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A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa

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Smith Ouma††

INTRODUCTION

Historically, traditional means of settling disputes have been commonplace in African societies. Before the advent of colonial administration, parties were represented by persons skilled in oratorical prowess, who could argue and who possessed the persuasive power of argument, parties recounted their story and “counsel” presented oral arguments in support, while the elders who acted as arbiters pronounced judgment which was garbed with wisdom and experience. ¹ It was the general belief that no appeal could come out from those judgments partly because the people feared and believed in the elders, and therefore their wisdom could not be questioned. Parties also ensured that they complied with the judgment meted as a set of injunctions, enjoinment, and taboos handed down orally from generation to generation, which dominated the consciousness of every member of the collective from birth to death.² The advent of colonial rule saw the transposition of western-styled dispute resolution mechanisms where court assisted instrumentality became the only option for the parties.

In the wider African setting, African scholars have attested to this traditional means of settling disputes.³ In traditional African communities, when a dispute arose among individuals, even in non-commercial transactions, the complainant invariably referred the matter to a third

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party for redress. The most serious disputes were resolved by a Council of Elders that would take testimony and sometimes hear the arguments of agents advocating on behalf of the disputants. Noteworthy is the fact that in similar cultures, this form of dispute resolution is also widely practiced. In ancient India, local village councils (panchayats) conducted informal arbitral proceedings and their decisions were considered binding. There is some evidence that early Indian practice preferred panchayat dispute settlement to litigation before judges who had been appointed by political authorities; the informal nature of the proceedings and the ability to avoid the technical requirements of India’s judicial system was seen as a significant advantage.

Undoubtedly, Conflict Resolution paradigms has come to be a part of Africa’s independence legal system. The contribution of methods of alternative dispute resolution (ADR) to the development of not only Nigeria but the African continent, is no less important, let alone the satisfaction that the parties enjoy from the conflict resolution process. Indeed, ADR is the oldest method for the peaceful settlement of local and international disputes. Mechanisms for ADR are not codified in any statutory enactment so as not to derail the world wide acceptability of this process. Moreover, ADR is meant to be less procedural to ensure that disputes are resolved expeditiously. The need for resorting to ADR is more compelling when the lacklustre attitude of Nigerian courts to the sophistication of business disputes are brought before the courts. When businessmen enter into disputes about a contractual relationship, their intention is certainly to have a speedy and trustworthy adjudication process, so that they can maintain or continue their business transactions. Almost always, the courts are not in a better position to provide this due to the imprecise basis of determining post-conflict relationships between the parties.

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5 Id. at 79.
7 Id. at 8-15.
Part One is the introduction. Part Two discusses the basic notion of native conflict resolution, the ideas surrounding the concept, and the impact it has had on the community. Part Three focuses on Rwanda’s justice system paying particular attention to the Gacaca court system and how it has helped fast track the adoption of traditional conflict resolution concept. Part Four is an elaboration on Nigeria’s various tribal dispute resolution methods and how those methods have been eroded over time. This has created a lacuna in forestalling conflicts and post-conflict community reconstruction. Part Five briefly discusses traditional dispute resolution in Kenya, while Part Six concludes the work. This work proposes a return to the age-long alternative and traditional means of settling conflicts that predate colonial rule. Africa is a peculiar continent and demands a peculiar alternative to dispute resolution. This paper argues for the recognition of African traditional dispute resolution in different African countries’ bodies of law.

I. PHYSIOGnomies OF NAtIVE CONFLICT RESOLUTION

To an average African, conflict is part of his everyday life. This is partly due to the vast preserve of natural resources which has often fuelled ethnic wars and conflicts in most part of Sub-Saharan Africa. Harnessing the benefits of the resources has been problematic, for not only have many countries failed to reap the benefits of the resources, the development of the resources has in fact triggered violent conflicts, destroyed the environment, exacerbated inequalities across gender and geography, displaced communities, and undermined democratic governance in many African countries. While the developed societies have done fairly well in managing their resources, developing countries continue to grapple with the challenges of resource development in the face of huge financial incentives from multinational corporations.

Native conflict resolution has evolved over the years. In the pre-colonial era, for instance, traditional wrestling was a means of showing prowess or ascending to a kingly throne. To a typical African, conflict is exhibited in his culture which more often than not signals forms of virility, responsibility, and versatility. The essence of conflict and its effect on societal development were thus appreciated early in time. Conflict, therefore, is in the psyche of the Africans and its perception often exhibited
to make all and sundry vulnerable to the matrices of development.\textsuperscript{10} One of the striking differences between traditional conflict resolution in pre-colonial Africa and its Western counterpart is the deep rooted cultural affinities that members of the community share amongst themselves. Conflicts were resolved in a cordial and harmonious way devoid of any formal process. Parties believed and trusted this process.

In modern times, resolution of conflicts is conducted at various platforms, including electronic media.\textsuperscript{11} Certain rules guide the resolution of conflicts in this manner. Those rules were tailored towards ensuring dispensation of justice and preservation of regulations and directives. Almost always, conflicts were firmly resolved and parties complied with decisions from those resolutions without let or hindrance. This may be partly due to the belief in the repercussions of non-compliance. These processes utilise the potency in the powers of different deities, which are used in oath swearing by parties. Truth was thus the guiding fact.\textsuperscript{12} The question that follows then is what is truth in this context. It is indeed a hard concept to easily identify. It denotes objective and subjective comprehension for the intended recipient. It reveals the mistakes of the past, conditions our perception of the present, and gives us a direction on the future. Clark highlights three types of truth which will be useful in the context of this work, especially with regards to the Gacaca court system.\textsuperscript{13} He identifies the legal truth, the personal/therapeutic/emotional truth, and finally, the restorative truth. In a general sense, the notion of truth-telling is that it may provide a sense of healing on the individual and community level through regaining a “sense of belonging.”\textsuperscript{14} This “sense of belonging” concerns how the truth is expressed and thus, shaped, to aid in the rebuilding of the social fabric of a society; thus it points to the communal aspects of truth as opposed to the individual. 15 Most truth and reconciliation committees set up by government have the tendency to


\textsuperscript{11} There have been various conflict resolution programmes carried out through the media. These include programmes such as: ‘e gbani e lâjá’ (Help us resolve this conflict), ‘gborò mi ró’ (Hear our story and decide), ‘iṣokó ọjọgbọn’ (The counsel of the wise).

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\textsuperscript{13} Phil Clark, The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers 195-96 (CUP 2010).

\textsuperscript{14} Id.

\textsuperscript{15} Id.
unravel the mystery behind the occurrence of a conflict as well as bring out the truth about such conflict, however, in varying degrees. Discourse on the Gacaca court will be carried out in the course of this work. However, suffice it to say that the legitimacy of the Gacaca court is based upon the willing participation of the parties and the community. Traditionally, village elders would convene all the parties to a crime and mediate a solution involving reparations or some act of contrition. This process guaranteed the much needed restorative effect. It allowed the community to freely and openly discuss the genocide, participate in the creation of justice and a standard of responsibility for criminal actions, and swiftly deal with recent disturbing events.16

A. Principles of Conflict Resolution in Traditional African Society

Customary practices and rules of behaviour culturally known and applied by natives dominated the core values of conflict resolution in traditional African societies. The values were widely believed to represent the character and personality of a typical African. The principles of conflict resolution in traditional African society were therefore built on the desirability of Africans to administer social order and justice in a unique way based on mutual trust and cohesion, the bedrock of affirming public morality and customary values.17

Further, the dominating factors for ensuring these principles are forgiveness, the prevalence of truth, attainment of social justice, and coherence amongst the community. These ensured the cohesiveness and mutual respect for one another under the African pre-colonial existence. For instance, elders under this dispensation whose respect in their respective communities were unwavering and manifested honesty and truthfulness resolved disputes. African elders view truth as the objective confirmation of scientific trust and ethical modesty showcasing movement of time in development process.18

Legend has it that the commercial activities of pre-colonial days were based on mutual trust and honesty. Sellers displayed their wares with price tags on them without necessarily staying with the goods. Any potential buyer would place the fares on the spot where those goods were

16 Id. at 137.
17 Olaoba, supra note 10 at 41.
18 Id.
taken from. Such was the extent of transparency and truthfulness that permeated the commercial activities that predated colonial Africa. However, with the positive emergence of globalisation and commercialisation came their attendant problems. The global world has been bedevilled by various activities that affect social interactions between individuals. In resolving conflicts arising from these interactions, oftentimes recourse is made to official court systems. This work is an assessment of the essence of oath taking and various forms of resolving disputes traditionally known in the African space. It does not call for a total abrogation of the formal means of settling disputes through court instrumentality but calls for a stepped up approach recognising traditional mechanisms rather than formal court instrumentality, which more often than not never really settles disputes and is full of warped contradiction. To put the issues in perspectives, this work analyses conflict resolution in some select communities in three jurisdictions.

II. RWANDA

This section discusses the importance of Rwanda’s Gacaca justice system as a means of resolving post-conflict challenges. Rwanda is a small landlocked country located in the central part of Africa, sharing borders with Uganda in the north, Burundi in the south, Tanzania in the east and Democratic Republic of Congo (DRC) in the west.19 History reveals that the first people to live in Rwanda were hunter-gatherers commonly known as “Twa” or pygmies. After this, subsequent migrations brought other groups of farmers and cattle herders. Finally, one of the clans, now known as the Tutsi tribe, came to dominate the others.20

Pre-colonial Rwandan history, shrouded in mystery, could only be recorded in myths and poems.21 Despite the fact that the Hutu ethnic tribe was large in number, colonial Rwanda promoted Tutsi superiority that contributed to the 1994 genocide.22 The 1994 Rwanda genocide saw lots of Tutsis fleeing Rwanda as a result of the Hutu attacks on Tutsis and

22 Id.
moderate Hutus. It is important to note that the Hutus were pushed by a sense of injustice and inferiority.\textsuperscript{23}

Undoubtedly, the dividing factors between the Hutus and the Tutsi were primarily occupation and wealth. The Tutsi owned large herds of cattle; their Hutu subjects farmed the land.\textsuperscript{24} However, with time, a lot of Hutus became assimilated into the Tutsi aristocracy because they could buy and own large herds of cattle. On the other hand, some Tutsi lost their privileged status as they lost their wealth and became poor.\textsuperscript{25} Thus, to a very large extent, pre-colonial Rwandan society was solidly materialistic.\textsuperscript{26}

\textit{A. THE RWANDAN JUSTICE SYSTEM}

At the end of the 1994 genocide, the Rwandan government lacked the legal and institutional framework to address the challenges of the genocide. The judiciary, for instance, lacked the capacity to enforce the constitution and adjudicate cases within a reasonable time.\textsuperscript{27} This apart, most infrastructure had been depleted, corruption was at the peak, and executive recklessness was rife.\textsuperscript{28} Besides, professionals who could deal with post-genocide Rwanda had become refugees in foreign countries.

To achieve constructive national reconciliation, innovative approach to dealing with post-conflict crisis surfaced. The Rwandan government established a National Unity and Reconciliation Commission in 1999 which ultimately recommended that Rwanda adopt the traditional \textit{Gacaca} system.\textsuperscript{29}

\textit{1. The Gacaca Courts}

\textsuperscript{23}Keane, \textit{supra} note 20 at 12.
\textsuperscript{24}Id.
\textsuperscript{25}Id.
\textsuperscript{26}Id. at 13.
\textsuperscript{27}Id.
\textsuperscript{28}Id.
\textsuperscript{29}See the Organic Law No. 40/2000 of Jan. 26, 2001 setting up \textit{gacaca} jurisdictions. [Category 1 relates to the most serious genocide offences and includes individuals who allegedly organized, instigated, led or took particularly zealous role in the violence. Category 2 of Law includes alleged perpetrators of or accomplices to international homicides or serious assaults that led to death. Accused persons who do not confess but subsequently convicted face maximum term of 25 years. Category 3 contains persons accused of other serious assaults against individuals. Category 4 includes those persons who committed property crimes].
The legitimacy of the Gacaca court was based on the willing participation of parties to the dispute and the community. This aided the effective implementation of the court’s decision. Traditionally, respected community elders would convene all the parties to a crime and mediate a solution involving reparations or some act of contrition. The participatory justice system of the Gacaca court is an important move in the restorative justice paradigm. This process contributed in no small measure in healing the divide between the Hutus and Tutsis.

The Gacaca court system provides some form of incentives for defendants who are willing to confess to the crimes accused in return for a reduced sentence. The reduced sentence comes in the form of community service. This provision utilises the concept of assisting the same community destroyed through the acts of the accused by helping to rebuild the community. In so doing, survivors of genocide, seeing the defendant engaged in community service, will feel a sign of fulfilment seeing one of the actors in the worst form of crime that ruined the fortunes of their city now helping to re-build that same community.

The Gacaca court system could have potentially positive or negative effects on achieving accountability and reconciliation in Rwanda. On the positive side, the Gacaca court could ease the burden on the courts and prison system by helping to quickly prosecute the accused. This process could have a restorative effect by allowing many individuals in society to discuss the genocide in liberal terms, participate in the creation of justice and a standard of responsibility for criminal actions, and swiftly deal with recent disturbing events. Gacaca court activists argue that the Gacaca court

31 Rwanda: Reconciliation Commission Making Progress,’ AFRICA NEWS, June 27 2001 (reporting that the National Unity and Reconciliation Commission has established programs to bring about reconciliation between the Hutus and Tutsis).
32 A modern day concept of plea bargain.
33 See Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Since 1 October 1990, Law No. 8/96, Rwanda Official Gazette, 30 August 1996, Art. 66; http://www.preventgenocide.org/law/domestic/rwanda.htm, Pernille Ironside, Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation, N.Y.U. J. INT’L L, 44-45 (2002), http://jurisafrica.org/docs/Ironside+and+Gacaca+Jurisdictions.pdf (The proceedings in each Gacaca Court begin by listing every victim and criminal act committed in the area. Then the cases for each suspect are debated, based on testimonies from the general assembly and whatever information that exists in the files that were prepared by the public prosecutors finally, the seat reaches a verdict based on that. Each verdict can be appealed at the next higher Gacaca level. The defendant does not have lawyers, but all village people can participate and intervene, either against or in favour of the defendant).
system is a more efficient solution for Rwanda because rehabilitative penalties can be quickly assigned if “the moral force of the village is used to shame perpetrators into admitting the truth.”

Indeed, as was the practice in pre-colonial Rwanda, many Rwandans are of the opinion that the more official, received Western-style system of justice does more harm than good in ensuring reconciliation and true justice. For instance, Rwanda’s former Justice Minister, Jean de Dieu Mucyo, believes that the Gacaca system will lead to truth for the whole society, whereas Western-style justice only leads to a small part of the truth for the accused, the judge, and the victims.

Observers, however, have expressed a number of concerns with the Gacaca system. One of them is that the Gacaca court system is structured as a speedy penal justice process but lacking the requisite due process safeguards. Although the African Commission on Human and Peoples’ Rights guaranteed the right to a fair trial in its Dakar Declaration, it particularly stated that “traditional courts are not exempt from the provisions of the African Charter on Human and Peoples’ Rights relating to a fair trial.” This is the underlying basis of the twin principles of natural justice: nemo judex in causa sua and audi alteram partem. Amnesty International reports, for instance, suggest that “a number of detainees, who had been arrested by the security forces, had no case file.” The reports also suggest that there are several events that have called into question the independence of the Gacaca courts. These are, expectedly, teething problems associated with a unique innovation destined to alleviate the technicalities of the formalised system of criminal justice. Another criticism

36 Clark, supra note 13. (Indeed, the Gacaca court system could serve as a medication for the wounds left open by genocide and continuous conflicts in a manner western-styled retributive justice system may not. The received criminal law system cannot obviate the technicalities inherent in resolving cases such as post-conflict Rwanda. This is due to local differences in language, custom, behaviours, mores and social ethos).
39 ‘No man should be a judge in his own cause.’
40 ‘Hear the other party.’
is that the *Gacaca court* system does not seem to be achieving reconciliation. This is due to the fact that the process puts the populace against the accused.\textsuperscript{42} It is also claimed that the court proceedings assign collective guilt to Hutus, ignoring crimes committed by rebel forces and other Tutsis, thus allowing only Tutsi survivors to be key witnesses against Hutus, thereby hindering reconciliation.\textsuperscript{43} The idea behind *Gacaca* is to create an environment where parties could interact and discuss the genocide in a more relaxed atmosphere. *Gacaca* seamlessly created that environment. People were free to talk about genocide openly without fear of repercussion or prosecution. It opened space for dialogue.

The emergence of the *Gacaca Court* system was borne out of the desire to find an alternative to the volume of cases that would have been heard at the international criminal tribunal. An alternative could have been found in the formal courts, however, a more traditional approach understands the culture and disposition of the people. Thus, any alternative to the *Gacaca court* would, in my view, be incapable of providing the basis for justice or reconciliation in Rwanda which is the essence of post-conflict community reconstruction.

### III. NIGERIA

Nigeria has had its fair share of conflicts. From the civil war in the 1960s to *Boko Haram* terrorist insurgency; community clashes of Tiv-Jukun, Ife-Modakeke, Fulani/grazing dichotomy. Indeed, no society is immune from conflicts. What makes a country strong is its ability to streamline its judicial procedure to ensure that future conflicts are forestalled or prevented.

Nigeria is a deeply unique country. With about two-hundred and fifty ethnic groups, it stands in all probability as one of, if not the country, with the largest concentration of ethnic groups under one corporate existence in the world.\textsuperscript{44} Unfortunately, the uniqueness in resolving conflicts arising from the admixture of these various ethnic nationalities has been whittled down by Western civilisation. Respect for traditionally

\textsuperscript{42} Paul Ntambara, *Gacaca Head Murdered*, THE NEW TIMES, Nov. 26, 2006 (referring to "anti-Gacaca campaign against genocide survivors and Gacaca judges ").

\textsuperscript{43}Id. See also Christopher J. Le Mon, *Rwanda’s Troubled Gacaca Courts*, 14 HUMAN RIGHTS BRIEF 16,18-19 (2007).

constituted authority no longer plays a role in forestalling and resolving conflicts. The three main ethnic groups in Nigeria are Hausa/Fulani (29%), Yoruba (21%), and Igbo (18%). However, for the purpose of our discourse, the Yoruba and Hausa traditional dispute settlement paradigms will be analysed.

A. Nigeria’s Justice System

The Nigerian Courts, in a plethora of cases, have given deference to the informal means of settling disputes. In *Agu v. Ikewibe*, the Supreme Court held that customary arbitration is recognised in Nigeria’s judicial system and this type of arbitration is founded on the voluntary submission of the parties to the decision of the arbitrators, who are usually elders and chiefs in their community. The decision of these elders was binding. It is important to note that the basis for recognition of traditional means of settling disputes by the courts and the general populace is based on two principles: firstly, that the parties voluntarily submit their disputes to a non-judicial body, which usually consists of their elders or chiefs for resolution, and secondly, that the parties willingly agree to be bound by the decision of this non-judicial body.

The foregoing is *sine qua non* for the acceptability of any decision given by a non-judicial body. The reason for this is because human beings by their nature tend to change history and thwart facts. Thus, where the decision does not go down well with one of the parties, such party may refuse to honour the terms of the agreement. It is on the basis that courts will more readily defer to the decision of the non-judicial bodies if those conditions are met. The exception, however, would seem to be the case where parties have sworn to an oath before a traditional priest. As will be seen in the course of this work, most African communities tend to avoid the repercussions or consequences of not respecting whatever is said, agreed upon, or done in a shrine or before a traditional priest.

45 Id.
48 *Agu v. Ikewibe*, supra note 46.
1. Yoruba Dispute Settlement Process

The Yoruba dispute settlement process stands unique. It starts from the family lineage. In the Yoruba tribal group, settling of disputes includes meeting of the elders in the community. Three basic administrators exist: the *Baälé*, *Mógáji*, and the *Ígbímó-Ílú*. The *Mógáji* sits over disputes that occur within the community unlike the *Baälé* that sits over family disputes alone.

The *Baälé* is the chief lawgiver and magistrate of the compound. He is held in high esteem within his compound whose judgments are well respected. There is always a sense of urgency and desire to forgive after the resolution of any particular conflict. This is indeed the essence and important advantage of traditional means of settling disputes. Further, the *Mógáji* resolves disputes that go beyond the intervention of the *Baälé*. Such communal cases, if not quickly resolved, may break the chord that binds the community. Over the years, this role of the *Mógáji* has come to be whittled down by the activities of the court system and practice. This has occasioned the rise in the overwhelming court cases that has even made it difficult for some crimes to be prosecuted. As a result, there is a recurring conflict between the *Mógáji* system and the adversarial system of court practice.

Most African communities believe in the potency of supernatural deities. This has shown over time to assist in the resolution of post-conflict matters. In the adversarial court system, shortly before a witness testifies in court, he or she swears to an oath or affirms in the form of: “I do solemnly, sincerely, and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth. So help me God.” Sometimes, the witnesses are trained by their lawyers to subvert the course of justice by their lies and wrongful evidence. A day

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49 Toyin Falola and Matthew Heaton, A HISTORY OF NIGERIA 23 (CUP 2008); David Laitin, HEGEMONY AND CULTURE: POLITICS AND RELIGIOUS CHANGE AMONG THE YORUBA 111 (U. Chi. 1986).
50 Fiona Macdonald et al., PEOPLES OF AFRICA 385 (Cavendish Square P.R. 2001).
51 “Head of the Family.”
52 “Eldest male in the family or the heir.”
53 “Chief-in-Council or Community Council.”
55 The *Baälé* resolves generally family disputes: conflicts amongst wives, brothers, sisters.
56 Isaac Olawale Albert et al., INFORMAL CHANNELS FOR CONFLICT RESOLUTION IN IBADAN, NIGERIA 13-35 (Institute français de recherche en Afrique 1995).

All court witnesses swear or affirm under oath before giving evidence in court.
before the court sitting and such affirmation, the lawyer has already prepared the witness about what to be said and what not to be said. The swearing or affirmation is a mere formality. However, if the witness comes before the court and swears as follows: “I swear in the name of Šángó/Ogún/Obàtálá/or any known deity,\(^{58}\) that the evidence I shall give in this place and before this honourable body shall be the truth, the whole truth and nothing but the truth,” two scenarios will emerge. Firstly, cases will be quickly decided as truth will be the guiding factor. Nobody would like to offend the gods by spewing falsehood to justify a conflict. Secondly, it will be difficult to find witnesses eager to testify for fear of the unknown, even when they believe their testimonies are truthful. Most African communities believe that the repercussions of offending the deities are insurmountable. It will demand a daring witness who believes in the veracity of the claims to come out and testify in a reconciliation process. People fear these deities and the repercussions of subverting the course of justice. Their judgment is usually catastrophic and calamitous without any remedy. Thus, cases will end quickly and speedily in an informal judicial administration processes. This process significantly assisted the Gacaca court system.\(^{59}\)

2. The Hausa Dispute Settlement Process

The Hausas are a deeply religious people. They believe in the divine power of Providence. Wherever they are congregated, they usually appoint a Sarkin Hausawa.\(^{60}\) His main responsibility is to settle disputes amongst Hausas and between Hausas and their host communities. The Sarkin Hausawa also delegates responsibility to his appointees, who address issues according to wards or districts. Such a delegate is called the Mai ungwa.\(^{61}\) Where the Mai ungwa finds it difficult to resolve a particular dispute, he refers it to the Sarkin Hausawa who will now call his Ubangari.\(^{62}\)

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\(^{58}\) These are deities representing the gods of thunder and iron.

\(^{59}\) There are various instances, though largely undocumented, where these oath traditional methods have worked successfully. For example, where two women quarrel over a property, the Mògíjì can order that the clothes worn by the women should be seized and affixed to the regalia of the family masquerades (ëgúngún). If the women do not come from families that revered ëgúngün, their clothes might be burnt. When people think of these processes or the repercussions of wiling submitting to these processes, people will learn to live in harmony.

\(^{60}\) “Ruler of the Hausa people.”

\(^{61}\) “Owner of the ward.”

\(^{62}\) “Committee of Elders.”
Due to their religious nature, cases are resolved according to the dictates of Islamic law. Interestingly, an average Hausa sees life’s occurrences as an act of God which is unquestionable. Thus, whatever decisions are given are not subject to debate because they believe in the institutions that give those judgments.

3. Role of Traditional Rulers in Conflict Resolution

Undoubtedly, African kings and chiefs, and indeed the elders, played a significant role in conflict resolution. The king was next in command to the gods. He was the revered representative of the mystical on the planet and was seen as the messenger of the gods to man. For instance, in Yoruba chieftaincy hierarchy, one of the revered kings, the Alāāfin of Òyó is always referred to as Ikú Bábì Yèyé, Alāšhe Igbákejì Òrìṣà.63 Thus in settling disputes, traditional rulers were feared and respected. Their words sometimes become law. Lemarchand sums it up wisely when he claims that to facilitate peace in his jurisdiction, the African king was imbued with:

- enduring sense of history of the norms and nuances of the kingdom,
- unwavering wisdom of distilling facts from falsehood in the treatment of issues of conflict,
- high level of epitomizing moral order, peace process and classical demonstration of harmony;
- and Broader legitimization of the vital link between the universe and the supernatural order.64

However, dishearteningly, the advent of colonial rule has eroded this respect accorded the African traditional rulers. With the coming of the colonial powers also came their religious affiliation who saw the religious practice of the natives as repugnant and abhorrent. They perfected their supremacy over the kings by imposition of courts with their rules and practices which was alien to African practice. The Western-styled pattern of formal court procedure has not reduced crime or corruption. In the alternative, it has aided it. The ease at which perjury is committed

63 The second in command to the gods, he who decides who lives and who dies. Significantly, the king has the power to make a decree which was unquestionable.
unnoticed in court attests to this fact. Even where the accused blatantly commits the offence, the lawyer, out of financial inducements, frustrates the immediate termination of the case by seeking for unnecessary adjournments or delay tactics. Given the respect accorded elders in an African setting, the elders, with the careful selection of lore, could persuade a hitherto recalcitrant party to compromise and ensure the settling of any dispute.

IV. TRADITIONAL DISPUTE RESOLUTION IN KENYA

Kenya, like many African countries, has a diverse ethnic composition with communities having cultures that have been acquired over long periods. Prior to the establishment of colonial domination in Kenya, communities living in the country had their own conflict resolution mechanisms which were guided by the respective cultures of the different communities. There existed certain institutions, principles, values and traditions that were critical in dispute resolution and resolution of disputes was guided towards fostering peaceful coexistence among members of the communities. 65 Kinship ties were also crucial in ensuring harmonious coexistence even after disputes had been resolved. As Okoth-Ogendo aptly puts it, there existed a social hierarchy within the communities that were responsible for making decisions and ensured social harmony within the community.66

It is notable that due to the fact that traditions are not static, traditional dispute resolution mechanisms in Kenya are always in a state of flux and may differ from one ethnic community to another. 67 It is, however, notable that certain salient characteristics are identifiable in most traditional dispute resolution mechanisms among different communities in Kenya. One key characteristic is the fact that most communities resort to

elders in solving disputes that arise among them. Further, traditional dispute resolution mechanisms among communities in Kenya have been seen to be key in fostering harmonious relations among disputants even after the dispute has been resolved.

In Kenya, the Constitution recognises the place of traditional dispute resolution mechanisms in resolving disputes. Article 159(2)(c) of the Constitution provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. However, there are certain conditions that must be met by the traditional dispute resolution mechanisms adopted. The Constitution provides that traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or is inconsistent with the Constitution and other written law. 68 The Constitution thus takes cognisance of the fact that certain practices may be harmful and may lead to the violation of the rights of certain groups, hence they ought to be prohibited.

Traditional dispute resolution mechanisms have been useful in solving various types of disputes that have arisen among members of different communities in Kenya and this has particularly been seen in disputes concerning ownership and use of natural resources. These kinds of disputes are usually complex and have certain underlying cultural dimensions, hence traditional dispute resolution mechanisms are known to work best in resolving them.69 Further, traditional dispute resolution mechanisms in Kenya are largely driven towards promoting restorative justice as opposed to retributive justice and hence these mechanisms are widely acceptable among many communities. 70 The use of traditional dispute resolution mechanisms in solving criminal cases has also been recognised in Kenya as it was seen in Republic v Mohamed Abdow Mohamed.

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69 Miguel (n. 83) 6.
CONCLUSION

This work has highlighted the importance of the need to activate the traditional mechanisms of dispute resolution in Africa, such as rebranding the witnesses’ statement in the law courts before they take an oath, and the need to revisit cultural values in decision making. Traditional methods of social control, such as traditional oaths, rewards, vigilantes, informal settlements, checks and balances, decentralisation, effective communication, and good governance, remain strong and have been informally used successfully for conflict management in many communities in Nigeria.\textsuperscript{71}

The \textit{Gacaca} system provides an innovative and practical blend of retributive and restorative justice. Since \textit{Gacaca} is based on local culture, it is likely to create from the beginning a greater sense of familiarity, respect, trust, and commitment to the process than the Western judicial system. There is room for the Rwandan government and the international community to improve \textit{Gacaca} and establish accountability for all the past and ongoing human rights abuses in Rwanda.

Africans have helped sharpen the economies of present day developed nations through the dark days of imperialism and inglorious slave trade. In sporting activities, Africans have excelled brilliantly. The resilient spirit and dogged determination to excel in whatever is being done is replicated in the numerous achievements of the continent. Africa is indeed the bedrock of cohesion and commonality. Garbed by its rich cultural relativism, the history of ADR cannot be written without stating the classic and exemplary models of conflict resolution in Africa. The inhibiting factor in positioning Africa as the origin of ADR is hinged on the fact that most of the practices are not well documented for future generations. Its deep cultural values are well suited for positive development strategy.

Growth and development demands a conflict-free society. Justice in all ramifications, restorative, criminal, and civil, thrives in societies that resolve conflicts in unique ways and have a well-established mechanism that guarantees delivery of justice to all, including the poor, vulnerable,

and marginalized members of the society. Transitional justice addresses the critical questions of what happens in society at the end of hostilities. What solutions are applicable to contextual situations where communities are emerging from bitter conflicts seeking ways to restore rule of law, peace, reconstruction, and development? What punishment could be meted to perpetrators of the conflict in a manner that will leave the community, victim, and accused more satisfied than the status quo had the conflict not arisen? If perpetrators are not punished, what happens to the rule of law? What message is sent to criminals world-wide if heinous crimes cannot be punished? It is evident in all these scenarios that the victims stand out in the hierarchy of post-conflict reconstruction. Is there a need to compensate victims, to rehabilitate them, to re-integrate them into society, or reparate them into the society? This work has sufficiently addressed these concerns.

Truth, justice, and reconciliation sometimes find themselves at odds with one another. Those who would rather have criminals prosecuted, run the risk of never being able to arrive at the truth of what happened. This has been the single reason for the failure of the received colonial procedure of the criminal justice system. Courts are, by all accounts, not the best mechanism at discovering the truth. For a myriad of reasons, court administered judicial process is no longer viable for African societies. Successive governments have shown a glaring path towards ineffective adjudication of cases bordering on post-conflict diatribe. Some of these include: lack of political will, lack of capability and resources, length of time that prosecutions would take amongst other reasons.\textsuperscript{72}

No doubt, prosecutions create bad blood between victims and accused. Indeed, justice is meted to the accused, but the victim and community are never satisfied in this process. Reconciliation is not achieved. The context of this work is not to throw the baby with the bath water. The concept of traditional dispute resolution is to be an alternative to Western conflict resolution. It can only thrive in a culture of stable societies where the rule of law is respected and court systems are operational. It simply re-emphasizes that a stepped up approach to traditional means of resolving disputes, which involves oath taking that pre-dates colonial rule, should be re-considered in our body of laws.

\textsuperscript{72} Some of the reasons that can pit the tent of court system as against local traditional means of administering justice include: costs, ineptitude, slow pace, corruption, ethno-racism, no real infrastructure, no jurisprudence to inform legislation to try genocides.
especially in the criminal justice system. This traditional mechanism can be developed into a body of laws to become a vital social function with a number of benefits. It could assist in developing African constitutional principles and general jurisprudence. It can also serve as a case precedent for future cases and thus serve as a deterrent for the would-be criminally minded and the disposal of cases requiring complex legal reasoning.

To put to rest the question whether some cases are not suitable for this type of process, the words of the London-based Centre for Effective Dispute Resolution is effective here:

No easy assumptions or assertions can be made over whether or not a case is unsuitable for mediation. It is wise to assume that practically every case is likely to be suitable for mediation at some time in its life cycle and that the right question to ask is not “is it suitable” but “is it ready?”

With the Advent of Artificial Reproductive Technologies is There a Fundamental Right to a Child?

Katarina Lee†

INTRODUCTION

Artificial reproductive technologies (ARTs), most specifically in-vitro fertilization (IVF), gestational surrogacy, and uterine transplants, have raised the question of whether there should be a legal right to a child. These technologies have opened up a plethora of legal concerns including legal parentage and citizenship issues, as well as whether embryos are deemed marital property. Additionally, the legalization of same-sex marriage in several countries further complicates many of these legal issues, as outdated parentage laws often do not accommodate same-sex relationships. The purpose of this paper is to focus on how recent court decisions have in effect instituted a right to a child and how the impact of same-sex marriage further supports this movement. There are four parts to this paper, Part I will provide relevant background information regarding ARTs; Part II will address several domestic and international court decisions regarding ARTs; Part III will address the bioethical reasons why it is ethically impermissible to institute a fundamental right to a child; and Part IV will address relevant counter-arguments.

I. BACKGROUND

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1 Artificial Reproductive Technologies: Mechanisms primarily used to assist in pregnancy. In Vitro Fertilization: The process in which an ovum is fertilized by sperm in glass for the purposes of transfer. Gestational Surrogacy: The process in which an embryo is transferred to a woman whom it is not genetically related to for the purposes of gestation. Uterine Transplantation: The process of transplanting a uterus into a woman who lacks a uterus for the purposes of becoming pregnant.

2 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, A Study of Legal Parentage And The Issues Arising From International Surrogacy Arrangement, (March 2014), https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf.
Conceivably, the initial purpose for artificial reproductive technologies was to provide a potential treatment for infertility.\(^3\) Artificial insemination and IVF increased the rate of fertilization for heterosexual couples and women who had difficulty conceiving. Eventually, for women who could not carry their own child(ren) a solution was found in gestational surrogacy.\(^4\) This provided the opportunity for intended parents who had difficulty conceiving to be genetically related to their child. However, these technologies are no longer solely marketed to these individuals. While ARTs continue to provide medical infertility assistance, they are now widely used in a variety of family planning situations, most notably for male and female homosexual individuals and couples. Arguably, the individuals most impacted by alternative family planning options are male homosexuals who need a gestational surrogate and an ovum to create children that they are genetically related to.

The majority of the ART markets in countries that permit these practices are within a private market, \(^5\) separated from governmental assistance. Of those countries that do provide governmental assistance, it is provided for in different forms such as tax breaks or a “free” program with significant caveats.\(^6\) As a result, the question of who has access to these private services comes into question. A related concern is the issue of fertility practitioners discriminating as to whom they will provide their services to. While the concern about discriminatory fertility practices is related to the question of a fundamental right to a child, the purpose of this paper is to address the ethical concerns associated with rights to children.

II. LEGAL FRAMEWORK REGARDING A LEGAL RIGHT TO A CHILD


\(^4\) John Robertson, Other women’s wombs: uterus transplants and gestational surrogacy, 3 J. L. AND BIOSCIENCES 1 (April 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5033439/.


Much of the legal discussion surrounding ARTs focuses on the distinction between genetic, gestational, and intended parents. Traditionally, parentage laws focused on genetic or gestational ties to children; however, with the advent of these technologies the emphasis has now begun to focus on intention. Conceivably, this movement has attempted to mirror the intentional relationship between adoptive parents and their adopted children. Notably, there have been several cases in the United States and abroad that have conferred intention to be the determining factor in regard to legal parentage. Prior to engaging in dialogue surrounding the ethics of this practice, I will provide a brief summary of several relevant court cases evidencing a movement to recognizing intended parents are legal parents.

In Johnson, a heterosexual couple (Calverts) entered into a contract with a surrogate in order to gestate their genetic child. The parties had a falling out and the gestational surrogate threatened to keep the child. The Supreme Court of California ruled that the gestational surrogate was not the “natural mother” of the child and that a genetic tie, as well as an intention to become the legal mother, meant that Mrs. Calvert was the legal mother. Similarly, in In re Marriage of Buzzanca, a husband and wife entered into a surrogacy contract using an embryo that had been created through donor gametes. The couple divorced and the husband claimed that he was not the lawful parent, while the wife petitioned to establish herself as the legal mother. The trial court ruled that because neither the husband nor the wife had a biological connection to the child, and that neither was the legal parent. However, the California Court of Appeals reversed, holding that even when there is no genetic or biological

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8 Johnson v. Calvert, 5 Cal. 4th 84 (1993).

9 Id. at 87.

10 Id. at 101.

11 Id. at 101.


13 Id. at 1410.

14 Id.
connection to a child, if a parties’ actions suggest that they intend to become parents they can be the lawful parents.\textsuperscript{15}

Raftopol evidences how some of these assisted reproductive technology arrangements can involve several parties from different countries.\textsuperscript{16} Raftopol and his domestic partner were a homosexual couple who lived in Romania.\textsuperscript{17} They jointly entered into a gestational agreement with an American gestational surrogate.\textsuperscript{18} The surrogate gave birth to two children who were genetically related to Raftopol, but the surrogate agreed to the adoption of the children by Raftopol’s partner.\textsuperscript{19} The Supreme Court of Connecticut found that the surrogacy agreement was valid and that both Raftopol and his partner were legal parents of the children.\textsuperscript{20} Notably, foreign courts are recognizing these legal parentage arrangements as well. The Supreme Court of Germany recognized a parentage order from a California court that recognized a male homosexual couple both as legal parents of a child born through the use of a gestational surrogate, even though only one was genetically related to the child.\textsuperscript{21}

The Italian government removed a child from his intended parents because the child was not genetically related to either of them and was birthed by a gestational surrogate in Russia.\textsuperscript{22} Under Italian law, gestational surrogacy is illegal and thus a legal mother is typically the woman who gives birth to the child.\textsuperscript{23} However, the European Court of Human Rights found that there was a family connection between the child and his intended parents and therefore the child should not have been removed from his intended parents.\textsuperscript{24} Eventually, the court ruled that because the child had “developed emotional ties with his foster family” the

\textsuperscript{15} Id. at 1411.
\textsuperscript{17} Id. at 687.
\textsuperscript{18} Id. at 686.
\textsuperscript{19} Id. at 687.
\textsuperscript{20} Id. at 717.
\textsuperscript{22} Lady Justice Arden, Surrogacy: how the law develops in response to social change, OUPBLOG (citing Paradiso and Campanelli v. Italy) (Feb. 24, 2015), http://blog.oup.com/2015/02/international-surrogacy-law/.
child is not being returned to the intended couple. In effect, the court ruled that an intentional parent with no genetic tie can be a legal parent.

While the culmination of these court decisions evidences a willingness to view intended parents as legal parents, it does not necessarily that there is a legal right to a child. Plausibly, conversation regarding rights to children has not been as prevalent prior to (1) same-sex marriage and (2) the advent of ARTs. The reason for this is that there is a presumption that heterosexual marriage may involve children, and those who cannot have children may seek out adoption or, now with ARTs, other forms of family creation. However, there has been a shift with recognizing whether all individuals should have the right to children, or the right to the opportunity of children. This means individuals suffering from infertility should be financially supported throughout the ART process, and similarly homosexual individuals, who do not have the procreative capacity to beget children, should be provided with these services.

The purpose of this paper is to focus on whether countries that permit same-sex marriage have in effect granted these couples the right to a child. The reason to highlight the impact on same-sex couples is that much of the conversations surrounding same-sex marriage focuses on the ability or inability of same-sex couples to create families. Evidently, the creation of families is more difficult for same-sex couples including the fact that some countries prohibit adoption by same-sex couples. Even in countries that are more willing to assist same-sex individuals and couples in creating families, these individuals are often faced with the additional financial burden of using ARTs.

Notably, in the recent U.S. Supreme Court case legalizing same-sex marriage, the conversation of children runs throughout the entire opinion. The Court in Obergefell references previous Supreme Court cases Zablocki and Meyer stating that “The right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process

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27 Id.
Clause.” However, what happens when the Court grants individuals the right to marry, but due to procreative differences these individuals cannot create a child? If we have already deemed intention sufficient for parenting, and the Supreme Court emphasizes protecting the ability to raise children, should there be a right to a child? Additionally, should other countries recognize a legal right to a child given the international relationship with many of these ART agreements?

Furthermore, what does a right even mean? In a general sense, legal rights are privileges and protections granted by a governmental system. Rights have been divided into two forms: positive rights, in which the government is required to actively do something and negative rights, in which the government should abstain from acting. Additionally, as Immanuel Kant states, “Where there are no rights there are no duties.” Negative rights have already been associated with procreative capacities, while the fundamental right to a child would require a positive right.

III. ETHICAL CONSIDERATIONS OF A FUNDAMENTAL RIGHT TO A CHILD

As aforementioned, the “fundamental right to a child” language would not simply impact homosexual individuals and couples, it would additionally impact all married heterosexual individuals and potentially single individuals. While one is sympathetic to the desire for an individual or couple to create a family, having a fundamental right to a child creates an opportunity to exploit and degrade children and therefore is ethically impermissible. There are several arguments in opposition to a fundamental right to a child; however, for the purposes of this paper I will address the following two concerns: (1) permitting a fundamental right to a child violates a child’s autonomy, risks exploitation, and degrades a child’s dignity and (2) permitting the fundamental right to a child unethically infringes upon the rights of several other parties.

A. Violation of the Child’s Right

Fundamentally the greatest concern about rights language associated with children is the notion that no individual should have the legal right to another person. Children are afforded similar rights and protections of those that are afforded to adults. Notably, these protections are supported on an international scale as the U.N. in its Convention on the Rights of the Child placed a strong emphasis on children’s ability to have “freedom of thought, conscience and religion,” as well as requiring all State Parties to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.”[^35] Children are separate entities from their parents and guardians. While they may not be able to make all decisions for themselves, parents and guardians are meant to raise children, not have a proprietary capacity over them. Rights language negates the fact that children are separate entities from their parents or guardians; moreover, it treats them as if they are commodities.

Arguably, it commodifies children in a variety of ways: (1) the monetary exchange needed to create embryos resulting in children is only a nuanced difference from exchanging money for live children and (2) it begins to treat children like another entity in life to be acquired, with little difference to that of acquiring other goods. Additionally, this may have a detrimental effect on the parent-child relationship. Creating a child through ARTs potentially risks the relationship between parents and their children primarily due to the money that is exchanged to create them.[^36] With the risk of commodification, it is inconsequential where the resources come from, whether they are public or private funds.

B. Infringement upon other’s Rights

Not only does a fundamental right to a child infringe upon the rights of a child, it arguably infringes upon the rights of many other parties.


There are four other parties that would be affected by this form of rights language: (1) private fertility clinics; (2) adoption agencies; (3) gestational surrogates; and (4) ova and sperm donors.

Providing the opportunity for individuals to have children through the services that private fertility clinics offer would necessitate that each clinic would have to serve anyone who wanted a child. The reality of this is that it infringes upon medical practitioner’s ability to practice. As mentioned earlier, the discriminatory practices of fertility clinics are outside the scope of this paper. However, regarding the rights conversation, rights should not be conferred to someone if it infringes upon another’s rights. Not only would rights language impact private fertility clinics, it would greatly impact practices of adoption agencies and services. Scholars have voiced their concerns that adoption agencies should not have the ability to discern who is a “fit” parent as this practice is discriminatory, similar to fertility clinics withholding services. However, granting rights language regarding the ability to have a child would infringe upon these agencies.

On a practical matter, there simply would not be enough children to provide each married couple or single individual with a child. Even if they all did not want children, what happens when they want multiple children? As a result, many of these individuals will seek ARTs to provide them with the opportunity to create children. However, (1) where would the genetic material come from and (2) are women going to be forced to be gestational surrogates? There are already many concerns about providing financial inducement for individuals to donate their sperm and ova. Presumably, there would need to be more sperm and ova donated in order to accommodate the need. It would be highly unethical and illegal to force individuals to give or sell their genetic material. Similarly, woman could not be forced to become gestational surrogates. Additionally, there is already significant concern about these fertility practices in international situations where individuals are being exploited. Lastly, would the...

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intention of parenthood trump the rights of those that are genetically or gestationally tied to the children?

IV. COUNTER-ARGUMENTS: WHY THERE SHOULD BE A FUNDAMENTAL RIGHT TO A CHILD

The two main arguments in favor of recognizing a legal right to a child are that there are concerns that while same-sex marriage has become legal: (1) homosexual individuals and couples will be discriminated against in their ability to create a family and (2) because of the cost of ARTs, many individuals will not be able to create a family\(^\text{41}\). While discriminatory practices are a valid concern, there are two issues that would need to be addressed.

The first concern is that while some governments have begun to provide assistance in paying for these procedures, the majority of ARTs are still performed in private clinics funded by individuals seeking these treatments or through generous compensation packages from employers.\(^\text{42}\) As a result, proponents of a “fundamental right to a child” could argue that if it is a right, intended parents cannot be discriminated against. While this argument is valid, as was stated earlier, the tension between private business practices of fertility clinics and the rights of intended parents come into opposition with one another. This right arguably infringes upon the ability for individuals to practice medicine and the practices of private business.

The second concern is that both heterosexual and homosexual individuals and couples wanting to create a family may not be able to afford to do so due to the high cost of ARTs. As a result, if there is a fundamental right to a child, this would necessitate that the government would have to provide means in order to be able to do so. While this practice is already happening in Canada, the “fundamental right to a child” language still would come into contradiction with many individuals’ beliefs and freedoms. This would vary by each country, but individuals arguably may not want their tax dollars funding practices that they find

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\(^{41}\) Connolly, supra note 23.

\(^{42}\) Sarah Elizabeth Richards, *Why companies are paying for IVF for their workers but don’t want to talk about it*, MARKETWATCH (Feb. 10, 2017, 1:04 PM), http://www.marketwatch.com/story/companies-are-increasingly-helping-people-have-babies-but-they-dont-want-to-talk-about-it-2017-02-07.
controversial. Rights based language is focused on giving rights without infringing upon another’s rights. Not only does a “fundamental right to a child” infringe upon the rights of a child, but it also infringes upon the rights of others.

CONCLUSION

The real question to be addressed is whether society has greater obligations to those who, for a variety of reasons, cannot procreate. While being sympathetic to the plight of these individuals, the assertion of greater privileges to these individuals unethically infringes on the rights of many others. Additionally, while there are controversies about using the judicial process to determine parenthood, allowing the courts to appropriately determine legal parentage is the best means of determining the best interest of a child. Creating a general blanket rule that all may have a right to a child negates the specificity needed when protecting the interests of children.


Aléxia Duarte Torres†

INTRODUCTION

In 1995, Brazil ratified the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, also known as the Convention of Belém do Pará, an international treaty focused on violence against women.¹

In 1992, Brazil also signed the American Convention on Human Rights, which made possible the processing of reports of human rights violations initiated by NGOs and victims. In the second half of the 1990s, a relevant case was sent to the Inter-American Commission on Human Rights: the case Maria da Penha.

This article analyzes the impacts of the case in the federal legislation, particularly the implementation of Law nº 11.340/2006, known as “Maria da Penha Law,” drafted for feminist organizations and submitted by the National Congress in 2004. This article also presents the additional effects of the law as the redefinition of the family institution, and the inclusion of the gender ideology.

I. FACTS OF THE MARIA DA PENHA CASE

On August 20, 1998, the Inter-American Commission on Human Rights (IACHR), under the Organization of American States (OAS) received a petition filed by Mrs. Maria da Penha Maia Fernandes, the Center for Justice and International Law (CEJIL), and the Latin American

*This paper was submitted in fulfillment of the writing requirement for the Edmund Burke Fellowship program held by the Center for Family & Human Rights (C-Fam). Special thanks to Susan Yoshihara and Stefano Gennarini for selecting the best submissions.
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and Caribbean Committee for the Defense of Women’s Rights (CLADEM),\(^2\) as provided for in Articles 44 and 46 of the American Convention on Human Rights and Article 12 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará or CMV).

The petition stated that on May 29, 1983, Maria da Penha a pharmacist, was the victim of attempted murder by her then husband, Marco Antônio Heredia Viveiros, originally from Colombia-naturalized Brazilian economist, at her home in Fortaleza, Ceará State. He shot her while she was asleep, bringing to a climax a series of acts of aggression carried out over the course of their married life. Because of this aggression of her spouse, Maria da Penha sustained serious injuries, had to undergo numerous operations, and suffered irreversible paraplegia and other physical and psychological trauma.\(^3\)

In 2001, the IACHR published a report of merit on this case, concluding that the Brazilian State had “violated the rights of Mrs. Maria da Penha Maia Fernandes to a fair trial and judicial protection.”\(^4\) The IACHR recommended “the State conduct a serious, impartial, and exhaustive investigation in order to establish the criminal liability of the perpetrator for the attempted murder of Maria da Penha and to determine whether there are any other events or actions of State agents that have prevented the rapid and effective prosecution of the perpetrator.”\(^5\)

The IACHR also recommended “prompt and effective compensation for the victim and the adoption of measures at the national level to eliminate tolerance by the State of domestic violence against women.”\(^6\) The Commission also recommended that the State adopt public policy measures, put an end to state tolerance of domestic violence against women in Brazil, and establish mechanisms that serve as alternative to judicial mechanisms and simplify criminal judicial proceedings.

In addition to the recommendations by the IACHR pertaining to reparation of the victim’s individual rights, this was the first case in which

\(^3\) Alda Maria Sousa Gant, Domestic Violence against Women as a Human Right Violation, 3 REVISTA DO INSTITUTO BRASILEIRO DE DIREITOS HUMANOS 9, 9-21 (2002).
\(^4\) Lee Hasselbacher, State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection, 8 NW. J. INT’L. HUM. RTS. 190 (2010).
\(^5\) Maria da Penha at 704.
\(^6\) Id.
an international human rights organization applied the Convention Belém do Pará, issuing an unpublished decision in which a country that signed the convention was also, for the first time, responsible for domestic violence practiced by an individual.7

In October 2002, the government, through the Secretaria de Estado dos Direitos da Mulher (State Secretary of Women’s Rights or SEDIM), created at the very end of Fernando Henrique Cardoso’s second term, began to pay attention to the case of Maria da Penha. The head of SEDIM, Solange Bentes, then pressured the Superior Tribunal de Justiça (Superior Tribunal of Justice) to conclude the appeal against the aggressor.8

The case was concluded soon after, confirming the decision of the local jury that had condemned Mr. Viveros to ten years and six months in prison.9 The delivery of such a decision, just a few months before the deadline for the prescription of the crime, was one among other IACHR recommendations on this case.


Between 2002 and 2004, the non-governmental feminist advocacy organizations Schedule, Themis,10 CLADEM, CEPIA,11 and CFEMEA12 gathered in the form of a consortium to draft a law to combat domestic violence against women.

The 2002 Conference of Brazilian Women created a feminist platform salient in the election leading to the presidential accession of Luiz Inácio Lula da Silva that same year.13 Two years later, the National Conference of Public Policies for Women and a newly designated Secretariat for Women developed and promoted the “Maria da Penha Law,” which passed with President Lula’s support on August 7th, 2006.14

8 Cecilia MacDowell Santos, Transnational Legal Activism and the State: Reflections on Cases against Brazil in the Inter-American Commission on Human Rights, 4 SUR INT’L. HUM. RTS. 29 (English ed. 2007).
9 Id.
13 Id.
14 Mimi Kim, Brazil and the Paradox of Gender Justice, UNIVERSITY CALIFORNIA, BERKELEY: CENTER FOR
The informal title of Law nº 11.340 as the “Maria da Penha Law”\(^{15}\) is a tribute to Maria da Penha Maia Fernandes.

The purpose of the law, according to Article 1 is:

This Law creates mechanisms to restrain and prevent domestic and family violence against women, in compliance with paragraph 8 of article 226 of the Federal Constitution, the Convention on Elimination of All Forms of Discrimination against Women, the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women and other international treaties ratified by the Federative Republic of Brazil; it provides for the creation of the Courts of Domestic and Family Violence against Women; and establishes measures for assistance and protection of women in a situation of domestic and family violence.\(^{16}\)

Among its more significant procedural reforms are changes to the Penal Code, the Law of Criminal Sentences (Lei de Execução Penal), and the Code of Criminal Procedure.\(^{17}\)

III. THE CONSTITUTIONALITY OF THE LAW AND INTERNATIONAL CITATIONS ON SUPREME COURT DOCUMENTS

In March 2011, the Brazilian Supreme Federal Court (Supremo Tribunal Federal, STF) ruled for the constitutionality of the Maria da Penha Law.\(^{18}\)

When judging the constitutionality of some articles of the Maria da Penha Law, the Supreme Court Judge Luiz Fux based his vote on the Brazil’s commitment before the international scenario, as written:

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16 Id.

17 Jodie G. Roure, Domestic Violence in Brazil: Examining Obstacles and Approaches to Promote Legislative Reform, 41 COLUMBIA HUM. RTS. L. Rev 67 (Fall 2009).

Therefore, Mr. President, it is not possible to sustain, in the present case, that the legislator chose wrong or did not adopt the best policy to combat the endemic situation of domestic abuse against women. It is important to remember that the Maria da Penha Law is the result of the Convention Belém do Pará, through which Brazil has pledged to adopt instruments to punish and eradicate violence against women. Numerous other international commitments were made by the Brazilian State in this sense, namely, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the IV World Conference on Women (1995), the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, among others.\textsuperscript{19}

Also, Judge Celso de Mello said in his vote:

It was with that purpose that the World Conference on Human Rights urged, particularly expressively, that "women have full and equal access to human rights and that this be a priority for Governments and the United Nations," emphasizing also "the importance of integration and full participation of women as both agents and beneficiaries of development process ..., all with the purpose of stressing the importance of "working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, of eliminating gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices, and religious extremism.\textsuperscript{20}


\textsuperscript{20}Supremo julga procedente ação da PGR sobre Lei Maria da Penha, \textit{supra} note 19.
IV. DISTORTIONS

A. Definition of the Concept of Family

The Maria da Penha Law is not limited to being an instrument to combat domestic violence, but also is an instrument to redefine family, bringing a broader definition. Article 5 states:

For the effect of this Law, domestic and family violence against women is defined as any action or omission based on gender that causes the woman’s death, injury, physical, sexual or psychological suffering and moral or patrimonial damage ..., in the scope of the family, understood as the community formed by individuals that are or consider themselves related, joined by natural ties, by affinity, or by express will.  

In this article, the law includes an unprecedented and liberalizing definition of family as a “community formed by individuals who are or consider themselves to be related,” ignoring the Civil Code and the Constitution that recognize the natural family.

The Brazilian Constitution expressly rules in art. 226 that the family is the foundation of society and the stable union is comprehended as a union between a man and a woman. The express concept of marriage in the Constitution and the Civil Code clearly indicates the will of the legislator to put in evidence the biological concept of the family.

The same happens in other States, like Latvia, Hungary, Croatia, Slovakia, FYR of Macedonia, when in order to prevent the introduction of same sex marriage in constitutional amendments, jurisprudence, and legislation, they define marriage as a “unique union between a man and a woman” instead of simply guaranteeing “to men and women” the right to marry and found a family.

However, it seems Brazil is going against its Constitution, as are other States. Out of 13 national high courts to consider whether individuals

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21 Brazil. Lei 11.340 de 2011, Maria da Penha’s Law, supra note 16 (emphasis added).
22 Id.
23 CONSTITUCAO FEDERAL [C.F.] [CONSTITUTION] art. 226 (Braz.).
24 Grégor Puppinck, Same Sex Unions and the European Court of Human Rights, PUBLIC DISCOURSE (May 4, 2015), http://www.thepublicdiscourse.com/2015/05/14848/.
who identify as LGBT have a right to marry another individual of their same-sex, only Brazil’s and the United States’ found such a right, and both only did so on the basis of a reading of the Constitutions that is widely seen as illegitimate.25

What impresses in Law nº 11.340 is the audaciousness of an infra-constitutional law to redefine the concept of family and to place emphasis on volition and emotional attachment in defining the family. Actually, not so impressive, if one takes into account that the bill was created by strong feminist groups. This perspective brings the idea of family based on an emotional ground (affection familiae), embracing each group of people that permeates the affection element,26 disregarding the biological sphere.

As Professor Gregor Puppinck contends, it reflects the decline of the institutional and stable nature of marriage to a contractual and easily revocable mode of union: the expression of a society in which it is not so much the family that is the natural and fundamental unit of society27 but the individual.28

B. Application For Same-sex Unions

The Maria da Penha Law’s application is going further than it was supposed to go, being applied in different cases from what is its main object. Despite the objective of the law to combat the violence against women, the Maria da Penha Law is the first to reference sexual orientation, in the sole paragraph of article 5.

The sole paragraph of article 5 provides for the following: “The personal relationships expressed in this article are independent of sexual orientation.” This paragraph has been interpreted as the juridical recognition that “homo-affective unions constitute a family entity.”29

With the innovated concept of family, including the “socio-affective family,” it allows judges to use the analogy and apply the law for same-sex

25 CENTER FOR FAMILY AND HUMAN RIGHTS, C-FAM FACTSHEET ON SEXUAL ORIENTATION AND GENDER IDENTITY (2015).
28 Puppinck, supra note 25.
couple situations, ruling that sexual orientation is of no relevance in determining how the law applies.\textsuperscript{30}

Luiz Flávio Gomes contends:

The Maria da Penha Law can (and should) be applied in favor of any person (once proven that violence had occurred within a domestic context, family, or intimate relationship). No matter if the victim is transsexual, a man, a grandparent, etc. Such measures were first thought to promote women (in a subordinate position, of subjugation). Now, every time these conditions happen (domestically, family, or intimate relationship, submission, violence to impose an act of will, etc.) nothing prevents the judiciary, making good use of the Maria da Penha Law, to come to the aid of those threatened or injured in their rights. Where there are the same circumstances there should be the same rights.\textsuperscript{31}

The problem with this affirmation is that the law has a view towards achieving the elimination of prejudices, customary and all other practices that are based on the idea of the inferiority or the superiority of the sexes, or on stereotyped roles for men and women; it is not a gender policy.

The application of law should not be based on a personal identification, but in reality. An adult who committed a crime should not receive the protections that are given to a child who committed an act against the law only because he or she identifies as a child, neither should a man who identifies himself as a woman should be treated as if a woman he were.

Moreover, the term “discrimination” should grant legal protection when related to a personal characteristic that is inborn, involuntary, immutable (like race and color) and innocuous (because it does no harm to the employer, to the individual, or to society as a whole),\textsuperscript{32} which is not the case of sexual orientation.


\textsuperscript{32} Peter Sprigg, \textit{Homosexuality is Not a Civil Right} (Fam. Research Council, 2007).
The contradictory logic is that when the victim is a man in a homosexual relationship, judges in general understand that the law applies. However, this law would not protect a man who is a victim in a heterosexual relationship, as explained below.

C. The Non-application for Men in a Situation of Domestic Violence

The majority of the legal scholars and jurisprudence hold that the law cannot be applied to protect the male victim of domestic violence committed by a woman. This is also the position of the Conselho Nacional de Justiça (National Council of Justice).

The formal Minister Iriny Lopes, Brazil’s Special Secretariat for Women’s Policies, holds that the law is about gender and should not be applied to female-on-male violence cases. For men, she said, there is the common legislation: “Man is not injured because he is a man, but the woman is injured because she is a woman.” So, what is the justification for the application for men who identify themselves as women, since they are not injured for being women, as they are not in fact women?

It gets more confusing with some scholars who argue that “the law protects the sex of the woman, regardless of the sexual orientation, including in this case lesbians. It also protects females, i.e., transvestites and transsexuals.” The subsequent question is: if the law protects the woman who identifies herself as a man in a relationship and the man who identifies himself as woman, why should the law not protect the real man?

Many legal scholars defend a clear violation of the principle of equality consecrated expressly as formal equality in art. 5, caput, of the

Constitution, which guarantee equality of all before the law, without distinction of any nature.  

Article 6 of the Law categorizes domestic violence against women as a type of human rights violation, ending the formal treatment for violence against women as a criminal infraction of minor offensive potential. However, it should not be a violation only because it is against women, but because it is violence against a human being and consequently against the dignity of the person inherent to the human condition.

In this way, Souza states that the law that seeks to avoid discrimination, is for itself discriminatory, because it does not apply when the victim of the domestic violence is a male person, which defies the provisions of Article 5, I of the Constitution, which establishes the principle of isonomy between men and women.

One recent example of the perpetration of this logic was the approval on March 9th of 2015 by Brazilian President Dilma Rousseff (the same party of formal President Luís Inácio Lula da Silva) of a new law that criminalizes femicide, the gender-motivated killing of women.

The new legislation amends Brazil’s Penal Code to redefine "femicide" as any crime that involves domestic violence, discrimination, or contempt for women, which results in their death. Imposing harsher sentences of between twelve to thirty years imprisonment, the bill also includes longer jail terms for crimes committed against pregnant women, girls under the age of fourteen, women over the age of sixty, and women and girls with disabilities.

Nevertheless, this is the inconsistency of the UN Women agency: to create special protections for women and a new sphere of rights. They fail


37 Cláudio Calo Souza, Violência Doméstica e Familiar, Brevisíssimas Reflexões, Algumas Perplexidades e Aspectos Inconstitucionais (citing Lei No. 11.340, 2006, Journal Jurid 182 ‘‘[Q]ue a própria lei, que procura evitar a discriminação, é, por si, discriminatória, por que afasta a sua incidência protetiva quando a violência doméstica e familiar tiver como vítima uma pessoa do sexo masculino, o que, por si só, faz crer que é possível que se questione a sua constitucionalidade, pois pode afrontar o disposto no artigo 5º, inciso I, da Constituição Republicana, que estabelece o princípio da isonomia entre homens e mulheres.’’).

38 C.F., supra note 25 art. 5.


40 Id.

to consider the Preamble and Article 1 of the Universal Declaration of Human Rights, which recognizes that all human beings possess the same fundamental rights by virtue of their inherent dignity and worth. This logic also fails to consider that human rights by definition belong to all people because of their humanity. There are no special additional human rights beyond those of other citizens by virtue of sex.

**CONCLUSION**

The *Maria da Penha v. Brazil* case is an important example of how International Law can affect a society and create diverse changes in the internal system.

It also demonstrates the power feminists gained to push for a national agenda on violence against women in Brazil, especially after the wave of international feminist movements that began with the 1975 Conference for Women in Mexico City and the subsequent signing of the CEDAW in 1982, and the Convention of *Belém do Pará* in 1994.

The mobilization of these groups at the national level led to the formation of the first institutions, and their demands echoed in the 2006 federal legislation, making them strong enough to submit a bill by the National Congress and get its approval with very few alterations.

Despite the creation of a mechanism to curtail domestic violence, the Maria da Penha Law is an attempt to impose the feminist agenda and positively include its goals through legal documents over the federal legislation, redefining the concept of family and creating space for gender ideology. Against the Constitution of Brazil and the Civil Code, the Law is an example on how organized civil groups can modify the purpose of the Law to insert their own political agendas and redefine institutions.

Human rights norms can not be overburdened with a political and ideological weight, being a refuge for the imposition of the worldview of certain specific groups and disengaging from its essential role.

In order to avoid this distortion, a very important measure is to establish local groups to remain vigilant to these feminist groups, mapping the cases they submit to the International Courts and avoid local effects of

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43 See *supra* note 16 at 2.
44 See Rodríguez de Assis Machado*, supra* note 13.
these decisions. These local groups of advocacy and litigation can actively act in national discussions, participate in the legislative process of passing a bill, and manifestly expose their views during the public audiences the National Congress promotes before the votes.

The majority of pro-life and pro-family organizations in Brazil, for example, count on volunteers who can donate a little part of their time to the cause, having to manage their full time jobs besides the volunteer work, which makes the work of these organizations slow and inefficient sometimes. The support to get paid, full-time professionals in these groups, like policy makers, academics, activists, would be essential to the local development of these institutions and surely the achievement of good results, such as avoiding bad policies.

One other efficient measure is the promotion of training with local partners to aware them about the dangers of these feminist strategies. In the Maria da Penha case, the government and feminist groups sell the idea of the law as the most important victory in the last years to combat violence against women. Unfortunately, even the pro-family groups cannot see the Trojan horse the law brings, as the infra-constitutional article redefining family discussed previously.

In its thirty-ninth session, in 2007, the CEDAW Committee recognizes that “international treaties, such as the American Convention on Human Rights, (the Pact of San Jose, Costa Rica), can effectively have a direct influence on the procedures adopted by the courts,” and consequently have a “direct impact on the federal legislation of the State Parties.”

These measures and practices should help to strengthen the groups working at national levels and avoid feminist strategies to create a safe space to implement their goals. International Law is such a powerful instrument to help improve conditions not only for women, but also for every human being, and should not be used to serve certain groups and their agendas.


47 Id.
What Freedom of Speech on Abortion in the Case-Law of the European Court of Human Rights?

Andreea Popescu†

INTRODUCTION

The litigation on the freedom of speech on abortion appeared in Europe in the 1970s, at the same time abortion was decriminalised in Western Europe and later legalized. The liberalisation of abortion in certain Western European countries,¹ along with the resistance to this legal phenomenon in other countries,² has provoked reactions that at times were very strong on the part of Europeans. Those who express themselves in favour of or against abortion, at work, as simple individuals, or as activists, have often found themselves sanctioned or inadequately protected by the responsible authorities of their country. Believing that their fundamental right to freedom of expression and opinion has been violated, they have addressed the European Commission on Human Rights, known since 1998 as the European Court of Human Rights (hereafter “the ECHR” or “the Court”). Since 1977³ and until the present day, eleven cases have been judged by the ECHR⁴.

Consequently, more than forty years after its liberalisation in Europe, abortion remains a much discussed societal issue. Those “for” and “against” continue to act by various means to change not only the

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1 In 1967 in the United Kingdom, in 1974 in Austria and in Germany, in 1978 in Norway and in 1978 in Italy.
² Such as Ireland and Portugal.
³ Date of introduction of the first case on the matter.
legislation, but also the attitudes of the public, of medical professionals, and of politicians on the matter. Nevertheless, they are often prevented, dissuaded, sanctioned, or do not know the limits to their freedom of expression on the matter. Furthermore, if one follows the news, one will notice that those who are against this practice find themselves in this situation.⁵

Therefore, the question is whether the speeches on abortion are protected by the European Convention on Human Rights (hereafter “the Convention”) and if they are equally protected.

Analyzing the eleven cases judged by the Strasbourg courts allows for the conclusion that the Convention protects the speeches on abortion. Nevertheless, those speeches are unequally protected by it.

I. THE EUROPEAN CONVENTION ON HUMAN RIGHTS PROTECTS SPEECHES ON ABORTION

The Convention protects the substance and the form of all ideas and information, as long as it does not have the potential of directly inciting violence. Because abortion is identified by the Court as a subject of public interest, it has received the benefit of being highly protected by the Court, equivalent to political speech. Hence, wherever there is a restriction by national authorities on freedom of expression regarding abortion, the national authority must establish, in a convincing manner, a justification for such a restriction. States have broader powers to limit the exercise of freedom of expression, if it concerns the protection of a fundamental right or a moral or ethical issue, the right to life of the unborn, and the state is more restricted if it targets the protection of the rights of others, the doctors’ personal rights.

A. The Convention Protects the Substance and the Form of All Ideas and Information

The right to freedom of expression includes the right to opinion and the right to information, without any unjustified interference on the part of public authorities.

In principle, all ideas and information are protected by the Convention:

Freedom of expression is applicable not only to ‘information’ or ‘ideas’ that are favourably received or

regarded as inoffensive or as a matter of indifference, but also to those that are of an offensive, shocking or disturbing nature to the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’

The Convention “basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.”

The Convention does not protect speeches that are “capable of [directly] inciting violence” and those which encourage the rejection of the principles of democracy. The Court stated that speeches that represent a danger to society do not deserve to be protected: “It is only by a careful examination of the context in which the offending expressions appear that one can draw a meaningful distinction between shocking and offensive expression which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society.”

The Convention not only protects the substance of the expressed ideas and information, but also the form in which they are expressed, even if it is excessive. Once it has been determined the exaggeration or the provoke does not imply an animosity or an intention to harm the reputation of a third party, it falls under the protection of the Convention.

B. The Debate on Abortion is a Subject of “General Interest” and It Benefits from the Highest Protection

As the Court has stated on various occasions, the speeches on abortion arise from the “public interest,” and hence they have the benefit of being highly protected by the Convention. This protection is equivalent to the protection bestowed on political speech by the

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10 Id. at § 56.
14 D.F. v. Austria, supra note 4; Annen v. Germany, supra note 4.
15 Hoffer and Annen v. Germany, App Nos. 397/07 and 2322/07, supra note 4 at § 44.
This aspect has an influence on the possibility for the State to limit the exercise of this right: "it is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest." The more the right to speech is protected by the Convention, the weaker the discretion for the State to limit the exercise of the freedom of expression will be. The discretion of the State will be even weaker if it does not entail the protection of morals, but instead the protection of the rights of others, such as the personal rights of others.

C. The Restrictions to Freedom of Expression

Freedom of expression is not an absolute right. The relationship between freedoms and responsibilities, as well as the search for the common good of society and the respect for its common values, allows the State to limit retrospectively or subsequently the exercise of the freedom of expression, submitting it to certain formalities, conditions, restrictions, or sanctions. The reasons for which this freedom can be limited are enumerated in Article 10 § 2 of the Convention. Nevertheless, the necessity of each restriction should be established in a convincing manner by national authorities.

Generally, the speech against abortion is limited in order to protect the rights of others, often the personal rights of doctors who practise it. In rare cases, speech against is limited in public education

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19 Id. at § 49 (stating that "[f]rom another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses.").
20 Handyside v. United Kingdom, supra note 6 at § 43.
22 European Convention on Human Rights art. 10 § 2, Nov. 4, 1950. “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”
23 Handyside v. United Kingdom, supra note 6 (stating that "a range of exceptions that always require a strict interpretation, and the need for the restraint must be established convincingly"); Boldea v. Romania, App. No.19997/02, Eur. Ct. H.R. para. 45 (2007), http://hudoc.echr.coe.int/eng?i=001-79497; Otto-Preminger-Institut v. Austria, supra note 18; Wingrove v. United Kingdom, supra note 17.
by the rights of parents to educate their children according to their own convictions. In these cases, the discretion of the State is restricted, because the reason for it does not touch on a sensitive moral or ethical issue.

On the other hand, the speech in favour of abortion collides principally with the right to life of the unborn child, the right to life being one of the “basic values of the democratic societies making up the Council of Europe”24 and “an inalienable attribute of human beings” which “forms the supreme value in the hierarchy of human rights.”25 Sometimes, this speech conflicts with the need to protect the life of the unborn and the physical and moral integrity of the woman.26 In these cases, as it is a question of a fundamental right and/or a moral issue, the discretion of the State is broader to limit the exercise of freedom of expression.

II. THE SPEECHES ON ABORTION ARE UNEQUALLY PROTECTED

The chronological study of the eleven cases regarding freedom of expression on abortion reveals that the Strasbourg courts were addressed by applicants who expressed their opinions for or against abortion at their work place,27 as ordinary individuals,28 or as activists.29 The courts have established the applicable principles on the matter and have developed a manner in which they have approached those cases. This body of case law, along with the way in which the courts approached those cases, leads to the conclusion that the protection of the speech on abortion is imbalanced. This inequality is determined, on one hand, by the profile of the person expressing their opinion on the matter (employer, employee, ordinary individual, or activist), and on the other hand, by the content of the speech (for or against abortion). Four stages of the development of the case law have to be examined in chronological order to arrive at this conclusion.

In the first stage, the former Commission has established that, when speech on abortion is expressed at work, the employer being a

27X. v. United Kingdom, supra note 4; Rommelfanger v. Federal Republic of Germany, supra note 4;
28D.F. v. Austria, supra note 4; Van Den Dungen v. The Netherlands, supra note 4; Annen v. Germany, supra note 4; Hoffer and Annen v. Germany, supra note 4; Annen v. Germany, supra note 4.
29Plattform ”Ärzte für das Leben” v. Austria, supra note 4; Open Door and Dublin Well Woman v. Ireland, supra note 4; Women on Waves and Others v. Portugal, supra note 4.
Church or a public school, whether it is for or against this practice, the right to freedom of expression of the Church-employer and the right of parents to educate their children according to their religious or philosophical convictions prevails over the right to freedom of expression of the employee.30

In the second stage, the same Commission has stated that when individuals express their opinions against abortion in terms that are shocking and offensive, their right to freedom of expression is guaranteed, as long as they do not undermine the personality rights of doctors.31

Thereafter, in the third stage, the Court has ruled that when activists express their opinions on abortion, either in favour or against the issue, be it during a political debate or during a pre-election period, they benefit from a heightened protection.32 The Court has also ruled that activists in favour of abortion have the right to choose the most effective means by which to communicate their message, even if other means exist, as long as it involves a symbolic act of legislative significance.33 Furthermore, it has established the right not to be prevented from expressing one’s opinion in the public sphere, open by its very nature. When deciding cases regarding the freedom of expression, the Court has reaffirmed the protection of expression if the speech is made by minority groups.34 In that way, it should be observed that when judging cases in favour of abortion, the Court has been careful to develop the case law towards a greater protection of freedom of expression by those in favour of abortion.35 Regarding the activists who were against abortion, the former Commission has established that the speeches on abortion can also be expressed through peaceful protest and the State has to take all necessary measures to ensure that the protest takes place in a peaceful manner.36

On the other hand, in the fourth stage, it should be noted that activists who were against abortion have partially benefitted from the same liberal principles developed by the Court in previous cases

30 Rommelfanger v. Federal Republic of Germany, supra note 4; X. v. United Kingdom, supra note 4.
31 D.F. v. Austria, supra note 4; Van Den Dungen v. Netherlands, supra note 4.
32 Bowman v. the United Kingdom, supra note 4 at § 42; Women on Waves and others v. Portugal, supra note 4 at §§ 37, 39.
33 Women on Waves and others v. Portugal, supra note 4 at §§ 38-42.
35 Open Door and Dublin Well Woman v. Ireland, supra note 4; Women on Waves and others v. Portugal, supra note 4.
36 Plattform “Ärzte für das Leben” v. Austria, supra note 4 at §§ 5, 6, 32.
regarding the speech in favour of abortion. Unfortunately, the Court has continued to apply the case law of the former Commission in these cases, taking the view that their speech can be expressed in terms that are shocking and offensive, as long as it does not undermine the personality rights of doctors. It has also decided that their speech can take place in the vicinity of a clinic, as long as it does not seriously disturb medical practitioners at work. Furthermore, the Court has judged that the speech against abortion cannot be detached from the historical and social context. Thus, the comparison of abortion to the Holocaust in Germany was considered a "very serious violation of the personality rights of doctors." Furthermore, the Court ruled it to be justified in order to create awareness of the fact that what is legal is not always moral.

Comparing the approaches adopted by the Court to decide cases for and against abortion, it is obvious that they are not the same. Until the November 26th 2015 judgment in Annen case, the Court afforded more protection to the speech in favour of abortion, whereas it afforded less protection to the speech against abortion. Will this judgment in favour of the speech against abortion be a change of trend or just an exception to the Court's approach regarding the speech against abortion? The answer is in the Court's future judgments on the matter.

A. The Protection of the Speech on Abortion in Regard to the Person Who is Expressing It

1. The Speeches on Abortion Held at Work

a. The Right of Parents to Educate Their Children Prevails Over the Freedom of Expression of a Teacher on Abortion

_X v. United Kingdom_ was the first relevant case judged by the former Commission on Human Rights. It concerns a Math and English teacher in a public secondary school who was terminated for, _inter alia_, wearing placards bearing religious, anti-abortion slogans on his clothes and suitcase. The former Commission concluded in this case that

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37 Annen v. Germany, App. Nos. 2373/07 and 2396/07, supra note 4; Hoffer and Annen v. Germany, supra note 4.
39 Hoffer and Annen v. Germany, supra note 4 at § 48.
40 Id. at § 47.
41 Annen v. Germany, supra note 4 at § 63.
42 X. v. United Kingdom, supra note 4.
Article 10 of the Convention had not been violated, taking the view that because this was a secular school and that parents had a right for their religious and philosophical convictions to be respected, the ban imposed on a teacher for displaying his religious and moral convictions at school was justified. The former Commission also judged that such a sanction was justified where the teacher’s convictions became offensive to his female colleagues or had the effect of disturbing the children.

b. The Freedom of Opinion and Expression on Abortion of the Church-Employer Prevails Over the Freedom of Expression of its Employee on Abortion

In the case of Rommelfanger v. Federal Republic of Germany, the former Commission concluded that the freedom of expression of the applicant had not been violated. The case concerned an assistant doctor, employed by a Catholic hospital, who was terminated with notice for having expressed his opinion in favour of abortion in the press. He had accepted, by his employment contract, a duty of loyalty towards the Church, which limited his right to freedom of expression to a certain extent without depriving him of the protection afforded by Article 10.

The former Commission, taking in account that that the right of the Church to impose its views on employees was not unlimited and that the courts have jurisdiction to insure that no excessive loyalty can be demanded from the applicant, held that “the obligation to abstain from making declarations on abortion that are against the position of the Church on the matter have not been perceived as an excessive demand because of the capital importance of this problem for the Church.”

It is justified to give priority to the right to freedom of expression of the Church-employer, or of the organisations founded on values indispensable for the accomplishment of their functions, or to the right of parents to educate their children over the freedom of expression of the employee. Firstly, because the restriction on the right to freedom of expression of employees was founded on the protection of other fundamental rights, which according to the Convention, a priori, deserve an equal protection. Secondly, because the particular

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43 Id.
44 Id.
46 Id.
47 Id.
circumstances of the cases called for it. In the X case, it was notably the need of students in a secular school to receive an education according to their parents’ convictions,\textsuperscript{49} and in the Rommelfanger case, it was the respect of the principle of autonomy of the Church and of the fact that the employee had accepted freely in his employment contract to limit his freedom of expression to a certain extent.\textsuperscript{50}

In this way, the right to freedom of expression on abortion by the Church-employer, or by an organisation founded on specific ethics is better protected than that of the employee.

2. The Speeches on Abortion Held by Individuals

a. The Speech on Abortion Can Be Expressed in Terms That Are Shocking and Offensive, as Long as It Does Not Severely Undermine the Personal Rights of Doctors

On a second occasion, the former Commission judged two cases in which individuals expressed themselves in different manners against the practice of abortion by doctors.\textsuperscript{51} Their intention was not only to attract the attention of the public and of politicians to the harmfulness of abortion for the woman and the unborn child, but also to convince doctors to renounce this practice and to convince women to abstain from aborting. Their goal was not to harm the reputation of doctors, as the national courts assessed. However, the courts in Strasbourg, confirming their sanctions, did not give priority to their right to freedom of expression, but rather to the personality rights of doctors.\textsuperscript{52}

Therefore, in the case of \textit{D.F. v. Austria}, an applicant had reacted to an article published by a gynaecologist on the medical instruction of the pill RU486 by sending circular letters to all doctors and ordinary citizens in his region. In this letter, he called the doctor in question a “supporter of murder” and a “fighter for the death pill.”\textsuperscript{54} He was convicted of defamation and was fined 4800 AS. Judging the case, the Commission concluded that Article 10 had not been violated.

\begin{itemize}
\item \textsuperscript{49} X. v. United Kingdom, supra note 4.
\item \textsuperscript{50} Rommelfanger v. Federal Republic of Germany, supra note 4.
\item \textsuperscript{51} By distributing letters and leaflets, by carrying posters and signs, by making conversation with the passers-by and the clients of a clinic, by exposing enlarged photos with aborted foetuses, and by publishing on a website.
\item \textsuperscript{52} D.F. v. Austria, supra note 4; Van Den Dungen v. Netherlands, supra note 4.
\item \textsuperscript{53} D.F. v. Austria, supra note 4.
\item \textsuperscript{54} Id.
\end{itemize}
the Commission gave greater weight to the degrading nature of the statements, to the degradation of the doctor in the eyes of readers of the letter, the words used, and the means as to how the information was distributed by the applicant.\textsuperscript{55} It took the view that the interest of the applicant to criticise the doctor, the pill RU486, and the use of this pill did not prevail over the rights of the third party to have its reputation protected.\textsuperscript{56}

In the case of \textit{Van Den Dungen v. Netherlands},\textsuperscript{57} the applicant lead discussions, distributed pamphlets, and displayed enlarged photographs of aborted foetuses in front of an abortion clinic. At the request of the foundation society which administrated the clinic, the national courts delivered an injunction against the applicant, barring him from a 250-meter radius of the clinic for a period of six months.\textsuperscript{58} Analysing the case under Article 10 of the Convention, taking into account that the aim of the applicant was rather to dissuade women from having an abortion than to express his beliefs, the Commission concluded that this Article had not been violated.\textsuperscript{59} It examined the interference with the right of the applicant in light of all the facts of the case, and considered that the reasoning followed by the national authorities was “pertinent and sufficient.”\textsuperscript{60} The Court observed that the duration of the interference was limited and restricted to a very precise area and that the purpose of the measure was not to deny the applicant’s right to freedom of expression, but only to restrain this right for the protection of others.\textsuperscript{61}

According to the Convention, the speech on abortion can be expressed in shocking, striking, or disconcerting terms,\textsuperscript{62} as long as it does not directly incite violence and it does not imply animosity or an intention to harm the reputation of a third party. Nevertheless, calling a doctor a “supporter of murder” and a “fighter for the death pill,”\textsuperscript{63} as well as organising discussions, distributing pamphlets, and displaying enlarged photos of aborted foetuses in front of a clinic was considered offensive towards the respective doctors by the former Commission and was believed to undermine their personality rights.\textsuperscript{64}
Protecting the reputation of doctors is commendable. Nevertheless, giving priority to a right not to be offended is very dangerous for a democratic society. It enables a mechanism for censoring every opinion that can be labelled contradictory to certain criteria, and ultimately rendering a fundamental right “theoretical and illusory.”

3. The Speeches on Abortion Held by Activists

Further, the Court judged two cases concerning activists who were not in favour of abortion and two others concerning activists in favour of this practice. In three of these cases the Court found a violation of the Convention. It took the view that the speech opposing abortion expressed by an activist in the context of a political debate or during a pre-electoral period benefits from an enhanced protection. The same applies if the speech is made by minority groups. Similarly, the Court affirmed the same principle regarding the speech in favour of abortion held by activist associations which contested the existing legislation. In the two cases concerning the speech in favour of abortion, the Court established very liberal principles regarding the freedom of expression; notably, the almost absolute right to choose the most effective means of expression and the right not to be prevented from expressing oneself in a place that is by its nature an open public space. In a case concerning the anti-abortion speech held by activist associations, the Court established principles concerning the freedom of peaceful protest and positive obligations of the State on this matter, principles that are still valid.

a. The Speeches on Abortion Expressed in the Context of a Political Debate or During a Pre-Electoral Period Benefit From a Heightened Protection

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66 Plattform “Ärzte für das Leben” v. Austria, supra note 4; Bowman v. the United Kingdom, supra note 4.

67 Open Door and Dublin Well Woman v. Ireland, supra note 4; Women on Waves and others v. Portugal, supra note 4; Plattform “Ärzte für das Leben” v. Austria, supra note 4; Bowman v. the United Kingdom, supra note 4.

68 Bowman v. the United Kingdom, supra note 4; Women on Waves and others v. Portugal, supra note 4.

69 Baczkowski and others v. Poland, supra note 34 at § 64; Akdas v. Turkey supra note 34; Chassagnou and others v. France, supra note 34.

70 Women on Waves and others v. Portugal, supra note 34 at § 39.

71 Id. at §§ 38, 40.

72 Plattform “Ärzte für das Leben” v. Austria, supra note 4 at §§ 5, 6, 9, 32.
In the case of *Bowman v. the United Kingdom*,73 the Court found a violation of Article 10 of the Convention, censoring the decision of the internal courts. The case concerned the criminal conviction of an activist, who was against abortion and stem cell research, for distributing pamphlets in a pre-electoral period that outlined the stance of the candidates on abortion.74 The Grand Chamber of the Court established that a provision of the electoral law prevented the applicant, in an absolute manner, from publishing certain information, subjecting her to a criminal sanction.75 To arrive at this conclusion, the Court took into account the following factors: the importance of political debate, particularly in a pre-electoral period due to the interdependence of freedom of expression and free elections; the nature of the sanction, including the feeble amount fixed by the costs; the duration of the restriction that was applied four to six weeks prior to the election; the importance of the timing for the effective transmission of the message in the pre-electoral period, the Court appreciating that even if the plaintiff could campaign at another moment, she would not have achieved the objectives she intended by publishing the pamphlets because during this critical period the voters’ minds were focused on choosing a representative; the plaintiff’s inability to access other effective means of communication; and the absolute nature of the legal barrier.76

On this occasion, the Court established that if the speech on abortion, be it for or against the practice, takes place in the context of a political debate, especially during a (pre)electoral period, it is strongly protected.77

b. The Speech in Favour of Abortion Can Be Expressed Even if the Information and Ideas Expressed are of an Offending, Shocking, or Disturbing Nature to the State or Any Sector of the Population and its Absolute Prohibition Cannot Be Justified Under the Convention

In the case of *Open Door and Dublin Well Woman v. Ireland*,78 the Court concluded, by 15 votes to 8, that Article 10 of the Convention had been violated. In this case, the Supreme Court of Ireland had prohibited

73 *Bowman v. the United Kingdom*, supra note 4.
74 Id. at §§ 10-5.
75 Id. at § 47.
76 Id. at §§ 41-7.
77 Id. at § 42; *Hoffer and Annen v. Germany*, supra note 4 at § 45; *Women on Waves and others v. Portugal*, supra note 4 at § 39.
78 *Open Door and Dublin Well Woman v. Ireland*, supra note 4.
the applicants from supplying pregnant women with consultation services and specific information regarding the organisation of trips abroad to foreign clinics to obtain an abortion. In examining the case, the Strasbourg Court admitted that the ban imposed on the applicants had a legitimate aim, namely the protection of morality, including the right to life of the unborn child as protected by Irish constitutional law. At the same time, it rejected the other aims invoked by the authorities, i.e. the defence of order, the protection of the rights of others (of the unborn child and its father), and the prevention of crime.

Further, it stated that “that freedom of expression is also applicable to “information” or “ideas” that offend, shock or disturb the State or any sector of the population.” Furthermore, taking into account Irish law and the attitude of the authorities; the nature, understanding, effectiveness, and consequences of the ban; the means of distribution; the target audience; and the existence of information available to the public, it considered this prohibition to be disproportionate. While the issue arose from an area that touched on moral values, the Court diminished significantly the broad discretion that the State benefits from. Regarding Irish law and the attitude of the authorities, the Court noted that Irish law did not criminally sanction a pregnant woman for going abroad to avail of an abortion and that the authorities had tolerated or continued to tolerate the litigious activities. Regarding the injunction, the Court believed that it hindered the freedom to receive and communicate information on lawful services abroad, that it was drafted in a very broad and disproportionate manner, and that it was of an absolute nature because it did not take into account the age of the female, her health status and the reasons for soliciting the information. Regarding the efficiency of the sanction, the Court believed that the injunction was not efficient enough to safeguard the right to life of the unborn and that it created a risk for the health of the women; notably for poor or under-educated women, as in the absence of proper advice, they would look for an abortion at a more advanced stage of the pregnancy and they would not request post-abortion care. In relation to this information, the Court observed that the organisations are confined to explaining the available solutions, the decision remaining in the hands of the mother. It judged that there was no link between the provision of information and the destruction of the

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79 Id. at § 20.
80 Id. at §§ 60, 63.
81 Id. at § 71.
82 Id. at §§ 73-5.
83 Id. at §§ 76, 77.
life of the unborn. The Court also noted that this information was not disseminated to the general public and that it already existed in Ireland in magazines, in phonebooks, and through people having contacts in Great Britain.\textsuperscript{84}

The Court’s solution in this case was surprising. All the more so since it had conducted, without precedent, an in-depth analysis of the case. It did so by placing the sanction imposed on the applicant in the general context in Ireland, by going as far as to judge the concrete efficiency of the sanction on defending the right to life of the unborn, and the necessity of this information for the health of women. On one hand, it noted that the sanction did not involve a ban, but merely a limit on the communication of information, because Ireland had tolerated the circulation of such information in its jurisdiction.\textsuperscript{85} It also noted that Ireland had limited neither the debate on abortion in general, nor the possibility of women to go abroad to have an abortion.\textsuperscript{86} On the other hand, it deemed the sanction to be absolute, broad, disproportionate, incapable of protecting the right to life of the unborn, and dangerous for the health of women, without any evidence whatsoever to support this view.\textsuperscript{87} Furthermore, in examining the proportionality of the sanction, if the Court had properly explored the question of the ban incurred by the applicants, it did not afford any weight to the constitutional right of the unborn, which is of utmost importance and is also protected by the Convention, which justified such a limitation on the exercise of freedom of expression. It came to the conclusion, again without any supporting evidence whatsoever, that the applicants, by dispensing the information, did not encourage abortion, hence their declared aim was precisely to provide pregnant women with information on the possibilities of aborting abroad and of organising their trip with this objective in mind.\textsuperscript{88}

c. Every Person Has the Right to Choose the Most Effective Means of Communicating His or Her Message, Particularly if it Involves a Symbolic Activity of Legal Challenge

In the case of Women on Waves and others v. Portugal, where the applicants challenged the legislation outlawing abortion in Portugal,
the Court concluded that Article 10 had been violated. 89 A Dutch organisation and two Portuguese organisations aimed to “promote the debate on reproductive rights,” 90 notably to lobby in favour of the decriminalisation of abortion in Portugal. The first applicant had charted a ship to sail from Amsterdam to the Portuguese port of Figueira da Foz and organised on board, over the course of two days, meetings, seminars, and practical workshops on the topics of preventing sexually transmitted diseases, family planning, on the decriminalisation of abortion, and the abortive pill RU486, which was outlawed at the time in Portugal by the Penal Code. As the ship approached Portuguese waters, the Secretary of State for the Sea gave a ministerial order banning it from entering. 91 To arrive at the conclusion of a violation of the Convention rights of the applicants, the Court established a true right to choose the most effective means to communicate ones’ message, believing that the applicants, owing to the prohibition, were not in a position to communicate their ideas and information in the means that they deemed most effective: “[the interested parties] must be in a position to be able to choose, without any unreasonable interference by the authorities, the mode of communication that they deem the most efficient to reach as many people as possible.” 92 Observing that they could have come ashore to assert their opposition to the law, the Court ruled that when ideas are shocking, disturbing, bringing into question the established order or involve a symbolic activity of legal challenge, the way of communication can be of such an importance that its restriction can essentially affect the substance of ideas and information in question: 93 “rightfully so, it is when ideas that are offending, shocking and challenge the established order that the right to freedom of expression is most precious.” 94 Furthermore, the Court decided that a “measure as radical as that inevitably will have a chilling effect not only as regards applicants, but also as regards other people who hope to communicate information and ideas which challenge the established order.” 95

In the same case, the Court established the State’s duty not to prevent individuals from expressing their opinion on abortion in a place “that is by its nature an open public space.” 96

89 Women on Waves and others v. Portugal, supra note 4 at § 44.
90 Id. at § 7.
91 Id. at § 8.
92 Id. at § 38.
93 Id. at § 39.
94 Id. at § 42.
95 Id. at § 43.
96 Id. at § 40.
Then, considering the reprehensible act that the authorities sought to prevent, namely the illegal distribution of the pill RU486, the Court held that nothing proved that this was the intention of the applicant. It also judged that the authorities had at their disposal other means of reaching their desired goals, the seizing of pills for example, that were less detrimental to the freedom of expression of the applicants than resorting to the prohibition. The Court reiterated that a prohibition has a dissuasive effect not only as regards the applicants, but also as regards other people who hope to challenge the established order.

d. The Speeches on Abortion Expressed by Activists and Minority Groups Benefit from a Heightened Protection

Thereafter, the case law of the Court consolidated the protection of activist speech. This allows us to affirm that if the expression of opinions or convictions on abortion takes the form of activist speech, it benefits from a reinforced degree of protection. The same applies if the speech is made by an organisation: “when an NGO draws the public attention on matters of public interest, it is exercising a public watchdog role of similar importance to that of the press.”

On numerous occasions, the Court has also affirmed that unpopular opinions or the opinions of minority groups benefit from enhanced protection, as they are the most often “stigmatised.” It also established that the exercise of a right guaranteed by the Convention to a minority group cannot be subject to the acceptance of the majority. In a democratic society, minority speech and ideas must be tolerated.

97 Id. at § 41.
98 Id. at § 43.
99 Id.
102 Baczkowski and others v. Poland, Eur. Ct. H.R. 1543/06 (May 3, 2007) (quoting Steel and Morris v. United Kingdom, Eur. Ct. H.R. 68416/01 (Feb. 16, 2005)). [I]n a democratic society even small and informal campaign groups (...) must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.
See also; Vides Aizardzibas Klubs v. Latvia, Eur. Ct. H.R. 57829/00 (May 27, 2004) “Such participation of an association being essential to a democratic society, the Court considers that it is similar to the role of the press in that it is defined by its constant jurisprudence”. “In order to carry out its task effectively, an association must communicate facts of public interest, assess these facts and contribute to the transparency the activities of public authorities.”
103 Akdas v. Turkey, supra note 34 at § 81; Chassagnou and others v. France, supra note 34.
104 Chassagnou and others v. France, supra note 34.
Therefore, as speech against abortion is a minority speech and is sometimes considered relatively unpopular, it must be tolerated, and in principle, must benefit from more protection than the speech in favour of abortion.

e. The Speeches on Abortion Can be Expressed Through Peaceful Protest and the State Must Take All Measures Necessary so that the Protest Can be Carried Out in a Peaceful Manner

As an extension of the freedom of expression there is the freedom of peaceful assembly pursuant to Article 11 of the Convention.

Article 11 of the Convention also protects “the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places,”105 as well as “protests that may offend or dissatisfy those opposed to the ideas or claims that they are seeking to promote.”106

The restriction of freedom of assembly can be justified only if “the organisers and participants have violent intentions or otherwise reject the principles of a “democratic society,” 107 or if there is an “increased likelihood of violence,” “a clear threat or imminent danger of violence,” 108 or if the applicant perpetrates at this occasion “a reprehensible act.”109 “The circumstances of “the particular place and time (...) unequivocally change the meaning of a certain display” to the point that they amount to “the apology of war crimes, crimes against humanity or genocide.”110

The simple “eventuality of tensions and heated exchanges between opposing groups during a protest” does not justify a ban, because such a society “would be faced with being deprived of taking account of differing points of views.” 111 The same, neither

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105 Tat ar and F lber v. Hungary, supra note 8 at § 41.
106 Id. at § 37; Alexeyev v. Russia, supra note 9.
107 Tat ar and F lber v. Hungary, supra note 8 at § 37; Alexeyev v. Russia, supra note 8 at § 80 (“any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it.”).
108 Id. at § 44.
110 Tat ar and F lber v. Hungary, supra note 8 at §38.
111 Id.
“uneasiness,”112 nor “the dictates of public feeling,”113 or “ill feelings or even outrage” of another are enough to justify the banning of a symbol” in the absence of intimidation.114

In the case Plattform Ärzte für das Leben v. Austria,115 concerning two protests organised by a doctors’ organisation that was opposed to abortion, the Court established that “the right to freedom of peaceful assembly is guaranteed to everyone who has the intention of organising a peaceful demonstration.”116

In the same case, the Court ruled that the Convention obliges signatory States to take reasonable and appropriate measures in order to ensure a certain protection so that the protest can be carried out in a peaceful manner. These measures cannot prevent counter-protests, but the right to counter-protest cannot be exercised to the point of paralysing the exercise of the right to protest.117

4. The Speech Against Abortion Held by Activist Individuals

It should be noted that the liberal principles developed by the Court in cases regarding the speech in favour of abortion were applied only partially in the cases concerning activists who expressed their opinions against abortion. These involve cases introduced by Mr. Klaus Günter Annen, either alone or with Ms. Collene Hoffer.118

112 Vajnai v. Hungary, Eur. Ct. H.R. 33629/06 § 57 (Oct. 8, 2010) (stating that “the display of a symbol which was ubiquitous during the [communist] regime[s] may create uneasiness among past victims and their relatives, who may rightly find such displays disrespectful.” However, “such sentiments, however understandable, cannot alone set the limits of freedom of expression” because “otherwise (...) freedom of speech and opinion is subjected to the heckler’s veto.”).

113 Id. (stating that “a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society”).

114 Tatár and Fáber v. Hungary, supra note 8 (“even assuming that some demonstrators may have considered the flag as offensive, shocking, or even “fascist”... its mere display was not capable of disturbing public order or hampering the exercise of the demonstrators’ right to assemble as it was neither intimidating, nor capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons.”).

115 Plattform “Ärzte für das Leben” v. Austria, supra note 4.

116 Id. at § 5.

117 Id. at § 32 (“A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.”).

118 Annen v. Germany, App. Nos. 2373/07 and 2396/07, supra note 4; Hoffer and Annen v. Germany, supra note 4; Annen v. Germany, App. No. 3690/10, supra note 4.
Mr. Klaus Günter Annen introduced four cases to the Court because he was punished on several occasions for expressing his opinion against abortion. In the first three cases the Court did not find a violation of the Convention. In the first two cases, the applicant had distributed a leaflet near a clinic in which he stated that a doctor, Dr. K., practised illegal abortions. He also indicated the name and professional address of the doctor. He was ordered by the national courts to no longer distribute this information, either in vocal or written form.

One year later, he protested and approached passers-by and potential customers of the clinic, carrying a poster on which one side stated “abortion kills unborn children” and on the other “You shall not kill’ also applies to doctors.” He was handed an injunction by the tribunals to no longer address passers-by or customers within a certain perimeter of the doctor’s clinic and to not point out that the doctor practised abortions. Analysing the sanctions, the motives invoked by the authorities, the content of the applicant’s statements, and how the national courts weighed up various rights, the Court declared the case inadmissible. It held that the interference with the applicant’s right to freedom of expression was relatively limited because he had not been subject to criminal sanctions and had not been ordered to revoke his statements. He was prohibited from repeating certain statements regarding the professional activities of the doctor, and was ordered to no longer approach passers-by in the vicinity of the clinic. Addressing the motives invoked by the authorities, the Court observed, concerning the first injunction, that the national courts had judged that the statement of the applicant suggested that the activities of the doctor were illegal and that it publicly named and shamed the doctor for no reason. Regarding the second injunction, the Court observed that the courts, referring to the naming and shaming of the doctor, had ruled that by approaching passers-by and potential clients to inform them on the practice of abortion by the doctor, the applicant had seriously interfered with the doctor’s exercise of his legal professional activities, which served a public health interest.

With respect to the content of the statement of the applicant, regarding the first injunction, the Court held that affirming that the

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119 Annen v. Germany, App. Nos. 2373/07 and 2396/07, supra note 4; Hoffer and Annen v. Germany, supra note 4.
120 Annen v. Germany, App. Nos. 2373/07 and 2396/07, supra note 4.
121 Id.
122 Id.
123 Id.
124 Id.
doctor practiced abortions was correct from a legal point of view, but not from the point of view of an ordinary person. With regard to the second injunction, the Court found that the applicant’s statement, that the doctor practised abortions, was accurate. Nevertheless, it agreed with the national tribunal giving more weight to the context of the statement, namely that it took place in the vicinity of the clinic, hence perturbing the professional activity of the doctor.

The Court held furthermore that the national courts had correctly weighed the different rights in question, privileging the rights of the doctor, taking into account that he had not taken part in the debate started by the applicant, and that he had given the applicant no reason to single him out. Finally, the Court observed that the applicant had not been prevented from criticising the general practice of abortion in Germany, or from criticising this practice of the doctor in general.

On another occasion, accompanied by Ms. Collene Hoffer, he handed out a four-page leaflet to passers-by outside a medical clinic, in which he mentioned, inter alia, Dr. F. “specialist in murdering unborn children.” On the last page of the leaflet he stated: “Yesterday: Holocaust, today: Babycaucst.” They were convicted of defamation and ordered to pay daily fines that amounted 150 and 100 euros respectively. Examining the case, the Court considered that the criminal sanction inflicted on the applicants was relatively modest. In affirming, along with the internal courts, that this concerned a subject of public interest having a political goal, making use of exaggeration and controversial criticism, the Court stated that the comparison between the practice of abortion and the mass homicide committed during the Holocaust gravely damaged the personal rights of the doctors and that the applicants could have expressed their criticism in a manner that was less detrimental to the reputation of the doctor.

A few years later, Mr. Klaus Günter Annen put leaflets against abortion in the letter boxes of people living in the surrounding

125 Id. 
126 Id. 
127 Id. 
128 Id. 
129 Id. 
130 Hoffer and Annen v. Germany, supra note 4. 
131 Id. at § 7. 
132 Id. at § 8. 
133 Id. at § 22. 
134 Id. at § 49. 
135 Id. at §§ 46-8. 
136 Annen v. Germany, App. No. 3690/10, supra note 4.
areas of clinics managed by two doctors, Dr. M. and R. The leaflet stated that the two doctors practiced illegal abortions which were allowed by the law,\textsuperscript{137} compared the practice of abortion to the Holocaust,\textsuperscript{138} and stated on the last page its website www.babycaust.de. This website contained, \textit{inter alia}, a list of “abortion doctors” and their professional addresses. He was handed an injunction from publishing this list on his website. On the 26th of November, 2015, judging the case, the Court concluded there was a violation of the applicant’s right to freedom of expression.\textsuperscript{139} Regarding the ban to distribute leaflets, the Court considered that the applicant had the right to choose the most effective means for his campaign and that the reference to Holocaust alone was a means to raise awareness that what is legal is not necessarily moral.\textsuperscript{140} As to the ban of mentioning the names and professional addresses of the “abortion doctors” on his website, the Fifth Section sanctioned the absence of proofs and the reasoning in support of the tribunals conclusion.\textsuperscript{141} Thus, the Court proposed concrete standards for the individual and contextual assessment of such cases by the national courts.

a. Speech on Abortion Can Be Expressed in Terms That Are Shocking and Offensive, As Long As It Does Not Severely Infringe the Personal Rights of Doctors and Does Not Interfere In A Serious Manner With Their Professional Activity

Until 2015, in all these cases, the Court has confirmed the sanctions made by national courts.\textsuperscript{142} By adopting this approach, the Court has affirmed the case law of the former Commission on the subject, recalling that the speech against abortion can be expressed in terms that are shocking and offensive, as long as it does not infringe the personal rights of doctors.\textsuperscript{143} It also decided that this speech can take

\textsuperscript{137} On the first page of the leaflet, the plaintiff claimed that “In their day clinics doctors M./R. [complete address] practise illegal abortions,” followed, in very small lettering by “who are nevertheless allowed by the German legislator and who are not subject to criminal sanction. The statement of the council protects the doctor and the mother from criminal sanction, but not from sanction before God.”

\textsuperscript{138} On the last page of the leaflet the following text appeared : “The murder of human beings at Auschwitz was illegal, but the national-socialist State, morally degraded, allowed the murder of innocent people and it was not subject to criminal sanction.”

\textsuperscript{139} Annen v. Germany, App. No. 3690/10, supra note 4 at §§ 65, 74.

\textsuperscript{140} Id. at §§ 62-3.

\textsuperscript{141} Id. at §§ 70-3.

\textsuperscript{142} D.F. v. Austria, supra note 4; Van Den Dungen v. Netherlands, supra note 4; Annen v. Germany, App. Nos. 2373/07 et 2396/07, supra note 4; Huffer and Annen v. Germany, supra note 4.

\textsuperscript{143} D.F. v. Austria, supra note 4; Van Den Dungen v. Netherlands, supra note 4.
place in the vicinity of a clinic, as long as it does not disturb, in a serious manner, doctors during their professional activity.\textsuperscript{144}

Nevertheless, according to the constant Strasbourg case law on the matter, the speech, including the one on abortion, can be expressed as long as it is not capable of directly inciting violence, and as long as it does not imply animosity or an intention to harm the reputation of a third party.\textsuperscript{145} Nevertheless, carrying a poster which states on one side, “abortion kills unborn children” and on the other, “You shall not kill” also applies to doctors,”\textsuperscript{146} claiming on a leaflet that Doctor F. is a “specialist in murdering unborn children” and stating on the same leaflet “Yesterday: Holocaust, today: Babycaufst”\textsuperscript{147} were considered to be offensive to the respective doctors by the Court.

This interpretation of the Convention was undermined in 2015, with the adoption of the judgment in the fourth Annen\textsuperscript{148} case. In this case, the Court recalled that “the attack to the personal reputation should attain a certain degree of seriousness and it should be made in a way to cause damages to the personal enjoyment of the right to private life.”\textsuperscript{149} It further stated that there should be a link between the applicant’s speech and the damage suffered by the doctors.\textsuperscript{150}

b. The Speeches on Abortion Cannot Be Detached From Their Historical and Social Contexts the Reference to Holocaust is Justified to Raise Awareness That What is Legal Is Not Necessarily Moral

Regarding the comparison of abortion with Holocaust, in the case Hoffer and Annen v. Germany, the Court stated that it could not be detached from the German historical and social context in which it had been employed.\textsuperscript{151} The Court also ruled that the use of this comparison is “a very serious violation of the personality rights of the doctor.”\textsuperscript{152}

This view of the Court was very questionable. Some years beforehand, in 2004, in a case against Austria, the Court considered that the expression “old crypto-Nazi” used to criticise a person, was a valid value judgment from the point of view of the Convention.\textsuperscript{153}

\textsuperscript{144} Annen v. Germany, App. Nos. 2373/07 and 2396/07, supra note 4.
\textsuperscript{145} Tatik and Füller v. Hungary, supra note 8.
\textsuperscript{146} Annen v. Germany, App. Nos. 2373/07 and 2396/07, supra note 4.
\textsuperscript{147} Hoffer and Annen v. supra note 4.
\textsuperscript{148} Annen v. Germany, App. No. 3690/10, supra note 4.
\textsuperscript{149} Id. at § 54.
\textsuperscript{150} Id. at § 62.
\textsuperscript{151} Hoffer and Annen v. Germany, supra note 4.
\textsuperscript{152} Id. at § 47.
Later, in 2015, in the fourth case of Mr. Annen, the Court stated that the reference to Holocaust “is a way of creating awareness of the more general fact that law may diverge from morality.”

Indeed, the comparison of abortion to the Holocaust was not without meaning for the applicants in the case of Hoffer and Annen v. Germany or for Mr. Klaus Günter Annen. They had no intention to damage the reputation of the doctors or to trivialise or instrumentalize the Holocaust. They called for the respect of human rights, namely for the respect for the life of unborn children which, in the present state of the case law of the Court, does not exclude the unborn child from its protection. The applicants used the striking image of the Holocaust because for Germans it refers to a tragic event in their history, where innocent human beings were massacred. The purpose was to immediately and effectively raise public awareness on the high number of innocent human beings who are suppressed every day by the practice of abortion so that another Holocaust does not take place. It also cannot be forgotten that the Holocaust began with the collaboration of the medical profession.

In order to draw a lesson from history, a comparison needs to be made. If one is denied the possibility of comparing, then one is denied a significant and necessary lesson from which one could learn an objective evil. To compare is not to deny the uniqueness of the Holocaust. The comparison that the applicants have made with the Holocaust in order to illustrate their ideas should be regarded from their point of view, that abortion is murder. This comparison is not disconnected with the Holocaust, or incongruous, or disrespectful to the victims, as was the case in PETA. In the latter case, the suffering of human beings during the Holocaust was compared with the suffering of animals in the abattoir. However, there is a very big difference between a human being and an animal.

Which other strong and effective image could they have used to convey the essence of their message and convince the German public that abortion is a mass crime against innocent human beings? With what other image could they have effectively expressed their message? Moreover, the applicants were not the only ones to use this comparison.

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154 Annen v. Germany, App. No. 3690/10, supra note 4 at § 63.
155 Id.
Public advertising campaigns against abortion in Poland, posted at the crossroads of the city centre, enormous posters of about 200 square meters, displaying the face of Hitler and aborted foetuses with the message: “Abortion in Poland: Introduced by Hitler the 9th of March 1943.” They recalled the decree on “the interruption of pregnancy for working mothers from the East and Poland” as a “measure for the security of the German people” because “the birth rate among working women from the East and from Poland was a biological weapon against the German people.”

John-Paul II, during a trip to Poland in June 1991, compared “the graveyards of abortion” to those of the extermination camps. Other examples can be mentioned: internet sites like Survivors of the Abortion Holocaust, the documentary 180, several books on this subject, like The Abortion Holocaust: Today’s Final Solution by William Brennan; The Holocaust Analogy to Abortion from the book The Facts of Life by Brian Clowes; Holocaust: New and Old by Elasah Dorgin; Rachel Weeping: The Case Against Abortion by James Tunstead Burtchaell, etc.

Opposing this comparison and preventing its circulation in the public space is in fact a means of promoting the opposing view of that of the applicants on abortion, which brings us back to using the Holocaust as a tool.

c. Any Censorship of the Speech on Abortion by the Tribunals Should Be Made After An Individual and Contextual Assessment of the Case, in Reference to the Situation at the Moment of the Publication

In the last case Annen, adopted in 2015, the Court established procedural obligations deriving from Article 10 of the Convention. Noting that the tribunals did not thoroughly assess the case, the Fifth Section indicated, for example, the tribunals failed to consider factors


160 Id.


165 WILLIAM BRENNAN, ABORTION HOLOCAUST: TODAY’S FINAL SOLUTION (Jul. 1983).

166 Annen v. Germany, App. No. 3690/10, supra note 4 at, §§ 70-3.
which should be taken into account for an individual and contextual review of a case: the geographical impact of the leaflets, their content, the general context of the case, the specific layout of the webpage, the necessity to protect sensitive data and the doctors' previous behavior (if they had already mentioned on the internet that they practiced abortions), the impact of the speech on the third parties, and if it is likely to incite aggression or violence against the doctors.  

B. Protection of speech on abortion according to its content

1. The speech against abortion is better protected by the Convention

If one examines the approach employed by the Court until 2015 to settle cases in favour of abortion with those against abortion, one will find that they are not the same despite the fact that, at the core, there have not been substantial differences between these cases to justify this difference in approach. This difference in approach fails to present not only the will of the Court to not develop its case law in accordance with protecting the speech against abortion, but also its refusal to reaffirm its own precedent established in cases regarding the speech in favour of abortion. The most obvious examples are the cases D.F. and Van Den Dungen, the speech against abortion, compared with the case Open Door, the speech in favour of abortion; and the first three Annen cases. The speech against abortion, compared with the cases Open Door and Women on Waves, speech in favour of abortion.

Nevertheless, the Annen judgment of November 26th, 2015 partially attenuates this trend. The Court is starting to apply to the speech against abortion certain principles already established in cases in favour of this practice, showing itself more protective of this speech.

a. The cases of D.F. and Van Den Dungen compared to the Open Door case

The Open Door case was decided by the Court in 1992, and the cases D.F. and Van Den Dungen were decided in 1994 and 1995 respectively. The first case concerned activists, organisations, and women who were pro-choice; and the other two cases concerned two individual activists who were against abortion. In the Open Door case,

\[^{167}\text{Id.}\]

\[^{168}\text{See supra note 4.}\]
arriving at a conclusion that the Convention had been violated, the plenary session of the Court gave an in-depth analysis of the sanction imposed on the applicants, taking into account Irish law and the attitude of the authorities, the nature, the extent, the effectiveness and the consequences of the ban, the means of dissemination, the intended audience, and the existence of information in the public sphere.\(^{169}\) It was the first time that the Court went into such detail in a case concerning the speech on abortion. However, two years later, the former Commission settled the case *D.F.* in two brief paragraphs, limiting itself to stating that the speech of D.F was of a stigmatizing nature and that the words used and the means of communication, a circular letter, did not prevail over the personality rights of the doctor.\(^{170}\) The same went for the case *Van Den Dungen*, which was condensed into one paragraph by the former Commission, three years after *Open Door*, considering that the sanction was limited in time and space and it did not deprive the applicant of expressing himself by other means.\(^{171}\)

b. The first three Annen cases compared to Open Door and Women on Waves

The applicants in the first three *Annen* cases, who were anti-abortion, were subject to the same arbitrariness of the Court in the cases *D.F.* and *Van Den Dungen*, unlike the cases *Open Door* and *Women on Waves*, where the applicants were pro-abortion. The case *Women on Waves* was decided in 2009 and the three *Annen* cases in 2010 and 2011 respectively. As there were no substantial differences between these cases, there was nothing to justify the different approaches taken in their judgment.

Like the applicants in the cases *Open Door* and *Women on Waves*, Mr. Annen and Ms. Hoffer were also activists. They wanted to change the legislation on abortion in Germany to convince doctors to renounce this practice and women to give up aborting their babies. Their speech was a minority one in German society. However, they did not benefit from the same heightened protection of their right to freedom of expression like the activists who were pro-abortion in the cases *Open Door* and *Women on Waves*.

They employed the means of communication that they considered most effective to convey their message: distributing leaflets,

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\(^{169}\) *Open Door and Dublin Well Woman v. Ireland*, supra note 4 at §§ 72-9.

\(^{170}\) *D.F. v. Austria*, supra note 4.

protesting and having discussions with passers-by outside the clinic, dropping anti-abortion pamphlets in letter boxes, and creating an internet site. Mr. Annen used a different means of expressing himself each time. Nevertheless, he was sanctioned on every occasion. Therefore, it was not until 2015, after his first three cases, he did not benefit from the “right to choose the most effective means of conveying his message” like the applicants had in Women on Waves. Furthermore, the repeated sanctions imposed on the applicant, while he changed each time the way of expressing himself, had nothing but an extremely dissuasive effect on his right to freedom of expression and the rights of others who wished to express their opinions against abortion in the future. However, the Court ignored this aspect in the case of Mr. Annen, failing to indicate that “a measure so radical inevitably has a chilling effect not only on the applicants, but also on other persons hoping to communicate information and ideas that go against the established order,” like it did in the Women on Waves case.

In the three cases, Annen too employed terms that some individuals may consider shocking or offensive, “abortion kills unborn children,” “You shall not kill” also applies to doctors,” “specialist in murdering unborn children,” “Yesterday: Holocaust, today: Babycast,” “abortion doctors”, but in his case, the Court did not affirm that “when ideas are presented that are striking, shocking and contest the established order, freedom of expression is the most precious thing,” like in the case Women on Waves, where it was stated that the “right to freedom of expression is also valid where the ideas or information conveyed are of a offending, shocking or disturbing nature to the State or any sector of the population.” A similar stance was taken in Open Door.

In the Annen cases, the Court ruled that the sanction was justified because the applicants’ wording undermined the personal rights of doctors. In the cases Open Door and Women on Waves, it judged that the sanctions incurred by the applicants to ensure the protection of the right to life of the unborn, a constitutional right in Ireland, was not justified and disproportionate, while the value protected by the Member State was of primordial importance in the aforementioned cases.

172 Women on Waves and others v. Portugal, supra note 4 at § 43.
173 Open Door and Dublin Well Woman v. Ireland, supra note 4 at § 71.
174 Open Door and Dublin Well Woman v. Ireland, supra note 4 at § 80; Women on Waves and others v. Portugal, supra note 4 at § 44; Annen v. Germany, App Nos. 2373/07 and 2396/07, supra note 4; Hoffer and Annen v. Germany, supra note 4 at § 49.
Mr. Annen made his speech in a place that was by its nature a public place, expressing himself and manifesting in a peaceful manner. However, in his case the Court did not recall that “the freedom to express one’s opinions during the course of a peaceful assembly is of such an importance that it cannot be made subject to any limitation insofar as the interested party does not commit himself, in this occasion, a reprehensible act” as it affirmed in the case Women on Waves. He also did not seriously disturb “the professional activity of doctors.” There is nothing in the facts presented by the Court to suggest this.

Altogether, the three Annen cases did not benefit from a thorough analysis on the part of the Court, like it had done in the Open Door case, taking into account Irish law and the attitude of the authorities, the nature, extent, effectiveness and consequences of the prohibition, the means of dissemination, the intended audience, and the existence of information in the public sphere. In the Annen cases, the Court limited itself to stating that the applicant did not incur a criminal sanction, while he was prohibited from repeating certain statements concerning doctors and approaching passers-by, the reasons given by the internal national courts were sufficient, and that he had other means of expressing his view against abortion. The same approach was taken in the case Hoffer and Annen, in which the Court ruled in three paragraphs that the applicants cannot, in their speech, compare abortion to the Holocaust, because this seriously violated the personal rights of the doctor, all the more so since the speech could not be detached from the historical and social context in Germany. According to the Court, they should have expressed their criticism in a manner that was less damaging to the reputation of the doctor.


It is to be noted that with this judgment the Court changed its approach applying to the speech against abortion the principles that it established in the cases favorable to abortion. Thus, it recognized to the applicant the right to choose the most effective means for his campaign, namely the distribution of leaflets near a clinic and indicating the name and the professional address of the doctors. The Court judged that the wording used by the applicant, “abortion doctors,” “illegal abortions,” including the reference to Holocaust to raise awareness that what is

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175 Women on Waves and others v. Portugal, supra note 4 at § 40.
177 Hoffer and Annen v. Germany, supra note 4.
178 Id. at §§ 46, 49.
legal is not necessarily moral, is a legitimate means for the efficiency of his campaign, which contributed to a highly controversial debate of public interest. Regarding the personal rights of doctors, the Fifth Section held that any damage caused to the doctors should be proved and must be caused by the applicant’s speech. Finally, it imposed procedural obligations under Article 10 of the Convention to the tribunals, obliging them to thoroughly assess each such case. Thus, the Court indicated concretely and non-exhaustively the factors that should be taken into consideration when examining a case individually and contextually.

CONCLUSION

Having regarded to the above considerations, the Convention, which has been interpreted by the former Commission and by the ECHR, protects the speech on abortion. However, this protection is unbalanced and it varies depending on the person expressing the opinion and the content of his or her speech. In principle, these speeches are more protected if they are held by activists, by a NGO, by a minority group which wishes to attract the attention of the public, and decision-makers on a subject of general interest, especially if they want to change the mentalities and the established order. The Convention protects all ideas that are offending or shocking and all symbolic activity of challenging of the legal order by establishing the right to choose the most effective means by which to convey a message. It condemns anything that might have a chilling effect on these speeches. However, the establishment and application of these principles in cases in which the applicants were in favour of abortion; and inversely, their ignorance or their partial application in the cases where the applicants were against this practice, illustrates how certain judges use the Convention to promote a certain speech on abortion, the one that criticises the existing societal values, respect for the life of every human being and for the health of the woman, so that they can be replaced by other values. In any event, once these principles are established, the European Court should apply them in the same manner in the cases against abortion as in those in favour of this practice. Otherwise, its reputation and justice will be diminished.
The Two Religions

Dina Nerozzi†

INTRODUCTION

Is it possible to make a distinction between State and Church? Is it possible to make a distinction between State and Religion? Are we bound to respond to God’s law or State laws?

In an attempt to give an answer to these everlasting questions, we need to set up the compass and unfold the charts in a time of great confusion. The goal we are trying to accomplish with the following reasoning is how we can meet the challenge of the present time and how we can live a profitable and happy life while promoting a civilized society at large.

I. THE TWO RELIGIONS

Since the beginning of time two religious systems relentlessly confront and challenge one another.

The first system is based upon the fact, hard to deny, that the Universe exists irrespective of human intervention. Human beings did not create life autonomously, nor can they be acknowledged for the world’s wonders.

Since it is impossible for human beings, with their limited intellectual resources, to understand how life began and the mysteries of the Universe, the problem was solved through an act of faith: the existence of a God, the Creator and Sustainer of life.

According to this worldview, the whole Universe and all living creatures are part of a prearranged order to which they must submit. Human beings, nevertheless, can tame and preside over the arranged order provided they fully understand nature’s rules and mechanisms. This is the task incumbent upon research and science.

In this worldview, science intended as “a systematic enterprise that organizes knowledge in the form of testable explanations and predictions about nature and the Universe” is accepted and well-appreciated.1

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To the contrary is the attitude towards technology, which is the use of acquired knowledge to modify nature and the reality around us. The achievements coming from technological progress are not always welcome. The invention of atomic energy, just to give an example, is certainly considered a great achievement of modern technology, but at the same time it became a real threat for all mankind.²

To be responsibly applied, modern technology should be submitted to moral rules, according to the precautionary principle, which is defined as follows:

When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. Morally unacceptable harm refers to harm to humans or the environment that is:

- threatening to human life or health, or
- serious and effectively irreversible, or
- inequitable to present or future generations, or
- imposed without adequate consideration of the human rights of those affected.

The judgement of plausibility should be grounded in scientific analysis. Analysis should be ongoing so that chosen actions are subject to review. Uncertainty may apply to, but need not be limited to, causality or the bounds of the possible harm.⁴

Actions are interventions that are undertaken before harm occurs that seek to avoid or diminish the harm. Actions should be chosen that are proportional to the seriousness of the potential harm, with consideration of their positive and negative consequences, and with an assessment of the

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² The Nuclear Threat, NUCLEAR THREAT INITIATIVE (Feb. 1, 2017), http://www.nti.org/learn/nuclear/ (“Today, nine countries—China, India, Israel, France, North Korea, Russia, the United Kingdom and the United States—hold nearly 16,000 nuclear weapons. That’s enough to destroy the planet hundreds of times over”).
moral implications of both action and inaction. The choice of action should be the result of a participatory process in order to avoid that one day men will find that the price to pay for the benefits of modern technology, is an unbearable one.

The second religious system, Atheist Humanism, is the one that rejects the idea of the existence of a higher being and states that man is the only god on earth. It claims that the universe began from an unaccounted-for Big Bang, that all forms of living creatures are the result of an evolutionary process.

In the beginning it was not the Word, it was a culture broth from which life emerged as a miracle. From the primitive forms of life, evolution gradually produced the present forms of all diversified animal and vegetal species inhabiting the earth.

It must be said that this different worldview needs an act of faith equal to, if not greater than, the one needed to believe in the existence of a God the Creator.

According to this different anthropological and cultural vision of reality, human beings are alone in the universe, there is no higher being leading their way, and men are at the mercy of a hostile nature from which they need to be liberated by all possible means.

In this different worldview, a separation between science and technology does not exist; every single enterprise that human beings are able to imagine and achieve is considered good in itself. In this different perspective, research and science have only one task, to curb and subjugate nature to the supremacy of man without any restrictions.\(^5\)

II. ATHEIST HUMANISM: THE OTHER RELIGION

All peoples living on the planet embrace some sort of religion. In the past, popular tribute was addressed to the power of nature for its ability to enhance well-being and fertility or, on the other hand, to bring about death and devastations. The ancient Egyptians worshipped the sun and the moon as well as their pharaoh; the Greeks and the Romans had a

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\(^5\) Julian Huxley, UNESCO ITS PURPOSE AND ITS PHILOSOPHY 8 (1946) (According to Huxley, the guiding philosophy of UNESCO should be what he termed, World Evolutionary Humanism).
specific god for everyday activity, a god that had to be petitioned, questioned, and honoured in order to acquire his benevolence.\(^6\)

Human beings were at the mercy of nature and of all kinds of divinities; therefore, the only way to achieve the gods’ benevolence was through the intercession of priests. Superstition and fear, the fruit of ignorance, ruled undisputed and it was possible to find people ready to take advantage of man’s gullibility and weakness.

Proverbial was the devotion that the Greek people bestowed upon Delphi’s oracle. They entrusted to it their hopes and fears and would often refer to the oracle in search for advice. Many soldiers on the verge of leaving for the never-ending wars used to go to Delphi’s oracle to know what their destiny would be. Without fail, they received this answer “Ibis, redibis. Non perieris in bello.” (You will go and you will be back. You will not die at war).\(^7\)

Reassured from the answer, they went to a war from which they often did not come back. When the bewildered relatives returned to the oracle’s priests asking for some explanations, they were told that the message was not well understood, since the oracle stated: “Ibis, redibis non. Perieris in bello.” (You will go and you will not be back. You will die at war).\(^8\)

All this was a shell game for the populace, a shameful trick whose victims were the confident petitioners. Obviously nobody knew what would have happened, who would have returned from war and who would have not. Nevertheless the role envisaged for the oracle was that it had the power to forecast the future and could not refrain from revealing it to the devout petitioners.

The ploy allowed the oracle to go on for a while, until the deception was discovered and from that moment the time had arrived for the oracle and its priests to shut down. To tell the truth, it seems that the oracle simply moved from the original place to a worldwide center, in fact these days


\(^7\) Nathan Bailey, Oracles, THE UNIVERSAL ETYMOLOGICAL ENG. DICTIONARY (2d Ed. 1736).

\(^8\) Id.
million people are ready to entrust horoscopes and fortune tellers to be their guides in the countless problems and pitfalls of life.9

The undeniable fact that over time some priests took advantage of popular gullibility to acquire prestige and personal power gave vitality to the opposing view, the one that calls itself lay and would like to compare every religion to a quackery to be erased from the face of the earth.

At this point a question arises: what is the use of religion? Why did it enter the history and life of mankind? Why did it turn out to be so difficult to remove it from the soul, the mind, and the lives of the peoples in spite of all the repeated efforts to destroy it along the course of time? The answers may be many. One proposal is that religion seems to be a defensive embankment raised by men against their own destructive power. Men are, in fact, the only creatures in nature capable of implementing their own destruction.

Atheist Humanism, the system that counteracts the profound religious feeling of the people, is not a new achievement of man due to its amazing technological advances as the progressive ideology would like us to believe. Its origin is not even to be found in the Enlightenment, nor at the time of the Renaissance.10

The Other Religion is rooted in the hearth of man ever since time began and depicts his eternal temptation to be the master of himself and king of the Universe.

Atheist Humanism makes its entry in the history of man when, according to the Bible, the snake tempted Eve saying, “You surely will not die! For God knows that in the day you eat from it your eyes will be opened, and you will be like God knowing good and evil” (Gen. 3:1, 4-5).

Since the beginning of time there has been somebody who opposed the idea that man has to submit to a higher authority and to natural laws and tried to become the master of the Universe.

In order to better understand the meaning of a puzzle as old as the world, there comes to our help an interesting book written by Henry Delassus more than a century ago: Le Problem de l’Heure Presente.


L’Antagonisme de deux Civilizations (1905). (The Problem of Present Time. The Clash of Civilizations.)

The introduction to the book gives us the opportunity to realize how effective and fashionable is the old saying, “nothing new under the sun.”

His writings provide the opportunity to better understand the serious crisis currently faced, and at the same time it gives the possibility to witness the never ending conflict between the two religious systems that are confronting one another since the beginning of time.

The thought that gave origin to this book is linked to the need to investigate the nature of the evil that is burdening our society, and to realize whether there is some hope for healing. The moans are unanimous and are arising from all social classes forming a shout that seems to bring about the most severe misfortunes. “We are crumbling” say unanimously the farmers, the industrialists and the traders. They see approaching the time when it twill be for them impossible to satisfy the needs of the workers, because of the conditions imposed by taxation, by the legislation, by the global competition, and by those conditions imposed by themselves through their own lifestyles. This ruin of the State and of the private sector is not the worst evil. Scourge of money is a curable one; but we are struck by what constitutes the vital forces of society. The clergy is clumsy in its social actions as well as in the religious ones; is humiliated in the eyes of the people that he is supposed to educate, ennoble, sanctify; is enslaved to the State, that can withdraw the bread or can decide to buy it with its favours, at will. The Judiciary has been corrupted and the Army has left insulting and disorganized. Which nation can survive without these three forces? The nations that loose them, dissolve; the social elements disintegrate and pretty soon – this is the story of all the peoples that are bound to perish – their provinces fall in the hands of the close nations that absorb them in their life.

May I say that evil is even more profound? Evil affects not only the nation, but also the social state; and this does not

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11 Henri Delassus, Le Problem De L’heure Presente, 2 DESCLEE 17, 18 (1904).
occur in France only. The three pillars of social life: private property, family, religion are shaken everywhere, in whole Europe, in the whole civilized world.

Leo XIII in His Encyclical “Humanus Genus” has observed it.

“the ultimate aim of Freemasonry is to uproot completely the whole religious and political order of the world which has been brought into existence by Christianity and to replace it by another in harmony with their way of thinking.”

The work is in progress and the Church has to defend herself at the same time from external enemies that are willing to make Her vanish, and from Her own sons that are studying the way to corrupt the doctrine.

Each person who cares about his interests, those of the family, of the nation, of the entire mankind, must ask himself: where does this destructive fury come from, why this inconceivable folly that is shaking France and, with her, Europe and pretty soon the whole world?

From these ruins shall we be able to see a renovation? This is the great problem of the present time.12

It is worth remembering that in 1914 World War I began, with its heavy burden of death and destruction.

In Delassus’ book, it is also possible to find the speech given on October 28th, 1901 in Toulouse by Waldeck-Rousseau, a French politician and member of the Masonry. In 1901, Waldeck-Rousseau signed his Law Associations Bill, which would produce as a result the abolition of all religious orders, convents, and Catholic schools all over France.

Through the words of Waldeck-Rousseau we are able to understand the meaning of the clash underway, then as well as now, and what is at stake:

The Church is always there continuously proclaiming that the real process of civilization is the one which really gives an answer to the true condition of man, to the destiny

\[12\] Pope Leo XIII, Humanum Genus ¶10 (Libreria Editrice Vaticana, 1884).

assigned to him by his Creator and made possible by the Redeemer; therefore, as a consequence, society must be built and governed in a way to favour all the efforts towards sanctity. And Revolution is also always there saying that man has only a earthen end and his intelligence was provided just to find the proper way to better satisfy his appetites and therefore, as a consequence, society must be organized and governed in a way to give the highest possible quantity of mundane and carnal satisfactions to all the people.\textsuperscript{13}

Atheist Humanism is therefore nothing new. It is an old and recurrent temptation. It represents the exaltation of man, his reason, his wishes, and his will that must become the measure for everything. According to the Humanist worldview, man is the only master of his own destiny, capable of ensuring material well-being and happiness in full autonomy.

For the Humanist philosophy, personal fulfilment, happiness, love, and justice are sought individually without any reference to a metaphysic reality. Man does not need to look outside himself to find salvation. The Humanists believe that moral values are relative, devised according to the needs of a specific group of people. Ethics are likewise situational, and therefore changeable, according to the technological advancements acquired by scientific progress.\textsuperscript{14}

For a long time, laws, as the product of human intelligence, were inspired by the principles of logic and Natural Law, but as time went by, and with the new technological acquisitions, these pillars have disappeared. The core of the Humanist creed is not limited to denying the existence of a God the Creator, it also considers the natural order an enemy to subdue. Therefore, Natural Law, as well as logic, have to be pushed into a corner each time they conflict with individual wishes and will. This is the reason why, as time went by, for the humanist creed it became necessary to enact laws that are, as a matter of fact, laws against nature and against the principle of logic.\textsuperscript{15}

\begin{itemize}
\item[] \textsuperscript{13} Delassus, supra note 12.
\item[] \textsuperscript{14} John B. Wong, \textit{Christian Wholism: Theological and Ethical Implications in the Postmodern World} 34 (2002).
\item[] \textsuperscript{15} Fred Hutchinson, \textit{The revolt against reason: The culture war and the fight to save}
Some of the ways modernism enacted laws against nature and the principles of logic are explained thusly: abortion is against Natural Law since life in the mother’s womb is not a disease to be cured with abortion, and gender ideology not only is against the natural law but is also against the principles of logic since there is no way that homosexual partners can achieve the gift of life.

Humanists reject Judeo-Christian morals and ethical laws, as expressed in the Ten Commandments, because they are considered dogmatic, obsolete, authoritarian, and above all a hindrance to human progress. It is solely in the name of progress that Natural Laws are sacrificed, it is in the name of progress that unborn life in the mothers’ womb is considered a disease to be cured with abortion, and it is in the name of progress that “lives not worth living” are ended. Moreover, it is always in the name of progress that male/female polarity must be rejected in an irrational project of reorganization of all mankind.

According to the Humanist worldview, human beings would achieve the higher peak of their greatness, the final goal and their full self-realization, the moment in which they stop believing in a higher being. When man wipes out the idea of God from the face of the Earth, he can feel free to do whatever he wants and, especially, he can enjoy the grandiosity arousing from his extraordinary achievements.

To reach the coveted goal, steps are thus obliged. First of all, men must be freed from the idea of a God Who sets limits and immovable rules deriving from Natural Laws; subsequently, he has to proceed in the task of liberation from the idea of good and evil to reach the final goal of liberation from the idea of guilt and justice.

All ties that lead to the idea of a higher justice, not manipulated by human will, must not survive God’s disappearance. The aim of the liberation fight is thus set, and the compass towards the brave new world is oriented against the writings of the Bible and the New Testament to their total demolition and reset.16

According to these premises, Humanist philosophy must, as a first step, open the road to the liberation of erotic minorities, as advocated by Lars Ullerstam, a Swedish psychiatrist whose book “The Erotic Minorities”

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defends the right to any sexual perversion; a term lately renamed as
sexual orientation, since, in a politically correct world, the term
“perversion” is not featured in the dictionary. In a world in which there
are no fixed codes of behaviour to follow and what matters is only
individual will, the inevitable consequence will be that all wishes and
behaviours must be considered equal, right, and unchallengeable.

The Atheist Humanists, the people who want to change the world,
are convinced that to establish a new world order and to end all conflicts
and tensions among men and nations it would be enough to remove the
idea of good and evil.

The basic idea of the pioneers of the new world is the following:
man must be freed from the idea of good and evil, from the nightmare of
a vengeful and violent god, and from religions considered the mainly
responsible for inequalities and prevarications. Once these goals are
achieved it would be possible to reach peace and well-being for all
mankind.

If the problems of human beings are God and His Church, as
promoters of “change” claim, then it would be enough to erase them to be
witnessing the miracle of men becoming, as by magic, mild and gentle to
one another, without resorting to the rigors of law and to policemen.

By now we know for sure that things did not evolved as forecasted
by the Humanist revolutionaries. Time has shown us that if the “polis” is
organized regardless of the God-given precepts of good and evil, we will not
free men from a self-imposed yoke, but we will contribute to a rampant
social chaos that must be stopped as soon as possible.

In the response to the alarm coming from increased social malaise
due to drug addiction, alcoholism, generalized violence, irresponsible
sexuality, pornography, robberies, racketeering more or less organized,
the Humanist project had to stop its course and find a way out.

After the negative experiences, the enlightened revolutionaries
decided that it would have been better to keep a distinction between
good and evil, and they decided that it is better for man to pursue good.
In itself this is already good news.

Since humanists feel free from the idea of a superior being, and have
no intention of changing their opinion, or script, they think men should
pursue good only for the pleasure of doing so. In fact, the American
Humanist Association addressed a message to the public using the modern
propaganda of billboards on city buses saying: “Why believe in god? Just be good for goodness’ sake.”17

Is that all? That’s all. It seems that the Humanist project can go on upon these new foundations with no need to disturb anybody else.

When the reasoning is set, once again, according to the Atheist’s standpoint, it is necessary to say that they have few problems to face. If the starting point is “there is no God,” then one must come to the conclusion that there is no free will.

Man is the only creature on earth able to choose his behaviour. What distinguishes man from other animals resides essentially in his ability to forecast the result of his actions and his capacity to make moral choices. Man is the only creature on earth free to choose between good or evil because he has the moral code written inside, as Immanuel Kant taught, or written in his genoma, as underlined by Pope Benedict XVI.18

Morality, the legal system, and the penal code stand only on this unique and distinctive ability of human beings. To delete freedom of choice from human beings would mean that morality has no meaning whatsoever, and at that point, the penal code would be meaningless as well.

A person can be judged, morally or through the penal code, only if held responsible for his actions. If there is no responsibility, there can be no sanction. Persons with mental disorders are not punishable according to the principle that they cannot make conscious choices, and therefore cannot be held responsible for their actions.19

If the starting point of the reasoning is “God does not exist and men are animals like all others,” then there can be no freedom of choice since man is, unavoidably, a prisoner either of his biological constitution or the environmental conditions, or both. If man does not have freedom of choice, then there can be no good and evil and human behaviour becomes unsanctionable.


This is the assumption upon which political action was founded since the end of World War II with the disastrous results that everybody can see.\textsuperscript{20}

Not only are the legal and penal systems rooted in morality, the ideas of liberty and equality reside upon the same transcendental matrix. Men can be sure that their inalienable rights will be preserved only if they, as society, decide to believe in God the Creator. If we don’t look beyond the biological rules and cultural dimensions of each person, how can we say there is equality among human beings? Looking around it is easy to realize how biology can be very generous with some people and much less with others, and the same is true about environmental conditions. How can we, then, talk about equality? It is possible to talk about equality among human beings only if we look up in the sky, beyond material borders, searching for God. There are no other possibilities.

Atheist Humanism has no biological or juridical bases upon which build its idea of equality and liberty. The destiny of the peoples, deceiving themselves and following the path set by the Humanist creed, is already traced - slavery and inequality on a large scale, exactly as it was before Christianity and exactly as it is, even now, where the idea of God has been rejected.

Seventy years after the beginning of the revolutionary process, Humanists had to change the original program due to the decay they have produced in society.\textsuperscript{21}

After changing their mind about the usefulness of keeping a distinction between good and evil, they now claim that to convince men to behave morally it is enough to rely upon their natural tilt towards morality.

Once again, the idea of entrusting the ideals of liberty and equality to a transcendent principle is precluded; thus, their goal seems to be far from reachable. Since when have men shown an inborn tension towards morality? We all know that man’s inborn tension is totally different and it is the one rampaging each time the idea of God was removed from the horizons of the peoples.

\textsuperscript{20} See HUXLEY, supra note 6 (the idea is also captured at: https://www.youtube.com/watch?v=lqv5Q8UjJzs).

\textsuperscript{21} G.A. Res. 53/144 (Dec. 9, 1998), http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx (The 1948 Universal Declaration of Human Rights of the UN only talked about rights, from 1998 they changed it and decided to introduce the idea of responsibility which is personal and not collective).
The people asking “Where was God in Auschwitz?” must also know where to find the answer: God was not there because He was chased out by the regime that built those concentration camps. It has occurred many times before, such as during the French Revolution, in Lenin’s and Stalin’s Russia, in Kemal Ataturk’s Armenia, in Mao’s China, in Pol Pot’s Cambodia, just to mention some of the more renowned tragedies.\(^2\)

This is the reason why the Holy Father Benedict XVI, just before the beginning of his pontificate, urged nonbelieving political leaders to organize their countries “velut si Deus daretur” (As if God existed), to avoid the recurrence of such tragedies. Cardinal Ratzinger recalled this admonishment was the one used by Blaise Pascal when dealing with his nonbeliever friends.\(^3\)

It has been shown many times along the course of history, that Atheist Humanism, as an ideology inspiring the political action, decrees the moral bankruptcy of the political system adopting it, followed inevitably by the economic bankruptcy and sometimes war.

Atheist Humanism has a meaning and a reason to be, only at individual level. It is possible, in fact, to meet some atheists behaving beyond reproach, and at the same time, it is possible to watch the miserable show of certain religious people on whose morality we need to draw a veil.

Even though history has shown Atheist Humanism’s infeasibility as a political system, there are some people who insist on the same wrong path, trying to make small changes to deceive their aim, hoping to be able to replace the genuine religious feelings of the people with a false religion in the attempt to safeguard the coexistence of civil society.\(^4\) In the brave new world, designed according to the Humanist spirit, freedom of religion can not be abolished outright, as it happened during the French revolution and at the beginning of the Russian revolution, because Humanists like to depict themselves as “tolerant,” and mainly because a violent revolution would start a counterrevolution from the people. Religious liberty is thus granted, but it must submit to the State’s power and control. The facade remains unchanged, but beyond it the core of Christian teaching must disappear. The Church should become part of the State bureaucracy and

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23 Ratzinger, supra note 18.
24 Fongemie, supra note 23 (Masonry is the red thread that links all these revolutions).
glorify the actions of the government, as it happens in many secularized countries.25

The war waged against the Church is invisible, deceptive, and it materializes in several ways. It can show up as true persecution leading to martyrdom, or as attempts of economic strangling, it can be done with its infiltration of questionable characters, with the slander of the saintly ones, with the imposition of laws contrary to the doctrine, or through the denied conscientious objection; but the more subtle trap materializes in endless time consuming bureaucratic impositions, which is damaging to culture, knowledge, and pastoral support for the disbanded flock.

How does the Humanist State impose itself? Abolishing the idea of a violent revolution, due to the fact that it does not grant victory and starts a reaction, the process must advance slowly and through the dialectic process: thesis, antithesis, and synthesis.

The State’s apparatuses are already tuned with the Humanistic “logic” and philosophy: from the school system to the judiciary, from the mass media system to the performing arts. The Humanist propaganda enfolds every sector of everyday life and reaches most with the glorification of sport and corporeality, as happens in all dictatorial regimes whose leaders focus more on bodily efficiency of their citizens and much less on their mental ability to discern.

The culturally-massed artillery is working at full capacity at a global level, since the end of World War II. Nevertheless, there is still some resistance. To eliminate the last resisters, it became necessary to have the judiciary, with all its coercive power, enter the battlefield. The judicial systems of the countries are increasingly leaning towards globalization of laws; therefore any State can look for and utilize laws already operative in other countries considered “more advanced” in the revolutionary process.

From the holding of the Supreme Court of the United States in the case Roe v. Wade (1973), when seven out of nine Justices decided that abortion was a legal procedure, the steps taken in this direction have been countless.

Italy is also facing a great activism of some magistrates who have abandoned their institutional task and are trying to impose their own

25 In England Henry the Eight became the head of the Church of England because he wanted to be free to do what he wanted to do. In all communist countries there are national churches that must submit to the state. If religious freedom is gone, all freedom is gone. Stéphane Courtois et al., The Black Book of Communism: Crimes, Terror, Repression 407 (Jonathan Murphy & Mark Kramer, trans., Mark Kramer, ed. 1999).
worldview on moral issues dealing with life and death, as clearly shown in the case of Luana Englaro, the Italian Terry Schiavo.26

They are also trying to impose their power and pressure on the debate surrounding medically-assisted procreation, and in every other field dealing with ethics - issues that should be far from the reach of the judiciary.

Following this path, the decision-making capacity, or sovereignty, moves from the desks of the political leaders, elected by the people, to those of the magistrates who are State officials, and inevitably, the same concept of democracy crumbles.

The problem with the judiciary is not only an Italian one, it is a global phenomenon, as clearly pointed out by Robert Bork in his book “Coercing Virtue: the worldwide Rule of Judges.”27

In spite of the fact that Atheist Humanism is a religion in every aspect, it does not show itself in its true role, but shows up as a Humanist philosophy, a cultural-religious movement in which everything stands together. It is some sort of syncretism used to give an answer to those poor in spirit, still existing on the face of the Earth, who are looking for a religious creed to believe in.

The aim of the movement was well-described in the Humanist Manifesto appearing in the pages of the New Humanist in 1933. The stated goal of the new Humanists was to offer a new religion suitable to a modern scientific era and a new ethics that had to be universal.

Aldous Huxley, Bertrand Russell, and Thomas Mann, just to mention the more renowned Humanists, were the heralds of the new religion that was supposed to wage war at war. We must not forget Albert Einstein and Sigmund Freud were also pursuing the same goal, as indicated in the chapter “Warum Krieg?” (Why War?).28

Julian Huxley, in his paper for the preparatory commission of the United Nations’ Educational, Scientific, and Cultural Organization “UNESCO: its purpose and its philosophy” (1946), declared quite clearly what the goals were of the humanist movement:

1. To go beyond traditional philosophies, theologies, and political economic doctrines;

26 Eluana Englaro, Italy’s Terri Schiavo, Dies, AM. LIFE LEAGUE (Feb. 10, 2009, 9:00 AM), http://www.all.org/eluana-englaro-italys-terri-schiavo-dies/.
2. To recognize the evolutionary bases of culture;
3. To integrate science with other humanistic activities.

Thus the general philosophy of UNESCO should, it seems, be a scientific world humanism, global in extent and evolutionary in background.”

The aim of UNESCO is to enhance scientific Humanism, having as its basic point the evolution hypothesis and its expansion at global level as its final goal.

This explains why politics is so much involved in the defence of the Evolution Theory taken to the extreme. (Resolution 11297 June 8th 2007 of the Council of Europe and Resolution 1580/2007 of the general Parliamentary Assembly of the Council of Europe). Council of Europe Resolution 1580 is concerning: The dangers of creationism in education. The document starts as follows:

1. The aim of this resolution is not to question or to fight a belief – the right to freedom of belief does not permit that. The aim is to warn against certain tendencies to pass off a belief as science. It is necessary to separate belief from science. It is not a matter of antagonism. Science and belief must be able to coexist. It is not a matter of opposing belief to science, but it is necessary to prevent belief from opposing science

2. …the Parliamentary Assembly is worried about the possible ill-effects of the spread of creationist ideas within our education system and about the consequences for our democracies. If we are not careful, creationism could become a threat to human rights, which are a key concern of the Council of Europe.

Darwinian Evolutionary Theory is the main pillar of the Humanist creed. If Evolution Theory crumbles, then the entire scientific scaffolding supporting the political “progressive” movement crumbles as well.

In fact, in spite of the enormous efforts brought about by a myriad of researchers around the world in the last one-hundred and fifty years, the fascinating evolutionary hypothesis could never reach the point of

29 HUXLEY, supra note 6.


becoming a theory since there are too many missing links, starting from the first essential one: a rational and convincing scientific explanation on how life began.  

Not even resorting to the ploy of festering Darwin’s figure will be enough to rescue an interpretation of reality, showing in full its weakness the moment in which to survive it needs to lean on the crutches of politics. At the beginning of the third millennium, it seems to revive the modern edition of Galileo’s case, when the establishment had to support a shaking scientific hypothesis to protect an ideological worldview.

CONCLUSION

From what so far exposed thus far, the inescapable conclusion is that while it is possible to make a distinction between State and Church, this becomes impossible when State and Religion are at stake.

Since society is governed by a set of laws, decrees, and norms aiming at strengthening a social order, the system of laws enforced in a country depicts the religion in place in that country.

Each law enacted in a country reveals a sealed morality and each legal norm embodies, de facto, the primary religion in that country.

While the State can behave neutrally in front of Churches, provided they only take charitable actions in support of the existing social order, it can not be neutral in front of Religions because no State can survive without laws, and the legislative system operating in a country reveals the religious faith which inspires it.

The proponents of Atheist Humanism have promoted the State neutrality myth in face of Religions in order to wage an underground war targeting Christianity. The more structured and convincing myth, where people spontaneously submit to the lowest common denominator of a civilized world, would consequently eradicate the concept of democracy which can exist only in a virtuous society, and is represented, for millennia, by the biblical Ten Commandments; those Commandments that The Supreme Court banned from public school prayers for the first time in 1962.  

The Unjust War in the Syrian Arab Republic and the Protection of Syrian Churches as Cultural Property

Michael Solomatin†

INTRODUCTION

While the destruction, looting, and black market sales of cultural property, defined as property possessing great inherent cultural value of a particular society (which varies from movable items of historical importance such as objets d’art and manuscripts, to immovable real property like churches, museums, and archaeological sites), in the international sphere is not a new phenomenon, the issue presents itself with greater significance and results in more red flags being waive at the unwary with each escalating international conflict because when such property goes missing or cannot be recovered or restored, one can infer that whatever purpose, identity, sentiment, and significance that property served for the possessing society, the result could be devastating to it as well as to the global community in several aspects.1 This was, indeed, the case from Nazi art lootings during WW II,2 to the vandalism and looting of the ancient Cambodian temple Angkor Wat by the Khmer Rougue, to the destruction of various cultural property by warfare in Kuwait, Iraq, and Afghanistan.3 The common theme among these instances is that a society’s history and identity ingrained through cultural property are victims of the repercussions of civil unrest or international conflict. This theme is indistinguishable from this article’s focus on the geographical area of the Syrian Arab Republic, or as it is widely-known as, Syria,4 and its civil war.

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To translate the latter when considering that Syrian cultural moveable and immovable property in the form of its Eastern Orthodox and Catholic churches and the relics within are among some of the most historic in the nation, but also in the world, the loss of or inability to restore these preyed-upon churches and their once amalgamated relics creates negative religious, political, and social residuum – forthcoming to blatant violations of fundamental human rights and the erasure of a society’s history, culture, and identity through what could be referred to as cultural genocide.

A. Divergence and the Ramification for Syrian Christians

In the context of political consequences, the eradication of Christian cultural property in Syria by the government’s opposition dismantles and restricts a Syrian Christian church members’ speech in the way that the disbursed members of that organization can no longer possess a voice to represent themselves as a community of that church. This is especially denoting when taking into account that Syria summates Christians to represent ten percent of its population – an already minuscule number. The end in itself turns out to be nothing but violative of the Christian community’s freedom of speech.

The segue of what occurs next could not be more appropriate. When considering the societal impact of the prevalent circumstance, the dissolution of Syrian Christian communities is detrimental not only to the rich and deep-rooted history of Christianity in Syria and the practitioners thereof, but also to the purpose and existence of such communities when looked at from a global scale because religion is not limited exclusively to any one state. These

7 Gerstenblith, supra note 4 at 336.
10 Bowker, supra note 6.
are the foremost reasons why a majority of Christians have fled from Syria, or have been martyred in the name of Christianity beside the need for self-preservation as an effect of the civil crisis.\textsuperscript{11}

Now that it is clear that compelling arguments exist to remedy the issues at hand, therefore at least one viable, simple, and effective solution should exist in order to attain the expected goal: to prevent looting and desecration of Syrian churches and religious relics by applying some relevant body of law with the intention of holding the perpetrators accountable and responsible for their actions. Given that the Syrian head of state’s, Bashar al-Assad, government is incapable of efficiently enforcing Islamic jurisprudence due to ad-hoc courts in rebel-held areas whose legal proceedings vary greatly in content and form\textsuperscript{12} due to the existence of several controlling organizations, which include the Free Syrian Army, Islamic State of Iraq and the Levant (ISIL), and other extremist organizations,\textsuperscript{13} Syria’s legislation would therefore not be the best body of law to apply.\textsuperscript{14}

International Law pertaining to cultural property does currently exist, mostly for the justification of UNESCO’s (United Nations Economic, Scientific, and Cultural Organization) existence and mission;\textsuperscript{15} however, UN (United Nations) treaties for the protection of cultural property and religious freedom were neither easily applicable nor effective in either World War, Yugoslavia,\textsuperscript{16} Syria, Iraq, or North Africa.\textsuperscript{17} If anything, these treaties were and are substantively inadequate since they have not been successfully applied to the Syrian Civil War thus far considering their non-unprolonged history.\textsuperscript{18} To this, this article will analyze the applicable legal framework and

\textsuperscript{12} Who’s to judge: The future of Syria’s judiciary, SYRIA JUSTICE AND ACCOUNTABILITY CENTRE (May 7, 2013), https://syriaaccountability.org/updates/2013/05/07/49855185394/.
\textsuperscript{14} Id.
\textsuperscript{16} David Kearne, LEAD ARTICLE: THE FAILURE TO PROTECT CULTURAL PROPERTY IN WARTIME, 14 DePaul-LCA J. Art & Ent. L. 1 (2004).
\textsuperscript{17} Gerstenblith, supra note 4 at 352.
\textsuperscript{18} Id. at 383.
the alternatives to it pertaining to the protection of Syrian Christian cultural property in the midst of the Syrian Civil War.

I. BACKGROUND OF SYRIA: ONCE THE HUB OF CHRISTIANITY, NOW A HAVEN FOR RADICAL ISLAMISTS SEEKING NATIONAL POWER

A. Syria’s Christian Community is One of the Oldest in the World

Syrian culture was not always known to be predominantly influenced by Islam. In 34 AD, by the time that Jesus Christ was already heard of in Syria, steps were being put in motion to spread Christianity – starting with the conversion of Saul of Tarsus, who later became known as St. Paul, on the road to Damascus. Between the years 46-48 AD, “Jesus’ disciples were called Christians” in the city for the first time. Following this, an Antiochian school of theology started developing between the 2nd and 4th centuries AD from which one of the most prestigious disciples, John Chrysostom, emerged. Shortly thereafter Monasticism spread in Damascus and to other areas of Syria, to include the inner regions, with “thousands of ascetics, monks and cenobites.”

St. Maron, after whom the Maronite Eastern Catholic Church was named and recently destroyed by Syrian rebels, resided in the vicinity of Aleppo. The seventh century proved to be the climax of Syrian Christianity by the fact that the Syrian population of four million was composed of 3.8 million Christians. By the ninth century, half of the population was forced to convert to Islam by the ambitious directive of an Abbasid Caliph to transform churches to mosques. Christians of course, revolted, but not to regain their once dominating numbers. Out of a population of one

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20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
million in the middle of the thirteenth century, Christians amounted to a mere 100,000.29

Currently, it is estimated that about ten percent of Syria’s population is Christian, but in reality it may be more like eight percent due to the ongoing migration stemming from the region’s conflict.30 The largest Christian group belongs to the Greek Orthodox Church, followed by Uniate churches, which recognize the Roman Catholic Pope while being an autonomous Orthodox church, and include the Syrian Catholic church, the Maronite Church, the Chaldean Catholic Church, and the American Catholic Church.31

Although the modern Christian community in Syria is diminutive, some Christians hold noteworthy titles of top bureaucrats, to include the Minister of Defense,32 merchants, and religious leaders.”33 Additionally, Syrian Christians regard the state as “a model Arab country when it comes to freedom of worship.”34 Therefore, an implication should be acquiesced how any shift in power would endanger the Christian community to a greater extent when taking into account the dire state of Syrian Christian churches because one of the more significant purposes of ISIL is to destroy “shrines” belonging to followers of minority sects of Islam, as well to those of Christians, out of a longing to “purify the region from what are considered to be heretical depictions and faith.”35

B. Background on the Syrian Conflict: West’s Influence of Pro-democracy, and Its Intolerance by Assad

Having been described by the Washington Institute as the “worst humanitarian crisis since WWII, “with over a quarter million killed, roughly the same number wounded or missing, and half of Syria’s twenty-two

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29 Id.
31 Id.
35 Gerstenblith, supra note 4 at 357.
million population displaced from their homes” as a result of President Bashar al-Assad’s attempt to suppress “Syria’s largest uprising,” the mortality and displacement rates continue to rise conceding that those statistics were published in 2015.\(^{36}\) While most of these statistics may be truthful, what the Washington Institute, in addition to multiple mainstream media sources, fail to mention is that “Syrians are not fighting their government, and Assad is not killing his own people”\(^{37}\) – but rather that the uprising was and is orchestrated and conducted by Jihadists from various foreign nations “to aid the United States, Turkey, Saudi Arabia, and Israel in order to gain control over Syria.”\(^{38}\) This is corroborated by numerous independent and international news sources which assert that many of the rebel fighters are of international and domestic origin who are “on salary” and actively supported by the already acknowledged nations while adding Qatar, Egypt, France, and Britain to the list.\(^{39}\)

Additionally, it is a well-known fact that the Obama Administration sent military weapons to the opposition of Assad following non-credible sources of whether the Syrian government used chemical weapons on its citizens.\(^{40}\) It has been evidenced that during the “winter of 2012/2013 three thousand tons of weapons were delivered to the rebels.”\(^{41}\) This in turn helped to create ISIL, which the citizens of the U.S. are ironically continuing to fight against after having contributed to its manifestation through the voting process.\(^{42}\)

Additionally, and to make matters worse, most of the renowned human rights organizations are directed by “liberal interventionists” which sequentially have dominated the United Nations by “US and

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\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) Sterling, supra note 34. See Martin Chulov, France funding Syrian rebels in new push to oust Assad (Dec. 7, 2012 2:58 PM) THE GUARDIAN, https://www.theguardian.com/world/2012/dec/07/france-funding-syrian-rebels; See also Id.


Western interests. An example of such an organization is the Human Rights Watch (HRW), which is substantially funded by liberal billionaire George Soros, who is well-known to corrupt politics. Even when disregarding the latter, the most relevant fact derived from the operation of HRW is that it fails, very possibly intentionally, to distinguish “between major and minor violations of international law and ignores or minimizes the most extreme violations of international law by powerful countries.”

C. The Just War Theory States that when Engaging in War at all, it should be Morally Justifiable

What exactly is a just war and how is it relevant to the protection of cultural property? These next few sub sections (this one in addition to D and E) will define the Just War Theory, will demonstrate that a just war was waged by Bashar al-Assad after multiple attempts to pacify civil unrest, and how the war was and is retaliated by unscrupulous acts executed by the government’s opposition.

The Just War Theory is not a doctrine based off law or a decree given by authority from above, but is rather a Natural Law which St. Augustine of Hippo and Thomas Aquinas established by the Latin motto as jus ad bellum, translated as the right to fight while touching upon “the morality of going to war at all.” The doctrine acknowledges that war is not always the greatest evil while it certainly can never be “positively good,” nor absolutely the worst when entertaining its comparison to genocide, ethnic cleansing, and wholesale slaughter. The theory is comprised of two criteria: the elements and the conduct tests.

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43 Sterling, supra note 34.
44 Id.
46 Id.
48 Id.
The elements of the just war tradition serve as a foundational framework for most of international laws of war by UN member states. The six elements are:

(1) Having a just cause – a morally justifiable reason to engage in war, which by interpretation could be accounted for to ‘protect the innocent, stop genocide, restore rights wrongfully denied, re-establish just order, and as a means of self-preservation;’

(2) The cause must be proportionate; meaning the reason for the war warrants its engagement. Proportionality could easily be misinterpreted if disregarding moral principles;

(3) The intention must be ‘right,’ in the manner of achieving a greater good and peace if not having had engaged in war;

(4) The person exercising the decision to engage in war must possess proper authority, such as the head of state, and not, for example, an illegitimate party’s leader empowered by various nations;

(5) There must a higher than not reasonable probability of the war’s success. For example, the motto ‘death before dishonor’ does not fit into this element since the result of the war would not materially or substantially impact the wager’s respective nation. And finally;

(6) War should be engaged as the last resort – after exhaustion of all attempts not to justify the first five elements.

Once all the elements have been satisfied, a second component of the Theory prescribes conduct – to include behavior to be exemplified by the soldiers partaking in the war. It sets forth the notion that innocent bystanders must not be deliberately attacked by the soldiers or fighters engaging in the warfare. The definition of “innocence” is certainly open to subjectivity and personal interpretation when considering that civilians may deem themselves “innocent” by not engaging in the actual warfare. However, this is a false perception because if they are logistically aiding any soldiers or fighters, they are indeed supporting their cause.

49 Id.
50 Id.
51 Id.
Additionally, terrorist and rebel fighters rarely wear uniforms, which needless to say, are oftentimes indistinguishable from civilians.\(^5\) Also, when fighters are not trained on the conduct of warfare, known as the Rules of Engagement; they most likely would not be conducive to properly conforming to *jus* rules when engaging in offensive or defensive action.\(^6\) Lastly, just conduct applies to all the phases of war, not solely in the pre or during phases. The implication here is that there is a critical societal issue which needs to be addressed after the war is finally over: Who will be instrumental in the post-conflict phase to aid with the recovery of wounded people and animals while also restoring society? One author proposed that this was another failure of not pursuing a just war in Iraq and Afghanistan because at the finale of those wars, “judges, lawyers, policemen, prison officers, diplomats, doctors, aid workers, civil engineers, vets and economists [were needed to help with the aftermath] and not the soldiers attempting to fill all their parts.”\(^5\) This is significant because examples will be provided below where not only unscrupulous acts took and currently take place by the government’s opposition, but also that those acts were in no way remedied. Therefore, not only do the elements of the just war need to be met in order to justify waging one, but the conduct of the soldiers and any other party engaging in the warfare, and after it, must be just also.

**D. A Just War Established In Syria**

By rudimentary application of the just war elements to the Syrian government and Assad as the head of state (who is by no means purported to be an ideal one here), it will demonstrate that the war was initiated for a just cause, which yields to a contention that foreign nations need to ally with the Syrian government and against the rebels in order to prevent further destruction of cultural property. Additionally, it will conclude that the opposition is violative of human rights by its retaliation to the Syrian government, which in turn serves as the basis for foreign nations to prosecute these individuals and hold them accountable by means of International Law.

The first element of the Theory of having a just cause is satisfied because reestablishing order from the Arab Spring uprising, which initially served as a catalyst for the conflict, was a priority of addressing an

\(^5\) Id.
\(^6\) Id.
imminent threat to the sovereign state of Syria. To support this notion, Assad considered Syria to be the “last stronghold of secularism and stability in the region . . . [and that the toppling of his government will] have a domino effect that will affect the world from the Atlantic to the Pacific and you know the implication on the rest of the world.” Syrian Christians agree.

The second element of the cause needing to be proportionate is satisfied because Syria was facing a threat which toppled governments across the Middle East and North Africa. The reason for the war warranted its engagement because it could have easily led, and almost manifested, to the toppling of the Syrian government as seen in the previous element. Satisfaction of the third element, which requires the intention to be right in the manner of achieving a greater good and peace; is justified by the fact that the Syrian people appointed Assad as the President, and that illegitimate representatives, such as those of radical Islam organizations such as ISIL, would strongly contradict the purpose for which Assad was chosen – to maintain order and peace in the country as the head of state.

In reference to the rebels, Assad stated, “Their words are meaningless. They speak this way of a president who was elected by the Syrian people and not appointed by the West – the president is not a minion of the United States. We have chosen political means of solving our problems within the first days since the onset of those events.” This serves as compelling evidence that neither violence nor authoritarianism were intended to be the methods of achieving peace. The fourth element of the person exercising the decision to engage in war must possess proper authority, such as the head of state, is satisfied because Assad was the officially elected and appointed as the Syrian head of state.

The requirement of the fifth element of meeting a higher than not reasonable probability of the war’s success could be justified by the argument that Assad possessed control over, and implemented the Syrian

56 Id.
57 Gavlak, supra note 35.
58 RT, supra note 56.
59 Id.
60 Id. (emphasis added).
61 Id.
military to engage unruly protesters after exhausting all possible methods of negotiations, which proportionally outweighs the opposition and logically infers a more than probable than not result of establishing social order. Assad called for elections for the people of Syria to voice their decisions on a potential replacement that would be the most appropriate and qualified to govern the country. This, along with Assad’s initial concession to release political prisoners in order to achieve peace in the region are clear and convincing attempts that measures other than war were considered before actually waging it.  

E. Just War of Syria Retaliated by Unscrupulous Acts

Regardless of the silly semantics used by the media in relation to who’s to blame for the civil unrest, the fact of the matter remains that human right violations of Syrian Christians as a result of the unwarranted destruction of cultural property by the rebels in Syria are evident. Three such illustrative cases are briefly summarized.

The first noteworthy event occurred on August 21, 2015 in the town of Qaryatain, where a 5th century (refer back to sub sec. I(A)) monastery of Saint Elian was demolished by the Islamic State. Relatedly, this event occurred days after ISIS rebels “publicly beheaded an 81-year-old antiquities scholar who had dedicated his life to studying and overseeing the town’s ancient ruins;” and after dozens of Christians were abducted earlier that month from the same location. It does not require a theologian to establish the fact that some, if not significant amounts, of Christian culture was inherent in the monastery, which qualifies it to be cultural property prescribed by the UN’s definition because a church is an immovable object, and this particular one has at least some inherent historic credentials. Additionally, not only is cultural property attacked, but the people who dedicated their lives are also.

In regard to the UN after this event occurred, a resident of Qaryatain “called on [it] to protect Christians in Syria, as well as ancient Christian sites.” This evidences that it is not only the international

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62 Id.
64 Id.
65 Id.
community that is concerned for the welfare of cultural property, but that Syrian citizens are as well. How ironic.

A second significant event which was reported on February 23, 2014 was the result of Islamist terrorists destroying “one of the country’s oldest Christian shrines - the church of Saint Constantine and Helen.” Albeit the building manifested into a church in 331 AD, it dates back to the first millennium BC. Inside were priceless historical icons and church utensils which were reportedly emptied out of the church before it was set on fire. Not only is this is another atrocity committed against Syria’s Christian community which results in the violation of those Christians’ rights to practice their religion, but the event also denies this community to officially exist, whether temporary or not, due to that community’s inability to rebuild the church out of scarce resources, fear of future attacks, self-preservation, or simply for pursuing a safer location by flight.

The last substantial example of the continuing human rights violations of Syrian Christians takes form in the event which occurred on Easter Sunday of 2015 when Islamic State militants blew up the 80-year-old church of the Virgin Mary in Tal Nasri village. While it is arguable that the church may not be old enough to be construed as cultural property, its leveling affects the previously discussed religious, social and political implications, but is also significant in the way that Christianity itself as a religion is being attacked, and in the most contemptible ways. During the same time-frame of this act, St. Maron’s church was also destroyed.

When looking at secular cultural property affected by the opposition, damage to “all six UNESCO World Heritage Sites in Syria” has taken place, as well as the destruction of a part of a Roman theater in Palmyra. In conclusion, it is not difficult to determine that International Law should be invoked in order to address and remedy what is left of the

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67 Id.
68 Id.
71 Id.
opposition’s aftermath if the reason for an intervention was or is lacking due to a misconception of why the war is being fought.

II. APPLICABLE PROTECTIVE INTERNATIONAL LAW

A. Background

As one of the founding fathers of International Law, Francisco de Vitoria concluded that a justification for waging war was reserved for cases where harm was done.\textsuperscript{73} That philosophy was later expanded upon by Hugo Grotius “to allow action against gross violations of the laws of nature.”\textsuperscript{74} In 1648, the Treaty of Westphalia allocated the nation state as the ultimate authority in international affairs.\textsuperscript{75} However, it was abandoned and replaced with the concept that infliction of harm was a violation of national sovereignty, pioneered by the UN Declaration.\textsuperscript{76} Therefore, UN treaties are relevant to the preservation of cultural property since harm is done by its destruction, especially since the civil conflict should have terminated with the support of the international community before it ever escalated to such turmoil and caused the damage because the Syrian Arab Republic is not only a UN member,\textsuperscript{77} but also a state whose national sovereignty was fought and financed against by the same states which should have been supporting it.

B. Failed Application Attempts of U.N.’s Body of Law

1. The Genocide Convention

The Convention on the Prevention and Punishment of the Crime of Genocide originated in 1933 from the work of Rafael Lemkin; a Polish lawyer.\textsuperscript{78} Lemkin defined cultural genocide as “one of the eight dimensions

\textsuperscript{74}Id.
\textsuperscript{75}Id.
\textsuperscript{76}Id.
\textsuperscript{78}Gerstenblith, \textit{supra} note 4 at 342.
of genocide: political, social, cultural, economic, biological, physical, religious, and moral. Lamkin focused on two specific acts, the acts of barbarism and acts of vandalism, which relate to any “form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and literature.” It is obvious to see how such a Convention would be applicable to the present case since acts of barbarism and vandalism are blatant. However, after having included cultural genocide in the draft Genocide Convention, several participating States did not approve of the concept, and therefore it was ultimately excluded from the Convention. This was a bleak foretelling of the future failures to come from the International Law community concerning the security of cultural property.

2. UN 1954 Convention

With the already given definition of cultural property, the 1954 Convention was enacted for the purpose of protecting it in the event of armed conflict with regulations for the execution of the Convention. Article 2 of the convention, Protection of cultural property, states that the protection of the property “shall comprise the safeguarding of and respect for such property.” Given the obvious violations by the opposition in the Syrian conflict, UNESCO voiced its opinions on the matter:

Archaeological sites are being systematically looted and the illicit trafficking of cultural objects has reached unprecedented levels.

There are alarming reports that Syrian heritage has been deliberately targeted for ideological reasons . . .

All layers of Syrian culture are now under attack - - including . . . Christian . . .

The protection of cultural heritage, both tangible and intangible, is inseparable from the protection of human

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79 Id.
80 Id.
81 Id.
83 Id.
84 Id.
lives, and should be an integral part of humanitarian and peacebuilding efforts.

This was published at the end of 2014, yet as delineated by the examples, destruction of cultural property in Syria continues without any imposed ramifications.

3. UN 1970 UNESCO Convention

An unsuccessful implementation history did not stop the UN from creating yet another, ill-fated treaty, the Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property.\(^{85}\) The treaty “requires” States to partake in preventative measures, to abide by restitution provisions, and be a part of the international cooperation framework.\(^{86}\) The preventative measures include educational campaigns, monitoring trade, imposing penal or administrative sanctions, and keeping inventories and export certificates. This is slightly difficult to achieve when a region is attacked by fighters from a multitude of foreign nations because a language barrier most likely exists in order to enforce effective educational campaigns and to keep inventories and export certificates, but also due to the nature of Christian cultural property – it not being a mere materialistic object with a number attached to it for the sake of record keeping.

The restitution provisions require State parties to “take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.”\(^{87}\) This feat may pose to be challenging as well since most of the destroyed churches cannot be simply returned to the owner, especially if the owner is a dissolved community. If the government opposition were to take it upon itself to incorporate Amish carpentry and work ethic for the purpose of restoring places of worship as this article is making its way to the

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\(^{86}\) Id.

\(^{87}\) Id.
ultimate concluding phase, the provisions seem to be a part of an inadequate measure. Lastly, it would truly be difficult to prove an “innocent,” or as taught in law, a bona fide, purchaser in black-market sales due to the illegality of the parties involved in the transactions in the first place. Stateside museums such as the Metropolitan and the Cleveland Museum display looted property.88 What is the resolution to that dilemma when taking into account that no conflicts stand between the so-called owners and bailees of that property when compared to an international conflict’s barriers of restoring destroyed or looted cultural property?

When considering the last requirement of the Treaty, “strengthening cooperation among and between States Parties” sounds promising on paper, but again, in reality, proves to be extremely challenging considering the fact that neighboring states, such as the previously-mentioned Turkey, Israel, Qatar, Egypt, and Saudi Arabia are funding the opposition of the Syrian government.89

4. UN Security Council Resolutions

a. Resolution 2199

The Resolution’s aim is to prevent terrorist groups in Iraq and Syria from benefiting from trade in oil, antiquities and hostages, and from receiving donations.”90 It is unmistakable that this resolution is not only violated because terrorist groups in Syria are indeed, receiving donations, but also because those donations are generously given by the previously mentioned states. Reverting to the point made in the previous subsection, if these States can without ability be held accountable for their actions, then how can the people they are funding? Syria’s Permanent envoy to the UN Dr. Bashar al-Jaafari supported this notion by stating:

Syria welcomes . . . Resolution 2199 to crack down financing terrorist groups through illicit oil sales, trading in antiquities . . .

88 Kirby, supra note 3 at 731.
The . . . resolution imposes serious commitments over member states which support terrorism in Iraq and Syria, and such commitments treat, particularly, trading oil and gas and smuggling archeological and cultural properties in a way that prevent terrorists to get financed from them.

Now we have three resolutions over fighting terrorism, and Turkey is still allowing terrorists, particularly from Islamic State in Iraq and Syria (ISIS) and Jabhat al-Nusra, to cross the joint border with Syria, as Israel assists terrorists in Golan . . . 91

It is now easy to see how ineffective UN treaties and resolutions and UN members severely impede the protection of cultural property and Syrian Christians’ human rights. Having mentioned which, the following body of law will be discussed.

C. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is relevant because it places obligations of States under the Charter of the United Nations.92 One of the purposes of the Covenant is to establish that individuals, by way of duty “to other individuals and to the community to which he belongs, are under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,” which includes religious freedom.93 Articles 18 and 27 are particularly relevant.94 Article 18, section 1 prescribes that “everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”95

Article 27 requires States in which “ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied

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91 Temmo, supra note 89.
93 Id.
94 Id.
95 Id.
the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” 96 In regard to both of the Articles, there have been numerous accusation of “both sides” of the Syrian War of violating human rights, but no such causes of action have been brought forth and litigated since the UN and its organizations are not even enforcing their own laws as previously illustrated.97 Therefore, this is yet another detriment to the citizens of the nations which cannot be protected by said Articles, and to those citizens of the member states who are represented by officials not capable of agreeing on and enforcing International Law which yields to the abuse of public monetary resources.


In 1981, the General Assembly of the UN enacted the Declaration on Religious Discrimination, which basically reaffirmed the ICCPR in the way that “discrimination against human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter.”98 The recent history of the Declaration is most notable up to the year of 2011, when the UN General Assembly “urged States to step up their efforts to protect and promote freedom of thought, conscience and religion or belief,” as:

To ensure that their constitutional and legislative systems provide adequate and effective guarantees of freedom of thought, conscience and religion or belief to all without distinction, inter alia, by the provision of access to justice and effective remedies in cases where the right to freedom of thought, conscience and religion or belief, or the right to freely practice one’s religion, including the right to change one’s religion or belief, is violated. 99

96 Id.
When analyzing Res. 36/55, its contents seem to directly apply to this article’s issue because the right of Syrian Christians to freely practice religion is violated by the destructors and looters of the churches. Therefore, this resolution is yet another body of law which could be applied against the perpetrators. However, one is led to stay attuned to the train of thought pertaining to the last body of law and its potential of being effective – which yields to a de minimus, and this may be an overstatement, effect on the communities which originally possessed the now ravaged cultural property.

2. The Rome Statute of the International Criminal Court

The Rome Statute established the International Criminal Court (ICC) in 1998 in order to exercise its jurisdiction over people for “the most serious crimes of international concern.” Furthermore, the ICC is in a direct relationship to UN member States. However, the State parties to the Statute are not automatically indoctrinated by their UN status, but are later approved by the Assembly of State Parties. Broadly, the Statute refers to three forms of international crimes: war crimes, genocide, and crimes against humanity. Article 8 of the Statute of the ICC prohibits “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments... provided they are not military objectives.” The premier international criminal prosecution by the ICC for cultural property destruction “in which the alleged perpetrator did not commit other war crimes and crimes against humanity” was of Mali’s Ahmad Al Faqi Al Mahdi, as head of the Hisbah and a member of the Islamic Court.

The Chamber found that the Prosecutor had established reasonable grounds to believe that Al Mahdi intentionally directed attacks “against nine mausolea and the Sidi Yahia mosque in Timbuktu,” thereby committing a war crime and being “criminally responsible for having committed, individually and jointly with others, facilitated or otherwise

\[101\] Id. at art. 3.
\[102\] Gerstenblith, supra note 4 at 346.
\[103\] Id. at 344.
\[104\] Id. at 386.
\[105\] Id.
contributed to the commission of war crimes.”106 While this body of law may finally look to be like the key to unlocking this issue’s resolution that has been attempted to be unlatched by copious amounts of seemingly fitting keys (analogous to bodies of law), the very significant however is that while 124 States have ratified the Statute, Syria is not one of those State parties107 – thereby making the Statute feckless, as well as the purpose of the UN and UNESCO, since a third-world country like Mali is a State party, but a developed one like Syria is not.108

III. POTENTIAL SOLUTIONS

A. Enforce action through military intervention

Philosophies of humanitarian intervention are also found in the just war tradition.109 A modern approach ‘is justified when it is a response. . . to acts “that shock the moral conscience of mankind.””110 Having arrayed how the moral conscience of Christians is shocked, especially when churches are blown up on Easter, the present issue does warrant humanitarian intervention. Additionally, globally directing military resources to oust opposing militants from regions most prone to cultural property violations by a priority list of cultural property importance is another feasible solution.111 In consideration of the priority list, creating one would prove to be difficult for not only the global community, but also a nation’s society, to agree on what cultural property is more important to preserve. An example of this is present in the issue at hand, where Christians represent a minority of the Syrian population, yet some of the cultural property associated with the Christian community dates back to a secular Syrian society,

106 Id.
108 Id.
111 Bowker, supra note 6.
if not earlier to it.\footnote{Elahe Izadl, War has damaged all but one of Syria’s World Heritage Sites, satellite images show (Sep. 24, 2014), https://www.washingtonpost.com/news/worldviews/wp/2014/09/24/war-has-damaged-all-but-one-of-syrrias-world-heritage-sites-satellite-images-show/?utm_term=.e594076657d7.} Therefore, it would be equally significant to take into account every cultural property of a region, but instead of initially prioritizing it by popularity or grandeur, a solid foundation of priority could be built upon the age of that property and the impact it made on a particular society or community.

B. Trade controls

Taking the UN’s 1970 UNESCO Convention to a higher standard for the purpose of “implementing trade controls to discourage ISIS and its network from looting and trafficking in cultural property particularly in market countries, such as Turkey, Switzerland, the United States, the United Kingdom, and China,” (ironically, or not, most of which fund ISIL\footnote{Sterling, supra note 34.}), the U.S. Protect and Preserve International Cultural Property Act, “imposes tighter import restrictions and harsh penalties for trafficking in looted objects.”\footnote{Bowker, supra note 6.} Various Syrian national and international organizations, like The Syria Campaign, are at the same time advocating for UN Security Council to restrict and ban trade in looted cultural property.\footnote{Amr Al-Azm et. al., ISIS’ Antiquities Sideline (Sep. 2, 2014), THE NEW YORK TIMES, https://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html?r=1.} This is due to the reason that the revenue which the Islamic State derives from cultural property, in the form of antiquities, and given U.S. trade data, indicates a twenty-three percent increase in cultural property “arriving from the Levant region since 2010.”\footnote{Yaya J. Fanusie & Alexander Joffee, Monumental Fight: Countering the Islamic State’s Antiquities Trafficking (Nov. 2015), FOUNDATION FOR DEFENSE OF DEMOCRACIES, http://www.defenddemocracy.org/content/uploads/documents/Monumental_Fight.pdf.} Needless to state, this type of trafficking not only “purges Syria, or any other nation, of ’pre or non-Islamic influence,’” but also benefits the global black market.\footnote{Id.} In conclusion, one would hope that such a treaty will be enforced, and through reciprocity with other States, could make positive impacts.

C. Heightening customs screening
This measure, when combined with the latter control, could be effective in the way that heightened “customs screenings in countries that have a history as a conduit for smuggling between the Middle East and Europe, such as Bulgaria, set a standard, precedent, and an example” for violators. This would be a cooperative effort involving dedication, loyalty, and resources between States to effectuate a positive result. As noted previously, many issues exist in order for Syrian cultural property to be tightly controlled around its borders if it had not already been significantly damaged or destroyed such as in the case of the destroyed churches. Therefore, such a measure could certainly be implemented and at least establish some type of track record in order to maximize its efficiency in the future if other cases manifest.

D. Setting an Example

Investigating and bringing high-profile criminal cases against terrorist organizations and their associated “network of antiquities traffickers” to the ICC in order to send “a strong, deterrent message that individuals engaged in the destruction and looting of cultural property will be arrested and prosecuted to the full extent of the law” could certainly be effective, but given the previous analysis of the complete inapplicability of the Rome Statute towards Syrian criminals, this solution seems to be light years away from an ever-encompassing International Law giving jurisdiction to the ICC. Additionally, it is of importance to note that while Assad waged a just war but allegedly violated human rights, the true criminals, those already identified as the desecrators and looters of cultural property belonging to radical Jihadist rebel organizations, would be challenging to prosecute because they are not readily-available or easily-located like a head of state would be to arresting forces.

While the UN and the global community give no high hopes for there to be immediate change for the protection of Syria’s cultural property because all six of UNESCO World Heritage sites in Syria have been destroyed (implicating that secular and archaic cultural property has

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118 Id.
119 Bowker, supra note 6.
priority over the religious), there may be some opportunity to take action by foregoing this solution and drafting a legal document to effect any possible steps needed in order to protect cultural property of the international community if it is ever endangered in other world regions. In regard to this factor, a prospective solution could be recommended: The Rome Statute could automatically encompass all foreign nations to be State parties in order to obtain jurisdiction to cases invoking the applicable International Law. An exquisite start could be in the form of beginning to automatically indoctrinate all UN Article 2 members as ICC member States. If this were to happen, violators of the Statute could at least be within the grasp of the legal process, never mind the legal effectiveness of the ICC.

E. Create an international tribunal

The final proposal would be to establish a special tribunal, similar to the International Criminal Tribunal for the former Yugoslavia or Rwanda. If this were to be pursued, “the tribunal could operate under customary International Law, incorporating the 1954 Hague Convention as well as relevant sections of Additional Protocol I.” Attempts have been made to pursue this solution. During its fifth year of continuation, the Syrian war prompted the United Nations Independent International Commission of Inquiry to establish “an ad-hoc tribunal to prosecute both sides to ensure accountability for the perpetrators of mass crimes committed in Syria.” The reason for this is to account for the use of aerial and ground weapons “indiscriminately and disproportionately” which resulted in an alarming number of human rights violations.

However, the previously-mentioned HRW recommended that the Commission of Inquiry take increased action to “further the quest for

121 O’Sullivan, supra note 71.
122 International Criminal Court, supra note 105.
124 Gerstenblith, supra note 4 at 346.
126 Id.
justice of grave abuses being committed in Syria.”\textsuperscript{127} “In particular, the Commission should – through public letters – put high-ranking individuals on all sides on notice that they could be held criminally responsible for ongoing serious crimes by forces under their command.”\textsuperscript{128} Even if both sides are prosecuted, and when considering the just war tests, more justice would be brought to Syrian Christians than not if such a tribunal is not disestablished.

CONCLUSION

In summary, Syria was initially a Christian-dominant region which succumbed to Islamic rule. Recently, and through a series of devastating events to most Syrians, Islamic rebels proved themselves to serve as a catalyst for the Syrian government to engage in military action, which it did by way of a Just War Theory with the intention of reestablishing order of the region. Throughout the use of military action, the opposition retaliated in unscrupulous acts which resulted in the damage of massive amounts of Syrian Christian cultural property. This in turn implicated detriments on the social, religious, and political levels for Syrian citizens, but most significantly, to Syrian Christians. While the potential solutions seem like viable options to ameliorate the Christian communities’ damages and losses, they do not give much hope as UN’s treaty and charter history proves an unsuccessful record in the global sphere. However, there is still light at the end of the tunnel through the proposed solutions. They include humanitarian intervention, trade controls, heightened customs screening, and establishing criminal tribunal. Therefore, the UN needs to take a herculean step, if not a leap or two forward, and implement effective means of preserving cultural property and protecting Christians.

\textsuperscript{127} Id.
\textsuperscript{128} Id.