s criteria of “venue” and “topic” hence pinpointing an area of acute employer concern. Such concern often translates into strict monitoring of workers’ social media activity with half of UK employers completely banning its use in the workplace19 and swiftly acting on data collected to discipline or dismiss20 sometimes to the point of “over-react[ion]”21. Evidently, it is work-related expression on social media, where employers have both the capacity and incentive to restrict and threaten workers’ Article 10 rights22 that warrants close attention and discussion.

3. THE CASE FOR FREEDOM OF EXPRESSION IN THE WORKPLACE

Before evaluating the fitness of the current law and practice in navigating social media usage in the workplace (discussed in Section 3), one must consider the value of work-

15 ET/1500258/11.
16 UKEAT/0188/14.
17 Crisp (n 15).
18 ET/1810462/10.
22 Barry (n 13) 272
related expression. Such is of high “practical stakes” since the value attached to freedom of expression bears on our perception of how competing interests of workers, employers and wider society should be balanced.

A) Blurring boundaries between work and personal lives

The notion that a worker can have freedom of expression but only “after work, on his own time” and limited to topics unrelated to work is problematic. While such appears a reasonable compromise since work-related expression carries high risks for employers and workers are otherwise free to express themselves outside work-related areas, this view is simplistic. Firstly, the boundary between work and personal life has today become increasingly indistinct: technology gives workers flexibility to work from home and the use of personal devices in the workplace has also brought workers’ personal lives into the workplace. Indeed, a divorce of the two is illusory as shown in Niemitz v Germany (concerning Article 8 rights to privacy) where the European Court of Human Rights expressed that professional and personal activities are often “intermingled” and practically indistinguishable. Given these eroding boundaries, employers who are understandably apprehensive towards worker expression on social media are likely to adopt an expansive conception of what is work-related, potentially controlling and limiting workers’ freedom of expression even in their personal lives. Additionally, even if a clear distinction between the two were possible, considering that workers spend the bulk of their days and experience community in the workplace, it is “natural” and expected that work-related issues constitute part of their identity and are discussed in their private lives. As such, failing to safeguard work-related expression essentially deprives workers of free expression even in their personal lives, constituting an “unreasonable” and unjustifiable infringement of their Article 10 rights.

B) The “intrinsic” value of freedom of expression

Work-related expression is not only important for its inextricable link to the personal sphere. It is deserving of protection for its intrinsic value. Firstly, the status of man as a “sovereign and inviolable being” demands that he has autonomy over his thoughts and expressions, this being effectively the “only appropriate way to treat people with minds of

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24 Bruce Barry Speechless: The Erosion of Free Expression in the American Workplace (Berrett-Koehler Publishers Inc. 2007) 121.
27 ibid ¶29.
29 Barry (n 13) 278
30 TUC (n 21).
31 ibid
their own”34. As such, independent of context and content, freedom of expression being an inherently human right demands protection where to do otherwise would constitute an affront to human dignity and a “negation of man’s essential nature”35. However, Meiklejohn distinguishes between “belief” and expression (“speak[ing], writ[ing] and assembl[ing]”)36 arguing that the former is indeed inviolable whereas the latter can legitimately be restricted without compromising intrinsic human rights. Yet such a position overlooks the well-established psychological effects on an individual’s beliefs, conscience and attitudes that constant suppression of expression may engender37; belief and expression are interlinked. In fact, given man’s social nature, limiting the right to free expression to mere personal belief is to “misconstrue the value at stake”38 since central to man’s autonomy and self-realisation is his ability to engage and communicate with other human beings39 and to that end, expression is key. A further point illustrating the intrinsic value of Article 10 is that restricting free expression also threatens other fundamental rights40 notably the right to “establish and develop relationships with other human beings”, that being considered a subset of Article 8’s right to private life41, itself worthy of protection.

Establishing Article 10 as intrinsically valuable strengthens the case for its protection both generally and in work-related areas. Indeed, its fundamental nature is widely recognised, where freedom of expression is enshrined in the European Convention on Human Rights and applies even to ideas that “offend, shock or disturb” (Handyside v UK42). Yet arguing the protection of rights based solely on their fundamentality to the human condition43 ignores conflicting interests that must be balanced44: rights do not exist in a vacuum and indeed Article 10 is not an unqualified right. Indeed, express provisions are made for its restriction in the ECHR. In the employment context, conflicting interests include employers’ legitimate right to safeguard their reputation and profitability45 and the interests of wider society that benefits from the economic prosperity that comes with thriving business46.

As such, considering only the intrinsic value of freedom of expression inevitably presents an incomplete case for its protection in the workplace. To enable meaningful engagement with the question “To what extent should freedom of expression override (if at all) when faced with conflicting societal interests?” it is pertinent to consider also the practical aspects of work-related expression. Hence, principled arguments aside, we turn now to examine arguments from an “instrumental” perspective: one with particular appeal and persuasiveness to the practical man.

36 A Meiklejohn ‘The First Amendment is an Absolute’ (1961) Supreme Court Review 257.
38 Moon (n 32) 3.
39 ibid
41 Niemitz (n 26) 29
42 [1976] ECHR 5 [49].
44 Labour Law (n 7).
46 Barry (n 13) 278.
C) The “instrumental” value of freedom of expression

The “instrumental” view is primarily concerned with consequences and grounds the value of free expression in the desirable outcomes produced. Rather than affording unrivalled primacy to rights perceived as “intrinsic”, the instrumental perspective expresses sensitivity to competing interests 47 ascribing rights only where it achieves an “optimal distribution of interests” amongst stakeholders 48. Adopting this view, I seek therefore to present the case for work-related freedom of expression based on its practical benefits for employers, workers and wider society while also highlighting its drawbacks. Albeit unable to determine the “optimal distribution” given the inherent unquantifiability of benefits and risks, this discussion nonetheless serves to highlight the merits of work-related expression and strengthens the case for its protection.

We firstly consider employers’ interests in restricting work-related expression on social media. Workers are considered “an extension” of the institutions they represent and given that many display their work affiliations on social media, the lines between personal and institutional voice are increasingly “blur[red]” 49. Accordingly, through workers’ use of social media, employers are thrust into the spotlight of high online visibility with their “reputation in [workers’] hands” 50. Problematically, many workers fail to appreciate the implications of their online acts instead viewing social media as a private forum “analogous to sharing a beer with colleagues” 51: they often behave carelessly using social media as an outlet for frustrations (Preece v JD Wetherspoons plc 52) or to display “unorthodox views or questionable behaviour” 53. This attitude, coupled with social media’s potential to reach millions 54, lack of content verification, immediacy of publication and the irreversibility of damage “once the cat is out of the bag” 55, heightens employers’ reputational risks. Another aspect of concern lies in vicarious liability that may arise when workers post discriminatory or defamatory content, engage in harassment, or breach data-protection and copyright laws. Similar to reputational risks, this intensifies when such content is work-related since employers attract vicarious liability for conduct occurring “in the course of employment” 56. Finally, social media expression may also jeopardise business interests when workers reveal sensitive company information like “trade secrets” 57 or when its use during work hours

47 Redish (n 23) 595.
48 Vickers (n 45).
51 Benaroch (n 25) 2.
52 ET/2104806/10.
54 Unum (n 2).
55 Crawford (n 12).
compromises productivity and harms profit\(^5\); indeed, a Forbes study found social media sites primarily (78 per-cent) responsible, for keeping workers “off-task” and distracted at work\(^6\). Social media therefore represents a “new terrain for disorder” that employers are keen to control\(^7\) and understandably so.

While there are risks involved, workers’ use of social media is a “double-edged sword” also capable of producing benefits\(^8\). For the employer, the same immediacy, extensive reach, and personal voice that have posed reputational risks are precisely the elements necessary to conduct effective marketing and boost reputation when faced with technologically savvy “postmodern consumers”\(^9\); indeed, marketing strategy today has shifted from “top down” advertising\(^10\) to involve dialogue with an increasingly questioning and informed consumer base\(^11\). While professional social media accounts facilitate this interaction by providing both reach\(^12\) and “real-time information”\(^13\), it is the often overlooked “treasure trove” of worker expression on personal social media pages that possesses real potential to influence\(^14\): people “trust [their] personal network”\(^15\) and comments by employees are perceived as more “credible” than statements from official sources\(^16\) therefore proving a uniquely advantageous form of marketing due to this element of authenticity. Beyond advertising, worker expression on social media is also valuable in safeguarding employers’ reputation. The “rising tide of employee activis[ts]” can combat negative publicity on a worldwide scale by employing social media to “defend their employers from criticism” and strengthen company presence\(^17\). Moreover, these benefits being motivated by workers’ “passion” rather than by duty or compulsion are not only potent\(^18\) but essentially come “free” for employers, being voluntarily created and distributed\(^19\). Despite having to relinquish more control over their image\(^20\), employers are quickly embracing the “value-


\(^{59}\) ibid

\(^{60}\) Trottier (n 50) 20.

\(^{61}\) Plosker (n 53) 2.


\(^{63}\) ibid 20


\(^{67}\) Leslie Gaines-Ross ‘Employee Activism: Why we did it and what we learned’ (Institute for Public Relations, 18 June 2014) 2 <http://www.instituteforpr.org/employee-activism-learned/> accessed 17 January 2014.

\(^{68}\) ibid 247.

\(^{69}\) ibid 20


\(^{72}\) Ivanauskas (n 63) 20.

\(^{73}\) ibid 4.
generating” potential of workers’ use of social media with numerous CEOs considering this move a “priority” lest they lose out to competitors.

Apart from the “external” benefits above, workers’ expression on social media also presents opportunities to improve the company “internally”. Corporate social networking sites such as “Yammer”, uniquely designed to facilitate worker interaction within the company can increase communication, facilitate collaborative activity, and enhance work-relations and unity between co-workers. Although sometimes deemed costly and underutilised, its potential is still recognised today with social media giant Facebook recently launching “FB@Work”, a workplace-oriented version of its popular networking site. While companies prefer such “internal” networking and seek to separate professional and personal material so as to control and minimise risks, there are additional advantages when workers’ use public social media platforms and share personal information at work. Firstly, “sharing” knowledge and dialoguing with those external to the workplace allows workers to broaden their perspectives by engaging with fresh ideas, consequently keeping employers abreast with new developments and giving them a competitive edge in today’s fast-changing market. Additionally, access to co-workers’ personal rather than merely “work” information encourages the establishment of “common ground[s]”, deeper friendships and mutual understandings to better achieve the goal of collaboration and cohesion. It must also be highlighted that an atmosphere of camaraderie where workers feel a sense of belonging and “ownership” in the company is also conducive for creativity and innovation, the elements necessary in a progressive workplace. Ultimately, by embracing workers’ use of social media, benefits are produced for employers and workers, the former

76 ibid
78 Gunders Kaupins and Susan Park ‘Legal and Ethical Implications of Corporate Social Networks’ (ScholarWorks, 2 June 2010) 6 <http://link.springer.com> accessed 11 February 2015.
82 Kaupins and Park (n 78) 50.
83 ibid 247.
84 ibid 249-250
maximizing profits through worker engagement and business innovation\(^{87}\) and the latter gaining “positive self-esteem”\(^{88}\) and increased work satisfaction\(^{89}\).

The benefits of work-related expression on social media also extend into wider society primarily through its role in enhancing workers’ “voice”. Social networking sites in transcending physical boundaries to connect likeminded individuals offer scope for organised “protest and dissent”\(^{90}\). Crucially, its accessibility, low-cost and ability to rapidly disseminate information and garner vast numbers for a united cause gives collective bargaining a “new lease of life”, potentially empowering workers and raising employment standards\(^{91}\). This is significant given the increased “fragmentation” of today’s workforce where geographical separation and union representatives’ lack of personal contact with workers can prove disadvantageous to collective action\(^{92}\). Moreover, with declining union participation in the UK where membership figures have fallen sharply from 50 to 27 per-cent from 1980 to 2010\(^{93}\), social media importantly offers workers the means to engage in “workplace activism” and assert their rights independent of unions\(^{94}\). While such “unofficial action” may complicate negotiation due to its elusive leadership\(^{95}\), workers have exhibited sophistication in their social media campaigns\(^{96}\) employing “creative, non-violent means to foster revolutionary social dialogue”\(^{97}\) notably through “virtual strikes”: these involve workers working without wages while employers distribute revenues to charities thereby causing minimal disruption to the public and economy\(^{98}\). Apart from empowering workers, social networking sites also serve as an important pool of resources to raise awareness and educate the public on workplace issues, contributing to a wave of engagement and social change\(^{99}\).

Finally, social media provides an important avenue for workers to whistle-blow, defined as exposing wrongdoing or risk of malpractice at work\(^{100}\). While whistleblowing is ideally carried out internally since it is management who can effect “organizational

\(^{87}\) Efimova and Grudin (n 71) 10.
\(^{88}\) Will Schutz, Self-Esteem: the Key to Productivity (Will Schutz Associates 1996).
\(^{90}\) Tonia Novitz ‘Information and Communication Technology and Voice: Constraint or Capability?’ in Alan Bogg and Tonia Novitz (eds) Voices at Work (OUP 2014), 438.
\(^{91}\) Kaupins and Park (n 82) 12-13.
\(^{93}\) Paul Willman, Rafael Gomez and Alex Bryson ‘Voice at the workplace: Where do we find it, why is it there and where is it going?’ in W Brown, A Bryson, J Forth, and K Whitfield (eds), The Evolution of the Modern Workplace (CUP 2009) 97-119.
\(^{96}\) Kaupins and Park (n 82) 8.
\(^{97}\) ibid 12.
\(^{100}\) ‘FAQ answers’ (Public Concern at Work, 2013) <www.pcaw.org.uk/faq-answers> accessed 14 February 2015.
adjustment”101, whistle-blowers are often “given the brush off”102 with 65 per-cent faced not only with managerial inaction but demotion and dismissals following internal disclosures103. In fact, failure to “listen and act” following whistleblowing contributed to appalling care standards at the Mid Staffordshire NHS Foundation Trust, the LIBOR rigging and the Jimmy Savile sex scandal104. Given such a climate, “virtual whistleblowing” through social media albeit more advisedly used as a last resort can be key to prevent harm to profit, consumers, co-workers and the wider public.105 While workers may alternatively whistle-blow to “prescribed persons” including the Office of Communications (Ofcom)106, the “prescribed” list contains hundreds of organisations and is frequently changing thus introducing complexity and further barriers for whistle-blowers who must identify and disclose only to the relevant bodies.107 Additionally, these “prescribed persons”, not being legally obligated to investigate disclosures are perceived as ineffectual and hence workers rarely whistle-blow via this means.108 Conversely, in addition to being highly accessible, social media’s extensive reach commands public attention, ensuring whistle-blowers that “something gets done”109. It also allows voices to speak out in unity to expose wrongdoing and demand change.110 eliminating workers’ fear of solitary action; the possibility for anonymity further encourages individuals to speak out especially in this climate of fear of employer reprisals.111 Considering society’s dependence on whistleblowing to weed out corruption and malpractice,112, despite reputational risks for employers and the fact that anonymous action is more difficult to manage and authenticate,113 social media whistleblowing has value and merits protection.

Thus far, we have explored the importance of protecting work-related expression on social media given the convergence of our personal and working lives, the intrinsic value of free expression and the practical advantages it holds for employers, workers and the wider

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101 Novitz (n 90) 388.
111 Miller (n 104) 5.
public. While the intrinsic approach in isolation fails to address legitimate conflicting interests, and a purely instrumental approach offers “flimsy” protection since rights contingent on social goals and subject to the vagaries of calculation\(^\text{114}\) are easily displaced\(^\text{115}\), taken together, a strong case for workers’ rights can be made. These arguments form the background to the discussion in Section 3.

4. **THE LAW AND PRACTICE IN THE UK: IS IT FIT FOR PURPOSE?**

Notwithstanding other forms of protection for workers’ voice such as the UK Employment Relations Act 1999 (Blacklists) Regulation 2010 against blacklisting for trade union involvement, and the Data Protection Act 1998 that requires “consent” before personal data is processed and “explicit consent” for sensitive personal data, this section will assess the fitness of the law and practice in the UK based on its ability to protect specific workers (namely employees) from unfair dismissals for expression on social media. Dismissal is not only a “common retaliatory gesture” but it impacts individuals both financially and psychologically\(^\text{116}\). Given such severe consequences, the mere threat of dismissal for perceived “inappropriate use” of social media\(^\text{117}\) even if not actualised compels employees to be constantly “watchful and alert”, promotes “self-censor[ship]\(^\text{118}\)” and ultimately produces a “culture of silence”\(^\text{119}\); this severely impacts the quality of the right\(^\text{120}\). I thus undertake to analyse two key statutes that protect against unfair dismissals namely the Employment Rights Act (ERA) 1996 and the Human Rights Act (HRA) 1998, with particular focus on their interaction.

**A) Protections under the ERA 1996**

Section 94 of the ERA states that “an employee has the right not to be unfairly dismissed by his employer”. The issue of fairness is set out in s.98: employers must provide “substantial reasons” for dismissal and the company’s “size and administrative resources” and the “equity and the substantial merits of the case” are relevant in determining fairness. While this statute goes some way in preventing “employer paranoia” towards work-related expression on social media from translating into “example-setting” dismissals\(^\text{121}\), its effectiveness has thus far been limited. This is notably due to the general reluctance of courts to “scrutinise managerial prerogative”\(^\text{122}\). Courts adopt the “band of reasonable responses” test where unfairness is found only when the act is what “no reasonable management would

\(^{114}\) Vickers (n 45) 3.

\(^{115}\) Moon (n 32).

\(^{116}\) ‘Blowing the Whistle’ (n 106) 12.

\(^{117}\) Linklaters (n 1) 8.


\(^{120}\) Moon (n 39) 927.

\(^{121}\) Pahm (n 57) 207-208.

\(^{122}\) Moon (n 39) 915.
have done” (Iceland Frozen Foods Ltd v Jones123) and courts may not substitute their own judgment for that of the employer124. Crucially, the presence of a “band” of responses provides wide ambit for the adoption of severe sanctions: this is seen in Haddon v Van Den Bergh Food125 where dismissal albeit considered by the court to be “harsh in the extreme”126 was deemed fair, and in Mathewson v RB Wilson Dental127 where again, dismissal was considered “harsh but fair”. While there have undoubtedly been successful claims against unfair dismissals under the current legislation such as in Whitham v Ventura128 and Stephens v Halfords129 where courts had regard for the “merits” of both cases namely the employees’ unblemished disciplinary records and their expressed regret for their actions, in many other cases the scales are tipped strongly in the employers’ favour. This is most evident where the employer adopts “clear policies” that expressly spell out the consequences of breaches, as was the “common theme” in Benning v British Airways130, Preece v JD Wetherspoons131 and Gosden v Lifeline Project132 where dismissals were all held to be fair133. These cases can be contrasted with Grant & Ross v Mitate Property Services where employees won an unfair dismissal claim due to vague employer policy. Admittedly, an employer is “best protected” by institutionalising clearly articulated social media rules134. Problematically however, this judicial approach ignores the fundamental inequality of bargaining power between the employer and employee where employees often feel compelled to “consent” to company policy or lose their livelihood135. While some company policies are indeed enlightened, focussing on equipping employees to blog “smart” and communicate respectfully thus setting boundaries without needlessly curtailing freedoms136, many are highly restrictive and severely limit employees’ Article 10 rights. It is also noteworthy that employees commonly sign acknowledgement forms blindly137 and are in fact unaware of company policies. This puts to question the legitimacy of such “consent” and the significance placed by courts on the presence of social media policies when deciding unfair dismissal cases.

B) Effect of the HRA 1998

Since the enactment of the HRA 1998, interpretation of the ERA 1996 has to be informed by human rights considerations: all domestic legislation “must be read and given

123 [1982] IRLR 439 [17].
125 [1999] IRLR 672.
126 ibid [13].
128 ET/1810462/10.
129 ET/1700796/10.
130 ET/2703528/10.
131 ET/2104806/10.
134 Kaupins and Park (n 91) 451.
135 ibid
136 Ivanauskas (n 72) 3.
137 Dredge (n 79) 8.
effect in a way which is compatible with the Convention rights”\(^{138}\) and courts being “public authorities”\(^{139}\) are bound to act compatibly as well\(^{140}\). This arguably strengthens protections against unfair dismissals in cases of worker expression on social media since these would likely concern Article 10 rights, and courts must adequately consider such rights even if they ultimately fail to affect the case outcome \((X v Y)^{140}\). Furthermore, since the HRA creates no distinction in treatment between the public and private sector employee (and rightfully so since the availability of human rights protection should not hinge on the status of one’s employer\(^{141}\), all employees stand to receive better protection. Yet while the application of the HRA has been envisioned to alter the permissive “band of reasonable responses” threshold to better secure employees’ Article 10 rights, proposals for its complete replacement with the proportionality test under the HRA\(^{142}\) or alternatively to accord a “higher status” to employee rights instead of employing a “mere balancing exercise”\(^{143}\) have gone unheeded. In \textit{Turner v East Midlands}\(^{144}\), the Court of Appeal expressly considered the compatibility of the existing “band of reasonable responses” test with the ECHR with a unanimous court finding the current test “sufficiently robust” even submitting that adopting the proportionality test would instead “obfuscate” and “complicate” matters.

In any case, it can be further argued that even if the proportionality test were adopted, protection for workplace expression may still be lacking. Article 10 is not an absolute right and may be restricted “for the protection of the reputation or rights of others”. Crucially, employers’ right to safeguard their “enterprise”, defined widely to comprise clientele, good will, business secrets, and even potential sources of income, constitutes “possessions” under Article 1 of Protocol No. 1 of the ECHR\(^{145}\) and are a competing right. It is thus conceivable that given the significant weight that courts already accord to business interests to maintain vibrancy in the market, attract investors and promote the economic welfare of the country\(^{146}\), business interests may still trump convention rights\(^{147}\). This can be seen in the application of the proportionality test in \textit{Pay v UK}\(^{148}\) where although Mr Pay’s article 10 rights were engaged, it was held that due to the sensitive nature of his work as a probation officer\(^{149}\) his rights were outweighed by his employers’ rights to safeguard their reputation. The fact that there was no evidence that the public knew of Pay’s acts, nor any actual reputational damage since he had neither exposed his employer’s identity nor his own (the photographs published having been “anonymised”)\(^{150}\) further highlights the priority (perhaps unduly) given to employers’ interests. As such, while the HRA and the proportionality test indeed offer wider scope for protection, under its current application, commercial interests still hold sway.

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\(^{138}\) Human Rights Act 1998, s 3.

\(^{139}\) ibid s 6.

\(^{140}\) UKEAT/0322/12/GE [49].

\(^{141}\) ibid [58].

\(^{142}\) Kaupins and Park (n 91) 454 and \textit{Handyside} (n 42) 53.

\(^{143}\) Moon (n 39) 930.

\(^{144}\) [2012] EWCA Civ 1470.


\(^{146}\) Mantouvalou (n 40) 931.

\(^{147}\) Collins (n 7) 432-433.

\(^{148}\) App no 32792/05 (ECtHR, 16 September 2008).

\(^{149}\) \textit{Handyside} (n 42) 56.

\(^{150}\) ibid
reveals a need for a “more just”151 or “more enlightened”152 approach: one that not only gives cursory acknowledgment but accords “sufficient weight” to workers’ Article 10 rights153.

C) Calls for an enabling approach

Accordingly, there have been calls for a more “proactive” approach towards securing workers’ Article 10 rights in the workplace154 since the state has a duty not only to prevent unnecessary barriers but also to actively “facilitate” freedom of expression155. This is supported by Strasbourg jurisprudence on Article 10 seen in the cases of Fuentes Bobo v. Spain156 and Özgür Gündem v. Turkey157. In the former, it was held that given the severe nature of dismissal, the state has positive obligations to safeguard Article 10 rights and in the latter, more than merely refraining from interfering with the right the state ought to have “positive measures of protection” to allow genuine and effective protection of the freedom of expression158. As such, to discharge this positive duty an “enabling” approach to secure “freedom to” instead of only “freedom from”159 is essential. While the current legal framework in the UK may lack an “enabling” approach, progressive steps have been taken on the ground. Guidance material for companies on social media often emphasise its “business benefits”160 and encourage policies that allow workers “as much freedom as possible”161; restrictive policies are conversely criticised162. Training is also provided to facilitate the formulation of reasonable, well-negotiated, well-communicated and adaptable policies163 that promote workers’ responsible use of social media. Nevertheless, these guidelines lack the force of law and depend greatly on employer goodwill and compliance to be effective; they alone are insufficient to provide the security that human rights demand.

5. CONCLUSION

My discussion has explored the value of freedom of expression in the workplace both for its intrinsic and value-adding potential for employers and wider society. Proceeding thenceforth, I have sought to argue that the UK’s law and practice fails to adequately secure workers’ Article 10 rights: it lacks sensitivity to the fundamental inequalities in employment

151 Moon (n 39) 930.
152 Handyside (n 150)
153 Collins (n 7) 433.
154 Kaupins and Park (n 91) 453-454.
156 App no 39293/98 (ECHR, 29 February 2000).
158 ibid [43].
159 Kaupins and Park [n 91] 439.
161 ibid
relationships by binding employees to restrictive ICT policies through “implied consent”, unduly prioritises business interests when dealing with dismissals and despite moves to encourage more permissive social media policies, fails to adopt an enabling approach necessary to encompass the positive nature of the right. Such a trend is undesirable and indeed dangerous especially in light of advancing technology creating avenues for increasingly oppressive employer surveillance and control of social media\textsuperscript{164}. It is only through taking human rights protection seriously that the accelerated pace of technological progress can be harnessed to our advantage while its harms are minimised.

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Island, Florida, USA) 246
The purpose of this essay is to examine the history of reparations in the Inter-American Court of Human Rights in comparison with the European Court of Human Rights. This essay argues that the Inter-American Court of Human Rights (“the Inter-American Court”, “the Court”) is marginally more progressive than the European Court of Human Rights (“the European Court”, “the Court”) on the scope and application of reparations to the victims and families of victims. This is due to the Inter-American Court’s broad remedial authority and the European Court’s emphasis on awarding states a wide margin of appreciation. This argument is constructed through the examination of case law in both the Inter-American and European Courts, along with corresponding American and European legislation, and analysis of relevant journal articles. This essay finds that the Inter-American Court is more innovative than the European Court because it goes beyond simply providing monetary compensation to the applicants by seeking to honour the victims and prevent similar violations from occurring in the future. Finally, this essay concludes that the European Court has taken notable steps to revise its traditionalist approach to reparations through the invocation of restitutio in integrum.

Keywords: collective reparations, symbolic reparations, restitutio in integrum, margin of appreciation, remedial authority

1. INTRODUCTION

This essay will critically evaluate the work of the Inter-American Court of Human Rights (“the Inter-American Court”, “the Court”) on the issue of providing reparations to victims and families of victims. It will compare the Inter-American Court of Human Rights to the European Court of Human Rights (“the European Court”, “the Court”), on the issue of reparations, with the aim to demonstrate the progressive nature of the Inter-American Court. Scholars have remarked on the innovation of the Inter-American Court, particularly on the way the Court has addressed reparations. For instance, in his article “The Americas”, Jo Pasqualucci said, “One of the greatest contributions made by the Inter-American Court to international human rights law is the enhancement of the concept of reparations.”1 Pasqualucci was referring to the way in which the Court has enhanced the concept of reparations by going beyond monetary compensation. For instance, in addition to monetary reparation the court focuses on ensuring the enjoyment of a right or freedom that was violated;2 establishing that consequences are given to remedy a violation of a right or

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freedom;\textsuperscript{3} and ordering a state to undertake various non-traditional remedies. Some remedies the Court has ordered have been human rights training, free medical and psychological treatment to victims, grants to victims for higher education, and funds for the collective interest of a community.\textsuperscript{4} Furthermore, the Court has further enhanced the concept of reparations through creative redress, such as implementing national campaigns to educate the public on issues such as the work of environmental activists,\textsuperscript{5} and symbolic redress, such as naming streets or schools after victims and hosting public ceremonies to discuss the case publically.\textsuperscript{6} The main difference between reparations in the European Court and reparations in the Inter-American Court has been the push to move beyond monetary awards in the Inter-American Court.

2. ENHANCEMENT OF REPARATIONS

A) Compensation

In order to unpack what is meant by how the Inter-American Court “enhanced the concept of reparations,” as Pasqualucci stated in his article, this essay will examine the meaning of reparation in the European Convention of Human Rights (ECHR). Article 41 of the ECHR outlines the way in which the Court responds to a violation of the Convention or the Protocols. If the Court finds there has been a violation of the Convention, then the Court shall, if necessary, provide just satisfaction to the injured party.\textsuperscript{7} The Court may afford just satisfaction to victims when the domestic law of the respondent state “allows only partial reparation to be made.”\textsuperscript{8} Based on these rules, the European Court typically responds to violations by providing, if any, a sum of money to be paid by the respondent State to the victim or victims of human rights violations.\textsuperscript{9} The award will take into consideration damages, costs, and expenses.\textsuperscript{10} That being said, the award of just satisfaction is not an automatic response when the European Court finds that there has been a human rights violation. The Court makes a declaratory judgment, but the applicant must apply to be awarded just satisfaction.\textsuperscript{11} In other words, the Court’s primary responsibility is to make a statement on whether or not a violation has occurred. If the Court finds that there has been a human rights violation, then it is the applicant’s responsibility to seek monetary compensation for the violation that occurred. In a very real way the odds are stacked against the victim.

\textsuperscript{3} ibid art 63(1).
\textsuperscript{4} Pasqualucci (n 1) 409.
\textsuperscript{5} I/A Court HR, Kawas-Fernández v. Honduras, Judgment (Merits, Reparations and Costs) of 3 April 2009 para 214.
\textsuperscript{6} Pasqualucci (n 1) 409.
\textsuperscript{7} Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 41.
\textsuperscript{8} ibid art 41.
\textsuperscript{9} Rules of the European Court of Human Rights, as amended [1 Jan 2016] Section on Just Satisfaction Claims para 23.
\textsuperscript{10} ibid para 6.
\textsuperscript{11} ibid para 1.
Comparatively, the Inter-American Court also takes into consideration damages, costs, and expenses such as loss of income, pain, and suffering. This is referenced in Article 65 of the Rules of Procedure of the Intern-American Court, which states that the judgment shall contain “the decision on reparations and costs, if applicable." However, the Inter-American Court has gone beyond monetary compensation to try to atone for the suffering of the victim. This includes guarantees of non-repetition, as well as cultural, creative, and symbolic reparations. For instance, the Inter-American Court has placed incredible value on making moral and material reparations to individual victims. Such reparations are evident with the Court’s decision in the case of Velásquez-Rodríguez v. Honduras. In Velásquez-Rodríguez v. Honduras, the Court made a statement arguing that the purpose of international law is to protect victims and provide reparation and it should not be confused with punishing individuals:

The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals, who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.

In the case of Velásquez-Rodríguez v. Honduras, the Inter-American Court demonstrated the importance of moral and material reparations by not just providing compensation to the applicant, but to other family members as well. For instance, after a legal discussion between the applicant, Emma Guzmán de Velásquez, the state of Honduras, and the Inter-American Commission, the Court unanimously decided to award seven hundred and fifty thousand lempiras in compensatory damages to the family of the victim, Angelo Manfredo Velásquez-Rodríguez, to be paid by Honduras. One fourth of the indemnity would be paid to the wife of Manfredo Velásquez-Rodríguez, Mrs Emma Guzmán Urbina. The remaining three-fourths of the indemnity would be paid to their children, Héctor Ricardo, Nadia Waleska, and Herling Lizzett Velásquez Guzmán, at the age of twenty-five from a trust fund set up at the Central Bank of Honduras. This is an example of how the Inter-American Court’s rules allow for the Court to make moral decisions that seek to positively improve the lives of people it serves.

B) Cultural Redress

In addition to moral decisions, the Inter-American Court has also displayed an appreciation for cultural differences of applicants seeking redress and has tailored restitution

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14 I/A Court HR, Velásquez-Rodríguez case, Judgment of 29 July 1988 Series C No 4 para 134.
16 ibid para 58.
to fit cultural differences.\textsuperscript{17} For example, when examining cases involving violations against indigenous persons, the Court has often ordered a translation of the proceedings to be issued in the native language of the victim. For instance, in the case \textit{Tiu Tojín v. Guatemala}, which involved the enforced disappearance of Ms Tiu Tojín and her one-month-old daughter Josefa Tiu Tojín, the Court took the advisement of the Commission and ordered that the State give “ample coverage” of the case on a radio station in the native language of the victims: Maya K’iche’.\textsuperscript{18} The translations were a simple and effective way of acknowledging that protecting and supporting cultural differences is another way to pay tribute to the victims of human rights violations. This serves as a symbol of the structure of the Court and how it places the victims at the centre.

\textbf{C) Creative Redress}

Furthermore, the Inter-American Court has tried to address reparations in a creative way, as to consider a way in which the Court can account for the disruption of a victim’s goals and plans for their life. For instance, in the case of \textit{Loayza-Tamayo v. Peru}, in which the victim was a professor who was illegally detained and tortured because she was suspected of being a member of a subversive political group, the Court recognized the damage that was done to the victim’s “life plan”. The Court discussed how the disruption of Loayza-Tamayo’s life plan was more than just the loss of future economic earnings, but the human rights violation affected the process of self-actualisation and achieving her “calling in life”.\textsuperscript{19} The Court considered how to account for Loayza-Tamayo’s potentialities, ambitions and goals\textsuperscript{20} that were thwarted by the human rights violations and how to account for the unfair and arbitrary factors that altered her life.\textsuperscript{21} Although the Court discussed Loayza-Tamayo’s life plan and how the Court could account for the disruption in achieving her personal, familial, and professional goals, in the end the Court refrained from quantifying it.\textsuperscript{22} The Court noted that it did not have a point of reference to turn to in order to address how a life plan could be accounted for in economic terms, “neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms”.\textsuperscript{23} Thus, Ms Loayza-Tamayo was not given compensation attributed to her life plan necessarily, though she was awarded $99,190.30USD or its equivalent in Peruvian currency for costs, expenses, and damages.\textsuperscript{24} The assumption here is that the compensation takes in to consideration the alteration in Ms Loayza-Tamayo’s life plan.

\textsuperscript{17} Bridget Mayeux and Justin Mirabal, ‘Collective and Moral Reparations in the Inter-American Court of Human Rights’ [2009] Human Rights Clinic at the University of Texas School of Law 1, 12.
\textsuperscript{18} I/A Court HR, \textit{Tiu Tojin v Guatemala}, Judgment (Merits, Reparations and Costs) of 26 Nov 2008 Series C No 190 para 108.
\textsuperscript{19} I/A Court HR, \textit{Loayza-Tamayo v Peru}, Judgment of 27 Nov 1998 Series C. No 42 para 147.
\textsuperscript{20} ibid para 147.
\textsuperscript{21} ibid para 150.
\textsuperscript{22} ibid para 153.
\textsuperscript{23} ibid para 153.
\textsuperscript{24} ibid para 192.4(a).
D) Restitutio in Integrum

While the Inter-American Court has given itself broad remedial authority, comparatively, the European Court has interpreted its reparation responsibility rather narrowly. Therefore, although the European Court has given non-monetary compensation several times previously, it is typically not the standard of the Court to do so. That being said, the European Court has ordered specific non-monetary reparations, through the concept of Restitutio in integrum, in a handful of cases, mostly cases dealing with the expropriation of private property. For instance, in the case of Papamichalopoulos and Others v. Greece, the Court ordered the respondent government to return the land 104,018 sq. m to the victims with the intention of putting the applicants in an equivalent position to where they were prior to the violation. The Court stated that this was part of Restitutio in integrum, meaning to return to its original condition, “The Court considers, firstly, that the buildings form part of the Restitutio in integrum”. In other words, the Court decided that it had the obligation to return the land to the victims in order to potentially return to their original condition prior to the violation. Thus, although the functionality of the Court does not allow for the Court to necessarily make non-monetary reparations, the Court has found a way to circumvent this and supply victims of human rights violations with other means to rectify their losses.

E) Non-Monetary Measures

The reason that the European Court does not typically issue non-monetary reparations is because the Court’s judgments are of a declaratory nature. Therefore, the implementation of the judgments is a shared responsibility between the respondent State and the monitoring body of the Court: the Committee of Ministers. The role of the Committee of Ministers is to supervise the implementation of the judgment but the choice of way to implement a judgment falls on the respondent State. Consequently, although applicants have often requested the issue of non-monetary orders, the Court has often had to deny such requests for it does not have the power to specifically direct a State. That being said, recently the Court has voiced the need to go beyond the traditional approach they have been using and have specifically

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25 Donoso (n 12) 42.
27 ibid para 40.
29 ECHR (n 9) art 46.2.
30 See Le Compte, Van Leuven and de Meyere v Belgium App No 7238/75 (ECtHR 23 Jun 1981) para 13; Dudgeon v The United Kingdom App No 7525/76 (ECtHR 22 Oct 1983) para 15; Campbell and Cosans v The United Kingdom App Nos 7511/76, 7743/76 (ECtHR 25 Feb 1982) para 15; Demicoli v. Malta App No 13057/87 (ECtHR 22 Aug 1991) para 45; Zanghí v Italy App No 11491/85 (ECtHR 19 Feb 1991) para 25; Yagci and Sargin v Turkey App Nos 16426/90 (ECtHR 23 May 1995) para 79; Guerra and Others v Italy App No 14967/89 (ECtHR 19 Feb 1998) paras 71-4; Akdivar and others v Turkey App No 21893/93 (ECtHR 1 Apr 1998) paras 45-7; Selcuk and Asker v Turkey App No 12/1997/796/998-999 (ECtHR 24 April 1998) paras 123-5; Mentes and others v Turkey App No 23186/94 (ECtHR 28 Nov 1997) paras 22-4; Orhan v Turkey App No 25656/94 (ECtHR 18 June 2002) paras 450-1; Ulku Ekinci v Turkey App No 27602/95 (ECtHR 16 July 2002) paras 176-9; Finucane v United Kingdom App No 29178/95 (ECtHR 1 July 2003) paras 450-1; Yöyler v Turkey App No 26973/95 (ECtHR 24 July 2003) paras 122-4; and BB v United Kingdom App No 53760/00 (ECtHR 10 Feb 2004) ECHR para 31 and 37.
directed States. For instance, the Court has ordered States that have breached their obligations under the European Convention to provide specific non-monetary measures, referred to as “individual measures”, to victims. For example, in the case of Assanidze v. Georgia, the European Court found that the violation of the Convention, and the failure of the Arjarian authorities to comply with the judgment of the Court, had caused the applicant substantial damage. Therefore, the Court ordered the State to comply with its judgment by securing the applicant's release as soon as possible, “the Court considers that the respondent State must secure the applicant's release at the earliest possible date”. Similarly, in the case of Ilascu and others v. Moldova and Russia, after the Court found the state to be in violation of the Convention, the Court remarked on how it is the respondent State’s responsibility to implement the measures of the judgment such as putting an end to the arbitrary detention of the applicants still detained and to secure their immediate release. Thus, there have been inklings from the European Court in the last decade that the Court has the responsibility and the power to go beyond monetary compensation for human rights violations and instead actively seek to prevent violations in the future. Whilst this does not necessarily constitute reparation per se, it does point to increased innovation within the European Court.

F) Symbolic Reparations

In the same vein, the Inter-American Court has also demonstrated symbolic reparations, in addition to cultural and creative reparations. For example, in the case of the “Street Children” (Villagran-Morales et. al) v. Guatemala, a case in which five boys: Anstrauim Aman Villagráin Morales; Henry Giovanni Contreras; Federico Clemente Figuroa Túnchez; Julio Roberto Caal Sandoval; and Jovito Josué Juárez Cifuentes, were abducted, tortured, and murdered by police officers in Guatemala City, the Inter-American Court ordered Guatemala to designate an educational centre in honour of the boys. The Court ordered Guatemala to name the centre with a name allusive to the young victims in the case and to place a plaque of their names within the centre. This demonstrates the capacity of the Inter-American Court to enhance reparations in a way to honour the victims beyond monetary compensation.

3. CONCLUSION

This new trend of the European Court to direct states on how they could be implementing a judgment follows in, arguably, the same fashion as the Inter-American Court in enhancing the meaning and application of reparations. The Inter-American Court has

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32 ibid 397.
33 Assanidze v Georgia App No 71503/01 (ECtHR 8 April 2004) para 199.
34 ibid para 203.
35 Ilascu and others v Moldova and Russia App No 48787/99 (ECtHR 8 July 2004) para 490.
36 I/A Court HR “Street Children” (Villagráin-Morales et al) v Guatemala, Judgment of 19 Nov 1999 Series C No 100 para 103.
demonstrated more advancement in the progressive nature of reparations for human rights violations due to its broad remedial authority and direct supervision of implementation of judgments. The Court has been willing time and time again to discuss ways in which, in addition to monetary compensation, the Court can account for the destructive nature of human rights violations. It has examined cultural, creative, symbolic, moral, and material ways which the Court can distribute reparation to victims. Comparatively, the European Court has faced much more apprehension to reparation beyond monetary means for the European Court functions more declaratively than the Inter-American Court and gives respondent States a wide margin of appreciation. That being said, the European Court has adopted a new trend in the past decade and has begun to bridge the gap between the wide margin of appreciation given to respondent States and enforcing judgments to provide reparation and redress to victims. In sum, both courts have demonstrated a pattern, albeit a recent pattern in the case of the European Court, to move beyond monetary reparations and institute other forms of remedies as well, in order to better support the victims of human rights violations and to help ensure that such violations do not reoccur in the future.
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THE DISTINCTIVE ROLE OF THE SABBATH COMMANDMENT IN THE DECALOGUE

Marcus Ho Shing Kwan

Modern Christian theology has sometimes been accused of having a laissez-faire attitude toward the Sabbath, gradually leading to a settlement of its place as a ‘lost’ law – old, archaic, and stuck in the mud. To accept this unfortunate state is to concede the finer nuances that capture the great story enshrined in the fourth commandment. Among all the Sabbath references in the Old Testament, its feature in the Decalogue in Exodus and Deuteronomy are the only two instances to give considerable detail about its origin and purpose, so its presentation offers the chance to obtain a most complete understanding of it. This essay asserts the Sabbath commandment’s centrality to the Decalogue in form and substance, exploring its longevity among the Jews in Biblical times to show how its significance remained steadfast through Israel’s changing circumstances by persistently recalling its incumbent covenant context, thereby vindicating its distinctive role in the Decalogue.

1. INTRODUCTION

To borrow an Orwellian turn of phrase, all commandments are equal, but some are more equal than the others. Academics have suggested that the fourth commandment (English Standard Version, Exodus 20:8-11; Deuteronomy 5:12-15) – ‘the Sabbath commandment’ – is central to the Decalogue. The Sabbath commandment is essentially a simple one: to rest and to cease all work on the Sabbath day. Yet Joseph Hester argues that no other commandment, apart from the first, has had “as significant an effect upon the development of contemporary social life and thought.” This essay seeks out the ways in which it is so, thereby reasserting an appreciation of its distinctive role within – and inevitably without – the Decalogue that goes beyond its mere position. A threefold approach will be taken to achieve this.

First, the form of the commandment will be examined to show that its wording and position in the Decalogue begs deeper inquisition. Then, a voice will be given to its substance to show that by alluding to the Biblical narrative, the commandment has the facility to breathe life into mere words. Finally, by charting the development of the commandment living and lasting beyond the Decalogue, its significance shall show in its capacity to evoke the recurring motifs to continually reassert its importance through Jewish tradition and Jesus’ teachings.

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1 In both Jewish and Protestant enumerations of the commandments the Sabbath remains as the fourth.
2 The Decalogue comes phrase *deka logos*. This is a Greek expression for the Hebrew *Aret Ha-Devarim*, more popularly known as the Ten Commandments but more accurately translated as ‘Ten Words’, or ‘Ten Utterances’. These are the words given by God to Moses at Mount Sinai and inscribed on two stone tablets, and is held out as the cornerstone of Mosaic law.
2. FORM

A) Built to Last

In establishing the importance of the Sabbath command, much more can be inferred from the way the Decalogue is structured than its position *thereabouts the middle*. The length of the commandment itself immediately sets the command apart *prima facie* and cannot be dismissed as mere coincidence so quickly: “this partial loss of form was obviously not caused either by chance or by neglect; rather it was dictated by a deep interest in the content”.4 Just as there is good reason why rules to a game are ordered the way they are, logic and significance can similarly be sought from the sequence of commandments,5 placing the Sabbath commandment in a position that immediately commands distinctiveness.

Patrick Miller sees the commandments laid out in terms of their priority, an order better applied in the second of the two tables in favour of the preservation of life, even though “in a very basic sense the commandments are all of the same weight”.6 The Decalogue has also been traced to the Jewish “ten sayings [by which] the world was created” (Pirkei Avot 5:1), purporting to reflect a more natural sequence. More pertinently, the context of the giving of the Decalogue embraces the notion of the covenant sequence: God’s choice precedes man’s obedience, which is a pre-requisite to knowing the full benefits of election.7 Accordingly, the fourth commandment has been regarded as a “transition” commandment.8 The Decalogue can be fragmented into five literary segments with the Sabbath as the central holding block,9 functioning as a bridge between the two tables of commandments that looks backwards at the creator and forwards to creation10: backwards to the rule of God in contrast with the world of Pharaoh, and forward to a human community peaceably bespeaking the settled rule of God.11 The implication of this is that “it is God’s Sabbath, but we, men, are to keep it”.12

On the other hand, Brevard Childs contends that the order of the commandments do not follow a strictly logical sequence as such, finding that “the lack of a rigorous order is a consistent feature of most Old Testament law”.13 Anthony Phillips adds that even though the Decalogue is rarely referenced in the Old Testament, the citing of specific commands of the Decalogue scarcely formed an integral part of the prophetic material, nor of the prophets’ message as a whole; rather they function theologically as a blanket expression of the rejection of God leading to the fall of Samaria (Hosea 4:2) and Jerusalem (Jeremiah 7:9). The

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9 Miller, *The Ten Commandments* (n 6) 128.
Decalogue in this sense is significant only as the sum of its parts, so any meaning in its sequence is primarily incidental.

Regardless, oddities in the expression of the commandment demand closer scrutiny of the text itself. Alongside the fifth commandment, the Sabbath command is cast in the form of positive imperatives – even if clarified explicitly through prohibitions\(^\text{15}\) (Exodus 20:9-10) – and supported with motive clauses, demarcated from the apodictic nature of the rest.\(^\text{16}\) Just as the repeated actions of the Genesis protagonists implicitly define certain virtues and vices that readers should imitate or avoid, many laws and ethical demands have a motive clause attached to justify the behaviour required.\(^\text{17}\) Here, the motivation to act as God acts is indicative of an ethic of correlation,\(^\text{18}\) a feature of many legal collections within the Pentateuch.\(^\text{19} \ 20\) That the motivation for Sabbath observance in the Deuteronomy commandment is completely different from the Exodus version suggests that it “has its own history”,\(^\text{21}\) prompting an examination into the law’s incumbent narrative content. Consequently, the form of the commandments directs us toward its substance.

3. SUBSTANCE

A) More than Words

The practice of the Sabbath may not originate from the commandment itself,\(^\text{22}\) but its statement in the Decalogue was essential in endorsing its future adoption. This is achieved in its capacity to allude to the narrative to give reason and grounds for its observance – inner motivation for external action\(^\text{23}\) – so the text possesses a meaning that must be uncovered through its narrative history.

The interweaving of law and history was the central literary concern of the Priestly writers\(^\text{24}\) in shaping the Pentateuch: “far from interrupting the narrative, the laws complete it… the story exists for the sake of the laws that it frames”.\(^\text{25}\) The presentation of the law is

\(^{19}\) The Pentateuch is the Greek translation for ‘five scrolls’, referring to the first five books of the Bible. It is also known in Hebrew as the Torah to mean ‘instruction’ and is regarded as the ‘Law of Moses’.
\(^{20}\) Gordon Wenham, Story as Torah: Reading the Old Testament Ethically (T&T Clark 2000) 104.
\(^{24}\) A large proportion of the Pentateuch is said to consist of material written by a Priestly source.
itself typically in narrative form and embodies such narratives.26 In Miller’s words, the narrative “carries the commandments”;27 attention to the force of the narrative context packages the commandments not as bits and pieces, but binds a “series of capricious fiats”,28 giving rise to the phenomenon of “patterned godliness”29 as the covenant sequence plays out.

Therefore, the fundamental context in which any single commandment must be understood is its “trajectory”, defined as the “dynamic movement of the commandment through narrative and law, tradition and experience, worked out in detail and in particular circumstances”.30 Indeed, in both Exodus and Deuteronomy, the reference point for understanding the laws is narrative: the “cognitive structures which go into reading the biblical Sabbath laws” are predominantly visual and narrative rather than “literal and semantic”,31 such as the description of the Sabbath as a visual sign to be observed (Exodus 31:17; Deuteronomy 5:12). Commandments are often misused when in isolation, so the relationship between the commandments and its narrative history cannot be ignored: “all the solemnities of the Old Law were established to commemorate some divine favour, either recalling a past one or prefiguring one to come”32. Of these divine benefits the first to be commemorated was that of creation, richly enshrined in the sanctification of the Sabbath.

B) Creation

Two parallel versions of the Decalogue are featured in the Torah, running two separate biblical narratives. The Exodus version of the Sabbath commandment has been described as a “mimetic re-enactment”33 of God’s rest after his work of creation (Genesis 2:1-3); “an invitation to imitate God’s activity”.34 This argument that “humankind is made in the image of God and God rested on the seventh day”35 ascribes an anthropomorphic attribute to God36 and is often forward as the “lynchpin” in establishing the binding nature of the Sabbath;37 consequently creation and its blessings conclude in the practice of Sabbath.38

The allusion to the creation narrative may be explicitly stated but is also implicitly settled into the text. Northrop Frye notes that in any narrative, “symmetry…always means

27 Miller, ‘Divine Command and Beyond: The Ethics of the Commandments’ (n 18) 23.
29 Miller, ‘Divine Command and Beyond: The Ethics of the Commandments’ (n 18) 24.
30 ibid.
33 Waltke, An Old Testament Theology (n 8) 187.
38 Brueggemann, Theology of the Old Testament: Testimony, Dispute, Advocacy (n 11) 533.
that historical content is being subordinated to the mythical demands of design and form”.\(^\text{39}\)

For Philo, the Sabbath symbolises the universal principle of Seven anchored in creation:\(^\text{40}\) its recurrence in the understanding of the Sabbath commandment and the subsequent reiteration of Sabbath laws is an extension of the heptatic structure woven into the Genesis cosmogony\(^\text{41}\) – the seventh day of creation being the “sole calendric anchor”\(^\text{42}\) to the Sabbath seventh day of the week. The recurrence of this number includes the seven categories of living beings in command and prominently, the instructions for making the tabernacle: its seven speeches (Exodus 25:1; 30:11, 17, 22, 34; 31:1, 12) match the seven days of creation and ends with the provision for the Sabbath,\(^\text{43}\) signalling its parity with or even supremacy over God’s tabernacle.\(^\text{44}\) The additional instructions prohibiting even animals to work (20:10) reminds man of God’s role in nature, pre-empting the later reiteration of rest in ploughing time and in harvest (34:21), also reinforcing the role of the Sabbath commandment as the “bridge” that leads to an understanding of the humanitarian and egalitarian commandments.\(^\text{45}\)

To clear all doubt, Childs dismisses the notion that the Sabbath was the product of a late Priestly source, spun to garner support for a self-serving institution. Rather, the shaping of Genesis 1 on the pattern of seven days presupposed the prior tradition of the Sabbath, so “the influence was from the reverse direction”\(^\text{46}\). In Niels-Erik Andreasen’s analysis of Genesis 2:1-3\(^\text{47}\) he observes that it is saturated with expressions characteristic of the Sabbath literature without commandment or enforcing recognition of the Sabbath institution – the use of the verb sabat (rest) rather than shabba’ (Sabbath) for instance suggests that it is concerned only with God’s rest – hence the creation Sabbath was not conceived of as a socio-religious or cultic phenomenon, but used to provide reason and analogy to man’s Sabbath, accentuating the former in terms of the latter.\(^\text{48}\)

Indeed, to work is human, to Sabbath – divine. This allusion to the creation narrative reminds the Israelites of the starting point of their relationship with God in a way unique to this commandment, directing them to a response of gratitude to reflect that relationship with the Sovereign.\(^\text{49}\) To keep the Sabbath is to participate in God’s intention for the cadence of creation,\(^\text{50}\) so man’s response comes in the work-rest rhythm: “rhythms of a life of faith require a cessation of all activity as an act of acknowledging the rule of [God]”.\(^\text{51}\)

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\(^{40}\) Lutz Doering, ‘Sabbath’ in Roger Bagnall, Kai Brodersen, Craig Champion, Andrew Erksine and Sabine Heubner (eds) *The Encyclopedia of Ancient History* (1st edn, Blackwell Publishing 2013) 5989.


\(^{44}\) Chavel, ‘Numbers 15:32-36: A Microcosm of the Living Priesthood and Its Literary Production’ (n 42) 50.


\(^{46}\) Childs, *The Book of Exodus A Critical, Theological Commentary* (n 4) 430.


\(^{48}\) ibid 202.


\(^{50}\) Fretheim, *Exodus: Interpretation, A Bible Commentary for Teaching and Preaching* (n 45) 229.

20:11 thus exhibits the creation cycle of covenant life as the original model of the Sabbath: “God works, accomplishes his purpose and rejoicing, rests”.  

C) Freedom

The Deuteronomy version of the Decalogue serves as a revision of the original covenant, differing most prominently in its more expansive clause concerning rest on the Sabbath and its direct reference to Israel’s freedom from Egypt (Deuteronomy 5:14-15). This reminder of the Israelites’ deliverance and provision by God’s hand is by no means a feature unique to this commandment – the covenant context of the Decalogue is after all a thread running through its entirety – but its very explicit reference in the Deuteronomy version by means of repetition (with the prologue) and also contrast (with Exodus) inevitably reinforces this crucial recollection.

The Sabbath commandment here thus enhances the covenant context of the Decalogue through a sure show of God’s pastoral governance. The provision of manna (Exodus 16) functions as such a parallel: despite the lack of clear intertextuality, the “identical use of the notion of Sabbath… as well as [its] proximity” draws strong correlation with the episode. Its subsequent manifestation as the Sabbath year begs further comparison: the way the Israelites gathered enough manna on the sixth day is a clear affiliation with the comfortable harvest during the sixth year. That the Israelites’ murmurings and doubt will be met by the Lord’s provision is a lesson narrated three times in similar stories, a technique of repetition commonly employed in the Pentateuch.

This adage of God’s provision, deliverance and rest concealed within the commandment is further illuminated as an antithesis between the regime of service to God and the enforced servitude of Egypt (Exodus 1:11-14; 5:6-18), under which Moses’ requests for time off work for the Israelites to worship were repeatedly denied (5:4-5). The Sabbath thereby serves as a perpetual reminder of Israel’s enslavement to the Pharaoh, freedom from which allowed a reassertion of a broken Sabbath tradition and the creation of a day of rest for a formerly slave people. This sets up a contrast between Pharaonic economics and family economics, the structural binary opposition between the “tight first” of Deuteronomy 15:7 and the “open hand” of 15:8 – a comparison between two narrative stereotypes: one who would not let go and one who brings freedom; the Sabbath was therefore assigned as a day in which slavery was abolished and replaced with social solidarity.

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54 Bartor, ‘Seeing the Thunder: Narrative Images of the Ten Commandments’ (n 23) 27.
57 Umberto Cassuto, A Commentary on the Book of Exodus (Magnes Press 1967) 188.
60 Schweid, The Philosophy of the Bible as Foundation of Jewish Culture (n 53) 41.
D) Two Sides of the Same Coin

As the outstanding change between both versions of the Decalogue, a comparison between the varied motifs in Exodus and Deuteronomy is necessary. It has been suggested that the differences could be explained by their authorship and the respective contexts in which they were found. As per customary literary usage in the Bible and in Ancient Near Eastern texts, an utterance once cited is not repeated *ipissima verba* but certain variations are introduced instead.\(^{61}\) Stuart similarly attributes the differences to the settings: one emphasises the establishment of the law on Mount Sinai and the other emphasises the observance of the already established Sabbath law, so the discrepancies in wording are expected of a renewal of the original covenant formulation a generation later;\(^ {62}\) the Exodus “remember” (Exodus 20:8) presupposing the Deuteronomy “observe” (Deuteronomy 5:12).

Yet to limit our understanding of the text to these factors would be to adopt an unjustifiably narrow view of the Decalogue, especially given the rich narrative history and meaning they purport to contain. Rather, it is useful to view them as a means of tracing the changes between the versions. Additionally, it is curious to note that the Exodus commandment refers to creation, whereas it is in Deuteronomy that the actual exodus event is referred to; this prompts us to consider a different purpose of the Deuteronomy Decalogue.

While creation theology was likely advanced to interpret the Sabbath as a sign that God would not renounce his election of Israel, the Deuteronomic redactors could emphasise the new concern of the exilic situation by subtle modifications of the Decalogue.\(^ {63}\) By introducing the exodus as a reason for Sabbath-keeping and by inserting the ox and donkey to the prohibited list (Deuteronomy 5:14) to secure verbal links with both the beginning and the end of the Decalogue, the new importance of the Sabbath command could be augmented by its dominant, central position.\(^ {64}\)

Accordingly, between the two iterations of the commandment we see the product of a period of reflection and reassessment necessitated by successive changes in Israel’s theological outlook. Indications of this can be found in the additional promise of prosperity in the parental command (Deuteronomy 5:16) and the expansion to the workers and the household, which Andreasen hypothesises may have been added at a time when the Israelites were misusing their servants to do tasks from which they themselves abstained on the Sabbath.\(^ {65}\) Yet while the reflective motivations that belie the commands may suggest that they are reactive, the fundamental demands of the Decalogue continue to reflect God’s will for Israel regardless of their circumstances, thus also corresponding with the general role of the commandments as covenant conditions.\(^ {66}\)

The underlying meaning remains unmoved: the two versions point to the same message of remembering God’s design from dust to deliverance. Critical to God’s relation with man are his works, two of which are “creation of land out of water... and Israel’s

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\(^{61}\) Cassuto, *A Commentary on the Book of Exodus* (n 57) 250.


\(^{64}\) ibid.


exodus through the sea in the same connection”.

In fact, both reasons given are complementary - two sides of the same theological reality: the Sabbath “commemorates both the liberation of the cosmos from lifeless chaos to ordered life and liberation of Israel from Egyptian bondage to worship [God]”.

The juxtaposition of creation and salvation “nicely articulates Israel’s characteristic way of linking cosmic and concrete social realities”. Alongside each other, imitatio dei is set as an element of the ethical grounding of the Sabbath commandment: in Exodus it is a reflection and imitation of the work of God; in Deuteronomy the human moral act corresponds not to the creative activity of God but to His redemption of the people from Egyptian slavery. The cohesive tale told by the two seemingly disparate versions underlines powerfully the importance of the Sabbath in Israel’s history, thereby accounting for the commandment’s continued influence beyond the Decalogue.

4. BEYOND

A) A Design for Life

Indeed, the longevity of the Sabbath command persisted after Sinai, manifesting in a series of Sabbath laws, feeding off its importance as established above. Subsequent Sabbath laws draw irrefutable links with the commandment itself, several of them adopting a striking, coherent form: “for six years…but on the seventh” (Exodus 23:10-11; Leviticus 25:4-5; Deuteronomy 15:12), at once tracing back to the creation narrative as enshrined in the Decalogue, and separating themselves from the other laws. The reiteration of Sabbath laws outside the Decalogue may not be conceptually inventive, but by repetition of the law in different form, the import of what is commanded could be reinforced, “so no one could claim that its interpretation was somehow flexible or subjective”.

Circumstances played a part in dictating its continued application, especially in a highly agrarian society with a high work ethos. The laws were adapted to show its relevance to living out God’s covenant in all its detail and were wielded as a quintessential tool in unifying an increasingly unsettled Israel. Where failure to ensure individual economic freedom became divisive, the Sabbath was sought, borrowing the idea of fallowing to develop the Sabbath year and the Jubilee - the natural progression of a cycle of these years as a measure of provision for all. The Sabbath thus grew into an identifying mark of the

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67 Waltke, An Old Testament Theology (n 8) 187.
69 Waltke, An Old Testament Theology (n 8) 187.
70 Brueggemann, Theology of the Old Testament: Testimony, Dispute, Advocacy (n 11) 185.
71 Miller, ‘Divine Command and Beyond: The Ethics of the Commandments’ (n 18) 25.
72 For example, McConville observes that Deuteronomy 15 shares the same prevalence of the number seven, a concern for the weak and the idea of unity, grounded in the command to release the slave. See Gordon McConville, Deuteronomy: Apollos Old Testament Commentary 5 (Apollos 2002) 258.
74 Stuart, Exodus, vol 2 (n 59) 530.
Israelite community and characterised them at a time when deportation and death had proved distressing.  

The Sabbath increasingly became a distinguishing symbol for Jews with a body of law unique to Jewish and Christian tradition, a “sign of recognition” akin to God’s mark on Cain (Genesis 4:15). That such ‘atypical’ laws are to date so highly revered is testament to the significant role of the Sabbath in the Decalogue, separate from the other commands that more readily appeal to universal morality. By incorporating an appreciation of the Sabbath laws, the lasting effects of the commandment can be better understood as a reminder of the importance of God’s design for man.

B) Cosmic Proportions

Reminiscent of the way the Sabbath command was restated for Israel, two peculiar practices were imposed upon Israel as the will of God, summarised in Leviticus 25: the Sabbath year – a periodic rest from cultivation - is a reminder that all land is God’s provision; and the year of Jubilee – a “total release of debts” - is a reminder that all of Israel is God’s community. Despite its opaque origins, the Jubilee’s apparent continuity was boosted by its perceived relation to the Sabbath: by using the verb kiddesh (to hallow), a connection between the Jubilee and the sanctification of the Sabbath was also made, providing a stable basis for an ethics of land ownership. The Jubilee laws thus restored the value of land as a gift of God’s promise, not a product of market forces.

The capital punishment attached to the breach of this ‘duty to rest’ appears counter-intuitively harsh especially in light of the economic justifications associated with the Sabbath, fuelling the idea that breaking the Sabbath command is not so much a moral wrong as it is a cosmic one. The treatment of the woodgatherer (Numbers 15:32-36) is central in showing this: he was “put in custody” pending further disclosure of divine intent because this was a wrong against God not man. This episode thus understands Sabbath not as a demand to ‘rest’ but as a cessation of melakha – taken to refer to human productive endeavour that changes the material environment significantly, putting man at risk of forsaking his creaturehood.

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77 Andreasen, The Old Testament Sabbath: A Tradition-historical Investigation (n 47) 239.
80 Brueggemann, Theology of the Old Testament: Testimony, Dispute, Advocacy (n 11) 189.
81 Lalleman, Celebrating the Law?: Rethinking Old Testament Ethics (n 73) 84.
82 The Jubilee also had roots in certain beliefs about land tenure from Israel’s early period, though the extent of this influence is less certain. See John Hartley, Word Biblical Commentary, Volume 4: Leviticus (Thomas Nelson Publishers 1992) 427-430.
84 Burnside, God, Justice, and Society: Aspects of Law and Legality in the Bible (n 59) 203.
85 Fretheim, Exodus: Interpretation, A Bible Commentary for Teaching and Preaching (n 45) 229.
86 Richard Hiers, Justice and Compassion in Biblical Law (Continuum International Publishing Group Inc 2009) 70.
The woodgatherer’s activity could also be viewed as a prelude to lighting a fire as explicitly prohibited in Exodus 35:3, and so inferred as a preparation for covenant-breaking. Following the Numbers 15:30 ruling that sins done “with a high hand” in open defiance of the covenant merit the punishment of karet, Jacob Milgrom finds that the transgressor who “reviles the Lord” in respect to the Sabbath shall not only be “cut off from his kin” (15:30-31) but also executed judicially. This effectively alludes the ramifications of Sabbath-breaking to covenant-breaking so profanation of the Sabbath could be considered a “wholesale breach of trust vitiating the very covenantal connection itself”. Rolf Knierim and George Coats, while holding the contentious view that the Sabbath is a mere cultic ordinance, concur that the case looks beyond mere flagrance of the Sabbath command itself to the bigger picture of a violation of God’s laws.

By implication, Sabbath observance can be established as a covenant “sign-reminder” between God and his people, hence the repeat of the Sabbath law at the start of the tabernacle construction commands (Exodus 35). Bruce Waltke notes that many ancient covenants had a visible sign to remind people of the covenant; the Noachic covenant was symbolised by a rainbow (Genesis 9:16) and the Abrahamic covenant by circumcision (17:13). In this trend the Sabbath functions as a sign for the Mosaic covenant (Exodus 31:16), sharing the same Hebrew phrase berit ‘olam to mean “everlasting covenant”.

C) Back to Basics

Even while immersed in ritual and religion, the Sabbath laws return to the same starting point, introducing the same vision of the Sabbath command. The practice and reverence of the law is rooted in a recollection of creation: the restorative prohibition of the Jubilee and Sabbatical years perpetuate the notion of society periodically returning to a state of original “virginal” purity – “its condition on the Sabbath of creation” – where all servants, livestock and even wild beasts have equal right to the ‘Sabbath’ of the land (Leviticus 25:6-7), sharing from an unworked food source in a fashion that is “manifestly edenic and fecund”. The adoption of the Jubilee, as with the Sabbath command, marks it as a “crucial component of the cosmic order”. The fact that the Jubilee was turned into cultic law reinforced by the motive clause “I am the Lord your God” (Leviticus 25:17, 38, 55) removed the issue of land tenure “from the realm of economic expediency…into that of divine interest”.

88 Stuart, Exodus, vol 2 (n 62) 749.
90 Schweid, The Philosophy of the Bible as foundation of Jewish Culture (n 53) 39.
91 Rolf Knierim and George Coats, Numbers (Eerdmans 2005) 201.
92 Stuart, Exodus, vol 2 (n 62) 747.
93 Waltke, An Old Testament Theology (n 8) 423.
97 Burnside, God, Justice, and Society: Aspects of Law and Legality in the Bible (n 59) 199.
99 ibid 107.
Similar links could be made with the freedom narrative, suggesting that the law therefore purports to disengage Israel from her Egyptian heritage to assume a new – yet original – cultural identity. The reminder of God’s salvation – “whom I brought out of Egypt” (Leviticus 25:42, 55) – is repeated in the Torah and returns the reader to Moses’ encounter with God at Sinai, tying in with the promise of God’s blessing (Deuteronomy 15:3-6) set against a history of deliverance from Egypt.100 The idea behind Leviticus 25 thus mirrors Israel’s freedom from Egyptian bondage,101 consistent with the explicit anti-Egyptian agenda elsewhere in Leviticus (see Leviticus 18:3).102

The Jubilee can thus be regarded as an ‘exodus-type’ event: just as the exodus was an act of divine intervention that began with national level sacrifices and purported to return the Israelites to their land of ancestral promise, so the Jubilee began with the Day of Atonement and liberated an enslaved people; both sacral events “[breaking] a spiral of economic dependency”.103 Further indication of this was observed by Burnside in the association of the sound of the ram’s horn (shofar) that commences the Jubilee with other divine declarations of freedom: Mount Sinai (Exodus 19:13), New Year’s Day (Leviticus 23:24), and the day of future redemption (1 Corinthians 15:52) amongst them.104 The principle of redemption (geullah) of land is suitably introduced for the first time in Leviticus 25:24105 and requires the act of acknowledging God’s ownership through a “tithe on time”.106 The Sabbath thereby promoted social justice for vulnerable workers: the laws “are not really demands; they are liberation from demands”.107

D) Shackles

Ironically, the failure to come to terms with this paradox led to persistent distinctions being made in the New Testament between Sabbath-keeping and the fear of Sabbath-breaking, obscuring God’s intentions set out for the Sabbath. As a result of the preoccupation with the amplification of the Torah, “Sabbath the central commandment” was quickly renewed as “Sabbath the legislation”.108 A range of responses emerged: from being a restrictive day of “almost total inactivity”,109 to its more measured employment by the prophets Jeremiah and Ezekiel (Jeremiah 17:21-22; Ezekiel 20:11; 22:8; 23:38) as a token of Israelite tribal traditions in Babylonian exile; from its institutionalisation by Nehemiah (Nehemiah 13:15-22) in order to re-introduce the law of Moses as the rule of community life,110 to a return to its pious observance during the Second Temple and Roman periods.111

This regeneration, effectively in the form of ‘hard laws’, fostered a fear palpable in the embedding of protective legislation by Rabbis – a “fence about the law” (seyag la-

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102 Burnside, God, Justice, and Society: Aspects of Law and Legality in the Bible (n 59) 212.
103 ibid 207.
104 ibid 201.
105 Hess, ‘Leviticus’ (n 56) 804.
to give practical effect to unintentional Sabbath-breaking. Growing abomination for the superficial regard of the Sabbath, kept strictly according to the letter but not in the spirit (Amos 8:4-6), cumulated in its observance becoming one of the principal bones of contention between Jesus and the Pharisees. It has thus become imperative to consider Jesus’ impact in reaffirming the Sabbath’s original significance in the New Testament.

The methods of Jesus stood in contrast: instead of externalising it into detailed legislation, he moved inwards to what the scripture revealed as the nature of God’s creation design. The Sabbath command featured prominently in Jesus’ aphorisms, and its survival through his astounding reinterpretations testifies to its original importance. One theory suggests that Jesus’ more ‘flexible’ attitude to the Sabbath may have simply reflected the milder practice of post-Exilic times more accurately than his strict Pharisaic opponents. Still, the popularity of his ‘abolition of the law’ (Mark 2:23-28) offers the impression that Jesus obeyed the law of the Sabbath only in its essence, but did not himself feel bound by the casuistic interpretations of it traditionally held by the scribes, thus viewing the Sabbath as a means of grace rather than a legalistic burden.

Ultimately, it is commonly held that it was not the Sabbath that Jesus broke, but the human traditions of its mechanical observance: “he did not need to stress strictness in the minutiae of Sabbath-keeping, for Israel had already gone too far in that direction”. Jesus’ reading in the synagogue on the Sabbath (Luke 4:16-20) climaxed in his proclamations of “liberty”, combining the release of Old Testament law and Jesus’ own release of people from sins as prophesised, foreshadowing the new covenant in place of the old. His acts thus celebrated and reinstated the true intentions of the Sabbath as a delight (Isaiah 58:13): “redemption, joy and service”, reaffirming the commands in the Decalogue by reconsidering two inalienable concepts of God’s design: rest (creation) and restoration (freedom).

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120 Swartley, Slavery, Sabbath, War and Women (n 12) 70.
5. CONCLUSION

The Sabbath commandment is therefore unique and distinctive in its ability to both tap on the flames of Israel’s narrative history and light the path ahead in Israel’s narrative future to track the two fundamental motifs of God’s covenant: creation and freedom. Yet in this same context there is little to suggest that the commandment is necessarily more important, so it ought not be taken out of its setting in the Decalogue, lest one risks extolling the shell of the command, rather than its substance.

This essay thus walks towards a precautionary conclusion, revisiting the example of the Sabbath woodgatherer. As Chavel123 offers, its placement in Numbers 15 served as a segue between the implication of violating any of God’s commandments (15:22-31) and the blue tassel instructions to remember them (15:37-41), so making the Sabbath representative of and equal to God’s laws. A breach of one is essentially a breach of all; lessons learnt in the appreciation of the Sabbath commandment ought to be applied to a reading of the Decalogue on a whole, calling for a holistic observance beyond the letter of the commandments, embracing its significance as God’s covenant.

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THE ROLE OF THE BRETTON WOODS INSTITUTIONS IN DEVELOPMENT COOPERATION

Héloïse Daste

Economic globalization has brought increased interdependence and has strengthened the collective duty of all states to cooperate, as consecrated in the UN Charter, the foundational legal text establishing the aims and the purpose of the UN. International cooperation is an essential element in the realization of economic and social rights at the international level and its contemporary relevance is reinforced in the light of the adverse effects of globalization on developing countries and their population. The very design of globalization is heavily influenced by the Bretton Woods Institutions, namely the World Bank and the International Monetary Fund, which gained major and powerful roles in the shaping of the global economy, thus providing the structural links between their responsibilities and world poverty. This is why it is essential to adjust the process of globalization towards a rights-based approach which would foster the realization of all human rights at the global level.

An inherent link between human rights and international cooperation being embedded in the international legal framework, the first step towards a more inclusive and equitable globalization would be the incorporation of a human rights-based approach to development cooperation by the Bretton Woods Institutions. The major added-value provided by this legal framework is the incorporation of accountability into poverty reduction strategies, with the formulation of rights and corresponding obligations. On the other hand, it would permit to acknowledge that human rights and development are mutually reinforcing.

Adapting the institutions and reforming them in the light of contemporary challenges and universal demands for social justice is crucial. International cooperation for development requires indeed much more than the transfer of resources form North to South, it does require the creation of an international enabling order conducive to development. This has important legal implications with regards to the governance structures and substantive policies of both the World Bank and the International Monetary Fund.

“Poverty anywhere is a threat to prosperity everywhere”
ILO Declaration of Philadelphia

1. INTRODUCTION

The contemporary relevance of international cooperation—established as an overarching goal of the United Nations (UN)—has been reinforced by evidence of our growing global interdependence. The lengthening list of transboundary issues including environmental preservation, economic globalization, financial crises, migration and refugee,
terrorism and security, or the control of nuclear weapons animate the duty to cooperate, and its necessity.

Globalization has generated considerable debate as to its effect on developing countries. In his landmark book entitled Globalization and its Discontents, Joseph Stiglitz noted that ‘for too many in the developing world, globalization has not brought the promised economic benefits. Despite repeated promises of poverty reduction made over the last decade of the twentieth century, the actual number of people living in poverty has increased by almost 100 million. This occurred at the same time that total world income actually increased by an average of 2.5% annually’. Global inequality has indeed risen at a pace faster than ever in recent history. This raises important concerns about the ethical aspects of the market-driven economy and the impact of globalization on human rights and development. Persistent world poverty appears to be one of the biggest human rights challenges that the international community has to address. To that regard, the Millennium Declaration adopted in 2000 declared that:

We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.

The duty to cooperate, embedded in the very purpose of the UN, has been extensively developed within the international human rights framework. The realization of human rights at the international level, and in particular economic and social rights, is therefore intrinsically related to international cooperation. The Declaration on the right to development provides the legal basis for collective action in the pursuit of the realisation of economic and social rights at the global level. It provides a juridical framework for international cooperation for which one of its underlying obligations is the removal of structural deficiencies impeding the development process at the international level.

As specialized agencies of the UN, the Bretton Woods institutions, namely the World Bank and the International Monetary Fund (IMF) are major institutions responsible of the shaping of the international economic order. In theory, they therefore hold a strategic position in the duty to cooperate for development. An exploration of the roles of the IMF and the World Bank is therefore required in order to determine to what extent it complies with the requirements of an international enabling order conducive to development.

For that purpose, it is first important to determine where the duty to cooperate is located within the international legal framework, in order to grasp its dimensions and implications (Part II), before then turning to the specific roles the Bretton Woods institutions play within this normative framework and the UN system, to appraise the extent to which it

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1 Joseph Stiglitz, Globalization and its Discontents (2002) at 5
3 UN General Assembly A/RES/55/2, para.11
fits into, or departs from, this international legal framework of cooperation (Part III). Part IV will review the key dimensions of development cooperation and the way forward beyond the post-2015 development agenda.

2. THE DUTY TO COOPERATE EMBEDDED IN THE INTERNATIONAL LEGAL FRAMEWORK

A) The normative framework for international cooperation

I. The UN imperative of international cooperation

Throughout the twentieth century, the evidence of our global interdependence grew more and more present, and although the League of Nations failed its mission to preserve peace, there was an unprecedented effort to join the world together at the end of World War II. The United Nations order is founded on a post-war international law of cooperation enshrining values of justice, peace, security, democracy and self-determination. The Charter of the United Nations (UN Charter) was adopted at San Francisco on 26 June 1945 and as set out in its article 1(3), one of the purposes of the United Nations is

>To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

This suggests that from the outset, the drafters of the UN Charter acknowledged that international cooperation would be of particular relevance for economic and social matters, and that the corresponding human rights obligation in that context would go beyond national borders. This legal obligation to cooperate in economic and social matters is strengthened by article 55, which was regarded as the implementing provision of article 1, and read in conjunction with article 56, underlies the responsibilities of the UN to take action. Article 56 of the UN Charter indeed states that “all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”. In terms of operational strategy for this cooperation, article 55(c) recalls the essential role of human rights in “international economic and social co-operation” —as chapter IX of the UN Charter is headed— and if none of the human righted treaties were drafted at the time of the adoption of the UN charter, such references acted as a ‘golden thread’. Indeed, a range of international human rights treaties subsequently developed human rights standards and came to reinforce the Charter’s overarching goal to promote and

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7 ibid 919.
respect human rights, with the Universal Declaration of Human Rights (UDHR) adopted in 1948, followed by the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both adopted in 1966.

These human rights instruments incorporate a clear “international assistance and cooperation component”, concerned about the operationalization and realisation of human rights. Article 28 of the UDHR can be seen as the normative basis articulating a relationship between international cooperation and the realisation of human rights; It states that: ‘everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.’ By requiring a structural adjustment of the social and international orders so as to create the conditions necessary for the equal enjoyment through the world of human rights, it effectively links the structural causes of human rights violations and major global economic and social patterns. For Salomon, the structural content of an obligation of international cooperation is informed by a consensus on an “international enabling environment” which implies an obligation of conduct over result. Thus the implied obligation underlying article 28 is that international cooperation should be orientated towards the creation of an equitable and just international economic and social order, conducive to the realisation of all human rights. This represents a quest for international justice more generally, with the establishment of equitable global rules and fair international institutions, representatives of the common interest. Moreover, article 22 of the UDHR, seen as an umbrella article on economic and social rights, was incorporated in order to describe the obligations of states in fulfilling these rights, and thus refers to obligation ‘through national effort and international co-operation’. Article 22 seems to recognize, anticipating the dramatic expansion of globalization, that international cooperation is an essential component for the realisation of economic and social rights at the international level. If it is consistently recalled that human rights obligations rely primarily on the domestic state, it should also be emphasized that their realizations are intrinsically interrelated with the international system. Indeed, domestic states have the primary responsibility to comply with their human rights obligations, but this cannot be dissociated from the wider global environment and the impact of globalization on the determination of national policy priorities.

The International Covenant on Economic, Social and Cultural Rights which elaborates in more detail the nature of the economic and social rights, confirms the importance of international cooperation and assistance in their operative realisations; article 2(1) provides:

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8 Skogly (n 5) 17.
10 Salomon (n 4) 102-103.
11 ibid 73.
12 Salomon (n 4) 469.
13 Salomon (n 4) 476 & 488.
Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.

Therefore, obligations of international assistance and cooperation in the ICESCR form part of the general legal obligations in that treaty. This has been emphasized by the UN Committee on Economic, Social and Cultural Rights (CESCR) which recalled that international cooperation for development, having its foundational basis in articles 55 and 56 of the UN Charter, is also an obligation in the provisions of the Covenant. International cooperation is reiterated in relation with the right to food (article 11), the rights to benefit from cultural and scientific work (article 15(4)) and in the general implementing provisions (articles 22 and 23) which demonstrate that international action for the fulfilment of the Covenant was seen as imperative, and as a natural continuation of the principles contained in article 2(1). The Convention on the rights of the child (CRC), the most widely ratified human rights treaty, relies also extensively on the language of international cooperation.

There is, therefore, a strong normative framework for international cooperation in international law, further elaborated in international human rights treaties. International cooperation is indeed a powerful tool to advance human rights and underlies the very idea of the United Nations. If the clear substantial and procedural implications of international cooperation in relation to economic and social rights was at first obscured, it became clear that it goes well beyond a traditional ‘Official Development Assistance’ (ODA) and requires a qualitative assessment of the impact upon the enjoyment of economic and social rights.

II. The right to development as a new impetus for international cooperation

An inextricable link between the framework of international cooperation and the realisation of economic and social rights is clearly articulated in international human rights treaties such as in the UDHR, the ICESCR or the CRC. According to Salomon, the strongest articulation of this link came into the form of Declaration of the right to development (DRD), which, instead of establishing new substantive rights, frames a system of duties with corresponding responsibilities that might give better effect to existing economic and social rights. The normative force of the right to development is that it powerfully advances international cooperation as a legal duty —thus reinforcing this overarching and

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17 CESCR (n 15) General comment 3, para 14.
18 Skogly (n 5) 97.
20 Skogly (n 5) 98.
21 General Assembly, A/RES/41/128
22 Salomon (n 4) 7.
operationalizing goal contained in the UN Charter and international covenants. Indeed Article 3(3) of the DRD affirms that ‘states have the duty to co-operate with each other in ensuring development and eliminating obstacles to development’. This is reinforced by article 4(1) which provides that ‘states have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development’. The DRD can be seen as an elaboration of article 55 of the UN Charter, as in practice, the international obligation of cooperation has been carried out with a focus on development. The right to development therefore formulates an obligation of conduct resting on the international community as a whole, to provide the appropriate means and facilities to foster the sustainable development of developing countries.

The DRD was adopted in 1986 by the General Assembly in a context of radical claims for a New International Economic Order (NIEO) made by the Third World. This NIEO was directed at fundamentally reforming the global political economy for trade, finance, investment, aid and information flows. This echoes the requirements for an international enabling order contained in article 28 UDHR, which implies a structural change at both the international and national orders leading to the establishment of a holistic framework for the cumulative realisation of all human rights. This approach on the right to development is also reflected on development as a process based on claims of equity and justice, and as Sengupta argues “the essential spirit of this demand for equity remains in force in all forms of international cooperation envisaged in the realization of the right to development”. Therefore, the right to development, if it is directed at establishing an international equitable order, considerably expands the understanding of what international cooperation does imply: not only direct form of transfer of resources in the form of ODA but a myriad of multilateral and bilateral indirect forms of cooperation based on equity such as preferential trade liberalization, incentives for foreign direct investment (FDI), transfer of technology and knowledge or debt forgiveness. François Bourguignon indeed emphasized that international redistribution of income takes place through a variety of channels, and that there are numerous ways to account for the impacts of international policies in trade or economic matters on that redistribution.

By emphasizing on the global dimension of rights and implying the reality of massive global inequalities between North and South, the DRD gives a new dimension to international cooperation by stressing on the collective duty of all states to promote the

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23 ibid 85-86.
24 (n 19) 82.
29 ibid 879.
necessary conditions for the realization of economic and social rights.\(^{31}\) The major concern behind the right to development is precisely the actual inequities conveyed by economic globalization.\(^{32}\) The World Bank itself acknowledged that the dominant strategy advanced by the International Financial Institutions (IFIs) to reduce global poverty has been the integration of developing countries into the global economy, but ‘global markets are far from equitable, and the rules governing their functioning have a disproportionately negative effect on developing countries’.\(^{33}\) Nevertheless, the principle of international cooperation contains an obligation to take the special interests and needs of developing countries into consideration when shaping the international economic order.\(^{34}\)

The CESCR observed that global poverty represents massive and systemic breaches of economic, social and cultural rights, therefore characterizing poverty as a human rights violation.\(^{35}\) This strengthens the assertion that poverty reduction has become a “universal obligation” in light of the international obligation for cooperation and the right to development.\(^{36}\)

**B) Human-rights based approach to development cooperation**

**I. The added value of a human rights framework to development cooperation**

A major contribution of the right to development is that it introduced development to the human rights normative framework and triggered comprehensive reflections on a rights-based approach to development. The DRD marked indeed a key milestone to encourage more interdisciplinary works between development (previously considered as the exclusive task of economists), and human rights, adding an essential ethical aspect to development.\(^{37}\) The CESCR, on its statement on the importance of the right to development, noted that ‘through the systematic application of the core principles of equality, non-discrimination, participation, transparency and accountability’, it ‘establishes a specific framework within which the duty to provide international cooperation has to be implemented’.\(^{38}\) To fully grasp the potential of a human rights-based approach (HRBA) to development cooperation, its three main characteristics as laid down in the *Common Understanding among UN agencies (2003)* \(^{39}\) will be analysed in the light of the Draft guidelines (2002),\(^{40}\) and the Principles and Guidelines for a Human Rights Approach to poverty reduction strategies (2011), both adopted by the Office for the High Commissioner of Human Rights (OHCHR):

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32 Stiglitz (2002) at 5-6
34 Tietje (n 14) 553.
40 OHCHR (2002). See n 32.
First, “all programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the UDHR and other international human rights instruments”.

The first implication of a HRBA to development is encapsulated in the vision that human rights should not be merely instrumental but ends in themselves. This also reflects the re-definition by Amartya Sen of development as freedom, which includes human rights as a constitutive part of development. Indeed Sen considers ‘substantive freedoms’ as ‘constituent components of development’, and in this perspective, ‘poverty must be seen as the deprivation of basic capabilities rather than merely as lowness of income’. This conception of development permitted to conceptualize poverty as a multi-dimensional condition, with human freedoms as simultaneously instrumental, constitutive and constructive for development, both concepts being intrinsically interrelated.

This approach also highlights the interdependence and indivisibility of civil and political rights on the one hand, and economic, social and cultural rights on the other. This considerably broadens the scope of poverty reduction strategies which, along the right to decent work, the right to food, the right to education or the right to health, integrates the right to personal security and privacy, equal access to justice and political rights and freedoms. The principle of indivisibility and interdependence implies that considering the realisation of rights in isolation would be meaningless as they are all conceptually and functionally linked. Indeed, lack of political rights and freedoms is both a cause and a consequence of poverty, as it undermines the right to participation and information, crucial for empowering the poor and combating social exclusion. Sen indeed observes ‘extensive interconnections between political freedoms and the understanding and fulfillment of economic needs’. Political rights are thus crucial for the development process, in substantive and procedural terms, and reflect to some extent that poverty reduction strategy must be a country-driven process, as the domestic state must “create the necessary legal and institutional framework” in which such political rights can flourish. This holistic human rights framework for realizing development is particularly relevant if we consider that development seeks to vindicate human dignity and freedoms; in that perspective, it makes perfect sense that development standards relate to human rights standards.

Second, “human rights standards contained in, and principles derived from, the UDHR and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming access”.

41 Uvin (n 26) 601.
43 See n 39.
44 OHCHR (n.36) section 2 ; OHCHR (2011), Ch 3.
45 see guideline 8 of the OHCHR (2011)
47 OHCHR (2011) para 212-214
48 Sen (n 42) 147.
49 OHCHR (2011), para 74
50 Darrow and Tomas (n 46) 520.
This second principle for a HRBA to development highlights that the process conducive to development is crucial, not only the outcome.\(^5\) The two OHCHR guidelines states that the process of the formulation of poverty reduction strategies must be consistent with the international and national human rights framework, and this has considerable potential for the development process to foster the state human rights obligations.\(^5\) Moreover, equality, non-discrimination, participation and empowerment are fundamental human rights principles to be integrated into development programming. These human rights principles provide a more powerful approach to development, by building political capabilities and consciousness and thus, permit to engage in a more active process of social transformation.\(^5\) The principle of participation and strategies of empowerment allow for making the poor active in the process of development, which is fully reflective of article 2(1) of the DRD providing that: ‘the human person is the central subject of development and should be the active participant and beneficiary of the right to development’. As such, a HRBA is a framework for understanding the structural causes of poverty and addressing them, and should not be considered as a one-dimensional, static formula.\(^5\) The process of development should create opportunities that are not dependent on the whim of a benevolent outsider, but rooted in internal institutions and procedures.\(^5\)

Another important aspect of the HRBA is that it fully associates a “right to international assistance and cooperation” with the development process.\(^5\) This extends the development enterprise to the normative framework of international cooperation enshrined in article 55 of the UN Charter, article 2(1) ICESCR and the DRD, and therefore moves from the rhetoric of charity to the legal formula of duty.\(^5\) Acknowledging the legal dimension of development cooperation would bring increasing accountability and certainty to the activities of development agencies, which is by definition lacking in the pledges of the MDGs, which calls only for greater generosity by rich donors and introduces no mechanisms of accountability.\(^5\)

- Third, “development cooperation contributes to the development of capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holder’ to claim their rights”.

An intrinsic feature of the human rights approach to development is the introduction of the concept of rights, which means that people living in poverty not only have needs, but legal entitlements that give rise to obligations on the part of others.\(^5\) Because rights imply duty and duty demands accountability, increasing accountability and transparency are at the

\(^{52}\) OHCHR (2011) para 41
\(^{53}\) Cornwall & Nyamu-Musembi (n 31) 1418.
\(^{54}\) Darrow and Tomas (n 46) 501.
\(^{55}\) Uvin (n.26) 603.
\(^{56}\) OHCHR (n 36) See guideline 15.
\(^{57}\) Uvin (n.26) 602.
\(^{59}\) OHCHR (2011) para 19
heart of the HRBA to development. It treats development issues as a matters of rights and
obligations rather than discretion and charity and determine the relationship between
individuals or groups with valid claims (rights-holders) and states with correlative obligations
(duty-bearers). The development process should then be directed at building capacities for
people to assert their rights and for those responsible to meet their obligations. This makes
the process of development explicitly political and has the potential to achieve a positive
transformation of power relations among development actors, by enabling the poor to claim
genuine accountability from development agencies.

If the principal duty-bearer is the state, the international community bears also a shared
responsibility to realize universal human rights. In the “internationalization of
responsibilities”, the accountability of global actors should not be understated. There is
indeed an increased acknowledgement that international organizations and UN bodies have
obligations under international law, and particularly human rights obligations. Moreover, it
can be argued that a state extraterritorial obligations are at stake in the context of the decision
making of international organisations, and in the context of the IFIs, the more influence a
state has on these policies given its quota share, the more responsibility it bears. To this
regard, the CRC Committee used the concept of “sphere of influence” as a criterion to
determine the extent to which UN agencies are responsible.

II. The content of development cooperation informed by extraterritorial human rights
obligations

The potential of a rights-based approach to development lies also not only in the legal
framework of accountability it provides, but also in the potential of the tripartite typology of
human rights obligations to clarify the content of international cooperation. The Maastricht
Principles on Extraterritorial Obligations of States in Area of Economic, Social and Cultural
Rights list the three commonly used levels of obligations: duty to protect, to respect and to
fulfil. The scope of extraterritorial obligations of states overlap with the obligations of global
character as set out in the UN Charter, that is to say, international cooperation. In that
perspective, the extraterritorial obligations to respect, to protect and to fulfil can be
interpreted as providing a comprehensive framework for the content of international
cooperation.

Broadly speaking, the duty to respect and to protect are both negative obligations
with the duty to respect implying to refrain from interference with the they enjoyment of rights

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60 Darrow and Tomas (n 46) 511.
61 Cornwall & Nyamu-Musembi (n 31) 1417 & 1432.
62 OHCHR (2011) para 81
63 OHCHR (n 36) Guideline 18.
64 Morton Haugen (n 51) 45.
65 Vandenhole, W. and Benedek, W. Extraterritorial Human Rights Obligations and the North-South Divide (2012) in
Langford, M. Global justice, State duties: the Extraterritorial Scope of Economic, Social and Cultural Rights in International
Law (CUP), 359.
66 Vandenhole, W. ‘Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate
67 Skogly (n 5) 18.
68 ETOs (2011) III, IV and V
69 De Schutter, O et al. ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of
while the duty to protect requires to prevent third parties from causing violations. The duty to fulfil however, is a positive obligation implying to take steps. There is consequently a difference of degree of resources in this tripartite typology and the duty to fulfil extraterritorially is arguably the most controversial one. The CRC Committee nonetheless recommended in concluding observations to allocate 0.7% of GDP to ODA and this has set up an important point of reference in terms of positive obligation. It has indeed been enshrined as one of the target under the MDG 8.

Nevertheless there has been disproportionate attention paid to the extraterritorial obligation to fulfil, that is to say the transfer of resources from North to South, which is politically the most contentious and the legally most difficult to establish. Indeed, developed states have consistently denied the existence of any clear legal obligations to transfer resources to the developing countries, preferring to characterize it as an ‘important moral obligation’ rather than a legal entitlement. Consequently, there is no legal obligation to provide financial assistance under article 2(1) of the ICESCR. In contrast, the duties to respect and to protect in the formulation of policies in the field of trade, agriculture, or in adjustment programmes are of paramount and practical importance for the enjoyment of human rights in developing countries, and have been relatively neglected in the formulation of development policy. The CESCR has indeed clearly elaborated on the negative obligations to respect and to protect extraterritorially. On its general comment on the right to health, it indirectly referred to the obligation to respect extraterritorially of states as members of international financial institutions, notably the IMF and the World Bank, and held that they ‘should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.’ Whilst not explicitly mentioning it, the Committee clearly refers to obligations of international cooperation, effectively linking extraterritorial human rights obligations with the international framework of international cooperation. On the other hand, the obligation to protect has considerable implications for the regulation of transnational corporations (TCNs) activities.

The negative obligations to respect and to protect extraterritorially relate to the international legal system as a whole and should be understood as including a responsibility to work actively towards equitable multilateral trading, investment and financial systems that are conducive to the realisation of human rights and the elimination of poverty. The responsibility of states acting through international organisations, and in particular the World

70 Skogly (n 5) 67 & 69.
71 Vandenhole and Benedek (n 65) 337.
72 ibid 347.
73 Vandenhole (n 66) 24.
76 Vandenhole (n 66) 24.
78 Ssenyonjo (n 74) 986.
Bank and the IMF, is at stake in the shaping of the international economic order, and is a dimension of the obligation to protect human rights at the international level. 79

C) The MDG, between progress and relative engagement

I. Removal of the normative effect of human rights

The Millennium Declaration adopted by the UN General Assembly (GA) in 2000 represents one of the most significant soft law-making instruments in terms of coverage and participation. 80 As a UN GA resolution, it is designed to be a non legally binding instrument and thus characterized by soft means of enforcement, the absence of any accountability and a character purely political. 81

The Millennium Development Goals (MDGs), globally endorsed in the 2005 World Summit Outcome, 82 represent an unprecedented international effort to promote human development and dramatically reduce poverty. 83 Framed in soft goals and objectives, they fail to draw on the existing normative framework on international cooperation contained in the UN Charter and elaborated in the DRD. The MDGs indeed significantly depart from the rights-based approach as they do not stipulate the internationally agreed set of norms backed by international law and the normative framework of rights, but instead, adopts a ‘needs-based’ approach. 84 The sole use of the term ‘goal’ as opposed to ‘rights’ reveals substantial conceptual gaps; goals embody a utilitarian approach whereas rights make a normative claim. 85 This utilitarian approach reflects a “quick win” or “low cost-high impact” strategy at odds with the human rights approach which aspires to address the structural causes of poverty by empowering the poor and guaranteeing mechanisms that give citizens the means to assert their rights. 86 On the contrary, the MDGs adopt a narrow definition of poverty — dismissing the elements of ‘development as a process’ and ‘development as freedom’ of the HRBA described above — as encompassing solely “income poverty”, “social service poverty” and “environmental poverty”. 87 For instance, Goals 4 and 5 address very limited aspects of the right to health, which is the right to maternal, child and reproductive health (article 12.2(a) ICESCR), without dealing with the overall improvement of health infrastructures and environments. This reduces the MDGs as demographic and economic indicators aiming at addressing the worst symptoms of poverty rather than its causes. 88 This is at odds with the capability approach advocated by Sen, arguing for structural change enabling people to

81 ibid 363 & 376.
82 A/RES/60/1
83 Alston (n 37) 756.
84 Cornwall & Nyamu-Musembi (n 31) 1417.
85 Nelson (n 58) 2045.
86 ibid 2047.
87 Alston (n 37) 787.
88 Nelson (n 58) 2046.
achieve development outcomes by themselves.\textsuperscript{89} This means that gains generated by the MDGs would last only as long as the UN sponsor keep funds flowing, without promoting the necessary mechanisms and structures at the basis of human development.\textsuperscript{90} To this regard, the total lack of political and civil freedoms, any references to democracy, justice or the rule of law in the MDGs is symptomatic of their failure to recognize poverty as a complex and multidimensional condition.

If both resolutions of the 2000 Millennium Declaration and the 2005 World Summit Outcome make numerous references to human rights, and event the right to development,\textsuperscript{91} the MDGs themselves carefully avoid the language of human rights, then basing cooperation on moral rather than legal obligations.\textsuperscript{92} These passing references of human rights remain indeed merely verbal without the introduction of mechanisms of justiciability or accountability.\textsuperscript{93} For Uvin, references to human rights in the development discourse amounts to pure rhetoric and a quest for the “moral high ground”, which in substance permits the continuation of the status quo and avoid any challenge to the international system.\textsuperscript{94} The absence of rights and the sloppiness of the MDG target formulation have even left room for human rights violations, such as slum clearance and forced evictions as part of Vietnam or South Africa efforts to achieve Target 7D.\textsuperscript{95}

This reluctance to integrate a rights-based approach into the MDGs is related to the unwillingness to acknowledge human rights accountability.\textsuperscript{96} International development actors make deliberate efforts not to incorporate the language of rights and in particular the underlying obligations of the DRD to avoid the controversies raised by its reference to global inequalities and its implications for international cooperation.\textsuperscript{97} In the words of Alston, accountability ‘is indispensable in any human rights context’ and an accountability dimension is equally ‘necessary to ensure that the MDG initiative is more than just another bureaucratic

\begin{itemize}
  \item \textsuperscript{89} WESS 2014/2015 at 29
  \item \textsuperscript{90} Nelson (n 58) 2053.
  \item \textsuperscript{91} See n 3, para 11 and 24; n 81, para 24(b) & 123
  \item \textsuperscript{92} Nelson (n 58) 2041.
  \item \textsuperscript{93} Azzam, F. ‘Reflections on Human Rights Approaches to Implementing the Millennium Development Goals’ (2005) 2(2) International Journal of Human Rights 23, 24
  \item \textsuperscript{94} Uvin (n 26) 603.
  \item \textsuperscript{95} Langford, M. ‘A Poverty of Rights: Six Ways to fix the MDGs’ (2010) 41(1) IDS Bulletin 88.
  \item \textsuperscript{96} Darrow and Tomas (n 46) 518.
  \item \textsuperscript{97} Cornwall & Nyamu-Musembi (n 31) 1423.
\end{itemize}
scheme that will come and go just as its predecessors have. Rather than engaging into a rights-based approach, the MDG can be featured as “transgovernmental networks of cooperation” in the architecture of international cooperation, by remaining at the level of informal, top-down efforts characterized by pledges and declarations. Removed from the context of rights, they represent no more than appeals to the international community to reduce poverty and place development cooperation in a perspective of charity, which downgrades existing international legal obligations and dismiss meaningful accountability mechanisms.

II. **MDG 8, the limited global partnership**

Goal 8 institutes the establishment of a “global partnership for development”, and is in that sense an overarching goal for the operationalization of the other goals. The human rights framework of international cooperation contained in article 2(1) ICESCR and the Declaration on the right to development provides useful tools and guidance on the substantial and procedural aspects of international cooperation, as well as some forms of accountability for compliance with MDG8. But the targets and indicators contained in the MDG8 are framed in a technical manner so as to be quantifiable and thus focus on outcomes, in contrast with the implied obligations of international cooperation emphasizing on obligations of conduct over result, and thus on cooperation as a process. The targets for MDG8 include to increase ODA, to address debt problems of developing countries, the special needs of least developed countries (LDC) in the multilateral trade regime or transfer of technology amongst others. As Fukuda-Parr observes, these are clearly frameworks for international cooperation and agendas for promoting the right to development, but the overall emphasis is on resource transfer through ODA which is the only quantitative target whereas the other objectives are stated as desired outcomes and fall short of identifying concrete policy changes that can be monitored. This is in contrast with the Monterrey Consensus agreed on in 2002, which identifies the need to address systemic issues to enhance the coherence, governance, and consistency of international monetary, financing and trading system. The Doha Round of negotiations identified the same special needs of developing countries but no coordination or monitoring mechanisms have been created in order to link the efforts of the MDG with the multilateral trading regime. Therefore, the mechanisms and commitments contained in MDG8 are weak and limited to genuinely permit to work towards an inclusive international economic order governed by fair and equitable rules, and reflecting the interests of developing countries.

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98 Alston (n 37) 813.
100 Carmona (n 75) 87.
101 ibid 102.
103 (2006) at 985
104 ibid at 984
As argued by Margot Salomon, the DRD requires a process aimed at the creation of an equitable and fair multilateral economic system, and thus the removal of the structural deficiencies in the international order impeding the realisation of economic and social rights.\(^{105}\) This implies the reforms of the international economic institutions, namely the World Bank and the IMF in order to increase the representation of poor countries in their decision-making processes, given that better representation of the interests of the global poor in the global economic system would be the first step to achieve poverty alleviation.\(^{106}\) However, MDG8 do not refer to the asymmetry of powers and the low representation of developing countries and their interests in the global economic governance.\(^{107}\) It therefore fails to a large extent to recognize the major constraints that arise from the global economic environment impeding developing countries to assert their interests.

3. THE ROLE OF THE BRETTON WOODS INSTITUTIONS IN DEVELOPMENT COOPERATION

A) The Bretton Woods regime within the UN system

I. An outward independence

While article 56 of the UN Charter underlies the responsibilities of the member states to cooperate with the UN in a constructive way, article 57 emphasizes the same duty in relation to specialized agencies in the economic, social, cultural, educational, health and other related fields. It is clear that the obligation of cooperation between the IFIs and the UN in the economic and social field arises from the UN Charter, and that this cooperation has a human rights purpose.\(^{108}\) The World Bank and the IMF are uniquely placed to promote such cooperation in economic and development matters and address global collective action plans.\(^{109}\) However, in practice it appears that both institutions enjoy an important degree of independence, insulating them from the UN system and undermining effective coordination and cooperation. Indeed, the UN has failed its mission of central-policy making and coordination in economic and social matters, a mission assigned to the Economic and Social Council (ECOSOC) in accordance with article 58 of the UN Charter.\(^{110}\) The World Bank and IMF Relationship Agreements with the UN carefully protect their budgetary independence and protect them from full oversight from ECOSOC, providing for complete independence in their lending operations.\(^{111}\) Consequently, the IFIs have no real accountability to ECOSOC and their agenda is not subject to any meaningful review, which is heavily influenced by their

\(^{105}\) Salomon (n 4) 50-51.
\(^{111}\) ibid 520.
most powerful members.\textsuperscript{112} The Relationship Agreements have been interpreted by the IFIs as precluding the UN from requiring them to undertake specific policies or participating in the promotion of a defined strategy.\textsuperscript{113} Consequently, this outward independence of the Bank and Fund sits at odds with the scheme of cooperation envisaged by the drafters of the UN Charter.\textsuperscript{114}

This greater degree of independence is justified by the IFIs by the theory of functionalism, according to which they are narrow, technical institutions focusing on the economic aspects of development and do not respond to political agendas.\textsuperscript{115} This claim of limited and technocratic mandate is clearly inaccurate with regards to the dramatic expansion of the scope of their activities. International cooperation is significantly undermined by this insulation which does not permit effective policy coordination within a global strategy reflecting the common good. As they claim to be concerned with economic and financial welfare, the liberal ideology underpinning the policies of the Bank and the Fund in matters of monetary stability, balance of payments or capital mobility make it from the outset difficult to reconcile with other UN values of justice, human rights, democracy or cooperation.\textsuperscript{116} In practice however, the increasing interdependence of economic issues and the intertwining of global problems mean that neither the Bank, nor the Fund can address monetary stability, economic welfare and poverty alleviation in developing countries in isolation from ‘political’ or ‘social’ issues such as institutional capacity and good governance, health, education or environmental degradation.\textsuperscript{117} This has led to a \textit{de facto} enlargement of their scope of interventions coupled with an increasing influence on virtually all aspects of the domestics policies of their recipient countries in economic and social matters. This means that the enforcement of their policies has become a matter of UN law, and that these policies must be developed in line with fundamental principles governing the UN system.\textsuperscript{118} As international economic problems no longer fall into neat categories, the anachronistic economic functionalism of the Bretton Woods institutions should consequently be formally acknowledged. Their mandates should be revisited into a more cooperative model with other UN agencies for more coordinated solutions to international economic governance and development.\textsuperscript{119}

\textbf{II. A position undermining collective action}

The overall pattern of separation between the UN and the Bretton Woods institutions demonstrates that the UN has certainly not reached its full potential of cooperation in

\begin{thebibliography}{99}
\bibitem{112} ibid 514.
\bibitem{114} Darrow (n 108) 125.
\bibitem{115} Zamora (n 110) 511.
\bibitem{117} Bradlow and Grossman (n 113) 414.
\bibitem{118} White (n 116) 276.
\bibitem{119} Zamora (n 110) 575-576.
\end{thebibliography}
economic and social affairs.\textsuperscript{120} Indeed, if the World Bank is the leading development agency, the international development assistance regime is fragmented with multiple donors including national agencies or other regional banks.\textsuperscript{121} The proliferation of aid and the lack of coordination have been major obstacles in aid effectiveness.\textsuperscript{122} The need for a clear division of functions between the World Bank and regional banks in order to reduce transaction costs and prevent their competition for same projects has been pointed out by the Meltzer Commission.\textsuperscript{123} On the other hand, whilst both institutions claim development and poverty reduction as their mandates, important differing philosophies divide the World Bank and the United Nations Development Programs (UNDP). They have indeed divergent development strategies as the UNDP is clearly an advocate of a human rights based approach to development as exemplified in its Human Development Report 2000, while the World Bank continues to claim that human rights fall beyond its legal mandate.\textsuperscript{124} The Bank’s refusal to fully embrace human rights commitments might be interpreted as a natural repercussion of its outward independence and insulation from the UN international legal order. As the World Bank acquired a quasi-monopoly in the international architecture of development,\textsuperscript{125} it is problematic that it steers clear of the existing international legal framework for development cooperation. Institutionalization through formal intergovernmental organizations such as the UN serves to anchor international cooperation.\textsuperscript{126} Therefore, circumventing the UN as an institutional mechanism for transnational cooperation undermines the very purpose of the UN, and constitutes a significant obstacle for collective action.

B) The ‘status quo’ on the governance and accountability structures of the Bretton Woods institutions as structural obstacles to development

I. The expansion of their mandates leading to ambiguities and overlap of jurisdictions

Since their establishment in 1944, the roles of the IMF and the World Bank have changed beyond their original mandates, and have adapted to new challenges in the light of globalization and increasing interdependence.\textsuperscript{127} The Bank shifted rapidly from a reconstruction to a development role with the creation of the International Development Agency (IDA) in 1960 providing concessional loans to poor countries and extended its funding programs beyond infrastructures to social programs covering reforms of the judicial system, the rule of law, gender equality or good governance.\textsuperscript{128} The Bank’s involvement in

\begin{footnotes}
\item Woods (n 109) 50.
\item Cornwall & Nyamu-Musembi (n 31) 1425-1427.
\item Blackmon (n 106) 182.
\end{footnotes}
issues of ‘good governance’ stretched the limits of its mandates by indirectly dealing with aspects of political systems, accountable governments and democracy.\textsuperscript{129} With regards to the IMF, it was originally designed to ensure the stability of the international monetary regime by providing short term balance of payment credits.\textsuperscript{130} With the demise of the fixed exchange rate system in 1971, a lynchpin of the entire Bretton Woods system, the IMF was in search for a new role and became increasingly involved in the financial and economic problems confronting developing countries, expanding its mission to include the promotion of capital liberalisation, poverty reduction and growth facility, the merits of which are still debated.\textsuperscript{131} The IMF has thus turned to address some of the developmental problems, as opposed to purely monetary.\textsuperscript{132} This self-expansion of mandates is understandable if the IFIs are to adapt and remain relevant in a changing and globalized world, but what is problematic is that it takes place outside a clear legal framework and delimited jurisdictional boundaries. As a result, they often operate on the basis of ambiguous institutional and substantive principles and rules,\textsuperscript{133} conferring them with a wide scope of discretion.

On the other hand, the over-extension of mandates of the IMF to include poverty reduction—which is not reflected in Articles I of its Articles of Agreement—duplicates the function of the World Bank, leading to overlaps and conflicts of jurisdiction.\textsuperscript{134} The view of the IMF is that it has an indirect role in poverty alleviation though its mandate by providing sound macroeconomic policies permitting sustainable economic growth, essential to cut poverty.\textsuperscript{135} The Poverty Reduction and Growth Facility (PRGF) was created in 1999 according to this rationale, but it is doubtful that the IMF has the capacity and expertise to monitor and set conditions in virtually all aspects of the economic and social polices of the borrowing countries.\textsuperscript{136} This doubt can be illustrated by a study on the structural adjustments programmes (SAP) and their effects on growth, which suggests that economic growth under the economic reforms promoted by the SAP has had perverse effects on poverty and has been less pro-poor than in economies without SAP.\textsuperscript{137} This might be explained by the fact that the economic opportunities created under SAP, namely financial liberalization, are ill-suited to the poor and do not represent an expansion of their opportunities. This finding thus challenges the legitimacy of the IMF to engage in poverty alleviation with regards to the nature of the reform its pushes for. Nevertheless the viewpoint of the Bank and the Fund was that they had the same mandates and goals which led them to coordinate their policy within the Comprehensive Development Framework (CDF). But if both the Fund and the Bank have become deeply involved in poverty alleviation, they nonetheless retain different approaches

\textsuperscript{131} Ikhide (n 122) 135.
\textsuperscript{132} Bradlow & Grossman (n 113) 421.
\textsuperscript{134} Ikhide (n 122) 135.
\textsuperscript{135} Blackmon (n 106) 184.
\textsuperscript{136} Ikhide (n 122) 144.
to poverty.\textsuperscript{138} Indeed the IMF is more likely to focus on macroeconomic issues that affect the poor such as high inflation and slow economic growth whereas the Bank has been able to encompass a broader understating of the concept of poverty.\textsuperscript{139} The IMF’s very narrow approach to poverty puts the legitimacy of its involvement in poverty reduction into serious doubt. This overlap of jurisdictions and over-extension of mandates is therefore questionable, and a clear delimitation of the activities between the Bank and the Fund is long overdue.\textsuperscript{140} The Fund must focus on the short-term issue of financial stability, relating to the interests of rich countries, while the Bank should revert fully to its development role and address the chronic development crisis of many low-income countries.\textsuperscript{141} It is indeed apparent that well-defined mandates and clear-cut division of labour amongst UN agencies, including the Bank and the Fund, are important prerequisites for the coherence, coordination and effectiveness of international development policy.\textsuperscript{142}

\section*{II. A growing accountability deficit}

If the roles of the Bank and the Fund have expanded, their accountability has not.\textsuperscript{143} Indeed the IFI’s were neither created nor structured to undertake or to be accountable for such far-reaching activities.\textsuperscript{144} The importance of the IFI’s dramatically changed during the 1970s with the abandonment of the fixed exchange rate system, and the oil crisis of 1973; the debt crisis resulting from the sharp rise in oil prices increased their share of financial support to developing countries, coupled with augmented use of conditions linked to loans, which meant that they both gained significant influence over national policies.\textsuperscript{145} They did indeed become heavily involved in conditionality and policy-based lending whereas there was no consideration of intrusive conditionality at the time of their establishment.\textsuperscript{146} The two institutions have deep reach into policy-making with members going well beyond the respectful boundaries set out in their original Articles of Agreement. This also means that conditionality has become dysfunctional as it has expanded into areas which have no direct bearing on loan repayment, and thus infringes national sovereignty.\textsuperscript{147}

As a result, the IFIs have enjoyed a high degree of unaccountability and discretion in the pursuit of their loans arrangements and activities, evolving in a sort of grey area. Accountability is said to be “probably the weakest aspect of IMF governance” as denounced by its Independent Evaluation Office (IEO).\textsuperscript{148} Considering it has shifted from a monetary institution to a development financing institution, and has consequently developed policies

\textsuperscript{138} Blackmon (n 106) 189.
\textsuperscript{139} ibid 181.
\textsuperscript{140} Ikhide (n 122) 145.
\textsuperscript{141} You (n 128) 217.
\textsuperscript{142} Messner and al. (n 125) at 43
\textsuperscript{143} Woods, N. ‘Making the IMF and World Bank More Accountable’ (2001) 77(1) International Affairs (Royal Institute of International Affairs 1944-) 83, 88
\textsuperscript{144} ibid 89.
\textsuperscript{145} Skogly (n 5) 16.
\textsuperscript{146} Dreher (n 130) 445.
\textsuperscript{147} You (n 128) 221.
directly affecting people in its member states, the need for holding the IMF accountable for human rights violations is all the more strengthened. Its self-characterization as a narrow and technical institution, sheltering it from clear human rights involvement and accountability, is no longer sustainable with regards to the pervasive effects of its policies in the domestic legal order of its borrowing countries.

The World Bank approach to human rights is somewhat ambiguous: it has clearly acknowledged the relevance of human rights for its work, notably the effect of civil liberties protection on economic returns, the importance of gender equality for development and thus women’s rights, the necessity to eliminate child labour and promote education and consequently children’s rights. But this acknowledgement appears to remain only at the rhetorical level as it stands in contrast to the Bank’s failure to internalize any consistent overarching operational policy on human rights. Human rights is at best merely ‘inspirational’ as human rights indicators or a human rights legal framework are not reflected in substantive policy development. The reason for its long-term refusal to formally recognized human rights as part of its mandate, constantly justified by its “political prohibition” contained in its Articles of Agreement, might be to avoid the human rights accountability it would entail. The UN Special Rapporteur on extreme poverty and human rights denounced the hypocrisy of this position, stating that “the bank’s main concern seems to be to minimize its own responsibilities in relation to rights violations”.

The CESCR nevertheless recalled that international organizations with specific responsibilities in areas of trade, finance and investment are in no way exempt from human rights obligations and “should play a positive and constructive role in relation to human rights. This is where the adoption of a human rights based approach to the activities of the IFIs would be crucial, as accountability is a core principle to any human rights framework. Moreover, the integration of a rights-based approach by the IFIs would acknowledge the demise of pure economic functionalism but also the interrelatedness between the protection of human freedoms and economic performance. Drawing on the lessons of the European integration and its model of ‘social market economy’ combining market freedoms with strong social rights, Petersmann calls for a rule[d]-based approach to economic development and the adoption of the HRBA as a legal framework by the financial and economic international organizations. Although the IMF continuously denies any role in human rights and entrenches itself in macroeconomic and financial expertise, the interdependency of economic development and human rights suggests that constructive interplays between its mandate and

149 ibid
150 Darrow (n 108) 20-22.
152 Darrow (n 108) 25.
153 IBRD Article IV, section 10
155 Statement on Globalization (n 15) para 5.
human rights exist and should be explored.\textsuperscript{157} With regard to the World Bank and considering its explicit development mandate, though human rights and development are different disciplines, the right to development can provide mutually reinforcing goals for both and encourage a new conceptualization of a HRBA to development.\textsuperscript{158} All of this suggests that creative thinking is needed to permit the incorporation of human rights accountability by both the Bank and the Fund. More generally, although the general accountability of International Organizations is still in its infancy, it is clear that the development of constraints on their power appears crucial, as reflected in the work of the International Law Commission on the responsibility of International organizations.\textsuperscript{159} Strengthening accountability of influential and powerful worldwide organizations would reflect a ‘globalisation of responsibility’ which is an important component of international cooperation. Moreover, limited accountability has enabled failed practices such as conditionality to continue despite apparent deep flaws.\textsuperscript{160}

III. \textit{A systemic asymmetry in the governance structures}

If this dramatic expansion of mandates coupled with deep intrusions into the economic structure of the borrowing countries has not been counterbalanced by an increase of accountability, it has not been met by increased representativity [representation by?] of the institutions either. On the contrary, the universal and multilateral character of the IFIs is seriously compromised by a governance structure which preserves a ‘status quo’ and fails to be reformed to reflect the rapid economic expansion of emerging market economies.\textsuperscript{161} This resistance to reform is referred to as the “balkanization” of the Bretton Woods Institutions.\textsuperscript{162} Decision-making within both institutions are determined according to two variables: quotas which are defined proportionally to the economic weight of the country, and according to ‘basic votes’ which are granted equally and with no distinction to all countries. The unrepresentative character of the quotas coupled with the erosion of basic votes [what does this mean?] have substantially shifted the balance of power in favour of large quota countries.\textsuperscript{163} The G7 countries alone detained 45\% of the voting shares,\textsuperscript{164} whereas the 21 Anglophone African members which are all deeply affected by their policies gather a voting share of only 3.26\%.\textsuperscript{165} The inadequate representation of Africa in the decision-making process and governance while the continent is a major beneficiary of both the Bank and the IMF policies reveals the imbalances in the concentration of power characterizing the institutions. Major policy decisions are taken on a discretionary basis outside the Executive Board which dismisses any inclusivity and goes against the principle of transparency.\textsuperscript{166} This lack of participation of developing countries in decision-making despite these countries being

\begin{footnotesize}
\begin{itemize}
    \item Schmitt (n 148) 444.
    \item Bunn (n 1) 282-283.
    \item Dekker (n 133) 21; UN Doc. A/64/10 (2009) Chapter IV
    \item You (n 128) 220.
    \item Zamora (n 100) 533.
    \item Buira (n 161) 3.
    \item Ibid 4.
    \item Woods (n 143) 85.
    \item Buira (n 161) 26.
\end{itemize}
\end{footnotesize}
most affected by its outcome significantly undermines the legitimacy of the IFIs themselves. Claims for a NIEO in the 1970s already expressed dissatisfaction with the Bretton Woods regime and the slow pace of reform since has only exacerbated this decline of confidence. The new voting share of the IBRD has seen very small increase in the shareholding of large developing countries,\(^{167}\) while the quota increase of the IMF agreed on in 2010 and enhancing the role of emerging economies in its governance are still blocked by the US congress.\(^{168}\) The fundamentally undemocratic US veto only serves to maintain it as a big player in the game, and prevent it from being meaningfully limited.\(^{169}\) But this cannot occur without the IFIs being marginalized as a result of long-term frustrated efforts to reform them. The multilateral governance of the Bretton Woods institutions is indeed seriously compromised and this has had repercussions; the efforts of developing countries to escape from IMF influence proved to have been successful with regards to the dramatic decline in its loan portfolio since the beginning of the 2000s.\(^{170}\) Regional financial arrangements express also diminished influence of the Fund in the developing world.\(^{171}\) On the other hand, the growing south-south cooperation in development aid illustrates the waning influence of the traditional donors in the global south.\(^{172}\) The development of regional development banks significantly challenges the dominant position of the World Bank as well, as illustrated by the recent creation of the BRICS development bank based in Shanghai, which openly claims to provide “an alternative to the US-dominated World Bank and International Monetary Fund”.\(^{173}\)

If the World Bank and the Fund were to remain—or re-establish themselves as—major institutions in the contemporary global economy, it is crucial to restore their legitimacy by ensuring their multilateral governance and inclusive character. These are necessary prerequisites if they are to become a genuine part of the machinery for international cooperation and enhancing the possibilities for collective action.\(^{174}\) If globalization is to work for all countries, the agenda and governance of the IFIs must be globalized too. Increased representation of poor countries in the decision-making process of the Bank and the Fund is indeed the first step to achieve their goals to alleviate poverty.\(^{175}\) The World Commission on the Social Dimension of Globalization recommended to increase the representation and voting strength of developing countries in the IFIs, as industrialized countries, representing 15% of the world’s population and 60% of the voting powers within the institutions, exercise disproportionate influence on policies affecting developing countries.\(^{176}\) The first step to international cooperation for development is therefore to reform the international economic

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169 Kapur (n 126) 348.
171 ibid
174 Woods (n 109) at 54
175 Blackmon (n 106) 194.
176 ‘A Fair Globalization: Creating opportunities for all’ para 522-525
governance, by ensuring fair and inclusive institutions.\textsuperscript{177} The ILO Declaration on Social Justice for a Fair Globalization (2008) also highlights on the need for globalization to meet universal aspirations for social justice and social cohesion.\textsuperscript{178}

C) Conditionality as opposed to Cooperation

I. The Washington consensus and conditionality as a vehicle for neoliberalism

The demise of the fixed exchange rate system in 1971 provoked a shift from a Keynesian mentality according to which the state should be responsible for managing development, to a market-orientated exchange system and the promotion of free markets.\textsuperscript{179} Referred as the ‘Washington consensus’ era, the 1980’s represent the dominance of the neoliberal ideology, with the US and UK governments led by Ronald Reagan and Margaret Thatcher pushing for “market fundamentalism” and liberalization through the policies of both the Fund and the Bank. Simultaneously, conditionalities increased dramatically through the 1980’s with the IFIs facing higher demands for their resources from developing countries seeking new loans;\textsuperscript{180} The activities of the World Bank and the IMF became closely intertwined as the conclusion of an IMF arrangement became a precondition for a Bank adjustment lending, a requirement explicitly introduced in the World Bank’s Articles of Agreement.\textsuperscript{181} The mission of the Bank was no longer state-led poverty alleviation as conditional policy-based loans replaced poverty-based loans.\textsuperscript{182} There are widespread recognition that the nature of the conditions imposed through the Structural Adjustments programs (SAP) focused disproportionately on macroeconomic fundamentals and the institution of free markets, and that the results on countries at their early stage of development were bleak.\textsuperscript{183} Intense privatisation with the reduction of the role of the government in the economy and the nullification of social programs required by the reforms are at odds with the protection of the most vulnerable in society, and caused hardships among the poorest.\textsuperscript{184} The short-term orientation of adjustment programmes compromises sustainable development and causes adverse effects on social equity by implementing cuts in public spending and imposing fiscal and monetary austerity.\textsuperscript{185} More generally, the wisdom to divert responsibility for national development to the private sector and free markets is highly questionable.\textsuperscript{186} As the main motive of the private sector is profit, it is apparent that it cannot be substituted for the financing of public goods such as health or education, where

\textsuperscript{177} Salomon (n 4) 6.
\textsuperscript{178} ILO Declaration on Social Justice for a Fair Globalization (2008) preamble
\textsuperscript{180} Dreher (n 130) 450.
\textsuperscript{182} Bazbauers (n 179) 96.
\textsuperscript{185} You (n 128) 215.
\textsuperscript{186} Bazbauers (n 179) 105.
there is no direct economic return.\textsuperscript{187} As Stiglitz argues, the state has a central and constructive role in development, and markets are surely not sufficient by themselves to provide social and physical infrastructures, to support technology and innovation, or to ensure access to education.\textsuperscript{188} There are clear evidences that state intervention is needed to support the development process and to protect the most vulnerable in society. And this is particularly true regarding states in their early stages of development.

Nevertheless, considerable efforts were made to entrench the neoliberal ideology of liberalization and privatization through the SAP, and to reduce the size of the state in the economy, therefore promoting private international law as the aid strategy for development.\textsuperscript{189} Of all conditions between 1980 and 1988, less than 1% account for the protection of the poor.\textsuperscript{190} This imposition of a “uniform brand of liberal capitalism”\textsuperscript{191} neglected the particular circumstances of the country, and ignored the broader context necessary for development by focusing solely on macroeconomic fundamentals. Critics of the ‘Washington Consensus’ legitimately argue that the reforms required by the structural adjustments were mainly driven by politics and ideology.\textsuperscript{192} No thoughtful consultation or tailor-made policies were made to address the developmental issues of the borrowing country, a “one-size-fits-all” approach was instead imposed to satisfy the free market mantra; The liberalization of financial markets had become an end in itself rather than a means to achieve economic development.\textsuperscript{193} In that sense, the development discourse was an instrument in global politics, used to consolidate the ideology of global capitalism.\textsuperscript{194} The far-reaching reforms imposed were instruments of political ideologies rather than means to respond to the developmental and social needs of the borrowing country.

II. \textit{The continuity of the neoliberal mentality}

The prescriptions of the ‘Washington Consensus’ were not significantly challenged until the Asian Financial Crisis in 1997 and the troubled transition towards market-based economies in the former Soviet Union, which shed light on its failure and durably discredited the neoliberal discourse.\textsuperscript{195} The management of the financial crisis by the IFIs has received much criticism; it is said to have worsened it by undertaking coercive and aggressive neoliberal reforms.\textsuperscript{196} This produced an internal crisis of identity within the Bank which led it to undertake extensive institutional and ideological reforms under the presidency of Wolfensohn (1995-2005) in order to renew the legitimacy of its development agenda.\textsuperscript{197} The Bank started to show discontents with the IMF financial reforms by introducing social safety

\textsuperscript{187} Ikhide (n 122) 136.
\textsuperscript{190} Dreher (n 181) 14.
\textsuperscript{191} White (n 116) 272.
\textsuperscript{193} Schmitt (n 148) 442.
\textsuperscript{194} Weber (n 189) 199.
\textsuperscript{195} Naim, M. ‘Washington Consensus or Washington confusion?’ (2000) 118 Foreign Policy 86, 100.
\textsuperscript{196} Bazbaur (n 179) 100.
\textsuperscript{197} ibid 97.
nets in its programmes and demonstrated the willingness to learn from past failures. The Learning from a Decade of Reform report testifies of a greater humility by emphasizing that there is no one universal set of solutions and that different contexts require different solutions. The CDF embodies this new paradigm by encompassing an holistic approach to development going beyond the sole use of economic indicators. More significantly, the CDF acknowledges the need for recipient countries to own their development programmes, and therefore that development policies should be a country-driven partnership. At least in the policy language of the Bank, there is a clear movement of rethinking which attempts to depart from coercive conditionality and adopt a more flexible and collaborative approach to its development mandate. It should be noted that this self-rethinking stands in clear contrast with the IMF which considered that the reforms pushed through the SAP failed because they did not go deep and far enough. The Fund therefore admits failures only on the parts of its clients which did not implement its prescriptions sufficiently, and do not challenge the adequacy of the neoliberal reforms for developing countries.

But it appears that the adoption by the Bank of a country ownership framework and of a human-centred development in line with the capabilities approach advocated by Sen remains at the rhetorical level, and is not substantially reflected in the content of its policies. Indeed, if the ‘Post-Washington consensus’ era has been announced, the World Bank remains within a neoliberal mentality as it has maintained and even reinforced its advocacy of marketization, privatization, deregulation and private sector-led growth. It seems that even in the new development framework of the post-Washington Consensus era putting good governance and country ownership at the forefront, there is still strong preface clarifying that sound macroeconomic fundamentals are indispensable. Growth is indeed necessary to sustain poverty reduction but it should be borne in mind that it is only precondition and cannot equate to development. In that regard, the Independent Evaluation Group (IEG) of the World Bank pointed in a report in 2006 that gains generated by growth in privatisation-dependent economies “go to very few people”. If the Bank has to combine a development and financing role, its very challenge is then not to prioritize economic efficiency over social equity.

Indeed, as holding both a development and a financing role, the Bank suffers from conflicting goals creating significant tensions as it cannot lose sight of the promotion of a market-led economy while promoting development. However, the wisdom of a neoliberal development strategy is highly questionable, especially concerning low income countries with weak or non-existent infrastructures and institutions, and a dominant agricultural

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199 Rodrik (n 183) 200.
201 Ikhide (n 122) 139.
202 Rodrik (n 183) 977.
203 Darrow (n 108) 67.
205 Bazbauers (n 179) 92.
206 Naím (n 195) 96.
207 Stiglitz (n 188) 234.
208 ‘Bank Focuses on Growth often Leaves Poor behind’ Inter-Press Service, 7 December 2006
economy. In this context, it is doubtful that the liberalization of the financial sector will benefit the poor by expanding their freedoms and opportunities. But the Bank continues to push for a neoliberal agenda, notwithstanding in a more flexible and collaborative way through the Poverty Reduction Strategies Papers (PRSP) and its Knowledge Bank function. Critics of the PRSP argue that it is the “same old wine in a new bottle”, duplicating SAPs merely introduced in a new legitimising rhetoric of ‘participation’ or ‘ownership’, and which in practice reflect a misleading and superficial approach to ownership and the realities of local governance.\(^{209}\) Indeed, if the country is meant to design its own poverty papers, they must be endorsed by the Board of Directors which means that their policy content must be compatible with key prescriptions of the IFIs, and a notable precondition for a full PRSP is the implementation of Bank and IMF supported SAP.\(^{210}\) The PRSP therefore builds on existing policies and ensures the continuity of the SAP, which still puts the market and trade liberalization at the forefront without providing any causation with poverty reduction.\(^{211}\) This continuous application of liberal macroeconomic prescriptions in the PRSPs demonstrates that the priority is not necessarily given to poverty reduction or development in themselves, but rather to the integration of developing countries into the global economy, thus risking to damage the legitimacy of the World Bank group and exacerbating critics that it serves as an instrument of hegemonic economic interests.\(^{212}\) Through the PRSP, the very contested framework of global capitalism is consolidated as development policy.\(^{213}\) In a similar vein, it has been argued that the ‘Knowledge Bank’ function is also used as a new capacity to reinforce disciplinary neoliberalism.\(^{214}\) As the authoritative knowledge seems to be mainly fabricated and controlled by developed countries and endorsed by Washington-based think-tanks and NGOs, it appears to be a tool to reinforce their dominant positions and neoliberal hegemonic discourse rather than promoting genuine research on development strategy for developing countries.\(^{215}\) Through conditionality, the IFIs have an habit of intervention, rather than cooperation.\(^{216}\)

III. The doubtful aid strategy of conditionality

The usual critique of conditionality has focused on the nature of the conditions rather than on the principle of conditionality itself.\(^{217}\) There are nevertheless legitimate concerns about the effectiveness of aid conditionality. As a chief economist of the World Bank, Stiglitz wrote in 1999 that “good policies cannot be bought, at least in a sustainable way” and

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\(^{210}\) Weber (n 189) 198.


\(^{212}\) Craig and Porter (n 209) 3.

\(^{213}\) Weber (n 189) 199.


\(^{215}\) ibid 518-519.

\(^{216}\) Woods (n 109) 44.

that conditionality “undermined democratic process”\textsuperscript{218} The PRSP acknowledged the importance of country ownership and participation for the effectiveness of reforms but as argued above, it is unclear whether the reform process was genuinely owned by the recipient country. The inability of conditionality to act as a credible mechanism to induce policy reform is particularly true with regards to ‘good governance’ reforms, as the use of financial leverage cannot be a substitute for weak institutions.\textsuperscript{219} Change in the domestic governance system must come from “within”. In its Assessing Aid report, the World Bank acknowledged that aid effectiveness may depend on specific circumstances in recipient countries, and that aid effectiveness on growth increases only in countries with sound macroeconomic management, or ‘good governance’.\textsuperscript{220} It therefore advocates a move from conditionality to selectivity, but selectivity is conditionality in disguise as it imposes the same requirements of conditionality in order to be eligible for aid.\textsuperscript{221} A more radical approach should instead be considered, notably the adoption of genuine development partnerships reflecting human rights principles of transparency, accountability and participation. Reforming the institutional framework for aid delivery as a whole should indeed lead to radically new approaches to development assistance that are based on reciprocal obligations in the form of development compacts.\textsuperscript{222} This dimension of reciprocal obligations mirrors the relationships between ‘duty-bearers’ and ‘rights-holders’ characterizing a HRBA to development.

Moreover conditionality has the perverse effect of undermining domestic democratic processes by supplanting policy-making.\textsuperscript{223} If the principle of contractual freedom central to contract law is applied to development compacts, it would fully embrace the right to self-determination. On the contrary, conditionality violates the right to development and the right to self-determination as it forces a country to accept a set of economic conditionals.\textsuperscript{224} Policy space and freedom in choosing development strategy should be allowed to developing countries while the Bank provides for technical assistance to support domestic forces of change.\textsuperscript{225} Developing countries should indeed be assisted in developing their democratic processes and own national policies in accordance with their priorities and particular specificities. This approach to development cooperation is fully consistent with article 2(3) of the DRD which held that ‘states have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom’. Moreover, a move from loans with conditionality attached to grants would reduce the accumulation of unsustainable debts and the dependence of developing countries on the IFIs.\textsuperscript{226}

\textsuperscript{219} Santiso (n 129) 9.
\textsuperscript{221} ibid 14.
\textsuperscript{222} Santiso (n 129) 19.
\textsuperscript{223} ibid 9.
\textsuperscript{225} You (n 128) 229.
\textsuperscript{226} Ikhide (n 122) 129.
4. CHALLENGES AND POTENTIALS FOR THE POST 2015-DEVELOPMENT AGENDA

By neglecting political and civil freedoms and thus essential elements to permit real structural changes and make the process of development sustainable, the MDGs largely failed to make progress towards rights-based development.227 The 17 Sustainable Development Goals (SDGs) to be adopted by the UN General Assembly in September 2015 encompass a broader vision of development in comparison with the MDGs by emphasizing sustainability with regards to the environment (Goals 14 and 15), energy and access to water (Goal 6 and 7) or economic growth (Goal 8). But the SDGs overall still fall short of identifying political freedoms and civil rights lying at the basis of empowerment and social justice, and which underlie a broader strategy of development addressing the structural causes of poverty.228 To this regard, Goal 16 of the Sustainable Development Goals (SDGs) proposal, aimed at promoting peaceful and inclusive societies, is to be welcomed. However, the negotiation history of the Open Working Group reveals that if the early sessions emphasized the relevance of formulating the SDGs with a human rights-based approach and the interrelatedness between the rule of law and development, the human rights substance of SDG 16 has been significantly watered down in the final adoption process; notably explicit mention of the rule of law has been removed, freedom of the press and reference to due process in respect of access to justice deleted.229 The reworked SDG 16, initially meant to embody a right-based approach, has been broadened and made less specific by using much weaker language.230 Whilst some other targets mention rights explicitly, such as ‘equal right to economic resources’,231 in relation to gender equality,232 or labour rights,233 we are still far from a rights-based approach to development and a strong human rights language. The SDGs should have indeed moved away from quantifiable targets prioritizing results over conduct, and emphasize more on development as a process of empowerment, capacity-building, expansion of opportunities and social justice. Despite the fact that the SDGs represent non-legally binding commitments, it seems that associating human rights with the development enterprise is still contentious.

On the other hand, the draft for the post-2015 development agenda does not sufficiently call for structural reforms in the international institutional order. SDG 10 calling on reducing inequality within and among countries marks nevertheless an important improvement compared to the MDG framework whose exclusive focus on poverty rater than on reduction of inequality was said to be a major omission.234 But SDG 17, which continues MDG 8, does not identify the asymmetry of powers in global economic governance as a systematic issue and instead calls to ‘enhance global macroeconomic stability’ and “enhance

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227 Langford (n 95) 86.
228 See part 1. B.
230 ibid
231 target 1.4
232 target 5.a
233 target 8.8
234 Wiik and Lachenmann (n 229) 288.
policy coherence for sustainable development”. These are phrased in such as broad way that the exact implications are difficult to determine. Moreover, it fails to identify the actors who are supposed to engage in this process of cooperation and their corresponding responsibilities in the development agenda. The World Bank and the IMF as powerful and influent international organizations who have major responsibilities in shaping the global economic environment are not held accountable for implementing systemic institutional reforms which lie at the source of global poverty.

Through these major international institutions, efforts should be made to strive towards a rights-based globalization, meeting universal aspiration of peace, human rights and sustainable development.

Since their establishment in 1944, the Bretton Woods Institutions have evolved to become one of the major global institutions participating in shaping the globalized economy. Their policy recommendations and the conditionalities they imposed through their loans reflect their mandate to expand international trade and promote economic globalization. But applying this model of economic liberalisation universally has not proven to be beneficial to all countries. As opposed to a “one-size-fits-all” approach, acknowledging the particularities of each countries and cooperate with them by respecting their economic self-determination would foster constructive policy dialogue.

Economic globalization should come with equitable and fair rules for its profits to translate into sustainable development for all countries. While it has not come with regulation ensuring protection of the most vulnerable, it on the contrary induced deregulation and privatisation. A right-based approach to globalization implies the regulation needed to ensure social justice at the global level. To this regards, a human rights-based approach to development cooperation permit to conceptualize poverty as a multi-dimensional condition, with human freedoms as simultaneously instrumental, constitutive and constructive for development. Integrating human rights principles such as equality, non-discrimination, participation and empowerment into development strategies ensure that the process of development is as important as the outcome, and remains human-centred.

Globalization must be well-managed to ensure it benefits for all. This is why understanding development cooperation as the establishment of a global and inclusive economic governance is so essential, and overdue. International cooperation for development requires indeed much more than the transfer of resources from North to South, it does require the creation of an international enabling order conducive to development. Integrating this concern into the governance structure of the Bretton Woods institutions would be the first step to achieve poverty alleviation and reduce global inequalities.

The growing South-South cooperation demonstrates that the traditional western powers must urgently adapt in an increasingly multipolar world, and truly embrace international cooperation for their own benefits and the global interest.

235 targets 17.13 and 17.14
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FROM CLIMATE MARCH TO THE COURTROOM: ENVIRONMENTAL DEMOCRACY AND THE ECHR

Sarah Thin

1. INTRODUCTION

Environmental democracy is a relatively new concept which combines the objective of effective environmental protection with a number of democratic ideals. It has been defined as consisting of three core rights: the right to free access to information on environmental matters; the right to participate meaningfully in environmental decision-making; the right to seek enforcement of environmental laws or compensation for harm. These rights were first recognised by the international community in 1992 under Principle 10 of the Rio Declaration, and were later at the centre of what is known as the Aarhus Convention of 1998. The principles and ideals of this concept are beginning to have widespread effect in legal and political circles globally. The development of this concept has occurred along a similar timeframe to the development of environmental jurisprudence under the European Convention on Human Rights (“ECHR”), notably the emergence of so-called “derived environmental rights” which is beginning to allow individuals to challenge the State concerning environmental issues that affect them directly.

The compatibility of this developing environmental human rights jurisprudence has raised a number of issues. To what extent is it possible for an individualistic system like that of human rights to protect interests which are not only global but non-anthropocentric like the environment? How can the judicial imposition of environmental obligations on elected governments be reconciled with the values and ideals of democracy? I will attempt to demonstrate here that, despite the existence of a number of limitations to this method of protection, the new human rights jurisprudence provides a novel approach which is highly beneficial; one which introduces a new means by which individuals may conceptualise the environment, their place in it and their rights and responsibilities pertaining to it, and one which not only encourages but also promotes and facilitates localised, democratic environmental action.

2. HUMAN RIGHTS, THE ENVIRONMENT AND ADMISSIBILITY

It must first be recognised that the system of human rights protection itself, and more specifically the ECHR regime, impose a number of limitations to that which can be achieved by using such an approach. The interests which may be protected under such a regime are

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1 Environmental Democracy Index, ‘Background and Methodology’ <http://www.environmentaldemocracyindex.org/about/background_and_methodology> accessed 12 November 2015
2 Rio Declaration on Environment and Development 1992, Principle 10
inherently limited by underlying anthropocentric and individualist focuses, and the protection which may be afforded to the environment is undermined by the \textit{ex post facto} nature of human rights adjudication, although the extent of such limitations may be debateable. Conversely, such focuses create the possibility for a renewed perspective on the relationship of the individual with his environment. Bearing in mind that different approaches to environmental protection can evidently coexist, and that the lacunas left by one method may be remedied by another, the human rights approach can be seen to provide a novel and useful angle from which to tackle environmental issues.

A) \textbf{Anthropocentrism}

Human rights are, by definition, human-centred. An initial, principled criticism of human rights-based environmental protection therefore is that such an anthropocentric approach is unsatisfactory because it fails to recognise the intrinsic value of the environment.\footnote{Robert Traer, ‘Doing Environmental Ethics’ (Second Edition, Westview Press 2012) 12} Any environmental advances are only achieved as a “by-product of [the] primary goal of protecting individual human entitlements.”\footnote{KL Morrow, ‘The rights question: the initial impact of the Human Rights Act on domestic law relating to the environment’ [2005] JPL 1010, 1010-1011} Aside from the ethical argument, this also reduces the scope of environmental protection available; any interests must not only be linked to those of an individual human, but also those interests must be so fundamental to that human as to be considered worth protecting under human rights law. There is therefore both a “categorical” obstacle and a “qualitative” one, which combine to exclude both non-human interests and those interests which are merely aesthetic or recreational.\footnote{Brennan Van Dyke, ‘A Proposal to Introduce the Right to a Healthy Environment Into the European Convention Regime’ [1993] 13 Va Envtl LJ 323, 334-335} These limitations were apparent in \textit{Kyrtatos}, in which the European Court of Human Rights (“the Court”) noted that “[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.”\footnote{Kyrtatos v Greece App no 41666/98 (ECHR, 22 May 2003)}

As Hayward emphasises, the anthropocentric approach is not presented as a “panacea”, nor does it preclude other approaches.\footnote{Tim Hayward, ‘Constitutional Environmental Rights: A Case for Political Analysis’ [2000] 48 Political Studies 558, 559} Shelton reasons that there is no conflict between human and other environmental interests; we are not “separable members of the universe” but “interlinked and interdependent participants” and therefore protection of human environmental interests can only be a positive thing for the environment as a whole.\footnote{Dinah Shelton, ‘Human Rights, Environmental Rights and the Right to Environment’ [1991] 28 Stan J Intl L 103, 110} In fact, the development of an anthropocentric approach may indirectly enhance more eco-centric or bio-centric approaches by encouraging the development of “practical jurisprudence and wider social norms” to “support more ambitious aims”,\footnote{Hayward (n9) 559-560} and developing and defending “the moral standards of social justice in the world of human culture” which may then be extended to non-human spheres of interest.\footnote{Traer (n 5) 40} As such, a movement which may begin solely...
focused on the interests of humans could contribute to a culture of morality and awareness that may benefit all species.

B) Individualist Focus

Human rights instruments generally involve a strong focus on the individual; this is coherent with one of the prevailing rationales for the existence of human rights: the protection of individual in the face of the general interest. The ECHR is no exception in this regard, and is perhaps even more individualist than others in that it does not recognise the existence of specific group rights (such as the African Charter’s focus on “peoples’ rights”). Article 34 (often referred to as “the victim requirement”) allows for claims to be made by an individual, group of individuals or non-governmental organisation that has/have been directly (or, exceptionally, indirectly) affected by the alleged violation. There is currently no prospect for a claim to be made as an actio popularis.

A primary criticism of such an individualist approach is that, once again, it limits the kinds of cases that can be brought to the European Court of Human Rights (“the Court”). Environmental degradation “rarely impact[s] solely upon individual litigants and their rights but usually involve broader public interests that are not easily addressed in a typical litigation context”. There is no opportunity under the ECHR for an individual or group to invoke a collective or shared environmental interest against a State; neither is there any scope for the implementation of the principle of intergenerational equity (the protection of the rights of future generations). Nevertheless, these “collective” environmental rights do find some protection under the ECHR regime in opposition to other individual rights. Where an individual right, such as the right to protection of property under Article 1 of the first Protocol to the ECHR (“P1-1”), is in conflict with environmental objectives, a State may defend limitation of that right by reference to the protection of the environment as part of the “general” or “public interest”. For example, in Fägerskiöld v Sweden the Court held that the State’s interference with the applicants’ rights under P1-1 by building windmills near their residence was “proportionate to the aims pursued” since “in relation to the interests of the community as a whole, […] wind power is a renewable source of energy which is beneficial for both the environment and society.” The downside to this form of protection is clearly that it cannot be invoked by individuals, and relies on the State to take action in favour of the environment. As such, it does little to promote the aims of environmental democracy except in that it decreases the legal barriers to environmental protection where there is sufficient effective political pressure for this to be an aim of the government.

On a more profound level, some might argue that the conceptual focus on the individual is essentially discordant with environmental aims. With the growing popularity of

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14 Varnava and Others v Turkey App no’s 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECHR, 18 September 2009)
15 European Convention on Human Rights and Fundamental Freedoms 1950, Article 34
16 Aksu v Turkey App nos 4149/04 and 41029/04 (ECHR, 15 March 2012)
17 Morrow (n6) 1011
19 Fägerskiöld v Sweden App no 376604/04 (ECHR, 26 February 2008) [2]
the idea that the source of many of the environmental crises that we are faced with today is a liberal, individualist culture that favours self-interest over the common good.\textsuperscript{20} It may seem that trying to solve such problems with similarly individualist methods is at best insufficient and at worst counter-effective. Conversely, it is possible to argue that such an individualist approach is in fact welcome in the sphere in environmental protection. As DeMerieux points out,\textsuperscript{21} existing environmental law (whether international, regional or domestic) tends to rely on states and other such bodies for enforcement, leaving the individual citizen far-removed from this process and with few or no legal options with which to challenge the decisions taken or their enforcement (or lack thereof). Douglas-Scott has documented such difficulties in the context of EU environmental law, noting that national \textit{locus standi} criteria amongst other legal obstacles present “a barrier to the effective enforcement of environmental law”.\textsuperscript{22} In this sense, a human rights based approach not only allows individual citizens direct access to justice regarding environmental matters; it also re-orientates the nature of environmental law towards the individual and local issues. “The Environment” ceases to be an issue that is exclusively dealt with by men and women in suits at international conferences, full of abstract notions and references to distant future generations; it becomes a question of our relationship with the environment at a local level which has importance in our daily lives. It seems especially symbolic that the most notable development in environmental jurisprudence has been under Article 8: the link created between the environment and the idea of the home transforms the environment and its protection into an issue which is both intimate and personal. While the vindication of a single individual’s rights in this way may not usually have any significant effect on a national or international scale, popular engagement with such issues is the essence of this new movement towards a more democratic and more participatory way of dealing with environmental challenges.

C) Preventative Action

Human rights litigation inevitably takes place after the alleged violation has occurred. This poses a particular problem in the sphere of environmental protection since meaningful reparation is often impossible – the effects of pollution can be felt for years, or even centuries, and may even be effectively irreversible. Such rights therefore require “proactive protection”.\textsuperscript{23} As was confirmed in \textit{Tauria v France}, however, the exercise of the individual right to petition cannot be used to prevent a potential violation of the ECHR.\textsuperscript{24} This would seem at first glance to deprive the human rights approach of much of its usefulness in terms of environmental protection.

Nonetheless, a number of jurisprudential developments would seem to have created the potential for a limited amount of preventative action. It has been held that Article 8 may be engaged when the risk posed by a dangerous activity is so high “as to establish a

\begin{thebibliography}{9}
\item See for example: Naomi Klein, ‘This Changes Everything’ (Simon & Schuster 2014)
\item DeMerieux (n4)
\item Sionaidh Douglas-Scott ‘Environmental Rights in the European Union – Participatory Democracy or Democratic Deficit?’ in Alan E Boyle and Michael R Anderson, ‘Human Rights Approaches to Environmental Protection’ (Clarendon Press 1996) 113, 121
\item Van Dyke (n7) 338
\item \textit{Tauria and Others v France} [1995] 83 D&R 112
\end{thebibliography}
sufficiently close link with private and family life”. The Court has also been seen to place emphasis on the importance of fundamental international norms like the precautionary principle, arguably signalling a more proactive approach. These are important developments as they imply that the Court may, in limited cases, find a violation of the Convention before pollution has actually occurred.

Further, there are a number of indirect ways in which the ECHR may prevent future environmental harm. Clearly, the mere possibility of a future claim to the Court is likely to affect a State’s actions. It also provides pressure groups with material with which to lobby governments against action which will harm the environment. For example, the Bianca Jagger report on hydraulic fracturing makes explicit reference to ECHR jurisprudence and highlights the possible non-compliance with the ECHR of the UK government’s plans regarding hydraulic fracturing, calling for an investigation into human rights compliance before any further action is taken. The effectiveness of such tactics will evidently depend on the political climate and government in question, but it is nevertheless undeniable that the prospect of condemnation by a regional human rights court with all the accompanying political embarrassment and reparation costs is a formidable weapon for campaigners. The power of the language of human rights should not be underestimated.

3. **SUBSTANTIVE RIGHTS**

The substantive rights protected by the Convention are numerous. Since the mid-1990s there has been a steady growth in the extent of protection of environmental interests: notably under Article 8 (Right to respect for private and family life), but also Article 2 (Right to life) and Article 1 of the first Protocol (“P1-1”). Article 3 (Prohibition of torture) has been invoked unsuccessfully in a number of environmental cases (although two recent successful such cases concerning passive smoking in prisons could possibly provide a starting point for future environmental development).

The recognition of these rights is an essential step forward, although it remains to be fully examined whether the protection afforded to such rights is truly effective. This section will analyse two aspects of this question: the extent of the obligations of States and the effect of the margin of appreciation on the potential for States to be held to account for harm inflicted on the environment.

A) **Positive Obligations**

       Given that a large extent of the threat posed to the environment comes from private actors rather than directly from the State itself, it is essential that the regime for the protection

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25 *Hardy and Maile v United Kingdom* App no 31965/07 (ECHR, 14 February 2012)
26 *Tătar v Romania* App no 67021/01 (ECHR, 27 January 2009)
28 *López Ostra v Spain* App no 16798/90 (ECHR, 9 December 1994)
29 *Önercilidiz v Turkey* App no 48939/99 (ECHR, 30 November 2004)
30 Zander v Sweden App no 14282/88 (ECHR, 25 November 1993)
31 *López Ostra* (n28)
32 *Florea v Romania* App no 37186/03 (ECHR, 14 September 2010); *Elefteriadis v Romania* App no 38427/05 (ECHR, 25 January 2011)
of environmental human rights includes a means by which the State can be held accountable for the actions of non-public actors. Thankfully the Court has underlined that such rights implicate the existence of positive obligations as well as negative, therefore a State may be held responsible for its failure to take “the necessary steps to ensure effective protection of the applicants’ right to respect for their private and family life as guaranteed by Article 8.”

This obligation was extended to Article 2 cases in Öneriylidz v Turkey, in which the preventative nature of those obligations was emphasised: in the context of any activity in which the right to life may be endangered, there would be “a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.” Indeed, so commonplace have they become that “the Court often declines to articulate whether positive or negative obligations are at issue in environmental cases,” as in Hatton where the Court stated that it was not “required to decide whether the present case falls into the one category or the other.”

While the existence of such positive obligations is clearly an essential development, the extent of such obligations or exactly when a State will be considered by the Court to have taken “appropriate steps” will define their impact on the protection of environmental human rights. These obligations may be both substantive (such as the putting in place of “a legislative and administrative framework designed to provide effective deterrence against threats to the right to life”) and procedural (for example, “to take regulatory measures and adequately inform the public about any life-threatening emergency” and to ensure the initiation of a judicial inquiry). The application of such obligations by the Court, however, seems to be of varying strength from case to case. While, for example, in Hatton the Court judged that there had been no violation of the Convention because the UK government had taken “reasonable and appropriate measures” to protect the rights in question, it later held in Kolyadenko that there had been a breach of a positive obligation because “the State officials and authorities failed to do everything in their power to protect the applicants’ rights” under Article 8 and P1.

This apparent inconsistency is in fact intricately linked with the application of the doctrine of the margin of appreciation: where the margin is wide, the Court will tend to be more forgiving in its analysis of the fulfilment or otherwise of a State’s positive obligations. It is therefore to this doctrine that we now turn, with a specific focus on its application to Article 8 cases.

B) Margin of Appreciation and Article 8

The controversial doctrine of the “margin of appreciation” rears its mighty head during the “fair balance” or “proportionality” stages of Article 8 adjudication. The Court

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33 Guerra and Others v Italy App no 14967/89 (ECHR, 19 February 1998) [58]
34 Öneriylidz (n29) 71.
36 Hatton and Others v United Kingdom App no 36022/97 (ECHR, 8 July 2003) [119]
37 Budayeva v Russia App no 15339/02 (ECHR, 20 March 2008) [129]
38 Ibid 131-132.
39 Hatton (n36)
40 Kolyadenko v Russia App no 17423/05 (ECHR, 28 February 2012) [216]
generally affords States a wide margin of appreciation in environmental cases due to their political nature: national economic interests are inevitably raised as a justification for the interference with individual environmental rights. As was reiterated in Hatton, the role of the ECHR is a subsidiary one, and “[t]he national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions” and that “[i]n matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight”. So wide is the margin in such cases that for one commentator, “acquiescence” is the “dominant feature” of the Court’s environmental jurisprudence.

Despite this, it is apparent from the growing number of successful applicants in such cases that the margin is not without limits. However, analysis of the case law presents an emerging pattern which suggests that those limits are not substantive; the Court repeatedly focuses on domestic irregularities, procedural issues and the measures taken by States to reduce the impact of an environmental interference rather than the substantive extent of the impact itself. This focus on procedural rather than substantial limits can be seen as a compromise that allows judicial protection of environmental rights and of the rule of law while remaining respectful of democratic values and systems by refraining from imposing substantive limits on the actions of popularly elected governments.

The importance of domestic irregularities was highlighted in Hatton, in which the Court noted that in previous “environmental” cases in which the applicants had been successful in claiming a violation of their rights, “the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime.” As such, the Court noted that in López Ostra, the waste-treatment plant in question was operating “without the necessary licence” and in Guerra, “the violation was also founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the State was under a statutory obligation to provide”. Such irregularities have remained prominent in more recent jurisprudence: in Fadeyeva, for example, the Court “pays special attention” to the fact that the domestic Courts recognised the applicant’s “right to be resettled” and that domestic legislation recognised the zone in which the applicant as “unfit for habitation”. It notes additionally that the levels of air toxicity were, “for a significant period of time”, above legal maximum levels imposed by domestic legislation. This focus on domestic irregularities allows the Court to go above and beyond simple recognition and respect of the democratically made decisions of national parliaments but also to reinforce and promote those same democratic systems; when a national government does not abide by the rules and regulations that it itself has set down, it is not undemocratic for a judicial body to hold it to account for such a failure.

As is discussed further in the section on procedural rights, there has been an increasing focus by the Court on the procedural obligations inherent in Article 8 in relation to

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41 Hatton (n36) 97
42 DeMerieux (n4) 550
43 Hatton (n36) 120
44 Fadeyeva v Russia App no 55723/00 (ECHR, 9 June 2005) [86]
45 Ibid 49 and 87
environmental cases. It is worth noting here that the focus on procedural issues often eclipses the consideration of substantive ones in Article 8 litigation. In Taşkin, the Court held that the “material aspect of the case” had already been dealt with by the Supreme Administrative Court of Turkey and therefore it fell to the Court to consider only the procedural issues, focusing on the fact that the executive’s decision was not taken in public and therefore “deprived the procedural guarantees available to the applicants of any useful effect.” Similarly, in Giacomelli the Court focused on the delay in government action and the lack of effective procedural guarantees rather than on substantive issues. These procedural requirements generally promote the principal three pillars of environmental democracy: free access to information on environmental matters, the right to participate meaningfully in environmental decision-making and the right to seek enforcement of environmental laws or compensation for harm.

San Jose has underlined the weight given to the measures taken by a State to reduce the impact on individual rights. He argues that the main difference between the first successful Article 8 environmental claim (López Ostra v Spain) and a previous, unsuccessful case (Powell and Rayner v UK) was that while the UK government had taken a number of measures to reduce the impact of the noise disturbance, “the Spanish authorities had proved notoriously reluctant to remedy the situation complained of,” notably in that they not only failed to take steps to protect the applicants’ rights but also that they resisted domestic judicial decisions which would have had such an effect. This analysis may be thrown into doubt by the more recent case of Deés v Hungary, in which the applicant complained of a violation of his rights as a result of noise, vibration, pollution and odour caused by traffic on the road alongside his house: despite the fact that in that case the State had implemented extensive and costly measures to attempt to reduce the impact on the applicant, the Court found that there had been a violation of Article 8. However, given that the enforcement of some of these measures was called into question, including the installation of speed limits and road signs prohibiting heavy vehicles and re-orientating traffic, it is arguable that this is simply authority for the requirement that such measures be effective. This is supported by the fact that, despite these measures, the noise levels were still around 15% above statutory limits. This case therefore combines the ineffectiveness of the measures taken and continuing domestic irregularity.

Increasingly therefore it seems that rather than imposing substantive limits on environmental harm, the Court will, on the one hand, enforce a number of procedural requirements which promote the informed participation of the public in environmental issues, and on the other, ensure that the relevant national law is applied fairly and effectively. It is

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46 Taşkin v Turkey App no 46117/99 (ECHR, 10 November 2004) [117]
47 Ibid 125
48 Giacomelli v Italy App no 59909/00 (ECHR, 2 November 2006) [88] and [93]
49 López Ostra (n28)
50 Powell and Rayner v United Kingdom App no 9310/81 (ECHR, 21 February 1990)
52 López Ostra (n28) 56
53 Deés v Hungary App no 2345/06 (ECHR, 9 November 2010) [24]
54 Ibid 7 and 22
55 Ibid 23
an approach of give and take, through which the Court steps back from substantive issues but imposes a strict control on the legality of State action and the effectiveness of democratic processes. The subsidiary role of the Court and the ECHR is therefore highlighted while simultaneously drawing attention to the primary role of popular political pressure and action.

4. PROCEDURAL RIGHTS

The ECHR protects a number of procedural rights which have relevance to environmental protection, some of which are procedural by their essential nature (Articles 6 and 13) and some of which have been derived from substantive rights, including Articles 8, 2, 3 and P1-1. As we have seen, procedural rights have come to play an important, even dominant role in the environmental jurisprudence of the ECHR. This section will consider the content and application of these rights, while posing the question as to the effectiveness and appropriateness of such procedural protection in the face of the environmental challenges of our time.

A) Essential Procedural Rights

I. Article 6: right to a fair trial

Article 6(1) has played an important role in guaranteeing access to justice in environmental matters. As DeMerieux notes, it essentially operates “to demand the putting in place of a coherent system to achieve a fair balance between the authorities’ interest and that of the applicant.” It has so far been invoked in relation to (inter alia) the right to personal integrity (in relation to the risks posed to health by a nuclear station), the right to enjoyment of property (in relation to water pollution which rendered the applicants ability to use water from a well on their property for drinking purposes impossible), and a constitutional right to live in a healthy and balanced environment.

Unfortunately however, some controversial case law has created new obstacles for the enforcement of Article 6(1) rights in environmental cases, especially in the context of nuclear energy. The issue first arose in Balmer Schafroth v Switzerland in 1997, in which the applicants complained that their Article 6(1) rights had been violated by the denial of a means to challenge the decision of the Federal Council to grant an operating licence to a nuclear power station in their area. It was held that the link between the “civil right” which they claimed fell to be determined (the right to physical integrity) and the Federal Council’s decision was “too tenuous and remote” because the applicants “failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent.” The requirement that the risk posed must be “specific” and “imminent” was, according to DeMerieux, “a decidedly new and

56 DeMerieux (n4) 550
57 Balmer-Schafroth and Others v Switzerland App no 22110/93 (ECHR, 26 August 1997)
58 Zander (n30)
59 Taşkin (n42)
60 Balmer-Schafroth (n57) 40
added fetter on access”.  

It seems possible that this decision was taken as a result of the Court’s reluctance to deal with “the Nuclear Question” considering its strongly political dimension: as DeMerieux notes, “[c]learly, the Convention court was setting a near unreachable criterion where nuclear power and questions of ‘high policy’ were concerned.” 

The Court saw the domestic decision that the applicants sought to challenge as one which lay squarely in the field of political decision-making and not one which was appropriate for a court to assess. However, as is highlighted in the strong dissenting opinion led by Judge Pettiti, this was not a case in which the question posed was whether or not nuclear energy should be used but a licencing decision which should not have escaped judicial scrutiny. Nevertheless, the majority’s decision was affirmed in an almost identical case 3 years later: in *Athanassoglu*, the Court held once again that “the connection between the Federal Council’s decision and the domestic-law rights invoked by the applicants was too tenuous and remote.” It considered that “how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes. Article 6(1) cannot be read as dictating any one scheme rather than another.” However, this was not the question before the Court: it was simply being asked to rule as to whether the applicants’ procedural rights to challenge the licencing of a specific station had been respected. These kinds of executive decisions are not open to the same democratic public debate. As Judge Pettiti reasoned in *Balmer-Schafroth*,

> What applies to the supervision of quarries, motorways and waste-disposal sites applies a fortiori to nuclear energy and the operation of power stations required to comply with safety standards. If there is a field in which blind trust cannot be placed in the executive, it is nuclear power[.] This failure to exercise effective judicial scrutiny is unfortunate. The reluctance of the Court to deal with such questions of national policy certainly limits the scope of application of the environmental rights approach. It seems that such jurisprudence may be limited to cases similarly concerning nuclear energy: in *Taşkin*, which involved the operation of a gold mine, the Court did not mention the “imminence” criterion, despite the fact that it was raised in argument by the Turkish government. This does not, however, alter the fact that these cases leave a significant gap in the protection of the right of access to justice, created in the name of preserving democratic legitimacy.

### II. Article 13: right to an effective remedy

61 DeMerieux (n4) 548  
62 Ibid 554  
63 *Balmer-Schafroth and Others* (n57) Dissenting Opinion of Judge Pettiti, joined by Judges Gölcükli, Walsh, Russo, Valticos, Lopes Rocha and Jambrek 6  
64 *Athanassoglu and Others v Switzerland* App no 27644/95 (ECHR, 6 April 2000) [51]  
65 Ibid 54  
66 *Balmer-Schafroth* (n57) 6 (Judge Pettiti)  
67 *Taşkin* (n46) 107 and 128
Article 13 has been claimed successfully a number of times in relation to environmental cases, notably where domestic law does not allow for an effective remedy (for example, in Hatton it was held that judicial review was not an effective remedy because the scope of review was limited to English public law concepts like irrationality)\(^{68}\) and where the remedy is rendered ineffective by the means in which it is discharged (in Öneryildiz the Court found a breach of Article 13 because the compensation that had been awarded had never been paid).\(^{69}\)

The right to an effective remedy is important because it underlies all the other aspects of the Convention and is therefore an important aspect of the right of access to justice.

B) Derived Procedural Rights

Most discussion regarding such derived rights surrounds the application of Article 8, although they have been extended to other substantive rights as well (notably to Article 2 in Öneryildiz).\(^{70}\) In general terms, these procedural obligations can be summarised as the existence of an informed decision-making process involving effective participation of the public, who in turn have a right to information concerning matters which may affect their rights. The Court has held that “[w]here a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities” on the environment and the rights of individuals in order to “enable them to strike a fair balance between the various conflicting interests at stake.”\(^{71}\) As such, the Court bases the justification for such derived procedural rights on the ability of the national state to be able to assess the situation by taking both sides into account in order to make a decision as to the correct balance to be struck which is based on full information, thus forcing the State to engage effectively with the rights question at hand and giving a platform to those whose voices may otherwise have gone unheard.

Such rights and procedures have been emphasised in a number of cases, including Giaccomelli, in which the importance of Environmental Impact Assessments was underlined,\(^{72}\) and Hardy, in which the Court conducted a detailed appraisal of the various investigations and assessments carried out by the UK government in order to inform their decision.\(^{73}\) The right to information enabling individuals to assess the risks to which they may be subject was first derived from Article 8 in Guerra.\(^{74}\) Since then it has been highlighted numerous times, notably in Taškin where the Court noted that “[t]he importance of public access to […] information which would enable members of the public to assess the danger to which they are exposed is beyond question.”\(^{75}\) The focus on public participation is a more recent development and is arguably a result of the impact of environmental democracy rights as set out in the Aarhus Convention. In Taškin, the Court referred to a number of international

\(^{68}\) Hatton (n36) 142  
\(^{69}\) Öneryildiz (n29) 149  
\(^{70}\) Ibid 141  
\(^{71}\) Taškin (n46) 119  
\(^{72}\) Giaccomelli (n48) 8  
\(^{73}\) Hardy (n25) 222-232  
\(^{74}\) Guerra (n33) 60  
\(^{75}\) Taškin (n46) 119
documents including the Aarhus Convention and Principle 10 of the Rio Declaration and noted the importance of public participation.\(^{76}\) It has since been highlighted, notably in *Flamenbaum*.\(^{77}\)

The Court’s approach to such derived rights recognises the fundamental tenet, deeply rooted in environmental democracy, that a decision cannot be truly informed unless it involves the participation of those whom it is likely to effect. This participation is unlikely to be effective without access to information; this information is unlikely to be available if there has not been a process of investigation and assessment. Additionally, a decision that cannot be challenged leaves far too much open to the risk of error, human or otherwise. As such, the Court has recognised and demonstrated that the three defining rights of environmental democracy – access to information, participation in decision-making processes and access to justice – are not simply attractive on their own merits but are inextricably linked with the engagement and balancing act that national states are required to carry out as part of their obligations relating to human rights law.

C) The Effectiveness of Procedural Rights

It falls now to consider whether these procedural rights are effective in promoting both protection of the environment and the values of democracy. This is especially pertinent given that, as we have seen, the Court, in applying the margin of appreciation, has avoided setting any real substantive limits to environmental impacts. Mason criticises the almost exclusive focus on procedural guarantees in the Aarhus Convention, arguing that the lack of substantial environmental standards is “a practical obstacle” since it “reduces the scope for public deliberation on the appropriateness of environmental decision-making according to competing social values.”\(^{78}\) He argues that “[i]nformation disclosure and public participation become more a means for legitimising rather than interrogating governance institutions and for benchmarking public institutions against procedural check-lists rather than substantive environmental standards.”\(^{79}\) He throws doubt on the assumption that procedural rights necessarily promote substantive ones;\(^{80}\) that access to information necessarily empowers citizens to defend their rights and hold their governments to account.\(^{81}\)

Mason’s arguments are interesting to consider because they underline that the imposition of procedural guarantees, however strictly policed, is not a panacea. However, it must be underlined that there are important differences between the Aarhus Convention, the instrument at the receiving end of his critique, and the ECHR. There have been calls in the past for the introduction by protocol of an independent and substantive “right to a healthy environment” to the ECHR.\(^{82}\) This proposal was taken up by the Council of Europe’s Parliamentary Assembly in 2003 but rejected by the Committee of Ministers the following

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\(^{76}\) Ibid 98-100

\(^{77}\) *Flamenbaum and Others v France* App nos 3675/04 and 23264/04 (ECHR, 13 December 2012) 157-158


\(^{79}\) Ibid 26

\(^{80}\) Ibid 17

\(^{81}\) Ibid 13-14

\(^{82}\) Van Dyke (n7)
It is unclear, however, how much more protection such a right would be able to offer in the human rights context. Were the Court to impose substantive limits on environmental harm it would most likely continue to allow a very wide margin of appreciation (as it currently does in relation to Article 8) given the political nature of the subject matter. It would also have to impose such judgments on a case-by-case basis, which, given the variety of such cases which would be likely to arise and the constantly developing nature of environmental science, would be unlikely to provide effective guidelines for States and potential applicants. While specific, quantitative regulations and limitations may be negotiable in the context of international conventions with environmental objectives like the Aarhus Convention, the dynamic is completely different in a human rights instrument: terms are vaguer, the power of interpretation is much greater and the subsidiarity of the role of the Court is much more important.

Some criticisms still hold, however: “procedural checklists” may not necessarily directly promote the formation of substantive national norms for the protection of the environment; perhaps the focus on procedural over substantive issues does serve to “legitimise” government action in some circumstances. Nevertheless, although they may not be sufficient for the effective protection of the environment in general, such procedural guarantees are a necessary prerequisite for the effective enforcement and exercise by individuals of the obligations owed to them by the State and the rights to which they are entitled under human rights law; rights which, thanks to the conception of the ECHR as a “living instrument”, have the potential to expand and extend their reach with the passage of time. This role of facilitation is a highly important one, and one which the Court is able to play without posing a threat to democratic values and institutions.

5. CONCLUSION

Evidently the ECHR is not a cure-all: its scope of application is certainly limited; it shies away from the enforcement of substantive guarantees; it suffers still from a number of complex issues and hurdles to access to justice and the protection of the environment (for example, the imposition of the “imminence” criterion in Balmer Schafroth). However, it does play two essential roles in the promotion of environmental protection. Firstly, its focus on procedural rights, guarantees and obligations is fundamental in the facilitation of individuals’ engagement with environmental questions and State policy which affects them. Secondly, in so enabling private citizens in this domain, it represents a new, re-orientated vision of environmental law and protection that has at its centre the individual and her relationship with the environment. This re-localisation will hopefully encourage greater engagement with environmental issues which is unlikely to remain entirely confined to human rights jurisprudence but may serve to reinvigorate wider environmental movements.

84 Tyrrer v United Kingdom App no 585672 (ECHR, 25 April 1978) [31]
The facilitation of political, civil and legal action through the increasing focus on procedural rights is largely complementary to this shift. The combination of renewed, reconnected engagement and stronger, enforceable access to information, participation and justice in the environmental context present the possibility of a reinvigorated movement with a dual focus: the preservation of the environment and the promotion of truly participatory democracy.
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‘IF A WOMAN’S PERSONHOOD IS TRULY RESPECTED BY THE LAW, THEN SHE MUST ALSO BE THE ULTIMATE SOURCE OF BOTH THE DECISION TO ABORT AND THE MEANING GIVEN TO THAT DECISION.’
A DISCUSSION WITH REFERENCE TO UK ABORTION LAW

Abigail Ward

1. INTRODUCTION

In order to evaluate personhood, it must firstly be defined. When Cornell refers to a woman’s personhood, she does not only refer to a physical wholeness but also a psychological wholeness – it is not only to have control over one’s bodily integrity but to have control of one’s mind and one’s ability to make a decision. This essay will, therefore, argue that UK Abortion law does not permit such wholeness and instead usurps a woman’s personhood. It will firstly be demonstrated that the very existence of UK abortion law represents a serious barrier to a woman’s decision to abort as it assigns the real decision-making process away from her. This will be shown through a discussion relating to the construction of women in the legislation in contrast to the doctor, who in this essay, will be identified as the real source of the decision to abort. It will then discuss the fact that abortion as an exceptional medical procedure prevents a woman’s personhood from being truly valued before finally examining the growing prominence of foetal rights in UK law which threatens to further dissociate a woman’s right to abortion.

2. ABORTION LEGISLATION AND WOMEN’S AUTONOMY

Despite the fact that the Abortion Act 1967 was heralded as a crucial step for women’s emancipation, it will be conversely argued that what women won was not freedom but an apparent “right” to undergo invasive procedures in order to terminate unwanted pregnancies. Expecting women to be grateful for such a right highlights how the meaning attached to a woman’s decision to abort is not valued. The fundamental right to bodily integrity should encompass abortion as an inherent and undisputed entitlement. However, the legislation operates on the assumption that all women want to become mothers and, therefore, do not need this right; this is reflected in the fact that abortion is prima facie illegal under the Offences Against the Person Act 1861 and Infant Life (Preservation) Act 1929. The offences effectively deny autonomous decision-making as women are not automatically granted the right as the Abortion Act only creates a defence. Therefore, the very essence of the Act is incompatible with the idea that a woman’s personhood is respected by the law as to criminalise a bodily right is to implicitly disregard a woman’s ability to make a decision. Cornell uses her imaginary domain concept to further highlight what this denial represents. The imaginary domain of women refers to the space women need to think through the decision to abort, allowing them to take into account future implications that their decision

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may have. However, this is rejected in the legislation, representing an assault on a woman’s personhood as it thwarts the projection of bodily integrity and is thus a symbolic dismemberment of a woman’s body.\(^5\) Hence, the only way to give meaning to the decision to abort is to reallocate women as the ultimate source of the decision which is currently denied in law. Recognising women as the source would challenge the discourse which currently legitimises women’s social status as objects to be manipulated and constructed.\(^6\)

### 3. CONSTRUCTIONS OF WOMEN

The way in which women are represented in UK abortion law is a means to justify the imposition of control. As Lee points out, women who have abortions rarely appear as what they are: ordinary women.\(^7\) Instead, Sheldon has identified two constructions of women who do decide to abort and go against the norm, both of which portray women in a way which deems regulation necessary. They are depicted in one of the following ways:

A) **Women as Mothers**

Abortion and motherhood are often regarded as opposing interests.\(^8\) There is an assumption that women who choose to abort are rejecting their natural responsibilities as a woman destined for motherhood. This is reflected in the legislation as abortion is only permissible if the woman falls into one of the grounds in section 1(1) of the Abortion Act. Therefore, abortion is never deemed to be intrinsically acceptable and is only justifiable if a woman can show that to continue with pregnancy would pose a threat to her physical or mental health or to that of her existing children. The grounds, therefore, implicitly construct a woman worthy of an abortion but who is still able to comply with the norm: a married woman who already has children. These provisions measure women against the “ideal mother”\(^9\) who wants an abortion in order to remain a good mother to her children but who is ‘at the end of her tether’\(^10\) mentally or physically. These women’s lives are more important than that of the foetus, not in their own right but because of their existing ties and responsibilities to family.\(^11\) Consequently, the Act promotes paternalism due to the importance placed on protecting the hegemony of the family.\(^12\) It also demonstrates that a woman’s maternal function is the core reason she is not respected by the law as, under the Act, a woman cannot reject motherhood without demonstrably being in such a distressed state that she may be permitted an abortion. She is seen as a victim in need of support.

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\(^5\) ibid, 38.
\(^6\) ibid, 88.
\(^10\) Emily Jackson, Regulating Reproduction – Law, Technology and Autonomy (Hart 2001) 75.
\(^12\) Victoria Greenwood and Jack Young, Abortion in Demand (Pluto Press 1976) 49.
B) Women as Immature

A woman who is irresponsible due to the misuse of contraception is conversely portrayed as immature because she now refuses to pay the expected price for her carelessness. She has rejected the natural outcome of sexual intercourse and is thus deemed to be selfish in only considering her needs, facilitating the denial of her ability to make a decision as she cannot be expected to make this decision carefully or without assistance. For this woman, the task of the law is one of responsibilisation as if the woman seeks to evade the consequences of her carelessness, the law acts as a barrier by not allowing her to reject her predetermined role without regulation. She is seen as immature in need of guidance.

The legislation is clearly founded on health grounds and both constructions present women who are psychologically vulnerable and thus unsuitable to be allowed to undertake such an important decision. This image of female weakness, and the impossibility of having an abortion from a position of strength makes it seem necessary that a more responsible figure should assume the role of decision-maker. This is provided in the Act which requires the approval of two doctors to ensure women only get abortions based on the permitted grounds, as abortion can only be an exception to maternity in extreme circumstances that are tightly regulated. For this reason, the doctor acts as a corrective figure and is portrayed in stark contrast to the woman.

4. CONSTRUCTION OF THE DOCTOR

The legislation generates an image of the unstable woman, sharply contrasting that of the doctor. The gender of the patient is important according to Boyle as a woman is only granted an abortion if she is incapable of making a decision, thus creating a vacancy that seemingly suggests only a male doctor can fill. Sheldon observed the sustained referral to the doctor as “he” in the Parliamentary debates before the 1967 Act was passed. This indicates the legislature’s intention to further entrench women’s role as a mother by constructing a male doctor within the provisions of the Act who would embody the epitome of maturity and common sense, displacing women as the source of the decision. By making doctors the “gatekeepers” for the Act, abortion in the UK is a privilege granted or withheld at the doctor’s discretion meaning that refusals could result in women carrying unwanted pregnancies to term. It is, therefore, submitted in this essay that a woman’s personhood is not respected by the law due to the fact that it is the doctor who has the final say; this can be explored further in three ways:

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13 Sheldon (n 11) 9.
14 ibid.
15 Sheldon (n 11) 15.
17 Mary Boyle, Re-thinking Abortion: psychology, gender, power, and the law ( Routledge 1997) 72.
18 Sheldon (n 11) 13.
A) The ‘two doctor’ Requirement

Under section 1(1) of the 1967 Act, a woman must obtain the approval of two medical practitioners in order to qualify for an abortion. Women are instantly placed in a position of weakness and are supplicants\(^{20}\) who have to convince not one but two figures of authority that their reasons for wanting an abortion are satisfactory. In doing this, women are subjected to a demeaning process whereby they must present their circumstances in the worst possible light to persuade the practitioners. Eligibility is thus contingent upon women appearing desperate.\(^{21}\) Under section 1(2), the doctors are directed to take account of the woman’s actual or foreseeable environment;\(^{22}\) this introduces women’s social circumstances as relevant meaning that the doctor is opened up to scrutinise the woman’s lifestyle, her finances and her relationships.\(^{23}\) Social factors are conflated with medical ones, prompting Jackson to question whether the doctors’ medical training can actually equip them when deciding whether a woman should terminate her pregnancy.\(^{24}\) Furthermore, this highlights the danger of an ununiformed approach as doctors may assess certain factors more favourably than others and if a conflict arises between the two, the procedure simply cannot go ahead. The deliberately vague wording\(^{25}\) in the statute means that doctors may choose to adopt a liberal or restrictive interpretation whereas women cannot be said to play any part in the decision. Additionally, the use of the word “may” in section 1(2) creates no legal obligation on either doctor to take any of the woman’s circumstances into account, further rendering women powerless in a decision being made for her.

B) Lack of Review

The vagueness of the statute causes further problems concerning the duty placed upon doctors to act in “good faith”.\(^{26}\) This term remains undefined and consequently gives doctors a great deal of discretion when considering a woman’s case, so much so that Sheldon believes this level of discretion to be the “DNA of the legislation.”\(^{27}\) Nevertheless, this is not far from the truth seeing as the provision provides no limits or criterion which the doctor must follow, contributing further to the already present level of ambiguity. It would, therefore, be difficult to draw a line to indicate when a doctor has exceeded their power which arguably suggests that doctors are to an extent free from regulation as they are able to define the scope of their own statutory defence.\(^{28}\) In fact, there has only been one case where a doctor was found to not have acted in good faith, however in \textit{R v Smith}\(^{29}\) it was undeniably obvious as the doctor had not asked about medical history nor examined the woman and had

\(^{20}\) Boyle (n 17) 113.
\(^{21}\) Jackson (n 10) 81.
\(^{22}\) ibid 80.
\(^{23}\) Sheldon (n 2) 25.
\(^{24}\) Jackson (n 21).
\(^{25}\) Sheldon (n 2) 59.
\(^{26}\) S1 (1).
\(^{28}\) Jackson (n 21) 78.
\(^{29}\) [1974] 1 All ER 376.
asked for payment in cash.\textsuperscript{30} However where it is not obvious, a doctor’s conduct may not be reviewed due to the subjectivity of the provision, rendering the meaning of abortion as irrelevant in the eyes of doctors despite their usurpation of a woman’s decision to whom it means a great deal more.

C) Conscientious Objection

The meaning of abortion is further devalued by opposing doctors who have the right under section 4 of the Abortion Act to conscientiously object to performing abortions. Again, the legislation remains vague as doctors are neither legally required to publicise their objections nor refer women to another doctor. Women, therefore, have no way of knowing in advance whether or not their GP is a conscientious objector,\textsuperscript{31} this detaches them further from being the source of the decision as even before presenting their case, the decision may have already been made. Although guidance exists from the General Medical Council advising doctors to inform their patients that they have the right to see another doctor,\textsuperscript{32} this is not codified and is thus unenforced in practice, rendering women helpless if delay further prevents them from having an abortion. What is more worrying is the right allocated to medical students to opt out of learning about abortion treatments despite the requirement in section 1(4) to carry out an abortion in an emergency. This concept is severely flawed and not only compromises a woman’s right to make a decision but also her right to live if a doctor is medically unqualified to perform a life-saving procedure; a woman’s personhood cannot exist in the context of abortion when she has such little control and respect.

These barriers that the law present to women render the relationship between a doctor and patient as one that is pervaded with power.\textsuperscript{33} A woman’s personhood cannot be respected when the role of doctors as the source of the abortion decision denounces what it means to a woman to have an abortion through a “stereotype-like grid”\textsuperscript{34} which doctors use at indifferently at will.

5. ABORTION AS AN ‘EXCEPTION’

Without the tight regulation of abortion, a woman’s personhood would be valued. However, as abortion is detached from a woman’s decision-making and superseded by the ‘doctor knows best,’\textsuperscript{35} assumption, abortion is set apart\textsuperscript{36} from the principle of self-determination used in all other medical treatments. The decision is hence dependable on idiosyncratic medical goodwill rather than the medically ethical principle of bodily autonomy. It is an anomaly\textsuperscript{37} seeing as the same, competent pregnant woman could legitimately refuse an emergency caesarean, even if this were to cause the foetus to die.\textsuperscript{38}

\textsuperscript{30} Sheldon (n 27).
\textsuperscript{31} Jackson (n 10) 85.
\textsuperscript{32} Shelley Sclater, Fatemeh Ebtehaj, Emily Jackson and Martin Richards, Regulating Autonomy: Sex Reproduction and Family (Hart 2009) 245.
\textsuperscript{33} Sheldon (n 2) 73.
\textsuperscript{34} Jackson (n 10) 81.
\textsuperscript{35} Sally Sheldon, ‘It’s time to ditch the two doctor’s rule’ (Spiked, 20 October 2008) <http://www.spiked-online.com/newsite/article/5834#.VOmwPmsUvw> accessed 10 February 2015.
\textsuperscript{36} Sclater (n 32) 243.
\textsuperscript{37} Sheldon (n 35).
\textsuperscript{38} St George’s Healthcare NHS Trust v S [1998] 3 W.L.R. 936.
has been confirmed that pregnancy does not diminish a woman’s right to choose whether or not to undergo medical treatments even if her decision is seen as morally repugnant\(^{39}\) and yet abortion rejects this. Consequently, a woman’s personhood is compromised as not only is she denied a right to abortion but also the right to self-determination, a basic medical legal right. The implications of this are highlighted by Katz who believes that the law’s concern for autonomy can be too readily yielded to the temptations to view and treat women as vessels\(^{40}\) for the foetus.

6. FOETAL RIGHTS

Sokol argues that the Abortion Act is a delicate compromise between female autonomy and the protection of the foetus;\(^{41}\) however Sheldon’s identification of women as the forgotten party\(^{42}\) will instead be pursued. The fact that compelling a woman to carry an unwanted pregnancy is not regarded as a derogation of her right to make decisions\(^{43}\) reveals an underlying value placed on the life of the foetus. This is further demonstrated by the amendments made by the Human Fertilisation and Embryology Act 1990 which reduced the time limit from 28 to 24 weeks.\(^{44}\) 24 weeks refers to the point where the foetus is deemed to be capable of sustaining independent life outside the womb;\(^{45}\) however this shifts the focus of decision-making away from the woman.\(^{46}\) Sheldon believes that the amendment has reinforced medical control over women’s access to abortion\(^{47}\) as the emphasis placed on foetal viability could, if equated with the sanctity of life,\(^{48}\) further reduce the rights of woman as medical advances develop. The medical stance towards the foetus strengthens this essay’s claim that it is, in fact, the doctor at the heart of the decision and if foetal life eventually comes to be prioritised, doctors will have a concrete reason to prohibit abortion, foreshadowing the ultimate disregard of a woman’s personhood.

7. CONCLUSION

A definitive conclusion can thus be drawn: UK abortion law prevents the achievement of the minimum conditions of individuation which are necessary to determine a meaningful concept of personhood.\(^{49}\) This has been primarily shown through the constructions of women which have allowed doctors to assume the role of decision-maker. Furthermore, the more recent emphasis on foetal viability signifies the eventual erasure of the woman who will be reduced to a mere environment for the foetus,\(^{50}\) allowing the doctor to completely replace her as the source of the decision. The right to abortion therefore needs to be re-articulated.\(^{51}\)

\(^{39}\) ibid 937.
\(^{42}\) Sheldon (n 11) 4.
\(^{44}\) Section 37(1)(a).
\(^{45}\) Bourne (n 9) 85.
\(^{46}\) Sheldon (n 19) 115.
\(^{47}\) ibid.
\(^{48}\) Greenwood (n 12) 53.
\(^{49}\) Cornell (n 4) 33.
\(^{50}\) ibid48.
\(^{51}\) Cornell (n 4) 53.
Women must be empowered to re-define themselves beyond the constructions and re-imagine what abortion means to them so that decisions can stem directly from them.
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SEXUALLY MOTIVATED KILLINGS: PROBLEMS WITH THE PROVOCATION DEFENCE AFTER THE CRIMINAL JUSTICE ACT 2009

Alvin Sng

Prior to the Coroners and Justice Act 2009, the defence to murder of "provocation" was criticised for unfairly favouring men, who more likely fit the requirements of the defence. Sexually jealous men who killed their wives were thus often able to escape the harshness of a murder conviction. The CJA2009 enacted attempted to address that problem, by specifically excluding situations where there was a loss of control from "sexual infidelity". However, the reform has split opinion among commentators into two main camps: that it was commendable as a major milestone to correct unfair gender discrimination, or that it was a poor piece of legislation as it had failed spectacularly and made the law more confusing.

This essay will examine the policy across two levels- the policy direction and its implementation. The intention of Parliament will be analysed, as well as the actual results of the consequent legislative reform. It will ultimately be concluded that while the policy direction to correct the unfair gender imbalance was commendable, it was poorly implemented by its semantic construction - as evidenced by R v Clinton - and could not genuinely be said to have improved the law of homicide.

Keywords: partial defence to homicide; loss of control; sexual infidelity; Coroners and Justice Act 2009; R v Clinton

1. INTRODUCTION

The Coroners and Justice Act 2009 (CJA 2009) removed provocation as a partial defence to murder, and replaced it with a "Loss of Control" defence which controversially excluded triggers stemming from sexual infidelity. This essay will examine the policy across two levels-the principle behind the policy and its application. It is submitted that the policy direction to fully exclude sexual infidelity from jury consideration via legislative means, aiming to prevent "jealous husbands" from benefitting from the defence without depriving "battered wives" of it, was fundamentally a commendable decision factoring in modern realities. However, the poor implementation of the otherwise good decision has caused problems videlicet from the semantic construction of the CJA 2009. Significant interpretive uncertainty was introduced, which consequently allowed the Court of Appeal in R v Clinton leeway to veer off the policy direction intended by Parliament, and essentially failed to adequately achieve Parliament's initial policy aim

1 Coroners and Justice Act 2009, c 25 s 54
2 Clinton [2013] QB 1
2. INTENTION TO LEGISLATIVELY EXCLUDE SEXUALLY JEALOUS KILLERS FROM PROTECTION WAS CORRECT

A) Adaptation to Contemporary Norms

Prior to the CJA 2009, the defence of provocation would be available to an accused killer if the jury found that he was in fact provoked and had lost his self-control, and that a reasonable man would have done what he did, taking into account everything said and done. The latter prong certainly recognised how impactful the betrayal of sexual trust could be, but the defence became overly wide. With killings from sexual taunts coming into ambit, the meaning of "provocation" was argued to have enlarged so much that it became the same as "caused", and that the defence should be reduced to cases where the provocation was "sufficiently grave". Contemporary norms no longer accepted "egregious precepts of male proprietorialness, jealousy, and envy" and thus "[m]ale possessiveness and jealousy should not today be an acceptable reason for loss of control", as sexual betrayal is "so common in modern society... not considered as conduct that could impact a person's capacity for control... to restraining himself from killing". Empirical evidence however showed the prevalence of such killings, and Polk, in a study of all homicides from coroners' files in 1985-86, identified a significant proportion involving violence representing "an ultimate attempt by the male to control the life of his female sexual partner". Growing recognition that existing "law of homicide [stood] in urgent need of comprehensive and radical reform" cumulated in the CJA 2009 which repealed the "provocation" defence and replaced it with a "Loss of Control" defence. Parliament did not overlook the potentially serious provocation that sexual betrayal could cause. Conversely, the very fact that an express exclusion was found necessary meant acknowledgement of sexual infidelity as a classic case for serious provocation, but considering the understanding of contemporary norms meant this was now insufficient to ground a defence. Thus the Government's stance of being "absolutely clear that [sexual infidelity] on the part of the victim can never justify reducing a murder charge to manslaughter" appears justified.

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1 Homicide Act 1957, s 3
2 Luc Thiet Thuan v R [1997] AC 131
3 Law Commission, 'Partial Defences to Murder' (No 290, 2004) para 3.25
4 Alan Reed and Nicola Wake, 'Sexual infidelity killings: contemporary standardisations and comparative stereotypes' in Alan Reed and Michael Bohlander, Loss of control and diminished responsibility: domestic, comparative and international perspectives (Ashgate 2011)
5 R v Smith (Morgan James) [2001] 1 AC 146, 169
6 Baker and Zhao, 'Contributory qualifying and non-qualifying triggers in the loss of control defence: a wrong turn on sexual infidelity' (2012) 76(3) JCL 254, 255
7 Kenneth Polk, 'Homicide: Women as Offenders' in Patricia Eastal and Sandra McKillop (eds), Women and the Law (1993)
8 Attorney-General for Jersey v Holley [2005] 2 AC 580, [44]
9 CJA 2009, s 56
10 CJA 2009, ss 54-55
11 Clinton (n2), [36]
B) Affirmation from Foreign Jurisdictions that Reliance on the Judicial Process was Insufficient

It may be argued that judges alone could be trusted to exclude sexual jealousy from jury consideration without legislative intervention, but comparative studies of foreign jurisdictions show that judges could not always be relied on to do so when expected. Reform states in the USA have seen infidelity defences apply to the killing of "[a] fiancée who danced with another... divorcee pursuing new relationship months after final decree". Classic "adultery" moved to "modern dating and moving" which could help killers escape murder charge. While most states had rejected the proposition that verbal confessions of infidelity could ever constitute sufficient provocation to incite the use of deadly force, a minority of "reform states" have nevertheless passed legislation that extraordinarily liberalised the provocation defence. This cumulated in State v Dixon, which Reed laments to be a "notorious cause célèbre... unfortunate consequences of unrestrained mitigatory principles [when] devoid of effective distillation by the trial judge". Further, Scottish criminal jurisprudence gives a very liberal interpretation to the provocation defence to murder, and courts have recognised a "duty of sexual fidelity" by individuals, failing which another might be expected to be "swept with sudden and overwhelming indignation which may lead to a violent reaction resulting in death". It therefore appears that without clear legislative direction to exclude sexually jealous killers, disproportionate judicial liberalisation may result.

C) Criticisms of Solely Excluding Sexual Infidelity are Irrelevant

As discussed, Parliament had rightly decided that it was no longer willing to recognise the “loss of control” stemming from sexual jealousy as an excuse to killing. Clough criticised the fact that honour killings and homophobic fatalities were not similarly excluded, and pre-eminence attached only to sexual infidelity was "illogical stereotyping". The Government acknowledged that triggers such as honour killings should be equally excluded from consideration, but as that would fail the requirements of being "extremely grave in character" or "cause justifiable sense of being wronged", there was no need for express statutory exclusion. Yet Clarkson and Keating point out that no substantiation was given as to why this barrier itself was insufficient to exclude sexual infidelity. This is however a weak argument against the policy. Not excluding other equally undeserving triggers could well affect the completeness of the defence, but this detracts from the key issue

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15 Law Commission (n5) para 3.56
16 ibid
17 State v Shane 590NE 2d272 (Ohio 1972)
18 Baker and Zhao (n8) 123
19 State v Dixon 597SW 2d77 (Ark 1980)
20 Reed and Wake (n6) 124
21 Drury v HM Advocate [2001] SLT 1013, [75]
22 Baker and Zhao (n8) 273
23 Amanda Clough, 'Loss of Self-Control as a Defence: The Key to Replacing Provocation' (2010) 74 JCL 118
25 Clarkson and Keating, ‘Criminal Law’ (7th edn, Sweet and Maxwell 2010), 679
that Parliament's objective was to remove the protection of the "loss of control" defence from sexually jealous killers.

D) Issues with the Wideness of the "Sexual Infidelity" Concept

The most substantial objection against the policy direction is that views on sexual infidelity differ too widely at a societal level, and various gradations exist for "things said or done that constitutes sexual infidelity", which consequently requires a more nuanced approach. The Law Commission recognised different situations on a sliding continuum of severity, where something "said or done" constituting sexual infidelity had caused the loss of control, and public survey respondents consistently assigned lower culpability to killers in more severe scenarios, such that a sentence below that of life (as it would likely be should the Loss of Control defence fail) would be fair.

Reed and Wade thus argue for striking of via media between the Anglo-Scottish bifurcatory jurisprudence, allowing sexual infidelity to be considered in the defence - but only for cases of the "most extreme and exceptional character". This would necessitate Parliament to provide for a compartmentalised approach in defining the meaning of sexual infidelity, and to differentiate between various gradations of severity; each severity-level of things said or done should then be compared to contemporary social standards, and then statutorily recognised or excluded as triggers, rather than homogeneous exclusion of sexual infidelity. It is argued that this could complement the "seismic shift in the role of the trial judge" to provide an "optimally balanced position for "sexual infidelity" killings who have discretion of the "qualifying threshold for jury consideration of the loss of control", taking into account the "weight and quality" of all evidence.

However, excluding sexual infidelity with such specificity is not ideal. The judge (like jury) still has to make a value judgement on the "severity-level" of the act of sexual infidelity, before deciding if a reasonable jury could consider it. It remains so even with an interlocutory appeal system to re-examine claims of exceptional taunts of infidelity. If a trial judge was a sufficiently good "filter mechanism", a Dixon-style case should not have happened. Further, although politicians who spoke to the Bill when it was going through Parliament made "terse statements" against such blanket exclusion, the general aim was to reduce the provocation defence to almost nothing, but leave "elbow room" to protect deserving battered women killers who might not have had a sudden loss of control.

27 Reed and Wake (n6) 127
28 Law Commission (n5) paras 2.22-2.30
29 Reed and Wake (n6) 133
30 ibid 129
31 ibid 130
32 ibid 132
33 R v Gurpinar [2015] EWCA Crim178, [12]
34 Law Commission, Murder, Manslaughter and Infanticide (No 304, 2006) para 5.16
35 Reed and Wake (n6) 129
36 Dixon (n19)
37 HC Deb 9 November 2009, vol. 499, cols. 86-92
38 Baker and Zhao (n8) 275
39 R v Ahluwalia [1993] 96 Cr App R 133, 138
Lord Judge in *Clinton* believed that a blanket exclusion might lead to injustice, this is incorrect. Contrariwise, Parliament has determined that according to contemporary standards, allowing the defence in such a case would be contrary to justice. The complete exclusion of sexual infidelity from the defence at all levels of severity sends out the message that it would be "doubly wrongful, in both taking offence initially and killing", and is in conformity with Parliament's aims. It is therefore submitted that this policy direction undertaken was good.

**3. UNSATISFACTORY IMPLEMENTATION BY CJA 2009**

**A) Conceptual Differences: "Jealousy" and "Infidelity"**

While "sexual infidelity" and "sexual jealousy" were considered almost interchangeably by the Government, Horder noted that they were "different conceptualisations," and highlighted Parliament's "egregious focus on "sexual infidelity" as a catch-all term for those cases where a defendant kills out of "sexual jealousy" to deprive the defence from killers for envy, jealousy and proprietorialness. Wade describes as "paradoxical" that sexual infidelity related killings include killings from "reasons other than sexual jealousy... extreme breaches of trust, excessive taunting... sexual humiliation", yet "envy and proprietorialness" cases not involving sexual infidelity would not be within ambit of the exclusionary term, contrary to the Government's aims.

**B) Unclear Phraseology**

Further, the wording of the eventual exclusion provision has been criticised to have "numerous problems [arising]." "Sexual infidelity" was undefined by the Act, and it was unclear whether it necessitated being engaged in a relationship, included one night stands, or a mere intention to leave home for another. Ashworth questions how "things said can ever constitute sexual infidelity", and must be assumed that it refers to "admissions of sexual infidelity (even if untrue) as well as reports (by others) of sexual infidelity." Further, the provision prohibited taking into account "the fact that a thing done or said that constituted sexual infidelity in determining whether the loss of control had a trigger", but not that sexual infidelity itself could not amount to a qualifying trigger, nor that any reference to sexual infidelity should be disregarded. Baker also points out that by logical extension, the ambit is far wider than it seems: if sexual infidelity is excluded as a qualifying trigger, a fortiori mere

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40 *Clinton* (n2), [39]
41 Baker and Zhao (n8) 275
43 Memorandum from Jeremy Horder to HC (Coroners and Justice Bill, committee stage, 3 Feb 2009, CJ01)
44 ibid
45 Nicola Wake, 'Loss of Control beyond Infidelity' (2012) 76(3) JCL 193, 196
46 CJA 2009, s55(6)(c)
47 David Ormerod, 'Smith and Hogan's Criminal Law' (13th edn, OUP 2011) 520
48 David Selfe, 'The Defence of 'Loss of Control'', (2012) 208 Criminal Lawyer 3, 4
49 Andrew Ashworth, 'Homicide: Coroners and Justice Act 2009 s.54 - loss of control - qualifying trigger' [2012] 7 Crim LR 539, 544
communication of it (such as taunts of sexual infidelity) must also be excluded.\(^{51}\) If sexual infidelity in the form of intercourse is excluded as a qualifying trigger, *a fortiori* sexual infidelity at all lower levels of intimacy (such as hugging) must be excluded.\(^ {52}\) The variance of interpretations was evidently not merely academic, as it resulted in the problematic *Clinton* decision.

**C) Judicial Misinterpretation in *Clinton***

Apparent problems in the provisional wording manifested itself in several erroneous interpretations in the seminal case of *Clinton*, primarily in determining if requirements of the second\(^ {53}\) and third\(^ {54}\) prongs of the "loss of control" defence was established, demonstrating the semantic weakness of the statute.

First, Lord Judge erred in *Clinton* in finding that in determining the second prong, sexual infidelity could be considered "contextually" provided it was not *on its own*.\(^ {55}\) However, Ashworth observes that this interpretation did not necessarily follow from the semantic reading of the subsection, which could yield various plausible alternative interpretations.\(^ {56}\) Further, it would be extremely difficult to determine what triggered the loss of control: whether the sexual infidelity was a cause or mere context,\(^ {57}\) and the trial judge would find difficulty admitting evidence.\(^ {58}\) The hypothetical example from the Court on battered and sexually-cheated women in justifying the contextual approach for justice is unconvincing, since the battering alone and immense fear of violence would meet both prongs without analysis of the husband's sexual infidelity.\(^ {59}\) The message the court was publicly sending in allowing sexual infidelity to back into consideration contradicted that of Parliament.\(^ {60}\) Importantly, the goading of the killer itself was not "of an extremely grave character" and had to "stand on [its] own as a form of objective provocation".\(^ {61}\) An "insufficient trigger" cannot be combined with an "excluded trigger" to make the former valid.\(^ {62}\) As sexual infidelity cannot in reality be mere "context", it will at least be a "contributory trigger"\(^ {63}\) if taken as a "contextual" factor to make the goading qualify, once it does not "stand alone".\(^ {64}\) The fact that sexual infidelity was the "overriding trigger" in *Clinton* made the decision further indefensible.\(^ {65}\)

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\(^{51}\) Baker and Zhao (n8) 263

\(^{52}\) ibid 264

\(^{53}\) CJA, 2009 s54(1)(b): whether the LOC had a QT

\(^{54}\) CJA, 2009 s54(1)(c): whether a person of the killer's age and sex might have reacted similarly

\(^{55}\) *Clinton* (n2), [39]

\(^{56}\) Ashworth (n49) 543

\(^{57}\) Findlay Stark, 'Killing the unfaithful' (2012) 71(2) CLJ 260, 261

\(^{58}\) ibid

\(^{59}\) Baker and Zhao (n8) 269


\(^{61}\) Baker and Zhao (n8) 265

\(^{62}\) ibid 269

\(^{63}\) ibid

\(^{64}\) ibid 260

\(^{65}\) ibid 266
Assuming the Court was correct, sexual infidelity would in practice unlikely ever be the only element relied on such that the statutory exclusion could operate.\(^66\) Indeed, Herring remarks that "every barrister worth his salt would... point to another trigger" to evade the exclusion.\(^67\) When sexual infidelity is "intimately bound up with a number of other [permissable] triggers arising",\(^68\) it is unlikely the jury can truly disregard sexual infidelity itself but consider it in "context",\(^69\) and "micro-management of the defence" would likely do more harm than good.\(^70\) Slater acknowledges these difficulties and considers the possibility of interpreting a difference between cases where sexual infidelity is a "principle reason" for the loss of control, against where cases where it is merely a minor factor that may just tip the balance,\(^71\) but ultimately concludes that it introduces "even more complexity to an already highly complex defence", hence even such a "weak contextual interpretation" should be rejected.\(^72\) Slater further demonstrates the contrasting use of singular and plural in the literal text. While the second prong referred to "a thing or things done or said",\(^73\) the exclusion was for "a thing done or said".\(^74\) Thus, whether by itself or not, sexual infidelity must be disregarded. If this literal reading is correct, the Clinton approach is necessarily wrong.\(^75\)

Second, it was mistakenly held that the overall impact of all potential triggers (including non-qualifying triggers) on D's capacity for control could be assessed to determine the third prong,\(^76\) as it "let non-qualifying triggers in via the backdoor",\(^77\) undercutting Parliament's aim to exclude sexual infidelity from being used as a qualifying trigger in the second prong.\(^78\) There is conceptual overlap, and the second and third prongs are "two halves to a single question".\(^79\) If sexual infidelity was not excluded from the third prong, it would necessarily "taint jury evaluation under the second".\(^80\) Further, the third prong should not even have been examined without having met the second.\(^81\) Finally, even if it were possible to consider sexual infidelity under the third prong, Baker argues that it would necessarily fail, given contemporary social norms and values. The Law Commission accepted the Canadian Supreme Court's recognition\(^82\) that society had "changed views... and [the] present reality is that a high percentage of [marital relationships] end in separation".\(^83\)

In essence, many commentators found that the Clinton-mistakes "[diluted] the impact of a provision designed specifically to limit the use of the Loss of Control defence by abusive

\(^{66}\) Wake (n45) 196
\(^{67}\) Jonathan Herring, 'Criminal Law, Text, Cases and Materials' (6th edn, OUP 2014) 249
\(^{68}\) HL Deb 11 November 2009, vol. 714 col. 840 per Lord Thomas of Gresford
\(^{69}\) Jo Miles, 'The Coroners and Justice Act 2009: a "dog's breakfast" of homicide reform' (2009) 10 Archbold News 6, 8
\(^{70}\) ibid
\(^{71}\) James Slater, 'Sexual Infidelity and Loss of Self-Control: Context or Camouflage' (2012) 24 DLJ 153, 161
\(^{72}\) ibid
\(^{73}\) CJA 2009, s55(4)
\(^{74}\) CJA 2009, s55(6)(c)
\(^{75}\) Slater (n71) 158
\(^{76}\) Clinton (n2), [31]
\(^{77}\) Baker and Zhao (n8) 260
\(^{78}\) ibid 271
\(^{79}\) ibid
\(^{80}\) ibid
\(^{81}\) ibid 269
\(^{82}\) ibid 270
\(^{83}\) R v Tran [2010] 2 SCR 350 [19]
men who killed their partners"\(^{84}\) and the provision allowed judges in the Court of Appeal to "[evince] an obvious distaste for s55(6)(c) and [adopt] apologist attitudes with deeply troublesome rationalisation of domestic violence, at odds with the [legislation] as intended".\(^{85}\)

While it was indeed "artificial and conceptually difficult to disregard/regard sexual infidelity at different stages of the defence, or another defence,\(^{86}\) compartmentalising was wrongly found "too difficult for the jury"\(^{87}\) as this misses the point, as it was what "exactly what the law requires".\(^{88}\) A "hazardous precedent" said to have ultimately been set.\(^{89}\)

### 4. CONCLUSION

While contemporary society rightly rejects the out-dated view that a woman's infidelity was the "highest invasion of property"\(^{90}\), piecemeal reform in s55(6)(c) CJA 2009 was a poor implementation of a good policy direction to correct it. Not only has the classic "sexually jealous" killer in *Clinton* benefitted from the new defence contrary to the feminist aims intended by the Government,\(^{91}\) deserving "battered women" would still find difficulty in satisfying current requirements.\(^{92}\)

The Court of Appeal in *Clinton* conceded that it had to "make sense of the statute"\(^{93}\), rather than merely interpret it. The Government added s55(6)(c) in contrary to the Law Commission's proposals,\(^{94}\) without pointing the Court in a clear direction, and judges "felt very much on their own"\(^{95}\) as the previous provocation defence gave little interpretive guidance. Uncertainties point to an ideal clarification of the confusing provision by Parliament, or a re-attempt at reasoning by the Supreme Court. In the longer term, it may also be considered if wholesale reform of the law of homicide, as recommended by the Law Commission\(^{96}\), might more effectively conform to the Government's policy direction.

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\(^{85}\) ibid

\(^{86}\) Stark (n57)

\(^{87}\) *Clinton* (n2), [39]

\(^{88}\) Baker and Zhao (n8) 266

\(^{89}\) ibid 260

\(^{90}\) *R v Mawbridge* (1707) Kel 119, 337

\(^{91}\) Cobb (n84)

\(^{92}\) Clough (n23)

\(^{93}\) *Clinton* (n2), [26]

\(^{94}\) Reed and Wake (n6) 118

\(^{95}\) Baker and Zhao (n8) 266

\(^{96}\) Law Commission (n34) paras 1.36-1.69
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