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Natural and Un-Natural Law

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By Jakob Cornides, J.D.

INTERNATIONAL LAW GROUP ORGANIZATIONS

Legal Studies Series • Number Two

A Program of Catholic Family & Human Rights Institute

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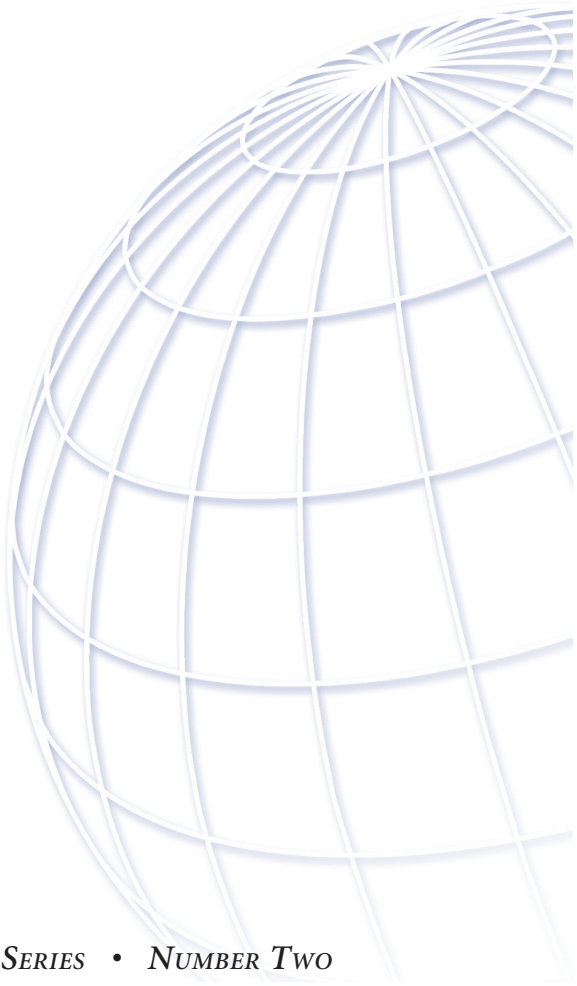

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Table of Contents

Foreword

A mere twenty years separates 1948 from 1968. Yet a chasm exists between the year of the Universal Declaration of Human Rights of 1948 and that year of great social revolution — an *annus horriblilis* whose repercussions are still felt across Western society.

The language of human rights in the Universal Declaration was grounded in something objective, a truth based in natural law. Its principle drafters — men such as the great neo-Thomist thinker Jacques Maritain and the Maronite Catholic Charles Malik — were schooled in that tradition, which is reflected in provisions such as Article 16, proclaiming that the family is "the fundamental group unit of society."

That tradition, if not close to becoming extinct, is certainly endangered, as proponents of new theories of "human rights" emerge and dominate the discourse at the United Nations, in the capitals of aid-dispensing countries of the global North and in the academic journals. There is a proliferation of rights — "reproductive rights," the right to non-discrimination based on undefined and malleable categories of "sexual orientation and gender," the right to die — all of which threaten to crowd out long-established rights, such as the rights of conscience, free speech and religious free exercise when the old and the new rights (inevitably) come into conflict. What happens when the religious minister speaks out on the immorality of homosexual conduct, or the doctor refuses to perform an abortion on grounds of conscience?

And what grounds these newly-minted rights? Is it anything objective? Or are these rights to be imposed on dissenting individuals, and even dissenting cultures — "unenlightened" nations that believe that the unborn should be protected from the moment of conception, or that believe that homosexual conduct is detrimental to individual and civilizational flourishing and the passing on of one's cultural patrimony from one generation to the next, and therefore should be discouraged (or at least not enabled) in law?

In his address to the United Nations General Assembly in April 2008, Pope Benedict XVI, noted that removing human rights from their objective, natural law basis, "would mean restricting their range and yielding to a relativistic conception, according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of different cultural, political, social and even religious outlooks. This great variety of viewpoints must not be allowed to obscure the fact that not only rights are universal, but so too is the human person, the subject of those rights."

It is with this in mind that we present to you an essay of, I believe profound clarity, from the International Organizations Law Group, the public interest law arm of the Catholic Family and Human Rights Institute.

Jakob Cornides is a thinker, based in Europe, whose writing deserves wider recognition, not only from American audiences but also those throughout the world. The monograph that follows — "Natural and Un-Natural Law" — sets forth that clash between the ideals of 1948 and the counter-principles asserted by the generation of 1968. He exposes the shoddy thinking of those who seek to establish a right to abortion — the ultimate exercise of raw, bloody power over the helpless and powerless. He brings to light the incipient totalitarianism and anti-democratic elitism of those roughly thirty United Nations and activist human rights "experts" who crafted a manifesto entitled the "Yogyakarta Principles." The document purports to propound "binding" human rights norms that are to govern social legislation in the area of "sexual orientation and gender identity," despite such norms never having been consented to by sovereign states.

After reading "Natural and Un-Natural Law," the reader is left questioning whether the human rights project begun in 1948 can continue, or whether it will collapse from its accreted weight. Indeed, one is left with a sobering thought — if rights are simply commodities handed out and enforced by the positivist state, which defines who is a "person" and

entitled to be a rights-bearer, then such rights so granted by the state can also be taken away by the state. Rights are either grounded in something objective or they are changeable and ultimately illusory.

If the human rights tradition is to be saved from those who would ultimately destroy it, then works such as "Natural and Un-Natural Law," which points to a Truth whose name some dare no longer speak, are an essential part of that reclamation project.

Piero A. Tozzi
Director
International Organizations Law Group

Abstract

On the basis of two recent publications, this paper examines how human rights-related language is used by advocacy groups to promote their particular political agendas. A key element in this strategy is to assert "consensus" around these agendas, be it of a political or academic nature, which remains to be implemented through legislation and administrative practice. A closer examination casts doubt on this "consensus" with regard to its content, as well as the procedure in which it is reached. This raises wider questions with regard to the manner in which human rights are "made" nowadays: the "experts" and advocacy groups that have gained control over much of the academic and political discourse on human rights, refusing to acknowledge an inalienable and inalterable Natural Law, underpin their campaigning with sentiments, rather than with rational arguments.

Introduction

The February 2008 issue of the Human Rights Law Review contains two articles of importance in the conversation about homosexual and abortion "rights:" "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles," by Michael O'Flaherty and John Fisher;[1] and "Abortion as a Human Right — International and Regional Standards," by Christina Zampas and Jaime M. Gher.[2]

According to its abstract, the O'Flaherty/Fisher article claims to be "the first published critical commentary" on the "Yogyakarta Principles"[3] (YP), a set of principles formulated in 2007 by "a group of human rights experts" in order to provide "a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity." The authors claim "it is likely that they (the YP) will play a significant role within advocacy efforts and, whether directly or otherwise, in normative and jurisprudential development."[4] It is essential to note that O'Flaherty is one of the 29 human rights activists and United Nations staff who composed the YP.

The Zampas/Gher article "focuses on the striking expansion of international and regional human rights standards and jurisprudence that support women's human right to abortion. It summarizes pertinent developments within the United Nations (UN), European, Inter-American and African

1 Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," *Human Rights Law Review* 8:2 (2008): 207-248.

2 Christina Zampas and Jaime M. Gher, "Abortion as a Human Right — International and Regional Standards," *Human Rights Law Review* 8:2 (2008): 249-294.

3 The full text of the Yogyakarta Principles is available at http://www.yogyakartaprinciples.org (accessed December 15, 2009).

4 Michael O'Flaherty and John Fisher, "Sexual Orientation," 207.

human rights systems regarding abortion, as they relate to women's rights to life and health, in situations of rape, incest or fetal impairment, and for abortion based on social and economic reasons and on request."[5]

Both articles have in common that they deal with what could be described as the emergence of "new human rights" which, not being generally recognized as such, in fact stand in radical contradiction to "traditional" ethical and cultural values; and, consequently, are also in conflict with the existing domestic legislation and jurisprudence in most countries. They bespeak a "fourth generation" of human rights which, unlike the second and third generations, do not build on the first generation of "civil liberties" and complement them with social and economic entitlements, but are of a truly revolutionary nature: what was once considered a crime is to be transformed into a right, and what was once considered justice, into a human rights violation.

What was once considered a crime is to be transformed into a right, and what was once considered justice, into a human right violation.

5 Christina Zampas and Jaime M. Gher, "Abortion as a Human Right," 249.

Part I: Normative and Jurisprudential Developments

It seems no injustice to the authors of both articles in saying that they are themselves actively promoting, if not anticipating, the "normative and jurisprudential developments" upon which they comment. Therefore, their views must be considered not as those of disinterested observers, but of partisan stakeholders. Prof. Michael O'Flaherty is himself one of the co-authors of the YP[6] (how then can he claim to offer a "critical commentary" on them?), while John Fisher is "Co-Director of ARC International, a non-governmental organization [NGO] that advances recognition of sexual orientation and gender identity issues at the international level."[7] Likewise, Christina Zampas and Jaime M. Gher are both employed at the Center for Reproductive Rights (CRR), an international lobby group militating for the international recognition of abortion as a human right.[8] Against this

6 The experts who drafted the YP are listed in footnote 136 of the O'Flaherty/Fisher article. Prof. O'Flaherty is one of them and, in fact, appears to have played a key role. As one recital of the text specifically mentions on page 7, "Professor Michael O'Flaherty has made immense contributions to the drafting and revision of the Yogyakarta Principles. His commitment and tireless efforts have been critical to the successful outcome of the process."

7 Cf. the biography notice published with the O'Flaherty/Fisher article.

8 The Center for Reproductive Rights describes itself as a "nonprofit legal advocacy organization dedicated to promoting and defending women's reproductive rights worldwide." According to CRR, these reproductive rights include "the right to safe, accessible and legal abortion," which it seeks to make available on demand, i.e., without any restriction. CRR claims to be funded "by a community of supporters who believe deeply in our mission." In actual fact, however, CRR's main source of funding appears to be the donations received from a small number of extremely wealthy foundations seated in the US, which (according to the organization's annual report for 2007) include the William and Flora Hewlett Foundation, the David and Lucile Packard Foundation, the Picower Foundation and, allegedly (according to an article in the *National Review* of January 26, 2004, "Agendas all their own: the perils of NGOs — non-governmental organizations"), George Soros' Open Society Institute. These same funders finance a large number of similar institutions that, in the name of "human rights," "development aid" or similar purposes, militate for the liberalization of abortion. This situation, where a wide array of seemingly independent advocacy groups depend on grants made by a relatively small number of donors, creates a false impression of pluralism, and allows these funders to

backdrop it is not surprising that the O'Flaherty/Fisher article is based on the assumption that any difference in treatment between heterosexuals and homosexuals is "discriminatory"; or that Zampas/Gher assume (unrestricted?) access to abortion should be a "human right" to be defended, and that laws prohibiting or foreseeing sanctions for abortions violate human rights. In a certain sense, therefore, both articles could be described as a monumental *petitio principii:* what the authors seek to demonstrate through their arguments is identical to the assumptions on which their arguments are based. Yet these assumptions, as the authors themselves cannot ignore, are far from universally accepted (which, in turn, is precisely the reason for their relentless campaigning): many jurisdictions continue treating abortion or same-sex relations as crimes or offences, not as "rights."

It is thus impossible to consider the O'Flaherty/Fisher article — despite the claim made by the authors — as a "critical commentary" on the YP, assisting the reader in ascertaining whether these principles do or do not reflect human rights standards. Nor can one expect to discover in the Zampas/Gher article any useful guidance or insights with regard to whether abortion is a crime or a right. Nevertheless, both articles are of great interest and important reading for any person interested in contemporary debates around human rights. While they cannot realistically be acknowledged as scholarly contributions, both articles can be seen as the stocktaking by political campaigners who wish to change the traditional meaning of human rights and who, after some years of intense lobbying, give an account of what they have achieved and what, in their assessment, remains to be done. Reading them in this way, one can safely assume to receive a complete picture both of the progress made in the transformation of "human rights," and of the resistance this transformation process still encounters. Without doubt, if someone were to look for a complete bibliography of all reports issued by UN committees, or all decisions issued by the European Court of Human Rights (ECtHR) that could, in one way or the other, be used to promote abortion as a "right," he or she may happily expect to find that information in the Zampas/Gher article. The same can be said for the O'Flaherty/Fisher article in relation to lesbian/gay rights. Besides this, both articles provide the attentive and discerning reader with some valuable insight into how a manipulative discourse on "human rights" is used today to promote certain political agendas:[9] how the debates are framed, how political

influence the political decisions of governments and international institutions that, sometimes naïvely, consider such advocacy groups as legitimate representatives of civil society.

9 The advocacy work of CRR raised considerable public attention in 2003, when internal strategy papers were leaked to a member of the US Congress who immediately had them

campaigning is disguised as scholarly work, which argumentative patterns are used, and which questions, by contrast, are silently passed over. They reveal the mindsets and working methods of many contemporary "human rights experts" and activists who consider human rights to be a motor for a social and cultural change most people disagree with, rather than a shield to defend fundamental values with which most people agree. They give a snapshot of the current situation which, blurred as snapshots usually are, is probably more illustrative of the dynamics of the debate around abortion and same-sex issues than a more static picture could be.

It comes as no surprise, then, that the new generation of human rights is highly divisive and controversial. There is a risk that the attempt to use human rights as an instrument to impose newly manufactured cultural and social values on societies unwilling to accept them could lead to some kind of schism in the world of legal thought: human rights would no longer be universal. Such a schism can only be avoided if the debate returns to some recognized common ground. In this article, therefore, it is argued that such common ground must be the assumption that "human rights" must be understood as a codification of Natural Law. Where this assumption is not made, it becomes inevitable that radical pressure groups use a stultified human rights language to campaign for a questionable political agenda.

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published in the Congressional Record (Extension of Remarks – E 2534-2547 of 8 December 2003) in order to warn the public against "the schemes of those who want to promote abortion here and abroad." Among other things, the leaked papers (from which all of the following quotations are taken) reveal that CRR has a consistent strategy of "establishing international right norms." The goal of that strategy is "to ensure that governments worldwide guarantee women's reproductive rights out of an understanding that they are bound to do so." Since, at the same time, CRR acknowledged that "there is no binding hard norm that recognizes women's right to terminate a pregnancy" and that "the campaign for the adoption of a new international treaty would be an extremely involved, resource-intensive and long process," its efforts are now directed at "developing a jurisprudence that pushes the general understanding of existing, broadly accepted human rights law to encompass reproductive rights." A key element in this strategy is to bring cases to international and regional adjudicative bodies (such as the UN, the ECtHR, or similar bodies) in order to promote novel interpretations of existing norms. "There are several advantages to relying primarily on interpretations of hard norms. As interpretations of norms acknowledging reproductive rights are repeated in international bodies, the legitimacy of these rights is reinforced. In addition, the gradual nature of this approach ensures that we are never in an 'all-or-nothing' situation, where we may risk a major setback. Further, it is a strategy that does not require a major, concentrated investment of resources, but rather it can be achieved over time with regular use of staff time and funds. Finally, *there is a stealth quality to the work*: we are achieving incremental recognition of values without a huge amount of scrutiny from the opposition. These lower profile victories will gradually put us in a strong position to assert a broad consensus around our assertions." (emphasis added)

Part II: Reality Check: The Somewhat Disappointing Achievements of "Human Rights Advocacy"

In any discussion relating to "human rights" there is one fundamental question: how do we identify what is and what is not a "human right"? What, for example, are the reasons that should compel us to believe that access to abortion is a human right, or that same-sex couples should have the right to marry?

One simple answer could be that human rights are those which are generally recognized as such by the international community. In order to determine what has been generally recognized as a human right, one could rely on the relevant legal texts to which a greater or lesser number of States have signed up.

But if these criteria are applied, the recognition of access to abortion or of gay/lesbian rights as human rights meets some important obstacles. Indeed, these novel rights do not appear to find much support in positive law. And if, rather than looking into the statute books, one were to concede that for a "human right" to be "generally recognized" it would suffice to demonstrate that it is implemented and respected in practice, the result is even clearer: the facts exposed by Zampas/Gher and O'Flaherty/Fisher in their respective articles do not demonstrate that abortion or homosexual acts are generally considered as "rights"; instead, they could rather be used to demonstrate the contrary.

Abortion as a Human Right: Nowhere Out of Africa

With regard to abortion, Zampas and Gher may at least be trusted to have carefully analyzed all the relevant international legislation at both a global and regional level. Wherever they have found even the slightest hint of access to abortion being considered a (human) right in any one country

or region, or by any political institution or UN Committee, they surely have not failed to mention it; in that sense, they can make a valid claim to comprehensiveness. Yet, while they speak of "pertinent developments within the UN, European, Inter-American and African human rights systems regarding abortion,"[10] and happily announce that "human rights advocacy for abortion has gained greater momentum," they nevertheless cannot avoid acknowledging that access to abortion is far from being universally recognized as a human right. Judging from their own words, the success of their advocacy appears to be limited:

> The most explicit pronouncement of women's right to access abortion in the text of a human rights treaty is found in the Protocol on the Rights of Women in Africa (African Women's Protocol, AWP) … The Protocol explicitly states: States Parties shall take all appropriate measures to ... protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.[11]
>
> The AWP is the only legally binding human rights instrument that explicitly addresses abortion as a human right.[12]

As obscure as the AWP may be, the fact that an international human rights instrument "addresses abortion as a human right" is admittedly a remarkable success of CRR's advocacy work, even if the instrument has only a limited regional outreach. Yet, one could also say it in other words: "No human rights treaty except the AWP explicitly articulates women's right to abortion."[13] And even in the AWP this new "right" exists only in narrowly defined circumstances. Moreover, if one takes a closer look at the list of States having ratified this instrument, one finds that the twenty signatory States of the AWP[14] include a remarkable selection of countries that are otherwise not reputed for their promotion of the feminist agenda. Many of signatory States belong to the Islamic cultural sphere. Given that Islam has a reputation of usually not be-

10 Christina Zampas and Jaime M. Gher, "Abortion as a Human Right," 249.

11 Ibid., 250.

12 Ibid.

13 Center for Reproductive Rights Briefing Paper: "The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights" (February 2006), 6.

14 According to n. 8 of the Zampas/Gher article, these States are: Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, Gambia, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Togo and Zambia.

ing very receptive to those progressive concepts of women's rights advocated by Zampas/Gher and likeminded activists, it is more than surprising that *these* States should have gathered to negotiate and sign, on their own initiative, a protocol in which access to abortion is treated as a human right. One wonders whether the ratification of the AWP by the governments concerned really reflects the attitude of the people supposedly represented by those governments.[15] Could the willingness to sign up have had to do with the fact that several of the signatory States are developing countries relying heavily on aid from industrialized countries, and that such aid was made conditional on signing the Protocol? It is a known fact that many Western countries attempt to exert pressure on developing countries in this way, making the grant of development aid conditional on the liberalization of abortion.[16] But even if a government gives way to such pressure, does that mean that the "liberalized" legislation reflects a general moral sentiment in that country according to which abortion were to be considered a right?

In addition, Zampas/Gher themselves provide (probably *malgré eux*) ample evidence that outside of the AWP abortion is generally *not* recognized as a "right" — not even in Europe, where legislation on abortion is considered to be the most liberal, given that many countries refrain from applying criminal sanctions against abortion in certain circumstances. For example, with regard to the European Convention on Human Rights (ECHR), they write that the Convention "does not expressly guarantee any health or reproductive rights,"[17] and that "the ECHR bodies have carefully avoided stating whether abortion is protected under the ECHR, and/or whether 'legal and safe abortion should or should not be available under domestic law.'"[18]

15 It should be noted that several, if not a majority, of these governments cannot be described as democratic, a circumstance that provides further grounds to such doubts.

16 This is termed "contraceptive colonialism" in some quarters. One widely publicized instance of this kind affected Nicaragua, which in October 2006 adopted a law contemplating a total ban on abortion. Even before the adoption of the vote, a group of diplomats attempted to pressure the government to drop the proposal urging them to reflect and enter into a dialogue before making the decision. A threatening letter was sent to National Assembly President, Eduardo Gomez, by a group of ambassadors of donor countries, hinting that aid money, still badly needed after the devastation of Hurricane Mitch in 1998, would be withheld if abortion restrictions were not loosened. The letter's signatories included the ambassador from Sweden, Eva Zetterberg; advisor of development and head of cooperation of Canada, Kerry Max; representative of United Nations Development Program (UNDP), Alfredo Missair and formerly the representative of UN Children's Fund (UNICEF) for Latin America; and ambassador of Finland, Inger Hirvela Lopez.

17 Christina Zampras and Jaime M. Gher, "Abortion as a Human Right," 275.

18 Ibid., 276.

In short: under current international law, there is *no* right to abortion. This "right" remains yet to be manufactured.

Against this overwhelming evidence, Zampas/Gher might, of course, argue that the tide is turning: whereas a majority of countries still reject the view that abortion is a human right, some progressive-minded countries are now beginning to accept this view, and their number is increasing.[19] In addition, they point to a number of recent cases in which existing international conventions on human rights have been, by relevant treaty-monitoring bodies, subject to novel interpretations that are supportive of this view. Decisions advocating support of a right of access to abortion include *Karen Llantoy Huamán v. Peru*[20] and *Alicja Tysiąc v. Poland*.[21]

Even while Zampas/Gher, in describing these developments, use terms such as "ground-breaking,"[22] "landmark decision,"[23] "significant advancement,"[24] etc., they acknowledge their own awareness that the interpretations of human rights they are applauding are novel, unusual and far from being universally recognized (otherwise, what ground needs to be broken?). Indeed, legislation guaranteeing total and unrestricted access to abortion on demand throughout the full term of a pregnancy (which, it seems, would be the one and only way to bring a country's law into full conformity with what Zampas/Gher believe to be the "reproductive rights of women")[25] exists nowhere in the world.

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19 However, the contrary is equally true. More recently, several countries have enacted new, more restrictive legislation. Examples include Nicaragua, Ireland (where a constitutional amendment to ban abortions has been adopted), Poland (where a restrictive law replaced the law dating from the communist era, which allowed abortion on demand), and Russia, which is said to have demographic concerns.

20 UN Human Rights Committee, Communication 1153/2003, *Karen Noelia Llantoy Huamán v. Peru*, final views of 17 November 2005 (CCPR/C/85/D/1153/2003).

21 ECtHR, *Tysiąc v. Poland*, Application 5410/03. It should be noted however, that in this decision Poland was condemned for not having foreseen a mechanism to review, at the request of a pregnant woman, the decision of medical doctors that the conditions for a legal abortion were not met (abortion being exempted from criminal sanctions under certain, very restrictive conditions). While the decision can with good reasons be criticized as an attempt of legalizing abortion through the backdoor, it remains true that, as Judge Bonello pointed out in his separate opinion, the decision does not concern "any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention."

22 Christina Zampas and Jaime M. Gher, 292, with regard to the decision of the legislature of Mexico City to legalize abortion in the first trimester.

23 Ibid., 275, with regard to the decision *Tysiąc vs. Poland* of the ECtHR.

24 Ibid., 293, commenting on new Portuguese legislation liberalizing abortion.

25 In fact, it is not discernible from the Zampas/Gher article whether the authors would

Homosexual Relations: Considered a Crime in a Majority of Countries

With regard to lesbian/gay rights, the situation is even more clear cut. The O'Flaherty/Fisher article draws a bleak picture:

> At least seven countries maintain the death penalty for consensual same-sex practices.[26]
>
> More than 80 countries still maintain laws that make same-sex consensual relations between adults a criminal offence.[27]
>
> In some countries, laws have prohibited the "promotion of homosexuality" in schools.[28]

Certainly, there are good reasons to consider it inappropriate, or at least exaggerated, to persecute homosexual acts between consenting adults through criminal law. Yet one thing is very clear: if more than 80 countries maintain laws making same-sex relations a criminal offence, and if some (or rather, as one must suppose, the majority) of the remaining countries have legislation prohibiting the promotion of homosexuality among minors, one is hardly in a position to affirm that practicing homosexuality is generally recognized as a human right. In reality, the contrary is true: those considering homosexuality as a "right" cannot base their views on positive law; instead, they must (and do) seek to *change* positive law in order for it to reflect their views.

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accept *any* restriction on abortion as legitimate, and where that limit would lie. It should however be noted that CRR, the organization both authors are affiliated with, has campaigned against attempts to ban partial-birth abortions in the US, both at federal and state level. Partial-birth abortion is a particularly gruesome method that is typically used for abortions in cases where the pregnancy is already in a late stage.

26 Michael O'Flaherty and John Fisher, "Sexual Orientation," 208.

27 Ibid., 210.

28 Ibid., 212.

Part III: Emerging Consensus?

As we have seen, the notion that abortion and homosexuality are "rights" is not supported by positive law, and the authors asserting such "rights" are aware of this. What is then the basis for their assertions? In both articles, the authors refer to a newly found "consensus" which, after having been agreed upon in international fora, now needs to be implemented. The question is: who has agreed to this "consensus"? When and where? If it really is a consensus, why does it meet so much resistance?

Consensus on Conferences

According to Zampas/Gher, the "consensus" that "reproductive rights" (which are here equated to a right to abortion) are human rights originates from two international Conferences which, in the last decade of the twentieth century, were organized by the UN. They write:

> Promotion of women's reproductive rights has recently gained momentum, in large part, due to the 1994 International Conference on Population and Development (ICPD), held in Cairo, and the 1995 Fourth World UN Conference on Women, held in Beijing. Commentators consider that "[t]hese two conferences led to the recognition that the protection of reproductive and sexual health is a matter of social justice, and that the realization of such health can be addressed through the improved application of human rights contained in existing national constitutions and regional and international human rights treaties." The consensus statements created at these conferences touch on women's right to abortion, and thus provide additional support for the notion that women's reproductive rights are human rights.[29]

29 Christina Zampas and Jaime M. Gher, "Abortion as a Human Right," 252.

Upon closer look at this passage, one cannot help noting that the origins of the asserted "consensus" remain rather obscure. Zampas/Gher avoid committing themselves; instead, they quote "commentators" who make a statement that the two UN Conferences "led to the recognition that the protection of reproductive and sexual health is a matter of social justice," etc. But the "commentators" fail to say *whose* recognition or consensus this was, and it remains unclear how the notion that abortion is a "human right" can be deduced from this recognition.

The truth is that the ICPD Programme of Action adopted at the Cairo Conference is the first text in history where the term "reproductive health," which has ever since been the *cheval de bataille* of those wishing to assert that a "right to abortion" enjoys international recognition, was defined and used. But that definition *does not include a "right to abortion.*" It describes reproductive health as:

> A state of complete physical, mental and social well-being and ... not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed [about] and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.[30]

Only subsequently have some interested parties attempted to interpret the term "reproductive health" in the sense that it included a right to abortion. Yet these attempts have been unsuccessful. While it would exceed the scope and purpose of this paper to analyze the positions of all and every government that, following the Cairo Conference, has joined the consensus, it suffices to look at one group of countries, the European Union (EU), where legislation on abortion is certainly less restrictive than elsewhere. In that context, it should be noted that the Council Presidency,

30 ICPD Programme of Action, para. 7.2.

answering to a question of a Member of the European Parliament, clearly stated that the Council's commitment to promote "reproductive health" did not include the promotion of abortion.[31] Likewise, the European Commission, in response to a question from a Member of the European Parliament, clarified:

> The term "reproductive health" was defined by the United Nations in 1994 at the Cairo International Conference on Population and Development. All Member States of the Union endorsed the Programme of Action adopted at Cairo. The Union has never adopted an alternative definition of "reproductive health" to that given in the Programme of Action, *which makes no reference to abortion.*[32]

With regard to the United States (US), it should be noted that, only a few days prior to the Cairo Conference, the head of the US delegation, Vice President Al Gore, had stated for the record:

> Let us get a false issue off the table: the US *does not seek to establish a new international right to abortion*, and we do not believe that abortion should be encouraged as a method of family planning.[33]

Some years later, the position of the US Administration in this debate was reconfirmed by US Ambassador to the UN, Ellen Sauerbrey, when she stated at a meeting of the UN Commission on the Status of Women that "non-governmental organizations are attempting to assert that Beijing[34] in

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31 European Parliament, December 4, 2003: Oral Question (H-0794/03) for Question Time at the part-session in December 2003 pursuant to Rule 43 of the Rules of Procedure by Dana Scallon to the Council. In the written record of that session, one reads: Posselt (PPE-DE): "Does the term 'reproductive health' include the promotion of abortion, yes or no?" — Antonione, Council: "No."

32 European Parliament, October 4, 2002: Question no. 86 by Dana Scallon (H-0670/02). (emphasis added)

33 Jyoti Shankar Singh, *Creating a New Consensus on Population* (London: Earthscan, 1998), 60, quoted in Doug Sylva and Susan Yoshihara, "Rights by Stealth: the Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion," *International Organizations Research Group White Paper No. 8*, (New York: C-FAM, 2007): 10. (emphasis added)

34 Sauerbrey was referring to the Fourth World UN Conference on Women, held 1995 in Beijing. Participants at the Beijing conference adopted a platform stating that abortion should be safe in places where it is legal, and that criminal charges should not be filed against any woman who undergoes an illegal abortion. The platform also stated that women have the right to "decide freely and responsibly on matters related to their sexuality ... free

some way creates or contributes to the creation of an internationally recognized fundamental right to abortion."[35] She added: "*There is no fundamental right to abortion.* And yet it keeps coming up, largely driven by NGOs trying to hijack the term and trying to make it into a definition."[36]

Where then is the consensus? If not even the governments of European countries or the US interpret the Cairo Programme of Action or the Beijing Platform as containing an obligation to legalize abortion, is it plausible that the governments of countries with more restrictive legislation would read such obligation into it? Even if governments may have endorsed the texts, it is clear that not all of them (if any) interpret them in the way suggested by Zampas/Gher. Any claims, whether by these or other authors, that the definition of "reproductive health" adopted at the Cairo Conference included or implied abortion to be a "right," are therefore manifestly ill-founded.

It is not the place here to analyze in-depth the genesis of the texts adopted at the Cairo and Beijing Conferences. It should suffice to note that these texts are not legally binding, that their drafting is vague and ambiguous;[37] and that, according to critics, it was indeed the underlying strategy of the organizers of the Conference to pressure sovereign countries into accepting an obscure text, the true meaning of which was only subsequently to be revealed through the interpretation of these texts by "experts." Commentators have called the Cairo and Beijing Conferences a "fake consensus,"[38] and have described them as part of a power shift to the unelected,[39] i.e., to a "global governance" of international bureaucracies and certain, mostly leftist, non-governmental organizations:

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of coercion, discrimination and violence." This was subsequently used by certain NGOs as a basis to affirm a "consensus" that access to abortion was a "human right."

35 Edith M. Lederer, *AP/San Francisco Chronicle*, March 1, 2005.

36 Evelyn Leopold, *Reuters*, February 28, 2005. (emphasis added)

37 They are indeed so ambiguous that some commentators were able to interpret them in the direct opposite sense: " … the abortion language that did gain inclusion in the documents was so successfully debated by conservative forces, and therefore so circumspect, that arguably it categorically and explicitly stops abortion from being deemed a right. There simply was no clarion call for abortion rights emerging from the conferences." (Douglas A. Sylva and Susan Yoshihara, "Rights by Stealth: the Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion," 10.

38 Douglas A. Sylva, in a hearing held by the European Parliament's Committee on Women's Rights and Gender Equality on January 29, 2008.

39 Marguerite Peeters, *Hijacking Democracy – The Power Shift to the Unelected* (New York: American Enterprise Institute, 2001), 1. http://www.aei.org/docLib/20030103_hijackingdemocracy.pdf (accessed December 15, 2009).

> The vaunted consensus has been closed to outsiders … because those outsiders — government, in particular — have real people to govern and to help under real circumstances. But it remains open to the UN's special partners who continue interpreting the consensus in the light of their own agenda. The partners' agenda — that is, the hidden agenda of radical groups working against democracy, family, liberty, free market, religion — is the real powerhouse of the process. The process is self-generating, as it keeps on enlarging the consensus according to the partners' vision … In addition, many key terms or expressions used in the formulation of the new paradigm — such as *sustainable development, reproductive health, the gender perspective, the partnership principle, the rights approach, quality of life, people-centeredness, ownership, holism, global governance* — sound progressive, but their meaning has remained nebulous for most governments. This has made it easier for governments to commit to these notions, because of their ambivalence. The new terminology has been invented by the partners and interpreted by different people in different ways, both mainstream and radical, as if it had been agreed in advance to "let a thousand flowers bloom." This vagueness, however, is of great advantage to the Global New Left. The vocabulary's high-sounding vagueness attracts people of good will but not much experience, and once attracted they are vulnerable when the radical partners impose their own top-down interpretation of what these sonorous phrases really mean.[40]

This criticism of the UN Conferences may sound harsh, yet it is uncontestable that: 1) the texts adopted at these conferences were prepared, prior to the events themselves, by the UN bureaucracies in close co-operation with pre-selected representatives of "civil society"; 2) they are vague and purposefully leave a wide margin for different interpretations; 3) they are not legally binding; and 4) governments were confronted with the alternative of either endorsing these texts or staying outside the "consensus." Governments, in fact, had very little opportunity to influence the drafting. Under these circumstances one cannot help concluding that both the scope and the contents of the "consensus," if it can be called by that name, remain uncertain. And it is not surprising that governments that have endorsed the texts adopted at the conferences are reluctant to comply with the interpretations of these texts subsequently promoted by authors such as Zampas and Gher. "*Vor Tische las man's anders,*" as Friedrich Schiller[41] would have put it.

40 Ibid., 21.

41 Friedrich Schiller, *Die Piccolomini, IV, 7*. The quotation ("Before supper, it was read

Consensus Among "Experts"

In the YP a similar pattern can be observed. This time, however, the consensus does not stem from any of the UN Conferences, but from a select and exclusive circle of experts, i.e., the drafters of the YP:

> Twenty-nine experts were invited to undertake the drafting of the Principles. They came from 25 countries representative of all geographic regions. They included one former UN High Commissioner for Human Rights (Mary Robinson, also a former head of state), 13 current or former UN human rights special mechanism office holders or treaty body members, two serving judges of domestic courts and a number of academics and activists. Seventeen of the experts were women … All of the text was agreed by consensus.[42]

Again, this leaves some important questions unanswered. *Who* selected and invited the experts? In what sense can it be said that the experts were "representative" of all geographic regions? What is the value of a consensus between experts who, in the first place, may have been selected to draft the YP precisely because they are supportive of the agenda which the YP promote? To what extent, for example, can the views of former Head of State Mary Robinson be considered to represent those of her native Ireland, or of any other country? Was she democratically elected, or are there any other reasons to suggest that her views represent those of the Irish population?

A small self-recruited group of persons agrees on a text, which it then claims to represent a universal "consensus." This is how O'Flaherty/Fisher hope the YP will *"frame the debate."* But what does this consensus include? Is it really about "the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity"? (An objective which nobody would refuse.) Or does it not reach far beyond that?

This time governments are not even offered the choice to either sign up or stay outside the consensus. The most astounding feature of the YP is that the drafters, modestly introducing themselves as a "distinguished group of

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differently") is taken from a scene where Wallenstein, the supreme commander of the Imperial Army, attempts to make other senior commanders sign a document of which he has manipulated the content. The scene relates to an historic incident of the Thirty Years' War in Germany, the so-called "Pilsen Conclusions."

42 Michael O'Flaherty and John Fisher, "Sexual Orientation," 233.

human rights experts,"[43] do not find it necessary to wait for governments to sign up to their text. Instead, they claim that their "consensus" is that of all States that have signed up to the Universal Declaration of Human Rights (UDHR),[44] and therefore needs no further ratification. They call on the UN and their institutions, as well as regional human rights courts (such as the European Court of Human Rights) to enforce these Principles even against States that have never actually signed up to them.[45] (In other words, 29 "experts" without a mandate purport to act as global legislators.) It remains to be seen whether the UN and other human rights institutions will assume this task and, if so, whether national governments will find the courage to resist.[46] One can only urge governments to carefully read the small print of the YP prior to endorsing them, notably the parts introduced with the words "States shall." Then they will notice that the purported "consensus" includes, *inter alia*, an obligation on them to change their constitutions and fundamental laws to reflect the YP, to "ensure that an equal age of consent applies to both

43 YP, Introduction, para. 8.

44 Ibid., paras 11 and 12: "The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. They also recognise that States may incur additional obligations as human rights law continues to evolve. The Yogyakarta Principles affirm binding international legal standards with which all States must comply." One might expect a "critical commentary" on the YP (i.e., one not written by the lead drafter of the Principles) to challenge such a statement.

45 Ibid., "Additional Recommendations," where the *experts* recommend (inter alia) that: "the United Nations Human Rights Council endorse these Principles … with a view to promoting State compliance with these Principles"; "the United Nations Human Rights Special Procedures pay due attention to human rights violations based on sexual orientation or gender identity, and integrate these Principles into the implementation of their respective mandates"; "the United Nations Human Rights Treaty Bodies vigorously integrate these Principles into the implementation of their respective mandates, including their case law and the examination of State reports, and, where appropriate, adopt General Comments or other interpretive texts on the application of human rights law to persons of diverse sexual orientations and gender identities"; "regional human rights courts vigorously integrate those Principles that are relevant to the human rights treaties they interpret into their developing case law on sexual orientation and gender identity." In essence, this means that those monitoring bodies and regional human rights courts are called upon to change the law through interpretation.

46 Some countries are already taking pro-active measures to defend themselves against the imposition of the same-sex agenda. For example, Latvia has recently amended Article 110 of its Constitution to define marriage as "a union between a man and a woman." In the United States, 30 of the 50 states have in recent years made similar amendments to their constitutions in order to prevent same-sex marriages from being introduced undemocratically through court decisions. In addition, 10 states have adopted non-constitutional statutes explicitly ruling out the recognition of same-sex marriages.

same-sex and different-sex sexual activity," and to "ensure the right to … adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity." The YP contain not less than 127 "States-shall" clauses, some of them open to very wide interpretation.[47] For any critical reader it must be clear that these clauses do not represent any *existing* human rights standard, but a comprehensive working program for legislators, requiring them to rewrite considerable parts of their domestic legislation in order to accommodate an ultra-radical same-sex agenda. Setting aside all questions concerning the substance of the YP, their credibility as a consensus is thus more than questionable. If the YP represent a consensus, it must be one of gay-rights activists, not one of governments or nations. As such, it remains irrelevant for the international community.

While the drafters of the YP loudly demand that their "consensus" be endorsed by the UN and national governments, their strategy of affirming consensus is now also used by other "expert groups" to promote other new "principles." In October 2008 a "Declaration on the Principles of Equality"[48] was issued by a new organization called "The Equal Rights Trust." The Declaration reminds strongly of the YP: 1) a self-appointed group of persons describing themselves as "more than 120 of the world's leading human rights and equality experts";[49] and 2) the claim that the text they have drafted "reflects a moral and professional consensus among human rights and equality experts."[50] (Suggesting that this faux consensus is shared also by experts outside that group.) As in the YP, the language is high sounding and uses legal style and terminology, affirming "rights" and "duties." However, there is also one considerable difference of approach: these new "principles of equality" are so

47 One example is the provision at Principle 21(b) that "expression, practice and promotion of different opinions, convictions and beliefs with regard to sexual orientation or gender identity is not undertaken in a manner incompatible with human rights." O'Flaherty/Fisher comment as follows on page 236: "Thus expressed it is unclear, for instance, whether a faith community could exclude someone from membership on grounds of sexual orientation, albeit the Principle, at a minimum, would require reflection as to the legitimacy in law of such an exclusion." The agenda is thus set, and it seems that O'Flaherty/Fisher want their Principles to be understood as superseding the freedom of religious communities to define and practice their faith.

48 Equal Rights Trust. http://www.equalrightstrust.org (accessed December 15, 2009).

49 Press release of the Equal Rights Trust, October 21, 2008. http://www.equalrightstrust.org/news-archive/index.htm (accessed December 15, 2009).

50 Introduction to the Declaration on the Principles of Equality, 2. http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf (accessed December 15, 2009).

far-reaching that even their drafters dare not assert that they reflect the existing state of international law. Therefore, their discourse now goes into the exact opposite direction, alarming the public that "over 160 countries in the world lack effective legal protection against discrimination and legal means to promote equality," and "even in countries where such provisions are in force, the legislation is fractured, inconsistent, complicated and inefficient."[51] In other words, such "effective protection" against discrimination not only is not an international standard, but it is nearly the contrary: nowhere in the world is "equality," as such, recognised as a "human right." However, given that "more than 120 of the world's leading human rights and equality experts" have found that "in all its manifestations, discrimination is the most widespread human rights violation", it is clear that urgent action must now be taken. The drafters of the Declaration therefore, rather than invoking current obligations, call for "the most radical re-think of equal rights in two generations," further claiming that the Declaration is the "first ever international initiative to set out general legal principles that define equality as a basic human right."[52] In a certain sense, therefore, this new initiative is less misleading than the YP: it does not make wrong affirmations as to a current state of law; instead, the drafters openly say that they want international law to be radically changed according to their suggestions. Yet, it remains that the document is based on a "pretended" consensus rather than a real one. (It comes as no surprise that the signatories of the Declaration are in part identical to those of the YP:[53] a small group of always the same "experts" multiply their efforts to set the agenda for the world.)

Vox Populi?

But perhaps we need to understand the word "consensus" in a broader sense, i.e., as a consensus neither of experts nor of governments, but of humanity. This approach would beg questions to ponder: 1) Do govern-

51 These and the following quotations are from the press release of the Equal Rights Trust, October 21, 2008.

52 Ibid.

53 Lawrence Mute, Manfred Nowak, Michael O'Flaherty, Dimitrina Petrova, Rudi Muhammad Rizki, Nevena Vučković Šahović, Wan Yanhai, Roman Wieruszewski. It should also be noted that Manfred Nowak, as well as Olivier de Schutter (now UN Special Rapporteur on the Right to Food) and Martin Scheinin, who are among the signatories of the "Principles of Equality," were also members of the "EU Network of Independent Experts in Fundamental Rights" that issued the controversial Legal Opinion 4.2005 on "Conscientious Objection." (see footnote 61)

ments fail to adequately represent the views and moral convictions of their people when they adopt international conventions on human rights? 2) Is there now a broad, "*times they are a-changin*'," consensus among the vast majority of people in a vast majority of countries that abortion or homosexuality are "rights", not "wrongs"? 3) Does international law, for some mysterious reason, simply fail to appropriately transpose this general *opinio iuris sive necessitatis* (an opinion of law or necessity) into positive law, so that contemporary "experts" (like Zampas/Gher and O'Flaherty/Fisher) must base their views on such generally held views rather than on outdated legal texts?

In the Zampas/Gher article, no such reference to a general moral sentiment is made. This is by no means surprising. Given that Ms. Zampas and Ms. Gher both work for the pro-abortion lobby group, Center for Reproductive Rights, they have probably read the internal strategy paper of that group, which openly acknowledges that public opinion does not support its aims: addressing the situation in the US, the paper mentions that "even under pro-choice Administrations, women's right to choose has always needed, and will need again, the protection of the judiciary from hostile majorities in many, if not most, states,"[54] and, that "there is growing opposition amongst minors to abortion and being pro-choice."[55] In other words: they promote the right to abortion *despite*, not because of, the majority opinion.

Likewise, when the O'Flaherty/Fisher article reports that 80 States continue to criminalize same-sex relations between consenting adults, this situation, regrettable as it may be, provides also the best evidence that the same-sex agenda does not emanate from a worldwide consensus. But it is not the law alone that, in many countries, is hostile to homosexuality, as a small selection of the (very numerous) incidents reported by O'Flaherty/Fisher clearly illustrates:

> Numerous reports have documented persons killed … because of their sexual orientation or gender identity, including a gay man sprayed with gasoline and set on fire in Belgium, the murder of a transgender human rights defender in Argentina, a nail bomb

54 United States Congressional Record, December 8, 2003, E 2539.
55 Ibid., E 2540.

> explosion in a gay bar in the United Kingdom, killing three people and injuring dozens of others, the murder of a gay rights activist by multiple knife wounds in Jamaica, prompting a crowd to gather outside his home, laughing and calling out "let's get them one at a time," and the recent execution-style murder of two lesbian human rights defenders in South Africa.[56]
>
> A teenager in Dublin attacked a woman he mistook for a gay man because of her hairstyle. Approaching the woman and her male companion with the inquiry "are you two gay guys?" he proceeded to strike the couple, knocking them to the ground, before kicking the woman in the back and stomach, and jumping on the man's back.[57]
>
> Participants in an Equality March in Poland … faced harassment and intimidation by police as well as by extremist nationalists who shouted comments such as "Let's get the fags," and "We'll do to you what Hitler did with Jews," and attempted suppression of Pride events has been documented in at least 10 instances in Eastern Europe.[58]

There can be no doubt that the killing, assailing or harassing of any person is a serious crime, including in those countries from which these incidents have been reported. Although O'Flaherty/Fisher offer anecdotal evidence of spectacular individual cases rather than statistics, they clearly make a case in fact that homosexuals "are often subjected to violence ... in order to 'punish' them for transgressing gender barriers, or for challenging predominant conceptions of gender roles."[59] But what is the motivation for these assaults? If anything, they seem to indicate that homosexuality is not seen as normal, nor as a "right" by those assailants. Indeed, hooligans bully homosexuals because they know that a strong majority in society repudiates homosexuality. This, of course, does not provide legitimacy to any assault against homosexuals —but neither is the adequacy of the (apparently prevailing) negative moral judgement on homosexuality disproved by any of the incidents mentioned by O'Flaherty/Fisher. And while it is of course true that homosexuals must be protected against violence and harassment, it would

56 Micheal O'Flaherty and John Fisher, "Sexual Orientation," 208.
57 Ibid., 210.
58 Ibid., 211.
59 Ibid., 209.

be wrong to use these incidents in order to put reasoned and well-articulated opposition against the Lesbian, Gay, Bisexual and Transgender (LGBT) agenda into one and the same basket and describe it all as "homophobia."

Moreover, it should be noted that the YP make no specific contribution to solve the problem of violence against homosexuals. Adequate legislation against such violence is in place in nearly all countries of the world, including those where the reported incidents have taken place. If anything, there might be a lack of enforcement (but with regard to the specific cases reported by O'Flaherty/Fisher, their paper does not even mention any such lack of enforcement!). But the remedy against weak law enforcement is better law enforcement, not new legislation: one fails to understand how the world-wide recognition of same-sex marriages, to mention just one desideratum of the YP, would contribute to protecting homosexuals against being assaulted by hooligans.

One is thus left to wonder: why are O'Flaherty/Fisher mentioning these incidents, which 1) seem to disprove rather than support any suggestion that homosexuality is generally believed to be a "human right," and 2) are inept to provide proof for the necessity of any new document such as the YP? Is this to be understood as insinuating that anybody not providing unreserved support to the YP must be suspected of tolerating violence against homosexuals and/or sympathizing with the perpetrators of such acts?

In actual fact, the same-sex rights agenda is not opposed only by skinheads and hooligans, but also by the mainstream of society — even in liberal and "progressive" societies. Wherever and whenever the public has been invited to express its views on such matters in a democratic referendum, it has voted against. The most recent examples were the votes held in California, Arizona, and Florida on November 4, 2008, through which the constitutions of these three states were amended in order to explicitly rule out the recognition of same-sex marriages, bringing the number of US states having adopted such constitutional amendments to 30 out of 50. In addition, ten other states have adopted ordinary statutes foreseeing such a ban. By contrast, in those states where same sex-marriages are or were available (i.e., Massachusetts, Connecticut and California, where the referendum of November 4, 2008 was held to abolish them), this situation was not the result of any democratic legislative process, but of highly controversial judicial decisions adopted by the Supreme Courts of these states, finding that the obligation to recognize same-sex marriage was in some way

already mandated by existing constitutional law, but failing to explain why the hidden sense of the constitutional provisions used for that purpose had never been discovered in the decades or centuries before. New Hampshire, where it was adopted by the legislature, is the exception that proves the rule. In summary then, the same-sex rights agenda was imposed on an unwilling majority through a judicial putsch, in a way that definitely reminds of the US Supreme Court's *Roe v. Wade* decision. The support this agenda enjoys in the broader public appears to be, at best, very limited.

Part IV: Abortion, Homosexuality and the Natural Law of Morality

From the prior examination above, it is clear that the "right to abortion" advocated by Zampas/Gher and the same-sex rights agenda promoted by O'Flaherty/Fisher have no basis in positive law. They are not warranted by any "consensus," be it of a political or an academic nature; nor can they be based on a general sentiment prevailing in the general public, even if, giving n to some kind of a cultural prejudice, we understood that public to be not a global public, but only the "West." It thus seems that the positions of Zampas/Gher and O'Flaherty/Fisher are in fact isolated, even if they find strong support in certain factions of the European and Anglo-American political and cultural elite, as well as in the "findings" of "experts" such as themselves.

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The Elitism of "Human Rights Experts"

It should be said openly: the concept of human rights advocacy underlying the advocacy efforts of Zampas/Gher and O'Flaherty/Fisher is fundamentally elitist, patronizing and un-democratic. There is, it seems, a restricted circle of the same, constantly re-appearing experts[60] who alone

60 It appears that of the "experts" sitting on such UN Committees, Treaty Monitoring Bodies or similar institutions, many have a strong sympathy for the novel interpretations of human rights discussed in this article — which indeed might be among the key criteria for

purport to know what is and what is not a human right; and there is the rest of the world — helpless, hapless, uninformed people — who must be "empowered"[61] and "educated."[62]

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being appointed to such posts. This could be yet another reason why the "reporting" and "bringing of complaints" to these bodies enjoys such popularity among the pro-abortion and lesbian/gay lobbies. Indeed, this complicity at times so obviously influences the expertise provided that one has strong reasons to doubt the good faith and impartiality of these experts. One spectacular example was the Legal Opinion (No. 4.2005) of an "EU Network of Independent Experts in Fundamental Rights" on the right to conscientious objection and the conclusion by EU Member States of Concordats with the Holy See which purported to find that there was a "Right to Abortion," superseding the right of medical practitioners to decide according to their conscience whether they wanted to procure abortion or not. This legal opinion consisted in large parts of the written input provided by the Center for Reproductive Rights. At the same time, the Network took no steps at all to become acquainted with the views of any anti-abortion groups, let alone those of the State parties directly concerned, i.e., the Holy See and Slovakia. A more detailed commentary may be found in: J. Cornides, "Human Rights Pitted Against Man," *International Journal of Human Rights* 1/2008, 107-34. The mandate of this Network has meanwhile ended, but its members have found other places where they continue providing "expertise." For example, the Network's president, Prof. Olivier de Schutter, has been appointed to the post of UN Special Rapporteur for the Right to Food, whereas another former member of the Network, Morten Kjaerum, has been appointed Director of the new EU Agency for Fundamental Rights (FRA) seated in Vienna. As it turns out, this FRA is set to become an upgraded version of the "Experts Network:" it has a stronger institutional role, is endowed by a bigger budget, supported by permanent staff, and on top of it all the same closed shop of unaccountable "experts" promoting their radical social agenda, i.e., abortion and same-sex-marriage. As a first step, FRA has created a new "Fundamental Rights Agency Legal Experts Group" (FRALEX), the composition of which is nearly identical to that of the Network. The very first activity of this newly constituted group was the drafting of a study on "Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States," which was published in June 2008. The findings of that study were foreseeable.

61 This necessity to inform vulnerable groups about novel rights they are not aware of, and to empower them to use such rights, is a recurring theme in the contemporary human rights discourse. Cf. Christina Zampas and Jaime M. Gher, "Abortion as a Human Right," 251: "it is the evolution of human rights interpretations and applications, stemmed by increased sophistication, women's empowerment and changing times, which have given force to women's human right to abortion."

62 Cf. Michael O'Flaherty and John Fisher, "Sexual Orientation," 218: " … a lack of education programmes to combat discriminatory attitudes;" Ibid., 226: "States are obliged to undertake effective programmes of education and public awareness about human rights and must otherwise seek to enable people to fully enjoy their entitlements;" Ibid., 235: " … promotion of a human rights culture by means of education, training and public awareness-raising;" Christina Zampas and Jaime M. Gher, "Abortion as a Human Right," 258: "… increased access to family planning services and education;" Ibid., 274: "promote adolescent health, including by providing sexual and reproductive health education in schools." It should be noted that education in this context means *compulsory* education (it is thus not a

Such academic elitism is in itself neither wrong, nor illegitimate. It belongs to the essential characteristics of human rights that they are pre-existent to positive legislation, can neither be adopted nor abrogated by a democratic vote, but exist independently of any human will. If that is so, it is perfectly possible that a human right exists despite not being recognized or respected in a majority of countries, or despite not being considered as such by a majority of persons. It is also perfectly possible that one or two experts know better than the rest of the world. Human rights are not the result of opinion polls.

However, the opposite could also be true: the experts could be wrong, and the rest of the world could be right. It could be that, despite the advocacy of Ms. Zampas and Ms. Gher, a fetus *does* have a right to life, and its mother has no right to kill it. It could be that, despite the expertise of the drafters of the YP, homosexuality *is* a deviant behavior, or a psychological or mental disorder, and should be treated as such. And even if the whole world, experts and non-experts alike, were unanimous on a "right," it could nevertheless be a wrong. There were times when slavery existed in all countries of the world; today it is considered a fundamental human rights violation. There were times when abortion and homosexuality were strictly prohibited in all European countries; today many countries have legalized these practices. There was a time when the death penalty was in use throughout Europe; today there is a Protocol to the ECtHR obliging States to abolish it.

Whoever defies prevailing opinions through courageous elitism must explain what makes them believe to know better. What is the general approach that allows them to consider their cause a just one? What is the methodology? What the criteria?

With regard to Zampas/Gher and O'Flaherty/Fisher, two answers are possible. Either the authors consider human rights to be some kind of a political power game, in which anyone, in order to promote and defend whatever they subjectively perceive to be in their interest, is allowed to instrumentalize the language and institutions of human rights, including by stealth tactics[63] — or they believe in the existence of Natural Law or some kind of objective truth to which their views correspond.

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right, but a duty, to receive such education), which young people must undergo irrespective of whether their parents share the moral values underlying these education programs.

63 See n. 9 above.

In the first case, a further discussion of their views would be impossible and, at the same time, unnecessary: it would suffice to note that they advocate abortion because they receive their salaries from the abortion lobby, or militate for the same-sex rights agenda because they belong to the LGBT lobby. But at the same time, they would have to accept that their opponents (who work for the opposing lobbies) militate for the opposite, and that all arguments enjoy the same legitimacy. Speaking of human rights would be nothing more than a strategy to manipulate a gullible public. The discussion could stop here: there would be a mere conflict of interests, not a question of right and wrong, and in the end the stronger party, or the party with the cleverer tactics, would prevail.

In the second case, by contrast, a discussion remains possible. Under Natural Law we understand a set of ethical precepts that exists outside positive law and to which positive legislation, if it is not to be called abusive, must conform. This Natural Law is supposed to correspond to human nature, and to be accessible to reason — provided, of course, that this reason is not obscured by the desire to manipulate the law in one's own interest.

Let us then assume that Zampas/Gher and O'Flaherty/Fisher believe in Natural Law, even if, regrettably, they do very little to explain how their respective positions follow from it.[64]

This is the common ground on which we can meet and discuss.

Dismissing "Fetal Claims to the Right to Life"

Abortion means to voluntarily terminate an unwanted pregnancy by destroying the fetus in the womb of a pregnant woman.

People wishing to justify abortion usually rely on two arguments to answer the uncontested fact that each human being has a right to life. The first says that the fetus is not (yet) a human being — therefore destroying it is not prohibited. The second argument consists in saying that, even if the fetus is a human being, and thus has a right to life, compelling reasons exist to give women the right to choose abortion, which then trump the

64 This omission does make a discussion of their views somewhat difficult: what is not explained cannot be rebuffed. The commentary is on positions that Zampas/Gher and O'Flaherty/Fisher have not openly pronounced, yet seem implicit in their reasoning.

fetus' right to life. Such reasons may be that the pregnant woman's life or health are at risk, or that the pregnancy in question was the result of an act of sexual violence, or that the woman is under economic strain and cannot afford to have a child, or that the woman's plans for her own life take priority over her child's, etc.

This second set of arguments is easily dismissed. It is generally known that life must be the highest ranking right in any legal order (because, by taking a person's life, one negates all his other rights at the same time), so that in a conflict of values life will usually be given priority over other values, as long as that life is to be considered innocent, and killing it not an act of legitimate self-defense against illegal aggression. Who could be more innocent than an unborn child? It is therefore completely self-evident and requires no further explanation that, once the unborn child is understood to be a human being, no other circumstance than one in which a choice must be made between the life of the child and the life of the mother can ever justify abortion.

Taking a closer look at the first group of arguments, we see that in order to determine who is to be considered human and who is not (yet) human, a wide array of different criteria is used. In *Roe v. Wade*, the seminal case of the US Supreme Court,[65] the criterion was *time*: the pregnancy was simply divided into three trimesters, and the question whether and to what extent the State could regulate abortion was made dependent on how far the pregnancy was

65 *Roe v. Wade*, 410 US 113 (1973). Contrary to Europe, where abortion has been liberalized in most countries through the adoption of new legislation (and could, therefore, be restricted through new legislation), no law, whether federal or at state level, was ever adopted in the US to liberalize abortion. Instead, the shift came about through the *Roe v. Wade* decision, according to which legislation restricting abortion was unconstitutional. It is therefore not possible to prohibit abortion at state level (even if many states would wish to do so, and even if, in certain states, popular opinion would be overwhelmingly in favor of such restrictions), whereas at federal level it could be done only through a constitutional amendment. (An amendment to the United States Constitution must be ratified by 3/4 of the state legislatures, or of constitutional conventions specially elected in each of the states, before it can come into effect.) In short, *Roe v. Wade*, by bringing forward a novel interpretation of an old constitutional law, has created a formidable obstacle to such restrictions; what this case shows is that novel interpretations of existing provisions can be by far more efficient than legislative processes as a means to push certain political agendas — even against the will of the broader public. It is obvious that pro-abortion pressure groups, such as CRR, want to use the international human rights texts such as the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the European Convention on Human Rights to promote their agenda in the same manner.

advanced.[66] Given the evident arbitrariness[67] of such a cut-off date (because no reason at all was given why on a given moment during the pregnancy a fetus should have become a human being, whereas a quarter of an hour before it should not yet have been one), it was thought necessary to find more pertinent criteria, such as the "viability"[68] of the fetus (i.e., whether, in case of a premature birth, it could be expected to survive), or self-consciousness, or the ability to feel and react to pain, and many more criteria which are not worth listing here, since they all suffer from the same weakness: they are all too obviously guided by the interest of providing convenient "justification" for abortion. The arbitrary character of these criteria, which all aim at *de-humanizing the fetus*, is easily discerned when they are tested elsewhere: we do not kill adult people who have lost self-consciousness (e.g., because they are sleeping) — why would then the lack-of self-consciousness of a fetus justify abortion? We find killing people wrong not because it might cause them pain, but because it takes their lives — why then would the fetus' inability to feel pain serve as a justification for abortion? In a similar vein, why would the fetus' inability to survive outside its mother's womb justify abortion, if, in reality, every child remains dependent on its mother's care for years after its birth?

Obviously it is not one or more of the *capabilities* of the fetus (i.e., its ability to survive outside the uterus, to feel pain, to be self-conscious) that must be seen as the decisive criterion, but its *nature*. The question is whether a fetus is human, or whether it belongs to another species. Yet, it is uncontested that the human fetus is human from the very moment of its conception, as it comes into existence through the union of a human sperm and a human ovum. It is in this moment that the unique genetic identity

66 Ibid. Following the decision: a State cannot restrict in any way a woman's right to an abortion during the first trimester; the State can regulate the abortion procedure during the second trimester if such regulation serves the purpose of protecting the mother's (not the fetus') health; and the State can choose to restrict or proscribe abortion as it sees fit during the third trimester when the fetus is "viable."

67 The arbitrariness of *Roe v. Wade* was recognized even by Justice H. Blackmun, the decision's author. In an internal memorandum, he wrote: "You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point … is equally arbitrary."

68 Cf. *Roe v. Wade*: "Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks), but may occur earlier, even at 24 weeks." The "viability" criterion is still in effect today, although the point of viability has changed as medical science has found ways to help premature babies survive.

of a child is created. From that moment, the fetus does not pass through different stages of evolution — from amoeba to homo sapiens — but is, and remains human throughout gestation. For natural science, therefore, it is clear that the human being must be seen as such from the moment of conception, if "being human" is not to become a status that is conferred by politicians through co-optation. Accordingly, if positive legislation is to be brought into conformity with scientific reality outside the legal order, it must provide to the fetus full protection from being killed, like it must protect the life of any adult person. From the perspective of Natural Law, only one criterion is decisive: what the fetus *is*, not what we want it to be. And since it is a human being, only one conclusion is possible: abortion is not a "right," but the opposite of one.

Without doubt, readers may be curious to know which one of the two arguments set out above has been used by Zampas/Gher, who have written not less than 46 pages to demonstrate that abortion is a human right. The surprising answer: neither of the two.

They give no explanation why the fetus has no right to life, except to say that "historical analyses of the UDHR, ICCPR (International Covenant on Civil and Political Rights) and ICRC (International Convention on the Rights of the Child) — the major international human rights treaties conferring the right to life — confirm that that right does not extend to fetuses,"[69] and note (with visible satisfaction) that "foetal claims to the right to life brought to the European human rights system have largely been ineffective."[70] Setting aside any doubts with regard to the accuracy of these "historical analyses," such reliance on the exegesis of a legal text on a question that concerns the ontology of the human species is by itself an absurdity. Reading this line of reasoning by Zampas/Gher, one can only come to the conclusion that *nobody* enjoyed a right to life prior to 1948, when the UDHR "conferred" it to everyone (except, of course, to fetuses).[71] Reality is ignored — or simply superseded by the legislative will. This attitude and approach darkly mirrors that of the Roman Emperor Caligula, who planned to appoint his best horse

69 Christina Zampas and Jaime M. Gher, "Abortion as a Human Right," 262.

70 Ibid., 264.

71 Ibid., 262. As Zampas/Gher point out, "the first pronouncement of the right to life, Article 3 of the UDHR, specifically limits that right to those who have been 'born.' In fact, the term 'born' was intentionally used to exclude the foetus or any other antenatal application of human rights."

consul,[72] or of the Persian King Xerxes, who ordered the sea to remain calm while he was crossing it and, when the sea did not obey, had his soldiers chastise it with whips and scourges.[73] What this kind of legal positivism fails to understand is that the natural fact that a human fetus is human does not at all depend on what the UDHR or any other legal instrument says (or omits to say) about it. The argument would sound more reasonable if it went in the opposite direction: if the "historical analyses" quoted by Zampas/Gher were accurate, it is the human rights treaties which would need to be adapted in order to ensure that they conform to reality.

Zampas/Gher fail to provide any substantial reasons for their position that the fetus is not a human being, except a mere *quis-dixit*-argument: because the UDHR, or the ECHR, does not explicitly confer human rights on fetuses, they are not human. The ambivalence of this interpretative approach is self-evident, for it could be turned around and used against Zampas/Gher: it could be said that because the UDHR does not explicitly foresee a right to abortion, such a right does not exist. Yet Zampas/Gher say that this right exists despite not being mentioned in any international treaty; it is, it seems, precisely for this reason, that their employer CRR would strive for "the adoption of a new international treaty"[74] to enshrine such a right, if that were realistic. In other words, the authors base their views on legal positivism when they find it convenient, but they reject that same positivism when it is unhelpful to their cause.

Having, in this somewhat simplistic way, attempted an explanation at why the fetus might not have a right to life, it is no wonder that Zampas/Gher see no need to explain why the rights of a woman seeking abortion should enjoy priority over the right to life of a fetus. Their position is of a truly intimidating simplicity of spirit: the unborn child has no rights at all, and the woman has many rights. Why? For the sole reason that, as they believe, "in the context of abortion, the UDHR limits the right to life to women and girls."[75]

Under these circumstances, no point is served in further examining the other assertions made by Zampas/Gher on women's rights, or the creative interpretations made by these and other authors that delude them to find

72 Suetonius, *The Lives of Twelve Caesars*, 55.

73 Herodotus, *Histories, VII,* 35.

74 Cf. Congressional Record, December 8, 2003, E 2535, E 2538.

75 Christina Zampas and Jaime M. Gher, "Abortion as a Human Right," 263.

in these rights a right to abortion which does not exist in positive law. The methodology used to make these assertions is fundamentally and entirely flawed and self-contradictory: 1) it relies in part on an absurdly rigorous legal positivism (the sole reason why an unborn child has no right to life is that the UDHR does not explicitly say so); 2) in part on an equally absurd and fluid pretension of "consensus;" and 3) in part on what must be described as nonsense camouflaged as a travesty of Natural Law,[76] depending on what seems convenient to the authors. Apparently, any and every argument is good enough, if it serves the purpose.

The notable absence of any proper methodology in the reasoning of Zampas/Gher, as well as the predictable feminist mantra underlying their repetitive insistence on women's rights (as opposed to human rights, which, gender neutral and universal, should extend to the entire species),[77] could be called laughable, if it were not accompanied by tragic consequences — especially for women. It suffices to say that, according to a recent United Nations Population Fund (UNFPA) State of the World Population Report,[78] prenatal sex selection, abortion and female infanticide have resulted in at least 60 million "missing" girls in Asia, creating gender imbalances and other serious problems that might have far reaching consequences for generations to come. As it turns out, it is women who are the primary victims of abortion.

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76 This type of makeshift Natural Law is used where legal positivism does not yield the right results. One example is that, while the right to life of the child is silently passed over, the right to abortion is deduced from women's right to life, because, if abortion is illegal, women *might* use illegal abortion, which might be less safe, so that they *might* die from it. Three hypothetical assumptions on what *might* happen if a woman has no access to safe and legal abortion are sufficient to outweigh, as it seems, the hard fact that a fetus, as a human being, is entitled to the enjoyment of human rights.

77 From this approach, it follows that not only has the fetus no rights, but also the "right to decide freely and responsibly the number and spacing of one's children and the right to privacy," which Zampas/Gher ("Abortion as a Human Right," 287) consider a "human right," is in actual fact provided to women alone. The father has no such right; he can neither demand nor prevent the abortion of his offspring. It is very strange for a "human right" to exist only for persons of one sex.

78 Cf. Sherry Karabin, *Fox News*, Wednesday, June 13, 2007: "Infanticide, Abortion Responsible for 60 Million Girls Missing in Asia," http://www.foxnews.com/story/0,2933,281722,00.html (accessed December 15, 2009). *The UNFPA State of the World Population Report 2006 – A Passage to Hope*, 24, actually speaks of "as many as 100 million 'missing' women and girls — eliminated through prenatal sex selection and infanticide." Among the sources quoted by UNFPA were: United States Department of State, *Trafficking in Persons Report: June 2005,* 20; I. Attane, and J. Veron eds., *Gender Discrimination among Young Children in Asia* (Centre Population et Development, Pondicherry, India).

A Novel Doctrine on Sex, Marriage, and Families

"Non-discrimination" appears to be the basic principle underlying the YP. According to Principle 1, "human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights". The remaining YP (Principles 2-28) aim at spelling out what the authors derive from this non-discrimination principle with regard to a number of specific human rights, such as the right to life, the right to work, the right to a fair trial, etc.

Without doubt, a principle affording all human beings an entitlement to the protection of all human rights is something with which no seriously-minded person can disagree. However, it should be noted that all existing human rights instruments, for example the UDHR and the ECHR, already acknowledge that all the rights they recognize are enjoyed by all without discrimination. Why, then, are the YP needed? Are they not just repeating the self-evident?

The authors of the YP would probably reply by saying that the YP are needed because gay, lesbian, and transgender people are particularly vulnerable. This vulnerability is evidenced by the numerous cases quoted in the O'Flaherty/Fisher article, where gay and lesbian people have suffered violence or faced discrimination. These cases are certainly regrettable, and whoever reads them cannot but feel pity for the victims. However, the violence, humiliation, social exclusion, etc., reported by O'Flaherty/Fisher would be unacceptable not only regarding gays or lesbians, but regarding *everyone.* Moreover, in most of the cases reported, these "violations" have been committed by private persons, not by States. It is therefore not clear why a State should sign up to any of the 127 *"States-shall"* clauses contained in the YP. The rights that could be invoked by the victims are already protected through legally binding instruments (such as the ECHR or the UDHR). Why should these be duplicated? Is it not patronizing to say that homosexuals, too, have a right to life, if the right to life of everyone is already recognized in the UDHR? If a State fails to protect or enforce the rights enshrined in the UDHR, why would it enforce the YP? Does it really help to multiply legislation (or, in this case, self-serving interpretations of legislation) if the real problem is lack of enforcement? Finally, it is not clear what the implementation of a right to adopt children for homosexuals or the introduction of same-sex-marriages have to do with the above-mentioned violence against homosexuals, or how they could contribute to reducing or ending

it. It thus seems that the regrettable incidents highlighted by O'Flaherty/Fisher serve them as a mere pretext to call for measures that will not protect victims of hatred and violence, but instead impose a novel system of values on society. It could well be that this strategy will generate more violence and hatred against homosexuals instead of more tolerance for them: while there appears to be, at least in Western societies, tolerance for homosexuality if it is kept private, there is certainly much less acceptance for the idea of accepting the homosexual lifestyle as "equivalent," and promoting it in public. The reported cases where public Gay Pride events have met hostile reactions seem to confirm this.

Whoever takes the time to examine the YP more closely will find that, despite the assertion in Principle 1, the text does *not* reaffirm the extension of the well-known and generally accepted human rights to gays and lesbians. Instead, it uses the sufferings of homosexual victims of violence to advance (in a somewhat insidious way) novel and unusual interpretations of these human rights, which, in final effect, give them a completely new, radical meaning. In other words, the YP do not, as O'Flaherty/Fisher claim, "identify the (currently existing) obligations of States," but seek to surreptitiously introduce new obligations to which no State has ever committed.[79]

This is not the place to comment on the entirety of the YP. Perhaps the one Principle which provides the most obvious example of how the current meaning of a term frequently found in legal texts is in part subverted, in part turned into its exact opposite, is Principle 24:

> Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.[80]

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79 For a more detailed comment, cf. Piero A. Tozzi, Six Problems with the "*Yogyakarta Principles*," International Organisations Research Group Briefing Paper No. 1, 2007, available at http://www.c-fam.org/docLib/20080610_Yogyakarta_Principles.pdf (accessed December 15, 2009). Tozzi argues that the YP, instead of protecting human rights, subvert them, inter alia, by undermining the freedom of speech, the freedom of religion, and the right of parents to educate their children. In addition, they encourage (physically, psychologically and morally) unhealthy choices and fail to provide objective standards for evaluating conduct.

80 YP, Principle 24.

Once again, the right of everybody to found a family (provided, of course, he or she has the biological capability for doing so) is a right that is, as such, universally recognized.[81] It is also true that no family should become the victim of discrimination. But the YP add a new element by asserting that "families exist in diverse forms." Vague and imprecise as it is, this assertion completely dissolves the natural and universally accepted meaning of the term "family" (i.e., one man and one woman united in a stable marriage, and their natural progeny), replacing it through an artificial concept. "Family," by this artifice, would be whatever the legislator chooses to call by that name. It would not be something that corresponds to human nature, but a purely legal construct, which could include same-sex marriages as well as polygamous set-ups, or even the relationship between, for example, three men and five women and their natural or adoptive children. The relationship between parents and children would be equally artificial: as the authors of the YP explain, Principle 24 means that "laws and policies [should] recognise the diversity of family forms, including those *not defined by descent or marriage*,"[82] (but what, if descent or marriage, does not define a family?) and "ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity."[83] This appears to be based on the assumption that adoptions have the purpose of catering for or servicing the "right to have children" of parents-to-be, even if these parents are single, or not married to each other, or two persons of the same sex. Yet, traditionally, the purpose of adoption is the direct opposite: to find caring parents for a child that has lost its own parents, not to provide an "artificial" family with a child it otherwise would be unable to have.[84]

Strangely, the YP only explain what a family is *not*: not defined by descent, nor by marriage. This is in defiance of what the near totality of mankind traditionally believes and accepts — yet the YP drafters do not even seem to have found it necessary to explain what, in *their* view, defines a family.[85] The dissolution of terms like "family" and "marriage" and their

81 Cf.: Art. 16 UDHR, Art. 12 ECHR.

82 YP, Principle 24. (emphasis added)

83 Ibid.

84 ECtHR, *Fretté vs. France*, Application 36515/97, par. 42: "Adoption means 'providing a child with a family, not a family with a child,' and the State must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect." Conspicuously, the YP do not waste even a thought on the needs and the rights of the adoptive child, or on whether it is healthy for a child to grow up in a homosexual environment.

85 The traditional meaning of marriage and family is reflected in Article 16 of the UDHR.

replacement with novel constructs is a necessary step in the strategy that surreptitiously seeks to open the doors for same-sex marriages. While this motivation remains hidden,[86] the YP fail to give any explanation why their constructivist approach should be more appropriate than the realistic one they seek to replace. But this is a question that should be answered by anthropologists rather than lawyers, because a *new anthropological paradigm* is what the YP seek to advance.

Anthropology Re-invented. The new paradigm denies human nature and replaces it with "self-determination." If family is not defined by marriage and descent, the only remaining way to define it is by a normative act: nature cedes its place to the arbitrary decisions of law-makers. In the end, every constellation of two or more people can be called a family. This "inclusive," "non-discriminatory" understanding of the term "family" looks benign at first sight — but in reality it means to discard the insight that marriage and family have something to do with nature. Once this step is taken and the connectivity between law and reality forgotten, it would, in theory, be no problem, in a further step, to exclude the natural family from the legal definition of family. If this route is followed to its logical end, we might wind up in constructed relationship units, similar perhaps to the "phalanstères" invented by Charles Fourier.

Against this voluntaristic approach, there are some observations to be made that seem fairly common sense, if not self-evident.

Paragraph 1 of that Article foresees that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." The approach to give that right (contrary to other rights listed in the Declaration) not to "everybody," but to "men and women of full age," is a deliberate one: it excludes marriages between minors, and same-sex marriages. The notion that marriage is the foundation of a family is clearly enshrined in this provision. Article 24 of the YP thus stands in open contradiction to the UDHR.

86 It is for purely strategic reasons that the YP stop short of affirming an obligation for States to introduce same-sex marriage and content themselves with the demand that same-sex unmarried partners should receive the same rights and benefits as different-sex unmarried partners. The true intention of the YP drafters is revealed by a statement made by Michael O'Flaherty in an address delivered to, the International Gay Lesbian Association (ILGA), in Vilnius on October 26, 2007: "Of course the Yogyakarta Principles are not perfect. In the first place they do not include references many people would want to see in international law, for instance regarding same-sex marriage. This is because of the cautious approach of just expressing what the law now is, rather than where we might like to see it go."

The first is that the essential biological function of sexuality is to ensure the procreation and continued existence of the human species. It follows that a sexual urge directed at objects other than persons of the other sex of an age suitable for procreation is misguided and does not serve its natural, rational purpose. This applies — dare it be said — equally to homosexual urges as to pedophile or sodomite tendencies.[87] Considering homosexual relations as equal to marital relations therefore pre-supposes that the mutual procurement of sexual pleasure is the *one and only* function of sexuality,[88] while the fundamental purpose of procreation is completely discarded. If this reductionist and distorted view of sexuality is accepted, no argument is left to explain why pedophilia or sexual relations with animals might not also be considered equivalent.

Gay/lesbian rights activists will predictably react with a cry of rage at what they will view as a denigrating attempt to represent homosexuality and pedophilia as one and the same thing (though no such attempt is made here). They will argue that homosexuality between adults is consensual, whereas sexual relations with under-age children are not. That may be true, but it misses the point: it remains that homosexuality and pedophilia are both based on a sexual urge aimed at objects biologically incapable of procreation. Moreover, it should not go unremarked upon that the argument that anything becomes acceptable if it is only based on (verifiable) consent of all the persons involved could easily be used to justify (homosexual) sex with *minors*. The drafters of the YP, commenting on Principle 24, in fact take the first step in that direction: "in all actions or decisions concerning children … the best interests of the child shall be a primary consideration, and … the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best

87 In a sense, the sexual urge could be compared to sentiments of hunger and thirst. We have these sentiments to incite us to eat and drink; without them, we would at all times be at risk of starving amidst plenty of food. It is therefore of vital importance to be capable of feeling hunger and thirst. At the same time, it would obviously be unhealthy if these feelings were directed at inappropriate (in this case inedible) objects.

88 The alleged "equality" between homosexual and heterosexual relations would thus consist in the equal amount of pleasure that can be drawn from it. This, however, meets the important counter-argument that sexual pleasure is a purely subjective and therefore not verifiable sentiment. The same applies to feelings of "love." The status of marriage is not a "reward" for the mutual love of the spouses, or the sexual pleasure they mutually procure, but has the purpose of providing a stable environment for founding a family and rearing children, http://www.yogyakartaprinciples.org/principles_en.htm (accessed February 1, 2010).

interests".[89] If it is acceptable for a child to be of homosexual orientation, why would it be wrong for it to engage in consenting sexual intercourse? After all, Principle 24 implies "that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child."[90] What level of "maturity" is, according to the YP drafters, needed to engage in homosexual sex? They do not say. But probably they do not mean such maturity as would be needed to found a family and raise children.

In addition, the novel anthropology of O'Flaherty/Fisher suffers from some glaring self-contradictions. For example, they deplore that transgendered individuals have "been referred to by health professionals as 'thing,' 'it,' or 'not a real man/woman,'"[91] while at the same time they point out that "the notion that there are two and only two genders" is a cultural bias (i.e., not a biological reality), and the result of "binary Western thinking"[92] regretting that transgendered people have to "pay the cost of our confusion by their suffering."[93] But if there are more than two genders, there must be at least one that is neither male nor female, and health professionals should be allowed to say so; if, by contrast, the authors opine transgender people should not be told that they are not a real man/woman, this seems to suggest that a transgendered person must be either a man or a woman; otherwise, what would be wrong in telling them that they are not? As it seems, the authors themselves believe there are only two genders. Why, then, is the "binary" Western thinking confused? Also, it is argued that defining one's own sex is "one of the most basic essentials of self-determination,"[94] while on other occasions it is assumed that homosexuality is immutable,[95] and not accessible to any therapy or modification. Again, only one of the two assumptions can be true: if defining one's own sex is the result of self determination, it must be the result of a deliberate and conscious choice and cannot at the same

89 YP, Principle 24.

90 Ibid.

91 Michael O'Flaherty and John Fisher, "Sexual Orientation," 212.

92 Ibid., 209.

93 Ibid. The report from which O'Flaherty/Fisher, somewhat uncritically, draw this quotation has been published by the Canadian organization Egale Canada Human Rights Trust. Whose "confusion" is meant here? It should be noted that John Fisher himself served as Executive Director of that organization for eight years.

94 Ibid., 221, approvingly quoting from a judgment of the ECtHR.

95 A comprehensive study of the "immutable status argument" (albeit concerned more with its strategic value than with its veracity) is found in: Robert Wintemute, *Sexual Orientation and Human Rights* (Oxford: Oxford University Press, 1995). Prof. Wintemute is one of the drafters of the YP.

time be immutable. It appears that in this novel anthropology of O'Flaherty/Fisher there is not much certainty: any affirmation is as true as its direct opposite, provided, of course, that it helps to promote the agenda.

Reading all the arguments brought forward by O'Flaherty/Fisher, one must conclude that what is aimed at is not just to ensure more tolerance and understanding for a group of people at the margins of society without affecting the lives of the majority. Quite on the contrary, it seems that the homosexual ideology wants to impose a new paradigm on society, dissolving not only the concepts of family and marriage, but also the notion that there are two, and only two, biological sexes, replacing it by a novel doctrine according to which any person could freely chose any sexual identity at any time. Yet this would affect the lives of all and everyone in a way that most people probably are not even capable of imagining: nobody would be allowed anymore to accept simply being a man or a woman, and live and behave accordingly. We would all have to adjust our social behavior to the new doctrine. Our language, the way we educate children, normal relations between the sexes would be in perpetual flux because individual "sexual identity," in the authors' paradigm, is subject to constant change. Under this paradigm of permanent transience, even love would become an impossibility: for love by its very nature aims to be definitive, not transient.

Is Homosexuality Normal? The second remark concerns the way in which Western societies' view of homosexuality has evolved over the last century. Traditionally, homosexual sex was considered a moral perversion or, in religious terms, a sin.[96] This view appears to continue to prevail in non-Western, especially Islamic, societies. It was only under the influence of Freud that, in Western countries, a more permissive view was taken: the view on the immorality of homosexual orientation was re-formulated as a recognition of a mental disorder for which those affected by it were not to

96 This view seems to follow from an approach that focuses on the objective action rather than on the subjective situation of homosexually oriented persons. Today, the Catechism of the Catholic Church (2357, 2358) takes a more differentiated position: while it reminds that "tradition has always declared that homosexual acts are intrinsically disordered," and that such relations are "contrary to the natural law," it also acknowledges that "the number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided."

be held morally responsible.[97] As such, homosexuality figured for many years on the World Health Organization (WHO) list of diseases, until it was, for somewhat unclear reasons, withdrawn from that list in 1990.[98] Since then, the code of political correctness has exerted considerable pressure to speak of homosexuality as normal and equal, rigorously sanctioning those who continue describing it either as a disorder or as sinful.[99] Besides the obvious implications this may have for freedom of speech, the immediate consequence is that those homosexuals who suffer from their condition and who want to be cured from it are not allowed to look for any such cure: they are told that homosexuality is one of many different sexual orientations a human person can be born with, all of which are normal, and that it is immutable.

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97 In a letter he wrote in 1935 to the mother of a homosexual man, Freud expressed his view that homosexuality "is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness"; he went on saying that "we consider it to be a variation of the sexual function produced by a certain arrest of sexual development." He also hinted, albeit cautiously, at the possibility of treatment: "By asking me if I can help, you mean, I suppose, if I can abolish homosexuality and make normal heterosexuality take its place. The answer is, in a general way, we cannot promise to achieve it. In a certain number of cases we succeed in developing the blighted germs of heterosexual tendencies which are present in every homosexual, in the majority of cases it is no more possible. It is a question of the quality and the age of the individual. The result of treatment cannot be predicted." Sigmund Freud, "Letter to an American mother," *American Journal of Psychiatry,* 107 (1951): 787.

98 Cf. World Health Organization, *International Statistical Classification of Diseases and Related Health Problems,* 10th Revision (ICD 10). In the previous version of that document (ICD 9), which was published in 1977, homosexuality and lesbianism were included in a list of "neurotic, personality, and other non-psychotic mental disorders."

99 Specific legislation prohibiting such assertions has been adopted in several countries and is enforced zealously. Among the primary targets of such legislation are the clerics of Christian churches who continue preaching or applying their churches' traditional doctrine. For example, on June 29, 2004 a Swedish law court sentenced Pastor Åke Green to one month in jail for showing "disrespect" to homosexuals in the sermon he delivered from his pulpit in the small town of Borgholm, Sweden, on July 20, 2003. Full documentation of the case, which finally ended with Pastor Green's full acquittal by the Supreme Court, is found at http://www.akegreen.org (accessed December 15, 2009). Another case concerned the Rt. Rev Anthony Priddis, a Bishop of the Church of England, who, in February 2008, was convicted and fined £ 47.000 in damages for "unlawful discrimination on sexual grounds" to an openly gay person whom he had refused to appoint to the post of Diocesan Youth Officer in his diocese. Even elected parliamentarians do not enjoy freedom of speech any more: in January 2007, Christian Vanneste, member of the French Assemblée Nationale, was sentenced to pay a fine of € 3,000, and 10.500 in compensatory damages, for having stated that "if homosexuality were generally practiced, it would pose a danger for the survival of humanity," and that "homosexuality was inferior to heterosexual relations."

But this begs the question: what concept of "normality" is included in the assertion that homosexuality is normal? And what concept of "equality" is asserted by those insisting that homosexuality is equal?

This novel regard on homosexuality certainly holds no better scientific credentials than the old one. If homosexuality is genetically predetermined, it should be possible to identify a "homosexual gene,"[100] or to find some homosexual toddlers. And if it is immutable, it should be possible to disprove the claims of former homosexuals who say that they have been cured from it.[101] And even if nobody had ever made such a claim to have been cured from homosexuality, this would no more prove the immutability of the homosexual orientation than the lack of success in finding a cure proves the incurability of HIV/AIDS: it might just mean that some more research should be undertaken. Last, but not least, neither genetic pre-determination nor immutability, if evidenced, would necessarily mean that homosexuality was not a mental disorder. There are many disorders and illnesses that are genetically pre-determined, and there are many others that are immutable.

In the current situation, there are at least some very good reasons to believe that homosexuality is neither immutable nor genetically predetermined, but that it is induced through socio-environmental influences at an early age, and that, in principle, a therapy could be developed to reverse it. As long as this remains a possible view, it seems natural that parents should have the right to protect their children against such influences as could induce homosexuality, or that the state should not give children to homosexual "adoptive parents." After all, it is self-evident that

100 Arguments used to assert that homosexuality is genetically determined are, at times, somewhat surprising. Some time ago, in the well reputed weekly news magazine *The Economist* (of October 11, 2003) an article appeared referring to some of the newest insights of scientific research: among other things, researchers had discovered that a majority of homosexuals had ring fingers longer than their middle fingers, whereas the opposite was the case with heterosexuals.

101 From the abundance of both scholarly publications and autobiographic accounts of (former) homosexuals, I quote just a few: Richard Cohen, *Coming Out Straight — Understanding and Healing Homosexuality* (2000); Joseph Nicolosi, Reparative Therapy of Male Homosexuality (Northvale, NJ 1991); *A Parent's Guide to Preventing Homosexuality,* (2002); William Consiglio, Homosexual No More, Weaton, IL (1991); Gerhard J.M Van den Aardweg *On the Origins and Treatment of Homosexuality: A Psychoanalytic Reinterpretation,* (New York: Praeger, 1986); *The Battle for Normality: Self-Therapy for Homosexual Persons* (Ignatius Press, 1997). However, it seems that therapies are not always successful and healing successes, if and when they occur, can be fragile or transient.

the heterosexual orientation is the more desirable one: not only because of the social isolation painfully experienced by many homosexuals (of which O'Flaherty/Fisher provide ample evidence), but also because heterosexual relations, in addition to procuring sexual pleasure, are open to procreation.

It has been suggested that whoever rejects the idea of considering homosexuality as normal and equivalent dismisses "the most personal and intimate feelings of many millions of people."[102] But it is nonsensical to use statistical frequency as a basis for making an argument as to the normality of homosexuality, or of any other physical or, some would say, moral condition. The norm is, in fact, that which *never* occurs in real life: for ethical purposes, it is set by the man who never does wrong; with regard to health, by the man who does not suffer even from the slightest illness (in that sense, we all suffer from some greater or lesser "anomalities").

In the absence of any other plausible yardstick to assess the normality of a sexual orientation, the only remaining criterion is the one mentioned above: the conformity of the urge with the primary purpose of sexuality — that of procreation. The conclusion, then, can only be that homosexual orientation is not normal.

Is Homosexuality Equal? A third remark concerns the notions of equality and discrimination increasingly invoked by the gay/lesbian campaign, and which constitutes the cantus firmus of the YP.

Since the days of antiquity it has been considered to be the most fundamental precept of justice and fairness to treat like things alike, unequal things differently, and all things appropriately. It follows that only the unequal treatment of equal cases, and not every case of unequal treatment, can be viewed as discriminatory. Before deploring discrimination, one must demonstrate the equality of what is unequally treated.

As we have seen above, the equality of the homosexual and the heterosexual act is probably limited to the fact that both are apt to provide sensual pleasure (though that is, of course, purely subjective). A certain equality between the homosexual and the heterosexual orientation could consist in

102 Nicholas Bramforth, "Same-Sex Partnerships and Arguments of Justice," R. Wintemute, Mads Adenas (eds.), *Legal Recognition of Same-sex Partnerships: A Study of National, European and International Law* (Hart Publishing, 2001), 53.

the fact that both are genetically determined — but only if that hypothesis is finally proven. Apart from these elements, however, there is absolutely no basis for arguing equality between homosexuality and heterosexuality, and hence no reason to provide equal or similar treatment to both biological phenomena.

By contrast, there are many obvious differences between the homosexual and the heterosexual act, and hence many convincing reasons for unequal, or different, treatment. The homosexual act is sterile, and its *sole* purpose is to obtain sensual pleasure. The heterosexual act is open to procreation; its natural context is therefore that of marriage and family — institutions that are needed to create the environment for raising children, indeed the "natural and fundamental group unit of society."[103] Therefore, it is natural to provide these institutions for couples wishing to have children, whereas it seems unnatural and absurd to create a "marriage" for two persons of the same sex, who by nature cannot have any children. It seems equally unnatural to allow, as of "equal right" or "equal treatment," same-sex couples to construct artificial families with children who have had the misfortune of losing their natural parents prematurely, or who have been abandoned by them. It is the natural situation for a child to have a father and a mother, and anthropologists have found ample evidence that both are needed; families from which either the father or the mother are absent, not as the result of misfortune, but consequent upon a *deliberate* choice, and where either the role of father or that of mother is duplicated, are best described not as a family, but as a family's parody.

It is thus no prejudicial statement toward homosexuality if we conclude that same-sex couples are not equal to the traditional family. That conclusion would not change even if it were shown that homosexuality was genetically pre-determined and immutable. Conferring the status of marriage on homosexual couples would therefore not be equal treatment. On the contrary, it would result in a discrimination of the natural family, which fulfils a fundamental societal task that same-sex partnerships do not fulfil. By asking for "equal treatment" the same-sex lobby is in fact asking for a privileged status.

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103 UDHR, Art. 16.

Concluding Remarks on the Yogyakarta Principles. Not every difference in treatment is discrimination. Given the fundamental difference of homosexual and heterosexual behaviour, it is not discriminatory for homosexuals to be denied access to legal marriage, or for States to prevent minors from being exposed to propaganda about the homosexual lifestyle. What can be called discriminatory are such inequalities in treatment where the reference to homosexuality as a decisive criterion would be clearly inappropriate: however, it could be asked whether some law courts or treaty monitoring bodies have not been acting somewhat over-zealously in their crusade against possible discriminations.[104]

This being said, there can of course be no doubt that many of the incidents mentioned in the O'Flaherty/Fisher article are violations of the rights of homosexuals — not because the treatment they suffered was different or discriminatory, but because it was inappropriate (which probably is a more severe reproach). It is fundamentally unjust to put homosexuals in jail or to threaten them with the death penalty — not because homosexuality is equal, but because such sanctions stand in no relation to any harm that could follow from two consenting adult persons engaging in gay sex.

At the same time, many of the cases reported relate to violence of private persons.[105] These could be addressed by using the existing remedies provided for in the legislation of the countries concerned, or, if need be, in existing human rights instruments. There is no need for a new human rights instrument specific to homosexuals; it would suffice to remember

104 Of the cases quoted by O'Flaherty/Fisher in their article, several would merit a more critical review. One example is the ECtHR decision Karner v. Austria (appl. no. 40016/98), where it was found that a complainant's "right to privacy" had been violated because he was unsuccessful with his claim that, as surviving homosexual "partner," he was entitled to take over the rental contract for a deceased tenant's apartment. The interpretation that was made of Art. 8 ECHR was quite extravagant: in fact, nobody had violated the complainant's privacy, but he himself had made public the fact of his homosexuality in order to draw a legal advantage from it. Another example is the ECtHR case *E.B. v. France* (appl. no. 43546/02): here, a lesbian complainant was successful with claiming that she had a "right to adopt children" because French legislation foresaw such a possibility for unmarried persons, and her lifestyle and sexual orientation could not be used as an argument for not allowing her to adopt. Setting aside the factual issue of the aptitude of the applicant in the case at question to be an adoptive mother, it was an absurd misjudgment of the Court to even enter into a debate on who should, and who should not, have a "right to adopt children." In actual fact, nobody has such a "right." As the Court had held previously, the purpose of adoption is to find substitute parents for a child, not to find a child for would-be parents.

105 Cf. nn. 56, 57, 58.

that universal human rights apply to all human beings in an equal manner, and to embrace the reliance on the age-old principle that everything must be dealt with appropriately.

Therefore, besides being superfluous, the YP are dangerous and, indeed, have a potential of undermining the universality of human rights. It is, of course, a legitimate claim that homosexuality, as long as it remains discrete and private, should be tolerated. But the YP and similar initiatives are not at all directed at obtaining tolerance for private behaviour that one would still be allowed to consider immoral or unhealthy. Instead, their purpose is to turn the "equality" of homosexuality into a sort of compulsory social doctrine. The aim is to re-educate the public: everyone is forced to change his or her attitudes and values, and there are increasingly dictatorial noises about zero tolerance for dissent. The rights promoted by the same-sex agenda encroach on the rights of all non-homosexuals: parents are not allowed to educate their children as they see fit, religious communities are no more allowed to live according to their centuries-old faiths, the contractual freedom is limited,[106] and the freedom of speech is undermined.[107]

For these reasons alone, the YP would certainly have merited a critical commentary. But it is obvious that such a commentary could not be expected to come from one of the co-authors of these principles, or from one of the leading representatives of the homosexual lobby.

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106 Cf. YP, Principle 12, according to which States must "prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration" and "ensure equal employment and advancement opportunities in all areas of public service, including all levels of government service and employment in public functions." Will this lead to a fixed quota of homosexual employees in private companies (as the legislation of some countries foresees it for handicapped persons), or a fixed quota of lesbians among the board of public companies (as Norwegian law foresees it for women)?

107 Cf. YP, Principle 21, which purports to guarantee the freedom of speech — but only, as it seems, for the gay/lesbian lobby. The expression of views not conforming to the YP must be prevented because they are "incompatible with human rights."

Conclusion — "Rights" Replace Natural Law: A Lawyers' Revolt Against Reality

The analysis and comparison of the articles of Zampas/Gher and O'Flaherty/Fisher shows that both contributions, despite the diversity of the subjects treated, have much in common conceptually: the authors are fully aware that the "human rights" they are advocating (access to abortion in the one case, and a broad homosexual agenda in the other) do not exist in reality. The purpose they pursue by writing articles is therefore to *change* this reality, a goal that they seek to achieve mainly by putting forward novel interpretations of well-accepted norms.[108]

Such scholarly activism in the name of a "just cause" is not, in itself, illegitimate. However, one notices a complete failure of Zampas/Gher and O'Flaherty/Fisher to explain why their respective positions *are* such a just cause. They speak of human rights, but do not appear to know who is human, nor what corresponds to human nature, nor what a "right" is. The rights they are advocating float around freely; they are neither grounded in positive law, nor in Natural Law; nor is there, despite claims made by the authors, a true political or social consensus to support these purported rights.

The authors are fully aware that the "human rights" they are advocating (access to abortion in the one case, and a broad homosexual agenda in the other) do not exist in reality.

108 With regard to abortion, cf. Congressional Record December 8, 2003, E 2538. With regard to the YP, cf. Michael O'Flaherty, in an address delivered to ILGA, Vilnius (26 October 2007): "Ultimately, the strength, reach and impact of the Yogyakarta Principles, will, in large part, depend on the quality and the vigour of the advocacy work that will be done on their behalf. That brings the issue right back to all of you here today — we rely on you to take the next steps with the Principles — to take them to heart and to use them in national and international lobbying and awareness raising."

The reasons why Zampas/Gher consider abortion a human right, or why O'Flaherty/Fisher consider that two homosexuals make a family, remain, thus, rather obscure. If we take a closer look at the "arguments of justice" brought forward to promote the same-sex agenda, we find that these arguments heavily rely not on reality, but on abstract rights, such as privacy, equality and autonomy/empowerment.[109] These principles, taken out of their context, are made the subject of imbalanced and radical interpretations. For example, how can same-sex marriage or the adoption of children by homosexual couples be justified through arguments based on privacy? Marriage and adoption are facts belonging to the public sphere: the public is asked to take note and acknowledge a new personal relationship, and to confer specific entitlements to the persons involved. How can autonomy be invoked, when in fact the pretension is to impose legal obligations on others (e.g., on a child adopted by a same-sex couple, or on employers, or on home owners)?

The rights to autonomy, privacy, and equality are simply affirmed, but never deduced. Their origin remains, thus, unclear, and — since they are not linked to any reality — their scope and meaning is open for manipulation. This is how the "right to life" of a woman can be transformed into a "right to abortion," or a "right to self-determination" of homosexuals into a "right to same-sex marriage." Such transformations would not be possible if the linkage between law and nature, between norm and truth, is not eliminated first.

Using autonomy, privacy and equality as their first principles, the innovators flatly refuse to accept Natural Law. Which arguments, except those that inconveniently stand in the way of their socio-political projects, are used for that purpose?

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109 These "rights" are identified by Nicholas Bramforth as the principal arguments for the legal recognition of same-sex partnerships. Bramforth's study attempts to construct a comprehensive philosophical basis for the same-sex agenda and, at the same time, discusses arguments by what he describes as "new natural lawyers." (Nicholas Bramforth, "Same-Sex Partnerships," 31-54.) The reasoning of Zampas/Gher relies on similar stereotypes: 1) "women's right to abortion is bolstered by the broad constellation of human rights that support it, such as rights to privacy, liberty, physical integrity and nondiscrimination"; 2) "a constellation of human rights, including the rights to privacy, liberty, physical integrity, nondiscrimination and health, support the notion that abortion on request is a human right;" and 3) the claim that a fetus has a right to life would be "incompatible with women's fundamental human rights to life, health and autonomy." (Christina Zampras and Jaime M. Gher, "Abortion as a Human Right," 251, 255, and 262 respectively)

Usually, this question is passed over in silence — a silence that, as one might suspect, could have to do with the absence of presentable arguments. The innovators' strategy is to make affirmations, not to explain them. On those rare occasions, however, where a supporter of the same-sex agenda like Nicholas Bramforth attempts to reject Natural Law with arguments rather than pure avoidance of debate, one learns that Natural Law "is unappealing … unless one shares the … profoundly Roman Catholic view of the world,"[110] and arguments referring to it "are circular unless it is acknowledged that they rest clearly on theological foundations," namely those of "a conservative version of Roman Catholic theology,"[111] which are therefore "likely to lack general appeal."[112]

At such words the credulous believer cannot but incredulously shake his head in disbelief: Natural Law — an invention of the Catholic Church? What about Ulpian, Cicero, Aristotle, Plato, Socrates? Were they all Catholic? Or does the mere fact that someone has the audacity to quote, besides these classical philosophers and lawyers, some sources identified as "Catholic doctrine", irreversibly invalidate the argument they are making? This is a new kind of *quis-dixit*, this time not exhibiting naïve reliance on authority, but naïve reliance on secularist bigotry: whatever the Catholic Church teaches must be wrong, *because* it is the Catholic Church that teaches it. Never mind if many others have said the same before or afterwards: if a doctrine is found to be identical or similar to that of the Catholic Church, it is religious, therefore irrational, and thus inevitably wrong. But what has the Roman Catholic Church done to merit such rejection, except having based its doctrine, more than any other religious community, on the foundations of classical philosophy? The rejection of Natural Law is not directed against any particular religious doctrine, but against the heritage of occidental thought *tout court*. Even in pre-Christian times it was understood that behaving morally meant to conform action to insight, not to a purely subjective choice. Affirmations that sexuality serves the purpose of procreation, that the family serves the purpose to raise children, that children need a father and a mother, and that the unborn child is a human being, are portrayed as a religious doctrine by the innovators, but in fact they are not particularly religious. They simply

110 Nicholas Bramforth, "Same-Sex Partnerships," 46.

111 Ibid., 50. Apart from exhibiting what appears to be an (anti-) religious prejudice, Bramforth seems to have misunderstood the argument he is trying to reject. If the basic assumption is that the rational purpose of sexuality is procreation, and other purposes only auxiliary, then there is nothing circular in saying that a sexual act from which the possibility of procreation is categorically excluded is contrary to the order of nature, and thus (morally) wrong.

112 Ibid., 52.

reflect an insight deduced from the observation of nature. Of course, it is a very simple defense strategy for the innovators to flatly reject such insights, claiming that they have not been demonstrated with sufficient strength. But then it must be asked whether they are not themselves making indemonstrable assumptions that could be rejected in the same way, if not for more compelling reasons.

That raises two questions. The first is whether the mere fact that an argument coincides with, or is similar to, doctrinal positions adopted by the Catholic Church (or any other religious faith) must necessarily be wrong, even if that argument is itself not a religious doctrine. The second is whether the fundamental positions of those opposing the idea of Natural Law are not themselves, in a certain sense, "religious." Accepting the doctrine of Natural Law means to accept confronting a legal doctrine with the real world outside the legal order; in that way, it makes a doctrine verifiable. But can the same be said of an approach that relies on the mere affirmation, even if such affirmation is repeated and echoed a thousand times, of abstract rights? Is Bramforth's reliance on what he calls a person's right to "autonomy/empowerment" and "privacy" more rational than any religious doctrine? Or less sectarian? Or less "indemonstrable"? It seems clear that the promoters of access to abortion and same-sex marriages are granting and withholding "autonomy" and "privacy" in a selective manner. What about the autonomy of a child that does not want to be adopted by a same-sex couple, or a taxpayer who does not want to subsidize their lifestyle? What about a medical practitioner who does not want to perform abortions?

Bramforth summarizes his argument by saying that arguments relying on Natural Law "are, in short, prepared to dismiss the most personal and intimate feelings of many millions of people because of their failure to match up to a set of pre-ordained, absolute moral rules … Their disregard for the feelings and experiences of so many human beings — which are valuable and important to their holders — implies a complete lack of concern for the diversity of human experience and a blind determination to fit the world into a prescribed 'reality.'"[113] So, there we are: the reproach is that Natural Law refers to (an objective and verifiable) reality rather than to (subjective) feelings and sentiments. The argument is ambivalent and therefore self-defeating: in the same way, one might point out that Bramforth is showing disregard for the "feelings" and "experience" of many millions of people

113 Ibid., 53.

who feel that homosexuality is repellant. Which are the criteria that help him distinguish feelings that are worthy of respect from those which are not? Setting aside the question whether Bramforth's ideas about equality, autonomy or privacy are not themselves pre-ordained, it is clear that his acknowledgement that feelings and sentiments should supersede reasonable arguments excludes him and his likes from any rational debate.

Another telling example of the irrationality of the opponents of Natural Law was recently given by Jon O'Brien, a self-described Catholic campaigning in favor of a "right to abortion,"[114] when, in a letter to the editors of the *International Journal of Human Rights,* he wrote:

> Laws must not prevent people of other faiths from practising their faith. Since many religions support a woman's right to choose, laws against abortion would violate their rights.[115]

In other words: a woman having an abortion is "a woman practising her faith." The "right to abortion" follows directly from religious liberty (which, in turn, supersedes the right to life of the fetus, whose rights apparently can be discarded simply by believing that he is not a human person). Remarkably, this argument is made by a man who, describing his position as pro-choice, campaigns against the right to religious conscientious objection for medical practitioners.[116] Religious liberty and the "right to choose" are apparently not for everyone. What is consistent reasoning needed for, if there is a political agenda? The sad irony is that the pro-choice campaigners are anti-choice.

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114 Jon O'Brien is the chairman of "Catholics for Choice (CFC)," a lobby group that pretends to represent earnest Catholic laypeople who have reluctantly, but courageously, chosen to embrace a "Catholic alternative" to the views endorsed by the Vatican and Catholic bishops in order to adapt the Church's teaching to the actual beliefs and practices of Catholics. The secular media have embraced CFC as representative of a substantial number of Catholics. In actual fact, however, the organization has no membership and appears to be funded almost entirely by a small number of secular, or even anti-religious, sources, whose purpose in supporting CFC is to undermine Church teaching. For Information on CFC see: Thomas E. Woods, Jr., *War on Faith: How Catholics for a Free Choice Seeks to Undermine the Catholic Church,* International Organizations Research Group White Paper No. 1, 2001. http://www.c-fam.org/docLib/20080624_WarOnFaith.pdf (accessed December 15, 2009).

115 Jon O'Brien, *International Journal of Human Rights,* 2008, No. 3, 305.

116 Cf. the Catholics For Choice pamphlet "In Good Conscience — Respecting the Beliefs of Health-Care Providers and the Needs of Patients," (2008).

The campaigning of self-appointed "experts" and "advocacy groups" in favor of abortion and of same-sex marriages is best described as a revolt of lawyers against reality. Accepting these novel "rights" would mean to accept that laws, including human rights, are an arbitrary invention of some historic legislators, which can at any time be replaced by equally arbitrary inventions of contemporary lawyers. The law would thus not need to have anything to do with any reality outside the legal order, but could be used to create an intellectual parallel universe. The rejection of Natural Law and its replacement with voluntaristic concepts is intrinsically totalitarian: if things are not allowed to remain what they are by nature, they will become whatever politicians and lobbyists want them to be. To make things even worse, it seems that the rewriting of human rights does not even require any democratic legitimacy or due political process; it suffices that 29 self-elected "experts" gather to set up a to-do-list for sovereign governments with 127 items, or that some radical NGOs get involved with the relevant UN Committees in order "to assert a broad consensus around our assertions".[117]

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Human Rights, in the hands of such advocates, are likely to become a monstrous threat to humanity.[118]

117 Cf. Congressional Record, December 8, 2003, E 2538.

118 In a recent publication, the Austrian human rights "expert" Manfred Nowak (*Ein Weltgerichtshof für Menschenrechte — eine utopische Forderung? in: Vereinte Nationen 5/2008*) proposes the creation of a Global Tribunal for Human Rights. It is truly frightening to imagine this proposal becoming a reality. As it happens, Nowak is yet another of those relatively few names that one usually encounters whenever "experts" promote novel "human rights," in particular abortion and same-sex marriage. He was on the drafting committees of both the YP and the Declaration on the Principles of Equality. In addition, he was also a member of the controversial EU-Network of Experts, which, having acquired a questionable reputation for its efforts to impose a "right to abortion" on EU Member States, has recently resumed its activity under a different name (FRALEX) and in a different institutional context (under the aegis of the EU Fundamental Rights Agency in Vienna), but with the same persons and the same radical agenda. Mr. Nowak is also well-connected in the UN, where he serves as a Special Rapporteur on Torture. Is it then far-fetched or paranoid to presume that Mr. Nowak may envisage that he and other members of his network should be appointed as judges in this new Global Tribunal, so that at last they might impose their novel concept of "rights" globally through enforceable judicial decisions? *Quis custodiat ipsos custodes?*

List of Acronyms

AWP ..... African Women's Protocol
CEDAW..... Convention on the Elimination of All Forms of Discrimination Against Women
AWP ..... African Women's Protocol
CFC..... Catholics for Choice
CRR..... Center for Reproductive Rights
ECHR..... European Convention on Human Rights
ECtHR..... European Court of Human Rights
EU ..... European Union
FRA..... European Union Agency for Fundamental Rights
FRALEX ..... Fundamental Rights Agency Legal Experts Group
ICCPR ..... International Covenant on Civil and Political Rights
ICPD..... International Conference on Population and Development
ICRC..... International Convention on the Rights of the Child
ILGA..... International Lesbian Gay Association
LGBT ..... Lesbian, Gay, Lesbian and Transgender
NGO..... Non-governmental Organization
UDHR ..... Universal Declaration of Human Rights
UN..... United Nations
UNDP ..... United Nations Development Program
UNFPA..... United Nations Population Fund
UNHDR ..... United Nations Human Development Report
UNICEF..... United Nations Children's Fund
US ..... United States
WHO ..... World Health Organization
YP ..... Yogyakarta Principles

Biography

Jakob Cornides Doctor of Law (University of Vienna), is an official of the European Commission, where he has been working on consumer protection and on trade policy since 1997. The views expressed in this paper are those of the author, and are not in any way attributable to the institution in which he is employed. Former publications concern a broad variety of legal issues, including consumer law, intellectual property, international trade law, contract law, tort law, and human rights.

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