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TURNING RELIGIOUS VALUES INTO LAW THROUGH THE LANGUAGE OF HUMAN RIGHTS: LEGAL ETHICS AND THE RIGHT TO LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

In a globalized world in which different cultures and religions intermingle and live in close proximity to one another, there are hardly any truly mono-religious states any more. At the same time mainstream politics has become significantly secularized in most of Europe. This has implications for the way the role of religiously motivated values are perceived in the context of making and interpreting legal rules. Seen from a specifically Catholic perspective, this article investigates whether it is morally licit to import (religiously motivated moral) values into law. Looking at the moral fundament of the European Convention of Human Rights and at the issue of the right to life of unborn children, the relationship between justice and faith is investigated.

KEYWORDS

Religion, values, legislation, right to life, abortion

NOTE

The article is dedicated to the staff of the Faculty of Law of Vytautas Magnus University (formerly: The University of Lithuania), Kaunas, Lithuania, on the occasion of the 90th anniversary of the foundation of the University (13 February 1922) and the establishment of the Faculty of Law (12 April 1922).

INTRODUCTION

Human rights can be, to paraphrase Sharon M. Parker,[1] a tool to transfer religiously motivated values or ethics, for example Catholic bioethics, into the realm of politics and eventually into law. But, from the perspective of legal ethics, is it licit to import religiously motivated values into law? Or does law have to be neutral in all respects, just like the state has to be neutral towards different religions – after all, the European Court of Human Rights (ECtHR) understands Freedom of Religion to serve the purpose of safeguarding the religious plurality in our societies.[2] Is it even possible to create laws which are not based on moral values? Are not religiously motivated values particularly problematic in a time when relativism and political correctness demand almost unlimited tolerance and in which religion is if not de jure then de facto widely banned from the public sphere in many European states? After all, the separation between state and religion is a hallmark of the modern state. But how far can this separation go? The European Convention on Human Rights (ECHR) allows a number of systems, ranging from strict secularism in France and Turkey to state religions in the Scandinavian countries and Great Britain. In its relation to religion, united Europe somewhat resembles the Roman Empire, which tolerated many faiths, as long as they fit into the pantheon of beliefs[3] or were – like Judaism – tolerated as a "religio licta",[4] a tolerated religion.[5] This tolerance would only come to an end if a religion, as happened with the early Christians, were considered to have become a threat to the public order,[6] in particular when religious rites threatened public peace.[7] The early Christians were considered a threat because their faith did not allow them to participate in the rites of the state religion which required worshipping the Roman gods. Today religions are considered problematic if they do not fit into the framework of what is politically correct or into the constitutional or legal order of a state. In that sense, expectations of political correctness which have achieved the status of law have practically become a sort of secular religion. But also in this regard can we see parallels to the situation in ancient Rome: just as Christianity and the old order in ancient Rome were incompatible with each other because "Christianity could not be

[1] Sharon M. Parker, "Bringing the 'Gospel of Life' to American Jurisprudence: A religious, ethical and philosophical critique of Federal Funding for Embryonic Stem Cell Research," *Journal of Contemporary Health Law and Policy* 17 (2000-2001): 808.
[2] Françoise Tulkens, "The European Convention on Human Rights and Church-State Relations: Pluralism v. Pluralism," *Cardozo Law Review* 30 (2009): 2585.
[3] Malcom D. Evans, *Religious Liberty and International Law in Europe*, 1st ed. (Cambridge: Cambridge University Press, 1997), p. 14.
[4] *Ibid.*, p. 16
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*, p. 24 *et seq.*

fitted within the framework of the Empire",[8] it is possible for Christian values to overcome the current pro-abortion attitude which is prevalent in most European countries today. Similarly, from the perspective of radical Muslims, the existing conflict between Western values and Islam could also potentially be resolved. Here the line between rhetoric and reality on the ground becomes very thin, which highlights a need to take even more seriously the role of faith in a multicultural society.

Interestingly, the encyclical *Centesiums Annus* adds a disclaimer to the Catholic church's respect for the democratic constitutional order in that there is a need to protect human dignity at all times.[9] Today, ethical and legal discourses seem to have room for many faiths, as well as for the absence of faith. But if we allow religiously motivated values to play a role in the creation and interpretation of (international) law, we still need to address which values should be taken into consideration. This article attempts to shed light on these questions from the perspective of European human rights law—that is, from the perspective of a continent the culture of which is predominantly, but by no means exclusively, Christian in its origins.

1. LAW AND SOCIETY

In the case of Ireland, where abortion is severely restricted, the existing legislation is informed by the faith of the majority of the people of Ireland[10] (although it is suggested that the desire to break with the past, that is, the British rule in Ireland, led to a focus on religion as a part of Irish identity and hence to the pro-life legislation in the Republic of Ireland)[11].

While law reflects the self-image of a society[12] and indicates what is important to the members of a particular society,[13] things become considerably more difficult when we look at the international level because:

> [a]t the time being, only a few values can be considered to be truly shared by the international community as a whole or at least its overwhelming majority. The long Universalism-Relativism-Debate on Human Rights and the debate on

[8] *Ibid.*, p. 18.
[9] John Paul II, "Encyclical Centesimus annus" (May 1, 1991), para. 22 // http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html (accessed November 17, 2011).
[10] *Cf.* Ruth Fletcher, "'Pro-Life' Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986-1992," *Osgoode Hall Law Journal* 36 (1989): 19; G. Diane Lee, "Ireland's Constitutional Protection of the Unborn: Is it in Danger*?" Tulsa Journal of Comparative and International Law* 7 (1999-2000): 419 *et seq.*
[11] Ruth Fletcher, "Post-colonial Fragments: Representations of Abortion in Irish Law and Politics," *Journal of Law and Society* 28 (2001): 568.
[12] Josef Römelt, *Menschenwürde und Freiheit – Rechtsethik und Theologie des Rechts jenseits von Naturrecht und Positivismus*, 1st ed. (Freiburg im Breisgau: Herder, 2006), p. 10.
[13] *Cf. ibid.*

> the legality of the use of force outside the limitations of the United Nations Charter on the occasion of the 2003 Iraq War, the War against Terrorism and the 1999 war of members of the North Atlantic Treaty Organization (NATO) against Serbia give a glimpse on the fundamental differences which exist already on core issues of international law. Yet regarding the, albeit small, common ground between states, at least an international legal system in which the values the international community wants to promote are given a constitutional, hence supreme, status and in which the relation between such values is clearly defined offers the possibility give answers to such questions in the future. The inclusion of non-state actors in the decision-making process of the international community, while viewed by some as a danger to national sovereignty,[14] reflects the changing role of the state in modern international law: states will no doubt continue to play a key role on the international stage in the future,[15] yet they will no longer, and already do no longer, act alone. International law, in other words, is no longer the states' family business which it used to be and most approaches to the constitutional dimension of international law are based on this assumption.[16]

While we will look at this issue in more detail later, there are some general observations which can be made already at this point: making law almost always includes a choice and usually this choice will be based on values—whether the question is to allow or forbid a risky form of technology or merely to impose a speed limit.[17] The partial lack of speed limits on German highways does not mean that German law would not respect human life; rather, it has chosen other means, such as § 1 *Straßenverkehrsgesetz* (StVG – Germany's Federal Law on Road Traffic)[18] which requires all participants in traffic on public roads to avoid risks for other traffic participants, to achieve the same goal which elsewhere is aimed at with severe restrictions of the permitted travelling speed. In the same vein most countries have instated limitations to driving while under the influence of alcohol, which is another way to express the same value-oriented choice, that is, the choice to resort to legal measures which may not be popular with the overall electorate

[14] John R. Bolton, "Should we Take Global Governance Seriously?" *Chicago Journal of International Law* 1 (2000): 221.
[15] Christian Walter, "Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law," *German Yearbook of International Law* 44 (2001): 171
[16] Stefan Kirchner, "Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?" *German Law Journal* 5 (2004): 56.
[17] On the speed limit example in the debate regarding the prohibition of abortion *cf.* also already Heinrich Geddert, "Abtreibungsverbot und Grundgesetz (BVerfGE 39, 1 ff.)": 365; in: Klaus Lüderssen and Fritz Sack, eds., *Vom Nutzen und Nachteil der Sozialwissenschaften für das Strafrecht – Zweiter Teilband*, 1st ed. (Frankfurt am Main: Suhrkamp Verlag, 1980). The example of speed limits seems to be particularly apt since one might argue that speed limits are often ignored with little or no consequences and the pro-choice camp might argue that the prohibition of abortion will simply mean that there will be more illicit, unregulated and hence unsafe abortions. This view though underestimates the force of the law as such and presupposes and anarchic mind. If prohibitions would not prevent undesired actions, the entire notion of binding laws would have long since been abandoned.
[18] Bundesgesetzblatt [German Federal Gazette] Vol. I (1971), 38.

but which serves the purpose of reducing the risk of traffic accidents and thereby protecting human life. The opposite idea, that law is possible without values, an idea which, for example, provides the basis for Scandinavian Legal Realism,[19] is an illusion in so far as the values which inform legislative choices are still there, even if they are not acknowledged by the law-makers. While domestic law might include value choices, the question remains whether international law, which after all applies to a multitude of cultures, can be value based or whether it has to be perfectly objective.

2. THE VALUE OF VALUES

If law is not informed by values, a norm is at best some sort of technocratic tool. Religion is sometimes said to make bad science. Not only does the history of science contradict this view due to the high level of involvement of religious persons in the advancement of the natural sciences, religion also makes for coherent philosophy which in turn is the fundament for solid laws. Far from being incompatible with each other, religion and religiously motivated values have for a long time been part of the legal discourse. Only more recently, with the advent of modernism and the banishment of God from the lives of many, has religion been dismissed as a factor in the discussion of law. This perceived absence of God has led to major systems of injustice in the twentieth century characterized by their disregard of God. Yet, this is not the norm. By putting themselves in the place of God, humans have created an environment which allows for unjust laws due to their disregard for the Divine. Assuming that Natural Law exists requires a presumption of the existence of a Divine Creator.[20] As a consequence of the disregard of the Creator, His creatures suffer from violations of their rights which are incumbent on them by virtue of having been made in the image of God. A return to the natural state, the Natural Law in the classical meaning of the term, is necessary in order to achieve justice for everybody concerned. This requires that we honor man not for his own sake but for the sake of his Creator. From this flows the obligation to protect both the mother and the unborn child. Obviously, abortion can serve, if any, only one of those obligations and all too often will serve none, if one takes into account the serious psychological consequences of abortion[21]

[19] *Cf.* Thomas Achen, "The Merging of Ethics, Law and Politics in the Age of Genetic Engineering," *Studies in Ethics and Law* 7 (June 1998): 122.
[20] Sharon M. Parker, *supra* note 1: 806.
[21] *Cf.* Priscilla K. Coleman, "Abortion and mental health: quantitative synthesis and analysis of research published 2005-2009," *British Journal of Psychiatry* 199 (2011): 180. This text provides "the largest quantitative estimate of mental health risks associated with abortion available in the world literature" (*ibid.*) and the author found that "[w]omen who had undergone an abortion experienced an 81% increased risk of mental health problems" (*ibid.*); *see* also Peter Petersen, "Seelische Verarbeitung des Schwangerschaftsabbruchs bei der Frau, beim Mann und bei durchführenden Ärzten": 124 *et seq.*; in: Uwe Körner, ed., *Ethik der menschlichen Fortpflanzung – Ethische, soziale, medizinische und rechtliche*

experienced by many women. Neither does this obligation end at the need to prohibit abortion; in fact in continues in the obligation to create a social environment in which abortion is simply unnecessary by encouraging fathers to live up to their responsibility as well as by creating a framework which allows women to have children without having to worry about their financial security. In the Constitution of the Republic of Ireland, this has found a clear expression when Art. 41 (2) 2 of the *Bunreacht na hÉirann* requires the state to "endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

3. JUSTICE AND FAITH

As long as a society shares a certain set of moral values, it is fairly easy to determine what is 'just' in the eyes of the people.[22] In the past, one could have considered the values on which the European societies are based to be identical with Christian values[23] but both the immigration in the last decades as well as the inclusion of states such as Turkey, Albania, Bosnia-Hercegovina and Azerbaijan into the circle of states parties to the ECHR means that we also have to consider the views of Muslims.[24] Also non-religious philosophical concepts, atheism and humanism inform the value choices of today's societies in Europe.[25] In fact, the recent upsurge of moral relativism even raises the question in how far values have eroded, maybe already to a point that they either do not play a role for society anymore (which I doubt) or at least to the point that traditional values are now accompanied by "values" (if one wants to call them that in the first place) such as hedonism. But the complaint that the search for justice becomes more difficult as societies become more diverse is nothing new.[26] Even if one assumes that, complete justice is impossible in this world.[27]

Yet, the sense that we should not allow everything which is technically possible, for example in the case of pre-implantation genetic diagnosis, experiments with embryos and the like, also resonates with non-believers. Even the former president of the predominantly atheist Czech Republic, Václav Havel, saw

Probleme in Familienplanung, Schwangerschaftskonflikt und Reproduktionsmedizin, 1st ed. (Stuttgart: Thieme, 1992).

[22] Hans Jürgen Sonnenberger, "Recht und Gerechtigkeit," *Jura – Juristische Ausbildung* 22 (2000): 562.

[23] *Cf. ibid.*

[24] *Cf. ibid.*

[25] *Cf. ibid.*

[26] *Ibid.*, citing *Kelsen*, *Adomeit* and *Cardozo* to illustrate this point.

[27] In the wake of the 9/11 terrorist attacks the Allied military response which is now known as Operation *Enduring Freedom* was initially referred to as Operation *Infinite Justice*, a term which was scrapped after concerns emerged that this label could alienate potential allies in the Muslim world because according to Muslim belief, only Allah is able to mete out infinite justice (No author named, "Operation Infinite Justice" // http://www.globalsecurity.org/military/ops/infinite-justice.htm (accessed November 4, 2011)).

atheism as connected to egoism and loss of faith, when he stated that "the atheistic nature of this civilization coincides deeply, I believe, with the hypertrophic pursuit of individual interests and individual responsibilities together with the crisis of global responsibilities."[28] Our society has become a society in which responsibility is shunned. In fact, "responsibility" and "humility" do not even carry a positive connotation anymore for most ears. We as the majority of the members of our species have made ourselves the yardstick with which we measure everything. This has lead to the result that those who have been excluded from this determination, the weak, the sick, the old, the unborn, the disenfranchised, those who have no voice, those who fall short of our demands are effectively excluded from society. Rather than accept the other as a fellow human, making humanity the measure of all things has led to the exclusion of many. Only by reverting back to putting the Creator rather than the creatures in the first place, we can find the way back to the solidarity which is inherent in our humanity. Despite all competition between members of the human race, competition in many fields, there has always been a minimum level of solidarity. Our current society, though, is actively excluding some fellow humans. In essence what happens today follows a classical pattern which has been witnessed in many wars, the pattern that the enemy is dehumanized. If the other is no longer accepted as a member of the human race, we no longer feel obliged to treat him or her accordingly and to afford them the minimum amount of decency and solidarity which everybody should be able to expect.

Human rights also have "religious origins"[29] and even somebody like former U.S. President Jimmy Carter, who emphasizes the separation of church and state[30], has to admit to having used his religious views and his political power as the 39th president of the United States to shape international politics.[31] Therefore legal scholars, too, have to be conscious of the religious and philosophical origins of the law:

> Scholars examine the philosophical basis of human rights for several reasons. One is to demonstrate that respect for human rights has grown over time and has a solid foundation. A second reason is to note that there are contradictions within and across various human rights traditions, both religious and secular.[32]

That the influence of the Catholic Church on worldly matters is small has been seen time and again when church leaders were unable to stop atrocities despite

[28] Václav Havel, "Address by the President of the Czech Republic Václav Havel to FORUM 2000 Conference," Prague Castle, Spanish Hall (September 4, 1997) // http://old.hrad.cz/president/Havel/speeches/1997/0309_uk.html (accessed November 4, 2011).
[29] Michael Haas, *International Human Rights – A Comprehensive Introduction*, 1st ed. (London, New York: Routledge, 2008), p. 10.
[30] Jimmy Carter, *Unsere gefährdeten Werte – Amerikas moralische Krise*, 1st ed. (Munich, Zürich: Pendo Verlag GmbH & Co. KG, 2006), p. 23.
[31] *Ibid.*, p. 28 *et seq.*

their intervention.[33] Some argue against a faith-based justification of morals[34] or at least argue that such a faith-based justification is not necessary.[35] Yet, it is not on the men and women in the Church, lay Catholics or Cardinals, not on the office of the pope nor on worldly power that the impact of faith on the world is based. Rather, God acts through the church when and how He sees fit. What is needed is not so much to turn the church into an instrument of politics; rather, it is necessary to be open to becoming an instrument of God and to change the world according to His plan. What God's plan is for this world we can never know, but we can get a sense of it by using our conscience and thereby determining the Natural Law which describes the world as it was, and is, meant to be by the Creator. This does not mean that we should be passive and not take any action – on the contrary: faith requires the ability to be visible through action. Far from intending to revisit the old debate between faith and action, it needs to be repeated that from a Catholic perspective, action is a natural consequence of faith.

Our world is becoming more and more secular, meaning that there is an almost automatic, "reflex-like"[36] opposition to clearly defined values like those propagated by the magisterium of the Catholic church,[37] but also that religion gives up its claims on moral leadership in certain areas which are perceived as political in the name of a relativism which is disguised as tolerance,[38] leading to a privatization[39] and loss[40] of religion. If even churches and religious groups fall into this trap of secularism and relativism, it can hardly come as a surprise that even the government of a country in which religion is so important for society as the United States seeks to change the very nature of the freedom of religion by limiting it to the mere freedom of worship.[41] While the freedom of religion includes the right to act based on one's faith[42] (always keeping in mind the rights of others of course), freedom of worship is just that: the freedom to attend Holy Mass on

[32] Michael Haas, *supra* note 29, p. 10.
[33] Andreas Englisch, *Wenn Gott spricht – Die Prophezeiungen der katholischen Kirche*, 1st ed. (Munich: C. Bertelsmann Verlag, 2009), p. 223.
[34] Norbert Hoerster, "Ist Gott unverzichtbar für die Moral?": 61; in: Peter Kemper, Alf Mentzer, and Ulrich Sonnenschein, eds., *Wozu Gott? Religion zwischen Fundamentalismus und Fortschritt*, 1st ed. (Frankfurt am Main, Leipzig: Verlag der Weltreligionen, Insel Verlag, 2009).
[35] Rüdiger Safranski, "Gott ist doch nicht tot": 82; in: Peter Kemper, Alf Mentzer, and Ulrich Sonnenschein, eds., *Wozu Gott? Religion zwischen Fundamentalismus und Fortschritt*, 1st ed. (Frankfurt am Main, Leipzig: Verlag der Weltreligionen, Insel Verlag, 2009).
[36] Klaus Berger, *Widerworte – Wieviel Modernisierung verträgt Religion?*, 1st ed. (Frankfurt am Main, Leipzig: Insel Verlag, 2005), p. 79.
[37] *Ibid.*
[38] Hans Joas, "Die säkulare Option – Ihr Aufstieg und ihre Folgen": 42; in: Karl Cardinal Lehmann, ed., *Weltreligionen – Verstehen – Verständigung – Verantwortung*, 1st ed. (Frankfurt am Main, Leipzig: Verlag der Weltreligionen, Insel Verlag, 2009).
[39] *Ibid.*
[40] *Ibid.*
[41] Ashley Samelson, "Why 'Freedom of Worship' is not enough," *On the Square* (February 22, 2010) // http://www.firstthings.com/onthesquare/2010/02/why-ldquofreedom-of-worshiprdquo-is-not-enough (accessed November 10, 2011).
[42] *Case no. 1 BvR 241/66*, German Federal Constitutional Court, Decision of October 16, 1968; in: 24 Entscheidungen des Bundesverfassungsgerichts 236, p. 246.

Sunday. It would not include the right to support the poor, to inform about one faith, to protest against abortions etc. That such an incomplete vision of the freedom of religion as a freedom of worship is being promoted by government indicates the lowering respect a secular ruling elite affords to all things religious, an effect which also includes a lack of respect for religiously framed values, such as the sanctity of all human life.[43]

Values which are based on religion not only have shaped ethics, they also play a role in a number of legal areas, for example in the regulation of financially services, where Islamic finance services have become more important also in Western countries.[44] In Western countries, it is suggested that Sharia law may be used parallel to secular law, e.g. with regard to Islamic family law[45] or as the basis for arbitration.[46] This raises issues of tolerance between different faiths because "[i]n particular (but not only) when it comes to absolute truths embodied in religion, toleration also means allowing views with which one does not agree.[47] But toleration has limits – which in this case are crossed when the religious faith as well as the good faith of an investor is abused for fraudulent purposes. The only licit way to allow for Islamic finance is to regulate it like any other financial service. In that way, the rules underlying Islamic finance would not be applied *qua* religion and the state would refrain from endorsing Islam, just like the state would not endorse Christianity when it allows ethical banking from a Christian perspective. Given that sharia law also contains rules which are incompatible with human rights, this appears to be the only realistic option if there is to be any place at all for Islamic banking in Western legal systems. Allowing for Islamic finance would thereby cease to be perceivable mainly as a tool for increased integration (although it would have this effect, to some degree); rather it would be merely an expression of the equal legal treatment afforded to religions in the pluralistic societies of Western Europe."[48]

To stay with these examples, when it comes to Islamic finance or family law, there might be a possibility that different cultures, also different legal cultures

[43] On this concept of the sanctity of human life *see* also Heike Baranzke, "Heiligkeit des Lebens. Eine Spurensuche": 87; in: Konrad Hilpert and Dietmar Mieth, eds., *Kriterien biomedizinischer Ethik – Theologische Beiträge zum gesellschaftlichen Diskurs*, 1st ed. (Freiburg im Breisgau: Herder, 2006).
[44] Stefan Kirchner, "Faith, Ethics and Religious Norms in a Globalized Environment: Freedom of Religion as a Challenge to the Regulation of Islamic Finance in Europe," *Baltic Journal of Law and Politics* 4:1 (2011): 55.
[45] *Cf.* Ann Black, "Window into sharia family law, Part 1–Aspects of marriage," *Family Relationships Quarterly* 15 (2010): 6.
[46] No author named, "Sharia arbitration in Britain," *The World* (March 15, 2010) // http://www.theworld.org/2010/03/sharia-arbitration-in-britain/ (accessed November 17, 2011).
[47] *Cf*. Beate Rossmanith, *Tolerance in the field of bioethics from a Christian view*, Licentiate Dissertation (Rome: Pontifical Athenaeum Regina Apostolorum, Faculty of Bioethics, 2010), p. 6. On the Christian view of other religions *cf*. Urszula Pękala, *Eine Offenbarung – viele Religionen. Die Vielfalt der Religionen aus christlicher Perspektive auf der Grundlage des Offenbarungsbegriffs Wolfhart Pannenbergs*, 1st ed. (Würzburg: Echter Verlag, 2010), p. 191 *et seq*.
[48] Stefan Kirchner, *supra* note 44: 71.

coexist peacefully within a common framework, such as a national constitutional law or fundamental rules in the field of law in question. With regard to the question as to when human life begins in the womb, such well-meant "tolerance" is impossible because there can only be one correct answer: either life begins at conception and the unborn child is a human being from this very moment, or it is not. This absolute nature of the question at hand makes the debate about the right to life of the unborn child so difficult. There can be no middle ground, just like one cannot be a little bit pregnant. It is one or the other. Given that the right to life of the unborn child is often also the object of religiously motivated debates, it becomes clearer why these discussions are often not only difficult but also painful for many of those who are involved. One idea behind this thesis was to provide arguments which are based on reason in order to facilitate the debate and to move it away from the often highly emotional context in which it is conducted.

Although some might claim that there can be ethics without religion, for most people ethics is closely tied in with religion.[49] The philosopher Simon Blackburn accordingly considers the loss of faith (or as he calls it, the "Death of God"[50]) since the nineteenth century[51] to be one of the biggest threats to human rights – right along with relativism.[52] Relativism gives birth to uncertainty about what is right or wrong; it is closely linked to legal uncertainty,[53] not only with regard to the laws of this world but with regard to Natural Law. This Natural Law, which is written into the hearts of man, is made partially invisible. This legal uncertainty is a result of despotic rule, as can already be seen in the *Histories* of *Herodotus* in his criticism of *Cambyses*' disregard for the laws of Persia.[54] Yet, the rule of God is not arbitrary. "[T]he law of nature is the same for all"[55] and Natural Law, being accessible anytime by everybody, regardless of faith or culture,[56] through our consciences,[57] cannot be uncertain. What can cause confusion, though, is the fact that today the conscience is often misguided,[58] which goes so far as to attempt to justify everything by claiming recourse to one's own conscience, which is simply an extremely individual form of relativism[59] which makes oneself the ultimate authority.

[49] Simon Blackburn, *Ethics – A Very Short Introduction*, 1st ed. (Oxford: Oxford University Press, 2001), p. 9.
[50] *Ibid.*
[51] *Ibid.*, p. 10.
[52] *Ibid.*, p. 9.
[53] Therefore relativism can be considered to be the anti-thesis to the very idea behind the concept of the rule of law.
[54] Herodotus, *Histories, Book III*, as quoted by Simon Blackburn, *supra* note 49, p. 18.
[55] Thomas Aquinas, "Summa Theologica": 241; reprinted in: William Ebenstein and Alan O. Ebenstein, *Great Political Thinkers – Plato to the Present*, 6th ed. (Orlando: Harcourt, 2000).
[56] *Cf.* Klaus Berger, *supra* note 36, p. 82.
[57] *Ibid.*, p. 81.
[58] *Ibid.*
[59] *Ibid.*, p. 81 *et seq.*

> Wherefore, if man were intended to live alone, as many animals do, he would require no other guide to his end. Each man would be a king unto himself, under God, the highest Kind, inasmuch as he would direct himself in his acts by the light of reason given him from high. Yet it is natural for man, more than for any other animal, to be a social and political animal, to live in a group.[60]

Relativism clouds our view towards Natural Law, thus causing a blindness of conscience. Chief among the other threats to human rights which have been identified by the Cambridge-based philosopher Simon Blackburn is egoism[61] – and these three threats to human rights, loss of faith, relativism and egoism, also favor abortion.

4. THE RIGHT TO LIFE FOR THE UNBORN CHILD UNDER ART. 2 (1) ECHR

4.1. THE IMPOSSIBILITY OF OBJECTIVITY

After denying a "right" to have an abortion, outlawing abortion based on the right to life of the unborn child under Art. 2 (1) ECHR[62] should be the next logical step. Whether the ECtHR will actually have the chance to do so anytime soon depends on the cases brought before it, but it would not be the first time that Strasbourg were to be asked to prevent an abortion (although for obvious reasons the issue of the claimant requiring to have victim status would raise a number of interesting questions, which go beyond the scope of this article). If the European Court of Human Rights were to interpret Art. 2 of the Convention to the effect that unborn children do indeed have a right to life under Art. 2 (1) ECHR, it would almost certainly face the accusation of not interpreting the Convention in an objective manner. Such a charge would be rooted in the fact that the position presented here is currently still a minority position and certainly one which is at least inspired by religion. In the case of the right to life, the choice between values and objectivity is no problem: the values by which the proposed legislative and judicative choices suggested here are informed by faith, but they also require objectivity due to the universality of the issue at stake. The question when human life begins cannot be answered differently in different countries because this is a question which is open to scientific investigation and to which one clear answer can be given. In this case, there is no space for any margin of appreciation, nor for any

[60] Thomas Aquinas, *supra* note 55: 230.
[61] Simon Blackburn, *supra* note 49, pp. 26 *et seq.*
[62] For the argument that Art. 2 (1) ECHR also protects unborn children *see* Stefan Kirchner, "Abortion and the Right to Life under Article 2 of the European Convention on Human Rights?"; in: Asifa Begum, ed., *Medical Treatment and Law* (Hyderabad: Icfai University Press, 2010).

form of cultural relativism. Not only has the idea of a cultural relativism[63] of human rights been discredited since the end of the Cold War (despite some attempts by the People's Republic of China to reframe the concept under the label of 'non-intervention in internal affairs'), the universal nature of the issue at stake in the case of the right to life does not allow for different cultural approaches. In this case, a value-based approach—here an approach which highlights the inherent value of every human life[64]—would at the same time be an objective approach, since it would not differentiate between different cultures, etc. The idea that international law could be perfectly objective has already been proven wrong by *Martti Koskenniemi*, who has done so in a manner so eloquently that it appears worth to quote him at length:

> Things, says Hegel, exist in and through the boundaries which delimit them from other things. This applies also to such an abstract thing as international law. Any determination of what might count as [']international law['] involves a delimitation of that [']thing['] towards neighboring intellectual territories, in particular theories about the character of international life (descriptions of political behaviour) and the normative principles of international politics. [...] Two intellectual operations go to establish these boundaries. International law is kept distinct from descriptions of the international political order by assuming that it tells people what to do and does not describe what they have been doing. It is delimited against principles of international politics by assuming it to be less dependent on subjective beliefs about what the order among States should be like. These two delimitations establish what lawyers commonly assume to be the [']objectivity['] of international law. Inasmuch as international law has an identity, it must differ from descriptive and normative politics in the two senses outline. My argument is that these intellectual operations do not leave room for any specific legal discourse. The two distinctions have not been – and [...] cannot be – simultaneously maintained. Lawyers' law is constantly lapsing either into what seems like factual description or political prescription. What emerges is a way of speaking about international life in which each argument seems constantly vulnerabale to justifiable counter-arguments produced by the two constitutive deliminations themselves. The argument which seeks to give identity to international law by referring to its greater objectivity (in the two

[63] *Cf.* Rhona K. M. Smith, *Texts and Materials on International Human Rights*, 2nd ed. (London, New York: Routledge, 2010), p. 50 *et seq.*; Henry J. Steiner, Philip Alston, and Ryan Goodman, INTERNATIONAL *Human Rights in Context – Law – Politics – Morals*, 3rd ed. (Oxford: Oxford University Press, 2007), p. 517 *et seq.*; David P. Forsythe, *Human Rights in International Relations*, 1st ed. (Cambridge: Cambridge University Press, 2000), p. 47; Peter R. Baehr, *The Role of Human Rights in Foreign Policy*, 2nd ed. (Houndmills, London: Macmillan, 1996), p. 13 *et seq.*

[64] *First Abortion Judgment*, German Federal Constitutional Court, Joined Cases Nos.: 1 BvF 1, 2, 3, 4, 5, 6/47, Judgment of February 25, 1975; in: 39 Entscheidungen des Bundesverfassungsgerichts 1, p. 67: man has an "own independent value in the order of cre
ation which indispensibly demands […] an unconditional respect for the life of every individual human"; *cf.* also Hans Reis, *Das Lebensrecht des ungeborenen Kindes als Verfassungsproblem*, 1st ed. (Tübingen: J.C.B. Mohr (Paul Siebeck), 1984), p. 4.

> senses outlined) has been a failure. No identifiable intellecutal realm has emerged between historiography and politics.[65]

I would not go as far as *Koskenniemi* in his final conclusion regarding the lack of space for legal discourse and the non-existence of law, but I share his sentiment that law is not an end in itself. Rather, law is a tool. More specifically, it is way of shaping the reality of the public body, *vulgo*: politics. Again, this is a prediction which has already been made by *Koskenniemi* himself when he says that "[i]t is not difficult to see that law is continuously in danger of lapsing into an apology for politics. Critics of any prevailing law regularly accuse it of having done just this. This is natural because just like politics, law is understood to exist of the pursuit of social goals and there is constant disagreement about the correct goals. The same is true of international law. Like international politics, it is assumed to emerge from the subjective, politically motivate State wills or interests. Law-creation is a matter of subjective, political choice."[66]

The lawyer is a craftsman (or craftswoman) who is an expert in one specific process, the process of shaping reality through law. The most important tool at the disposal of the lawyer is language but the resources required to shape reality through law include the values on which the law is based and which inform our vision of reality as it should be – as opposed to reality as it is now. Just like a swordsmith cannot create a new blade without metal, a lawyer cannot shape reality without values. European Human Rights Law is the opposite of Damaszene steel: a blade made of Damaszene steel derives its value from the specific process which with it has been created. European Human Rights Law derives its value not from a process but from contents, i.e., from the values on which it is based. In other words: in European Human Rights Law, it is the raw material which makes the end product precious, even if the artisans who created the Convention might have been lacking in the skill required to draft a more clearer document. But even if there is an undeniable political dimension to law and even if we consider law to be a means towards a political end, we have to remember that "while law emerges from politics and diplomacy, it is assumed to remain separable from them. It is assumed to be binding regardless of the interests or opinions of the State against which it is invoked."[67] Only "[i]f such a separation were not maintained, then we could only concede the critic's point and admit the law's political nature."[68] Even though as international lawyers we have to be aware of the "social conception of law",[69] law,

[65] Martti Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument*, Reissue with new epilogue, Reprint of the reissue (Cambridge: Cambridge University Press, 2007), p. 16 [emphasis added].
[66] *Ibid.*, p. 17.
[67] *Ibid.*, p. 17 *et seq.*
[68] *Ibid.*, p. 18.
[69] *Ibid.*, p. 17, there fn. 1.

including human rights law, is not the same as politics but it is closely interwoven with it, a fact which becomes particularly evident in the context of controversial issues such as those which we deal with in our investigation.

4.2. EUROPEAN VALUES

Coming back to the European-ness of European Human Rights Law as law and the values which provide its foundation, we can conclude that in the sense outlined above, even when a legislative decision in the field of international (human rights) law is made based on certain values, international law will be as objective as it can be. Perfect objectivity of the law is at best an ideal. I maintain that it will most often be the case that law is made based on values, be it explicitly or implicitly. The very existence of the system of international human rights law would not be possible without a certain set of values, values, which, by the way, are predominantly Christian. It is no coincidence that there are regional human rights systems in Europe, the Americas and Africa, but that we will still have to way for some considerable time before we will see an Middle Eastern Court of Human Rights or an Asian Court of Human Rights fulfill the same tasks the Strasbourg organs have been fulfilling in Europe for more than half a century. It appears only stringent and logical to interpret the European Convention on Human Rights in the light of the values which informed the very creation of European Human Rights Law as a legal discipline in the first place. European Human Rights Law is a self-contained regime[70] of international law, even though other, more general, norms of Public International Law (for example rules which concern the interpretation of treaties) are also applicable in this context. European Human Rights Law consists of the convention, protocols and other documents created by the Council of Europe. As a purely European set of rules, European Human Rights Law is also based on European values. Therefore we who practice it can confidently use our European heritage and values to interpret this quintessentially European Document. Although the Convention has been amended by the protocols and the system has seen some changes, no other pan-European legal document holds the same emotional and constitutional status as the convention. In particular the failure of the EU to create one constitutive document and the sheer size and complexity of the EU treaty make the highly technocratical EU law unsuitable for the purpose of capturing the hearts and minds, the imagination and the loyalty of the people of Europe – not to mention of course the support of the peoples of the twenty states which are

[70] On the concept of self-contained regimes in international law *see e.g.* Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law," *European Journal of International Law* 17 (2006): 484 *et seq.*; and International Law Commission, Study Group on Fragmentation, Koskenniemi, "Fragmentation of International Law", p. 4 *et seq.*//

members of the Council of Europe but not (yet) of the European Union. The already mentioned parallel interpretation of the Convention and the Charter of Fundamental Rights of the European Union which has been agreed upon in early 2011 by the presidents of the European Court of Justice and the European Court of Human Rights already make the convention the human rights part of the constitution of Europe prior to the EU's ratification of the Convention, which has become possible by Art. 6 (2) of the EU Treaty[71] in the version of the Lisbon treaty[72] as well as by Art. 59 (2) ECHR in the version after the 14th Protocol the the ECHR,[73] which entered into force in 2010.

The values which have been preserved through the last two thousand years through the faith of a large part of the European population have inspired the creators of the Convention. The ECHR is a living instrument[74] but that does not mean that those who apply the Convention have to refrain from keeping in mind these values when interpreting the rights guaranteed under the European Convention on Human Rights.[75]

4.3. THE PERSONAL SCOPE OF THE RIGHT TO LIFE UNDER ART. 2 ECHR

At present, the interpretation of the personal scope of Art. 2 ECHR suggested here is not reflected in the practice of most states which are parties to the Convention. It might therefore appear to be necessary to prove the validity of the conclusions presented here in the face of the contrary state practice. After all:

> [a] law which would lack distance from State behavior, will or interest would amount to a non-normative apology, a mere sociological description. A law which would [as might at first glance seem to be the case with the conclusions presented here] base itself on principles which are unrelated to State behaviour, will or interest could seem utopian, incapable of demonstrating its own content in any reliable way. To show that an international law exists, with some degree of realitty, the modern lawyer needs to show that the law is simultaneously normative and concrete – that it binds a State regardless of that State's

http://untreaty.un.org/ilc/sessions/55 /fragmentation_outline.pdf (accessed November 10, 2011).
[71] Consolidated version available at: Official Journal of the European Union, 2006 C 321 E/1, December 29, 2006, 5 *et seq.*
[72] Official Journal of the European Union, 2007 C 306/1, 1 *et seq.*
[73] Council of Europe Treaty Series No. 194 (*nota bene*: the European Treaty Series was renamed to Council of Europe Treaty Series starting with No. 194).
[74] *Tyrer v. United Kingdom*, European Court of Human Rights, Application no. 5856/72, Judgment of April 25, 1978, para. 31.
[75] *Cf.* on the other hand *First Abortion Judgement*, *supra* note 64, para. 113, in which the German Federal Constitutional Court seems to have been against taking the values (of the drafters or of the society to which the law in question applies) into account when interpreting law.

> behaviour, will or interest but that its content can nevertheless be verfied by reference to actual State behaviour, will or interest.[76]

It is therefore necessary to prove that a conception of Art. 2 (1) ECHR which includes all human beings, including the unborn, passes *Koskenniemi*'s test,[77] namely, that it binds states regardless of their will but that its content can be determined by monitoring state behaviour. The principles on which the wide interpretation of the scope *ratione personae* of Art. 2 (1) ECHR is based are not "unrelated to State behavior" – the generous understanding of the scope of human rights as such, the general need to protect all human life etc. All states which are parties to the ECHR respect that human life must be protected in principle. At the same time is the wide understanding shown here (which apart from the author of this thesis is shared only by few academics and practitioners, most notably the already mentioned former judges at the ECtHR, *Javier Borrego Borrego* and *Antonella Mularoni*) is not shared by most states parties to the Convention in that unborn human life is considered to be of a lesser status and therefore less "worthy" of protection than born life. Interestingly enough, the German Federal Constitutional Court held in its so called First Abortion Judgment that unborn humans enjoy human dignity ("*Würde*", a word which in German, although not identical with the word for "worth" – "*Wert*" – is nevertheless closely related to the word "würdig" which means "worthy") just like born humans do.[78] Nevertheless the same court decided that the right to life of unborn humans does not need to be protected through means of criminal law in the same manner the right to life of born humans is protected.[79] In this sense, the German Federal Constitutional Court has accepted a principle which is independent of the state – the principle that unborn children enjoy human dignity and the right to life – but which is not followed up in the legislative practice of the Federal Republic of Germany.

5. IDEAL VS. REALITY

The German Criminal Law's rules on Abortion have been the object of many changes in recent decades. In West Germany, a strict prohibition gave some way in the 1970s, followed by a change required by the *Bundsverfassungsgericht*, West Germany's Federal Constitutional Court in the First Abortion Judgment, in which it was held that the unborn child was a human being, which led to an indication model

[76] Martti Koskenniemi, *supra* note 65, p. 17.
[77] For a more detailed elaboration on how to prove the objectivity of a given set of rules, in that case of international law, *cf. ibid.*, p. 23 *et seq.*
[78] *First Abortion Judgement*, *supra* note 64, para. 109.
[79] *Ibid.*, para. 119.

which allowed abortion in cases of rape[80] (criminological indication), health risks (medical indication) or for "social" reasons (social indication), and also under the new law which is currently in place, the projected living conditions of the mother remains relevant for the legality of an eventual abortion.[81] This system already allowed some degree of eugenics through the latter two indications but this system still protected unborn children far more than the permissive laws of socialist East Germany.[82] After the accession of the newly formed states on the territory of the German Democratic Republic to the Federal Republic of Germany in 1990, both laws co-existed for some time, as had been stipulated by the reunification treaty.[83] The new law created for the reunified Germany[84] was then put to the test before the Federal Constitutional Court as well. The Federal Constitutional Court held in its so called second abortion Judgment that the unborn child requires to be protected but also that the unborn's child's right to life does not lead to an absolute requirement to protect unborn life at all times. The Bundesverfassungsgericht held that in the early phase of human development the legislature were not required to protect unborn children. Rather, the parliament can decide to place more emphasis on a consultation procedure.[85] This contradiction between the fact that the unborn child is human and is to be protected, but not really at all times, might be the worst logical mistake ever committed by the German court, which is highly respected there because it is seen as standing above the fray of politics. Nevertheless, this position is upheld to this very day.[86]

This contradiction between the claim that human life is to be protected and the reality that abortion is widely available can be not only extrapolated to other states parties to the Convention but can actually be found in the legal systems of most states which have ratified the ECHR: the states parties to the Convention

[80] *Cf.* Patrick Lee, *Abortion and Unborn Human Life*, 1st ed., 2nd printing (Washington D.C.: The Catholic University of America Press, 1997), p. 120 *et seq.*; Michael Wreen, "Abortion and Pregnancy Due to Rape," *Philosophia* 21 (1992): 201-220.

[81] § 219 (2) of the German Criminal Code (*Strafgesetzbuch*, Bundesgesetzblatt Vol. I (1998), 3322 *et seq*.), although this rule also requires a risk for the life or the well-being of the mother. There is a significant risk of abuse of this norm due to a too-wide interpretation of the term "well-being".

[82] On the abortion laws in the German Democratic Republic *cf.* Stephan H. Pfürtner, "Ethische Aspekte des Schwangerschaftsabbruches": 105; in: Uwe Körner, ed., *Ethik der menschlichen Fortpflanzung – Ethische, soziale, medizinische und rechtliche Probleme in Familienplanung, Schwangerschaftskonflikt und Reproduktionsmedizin*, 1st ed. (Stuttgart: Thieme, 1992).

[83] *Einigungsvertrag* (Reunification Treaty), Bundesgesetzblatt Vol. II (1990), 889; *cf.* also Eva Kolinsky, *Women in 20th-century Germany: A reader*, 1st ed. (Manchester, New York: Manchester University Press, 1995), p. 281 *et seq.*

[84] On the 1991/1992 debates and law reform after German reunification *see* Ulrich Vultejus, "Die Debatte zur Neuordnung des Schwangerschaftsabbruchs an der Jahreswende 1991/92": 201 *et seq*.; in: Uwe Körner, ed., *Ethik der menschlichen Fortpflanzung – Ethische, soziale, medizinische und rechtliche Probleme in Familienplanung, Schwangerschaftskonflikt und Reproduktionsmedizin*, 1st ed. (Stuttgart: Thieme, 1992).

[85] *Second Abortion* Judgment, German Federal Constitutional Court, Joined cases 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, Judgment of May 28, 1993; in: 88 Entscheidungen des Bundesverfassungsgerichts 203, 264.

[86] *Reply to Petition 4-17-07-45130-014380, January 6, 2011, referring to a written statement by the Bundesjustizministerium (German Federal Ministry of Justice) of December 29, 2010*, Petitionsausschuss des Bundestages (Commission for Petitions, German Federal Parliament), p. 2 [on file with the author].

have domestic laws which deal with abortion in one form or another. If the unborn child were not a human being, such laws – no matter whether permissive or restrictive – would not exist in the first place. In *A, B and C v. Ireland*,[87] the European Court of Human Rights has followed up on *Brüggemann*[88] by clarfying that Art. 8 (1) ECHR does not entail a right to have an abortion at will. In so far, the judgment does not really come as a surprise for those who have continuously monitored the jurisprudence of the Strasbourg organs. Any expectations of a liberalization of European abortion laws[89] had been unrealistic right from the very beginning.

Yet, most judges in Strasbourg are still dragging their feet on actually saying out loud that the unborn child falls within the personal scope of Art. 2 (1) ECHR and only few states which have ratified the Convention protect the right to life of the unborn child by prohibiting at least abortions at the mere will of the mother. From this it follows that most European states do not consider life in the womb to be substantially the same as life after birth. This is also reflected in phrases employed when speaking about human life before birth: commonly heard phrases in this context are the membership of the embryo in the "human race"[90] (as if, if we exclude the possibility of the implantation of a human-animal hybrid child, the child of a human mother could be anything but a human being), the phrase "developing human life"[91] (which merely states the obvious fact that all beings develop continuously: obviously a three year old girl is different from the same girl as a teenager, as a mature woman or an elderly lady, yet we are always talking about the same being) or, maybe worst of all because it implies a denial of the human nature of the child and can be considered an attempt to put the child on the same level as material things, the term "potential child".[92] But if those European states which allow abortion do not consider the unborn child to be equally in need of legal protection regarding his or her right to life – regardless of the reasoning behind doing so – they contradict the principle of the right to life. In fact, they contradict themselves by the very laws created to allow abortion.

If there would be no life before birth, abortion laws would not be necessary. Hence the national legislatures must have felt the need to justify the treatment of

[87] *A, B and C v. Ireland*, European Court of Human Rights, Application No. 25579/05, Judgment of December 16, 2010.
[88] *Brüggemann and Scheuten v. Germany*, European Court of Human Rights, Application No. 6959/75, Report of July 12, 1977.
[89] *Cf. e.g.* Shannon K. Calt, "A., B. & C. v. Ireland: 'Europe's Roe v. Wade'?" *Lewis & Clark Law Review* 14 (2010).
[90] *Vo v. France*, European Court of Human Rights, Application No. 53924/00, Judgment of July 8, 2004, para. 84; Tanya Goldman, "*Vo v. France* and Fetal Rights: The Decision not to decide," *Harvard Human Rights Journal* 18 (2005).
[91] No author named, "German supreme court decision on abortion" // http://groups.csail.mit.edu/mac/users/rauch/germandecision/ (accessed November 4, 2011).
[92] Leon R. Kass, *Toward a More Natural Science – Biology and Human Affairs*, 1st ed., (New York: The Free Press, 1985), p. 82.

unborn humans, regardless of which treatment the domestic laws allow for in the states which are parties to the ECHR. The need for legislation in this field already implies that the unborn child is not merely a collection of cells which is at the complete disposal of the mother. Were this so, then there would be no laws – like there are no laws regulating when a woman can cut her hair or a man can shave. After all, the cells in the hairs do not receive legal protection independent of the human to whom they happen to be attached. If then the unborn child were no different, there would be no domestic laws on abortion. Yet, there are such laws. In fact, in most legal systems abortion is a hotly debated issue. The more fact that states have found it necessary to legislate on abortion, even if they allow abortion under all circumstances, proves that domestic legislators are aware of the fact that the unborn child is not just a lump of cells which is part of the body of the mother. But if states perceive the unborn child as some-"thing" human, then they implicitly accept that the unborn child is alive already before birth. These domestic legislative decisions may be morally wrong as well as incompatible with the rights of the unborn child, but they nevertheless are indicators of the legislators being aware of the human-ness and the life of the unborn child. The principle that the unborn child is a living human being can therefore be verified through the behaviour of states, even the behaviour of those states which allow -for the "destruction" of the unborn child.

CONCLUSIONS

What is still missing from Strasbourg is a clear statement to the effect that unborn children are also protected by Art. 2 (1) of the European Convention on Human Rights.[93] But spelling this out is necessary if the Court is to take its mandate seriously. Including unborn children in the personal scope of the right to life under Art. 2 ECHR does not mean that they would *per se* take precedence over the rights of the mother – but it would mean that they have not merely an *interest* in being alive but a *right* to life. This right would then have to be balanced against the rights – and not merely the interests – of the mother. Since Art. 8 ECHR does not provide the mother with a right to an abortion simply because the mother wants to have an abortion,[94] that is, no 'choice' (to use the parlance of the contemporary debate) on the part of the mother to have an abortion – unless an equal right of the mother is at stake. Therefore a balancing of rights will require that states only allow abortions to save the life of the mother. As of now, this is not the case for most states which are parties to the ECHR.

[93] *Cf.* Stefan Kirchner, *supra* note 62, p. 199 *et seq.*
[94] *A, B and C v. Ireland*, *supra* note 87, para. 214.

This divergence between theory and practice raises serious questions. Are states not serious about human rights – or do they extend human rights only in as far as it appears to be politically opportune? And if this question can be asked, we might as well go one level deeper and ask why the law, any law, includes human rights in the first place. Is it mere compassion by those who are in power or a kind of insurance against social unrest? But if so, why would any society extend rights to those who are by their very nature too weak to mount a serious threat to the existing public order? In other words, are there any benefits to society at large which flow from protecting the weak? Certainly we could imagine a much smaller human society in which the weak simply starve to death – in fact, for most of human history this was how our society worked and in many parts of the world, this is still the case. So why this focus on human rights, particularly in the developed world? Why is it that the Chinese model of material wealth but no individual freedoms is doomed to fail in the long run? There also might be a form of self-interest: one's own interests would be an explanation as to why human rights activists become involved in this field: if abortion becomes "normal", we might not care since we who are born are no longer at risk. At first sight, the legalization of abortion can only bring benefits to those who are born and only affects the unborn. This view, though, is short-sighted in two respects. Not only does it exclude the possibility of a form of divine judgment but, even from an atheist perspective, it raises the question as to what is there to stop a state from going one step further and not only legalizing abortion but also euthanasia? The risk of euthanasia affects everybody since nobody can rule out that he or she will come into a condition in which one can no longer express one's desire to live. Fighting against abortion at the same time means fighting against euthanasia and thereby fighting against the risk of being killed when, for example, one has fallen into a coma.[95] But self-interest seems not to be enough to explain why the law protects those who are weak, specifically, those who are completely defenseless. After all, the contemporary practice shows that doing so is hardly popular. The threat to the lives of the unborn is very real and it is realized in the death of millions of unborn children every year. This corresponds with a widespread belief that abortion is merely a form of birth control, on par with contraceptive devices. This argument has become so widespread that some abortive devices are commonly thought to be merely contraceptive devices (in particular intra-uterine devices (IUDs) come to mind, but also the "morning after pill", not to be confused with the abortion pill *RU-486* IUDs and "morning after pills" do not prevent conception; rather, they prevent

[95] A current example is the debate concerning organ donations and the question what really constitutes death and therefore what makes us human, material or immaterial aspects, *cf.* Alexander Kissler, "Warum ich kein Organspender bin," *The European* (October 18, 2011) //

the implantation of the embryo[96] and thereby lead to the death of a human being, despite claims that it is not abortive[97] or that it prevents the implantation of a mere egg,[98] which obviously must be a *fertilized* egg, i.e., an unborn child). In fact, it is even unclear how IUDs really work.[99] So why is it that a society such as Ireland's still has laws which safeguard against such popular anti-life sentiments? The right to life is widely accepted, not only out of self-interest[100] but because there exists in overwhelmingly large parts of society a belief, expressed or not, in the inherent sanctity of human life. It is here where the impact of faith on society enters the equation. Laws directly or indirectly reflect the attitude of the society which is governed by these rules. In Ireland, traditional religious values continue to shape the law. There is an understanding that humans are special, that we are more than animals. This understanding extends even to those human species which have died out in the past. Nobody would assume that a Denisovan or a Neanderthal is merely an animal. But what is it that makes humans special? If it were merely the capability for reason or some form of intelligence then we would have to exclude the very young or the mentally sick (and how about every one of us – when we are unconscious or asleep[101]?), but would maybe have to include some animals such as cataceans, larger apes and cephalopods as well as some bird species.[102] Since most humans have no problem eating animals and since most societies consider the killing of a small child a terrible crime, intelligence or reason alone are not enough to explain why there are *human* rights. What makes humans so special is their relationship with the Creator. Animals, no matter how smart, are subject to the rule – and care, for responsibility is the other side of the medal called power – of humanity, while *all* humans are made in the image of their maker. If we would not believe that humans are somehow special in a metaphysical way, we might follow the Chinese model and enjoy material wealth in exchange for our freedoms. This way of thinking is creeping into the Western world and this is the threat posed by the culture of relativism and materialism. Today there are many instances in which interests are phrased as claims to a right. Nowadays, one can easily get the

http://www.theeuropean.de/alexander-kissler/8507-hirn-oder-herz (accessed October 18, 2011).

[96] David Delvin, "The morning-after pill," *Netdoctor* (May 30, 2011) // http://www.netdoctor.co.uk/sex_relationships/facts/morningafterpill.htm (accessed November 23, 2011).

[97] Judy Peres and Jeremy Manier, "Morning-after pill's not abortion, scientists say," *Chicago Tribune* (June 20, 2005) // http://www.religiousconsultation.org/ News_Tracker/morning-after_pill_not_abortion_scientists_say.htm (accessed November 24, 2011).

[98] David Delvin, *supra* note 96.

[99] *Cf. ibid.*

[100] If that were the explanation, unborn life would be protected everywhere.

[101] The latter point is made well by Christian Fahl, "Schlaf als Zustand verminderten Strafrechtsschutzes?" *Jura – Juristische Ausbildung* 20 (1998): 462, who points out that the lack of actual active awareness does not mean that the person in question is less protected by the law (in the case of *Fahl*'s text, criminal law).

impression that "everything [...] has become a right",[103] e.g. 'right' to have an abortion,[104] the right to euthanasia,[105] to so called same-sex marriage,[106] abortion, contraception, preferably state funded[107], and so on. While this idea that one is entitled to practically everything one wants is increasingly common, this view not only weakens the concept of human rights as a whole, it is also not the set of values on which European human rights law is built. The Convention has to be interpreted in light of present day factual conditions and is not subject to the whims and desires of a part (not even of the majority) of the population. This has been made clear when the European Court of Human Rights rejected the idea that the right to private life under Art. 8 (1) ECHR might include a "right" to have an abortion.[108] In a society which at least aims to have just laws, law is based on values,[109] which in turn are more often than not based on faith. Therefore faith – again – matters in legal discourse. The legal systems of the countries of Europe cannot be seen as completely disconnected from Europe's history which includes the Enlightenment as well as the horrors of war and the Shoa, but also centuries of Christian faith, the exposure to other faiths and the rifts in Christianity. In the case of the Republic of Ireland, more than 1,500 years of Christian, specifically Catholic faith, have left their mark on the society, its values and its laws. One consequence is the protection afforded to unborn children, which has been a common feature of Christian faith since its earliest beginnings.[110]

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[102] Some birds, such as pigeons, are said to pass the mirror test: Robert Epstein, Robert P. Lanza, and Burrhus Frederic Skinner, "'Self-Awareness' in the Pigeon," 212 *Science* no. 4495 (1981) // http://www.sciencemag.org/content/212/4495/695.full.pdf (accessed November 28, 2011).
[103] Andrew Clapham, *Human Rights, A Very Short Introduction*, 1st ed. (Oxford: Oxford University Press, 2007), p. 17.
[104] *Cf.* Carrie H. Pailet, "Abortion and Physician-Assisted Suicide: is there a Constitutional Right to both?" *Loyola Journal of Public Interest Law* 8 (2006-2007), p. 46 *et seq.*
[105] *Ibid.*, p. 55 *et seq.*
[106] It has to be noted, though, that there can be no right to something that does not exist, in this case because equality before the law not only demands equal also means that in principle fundamentally different cases may not be treated alike because doing so would risk injustice for those who are involved in the case which are indeed equal. *See* also William L. Saunders, "Neither by Treaty, nor by Custom: Through the Doha Declaration, the World Rejects Claimed International Rights to Abortion and Same-Sex Marriage, in Affirming Traditional Understandings of Human Rights," *Georgetown Journal of Law and Public Policy* 9 (2011).
[107] Maureen Kramlich, "The Abortion Debate Thirty Years Later: From Choice to Coercion," *Fordham Urban Law Journal* 21 (2004): 783.
[108] *A, B and C v. Ireland*, *supra* note 87, para. 214.
[109] *Cf.* Stefan Kirchner, *supra* note 16, p. 56.
[110] "Didache," 2,2 // http://www.earlychristianwritings.com/text/didache-roberts.html> (accessed February 1, 2011); "Epistula Barnabae," 19,5 // http://www.earlychristianwritings.com/text/barnabas-light foot.html (accessed February 1, 2011).

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